GMX Tech., LLC v Pegasus Capital Advisors, L.P.

2020 NY Slip Op 32634(U)

August 10, 2020

Supreme Court, New York County

Docket Number: 654056/2019

Judge: Andrea Masley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:	HON. ANDREA MASLEY	**PART**	**IAS MOTION 48EFM**
	Justice		

---X

GMX TECHNOLOGIES, LLC, F/K/A KGS AGRO GROUP, LLC,

Plaintiff,

- v -

PEGASUS CAPITAL ADVISORS, L.P. and THE LEIBER GROUP, INC.

Defendants.

---X

INDEX NO. 654056/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISS.

In motion sequence number 001, defendants Pegasus Capital Advisors, L.P. (Pegasus) and The Leiber Group, Inc. (Leiber) move, pursuant to CPLR 3211(a) (7), to dismiss the verified complaint of plaintiff GMX Technologies, LLC f/k/a KGS Agro Group, LLC (GMX).

Background

The following facts are alleged in the verified complaint unless noted otherwise, and for purposes of this motion to dismiss, are accepted as true.

Plaintiff GMX, a Delaware company, is an agricultural supplement company that develops and distributes organic, nontoxic crop treatment products (NYSCEF Doc. No. [NYSCEF] 1, Complaint ¶ 3). GMX is owned and controlled by nonparty Arnold Simon (*id.* ¶ 4). Defendant Pegasus, a Delaware company, is a "'private alternative asset management firm providing strategic growth capital to middle-market companies . . . with over $1.5 billion in assets under management, comprised of 5 private equity funds,' which ... includes its 'portfolio company', Leiber" (*id.* ¶ 6).

Simon sought a $4 million equity infusion from Pegasus to expand the operations of Simon's company, nonparty Satz International LLC (Satz) (*id.* ¶¶ 13–14). Seeking to capitalize on Simon's expertise to save the struggling Leiber handbag brand, Pegasus agreed to lend Satz $8 million in a cross-investment arrangement (*id.* ¶¶ 7, 15–18). Specifically, Pegasus would lend Satz $8 million, but $4 million of that loan would be used by Leiber to pay off a Leiber loan coming due (*id.* ¶ 17). In exchange, Simon would receive a 7% equity stake in Leiber and hold a company strategist role (*id.*). Pegasus also invested an additional $4 million in a second company owned by Simon, nonparty Designer Holdings, on the condition that Simon personally guaranty the earlier cross-investments totaling $8 million (Guaranty) (*id.* ¶ 18.).

The relationship between the parties deteriorated, and Simon sued Leiber and one of Pegasus' funds (Prior Action) (*id.* ¶ 19). The parties settled the Prior Action, releasing any claims against each other and releasing Simon from the Guaranty (*id.* ¶ 21). As part of the settlement, Leiber received a minority equity interest of 12.5% in GMX (Membership Interest) (*id.* ¶¶ 22, 25). The settlement is memorialized in three executed agreements all dated February 24, 2016: (1) a release agreement (Release); (2) a security purchase agreement (Purchase Agreement); and (3) the Second Amended and Restated Operating Agreement of KGS Agro Group, LLC (SOA) (*id.* ¶ 24; *see also* NYSCEF 20, Release; NYSCEF 21, Purchase Agreement; NYSCEF 22, SOA).

Pursuant to the SOA, Leiber had the ability to exercise a put option regarding its Membership Interest. Specifically, Section 5.06 (a) of the SOA provides, in relevant part,

> "[s]ubject to the terms set forth in this Section 5.06, following (i) the 30-month anniversary of the date of this Agreement, and, (ii) if not exercised on or after such date, again on the 42nd-month anniversary of the date of this Agreement, Leiber, in its sole and absolute discretion, shall have the right, but in no event shall be obligated, to resell to the Company, at Leiber's sole and absolute discretion (each the '**Put Option**'), all or a pro-rated portion of the Membership Interest held by Leiber.

> The purchase price for the Put Interests under the Put Option (the '**Put Price**') shall be equal to eight million dollars ($8,000,000)"

(NYSCEF 22, SOA). Section 5.06 (b) requires that

> "Leiber shall give notice (the '**Put Notice**') in writing to the Company of its intention to sell the Put Interests pursuant to the Put Option within sixty (60) days of the applicable anniversary date (the '**Put Option Period**'). The closing of the purchase and sale pursuant to the Put Option shall take place on a date reasonably designated by Leiber but no later than thirty (30) days after the Put Notice (the '**Put Closing Date**')

(*id.*). GMX alleges that any cash payment pursuant to the Put Option is an impermissible Distribution as defined in the SOA (NYSCEF 1, Complaint ¶ 29).

