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

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HANOVER COMMUNITY BANK, a New York Banking Corporation,

Plaintiff,

-against-

NCG CAPITAL PARTNERS LLC f/k/a NAVIKA CAPITAL GROUP PHASE III, LLC,

Defendant.

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Index No. 650770/11
Motion Date: 10/14/2011
Motion Seq. Nos.: 001, 002

NCG CAPITAL PARTNERS LLC, independently and as a shareholder of HANOVER COMMUNITY BANK,

Third-Party Plaintiff,

-against-

HANOVER COMMUNITY BANK, EDWARD PETROSKY, PHILLIP A. OKUN, FRANK V. CARONE, INDUS AMERICAN BANK, IA BANKCORP, INC., JOHN DOES 1-10 and XYZ CORP. 1-10,

Third-Party Defendants.

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BRANSTEN, J.

Motion sequence numbers 001 and 002 are consolidated for disposition. In motion sequence number 001, Plaintiff Hanover Community Bank, a New York Banking Corporation ("Hanover") moves to dismiss Defendant NCG Capital Partners LLC's ("NCG") counterclaims for fraud, fraudulent inducement, negligent misrepresentation, rescission and breach of the duty of good faith and fair dealing. NCG opposes.

In motion sequence number 002, Hanover moves to dismiss NCG's First Amended Third Party Complaint, which asserts claims for tortious interference with contract, tortious interference with prospective business relations and breach of fiduciary duty. NCG opposes.

I. Background

A. Factual History

Hanover Community Bank ("Hanover") opened in January of 2009. James S. O'Brien's Affirmation in Support of Plaintiff's Motion to Dismiss Defendant's Counterclaims Pursuant to CPLR §§ 3211(a)(1) and (a)(7) ("O'Brien Affirm."), Ex. C, p. 6. Hanover encountered significant financial difficulties in its first year of operations. *Id.* at p. 3. As of March 31, 2010, Hanover's leveraged capital ratio had fallen to 9.92%. *Id.* This violated the Federal Deposit Insurance Corporation ("FDIC") order granting Hanover's deposit insurance, which required Hanover to maintain a leverage ratio of at least 10%. *Id.* Hanover therefore sought investors to raise the capital necessary to bring the bank into compliance with FDIC requirements.

In May of 2010, Hanover began negotiating a sale of Hanover's stock to NCG Capital Partners LLC ("NCG"). Affirmation of Dwight Yellen in Opposition to Defendant's Motion to Dismiss ("Yellen Affirm"), Ex. 1 ("Answer"), ¶ 81. On June 21, 2010, Hanover and NCG executed a "Letter of Intent" concerning NCG's purchase of Hanover's stock. *Id.* at ¶ 82. Hanover and NCG thereafter began negotiating the terms of the Stock Purchase Agreement (the "SPA").

1. Hanover's Disclosures to NCG

At a subsequent meeting with NCG, Hanover disclosed financial liability that it had incurred when it purchased Hanover Mortgage Corporation ("HMC") in October of 2008. Answer, ¶ 91. Hanover also allegedly represented that, pending regulatory approval, it planned to enter into a settlement with HMC to resolve these issues. Answer, ¶¶ 98-100.[1]

On July 19, 2010, Hanover's counsel sent NCG's counsel the Confidential Rights Offering Memorandum (the "Offering Memorandum"), which Hanover was using as part of its efforts to raise capital from its current shareholders. O'Brien Affirm. Ex. C, p. 1. On pages 3, 4 and 10 of the Offering Memorandum, Hanover discussed its noncompliance with FDIC and New York State Banking Department ("NYSBD") regulations. *Id.* at pp. 3, 4 and 10. The Offering Memorandum stated that:

> The Banking Department and the FDIC completed a joint examination of our bank at the end of 2009 and issued a Joint Report of Examination on July 7, 2010. In connection with the Joint Report of Examination, we received a draft Stipulation to the Issuance of a Consent Order from the FDIC and a parallel consent order from the Banking Department (the "Draft Orders"). Although the Draft Orders will not be binding on us until they are negotiated and executed by our board of directors, we anticipate that they will include provisions specifying actions we must take regarding our senior management, board of directors participation in our management, capital ratios, profit and budget planning, allowance for loan and lease losses, loan policy, interest rate risk, operational controls and other areas of regulatory oversight. We are conducting this rights offering to raise the additional capital that we anticipate will be a requirement for compliance with the Draft Orders. . . .

