

Galopy Corp. Intl., N.V. v Bissone
2019 NY Slip Op 30176(U)
January 22, 2019
Supreme Court, New York County
Docket Number: 657154/2017
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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GALOPY CORPORATION INTERNATIONAL, N.V.,

Index No.: 657154/2017

Plaintiff,

DECISION & ORDER

-against-

JUAN BISSONE, FEDERICO INFANTINO, MANUEL
MAXIMINO, RAYMOND YAM, and DEUTSCHE
BANK, AG,

Defendants.

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JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3211, defendants Deutsche Bank AG (Deutsche Bank or the Bank), Juan Bissone, Federico Infantino, Manuel Maximino and Raymond Yam move to dismiss the complaint. Plaintiff Galopy Corporation International, N.V. (Galopy) opposes. Defendants' motion is granted.

Background

This is the second action in this court in which Galopy seeks redress from the Bank due to its alleged loss of \$62.7 million of collateral posted on a bond forward transaction (BFT) (*see Galopy Corp. Intl, N.V. v Deutsche Bank AG*, Index No. 151766/2015 [Sup Ct, NY County] [the Prior Action]).¹ By decision and order dated

¹ References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Unless otherwise indicated, the facts are drawn from the allegations in the complaint (Dkt. 7 [the Complaint]), which are assumed to be true, as well as from documentary evidence and from the record in the Prior Action. Portions of the record were filed under seal pursuant to an order entered in the Prior Action. Because the only basis for sealing was the confidentially agreement in the Prior Action (and not any particular concern of prejudice that could overcome the presumption of public access, such as

August 18, 2016 (Prior Decision), the court dismissed all of Galopy's claims except for its cause of action based on breach of an alleged oral agreement (*Galopy Corp. Intl, N.V. v Deutsche Bank AG*, 2016 WL 4398456 [Sup Ct, NY County 2016]). The Prior Decision extensively sets forth Galopy's allegations and the nature of the complex derivatives.

Prior Action

In the Prior Action, Galopy claimed that the Bank breached an alleged oral agreement to permit Galopy to post collateral on a BFT, which supposedly would impel Venezuelan regulators to approve Galopy's purchase of a controlling interest in Consorcio Credican, C.A., the parent company of a Venezuelan brokerage firm, U21 Casa de Bolsa, C.A. (U21).² The regulators would not approve the sale unless U21's balance sheet was improved with a significant capital infusion. Galopy, however, did not

trade secrets), when the court relies on certain of the sealed materials in this publicly filed decision, it does so without redaction. Whether the remainder of the sealed material may remain sealed must be addressed by motion.

² As set forth in defendants' briefs, and as explained in the Prior Decision, Galopy's allegations have changed on numerous occasions, many iterations of which were demonstrably false, logically inconsistent or financially nonsensical (Dkt. 85 at 8 [claiming Botella had a "hazy" memory of the events in 2009]; *see, e.g.*, Prior Decision, 2016 WL 4398456, at *3 n 11 ["Galopy's allegation that it was a counterparty on the (total return swap [TRS]) is demonstrably false. As discussed further herein, the court-ordered discovery (reveals) that the TRS was a transaction between Activos and Deutsche Bank"]; *see also id.* at *13 ["During a discovery conference ... it became apparent that there are serious holes in the story set forth in the (amended complaint). Galopy's counsel could not provide answers to basic questions regarding the TRS and BFT"]). The court does not opine on why Galopy's allegations were such a moving target because it is irrelevant to the dispositive issue; namely, whether dismissal of the Prior Action bars this action. Likewise, the court declines to reach defendants' forum non conveniens argument, which would have been rejected for the reasons set forth in the Prior Decision, as the issue is moot.

wish to expose its capital to counterparty credit or political risk before obtaining regulatory approval. It believed the solution was to structure a derivatives transaction--such as a BFT³--that did not actually require Galopy to place assets in the name of U21, but, instead, to merely post collateral with the Bank in an account that, through “window dressing”⁴ accounting, would improve U21’s balance sheet.⁵ Over \$100 million of collateral was to be posted in two tranches, the first of which totaled \$62.7 million and posted on November 19, 2009. Prior to the November 27, 2009 deadline for posting the rest of the collateral, however, Galopy’s principal, Ricardo Fernandez Barrueco (Fernandez), was arrested in Venezuela on “politically trumped up charges” (Complaint ¶ 4). His associate, Pablo Botella, who was directly arranging the BFT, fled the country. Shortly after Fernandez was arrested, on November 26, 2009, the Venezuelan government took over U21 in an “intervention” that is supposedly like a bankruptcy.

³ Galopy originally tried, and failed, to obtain regulatory approval with a TRS--another derivative (Prior Decision, 2016 WL 4398456 at *3 [explaining structure of proposed TRS], n 10 [explaining TRSs]).

⁴ This is the actual term Galopy used (Prior Decision, 2016 WL 4398456 at *3).

⁵ “Essentially, the parties’ alleged agreement was that Galopy would post collateral and pay a \$6 million fee in consideration for the Bank telling the Venezuelan regulators that U21 had the right to \$500 million in Petroleos Bonds” (Prior Decision, 2016 WL 4398456 at *14). As set forth in the Prior Decision, it is doubtful that regulators would have approved the BFT for the same reasons that the prior TRS was rejected – likely because one cannot claim that a company’s balance sheet increases by the notional amount of the reference securities, as opposed to the value of the derivative itself (*id.* at *5 n 17 [explaining why the BFT “could not have resulted in U21’s balance sheet increasing in the marginal amount of \$500 million”]). Thus, “no sane regulator, if apprised of these facts, would assume the BFT would add \$500 million in value to U21” (*id.* at *6).

Though Fernandez was acquitted years later, neither he nor Botella were able to finalize the BFT given their predicament.

In January 2010, the Bank, which held the \$62.7 million of collateral, agreed with those that were now running U21 to remit the collateral (minus an amount to be paid to the Bank's counterparty on a mirror image BFT)⁶ to U21 except for a \$6 million fee, which had been agreed to by Galopy as part of the alleged oral agreement.⁷

Years later, in September 2012, Botella reached out to the Bank, demanding return of the Collateral. The Bank refused.

In February 2015, Galopy commenced the Prior Action. Galopy asserted claims for breach of fiduciary duty, aiding and abetting fraud,⁸ commercial bad faith and negligence, which it voluntarily withdrew (Prior Action, Dkt. 1 at 11-14; Prior Decision, 2016 WL 4398456 at *12). After Galopy filed an amended complaint, the Bank moved to dismiss and, in the Prior Decision, dismissal was granted as to all of Galopy's claims except for breach of contract based on an oral agreement.

The Bank appealed. While its appeal was pending, it produced voluminous ESI. With one anticlimactic exception (discussed later), in all of the voluminous ESI and

⁶ See Prior Decision, 2016 WL 4398456 at *3 (explaining purpose of mirror image hedges), *8 n 26 (discussing subject mirror image hedge).

⁷ See Prior Decision, 2016 WL 4398456 at *11 ("Botella had expressly agreed to pay Deutsche Bank a \$6 million fee on the November 16, 2009 call").

⁸ The aiding and abetting fraud claim was premised on alleged participation in the Venezuelan government's actions.

recorded phone calls produced by the Bank, “Galopy”--as opposed to other entities owned by Fernandez--⁹ is not mentioned.

After the appeal was argued, Galopy moved to “supplement the record . . . with newly discovered evidence” that it had obtained through ESI disclosure (Dkt. 66). The “new evidence” was an internal bank phone-call transcript “that Galopy claimed showed the BFT could be unwound without a default being declared, . . . taking Galopy’s oral agreement outside of the statute of frauds” (see Dkt. 32 at 23).

Days after Galopy’s emergency motion, the Appellate Division modified this court’s determination and dismissed what had been Galopy’s sole remaining cause of action (see *Galopy Corp. Intl, N.V. v Deutsche Bank AG*, 150 AD3d 416, 417 [1st Dept 2017]). Significantly, though this court concluded that Galopy had stated a viable breach of contract claim based on the alleged oral agreement, which was meant to be fully performed in less than a year and was separate and distinct from the unexecuted BFT confirmation, the Appellate Division disagreed. It held that the “alleged oral contract had a settlement date of July 10, 2011, and therefore could not be performed within a year” and “the possibility of its being terminated earlier” did not remove the contract from the statute of frauds (*id.*).

⁹ While the Bank “may have known the TRS and BFT were for the benefit of Galopy’s principal [Fernandez], nothing in the record indicates that the identity of Galopy itself [that specific legal entity] was ever disclosed” (Prior Decision, 2016 WL 4398456 at *3 n 11). Rather than identifying Galopy, Fernandez cryptically referred to his “group,” which, according to him, “includes ‘*literally hundreds*’ of companies” (*id.* [emphasis added]).