GMX alleges that defendants knew of GMX's "precarious financial situation" and used that knowledge to attempt to obtain control over GMX despite having a minority interest (*id.* ¶ 37). Specifically, GMX alleges that defendants dangled the prospect of a capital infusion in exchange for the execution of a Third Operating Agreement, which would give defendants up to a 51% controlling interest in GMX (*id.* ¶ 38). "The genesis of the proposed Third Operating Agreement was a contemplated investment in GMX by a Chinese company, who would obtain a 20% equity interest in return for a substantial investment in the Company" (*id.* ¶ 39).

On November 1, 2016, the parties entered into the Third Operating Agreement (TOA) (NYSCEF 15, TOA; NYSCEF 1, Complaint ¶ 42). The TOA provides that Pegasus was to "use commercially reasonable efforts to raise sufficient capital through a newly-created special purpose vehicle ... to provide a loan or other financing ('the **Loan**') to [GMX] in the amount of up to $5 million" (NYSCEF 15, TOA at 1). The TOA would be effective "from and after the closing of the Loan" (*id.*). Defendants never provided a loan or financing pursuant to the TOA (NYSCEF 1, Complaint ¶ 41). GMX alleges that despite the lack of financing defendants "nevertheless attempted to 'enforce' the agreement by threatening GMX and Mr.

Simon on numerous occasions under the terms of the purported agreement", including informing the potential investors in China that defendants had the right to acquire 51% of GMX which deterred the potential investors (*id.* ¶¶ 45, 47).

On June 26, 2019, Leiber provided written notice that it was exercising the Put Option, seeking $8 million by July 15, 2019 (*id.* ¶ 49). On July 15, 2019, GMX informed Leiber that its attempt to exercise the Put Option was invalid pursuant to Section 6.07 of the SOA and Section 18-607 of the Limited Liability Company Act of Delaware (Delaware Act) (*id.* ¶ 51). On that same day, GMX filed this action asserting "breach of contract, including the implied covenant of good faith and fair dealing", tortious interference with prospective business relations, promissory estoppel, and in addition to monetary damages, seeks a declaratory judgment and permanent injunctive relief concerning the Put Option. Defendants now move to dismiss the verified complaint for failure to state a claim.

Discussion

The standard of review on a motion to dismiss, pursuant to CPLR 3211(a) (7), is "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzberg*, 43 NY2d 268, 274-75 [1977]). "'Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss'" (*EBCI, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). A court may grant dismissal when "'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005], quoting *Held v Kaufman*, 91 NY2d 425, 430-431 [1998]).

As a preliminary matter, there does not appear to be a dispute that the TOA is not the operative agreement as the loan anticipated in that agreement never closed. Thus, most claims arise from the SOA, the operative agreement. Also, there is no dispute that Delaware law applies to the claims arising out of the SOA.

First Cause of Action – Declaratory Judgment Concerning the Put Option

GMX seeks a declaration that (1) Sections 6.07 of the SOA and 18-607 of the Delaware Act bar the exercise of the Put Option; (2) Leiber's attempt to exercise the Put Option and the remedies contained in Section 10.11(b)(ii) of the SOA constitutes a prior material breach of the SOA, including the implied covenant of good faith and fair dealing, discharging all of GMX's continued obligations under the SOA; (3) GMX is not in material breach of the SOA because the attempt to exercise the Put Option is improper; (4) Leiber is not entitled to exercise the remedies contained in
Section 10.11(b)(ii) of the SOA; and (5) Leiber's notice to trigger the Put Option is invalid as untimely, and the payment date of July 15, 2019 is not reasonable under Delaware law (NYSCEF 1, Complaint ¶ 56).

"[A] declaratory judgment requires a 'justiciable controversy,' in which not only does the plaintiff 'have an interest sufficient to constitute standing to maintain the action but also that the controversy involve present, rather than hypothetical, contingent or remote, prejudice to plaintiffs'" (*Touro Coll. v Novus Univ. Corp.*, 146 AD3d 679, 680 [1st Dept 2017], quoting *American Ins. Assn. v Chu*, 64 N.Y.2d 379, 383 [1985]). "By its nature a declaratory judgment is a judgment on the merits" (*NY Inst. for Educ. of Blind v United Fedn. of Teachers' Comm. etc.*, 83 AD2d 390, 402 [1st Dept 1981]). "A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of

whether the plaintiff is entitled to a favorable declaration" (*Tilcon NY, Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011] [internal quotation marks and citations omitted].)