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[1] Hanover further disclosed the details of the HMC transaction in the SPA. SPA, p. 21.

> ***We will be subject to parallel consent orders from the FDIC and the Banking Department within six months (the "Orders").*** We anticipate that we will be a party to the Orders in the near future. . . . Complying with the Orders will require a substantial amount of management's time, which time will be diverted from operating our bank. In addition, we anticipate that there will be increased financial burdens associated with compliance. The Orders will remain in effect until such time as the FDIC and Banking Department deem them satisfied, which they determine in their sole discretion. Our operations may be significantly hampered by the conditions of the Orders and they may not allow us to operate in the manner we believe to be most profitable. . . .
> ***We are not currently in compliance with the FDIC order approving our application for deposit insurance (the "Insurance Order"), which may result in greater regulatory oversight.*** The Insurance Order requires, among other things, that we maintain a leverage ratio of at least 10 percent throughout the first three years of our opearations. . . . [W]e are not in compliance with the Insurance Order because our leverage was only 9.92 percent as of March 31, 2010 . . . . Although non-compliance with the Insurance Order has no effect on our deposit insurance coverage, we may be subject to enhanced regulatory oversight that may limit the business activities in which we are permitted to engage. "

Id. at pp. 10-11 (emphasis in original).

On July 27, 2010, Hanover stipulated to the FDIC and NYSBD Consent Orders. On July 30, 2010, the New York State Banking Department Weekly Bulletin, a publicly available document, reported that "the New York State Banking Department issued a Consent Order to Hanover Community Bank pursuant to Section 39 of the New York Banking Law, effective July 27, 2010." Plaintiff's Reply Memorandum of Law in Further Support of its Motion to Dismiss ("Plaintiff's 001 Reply Memo"), Appendix A, p. 6. The parties dispute whether the NYSBD also published the contents of the Consent Order on July 30, 2010. The FDIC did not make its Consent Order publicly available until August 27, 2010.

2. The Execution of the SPA

On August 13, 2010, officers of Hanover and NCG met without their counsel and executed the SPA (the "August 13th Meeting"). Answer, ¶¶ 108, 113. The SPA provided that NCG would purchase a majority of Hanover's common stock in two sequential transactions. In the first transaction, NCG was to purchase 155,000 shares of Hanover's common stock for $620,000 (the "First Purchase"). In the second transaction, NCG would purchase enough shares of stock that NCG would own not less than 51% of Hanover's outstanding capital stock (the "Second Purchase").

NCG alleges that Hanover represented at the August 13th Meeting that (i) the parties would encounter no complications in swiftly obtaining NYSBD approval of board seats for two of NCG's officers; (ii) Hanover would use its best efforts to gain such approval; (iii) Hanover understood that obtaining the board seats were a prerequisite to moving forward with the Second Purchase; and (iv) Hanover would provide closing certificates and an attorney opinion letter pursuant to § 2.3 of the SPA. *Id.* at ¶ 108. NCG further alleges that Hanover "represented that it had a contact" in the NYSBD "who could expedite any and all items that needed NYSBD approval." *Id.* at ¶ 112.

At the August 13th Meeting, the parties also executed a hand-written addendum to the SPA (the "Addendum"). *Id.* at ¶ 113; Yellen Affirm., Ex. 3, p. 1. The Addendum specified that the parties "agreed that any error omission or technical mistake in any and all agreements executed on August 13th, 2010 shall be corrected if noticed subsequent to execution." Yellen Affirm, Ex. 3, p. 1. NCG claims that "Hanover specifically represented that the SPA

Addendum was to allow Hanover to have the immediate infusion of capital, but allowed the parties to continue to negotiate the specific terms of the SPA until the parties reached a final agreement on same." Answer, ¶ 114.

