

Miura Golf LP v Irving Golf, Inc.
2019 NY Slip Op 30298(U)
February 8, 2019
Supreme Court, New York County
Docket Number: 652584/2018
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

MIURA GOLF LP, MIURA GOLF CANADA ULC,

Plaintiff,

- v -

IRVING GOLF, INC. F/K/A MIURA GOLF, INC.

Defendant.

INDEX NO. 652584/2018

MOTION DATE 08/13/2018,
10/09/2018

MOTION SEQ. NO. 003 004

DECISION AND ORDER

-----X

IRVING GOLF, INC. F/K/A MIURA GOLF, INC.,

Counterclaim Plaintiff,

- v -

EMIGRANT BANK, MIURA GOLF LP,

Counterclaim Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61

were read on this motion to/for DISMISS.

Motion sequence 003 and 004 are consolidated for the purpose of this opinion.

Reference is made to a certain Asset Purchase Agreement (the **Asset Purchase Agreement**) dated October 13, 2016, by and among Miura Golf LP (**MG LP**) and Miura Golf Canada ULC (**MGC**; MG LP and MGC, collectively, the **Purchasers**) and Irving Golf, Inc. f/k/a Mura Golf, Inc. (the **Seller**). Pursuant to the Asset Purchase Agreement, the Purchasers agreed to purchase substantially all of the assets of the Seller. In exchange, MG transferred 40 class “B” units of MG and MGC transferred \$2,000,000 to the Seller.

The financial statements attached to the Asset Purchase Agreement indicated that the inventory was valued at \$1,368,164 as of February 29, 2016 and EBITDA was \$948,156. Following the closing, the Purchasers allege that they determined that \$444,402 of inventory on the February 29, 2016 balance sheet did not exist on such date, former employees of the Seller implemented a \$107,534 write-off of the inventory, and that inventory in an aggregate book value of \$117,211 was unsaleable (Amended Complaint, ¶¶ 23-24). The Purchasers also allege that they discovered that Seller's EBITDA was \$278,296 for the 2016 calendar year. (*Id.*, ¶ 28).

The Purchasers bring this action alleging that there was a breach of Sections 3.8, 3.18, and 3.9 of the Asset Purchase Agreement because (i) a Material Adverse Change (**MAC**) occurred with respect to Seller's lower EBITDA in 2016 and (ii) the inventory delivered to Purchasers included missing and unsaleable inventory. (*Id.*, ¶ 37).

The Seller brought a third party complaint in its answer by filing certain counterclaims (the **3rd Party Complaint**) against Emigrant Bank (**Emigrant**) and MG LP (Emigrant and MG LP, collectively, the **3rd Party Defendants**) alleging that MG LP breached a certain Limited Partnership Agreement of MG LP (**LP Agreement**), dated, October 13, 2016, by and among Seller, Circle Alternative Investments LLC (**Circle**) and Miura Golf GP LLC (**MGG LLC**). In its 3rd Party Complaint, Seller alleges that MG LP breached its duty of good faith and fair dealing by refusing to pay distributions under the LP Agreement (3rd Party Complaint, ¶ 76). The 3rd Party Complaint also states claims related to a certain Limited Liability Company Agreement of MGG LLC (**LLC Agreement**), dated October 13, 2016, by and among the Seller and Circle.

The Seller asserts the following claims against Emigrant in the 3rd Party Complaint: inducing breach of the LP Agreement, aiding and abetting MGG LLC's breach of fiduciary duty; aiding and abetting breach of fiduciary duty by members of MGG LLC's Board; aiding and abetting breach of fiduciary duty by Circle; as alter ego for MG, MGG LLC, and Circle for breach of fiduciary duties under the LP Agreement and LLC Agreement; and for injunctive relief requiring Emigrant to compel its alter egos to comply with applicable corporate governance requirements in the LLC Agreement (3rd Party Complaint, ¶¶ 78-107). For the avoidance of doubt, none of the claims asserted pursuant to the 3rd Party Complaint arise out of the transactions consummated pursuant to the Asset Purchase Agreement.

The Seller move to dismiss (motion sequence 003) the Amended Complaint under CPLR 3211(a)(1) and (7). The 3rd Party Defendants move to dismiss (motion sequence 004) the 3rd Party Complaint under CPLR 3211(a)(1) and (7) arguing, among other things, that the asserted counterclaims must be brought in Delaware because the governing documents of MG LP and MGG LLC require that claims brought pursuant to those agreements be litigated in Delaware. Further, Emigrant argues that, based on the "closely related" doctrine, the claims against Emigrant must also be litigated in Delaware.

For the reasons set forth on the record, and as set forth below, the Seller's motion to dismiss (motion sequence 003) is denied and the 3rd Party Defendant's motion to dismiss (motion sequence 4) is granted.

Dismissal under CPLR 3211 (a) (1) is warranted only if the documentary evidence “utterly refutes [plaintiffs’] factual allegations” and “conclusively establishes a defense to the asserted claims as a matter of law. (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 58 [1st Dept 2015].) Under CPLR 3211 (a) (7), a party may move for judgment dismissing a cause of action on the basis that the pleading fails to state a cause of action. The issue to resolve is “whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Leon v Martinez*, 84 NY2d 83, 86 [1994].)

Motion Sequence 003

The Seller argues that only MG LP can bring a claim regarding the inventory because they are the only party that delivered \$2,000,000 in exchange for the inventory. This argument fails. Per the terms of the Asset Purchase Agreement, the consideration for the inventory was delivered by both MG and MGC. In addition, the representations and warranties regarding Inventory and MAC run by their express terms to the Purchasers.

