

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

PRESENT: **BARBARA R. KAPNICK**
BARBARA R. KAPNICK Justice
J.S.C.

PART 39

Index Number : 603165/2008

603165/08

MEADOW STAR LLC

INDEX NO.

vs

MOTION DATE

MACLOWE, HARRY

MOTION SEQ. NO.

Sequence Number : 002

MOTION CAL. NO.

SUMMARY JUDGEMENT

is motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

NYS SUPREME COURT
RECEIVED
SEP 29 2010
MOTION SUPPORT OFFICE

Dated: 9/27/10

BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 39

-----x
MEADOW STAR LLC,

Plaintiff,

-against-

HARRY MACKLOWE and WH ROME PARTNERS, LLC,

Defendants.
-----x

BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 603165/08

Motion Seq. No. 002

In this action, plaintiff Meadow Star LLC ("Meadow Star"), a Delaware limited liability company owned and controlled by financier Carl Icahn, alleges that defendants Harry Macklowe ("Macklowe") and WH Rome Partners, LLC ("Rome"), engaged in wrongful conduct, including intentional acts, misrepresentations and omissions in connection with the negotiation and execution of a Partnership Agreement (the "Agreement")¹ entered into on November 15, 2006 to create Rome Acquisition Limited Partnership (the "Partnership"), and subsequently breached the Agreement by failing to fund the required initial \$600 million contribution by November 27, 2006, as allegedly required under the Agreement.

The Complaint asserts that the Partnership, which consisted of Meadow Star as a General and a Limited Partner, Rome as a General

¹ Section 14.4 of the Agreement provides that it shall be governed by Delaware law.

and a Limited Partner, Macklowe as a guarantor of Rome's obligation to pay the "Failure to Contribute Amount," as defined in section 3.1 of the Agreement (see below), and a representative of Meadow Star as a guarantor of its obligation to pay the "Failure to Contribute Amount," was formed for the purpose of competing against SL Green Realty for the acquisition of Reckson Associates Realty Corp. ("Reckson"), which was a large publicly held real estate investment trust.

Section 3.1 of the Agreement, Initial Capital Contributions, provides that:

By no later than November 27, 2006, the initial aggregate capital contributions of all of the Partners shall be U.S. \$1,200,000,000.00 (the "Initial Capital Commitment"), subject to the conditions set forth in this Section 3.1. Each Partner hereby agrees to contribute to the Partnership by no later than November 27, 2006, a capital contribution (with respect to each Partner an "Initial Capital Contribution") in cash in the amount set forth next to such Partner's name on Schedule A hereto; provided, however, that (I) no such capital contributions shall be required and (II) to the extent that such capital contributions shall have been made, such capital contributions shall be returned to any Partner upon its request unless (x) the price to be paid per Target Security pursuant to the definitive agreement between the Partnership or its wholly-owned subsidiary and the Target providing for the acquisition of the Target (the "Acquisition Agreement") does not exceed \$49.00 per Target Security and (y) the aggregate amount of equity required to consummate the acquisition of Target pursuant to the Acquisition Agreement does not exceed (without taking into account any of the Shared Expenses) the Initial Capital Commitment. Any breach by a Partner of this Section 3.1 shall constitute a "Failure to Contribute" hereunder, and any Partner that so breaches this Agreement shall constitute a "Non-Contributing Partner." The General Partner that is a member of the General Partner Group that does not have the Non-

Contributing Partner shall be entitled to collect from the other General Partner that is a member of the General Partner Group that does have the Non-Contributing Partner, and such General Partner shall pay to the General Partner that is so entitled to collect or its designee, an amount equal to \$60,000,000 (the "Failure to Contribute Amount"). Notwithstanding anything in this Agreement to the contrary, the Failure to Contribute Amount shall be the sole and exclusive remedy against a Non-Contributing Partner with respect to any Failure to Contribute.

Plaintiff alleges that Mr. Icahn agreed to form the Partnership and contribute \$600 million to it based on individual defendant Macklowe's personal guaranty that Rome would also contribute \$600 million, as provided in section 3.1 of the Agreement. Plaintiff asserts that defendants knew as early as November 15, 2006, that they would not be able to fulfill their contractual obligations under the Agreement, but continued to lull plaintiff into a false sense of security that they would live up to their contractual commitments. Plaintiff further claims that while it abided by the Agreement by depositing \$600 million into the Partnership's bank account at Bear Stearns on November 27, 2006, defendants breached the Agreement by failing to contribute their \$600 million by the same date.²

² In their papers, defendants contend that on November 27, 2006, Rome deposited \$600 million into a separate account at Bear Stearns as a "gesture of good faith" towards Meadow Star. However, defendants concede that this account was not subject to control by either the Partnership or Mr. Icahn, and that the funds were borrowed from Fortress Credit Corp which specifically directed that the funds not be deposited into an account subject to Icahn's control.

