12-9-05

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED PART 60
Justice

ACF INDUSTRIES LLC,

Plaintiff,

- v -

WACHOVIA CAPITAL MARKETS LLC, WACHOVIA CORPORATION d/b/a WACHOVIA SECURITIES, AND FIRST UNION COMMERCIAL CORPORATION,

Defendants.

INDEX NO. #600255-2005
MOTION DATE
MOTION SEQ. NO #003
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

FILED
DEC - 9 2005
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 12/07/05

J.S.C. BERNARD J. FRIED J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

----------X

ACF INDUSTRIES LLC,

Plaintiff,

Index No. 600255/05

-against-

WACHOVIA CAPITAL MARKETS LLC, WACHOVIA CORPORATION d/b/a WACHOVIA SECURITIES, and FIRST UNION COMMERCIAL CORPORATION,

Defendants.

----------X

FRIED, J.:

Defendants Wachovia Capital Markets LLC (Capital Markets), Wachovia Corporation d/b/a Wachovia Securities (Securities) (collectively, Wachovia) and First Union Commercial Corporation (First Union) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the first, second, third and fourth causes of action for failure to state a cause of action, and the fifth cause of action as moot.

This action arises out of a failed rail-car financing transaction. ACF sought to enter into a sale-leaseback financing transaction for certain rail-cars and other assets, and, to that end, entered into an agreement with Capital Markets (Engagement Letter) on October 22, 2003. Among other things, Capital Markets was to assist with the structuring and placement of the transaction.

On November 14, 2003, Securities expressed interest in underwriting the leveraged lease finance, and sent ACF a letter to that effect (Underwriting Letter). Defendants contend

that Securities is a name under which First Union does business from time to time. ACF maintains that it did not know that First Union was involved in any way, and would have objected to such involvement because First Union is a competitor of ACF. ACF further maintains that Wachovia specifically represented that First Union was not involved, and that there was a "Chinese Wall" between First Union and those dealing with the proposed transaction.

The Underwriting Letter provides:

> This letter will serve as a general outline of the parameters under which the Investor is willing to consider participating in the Transaction. This letter is not intended to be used as a binding obligation of terms and conditions by ACF or the Investor (except with respect to the payment of Transaction Expenses as set forth in the immediately preceding paragraph). Any such agreement will be part of the documentation and negotiation process.

The prior paragraph, quoted below, provides that ACF must pay all of Wachovia's reasonable costs and expenses even if the transaction did not close. There was no provision granting ACF the right to pre-approve any claimed expenses, as was included in the Engagement Letter.

Capital Markets, Securities and ACF each retained its own expert team of legal counsel and appraisers. During the course of negotiations, Wachovia changed the pricing, which resulted in ACF refusing to close on the transaction, because ACF would not have realized the cash flow that it had anticipated. ACF refused to reimburse Capital Markets or First Union, who commenced an arbitration in Charlotte, North Carolina to resolve the dispute. ACF then commenced this action.

In a prior motion, I permitted ACF to litigate the claims arising under the Underwriting Agreement in this court, but compelled ACF to participate in the North

Carolina arbitration with respect to the Engagement Letter dispute, and refused to stay the arbitration pending the outcome of this litigation. That determination was affirmed by the Appellate Division, First Department (22 AD 3d 426 [2005])..

In the amended complaint, plaintiff raises five causes of action: 1) breach of duty to negotiate in good faith; 2) tortious interference with a prospective economic advantage; 3) breach of fiduciary duty; 4) declaratory judgment declaring that ACF has no obligation to pay First Union its costs and expenses incurred under the Underwriting Agreement; and 5) preliminary injunction to stay the arbitration in North Carolina.

Defendants argue that the first cause of action for breach of the implied duty of good faith should be dismissed because the documentary evidence demonstrates that Securities never agreed to underwrite the transaction. Since there was no contract, defendants conclude that there was no duty of good faith.

ACF argues that even if there were no final agreement, defendants were obligated to negotiate in good faith, as was required by the Underwriting Letter. Thus, even if defendants were not bound to underwrite the transactions, they were obligated to deal with ACF with good faith. ACF asserts that by changing the pricing structure, and using ACF's confidential information against ACF, defendants breached that obligation.

Bearing in mind that this is a motion to dismiss, pursuant to CPLR 3211, I must accept the allegations of the complaint as true and give plaintiff the benefit of any possible inference. *EBC I, Inc. v Goldman Sachs & Co.,* 5 NY3d 11, 19 (2005). Here, the parties disagree as to whether defendants negotiated in good faith, and whether there was an obligation to negotiate in good faith.

The Underwriting Letter states:

> if the Transaction fails to close as a result of the Investor's failure to negotiate in good faith the final documentation, the ACF shall not be obligated to reimburse the Investor for its transaction expenses. Failure to close the Transaction as a result of a failure to satisfy of any of the conditions precedent set forth as items (1) through (9) of the preceding paragraph shall not be deemed to be a failure by the Investor to negotiate in good faith.
>
> ~~This Proposal does not constitute a commitment by the Investor to enter into the Transaction.~~ This letter will serve as a general outline of the parameters under which the Investor is willing to consider participating in the Transaction. This letter is not intended to be used as a binding obligation of terms and conditions by ACF or the Investor (except with respect to the payment of Transaction Expenses as set forth in the immediately preceding paragraph). Any such agreement will be part of the documentation and negotiation process. (Strike-out in original).

In determining whether the Underwriting Letter constitutes a binding preliminary agreement, thereby imposing an obligation to negotiate in good faith, I must consider the intentions of the parties at the time of their understanding. *Teachers Ins. and Annuity Assn. of Am. v Tribune Co.*, 670 F Supp 491, 499 (SD NY 1987). The fact that no agreement might ultimately be reached does not mean that plaintiff assumed the risk of bad faith. *Goodstein Constr. Corp. v City of New York*, 67 NY2d 990, 992 (1986).

There is no question that the Underwriting Letter requires Securities to negotiate in good faith; however, it is unclear when that obligation arises. The letter uses the term final documentation, but does not define what is encompassed by that term. Nonetheless, it does specify that the failure to satisfy the nine preconditions does not constitute bad faith. This would seem to indicate that even before the final documentation stage, the parties contemplated an obligation to negotiate in good faith. Such a conclusion is further supported by ACF's obligation to pay Securities' costs and expenses whether or not the transaction

closed. Under these circumstances, while the Underwriting Letter did not bind defendants to underwrite the transaction, it is enough of an agreement to require the parties to negotiate in good faith. *Goodstein Constr. Corp. v City of New York,* 67 NY2d 990, *supra; Teachers Ins. and Annuity Assn. of Am. v Tribune Co.*, 670 F Supp 491, *supra.*

Defendants contend that, even if there were an obligation to negotiate in good faith, the Underwriting Letter provides only that ACF would be relieved of its obligation to pay the costs and expenses in the event of the failure to negotiate in good faith. It does not provide for affirmative relief in terms of damages. Consequently, defendants seek to dismiss plaintiff's demand for damages resulting from the alleged breach of the duty to negotiate in good faith.

The fact that the Underwriting Letter is not a binding commitment makes it unlikely that ACF could prove that it suffered damages as a result of the failure to negotiate in good faith. However, that is irrelevant to the question of whether the cause of action should be dismissed on a motion pursuant to CPLR 3211. *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d at 19. Rather, the question is whether the complaint pleads a cause of action. Here, plaintiff has set forth a basis for its contention that defendants were obligated to negotiate in good faith, and has alleged that they failed to do so. Whether or not that can result in its ability to recover damages cannot be determined at this time.

Consequently, defendants' motion to dismiss the first cause of action based upon a failure to negotiate in good faith is denied.

Turning to the claim alleging tortious interference with prospective economic advantage, defendants contend that ACF fails to allege any facts demonstrating that the purported acts of interference, i.e., the pricing changes, amounted to criminal or tortious conduct. Further, that the changes were not without excuse or justification, nor were they intended solely to harm ACF. Finally, defendants maintain that ACF fails to allege that Securities' conduct was directed at anything other than Securities' own participation in the prospective underwriting; therefore, Securities' conduct was not directed at a third party.