Accepting all of the allegations in the complaint as true, the Purchasers have alleged a cognizable claim for breach of contract and the Defendant’s motion to dismiss is denied.

Motion Sequence 004

Section 11.03 of the LP Agreement contains a mandatory forum selection clause:

The parties to this Agreement hereby (i) irrevocably submit and consent to the *exclusive (emphasis added)* jurisdiction of the courts of the State of Delaware or any United States District Court of competent jurisdiction located within the State of Delaware in connection with any matter or dispute arising under this Agreement or between them regarding the affairs of the Partnership.” Irving’s claim arises from a dispute over the LP Agreement. Therefore, the forum selection clause at section 11.03 of the LP Agreement applies and Delaware is the proper forum for Irving’s claim against MG.

Section 11.03 of the LLC Agreement also contains a mandatory forum selection clause:

The parties to this Agreement hereby (i) irrevocably submit and consent to the *exclusive (emphasis added)* jurisdiction of the courts of the State of Delaware or any United States District Court of competent jurisdiction located within the State of Delaware in connection with any matter or dispute arising under this Agreement or between them regarding the affairs of the Company.

The Seller (3rd Party Plaintiff)’s third party complaint against MG LP arises from an alleged breach of the LP Agreement. Accordingly, Delaware is the proper forum for adjudicating the Seller’s 3rd Party claim against MG LP and the action is therefore dismissed as against MG LP.

The Seller (3rd Party Plaintiff) argues that Emigrant should be required to litigated its claims in New York. In support of this contention, the Seller relies on a certain, Note Purchase Agreement (NPA) dated October 13, 2016 by and between MG and Emigrant. The NPA involves an

agreement to purchase MG LP's Senior Class A Convertible Notes. Section 13.9 of the NPA contains a forum selection clause providing that

ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH THIS AGREEMENT OR ANY OTHER TRANSACTION DOCUMENT, SHALL BE BROUGHT AND MAINTAINED EXCLUSIVELY [*sic*] IN THE COURTS OF THE STATE OF NEW YORK OR IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Based on the foregoing, the Seller argues that Emigrant should be required to litigate its claims which arise under the LP Agreement and the LLC Agreement in New York. The argument however fails. The transaction contemplated by the NPA is wholly separate from the transactions contemplated by the Asset Purchase Agreement and the claims asserted by the Seller/3rd Party Plaintiff. In addition, and for the avoidance of doubt, "OTHER TRANSACTION DOCUMENTS" referred to in Section 13.9 of the NPA is defined in Section 1 of that Agreement:

Transaction Documents means this Agreement, the Notes, the Collateral Documents, the Acquisition Documents, the LP Agreement and any other agreements, instruments and documents executed from time to time *in connection herewith* (emphasis added), as the same may be amended, supplemented or modified from time to time.

To wit, the transaction documents referred to in the NPA do not even include the LLC Agreement.

Inasmuch as the claims against Emigrant relate to the LP Agreement and the LLC Agreement, Emigrant may enforce the forum selection clauses under the "closely related doctrine." (*See Freeford Ltd. v Pendleton*, 53 AD3d 32, 39 [1st Dept 2008]; *Triple Z Postal Servs., Inc. v United Parcel Serv., Inc.*, 13 Misc 3d 1241[A], 1241A, 2006 NY Slip Op 52202[U], *1 [Sup Ct, NY County 2006]). Emigrant is the parent company of Circle and a general partner of MGG LLC. In its 3rd Party Complaint, the Seller alleges that MG, MGG LLC, and Circle are instrumentalities and alter egos of Emigrant. (3rd Party Complaint, ¶ 68). And, as the alter ego of these entities, Emigrant has "shut Irving out of the corporate governance of MG and MGG LLC and mismanaged the Miura Business, deprived Irving of its distributions and diverted plaintiffs' revenues to TSG." (*Id.*, ¶ 100). Accordingly, Seller argues that as result, the Seller claims that Emigrant is liable for breach of the LP Agreement, LLC Agreement and fiduciary duty by MG, MGG LLC, and Circle. (*Id.*, ¶ 101). The Seller's allegations demonstrate the requisite close relationship necessary to permit Emigrant, to invoke the forum selection clauses in the LP Agreement and LLC Agreement as it is reasonably foreseeable that claims arising under this agreement as they relate to Emigrant would be litigated in Delaware and not in New York. Accordingly, the 3rd Party Complaint is dismissed as against Emigrant.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss (sequence 003) plaintiffs' amended complaint is denied; and it is further

ORDERED that defendant is directed to serve an answer within 20 days of this order; and it is further

ORDERED that all parties are directed to appear for a preliminary conference on February 13, 2019 at 10:00 am; and it is further

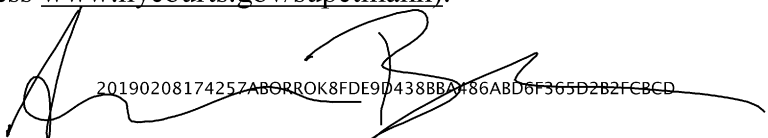
ORDERED that the 3rd Party Defendants motion to dismiss (sequence 004) is granted and the counterclaims are dismissed in their entirety as against such 3rd Party Defendants; and it is further

ORDERED that the action is severed and continued as to the first party action; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the defendant shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).


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2/8/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE