| **Delucca v Hayfin Capital Holdings Ltd.** |
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| 2021 NY Slip Op 31562(U) |
| May 7, 2021 |
| Supreme Court, New York County |
| Docket Number: 652210/2020 |
| 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*

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JOYCE DELUCCA,

Plaintiff,

- v -

HAYFIN CAPITAL HOLDINGS LIMITED, HAYFIN CARRIED INTEREST GP LIMITED, HAYFIN MANAGEMENT (GP) LIMITED, HAYFIN CAPITAL MANAGEMENT, LLC

Defendant.

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INDEX NO. 652210/2020

MOTION DATE 10/08/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 22, 23, 24, 25, 26

were read on this motion to/for DISMISS.

The Complaint in this action must be dismissed. In 2014, the Risk Retention Rule (the **Risk Retention Rule**) was adopted pursuant to Section 941 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Risk Retention Rule required that any person securitizing asset-based securities to retain at least 5% of the credit risk associated with the assets collateralizing those securities. A lawsuit (the **Risk Retention Litigation**) was brought in 2016 challenging the Risk Retention Rule and in 2018 the United States Court of Appeals for the District of Columbia Circuit (*Loan Syndications & Trading Assn. v Securities and Exchange Comm.*, 882 F3d 220 [DC Cir. Feb. 9, 2018]) invalidated the Risk Retention Rule as it applies to open-market CLO managers. Significantly, the Transaction Documents (hereinafter defined) that form the basis for Ms. Delucca's complaint were negotiated when the Risk Retention Litigation was pending and the continued viability of the Risk Retention Rule was being actively litigated.

Reference is made to a (i) Membership Interest Purchase Agreement ((NYSCEF Doc. No. 3; the **Purchase Agreement**) by and among Hayfin Capital Holdings Limited as buyer, Kingsland Capital Management LLC, Kingsland Holding LLC as seller and Joyce DeLucca, dated as of December 12, 2017, and (ii) a side letter (NYSCEF Doc. No. 4; the **Side Letter;** the Purchase Agreement together with the Side Letter, hereinafter, collectively, the **Transaction Documents**) of even date.

Section 7.03(f) of the Purchase Agreement provides:

> **Section 7.03 Conditions to Obligations of Seller**. The obligation of Seller to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment or Seller's waiver, at or prior to the Closing, of each of the following conditions:
>
> * * *
>
> (f) Buyer has obtained a commitment from the British Columbia Investment Management Corporation, or one of its Affiliates, to contribute capital in an amount not less than $120,000,000 to the Company (or a "majority-owned affiliate" of the Company (as defined in the U.S. Risk Retention Requirements)) pursuant to commercial terms that are substantially similar to those set forth in the term sheet set forth as Exhibit B hereto ***for the purpose of enabling the Company to satisfy the U.S. Risk Retention Requirements***.

(NYSCEF Doc. No. 3, § 7.03[f] [emphasis added]).

The plaintiff's claim for breach of contract fails because the documentary evidence [CPLR 3211(a)(1)] unequivocally demonstrates that the requirement that Buyer provide the $120 million commitment from British Columbia Investment Management Corporation was a condition precedent to the Seller's obligation to close which the Seller could either enforce or waive. The plaintiff is not the seller. Her company, Kingsfield Holdings LLC, was the seller and as such she

personally does not have standing to bring this claim. Additionally, Section 7.03(f) of the Purchase Agreement required the delivery of a commitment on the terms substantially set forth on the term sheet attached as Exhibit B for the purpose of enabling the Company to satisfy the U.S. Risk Retention Requirements. It is not disputed that the buyer provided a "commitment from the British Columbia Investment Management Corporation [**BCIMC**], or one of its Affiliates, to contribute capital in an amount not less than $120,000,000 to the Company," and a copy of same was provided to the plaintiff and her counsel prior to closing. The plaintiff's argument that the commitment provided did not satisfy the Purchase Agreement because it did not provide a continuing commitment to fund the plaintiff's business expansion which these defendants (who, other than Hayfin Capital Holdings Limited, were not a party to the Purchase Agreement) breached when the Risk Retention Requirement for CLOs was eliminated is unavailing. It was the seller's obligation to accept or reject the commitment and not close if the commitment was unsatisfactory — i.e., that it did not provide the facility for the investment period and to "fund equity in warehouses from CLO arrangers, and in respect of CLOs, to comply with US CLO risk retention requirements" (NYSEF Doc. No. 3). Having accepted the commitment provided, either the condition to closing was satisfied or to the extent of a discrepancy between the Purchase Agreement and the commitment, the discrepancy was waived. For completeness, the parties agreed pursuant to Section 10.06 of the Purchase Agreement that discrepancies between the body of the Purchase Agreement and its Exhibit B were to be resolved in favor of the body of the Purchase Agreement. If the commitment did in fact satisfy the expectations and BCIMC is not funding according to the terms of the commitment, the claim, if any, would be against BCIMC. Thus, the breach of contract claim must be dismissed.