The First Purchase closed on August 17, 2010. Compl., ¶ 9. The Second Purchase never closed.

B. Procedural History

On March 22, 2011, Hanover filed suit against NCG for anticipatory repudiation of the SPA (the "Underlying Action"). On April 4, 2011, NCG answered Hanover's complaint and asserted counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, fraudulent inducement "negligent inducement" and rescission (the "Answer"). Hanover moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss all of NCG's counterclaims except breach of contract.

On April 7, 2011, NCG filed a third party complaint against Hanover, Hanover board members Edward Petrosky, Phillip A. Okun, Frank V. Carone (collectively, the "Individual Third Party Defendants"), Indus American Bank, IA Bankcorp, Inc. John Does 1-10, and XYZ Corp. 1-10 (the "Third Party Complaint"). The Third Party Complaint asserted claims for tortious interference and derivative claims for breach of fiduciary, duty breach of loyalty and waste. Third Party Complaint, pp. 16-20. Hanover moved to dismiss the Third Party Complaint on May 13, 2011.

On June 8, 2011, NCG filed an amended third party complaint (the "Amended Third Party Complaint"). The Amended Third Party Complaint asserts three claims for tortious

interference and individual claims against three of Hanover's directors for breach of loyalty and breach of fiduciary duties. First Amended Third Party Complaint ("Am. Third Party Compl."), pp. 20-24. Hanover now moves pursuant to CPLR 3211(a)(7) to dismiss the Amended Third Party Complaint.

II. Standard of Law

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). The court accepts the facts as alleged in the non-moving party's pleading as true and accords the non-moving party the benefit of every possible favorable inference. *Id.*

"Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Id.* (internal citations omitted).

III. Analysis

A. Hanover's Motion to Dismiss NGC's Counterclaims

1. Fraud and Fraudulent Inducement

NCG asserts two counterclaims for "Fraud and Fraud in the Inducement" against Hanover. Both claims are based on allegations that Hanover made a series of misrepresentations and omissions to induce NCG to enter into the SPA. Answer, pp. 20-22.

"To plead a cause of action for fraud, a party must allege the elements of representation of a material existing fact, falsity, scienter, justifiable reliance and damages. In addition, each of these essential elements must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016(b) that the circumstances surrounding the fraud be pleaded in detail." *Bramex Assocs., Inc. v. CBI Agencies, Ltd*, 149 A.D.2d 383, 384 (1st Dep't 1989); *see also Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43 (1999) ("To make out a prima facie case of fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury.").

i. Representations Regarding NYSBD Approval

NCG claims that Hanover told NCG that (i) the NYSBD would quickly approve the settlement between Hanover and HMC; (ii) the NYSBD would approve the appointment of two board member selected by NCG; and (iii) Hanover's contact at the NYSBD could expedite such approval. Answer, ¶¶ 92, 99, 100, 112.

When the agent of a principal makes a representation to a third party, the "third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable." *Hallock v. State of New York*, 64 N.Y.2d 224, 231 (1984). NCG does not allege that Hanover was an agent of NYSBD, or otherwise had any authority to make binding promises regarding whether or how quickly the NYSBD would approve the settlement with HMC or the appointment of new board members. NCG's allegations that Hanover misrepresented the actions or intentions of the NYSBD cannot form the basis of a

claim for fraud because NCG could not have reasonably relied on those alleged misrepresentations. NCG's claim that Hanover fraudulently induced it to enter into the SPA through alleged misrepresentations concerning the NYSBD's future actions is thus dismissed.

ii. Representations Regarding Hanover's Promises of Performance

NCG next alleges that Hanover misrepresented that Hanover (i) would not delay in seeking any necessary regulatory approvals; (ii) would provide the closing certificates provided for in § 2.3(a) of the SPA; and (iii) would provide the opinion of Pryor Cashman, as provided for in § 2.3(b) of the SPA. Answer, ¶ 111.

