LMM Capital Partners, LLC v Mill Point Capital, LLC
2023 NY Slip Op 31612(U)
May 10, 2023
Supreme Court, New York County
Docket Number: Index No. 653606/2022
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

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LMM CAPITAL PARTNERS, LLC,
Plaintiff,

- v -

MILL POINT CAPITAL, LLC, E&M LOGISTICS, INC., AND MARTIN KELLY,
Defendants.

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INDEX NO.	653606/2022
MOTION DATE	
MOTION SEQ. NOS.	003 & 005

DECISION + ORDER ON MOTIONS

HON. BARRY R. OSTRAGER

The Court heard oral argument via Microsoft Teams on May 10, 2023, on two pre-Answer motions for an Order, pursuant to CPLR 3211(a)(1), (5) and (7), dismissing the action based on documentary evidence, a Release, and failure to state a cause of action. The first motion (seq. 003) was made by defendant Martin Kelly. The second motion (seq. 005) was made jointly by defendants Mill Point Capital, LLC ("Mill Point") and E&M Logistics, Inc. ("E&M"). In accordance with the May 10, 2023, transcript of proceedings, the Court grants both motions and dismisses all claims against all parties with prejudice. Although the result may appear harsh, the Court is constrained by the extremely broad release language in the Mutual Termination Agreement and Release entered into by LMM and E&M, dated April 21, 2021, that applies to all the claims asserted here by LMM against all the named defendants.

Plaintiff LMM is a private equity firm launched in 2016 that began seeking a co-investor to acquire defendant E&M in or about September 2020. In connection with that search, LMM entered into a Letter of Intent with E&M. Additionally, because LMM was considering Mill Point as a co-investor, LMM and Mill Point entered into a Non-Circumvention Agreement. Those documents, among others, are discussed more fully below. Ultimately, LMM chose not to proceed with Mill Point and selected a different partner for the contemplated transaction regarding E&M. Eventually,

Mill Point acquired E&M on its own, without any participation by LMM. LMM then commenced this action alleging breach of contract against Mill Point and fraud, tortious interference with contract and with business relations, and for declaratory relief against all three defendants, alleging that the defendants had worked together to misappropriate from LMM a significant business opportunity: LMM's potential acquisition of E&M.

The Court's decision on the pending motions is controlled by three written agreements. The first in time is a document, mentioned above, entitled "Letter of Intent" from Elisha Aharon and Kevin Singer, both as LMM Partners, to Martin Kelly as Chief Executive Officer of E&M, dated August 4, 2020 ("the LOI"). Kelly executed the LOI in his capacity as President of E&M on September 15, 2020, confirming that E&M had agreed to and accepted the LOI (see NYSCEF Doc. No. 58). Attached to the five-page Letter was a six-page Term Sheet for a "possible transaction."

LMM sent E&M the LOI proposing non-binding terms for LMM's contemplated acquisition of E&M. The LOI provided LMM with a 90-day exclusive access period to conduct due diligence and evaluate the transaction contemplated in the LOI. The LOI further provided that E&M would negotiate exclusively with LMM during that 90-day period and made clear that: (i) LMM and E&M would "not be under any obligation to consummate the proposed transaction;" (ii) LMM's due diligence had not been completed; (iii) a purchase agreement for the proposed transaction had not been negotiated or executed; and (iv) the terms and conditions outlined in the LOI were intended only as a starting point for future discussions. E&M expressly retained the right to elect "not to close the transaction contemplated by the [LOI] **for any reason, including but not limited to because the Company [E&M] receiv[ed] a superior proposal …**" (LOI ¶10, emphasis added).

In the event the proposed transaction did not proceed, E&M and Kelly were not subject to any non-circumvention agreement with LMM and were free to negotiate a deal with anyone E&M chose. However, under those circumstances, E&M was required and agreed to pay LMM a breakup

fee of $400,000.00. With that lone exception,¶11 of the LOI reiterated that all other terms and conditions in the LOI and Term Sheet were ***non-binding*** in nature, stating:

> Neither the other provisions of the Letter [of Intent] nor the attached Term Sheet, nor any other manifestation of [LMM's] interest in the proposed transaction constitutes or gives rise to any obligation on the part of [E&M] or [LMM] to proceed with any transaction and shall not be binding on the parties hereto. Any such obligation will arise only upon the parties' execution of a definitive purchase agreement expressly creating such an obligation.