"However, courts have, on occasion, reached the merits of a properly pleaded cause of action for a declaratory judgment upon a motion to dismiss for failure to state a cause of action where no questions of fact are presented [by the controversy]. Under such circumstances, the motion [to dismiss for failure to state a cause of action] should be taken as a motion for a declaration in the defendant's favor and treated accordingly" (*id.* [internal quotation marks and citations omitted]).

Declaration 1 – Barred by Sections 6.07 of the SOA and 18-607 of the Delaware Act

Sections 6.07 of the SOA and 18-607 of the Delaware Act both place limitations on distributions. In fact, the language of Section 6.07 is near identical to the language of Section 18-607 (a) of the Delaware Act. Specifically, Section 6.07 (a) of the SOA provides,

> "Notwithstanding any provision to the contrary contained in this Agreement, the Company shall not make a Distribution to a Member to the extent that, at the time of the Distribution, after giving effect to the Distribution, all liabilities of the Company, other than liabilities to Members on account of their Membership Interest and liabilities for which recourse of creditors is limited to specified property of the Company, exceed the fair market value of the assets of the Company, except that the fair market value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the Company only to the extent that the fair value of such property exceeds such liability. A Member who receives a Distribution in violation of this Section, and who knew at the time of Distribution that the Distribution violated this Section, shall be liable to the Company for the amount of the Distribution. A Member who receives a Distribution in violation of this Section 6.07, and who did not know at the time of the Distribution that the Distribution violated this Section 6.07, shall not be liable for the amount of the Distribution"

(NYSCEF 22, SOA). The SOA defines "Distribution" as "the transfer of Property by the Company to one or more of its Members in his or her capacity as a Member" (*id.* at 3). "Property" is defined as "all real, personal and mixed properties, cash, assets, interests, and

rights of any type owned by the Company. All assets acquired with Company funds or in exchange for Company Property shall be Company Property" (*id.* at 7).

Defendants counter that the satisfaction of the Put Option is not a Distribution. Defendants assert that, since Leiber is required to deliver his GMX certificates to GMX at the closing, and then the Put Payment is made, Leiber will no longer hold a membership interest in GMX when it receives that payment. Thus, the payment will not be made to Leiber in its capacity as member, and therefore, is not a Distribution. Defendants rely on Section 5.06 (b) of the SOA which provides, in relevant part, "[a]t such closing, Leiber shall deliver to the Company certificates or instruments, if any, evidencing the Put Interests, duly endorsed ... and otherwise in good form ..., and the Company or Simon shall pay the Put Price in cash (by wire transfer of immediately available funds or by certified or cashier's check)" (*id.*). This language is clear that the payment of "immediately available funds" is made simultaneously with the delivery of the certificates. Thus, while creative, this argument is without merit. Further, the cases cited by defendants are not applicable here as they involve payments made to former members or payments arising from a settlement agreement obligation.

Defendants also argue that Leiber's exercise of the Put Option did not violate Section 6.07 and Delaware law because satisfaction of the Put Option would not make GMX insolvent. Defendants assert that Simon accepted personal liability for payment of the Put Price. Again, defendants rely on the language of Section 5.06 (b), stating that "the Company <u>or Simon</u> shall pay the Put Price in cash (by wire transfer of immediately available funds or by certified or cashier's check)" (*id.* [emphasis added]). GMX asserts that this section merely sets forth a procedural alternative and not a payment obligation on behalf of Simon.

In order to grant defendants' motion to dismiss, there can be no questions of fact presented by the controversy. Whether payment of the Put Option would render GMX insolvent is a question of fact that cannot be resolved here. Further, the language highlighted by defendants is ambiguous. Like New York, in Delaware, "[i]n deciding a motion to dismiss, the trial court cannot choose between two differing reasonable interpretations of ambiguous provisions" (*VLIW Tech., L.L.C. v Hewlett-Packard Co.*, 840 A2d 606, 615 [Del 2003]). The court shall dismiss "only if the defendants' interpretation is the only reasonable construction as a matter of law" (*id.*).

Here, the parties present two reasonable interpretations of this provision. A reasonable person could conclude that this language, contained in a closing provision, is merely a procedural alternative as opposed to a payment obligation, as GMX suggests, as could a reasonable person conclude that this language creates a payment obligation, as defendants suggest. As this provision is susceptible to more than one interpretation, the court cannot make any findings as a matter of law on this motion. Thus, this portion of the declaratory judgment goes forth.