"[A] promise made with a preconceived and undisclosed intention of not performing it, constitutes a misrepresentation" that can form the basis of a fraud action. *Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954, 956 (1986). However, "[g]eneral allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support [a] claim" for fraud. *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 318 (1995). Furthermore, "[a] fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract." *First Bank of the Americas v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 291 (1st Dep't 1999).

NCG alleges that "neither Hanover not its counsel ever intended to provide the closing certificates or the opinion letter, as the assertions made therein would have been false and

misleading." Answer, ¶ 128. NCG's conclusory claim that Hanover never intended to perform its obligations under the SPA is insufficient to support a claim for fraud as it alleges only an insincere promise to perform. *First Bank of the Americas*, 257 A.D.2d at 291. NCG's claims concerning Hanover's failure to obtain necessary regulatory approval, provide closing certificates and provide an opinion letter from its counsel are duplicative of its breach of contract counterclaim, and are therefore dismissed. *Id.*

iii. Representations Regarding the SPA Addendum

NCG alleges that Hanover falsely represented that the purpose of the SPA Addemdum was to allow the parties to continue to negotiate the material terms of the SPA after its execution. Answer, ¶ 114. NCG fails to specify what harm it suffered due to this alleged misrepresentation, as NCG does state how it wished to change the terms of the SPA. NCG also alleges that "Hanover refused to correct the SPA" following its execution, but NCG does not enumerate any corrections that Hanover refused to make. Answer, ¶ 116.

Furthermore, NCG does not allege that Hanover had a "preconceived and undisclosed intention of not performing" its alleged promise. *Deerfield Communications Corp.*, 68 N.Y.2d at 956. NCG merely asserts that Hanover failed to carry out its alleged promise after it was made. NCG's allegations are insufficient to establish a cause of action for fraud or fraudulent inducement. *First Bank of the Americas*, 257 A.D.2d at 291. NCG's claim that Hanover fraudulently induced it to execute the SPA by promising that the material terms of the SPA could be altered subsequent to its execution is thus dismissed.

iv. Omission of the Consent Orders

NCG claims that Hanover failed to inform NCG that Hanover had entered into Consent Orders with both the FDIC and the NYSBD prior to the execution of the SPA. Answer, ¶¶ 102, 104, 106. NCG argues that the FDIC and NYSBD did not make the Consent Orders available to the public until after the execution of the SPA, and therefore NCG could not have discovered their existence prior to the execution of the SPA. NCG claims that, if Hanover had not omitted this material information, then NCG would not have entered into the SPA.

Hanover sent NCG the Offering Memorandum, which discussed the Consent Orders, on July 19, nearly a month before the parties signed the SPA. *See* O'Brien Affirm., Ex. C. NCG does not dispute that Hanover sent the Offering Memorandum to NCG, or that the Offering Memorandum disclosed that Hanover would be subject to Consent Orders from the FDIC and the NYSBD. Instead, NCG claims that Hanover's disclosure of the Consent Orders was "buried deep" in the Offering Memorandum. Yellen Affirm., p. 8. In fact, Hanover disclosed the forthcoming Consent Orders in two separate sections of the thirty-page Offering Memorandum. Hanover stated in bold, italicized font that it would ***"be subject to parallel consent orders from the FDIC and the Banking Department within six months."*** O'Brien Affirm., Ex. C, p. 11.