The next relevant document in time, also mentioned above, is a two-page letter dated February 16, 2021, from LMM to Mill Point, signed by Mr. Aharon as LMM Managing Partner and accepted and agreed to by Dustin Smith as Partner on behalf of Mill Point and referred to by the parties as the Non-Circumvention Agreement ("NCA", NYSCEF Doc. No. 62). Signed while LMM was negotiating with Mill Point about a possible transaction with E&M, Mill Point agreed in the NCA that, in exchange for receiving Confidential Material about the Potential Transaction, Mill Point would not use or disclose any of the Confidential Material for its own purposes, with limited exceptions. In addition, Mill Point agreed that for a period of two years (until February 16, 2023), or unless LMM expressly notified Mill Point otherwise in writing, Mill Point "shall not, directly or indirectly, other than in a transaction including LMM, participate in or assist or encourage any other person or entity in connection with any acquisition of, investment in, business combination with or change of control of the Company [E&M]."

The third document in time, but most relevant for these motions, is the five-page "Mutual Termination Agreement and Release" between E&M and LMM, executed by Kelly as President of E&M (referred to as "the Company") and by Aharon and Singer as Partners of LMM on April 21, 2021, and effective as of that date (NYSCEF Doc. No. 63). In that Agreement, the parties terminated the LOI effective April 21, 2021, and expressly agreed that "none of the covenants, obligations, provisions, representation, or warranties set forth in [the] Letter of Intent shall survive

the termination of the Letter of Intent." Further, after acknowledging that the LOI provided for a break-up fee of $400,000 should E&M elect not to close the Potential Transaction for any reason, E&M agreed to pay LMM a total of $420,000.00 commencing on June 1, 2021 and continuing for the successive five calendar months at a specified rate. It is undisputed that E&M timely paid, and LMM accepted, payments from E&M totaling $420,000.00.

The Release relied upon by defendants is their dismissal motions is set forth at Section 1.C. of the Mutual Termination Agreement. The Release contains extremely broad language pursuant to which LMM released E&M from any and all claims by LMM, whether known or unknown, stating in subdivision (i) (with emphasis added) that:

> LMM does, on its own behalf and on behalf of the LMM Released Parties (as defined below), hereby remise, release and forever discharge Company [E&M] and each of the Company Released Parties (as defined below), from and against any and all manner of actions, causes of action, suits, proceedings, claims, demands, damages, rights, liens, agreements, contracts, covenants, obligations, debts, dues, sums of money, costs, expenses, reasonable attorneys' fees, judgements, orders, and liabilities (the foregoing are hereinafter collectively referred to as the "Damages') of whatsoever kind and nature, whether based on tort (including, without limitation, acts of negligence), contract or any other theory of recovery, whether at law or in equity or otherwise, **whether known or unknown, liquidated or unliquidated, suspected or unsuspected and whether or not concealed or hidden**, which LMM and/or LMM Released Parties had, now has, or hereafter may have against the Company and/or any or all of the Company Released Parties arising out of, relating to, connected with, or incidental to, the Letter of Intent or the transactions contemplated thereby.

Section 1.C.(i) defines the term "Company [E&M] Released Parties" to include, among others, "(a) the Company's past, present and **future Affiliates** (as defined below); [and] (b) the Company's and the Company's Affiliates' predecessors, successors, and assigns…" (emphasis added). That provision goes on to define the term "Affiliates" to mean "with respect to a Party, an entity which, directly or indirectly, controls, is controlled by, or is under common control with such Party." Mill Point argues that it qualifies as an "Affiliate" because it now controls E&M.

It is undisputed that defendant Martin Kelly, as President of E&M, falls within the definition of "Company Released Parties", which expressly includes directors and officers of E&M. But the parties vigorously dispute whether the Release applies to Mill Point, which is not a named party or a signatory to the Release. The Court finds that it does.