The claim based on an alleged breach of the covenant of good faith and fair dealing also fails (*see Fesseha v TD Waterhouse Investor Servs., Inc.*, 305 AD2d 268, 268 [1st Dept 2003] [covenant of good faith and fair dealing cannot be read so broadly as to "create independent contractual rights"]). There is a specific contract here, the contract is clear on its face, and, in any event, the plaintiff is the wrong party to bring this action. The fact that the term sheet permitted a secondary use of the money does not in any way alter the fact that the obligation to provide the money was unambiguously pursuant to Section 7.03(f) of the Purchase Agreement "for the purpose" of meeting the Risk Retention Requirements. Therefore, the claim based on breach of the covenant of good faith and fair dealing must be dismissed.

The claim grounded in mutual mistake must be dismissed because there is no ambiguous term to which each party attaches a unique and different meaning (*see Chimart Assocs. v Paul.* 66 NY2d 570, 573-74 [1986]).

The claim grounded in unilateral mistake fails also because it cannot meet the requirements of CPLR § 3016(b) (*see also*, *Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 369-70 [1st Dept 2007]). Among other things, the press release indicating that Hayfin will be her partner in expanding her business is aspirational and does not supersede the express terms of the Purchase Agreement or form the basis for a well plead notion that Hayfin promised continued funding on unspecified terms if the Risk Retention Requirements no longer applied. In addition, and for the avoidance of doubt, the parties agreed pursuant to Section 10.06 of the Purchase Agreement that the Transaction Documents superseded all prior and contemporaneous understandings and

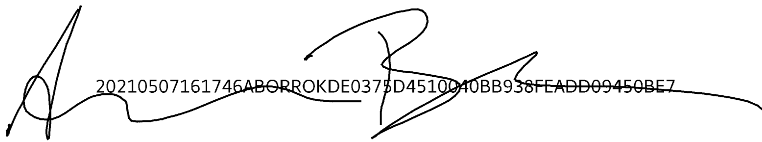
agreements, both written and oral, except for the Confidentiality Agreement and, as such, any reliance by the plaintiff on any such negotiations prior to or contemporaneous with the execution of the Purchase Agreement (NYSCEF Doc. No. 2, ¶ 22) cannot be reasonable. As discussed above, the court notes that the Risk Retention Litigation predated the consummation of the transaction contemplated by the Transaction Documents and the court's decision to eliminate the Risk Retention Requirement occurred a mere one month after the closing of the transaction occurred. To wit, it was public knowledge to these sophisticated parties represented by counsel that the Risk Retention Requirements could in fact be eliminated. The express language of the Purchase Agreement does not provide that the purpose of the $120 million commitment is for expansion of business but instead provides that it is for the purpose of satisfying the Risk Retention Requirements. Stated differently, the plaintiff cannot use this court to rewrite the Transaction Documents to provide for a continued commitment in the absence of these requirements particularly given that the continued application of the Risk Retention Requirements were already in question when the deal was negotiated and the Transaction Documents executed.

Finally, the securities fraud claim fails because there is no common law security fraud in New York. To the extent the plaintiff argues that this is a fraud in the inducement claim, the claim still fails because there are insufficient specific allegations which give rise to the fraud given that the Purchase Agreement does not promise to provide funding in the absence of the Risk Retention Requirements (*see Gregor v Rossi*, 120 AD3d 447, 447 [1st Dept 2014]). The claim also fails because the Risk Retention Requirements themselves, as noted above, were known to be challenged and their continued existence was in question.

Accordingly, it is

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

ORDERED that the defendants are directed to order a copy of the transcript of oral argument and upload the same to NYSCEF.




| 5/7/2021 | | ANDREW BORROK, J.S.C. | | | |
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| DATE | | | | | |
| CHECK ONE: | X | CASE DISPOSED | | NON-FINAL DISPOSITION | |
| | X | GRANTED | ☐ DENIED | ☐ GRANTED IN PART | ☐ OTHER |
| APPLICATION: | ☐ | SETTLE ORDER | | ☐ SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | ☐ | INCLUDES TRANSFER/REASSIGN | | ☐ FIDUCIARY APPOINTMENT | ☐ REFERENCE |