NCG further argues that, even if Hanover disclosed that it would be subject to the Consent Orders, Hanover never told NCG that the Consent Orders had been executed or

provide NCG with copies of the Consent Orders. Hanover demonstrated that the existence of the NYSBD Consent Order was made public on July 27, 2010, more than two weeks before the execution of the SPA. Plaintiff's Memorandum of Law in Further Support of its Motion to Dismiss ("Hanover's 001 Reply Memo"), Appendix A, p. 1. While NCG correctly points out that the FDIC Consent Order was not made available until August 27, 2010, NCG does not refute Hanover's documentary evidence showing that the existence of the NYSBA Consent Order was public knowledge as of July 2th. *Id.*

> New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations made during business acquisitions by investigating the details of the transactions and the business they are acquiring. Moreover, when the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without making additional inquiry to determine their accuracy. When a party fails to make further inquiry or insert appropriate language in the agreement for its protection, it has willingly assumed the business risk that the facts may not be as represented."

Global Minerals & Metals Corp. v. Holme, 35 A.D.3d 93, 100 (1st Dep't 2006).

It is uncontested that NCG, a large investment group, is a sophisticated investor. NCG had more than a hint of Hanover's alleged omission. Hanover disclosed the then-forthcoming Consent Orders, and a simple internet search would have revealed the existence of the NYSBD Consent Order weeks before NCG executed the SPA. Despite the fact that this information was readily available to NCG, NCG failed to make any inquiries concerning the Consent Orders, and failed to include language in the SPA to protect its own investments with regard thereto. Consequently, NCG "willingly assumed the business risk that the facts

may not [have been] as represented," and its reliance on Hanover's representations or omissions regarding the Consent Orders was unreasonable. *Id.* NCG's fraud claim that Hanover fraudelently induced it to enter into the SPA by concealing the Consent Orders is therefore dismissed.

v. Breaches of Warranty

NCG alleges that Hanover breached a number of warranties contained in the SPA. NCG claims that Hanover breached its representations that (i) the SPA would not violate any order, rule or regulation of any governmental authority; (ii) Hanover's financial statements were true, correct, and prepared in conformity with Generally Accepted Accounting Principles ("GAAP"); (iii) no Governmental Authority has undertaken any action which could adversely affect Hanover's financial statements; (iv) "Hanover's [n]et [a]sset [v]alue as of 30 June 2010 was not less than $4.00;" (v) Hanover was in compliance with all state and local laws, rules, regulations and orders; and (vi) there were no administrative actions or proceedings against or investigations of Hanover that could have a material adverse effect on Hanover. Answer, ¶ 129. NCG claims that all of these breaches flowed from the existence and alleged concealment of the Consent Orders.

"A warranty is not a promise of performance, but a statement of present fact. Accordingly, a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim." *First Bank of the Americas*, 257 A.D.2d at 292. A party asserting fraud based on breach of warranty must nonetheless

allege with specificity each of the elements of a cause of action for fraud. *Bramex Assocs.*, 149 A.D.2d at 384.

As explained above, NCG had ample notice that the Consent Orders were forthcoming, and it had an affirmative duty to investigate the details of its transaction with Hanover. *Global Minerals & Metals Corp.*, 35 A.D.3d at 100. All of the alleged breaches of warranty resulted from the Consent Orders, and NCG knew and/or should have known about the Consent Orders before it signed the SPA. NCG, therefore, had an obligation to investigate whether the warranties that were directly impacted by the Consent Orders were, in fact, true. NCG made no such investigation. NCG has not demonstrated that its reliance on Hanover's alleged misrepresentations contained in the warranties was reasonable. The portion of NCG's fraud claim that is founded on Hanover's alleged breach of warranties in the SPA is thus dismissed.

The court notes that, although NCG has not established a fraud claim based on Hanover's alleged breach of representations in the SPA, those breaches can still form the basis of a claim for breach of contract.

2. Negligent Misrepresentation

NCG brings two counterclaims against Hanover for "Negligent Inducement." No such cause of action exists in New York. On a motion to dismiss, however, the court liberally construes the pleadings and considers whether a cause of action exists, not whether it was given the proper name. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). NCG clarified

that it meant to assert a claim for negligent misrepresentation, but mistakenly wrote negligent inducement. Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss Certain of Defendant's Counterclaims ("NCG's 001 Memo"), p. 9. Accordingly, the court will consider whether NCG adequately pled a claim for negligent misrepresentation.

