

Vitro S.A.B. de C.V. v Aurelius Capital Mgt., LP

2012 NY Slip Op 33487(U)

May 4, 2012

Sup Ct, New York County

Docket Number: 650997-2011

Judge: Bernard J. Fried

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 650997/2011
VITRO S.A.B. DE C.V.
vs
ACP MASTER, LTD.
Sequence Number : 001
DISMISS ACTION

E-FILE PART 60

INDEX NO. 650997/11
MOTION DATE
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

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

SO ORDERED

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

Dated: 5/4/2012

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED (checked), NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

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

-----X

VITRO S.A.B. de C.V.,

Plaintiff,

-against-

Index Number
650997-2011

AURELIUS CAPITAL MANAGEMENT, LP, ACP
MASTER LTD., AURELIUS CAPITAL MASTER
LTD., AURELIUS CONVERGENCE MASTER LTD.,
BROOKVILLE HORIZONS FUND, LP, DAVIDSON
KEMPNER CAPITAL MANAGEMENT LLC, DAVIDSON
KEMPNER DISTRESSED OPPORTUNITIES FUND LP,
ELLIOTT MANAGEMENT CORPORATION, ELLIOTT
INTERNATIONAL, LP, THE LIVERPOOL LIMITED
PARTNERSHIP, KNIGHTHEAD CAPITAL MANAGEMENT
LLC, KNIGHTHEAD MASTER FUND LP, LORD ABBETT
DEBENTURE FUND INC., LORD ABBETT & CO. LLC,
MONEDA ASSET MANAGEMENT SA, MONEDA
INTERNATIONAL INC., MONEDA LATIN AMERICA
CORPORATE DEBT, MONEDA SOCIEDAD ANONIMA
ADMINISTRADORA DE FONDOS DE INVERSION,
COMO ADMINISTRADORA DEL FONDO DE INVERSION,
MONEDA DEUDA LATINOAMERICA,

Motion Sequence
Nos. 001, 002, 003,
004, 005 and 006

Defendants.

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APPEARANCES:

For Plaintiff

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Victoria L. Cook, Esq.

For All Defendants Except Knighthead

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For Defendant Knighthead

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Christopher J. Clark, Esq.

FRIED, J.:

This decision addresses motion sequence numbers 001 to 006 in the above-captioned action. The motions are made by certain noteholders who hold (or manage entities that hold) beneficial interests in certain secured notes issued by the debtor-plaintiff Vitro S.A.B. de C.V. (Vitro), which, in December of 2010, filed for bankruptcy relief with the District Court of Nuevo Leon, Mexico (the Mexican Court) under Mexico's bankruptcy laws, along with a pre-arranged plan of reorganization (the Concurso Plan).

In its complaint dated April 14, 2011, Vitro alleges four causes of action against the above-listed noteholders in this action (collectively, the Defendants): breach of confidential agreements, injurious falsehood, tortious interference with prospective economic advantage, and injunctive relief to prevent the Defendants from disclosing Vitro's confidential information provided to specific creditors and noteholders in connection with its restructuring efforts and negotiations.

In response to the complaint, the Defendants, including Knighthead Capital Management, LLC and Knighthead Master Fund, LP (together, Knighthead), filed the instant motions. While motion sequence numbers 001 and 002 seek to dismiss the complaint in its entirety, motion sequence numbers 003 and 004 seek to stay discovery by Vitro, and motion sequence numbers 005 and 006 seek to quash third-party subpoenas issued by Vitro.

Motions to Dismiss (Motion Sequence Number 001 and 002)

These two motions seek to dismiss, pursuant to CPLR 3211, all four causes of action asserted in Vitro's complaint. The motions (sequence numbers 001 and 002) are filed by (a) all Defendants except Knighthead and (b) Knighthead, respectively.

In considering a CPLR 3211 (a) (7) motion to dismiss, the court is to determine whether plaintiff's complaint or pleadings states a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002). The pleadings must be afforded a liberal construction, and the court is to give plaintiff the benefit of every possible favorable inference. *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 (2002). However, while factual allegations in a complaint are to be favorably construed, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Matter of Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995). Further, "[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether [he or she has stated one]." *Asgahar v Tringali Realty Inc.*, 18 AD3d 408, 409 (2d Dept 2005).