ACF maintains that it sufficiently alleges the elements of tortious interference with prospective economic advantage, because ACF alleges that Securities knew of the Engagement Agreement that was in place between ACF and Capital Markets, and was aware of the agreement to enter into the debt transaction; ACF entered into the Underwriting Letter as a result of Securities' advice and recommendation and as a result of Securities' professed expertise; Securities used its relationship of trust with ACF to obtain information about the tax credit that ACF hoped to take advantage of; Securities interfered with the consummation of the transaction with Capital Markets by attempting to renegotiate the terms of the deal; and, as a result, ACF was forced to call off the transaction and lose the substantial benefits that had been promised by Securities. ACF contends that Securities' actions involved wrongful means because they consisted of economic pressure. ACF further contends that if First Union was a party to the Underwriting Letter, as defendants assert, there was a misrepresentation or fraud that constitutes wrongful means because Securities assured ACF that there was a Chinese Wall between Securities and First Union. ACF also maintains that it need not allege wrongful means because it has adequately alleged the existence of a

fiduciary relationship between ACF and Securities. Additionally, while defendants may argue economic justification, defendants' actions were not legitimate economic self-interest and therefore fail as a defense. Finally, ACF argues that Securities deprived ACF of the prospective economic advantage that it expected to receive from the debt transaction with Capital Markets. Capital Markets is a separate entity, and is, therefore, a third party.

In order to state a claim for tortious interference with a prospective economic advantage, a plaintiff must allege that the defendants acted out of malice or used wrongful means, and that a contract would have been entered into but for the defendants' actions. *American Preferred Prescription, Inc. v Health Mgt., Inc.*, 252 AD2d 414, 418-419 (1st Dept 1998). Here, ACF has failed to allege that defendants acted solely out of malice. In fact, ACF states that defendants sought economic advantage. While ACF contends that the economic pressure that defendants exerted amounted to wrongful means, case law does not support that position. The economic pressure that must be exerted is not pressure on the plaintiff, but pressure on the third party to discourage it from entering into an agreement with the plaintiff. *See Carvel Corp. v Noonan*, 3 NY3d 182, 192 (2004). Here, there is no allegation that any of defendants exerted pressure on any third party in order to prevent the contract from coming to fruition. Consequently, ACF has failed to allege any wrongful conduct to support a claim for tortious interference. In addition, ACF has not alleged that but for defendants' actions, it would have entered into a contract with Capital Markets. Indeed, the terms of the Underwriting Letter would contradict such an assertion, because that letter clearly states that it is non-binding, and that further negotiations were required. Under such circumstances, the but for requirement cannot be met.

ACF's reliance on a lower standard because of a fiduciary duty is uncompelling. As discussed below, ACF has not adequately pled that Securities owed it a fiduciary duty. Accordingly, the second cause of action is dismissed.

In seeking dismissal of the third cause of action, i.e., breach of fiduciary duty, defendants contend that there was no such duty between Securities and ACF. They point to the express disclaimer against any binding obligation in the Underwriting Letter. Since there was no underwriting obligation, the fiduciary duty that arises with such an obligation never arose. In addition, defendants point out that during the entire negotiation process, ACF was advised by its own experts and legal counsel, and that ACF does not state what advice Securities supposedly gave to it upon which it relied.

ACF contends that the breach of fiduciary duty arose from Securities acting as ACF's expert advisor and investment banker. Specifically, ACF was seeking Securities' expert advice on how to finance the equity transaction, and after signing the Underwriting Letter, Securities learned confidential information regarding ACF's desire to use the one-time tax benefit from refinancing. ACF maintains that Securities breached its fiduciary duty by using that information to further its own interests at ACF's expense. ACF points out that underwriters owe a fiduciary duty to their clients. It relies on its interpretation of the Underwriting Letter, which is that it was a binding agreement. ACF further argues that the fact that it is a sophisticated entity who was advised by its own legal and financial advisors does not preclude a finding of a fiduciary relationship.

Defendants reply that the relationship between ACF and Securities is a classic arm's-length negotiation of partners to a potential transaction. There was no agreement to

underwrite, and there was no independent advisory relationship between ACF and Securities. Thus, Securities did not have a duty to give any advice to ACF. In fact, ACF alleges only that Capital Markets agreed to advise ACF. ACF's contention that Securities had superior knowledge and experience is insufficient both because ACF relies on an unspecified statement at an unspecified time, and because any such superior knowledge did not result in an unequal balance in bargaining power. Here, defendants maintain, ACF did not suspend its own judgment in the face of the alleged superior knowledge. Finally, defendants aver that the fact that ACF may have imparted some confidential tax information is insufficient to create a fiduciary duty.

In order to adequately plead a claim for breach of fiduciary duty, a plaintiff must allege that the parties have a relationship that is of a higher level of trust than that in a normal commercial arm's-length transaction. The fact that a party may have revealed confidential information does not automatically result in the relationship being considered to be that of a fiduciary. *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 122 (1st Dept 1998). "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation' (Restatement [Second] of Torts § 874, Comment *a*)." *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d at 19.