Galopy moved before the First Department to reargue or for leave to appeal to the Court of Appeals. In August 2017, it moved to “supplement [its] pending motion” and raise a new legal argument as to why its agreement was enforceable and not barred by the statute of frauds (Dkt. 69). The Appellate Division denied Galopy’s motions (Dkt. 70). On February 15, 2018, the Court of Appeals denied Galopy’s leave application (30 NY3d 912). There is a final judgment in the Prior Action and all appeals have been completely exhausted.

Galopy’s “New” Allegations

Approximately six months after the Appellate Division dismissed the Prior Action, Galopy commenced this one.¹⁰ Galopy asserts four causes of action against the defendants: (1) actual and constructive fraud,¹¹ (2) breach of fiduciary duty and aiding and abetting breach of fiduciary duty, (3) conversion and (4) commercial bad faith.

¹⁰ Galopy filed a summons with notice because it did not want to have to file its complaint until it obtained relief from the confidentiality order in the Prior Action, which did not allow it to use discovery materials in subsequent lawsuits. The same day that it began this case, Galopy moved for relief from the confidentiality order in the Prior Action. The Bank opposed the motion. By order dated January 19, 2018, the court granted the motion only to the extent of permitting Galopy to use the discovery in the Prior Action to draft a complaint in this case and to oppose a motion to dismiss (Prior Action, Dkt. 176). The court required the parties to file such discovery under seal, subject to revisiting the issue after this motion was decided (*id.*). Consistent with that order, the Bank is directed to show cause as to why the materials filed under seal should remain that way.

¹¹ The claim, though no so denominated, is clearly for fraudulent inducement, as it is based on the allegation that the Bank “*did not intend to go forward with the BFT*” (Complaint ¶ 71, ¶ 109 [Botella was *induced* to authorize the Bank to maintain custody over the \$62.7 million as collateral in connection with the BFT, and to sell the bonds held by Bear Stearns so there would be cash in the custodian account”] [emphasis added]).

Galopy has taken an about-face. Despite vehemently urging to the Appellate Division, in as late as August 2017, that it had an oral enforceable agreement and moving for leave to the Court of Appeals thereafter; now, it maintains, based on fraud first revealed in April-May 2017, that “in fact, there was no agreement at all between Galopy and the Bank” (Complaint ¶¶ 7, 11, 101 [“When Galopy commenced the (Prior Action in 2015), it believed that it had an oral agreement with the Bank (that was breached). . . . Galopy did not understand that there was a fraud, a breach of fiduciary duty and conversion of its money as well as a breach of fiduciary duty by (Factor AG Servicios Financieros CA [Factor]) induced by the Bank”], 104; Dkt. 85 at 8).

Analysis

Res judicata bars this action. “Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, once a claim is brought to a final conclusion, *all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy*” (*Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12 [2008] [emphasis added], quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]; see *O’Brien v City of Syracuse*, 54 NY2d 353, 357 [1981] [“This State has adopted the transactional analysis approach in deciding res judicata issues . . . Here, all of defendants’ conduct . . . was also raised during the (prior) suit as the basis for that litigation. That proceeding having been brought to a final conclusion, *no other claim may be predicated upon the same incidents*” (emphasis added)]). The rule

thus “applies not only to claims actually litigated *but also to claims that could have been raised in the prior litigation*” (*Matter of Hunter*, 4 NY3d 260, 269 [2005] [emphasis added]).

There is no doubt that the Prior Action, in which Galopy asserted claims regarding its \$62.7 million of collateral posted with the Bank, has been brought to a final conclusion. Galopy lost.¹² There is no further possibility of appeal. Res judicata precludes all of Galopy’s claims arising from the transaction in which it posted that collateral however couched.

Galopy seeks to avoid this settled rule by proffering “new” evidence, which the appellate courts did not find worthy of consideration. The “new” evidence, moreover, and “new” claims however creatively pled cannot be used as an end run around the Appellate Division’s statute-of-frauds dismissal. It is settled that a plaintiff cannot sue for fraudulent inducement of an agreement if enforcement of that agreement is barred by the statute of frauds (*Komolov v Segal*, 144 AD3d 487, 488 [1st Dept 2016] [quasi-contractual and tort claims including fraudulent inducement “were duplicative of underlying, unenforceable contractual claims and thus constituted an impermissible attempt to circumvent the statute of frauds”]; *see also Roberts v Champion Intl Inc.*, 52