NCG asserts that Hanover had a duty to provide NCG with accurate information, and that it breached that duty by failing to disclose the existence of the Consent Orders.

"A claim for negligent misrepresentation requires a showing of a special relationship of trust or confidence between the parties which creates a duty for one party to impart correct information to another." *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 296 (1st Dep't 2011). "A special relationship may be established by persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 180 (2011). "A special relationship does not arise out of an ordinary arm's length business transaction between two parties." *US Express Leasing, Inc. v. Elite Tech. (NY), Inc.*, 87 A.D.3d 494, 497 (1st Dep't 2011).

NCG argues that Hanover was in a unique position of confidence with NCG because Hanover "had material non-public information in its exclusive possession." NCG Memo, p. 9. However, NCG does not cite, and the court has not found, any case law to support this proposition. Hanover possessed no unique or specialized expertise and it was not in a special position of trust or confidence with NCG. NCG's purchase of Hanover's stock was an ordinary arm's length business transaction between sophisticated entities. The transaction

and therefore does not give rise to a special relationship. *Id.* NCG's claim for negligent misrepresentation is thus dismissed.

3. Breach of the Covenant of Good Faith and Fair Dealing

NCG's seventh counterclaim alleges that Hanover breached the implied covenant of good faith and fair dealing. NGC does not oppose Hanover's motion to dismiss this claim. NCG's claim for breach of the implied duty of good faith and fair dealing arises out of the same facts as NCG's breach of contract claim and is therefore dismissed as duplicative. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 297 (1st Dep't 2011) (holding that the cause of action for breach of the covenant of good faith and fair dealing was "duplicative of the breach of contract claims because they arise from the same facts.").

4. Rescission

In its fifth counterclaim, NCG asks the court to rescind its contract with Hanover because "Hanover has failed to perform whatsoever under the SPA and the SPA Addendum, thereby depriving NCG of any benefit under the SPA or SPA Addendum." Answer, ¶ 182.

"The equitable remedy of rescission 'is to be invoked only when there is lacking complete and adequate remedy at law and where the status quo may be substantially restored.'" *Sokolow v. Lacher*, 299 A.D.2d 64, 71 (1st Dep't 2002) (quoting *Rudman v. Cowles Communications, Inc.*, 30 N.Y.2d 1, 13 (1972)).

In support of its claim for rescission, NCG cites *Callanan v. Keesville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 N.Y. 268 (1910). NCG posits that *Callanan* supports the

proposition that when a party's "breaches go to the heart of the [agreement] and have drastically altered the subject of the contract [then] rescission is a matter of right." NCG 001 Memo, p. 11. The *Callanan* court, however, held that there can be no rescission if "the damages can be ascertained with reasonable certainty." *Callanan*, 199 N.Y. at 284.

NCG has not alleged or provided any facts that show that its damages cannot be ascertained with reasonable certainty, nor has NCG alleged that it has no adequate remedy at law. NCG's claim for rescission is therefore dismissed.

B. Hanover's Motion to Dismiss NCG's Third Party Amended Complaint

1. Tortious Interference with Contract

In its first cause of action in the Amended Third Party Complaint, NCG alleges that third party defendants Indus American Bank ("Indus") and IA Bankcorp, Inc. ("IAB") tortiously interfered with "the SPA, the SPA Addendum, and other agreements by and between Hanover and NCG." Am. Third Party Compl., ¶¶ 110, 117.

To state a cause of action for tortious interference with a contract, a plaintiff must allege "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996). The plaintiff must also allege that the contract would not have been breached "but for" the

defendant's interference. *Washington Ave. Assocs., Inc. v. Euclid Equip., Inc.*, 229 A.D.2d 486, 487 (2d Dep't 1996). "Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim a plaintiff must support his claim with more than mere speculation." *Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dep't 2006). "[V]ague and conclusory" allegations are insufficient to support a claim for tortious interference with a contract. *Washington Ave. Assocs.*, 229 A.D.2d at 487.