LMM cannot dispute that Mill Point would qualify as an "Affiliate" based on its control of E&M if the terms of the Release are strictly applied as written. However, LMM argues that the Court should look beyond the wording of the Release to the parties' intent, which LMM contends would establish that LMM never intended to release Mill Point – a non-signatory to the Release -- from the terms of the NCA. The Court disagrees. Where, as here, the Release is clear and unambiguous on its face, the Court may not look beyond the four corners of the document, particularly where, as here, the Release followed LMM's Non-Circumvention Agreement with Mill Point by approximately two months.

LMM also vigorously argues that the Release was not "fairly and knowingly made" and is not enforceable at all due to fraud. Specifically, LMM argues that E&M fraudulently obtained the Release knowing that, due to defendants' alleged misstatements and omissions, LMM was under the misconception that it was not releasing any of the defendants from claims of breach and/or tortious interference with, *inter alia,* the Non-Circumvention Agreement between LMM and Mill Point, which Mill Point allegedly breached by entering into a transaction with E&M without LMM's participation. The alleged misstatements and omissions related to whether E&M's vendors Nestle and Froneri would ever consent to an acquisition of E&M by a private equity buyer and defendants' alleged failed to disclose to LMM that Mill Point was working to directly acquire E&M without LMM's involvement.

These arguments, as well as LMM's fraudulent inducement and constructive fraud claims as a whole (the Fourth and Sixth Causes of Action in the Complaint) fail. The parties are all

sophisticated entities and individuals with experience in commercial transactions of this nature. In addition, all were represented by counsel and had full access to business advisors. None of the defendants owed LMM a fiduciary duty or had any type of "superior knowledge" or special relationship that required any additional disclosures under the "special facts doctrine."

It is also noteworthy that LMM had an ongoing relationship with all the defendants. Indeed, about sixty days before the Release was signed by LMM and E&M, LMM extensively negotiated and executed the Non-Circumvention Agreement with Mill Point, which prohibited Mill Point from entering into a transaction with E&M without LMM's participation. Thus, LMM could have inquired further of the parties at any time and obtained more information through its own due diligence, and it could have easily included in the Release language that carved out an exception for Mill Point. Under the circumstances, LMM cannot claim it justifiably relied on any representations by any of the defendants, which is a required element for any fraud claim proffered to invalidate the Release.

Nor has LMM identified a fraud separate from the Release, as all the alleged misrepresentations and omissions relate directly to the LOI and the Potential Transaction underlying the Mutual Termination Agreement and Release. Under these circumstances, LMM's attempt to invalidate the Release fails, and the Court need not reach defendants' argument that LMM ratified the Release by accepting the $420,00.00 termination fee paid out over a period of months when LMM was allegedly fully aware of defendants' purportedly wrongful conduct.

LMM's tortious interference with contract claim fails. E&M and Mill Point cannot be held to have interfered with their own contracts with LMM. To the extent LMM suggests that E&M intentionally induced Mill Point to breach the Non-Circumvention Agreement (the only contract allegedly breached), LMM fails to adequately allege that that E&M was the "but for" cause for Mill Point's breach of the NCA. Additionally, all the defendants were motivated to act by their own

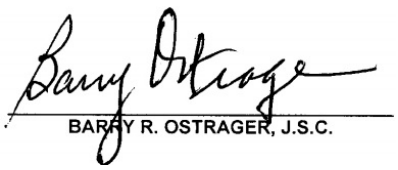
economic self-interest. LMM's claim of tortious interference with prospective business relations fails for similar reasons and the additional reason that no defendant can be said to have acted with malice or for the sole purpose of harming LMM, which is required to sustain a claim for tortious interference with prospective economic relations. Thus, both the Second and the Third and Causes of Action fail to state a claim. The declaratory judgment claim in the Fifth Cause of Action also is subject to dismissal as it is duplicative of the other causes of action.

In sum, the clear and unambiguous release language in the Mutual Termination Agreement and Release is very broadly drafted so that it requires dismissal of all the claims asserted by LMM against all the parties to this action.

Accordingly, it is hereby

ORDERED that the motions by the various defendants for an Order, pursuant to CPLR 3211(a)(1), (5) and (7), dismissing this action (mot. seq. 003 and 005) are granted. The Clerk is directed to enter judgment dismissing the action with prejudice.

Dated: May 10, 2023



BARRY R. OSTRAGER, J.S.C.

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