1. Breach of Contract Claim

In its complaint, Vitro alleges that the Defendants are parties to certain confidentiality agreements that were either entered into directly by themselves or through their agents,¹ pursuant to which they received confidential information about Vitro's business operations and financial conditions, including information of proposed transactions related to the restructuring of Vitro's debt to creditors and noteholders. Vitro also asserts that in the press

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The agents are the law firm of White & Case, legal counsel to the Defendants, and Chanin Capital Partner (Chanin), financial advisor to the Defendants.

release dated October 26, 2010 (the 10/10 Press Release), the Defendants allegedly breached the confidentiality agreements, including the so-called “joinder agreements”, copies of which are attached as exhibits to the complaint. Vitro takes the position that the Defendants, pursuant to such agreements, were not permitted to use Vitro’s confidential information for any reason other than to effect a transaction with Vitro.

Vitro’s arguments are unpersuasive. First, nothing suggests that the Defendants (except Lord Abbott) are parties to any confidentiality or joinder agreement. Indeed, Exhibit C to the complaint (a form of confidentiality agreement) listed members of the Ad Hoc Noteholders Group (the Ad Hoc Group) and identified members of the Steering Committee, a subset of the Ad Hoc Group. Although the Defendants are members of the Ad Hoc Group, only members of the Steering Committee (and the advisors to the Steering Committee and the Ad Hoc Group) were allowed to receive confidential information pursuant to confidentiality agreements with Vitro, unless members of the Ad Hoc Group entered into confidentiality or joinder agreements with Vitro. Moreover, sworn affidavits have been submitted by the Defendants which attested, inter alia, that they did not sign or assent to any confidential or joinder agreement. Further, Vitro has neither asserted, nor is there any showing that the Defendants (except Lord Abbott) are members of the Steering Committee. It is axiomatic that only parties to a contract can be sued for breach of a contract. Because none of the Defendants (except Lord Abbott) are signatory parties to any confidentiality or joinder agreement, the breach of contract claim has no merit. *Pevensey Press v Prentice-Hall, Inc.*, 161 AD2d 500, 501 (1st Dept 1990) (“there is no basis for holding a defendant liable for breach of a contract to which it was not a party”).

Nonetheless, Vitro argues that the Defendants are bound by confidentiality agreements because they accepted the benefits of or ratified such agreements signed by their agent, White & Case, and are thus liable for the alleged breach of such agreements due to the non-permitted disclosures made in the 10/10 Press Release. Vitro attempts to bolster its argument by relying on the verified statement filed by White & Case in Vitro's bankruptcy case, which stated that the law firm would serve as counsel for the Ad Hoc Group in connection with the involuntary bankruptcy petitions filed by the Ad Hoc Group against Vitro and its affiliates. According to Vitro, pursuant to the principle of ratification, an agent's acts can be imputed to its principal who condones the acts of the agent and accepts the benefit therefrom.

Vitro's arguments are unpersuasive. First, White & Case's confidentiality agreement with Vitro stated that the law firm may represent noteholders who are not signatory parties to a joinder or confidentiality agreement, but the law firm cannot use Vitro's confidential information in the course of such representation. Also, the fact that the Defendants retained White & Case as counsel does not mean that they acceded to or otherwise became a party to its confidentiality agreement with Vitro. Further, even where White & Case was permitted to receive Vitro's confidential information, it did not constitute a benefit to the Defendants because there is no allegation that White & Case acted improperly or gave confidential information to the Defendants. Indeed, at the hearing held on October 20, 2011 when Vitro's counsel was asked if any such allegation had been made, counsel replied that "we have made no such allegation, your Honor." Transcript of 10-20-2011 hearing, at 60. In addition, the documents submitted by Vitro - Exhibits B and C to Vitro's complaint - stated that a signatory noteholder shall not be responsible for a breach of any confidentiality or joinder agreement

entered into by any Steering Committee member, White & Case and Chanin. Thus, the very provisions of such documents negate Vitro's uncorroborated allegation and bare legal conclusion that the Defendants can be held liable for the acts of their agent (White & Case); in any event, there is no showing that any Defendant (except Lord Abbott) is a signatory party to any confidentiality or joinder agreement. Furthermore, and for the additional reasons explained fully below, the breach of contract claim must be dismissed because Vitro failed to show that the disclosures purportedly made by the Defendants in the 10/10 Press Release contained confidential information, and Vitro also failed to show damages proximately flowing from such Press Release.