The Complaint sets forth claims for breach of contract against Rome (first cause of action); common law fraud against both defendants (second cause of action); negligent misrepresentation against both defendants (third cause of action); breach of fiduciary duty/constructive fraud against all defendants (fourth cause of action); breach of contract against Macklowe, alleging that he personally guaranteed Rome's obligation to pay the Failure to Contribute Amount and failed to do so (fifth cause of action); and unjust enrichment against Macklowe, alleging that he was unjustly enriched because he failed to pay the Failure to Contribute Amount (sixth cause of action).

Defendants now move for an Order, pursuant to CPLR § 3212, granting them summary judgment on all causes of action in the Complaint.

Defendants contend that the breach of contract claims (the first and fifth causes of action) should be dismissed because the Agreement clearly provides that the parties' funding obligation (*i.e.*, the Initial Capital Commitment of \$1.2 billion) was conditioned upon: 1) the Partnership having entered into a definitive acquisition agreement to merge with Reckson at a price of not more than \$49 per share; and 2) the Partnership's ability to complete the Reckson acquisition with no more than the \$1.2 billion in equity that the partners had conditionally agreed to provide.

Defendants argue that they did not breach the Agreement because neither of these conditions had been met by November 27 or at any time thereafter.³

In addition, defendants contend that the "Failure to Contribute Amount" of \$60 million sought by plaintiff is an unenforceable penalty under either New York or Delaware law, as it is not rationally related to any measure of damages that the parties might reasonably have anticipated that plaintiff would sustain upon breach of the Agreement, and thus serves an impermissible punitive purpose.

In opposition, plaintiff contends that section 3.1 does not clearly require the parties to have entered into a definitive acquisition agreement to acquire Reckson for not more than \$49 per

³ According to the defendants, the acquisition of Reckson for \$49 per share would have required approximately \$6.8 billion of funding. However, by November 27th, the two institutional lenders to whom the Partnership's financing plan was submitted - Citigroup Global Markets, Inc. and Deutsche Bank Securities, Inc. - had informed the Partnership of their concerns with the plan, having concluded that the cash flows from the Reckson properties were inadequate to support the \$5.6 billion of debt being sought by the Partnership in addition to the \$1.2 billion in equity to be contributed by the partners, and had not agreed to provide financing.

On November 30, 2006, the banks allegedly proposed new terms under which the Partnership would have been required to make an equity contribution of \$1.6 billion. However, financing under these new terms was never finalized.

Defendants also contend that upon further due diligence being conducted, it became apparent that Reckson's assets would not support a transaction at \$49 per share and it was determined that the project was not economically sound.

share in order to trigger the required capital contribution, nor does it condition the parties' contributions on the availability of debt financing from institutional lenders for the entire purchase price.

Plaintiff further argues that defendants' interpretation of the Agreement is not plausible because they knew that the partners would not have entered into a definitive merger agreement with Reckson before November 27, 2006. Plaintiff refers to the joint bid letter from the Partnership to Reckson, dated November 15, 2006, which states, in relevant part:

we will execute an appropriate confidentiality agreement in connection with any proprietary information we may receive from Reckson. If granted appropriate access to Reckson's data and records,... we anticipate completion of due diligence and execution of a definitive acquisition agreement *within 10 business days*. (emphasis supplied).

Plaintiff contends that a confidentiality agreement with Reckson was executed on November 16, 2006 and that defendants could not reasonably have expected that the merger agreement would be finalized until at least December 6, 2006.

Based on the papers submitted and the oral argument held on the record on June 23, 2010, this Court finds that section 3.1 of the Agreement is ambiguous and that the extrinsic evidence submitted by the parties is not sufficient to clarify its meaning.

Further, as plaintiff contends, the \$60 million amount is not unenforceable as a penalty as it was negotiated by sophisticated business people as a measure of the damage that would be caused to the reputation and credibility of Mr. Icahn, individual defendant Macklowe, or their affiliates, had either of the partners failed to make the required contribution or been prepared to go forward with the acquisition.

Thus, that portion of defendants' motion seeking to dismiss the breach of contract claims (the first and fifth causes of action) is denied.

Defendants next contend that the claims for fraud, negligent misrepresentation, breach of fiduciary duty/constructive fraud, and unjust enrichment (second, third, fourth, and sixth causes of action) should be dismissed because they are based on plaintiff's conclusory allegations that defendants misrepresented their intention to perform when they promised in the Agreement to contribute \$600 million to the Partnership, and none of those claims allege a duty independent of the Agreement. See *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382, 389-90 (1987).

At the oral argument, plaintiff's counsel stated that plaintiff was not opposing that portion of the motion which seeks to dismiss the sixth cause of action for unjust enrichment. Moreover, he conceded that this is essentially an action for

This Court agrees, and thus the second, third and fourth causes of action are dismissed as duplicative of the breach of contract claims.

Accordingly, defendants' motion is granted to the extent of dismissing the second, third, fourth, and sixth causes of action. The first and fifth causes of action for breach of contract are severed and continued.

Counsel shall appear for a conference in IA Part 39, 60 Centre Street, Room 208 on October 27, 2010 at 10:00 a.m. to schedule a date for the trial on the two remaining causes of action.

This constitutes the decision and order of this Court.

Dated: September 27, 2010



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.