Daiwa Corporate Advisory LLC v Katapult Group, Inc.
2023 NY Slip Op 33079(U)
September 6, 2023
Supreme Court, New York County
Docket Number: Index No. 652164/2021
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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DAIWA CORPORATE ADVISORY LLC

Plaintiff,

- v -

KATAPULT GROUP, INC.,

Defendant.

INDEX NO. 652164/2021

MOTION DATE 05/31/2023, 05/31/2023

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 157, 167, 168, 169, 170, 171, 172, 182, 183, 190

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 158, 173, 174, 175, 176, 177, 178, 179, 180, 181, 184, 185, 186, 187, 188, 189

were read on this motion for PARTIAL SUMMARY JUDGMENT.

This action arises out of a March 22, 2018 Letter Agreement (the "Letter Agreement") between Plaintiff Daiwa Corporate Advisory LLC ("Daiwa") and Defendant Katapult Group, Inc. ("Katapult"). In that document, Katapult agreed that Daiwa "shall have the right to act as" Katapult's exclusive financial advisor and placement agent in connection with any "Private Financing" and as financial advisor in connection with any "Sale," as those terms are defined in the Letter Agreement (NYSCEF 93). Daiwa alleges that Katapult breached the Letter Agreement by failing and/or refusing to extend Daiwa the opportunity to exercise the Right of First Refusal granted under § 4(c) of the Letter Agreement (the "Right of First Refusal") in

connection with a 2020 Sale of Katapult and a related Private Financing (for which other advisers were retained), and by failing to pay Daiwa a termination fee upon Katapult's termination of the Letter Agreement (NYSCEF 1 ¶¶ 1-6).

For its part, Katapult argues that the Right of First Refusal is too indefinite to be enforceable and is merely an agreement to agree (*see* NYSCEF 156). Alternatively, Katapult argues that the private investment in public equity ("PIPE") transaction that financed the Sale transaction was not a Private Financing under the Letter Agreement (*id.*). Katapult also argues that Daiwa waived its right to the termination fee (*see* NYSCEF 167).

Daiwa seeks summary judgment in its favor on both causes of action, while Katapult seeks partial summary judgment dismissing Daiwa's First Cause of Action for Breach of Section 4(c) of Letter Agreement.

For the following reasons, Daiwa's motion for summary judgment is granted as to liability only on the branch of its First Cause of Action asserting breach of the Letter Agreement with respect to the 2020 Sale of Katapult, and is otherwise denied. Katapult's motion for partial summary judgment is granted to the extent it seeks dismissal of the branch of Daiwa's First Cause of Action asserting breach of the Letter Agreement with respect to the 2020 PIPE transaction and is otherwise denied**.**

I. BACKGROUND

In early 2018, Daiwa and Katapult entered into the Letter Agreement (NYSCEF 172 ¶ 1). Pursuant to the Letter Agreement, Katapult retained Daiwa to act as its financial advisor and placement agent (*id.* ¶¶ 1, 5). As part of the agreement, Daiwa received the Right of First Refusal which granted Daiwa the right to act as exclusive financial advisor and placement agent with

respect to a Sale or Private Financing during the term of the Letter Agreement, or within 24 months of its termination (NYSCEF 93 § 4(c)). Throughout the term of the Letter Agreement, Daiwa assisted Katapult in collecting and organizing materials for the purposes of facilitating investor due diligence (NYSCEF 172 ¶ 8); advised Katapult in considering Private Financing and/or a Sale (*id.* ¶ 9); assisted Katapult in identifying potential equity investors and lenders (*id.* ¶ 12); and solicited and evaluated proposals regarding Private Financing and/or a Sale (*id.*).

After purportedly terminating the Letter Agreement in April 2019[1], Katapult retained PJT Partners ("PJT") in August 2020 to serve as its exclusive financial advisor to pursue a sale of the company (*id.* ¶¶ 25, 31). In December of that year, Katapult and FinServ Acquisition Corp. ("FinServ"), a special purpose acquisition company, entered into an Agreement and Plan of Merger (*id.* ¶¶ 35, 38). The FinServ Sale was funded by the PIPE Transaction and closed in June 2021 (*id.* ¶¶ 40, 47). Katapult did not extend Daiwa the opportunity to act as financial advisor or placement agent in connection with either the FinServ Sale or the PIPE Transaction (*id.* ¶¶ 57, 59).