In its Amended Third Party Complaint, NCG claims that:

> NCG has learned that there are several potential investors involved in negotiations with Hanover. One such potential investor being [Indus] and its holding company [IAB] (collectively "Indus"). Despite Indus's knowledge of the SPA . . . it has continued negotiations to acquire Hanover to the detriment of NCG. Indus' actions thereby induced Hanover to breach the SPA."

Third Party Compl., ¶¶ 97-99. This constitutes the sum and substance of NCG's allegations against Indus and IAB.

Not only are NCG's allegations against Indus and IA vague and conclusory, but NCG fails to allege that Hanover would not have breached the SPA and SPA Addendum but for Indus and IA's interference. NCG's claims for tortious interference with contract against Indus and IAB are therefore dismissed. *Washington Ave. Assocs.*, 229 A.D.2d at 487.

In its second cause of action, NCG claims that the Individual Third Party Defendants tortiously interfered with the SPA, SPA Addendum and "other agreements." Third Party Compl. at ¶ 117. NCG once again fails to allege that but for Petrosky, Okun and Carone's actions, Hanover would not have breached the SPA and SPA Addendum. NCG's claim for

tortious interference with contract against Petrosky, Okun and Carone is therefore dismissed. *Washington Ave. Assocs.*, 229 A.D.2d at 487.

2. Tortious Interference with Prospective Contractual Relations

NCG's third and fourth causes of action allege that Indus, IAB and the Individual Third Party Defendants tortiously interfered with NCG's "prospective advantage and business relations" with Hanover "by unlawful and improper means." Am. Third Party Compl., ¶¶ 122, 128.[2]

"The requirements for establishing liability for interference with prospective contractual relations are more demanding than those for interference with performance of an existing contract." *Gertler v. Goodgold*, 107 A.D.2d 481, 490 (1st Dep't 1985). "To state a legally cognizable claim for tortious interference with prospective contract rights, the plaintiff must allege with specific factual support that the defendant directly interfered with a third party and that the defendant acted wrongfully, by the use of dishonest, unfair, or improper means, or was motivated solely by a desire to harm the plaintiff." *Posner v. Lewis*, 80 A.D.3d 308, 312 (1st Dep't 2010). "Allegations of mere self-interest or economic motivations will not suffice." *Steinberg v. Schnapp*, 73 A.D.3d 171, 176 (1st Dep't 2010).

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[2] While NCG uses the term "tortious interference with advantage and prospective business relations," the court reads this as presenting a claim for tortious interference with prospective contractual relations. On a motion to dimsiss, the court may liberally construe the pleadings and consider whether a cause of action exists, not whether it was given the proper name. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

NCG's raises only conclusory allegations and provides no evidence of Indus or IAB's wrongdoing. Nor does NCG allege with specificity with which prospective contractual relations Indus and IAB allegedly interfered. NCG's allegations are insufficient to state a cause of action against Indus and IAB for tortious interference with prospective contractual relations. *Posner v. Lewis*, 80 A.D.3d at 312. NCG's claim of tortious interference with prospective contractual relations is therefore dismissed.

NCG claims that the Individual Third Party Defendants tortiously "interfered with NCG's prospective advantage and business relations with Hanover by unlawful and improper means . . . . All of this was done for personal gain, that is among other things, to preserve their own positions with Hanover or any other acquiring entity." Am. Third Party Compl. at ¶¶ 128-29. All of the facts that NCG proffers in support of its claim allege that Petrosky, Okun and Carone interfered with NCG's prospective contractual relations with Hanover out of self-interest. For example, NCG asserts that "Petrosky, Carone and Okun decided that under no circumstances would they . . . allow NCG to have the two board seats . . . . The sole reason for this was to preserve their own positions with the bank. In fact, these rogue parties, were acting for their own benefit, not Hanover's." *Id.* at ¶ 101.