Declaration 2 – Leiber's Exercise of the Put Option is a Material Breach of the SOA

GMX seeks a declaration that Leiber's attempt to exercise the Put Option and the remedies contained in Section 10.11(b)(ii) of the SOA constitutes a prior material breach of the SOA, including the implied covenant of good faith and fair dealing, concerning Sections 5.06 (Put Option), 6.07 (Distributions), and 10.11 (Material Breach) of the SOA, discharging all of GMX's continued obligations under the SOA.

To state a claim for breach of contract, a plaintiff must allege "first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff" (*VLIW Tech., L.L.C.*, 840 A2d

at 612). Pursuant to Section 5.06, Leiber had every right to exercise the Put Option. Leiber's attempt to exercise the Put Option was not a breach; rather, it would not be permitted under the SOA and Delaware law if such payment would, in fact, render GMX insolvent. Although GMX argues that Leiber breached by attempting to exercise the Put Option in violation of Section 6.07, that is not the case. Section 6.07 restrains GMX from making a Distribution to a member if that Distribution would render GMX insolvent. This restraint is on GMX, not Leiber. Leiber was not restrained from exercising its Option. Thus, there can be no claim for breach of contract.

Further, GMX never made a Distribution; in fact, it did not comply with Leiber's Put Notice. GMX cannot successfully allege that Leiber's mere exercise, a right granted to it in the SOA, was a breach. Thus, this portion of the declaratory judgment is dismissed.

Declaration 3 - GMX is not in material breach of the SOA because the attempt to exercise the Put Option is improper

For the same reason as above, the court rejects GMX's premise that Leiber's assertion of a contract right is improper. This portion of the declaratory judgment claim is dismissed.

Declaration 4 - Leiber is not entitled to exercise the remedies contained in Section 10.11(b)(ii) of the SOA

At this time, Leiber has not exercised any remedies contained in Section 10.11 (b) (ii). Therefore, there is no justiciable controversy, involving a "present, rather than hypothetical, contingent or remote, prejudice to plaintiffs" (*Touro Coll. v Novus Univ. Corp.*, 146 AD3d at 680). This portion of the declaratory judgment is dismissed without prejudice.

Declaration 5 - Leiber's notice to trigger the Put Option is invalid as untimely, and the payment date of July 15, 2019 is not reasonable under Delaware law

Defendants assert that Leiber's Put Notice is timely and reasonable. Pursuant to the SOA, Leiber could exercise its Put Option "following (i) the 30-month anniversary of the date

of this Agreement, and, (ii) if not exercised on or after such date, again on the 42nd-month anniversary of the date of this Agreement" (NYSCEF 22, SOA § 5.06 [a]).

> "Leiber shall give notice (the '**Put Notice**') in writing to the Company of its intention to sell the Put Interests pursuant to the Put Option within sixty (60) days of the applicable anniversary date (the '**Put Option Period**'). The closing of the purchase and sale pursuant to the Put Option shall take place on a date reasonably designated by Leiber but no later than thirty (30) days after the Put Notice (the '**Put Closing Date**')

(*id.* at §5.06 [b]).

The parties entered into the SOA on February 24, 2016 (NYSCEF 22, SOA; *see also* NYSCEF 1, Complaint ¶ 24). On June 26, 2019, Leiber provided written notice that it was exercising the Put Option, seeking $8 million by July 15, 2019 (NYSCEF 1, Complaint ¶ 49). The 42nd anniversary date was August 24, 2019. The June 26, 2019 Put Notice was delivered within 60 days of that date, and therefore, timely. Pursuant to the SOA, the Put Closing Date had to take place no later than 30 days of the Put Notice. Leiber chose July 15, 2019, a date within the required time frame. GMX makes no argument in response. The court finds that Leiber's Put Notice and Put Closing Date complied with the terms of the SOA and are not untimely or unreasonable by those terms. Thus, this portion of the declaratory judgment is dismissed.

Second Cause of Action - Breach of Contract

For the reasons stated above, this claim is dismissed.

Third Cause of Action – Permanent Injunctive Relief Concerning the Put Option[1]

GMX alleges that an injunction is necessary because, if Leiber is permitted to exercise the Put Option, there is a likelihood that defendants will try to exercise the remedies provided for under Section 10.11 of the SOA, arguing that GMX is in "Material

---

[1] The parties cite to New York regarding this claim. Thus, the court will apply the New York law standard for injunctions.