¹² A dismissal based on the statute of frauds is “sufficiently close to the merits for claim preclusion purposes to bar a second action” (*Smith v Russell Sage Coll.*, 54 NY2d 185, 194 [1981]). Nor does it matter that Galopy sued the individual defendants for the first time in this action because they are in privity with the Bank; they are former employees who were involved in the underlying transaction and were known to Galopy during the Prior Action (*UBS*, 86 AD3d at 473; *see John St. Leasehold, LLC v Capital Mgmt. Resources, L.P.*, 283 F3d 73, 75 [2d Cir 2002] [“claims against FDIC employees and against non-FDIC defendants were barred by principles of res judicata because those persons were in privity with the defendants in the prior action”]).

AD2d 773 [1st Dept 1976] [“Nor will plaintiff’s attempt to plead a cause sounding in tort or in another form save the complaint for, ‘Whatever the form of the action at law may be, if the proof of a promise or contract, void by the statute (of frauds), is essential to maintain it, there can be no recovery’”]). It is equally well established that a plaintiff cannot avoid the statute of frauds “by arguing that the alleged oral promise was a misrepresentation of fact” and that the claim is based on fraud (*Nelson Bagel Bakery Co. v Moshcorn Realty Corp.*, 289 AD2d 69 [1st Dept 2001] [fraud claim not permitted where breach of contract claim was barred because contract was not capable of being performed within one year], citing *Lilling v Slauenwhite*, 145 AD2d 471, 472 [2d Dept 1988] [“Where a contract is itself void under the Statute of Frauds it cannot be used as a predicate for an action in fraud”]).

In any event, under the circumstances, the availability of new evidence is not a basis to avoid application of claim preclusion (*see Veleron Holding, B.V. v Morgan Stanley*, 151 AD3d 597, 598 [1st Dept 2017] [“Plaintiff’s claim that it did not have sufficient knowledge to raise the cause of action when filing the (prior) federal complaint is not persuasive in light of that complaint referencing the very allegations that form the basis of this action. ***The fact that subsequent discovery revealed emails supporting this claim is irrelevant***”] [emphasis added], citing *UBS Secs. LLC v Highland Capital Mgmt., L.P.*, 86 AD3d 469, 476 [1st Dept 2011]). The new evidence changes nothing.

While Galopy’s claims ultimately would have faced hurdles (for example, proving that the Bank knew it was contracting with Galopy), the *only* reason the action was

dismissed was because the alleged oral agreement was barred by the statute of frauds. None of the “new” evidence--much of which concerns matters indisputably known in the Prior Action (such as the identity of the mirror hedge counterparty)--reveals any fact that would have changed the Prior Action’s disposition or suggests that Galopy could not have pleaded the other causes of action. In fact, in its original complaint in the Prior Action, Galopy pleaded many of the very same causes of action pleaded here. This is nothing more than an attempt at another bite at the apple after the first was unsuccessful.

To be sure, Galopy’s fundamental premise purportedly justifying this new action--that it “did not know what was happening behind the Bank’s locked doors,” and now it “knows and has the evidence” (Dkt. 85 at 8)--does not warrant an exemption to the preclusion rule. Galopy claims it now knows that “the Bank had entered into a ‘mirror’ derivative transaction with Galopy’s own financial advisor [Factor/Activos] that included a cross-default provision triggered by Galopy’s failure to come up with the second tranche of collateral” and that “[w]hen Galopy was unable to deliver the second tranche, the Bank declared a default on the ‘mirror’ transaction and applied pressure to Galopy’s advisor, through which Galopy had transferred about half of the \$62.7 million, to get the advisor to concede that the Bank had contractual rights to Galopy’s funds when it plainly didn’t” (Dkt. 85 at 7; *see* Complaint ¶ 6). Leaving aside that the “mirror transaction” was expressly addressed in the Prior Decision (*see* Prior Decision, 2016 WL 4398456 at *13-14, n 26), there is nothing remarkable about seeking to close out a mirror hedge upon the failure of the other side of the trade to fully fund its collateral obligations (that is why it is

a “mirror” hedge). That the Bank sought to close out the mirror trade is not nefarious. Moreover, knowing the precise amount of the trade’s net proceeds remitted to U21 (\$42.7 of the \$62.7 million) would not have changed the result in the Prior Action, as it does not affect the applicability of the statute of frauds.¹³ Likewise, that the hedge counterparty was Factor/Activos and, thus, was supposedly Galopy’s advisor/fiduciary, is not a new fact. Factor’s role as the mirror hedge counterparty was known in the Prior Action and was addressed in the Prior Decision (Prior Decision, 2016 WL 4398456, at *8 n 26 [discussing the “November 20, 2009 confirmation of (the) mirror-image hedge between Deutsche Bank and (Factor)”]). Galopy therefore could have alleged in the Prior Action that Activos’ involvement raised fiduciary duty concerns.