2. Injurious Falsehood Claim

Vitro asserts that the allegedly false statements made by the Defendants in the 10/10 Press Release (Exhibit E to the complaint) injured or impeded its reorganization efforts, because it received a lower than expected response rate to its tender and exchange offer/consent solicitation made to the noteholders on November 1, 2010 (the Exchange Offer), which was conducted in connection with its proposed Concurso Plan.

I have reviewed the 10/10 Press Release, and I find that the statements therein did not contain confidential information that revealed the terms of Vitro's proposed restructuring. Instead, the Press Release generally contained statements of opinion (but not confidential economic terms) about Vitro's restructuring. Although the identity as to which entity - the Steering Committee or the Ad Hoc Group - was responsible for the Press Release is uncertain or has not been determined, the issue is relatively unimportant when viewed in the context of an injurious falsehood claim, which requires the claimant to allege special or itemized

damages (an essential element of such claim) proximately caused by the false statements. *Emergency Enclosures, Inc. v National Fire Adjustment Co.*, 68 AD3d 1658, 1660 (4th Dept 2009).

Vitro has failed to allege special or itemized damages. It is also noteworthy that within six days after the 10/10 Press Release, Vitro launched the Exchange Offer on November 1, 2010 and publicly announced the economic terms of its restructuring proposal (Exhibit D to the complaint). Further, the Concurso Plan was approved by the Mexican Court on February 7, 2012, despite the objections by many noteholders, including the Defendants. Indeed, even Vitro's complaint stated that the Concurso Plan "had the requisite support among its creditor body to accomplish the proposed restructuring through a prearranged Concurso Mercantil proceeding." Complaint, ¶ 40. Based on the foregoing, Vitro has not alleged nor established special damages proximately caused by the allegedly false statements, let alone alleged or pleaded them with specificity. Therefore, the injurious falsehood claim must be dismissed.

3. Tortious Interference With Economic Advantage Claim

Vitro alleges that the Defendants tortiously interfered with its prospective economic advantage by misrepresenting false facts to other noteholders about its restructuring plan.

Under New York law, a tortious interference claim requires a showing that the defendant acted solely based on malice or by means that are independently tortious or criminal. *Carvel Corp. v Noonan*, 3 NY3d 182, 190 (2004). Vitro has conceded in its complaint that the Defendants have an economic interest in its restructuring, and thus Vitro cannot show that the Defendants' purported acts were solely based on malice. Moreover,

Vitro cannot show that the Defendants acted tortiously because its independent tort claim - the injurious falsehood claim - is also without merit, as explained above. Therefore, the tortious interference claim should be dismissed.

4. Claim for Injunctive Relief

In the complaint, Vitro seeks injunctive relief to enjoin the Defendants from disclosing confidential information relating to its restructuring efforts. Because Vitro's companion claims are without merit, for the reasons stated above, the requested injunctive relief cannot not be granted. In any event, the requested relief is moot and academic, inasmuch as Vitro's restructuring plan has been approved by the Mexican Court.

Motions to Stay Discovery (Motion Sequence Numbers 003 and 004)

In these motions, the Defendants (including Knighthead) request a stay of the discovery sought by Vitro in the instant action while the motions to dismiss (discussed above) are pending. Because Vitro's complaint is dismissed, for the reasons explained above in connection with the motions to dismiss, the instant motions by the Defendants to stay discovery are denied because they are moot.

Motions to Quash Subpoenas (Motion Sequence Numbers 005 and 006)

In these motions, the Defendants (including Knighthead) assert that the broad subpoenas served by Vitro upon certain third parties seek information that are irrelevant to the issues raised in Vitro's complaint, and thus the subpoenas should be quashed. Because Vitro's complaint is dismissed, which renders the instant motions to quash third parties

subpoenas moot. Therefore, the motions to quash are denied because they are moot.

Accordingly, for all of the foregoing reasons, it is

ORDERED that the defendants' motions seeking dismissal of plaintiff's complaint (motion sequence numbers 001 and 002) are hereby granted, with costs and disbursements to the defendants as taxed by the Clerk of the Court; and it is further

ORDERED that defendants' motions seeking to stay discovery (motion sequence numbers 003 and 004) are hereby denied because they are moot; and it is further

ORDERED that defendants' motions seeking to quash third party subpoenas (motion sequence numbers 005 and 006) are hereby denied because they are moot.

DATED: 5/4/2012

ENTER:



J.S.C.

HON. BERNARD J. FRIED