Daiwa commenced this action on April 1, 2021 (*id.* ¶ 63).

II. DISCUSSION

To obtain summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law" by advancing "sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once established, "the burden then shifts to the [non-movant] to present facts, in admissible

[1] The parties dispute the legal effect of this alleged termination (*see infra.* II B).

form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment" (*Flores v City of NY*, 29 AD3d 356, 358 [1st Dept 2006]).

A. Daiwa's First Cause of Action – Breach of Contract – Right of First Refusal

In its First Cause of Action, Daiwa alleges that Katapult breached the Letter Agreement by refusing and/or failing to "extend [Daiwa] the opportunity to exercise its right of first refusal in connection with the 2020 Sale…and the 2020 Private Financing" (*id.* at ¶ 42). Section 4(c) of the Letter Agreement states,

> "[Katapult] agrees that [Daiwa] ***shall have the right to act as exclusive financial advisor placement agent*** to [Katapult] with respect to Private Financing ***and exclusive financial advisor*** with respect to a Sale in the event [Katapult] retains or otherwise uses (or seeks to retain or use) the services of an investment bank or financial advisor to pursue at any time during the term of this Agreement or within 24 months after the expiration or termination of this Agreement. If [Daiwa] agrees to participate in any such transaction, [Daiwa] shall be paid the Placement Fee in connection with any such Private Financing and, in the case of a Sale, mutually-agreed upon fees for its services that are customary and based upon similar transactions and practices in the investment banking industry. Notwithstanding the above or any oral representations made to the contrary, this Agreement does not constitute a commitment by [Daiwa] or its affiliates to participate in any such transactions and such a commitment will exist only upon the execution of a separate, written agreement or supplement or amendment to this Agreement, containing terms and conditions applicable to such transaction. (NYSCEF 93 at 4 [emphasis added]).

"The contractual right of first refusal…is a valuable right which has enjoyed the protection of the courts" (*ABC, Inc. v Wolf*, 76 AD2d 162, 169 [1st Dept 1980] *aff'd* 52 NY2d 394 [1981]). In fact, "[a] right of first refusal is a right to receive an offer, and the grantor's failure or refusal to extend the holder the opportunity to exercise the right constitutes a breach" (*Cipriano v Glen Cove Lodge No. 1458*, 1 NY3d 53, 60 [2003]).

i. The Sale Transaction

Starting with Daiwa's claim for breach of the Letter Agreement with respect to the Sale of Katapult, it is undisputed that Katapult retained a financial advisor (PJT) to pursue a Sale during the period set forth in § 4(c) without extending Daiwa the opportunity to exercise its Right of First Refusal (NYSCEF 172 ¶ 44). Katapult argues that § 4(c) gave Daiwa only the *opportunity* to pitch for work in connection with the Sale and leaves material terms to future negotiations and is thus an unenforceable agreement to agree (NYSCEF 167 at 5).

However, under New York law, "all the terms contemplated by [an] agreement need not be fixed with complete and perfect certainty for a contract to have legal efficacy" (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 61 [1st Dept 2015], *aff'd* 31 NY3d 100 [2018]). The doctrine of definiteness "is to be sparingly used, as a last resort, and only when an agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear" (*Cowen and Co., LLC v Fiserv, Inc.*, 141 AD3d 18, 21 [1st Dept 2016] [internal quotations omitted]). In fact, "[w]here at the time of agreement the parties have manifested their intent to be bound, a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties…, for example…by reference to an extrinsic event, commercial practice or trade usage" (*Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989]).

Here, the Right of First Refusal is sufficiently definite to be enforceable. It set forth the types of transactions, the role Daiwa would assume, the scope of Daiwa's services, and a means to determine Daiwa's compensation in accordance with commercial practice (*see Cowen*, 141 AD3d at 21 [contract enforceable where it included provision explicitly referencing "commercial

practice, or trade usage New York courts routinely rely upon to render a price term sufficiently definite"] [internal quotation omitted]).

Katapult's reliance on *Foros Advisors LLC v Digital Globe, Inc.*, 333 F Supp3d 354, 360 [SDNY 2018] to suggest that §4(c) merely provided Daiwa with an opportunity to *pitch* for work is unavailing. The contract in *Foros* required the defendant to "*offer* [plaintiff] *the opportunity* to act as a financial advisor to [defendant]" (*id.* at 358 [emphasis added]), whereas here the express language of § 4(c) unambiguously states "that [Daiwa] ***shall have the right to act as exclusive financial advisor placement agent*** to [Katapult] with respect to…a Sale" (NYSCEF 93 at 4 [emphasis added]). Moreover, the court in *Foros* distinguished *Cowen* (the case on which Daiwa primarily relies), where the "contract specifically defined the type of transaction…, type of financial advisor…[and] also specified the means for determining the compensation for that role" and found "there was no such specificity in the Offer Clause, and thus no comparable standard for the Court to apply" (*Foros*, 333 F Supp3d at 361-62). As stated above, here, § 4(c) delineates Daiwa's role and obligations with respect to contractually defined transaction types, and contemplates fees customary for similar transactions (NYSCEF 93 at 4). Therefore, "[Katapult's] failure or refusal to extend [Daiwa] the opportunity to exercise the [Right of First Refusal] constitutes a breach" of § 4(c) of the Letter Agreement (*Cipriano*, 1 NY3d at 60).

However, issues of fact remain with respect to what damages, if any, Daiwa will be able to prove stemming from Katapult's breach of the Letter Agreement with respect to the Sale transaction. Accordingly, future proceedings are necessary with respect to that claim.

ii. <u>The PIPE Transaction</u>

Next, Daiwa also alleges that Katapult breached the Letter Agreement by failing to extend Daiwa the Right of First Refusal to act as the exclusive financial advisor and placement

agent with respect to the PIPE transaction (those roles went to Barclays and PJT), arguing that the PIPE is a Private Financing as defined in the Letter Agreement (*see* NYSCEF 126 at 7-8; *see also* NYSCEF 1 ¶ 42). While it is again undisputed that Katapult did not offer Daiwa the Right of First Refusal with respect to the PIPE transaction, this claim must still fail.

The Letter Agreement defines a Private Financing as "any Equity Financing, Debt Financing or any combination or hybrid thereof," while "Equity Financing" is defined as "any sale or issuance of common or preferred equity, equity-linked securities, or interests…of any Company Entity" (NYSCEF 93 §§ 2(b)-(c)). Here, the PIPE transaction involved *FinServ's* stock, not any securities of Katapult or its affiliates, and thus does not meet the Letter Agreement's definition of a Private Financing.

Specifically, FinServ's Proxy Statement states that "15,000,000 shares of FinServ Class A Common Stock [were] issued in connection with the PIPE Investment [] for aggregate cash proceeds of $150 million to FinServ immediately *prior* to the First Effective Time" (NYSCEF 137 at 14 [emphasis added]). The "First Effective Time" is defined as "the time at which the First Merger becomes effective" (*id.* at 13), which is defined as when Merger Sub 1 (a wholly owned subsidiary of FinServ) would merge with and into Katapult (*id.* at 1). FinServ was thus distinct from Katapult at the time of the PIPE, and not a Company Entity. Daiwa's contention that the PIPE occurred concurrently with the merger and that FinServ was therefore an affiliate of Katapult is not supported by the record. Because the PIPE was not a Private Financing under the terms of the Letter Agreement, Katapult did not have any obligation to Daiwa pursuant to the Letter Agreement related to the PIPE transaction.

Moreover, the Proxy Statement states that "FinServ engaged Barclays" and "also engaged PJT as co-placement agent[s] for the PIPE Investment" (NYSCEF 137 at 32). Daiwa's reliance

on a November 27, 2020 Conflict Waiver Letter (NYSCEF 154) to suggest that Katapult "otherwise use[d] (or [sought] to retain or use)" PJT and Barclays (NYSCEF 93 at ¶4(c)) is unavailing. In fact, that letter shows that FinServ intended to pursue the financing and PJT was performing services related to the PIPE for FinServ (*see* NYSCEF 154).

Accordingly, Daiwa has failed to rebut Katapult's proffered evidence establishing that *FinServ* (not Katapult) engaged PJT and Barclays to serve as financial advisors for the PIPE transaction and that the PIPE transaction was not a Private Financing as defined in the Letter Agreement. Accordingly, Katapult is entitled to summary judgment dismissing this branch of Daiwa's First Cause of Action (*see Flores*, 29 AD3d at 358).

B. Daiwa's Second Cause of Action – Breach of Contract – Termination Fee

Daiwa has failed to establish that it is entitled to judgment as a matter of law on the Second Cause of Action for breach of § 4(a) of the Letter Agreement. There is a factual dispute as to whether Daiwa waived its right to enforce the provision and collect the Termination Fee referenced in § 4(a). "A waiver…is the intentional relinquishment of a known right – it must be clear, unequivocal and deliberate" (*Benedetto v Hyatt Corp.*, 203 AD3d 505, 5057 [1st Dept 2022] [internal quotation omitted]). "Such intention must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act" (*EchoStar Satellite LLC v ESPN, Inc.*, 79 AD3d 614, 617 [1st Dept 2010] [internal quotation omitted]). Further, while a party's prolonged "failure to assert [a] right" can "evince[] a knowing intent not to claim such right" (*Jumax Assoc. v 350 Cabrini Owners Corp.*, 46 AD3d 407, 408 [1st Dept 2007]), a finding of waiver "should not be lightly presumed" and cannot be based upon "mere silence or oversight [or] mistake, negligence, or thoughtlessness" (*Homapour v Harounian*, 200 AD3d 575, 576 [1st Dept 2021] [internal quotation omitted]).

Section 4(a) states "[Katapult] agrees to pay [Daiwa] a termination fee of $100,000, payable in cash on the effective date of such termination" in the event Katapult elected to terminate the agreement after the Marketing Launch (NYSCEF 93 at 4). Katapult acknowledges that it told Daiwa to stop work under the Letter Agreement on April 3, 2019 (i.e., after the Marketing Launch), thereby triggering the Termination Fee (*see* NYSCEF 167 at 18). However, in support of its argument, Katapult alleges that Daiwa accepted Katapult's expense reimbursement in January 2020 without reservation and later acknowledged this payment as signifying the end of the parties' relationship (*id.* at 19). Katapult further argues that it was not until two months after filing this lawsuit and almost 18 months after Katapult made its final payment under the Letter Agreement, and more than a year after Daiwa's alleged acknowledgement of the end of the relationship, that Daiwa finally sent an invoice for the Termination Fee (*id.* at 18-19).

By contrast, Daiwa argues that the January 2020 reimbursement did not terminate the parties' relationship. In support of this argument, Daiwa points to an email dated June 29, 2020 from an employee stating that the "engagement letter remains in full force and effect pursuant to its terms" (NYSCEF 122), a position that was reiterated in an email sent December 22, 2020 (NYSCEF 123). Additionally, Daiwa argues § 4(a) places no obligation on Daiwa to invoice the amount of the Termination Fee by any particular date but only requires Katapult to pay the fee "on the effective date of such termination" (NYSCEF 182 at 12; NYSCEF 93 at 4). Finally, Daiwa contends that the decision to send the invoice came only after it became apparent that Katapult would not pay the Termination Fee absent such an invoice, and that any delay was an oversight (NYSCEF 182 at 12; *see also* NYSCEF 5 ¶ 32).

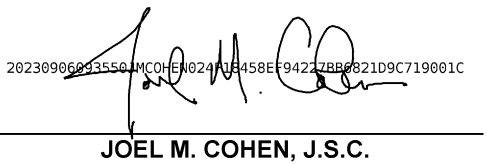
Therefore, fact issues exist as to whether Daiwa's delay in "assert[ing] its right to the [Termination Fee] evinced a knowing intent not to claim such right" (*Jumax*, 46 AD3d at 408). As a result, Daiwa's motion with respect to its second cause of action is denied.[2]

Accordingly, it is

ORDERED that Daiwa's motion for summary judgment (Mot. Seq. 03) is **granted** as to liability only on the branch of its First Cause of Action asserting breach of the Letter Agreement with respect to the 2020 Sale of Katapult, and is otherwise **denied**; and it is further

ORDERED that Katapult's motion for partial summary judgment (Mot. Seq. 04) is **granted** to the extent it seeks dismissal of the branch of Daiwa's First Cause of Action asserting breach of the Letter Agreement with respect to the 2020 PIPE transaction and is otherwise **denied.**

This constitutes the Decision and Order of the Court.



9/6/2023
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[2] In light of the decisions above, Daiwa's application for attorneys' fees and expenses under the Letter Agreement is denied (*see Sykes v RFD Third Ave. I Assocs., LLC*, 39 AD3d 279, 279, [1st Dept 2007] ["To determine whether a party has prevailed' for the purposes of awarding attorneys' fees, the court must consider the true scope of the dispute litigated and what was achieved within that scope"] [internal quotation omitted]). The issue may be reconsidered after trial.