Galopy’s contention that it “learned for the first time” that there was no agreement because, after Fernandez was arrested, the individual defendants conspired with others to seize the funds, is also unavailing. Galopy either had an enforceable agreement or it didn’t (and the Appellate Division concluded it didn’t). Regardless, Galopy was always in a position to know whether it was a party to an agreement¹⁴ and an after-the-fact

¹³ The value of the bonds is not material to the statute of frauds dismissal. It does not affect whether, according to the Appellate Division, the contract could have been performed within one year. To the extent that Galopy claims the Bank committed fraud based on these allegations (Complaint ¶¶ 84-86), it cannot show detrimental reliance as the collateral had already been posted with the Bank (*see also id.* ¶¶ 110-112 [alleged misrepresentations between November 20 and 23, 2009 – after first tranche of collateral had been posted]).

¹⁴ Indeed, Botella swore to the existence and terms of the oral agreement in affidavits submitted in the Prior Action. Botella swore that Galopy had funds given to the Bank on its behalf based on an agreement it now claims did not exist. This confirms that though Galopy does not specifically allege that any agreement with the Bank was fraudulently induced (likely mindful of the impact of such allegation), in substance that is what Galopy asserts.

conspiracy would not negate whether the parties had an enforceable agreement at the very outset.

Finally, according to Galopy, the “most damning” evidence is:

an internal email dated November 22, 2009 from Defendant Bissone to Alberto Ardura. In it, Bissone forwarded an article to Ardura, which discussed how the Venezuelan authorities had just invalidated Mr. Fernández’s attempted acquisition **through Galopy** of 4 Venezuelan banks, including Canarias. The article expressly mentioned Galopy and linked Mr. Fernández and Galopy to Canarias, which the Defendants knew was under common ownership with U21. By circulating this article, Bissone confirmed that he and his cohorts knew that Mr. Fernández (through Galopy) was attempting to acquire U21, and thus that it was Galopy that deposited the \$62.7 million (through Factor) with the Bank. Indeed, the article highlighted that Mr. Fernández did all his acquisitions through Galopy, and not through any other entities (Complaint ¶ 97 [emphasis added], citing Dkt. 78).

But this evidence--containing the first mention of Galopy in any of the documents or recorded phone conversations--is not damning at all. All it shows is that *after* the parties entered into their alleged oral agreement and *after* the first tranche of collateral had been transferred, the Bank was aware of Galopy. Even if the Bank knew about Galopy all along (and there is no “new evidence” that it did), that would not help Galopy escape the First Department’s binding conclusive holding that the alleged oral agreement is barred by the statute of frauds.

While defendants proffer alternative grounds for dismissal (collateral estoppel, statute of limitations, failure to state a claim, *in pari delicto* and *forum non conveniens*),

the court declines to address those issues because this action is clearly barred by res judicata.¹⁵

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted and the Clerk is directed to enter judgment dismissing the complaint with prejudice; and it is further

ORDERED that unless defendants move by order to show cause within two weeks of entry of this order on NYSCEF, in which they demonstrate recognized good cause to keep the sealed and redacted portion of the docket under seal,¹⁶ the parties shall promptly file unredacted versions of every sealed and redacted document along with an affidavit of compliance.

Dated: January 22, 2019

ENTER:



Jennifer G. Schecter, J.S.C.

¹⁵ For the avoidance of doubt, many of the Bank's arguments as to why Galopy's claims fail on the merits are correct (*see, e.g.*, Dkt. 32 at 42 [failure to plead scienter], 43 [lack of fiduciary relationship between Galopy and the Bank]; 45 [UCC's commercial bad faith rule inapplicable]). An extensive discussion of these issues is not warranted under the circumstances.

¹⁶ If defendants merely argue that sealing is appropriate based on their designation of such documents as confidential in the Prior Action, their motion will be summarily denied. Some actual imminent competitive harm or security concern must be articulated. As far as the court can tell, no such information is contained in the sealed material (e.g., since the documents are years old and the deal information is likely stale). Out of an abundance of caution, the court is permitting defendants an opportunity to convince the court otherwise.