Breach" and allowing them to effectively take control of GMX (NYSCEF 1, Complaint ¶¶ 64, 66). These allegations are speculative and cannot support a claim for a permanent injunction (*see Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738, 739-740 [2d Dept 2010] [citation omitted] ["the plaintiff made only conclusory allegations and failed to point to any imminent and non-speculative harm that would befall it in the absence of a preliminary injunction"]).

This claim is dismissed.

Fourth Cause of Action – Tortious Interference

GMX alleges that defendants intentionally and without justification interfered with GMX's prospective business opportunity with potential investor in China by "(a) meeting with the Chinese company, and (b) improperly disclosing GMX's confidential and proprietary business information about its products and financial information, in violation of the parties' NDA" (NYSCEF 1, Complaint ¶ 74). GMX further alleges that defendants tried to convince the investor to cut GMX out and deal directly with defendants (*id.*). It is further alleged that the investor did not invest in GMX (*id.* ¶ 76).

"A claim for tortious interference with a prospective business relationship (i.e., an economic advantage) must allege: (1) the defendant's knowledge of a business relationship between the plaintiff and a third party; (2) the defendant's intentional interference with the relationship; (3) that the defendant acted by the use of wrongful means or with the sole purpose of malice; and (4) resulting injury to the business relationship" (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick,* 90 AD3d 541, 542 [1st Dept 2011]) [citations omitted]). A claim for tortious interference with prospective business relations must allege that interference by "wrongful" means (*Carvel Corp. v Noonan*, 3 NY3d 182, 191 [2004]). "Wrongful means include physical violence, fraud or misrepresentation, civil suits and

criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract" (*id.* [internal quotation marks and citation omitted]).

GMX alleges that defendants falsely informed the investor that defendants, under the TOA, had the right to acquire up to 51% of GMX (NYSCEF 1, Complaint ¶ 43). GMX also alleged that defendants threatened to not sign off on the deal with the investor (*id.* ¶ 76); although, it is not clear who defendants threatened. These allegations show that the alleged "interference was neither wrongful nor motivated solely by malice, as opposed to its normal economic interest" (*Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 318 [1st Dept 2007]). GMX fails to allege facts suggesting that defendants used any unlawful means or acted with the sole purpose of harming GMX. Thus, this claim is dismissed.

Fifth Cause of Action – Promissory Estoppel

To state a claim for promissory estoppel, a plaintiff must allege "(i) a sufficiently clear and unambiguous promise; (ii) reasonable reliance on the promise; and (iii) injury caused by the reliance." (*Castellotti v Free*, 138 AD3d 198, 204 [1st Dept 2016] [citations omitted]). GMX alleges that defendants made numerous promises to invest $5 million in GMX (NYSCEF 1, Complaint ¶ 79). GMX reasonably relied upon the defendants' "representations that it would invest in GMX and/or raise capital for it, and as a result GMX has not sought to raise capital from additional sources" (*id.* ¶ 85).

Defendants argue that a cause of action for promissory estoppel cannot lie because of the existence of the TOA. The TOA provides that Pegasus "will use commercially reasonable efforts to raise sufficient capital through a newly-created special purpose vehicle

... to provide a loan or other financing to the Company in the amount of up to $5 million" (NYSCEF 15, TOA at 1).

"A claim for promissory estoppel cannot stand when there is an existing contract between the parties" (*Eastside Floor Serv., Ltd. v Ibex Constr., LLC*, 2012 NY Slip Op 33416[U], *6-7 [Sup Ct, NY County 2012], citing *Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st Dept 2012]). Here, the TOA memorializes the promise to invest $5 million. GMX, a sophisticated business entity, entered into the TOA, knowing that it would only be in effect if Pegasus fulfilled its promise to invest up to $5 million. The promise was memorialized. The fact that Pegasus did not obtain the funding, effectuating the TOA, does not change the fact that the parties entered into a written agreement reflect a promise to invest $5 million. This claim is dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted, in part, and the second, third, fourth, and fifth causes of action are dismissed in their entirety; the first cause of action is partially dismissed as detailed above;

ORDERED that defendants are to file their answer within 20 days of notice of entry; and it is further

ORDERED that the parties are direct to email the court (SFC-PART48@nycourts.gov) a joint proposed preliminary conference order (https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/JMasley-PCO.pdf) within 30 days of notice of entry; if the parties cannot agree as to a PC Order, they may each submit a proposed PC Order.

8/10/2020
DATE

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	