Here, Securities was not under any duty to act on behalf of ACF, nor was it obligated to give advice for the benefit of ACF. There was no agreement between them; thus, they were each acting in their own best interests to try to work out a deal that would be mutually beneficial. The fact that ACF was relying on First Union's (or Securities') expertise in order

to put an underwriting agreement in place does not transform their arm's- length negotiations aimed at that goal into an already existing fiduciary relationship. Further, as pointed out by defendants, ACF did not suspend its own judgment in reliance on Securities' purported superior knowledge. ACF concedes that it rejected that advice, and did not close on the proposed deal. Consequently, the third cause of action for breach of fiduciary duty is dismissed.

ACF also seeks a declaratory judgment declaring that it has no obligation to reimburse First Union for any fees and expenses incurred in connection with the Underwriting Letter. Defendants contend that ACF is not entitled to such a declaration because it has no claim for tortious interference or breach of fiduciary duty, and such a declaration would conflict with the unambiguous terms of the Underwriting Letter. Since the Underwriting Letter contemplates price changes and adjustments, such adjustments cannot be deemed to be negotiated in bad faith. The negotiations broke down over those price adjustments, not over the final documentation. According to defendants, the duty of good faith arose only with respect to the final documentation, and they contend that such negotiations never were held, because the pricing changes resulted in ACF refusing the financing, and that those pricing changes were expressly contemplated by the Underwriting Letter and took place before any negotiations with respect to final documentation. Defendants also point out that the Underwriting Letter did not give ACF the right to pre-approve expenses or fees. Therefore, ACF's objection on the ground that it was not given an opportunity to pre-approve those expenditures is without merit.

ACF contends that Securities was required to negotiate with ACF in good faith. ACF seeks a declaration that due to Securities' bad faith, ACF is excused from its obligations to pay Securities' fees and expenses.

As discussed above, the Underwriting Letter does not define the term "final documentation" and it is unclear whether the obligation to negotiate in good faith applied to all the negotiations from the time the Underwriting Letter was accepted, or only to the final phase. The fact that ACF was required to pay expenses of Securities for the entire process, and the fact that the nine conditions precedent were expressly exempted from the duty to negotiate in good faith, militates in favor of a finding that all the negotiations were required to be conducted in good faith. In any event, defendants have not demonstrated that, on its face, this cause of action is without merit. Accordingly, the motion to dismiss the fourth cause of action is denied.

Additionally, ACF seeks a stay of the North Carolina arbitration pending the outcome of this action. I already denied such relief in my prior decision and order, which has been affirmed. Consequently, this cause of action is dismissed as moot.

Finally, defendants contend that Wachovia Corporation was not a party to the Underwriting Letter and, therefore, should be dismissed from this action. They point to an affidavit of Mark Trollinger attesting that the Underwriting Letter was signed by him on behalf of First Union. The Underwriting Letter itself has the name Wachovia Securities. Wachovia Corporation is named in the caption as d/b/a Wachovia Securities.

ACF maintains that Securities represented to ACF that it was Wachovia Corporation, and that ACF found out only later that First Union was involved in the transaction. ACF

further points out that defendants contradicted themselves in the various demands for arbitration, including that Capital Markets used the name Wachovia Securities; that some business groups of Wachovia Capital Markets used the trade name Wachovia Securities; and that First Union under its occasional trade name Wachovia Securities entered into the Underwriting Letter. It argues that the Trollinger affidavit does nothing more than create an issue of fact.

The entity which signed the Underwriting Letter was Wachovia Securities. The complaint alleges that Wachovia Corporation was using that name. Defendants have not offered any conclusive documentary evidence to warrant dismissal at this time. The confusion regarding the identity of Wachovia Securities was one of Wachovia's making, and it cannot reasonably complain about any resulting inconvenience. Trollinger's affidavit is not conclusive documentary evidence that can be used to support a motion to dismiss before issue has been joined. Therefore, defendants' request that Wachovia Corporation be dismissed as a party is denied. It is further noted that defendants' Notice of Motion did not seek such relief.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent that the second (tortious interference with prospective business advantage), third (breach of fiduciary duty) and fifth (injunction) causes of action of the complaint are dismissed, and is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: 12/07/05

ENTER:

J.S.C.

BERNARD J. FRIED
J.S.C.