"Allegations of mere self-interest or economic motivation," however, are insufficient to state a claim for tortious interference with prospective business relations. *Steinberg*, 73 A.D.3d at 176. NCG's cause of action for tortious interference with advantage and prospective business relations with Hanover is therefore dismissed.

3. Breach of Fiduciary Duty

NCG alleges that Petrosky, Okun and Carone "breached the duties owed to NCG" and that NCG consequently "suffered a direct harm, a special injury not suffered by the other shareholders of the corporation generally." Third Party Compl., ¶¶ 133-34. NCG goes on to allege that "no person acting in good faith on behalf of Hanover could or would approve of the self-dealing actions and outright deceit of Petrosky, Okun and Carone." *Id.* at ¶ 136.

It is unclear exactly what cause of action NCG is asserting: a derivative claim as a shareholder of Hanover, or an individual claim that Petrosky, Okun and Carone breached the fiduciary duty they allegedly owed NCG.

To the extent that NCG asserts a derivative claim for breach of the duty of loyalty, that claim is insufficiently pled. Business Corporation Law ("BCL") § 626(c) states that, in a shareholder's derivative action, "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." NCG does not allege that it made any effort to secure the initiation of the action by Hanover's board of trustees, nor does it provide an excuse for failing to make such an effort. NCG's derivative claim is therefore dismissed.

NCG appears to instead assert an individual cause of action against the Individual Third Party Defendants for breach of "loyalty and fiduciary duties." Am. Third Party Compl, p. 23.

"For a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment. . . . Exceptions to that rule have been recognized when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged." *Abrams v. Donati*, 66 N.Y.2d 951 (1985). NCG argues that, because NCG and Hanover had executed the SPA and SPA Addendum, Hanover owed NCG a fiduciary duty distinct from the duty that Hanover's board owed NCG as a shareholder.[3] Memorandum of Law in Opposition to the Motion to Dismiss Third Party Complaint (NCG's 002 Memo"), p. 6. NCG further asserts that it suffered a particular harm when the Individual Third Party Defendants allegedly caused Hanover to breach the SPA and SPA Addendum for their own personal gain. *Id.*

NCG has not, however, demonstrated that the Individual Third Party Defendants, who were Hanover board members, owed NCG a fiduciary duty other than the duty Hanover's board owed to all of its shareholders. When "parties [have] engaged in arm's-length transactions pursuant to contracts between sophisticated business entities [it does] not give rise to fiduciary duties." *Sebastian Holdings, Inc. v. Deutsche Bank AG*, 78 A.D.3d 446 (1st Dep't 2010). A fiduciary duty only arises when parties present "allegations that, apart from the terms of the contract, the [contracting parties] created a relationship of higher trust than would arise from the [contract] alone." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y3d 11,

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[3] NCG also alleges that Hanover owed it a duty because they had entered into "other agreements" in addition to the SPA and SPA Addendum. NCG Memo in Opposition, p. 6. NCG does not elaborate on what these alleged other agreements were or provide any evidence of their existence.

20 (2005). NCG presents no such allegations. The SPA and SPA Addendum do not give rise to a fiduciary duty between Hanover and NCG. NCG does not show that the parties had anything but an arm's length relationship between two sophisticated business entities. NCG's claim for breach of "loyalty and fiduciary duty" is therefore dismissed.

The court's order follows on the next page.

III. Conclusion

For the reasons set forth above, it is hereby

ORDERED that Plaintiff Hanover Community Bank's motion to dismiss, Motion Sequence No. 001, is granted to the extent that defendant NCG Capital Partners LLC's first, second, third, fourth, fifth and seventh counterclaims are dismissed; and it is further

ORDERED that third party defendants Hanover Community Bank, Edward Petrosky, Phillip A. Okun, Frank V. Carone, Indus American Bank and IA Bankcorp, Inc.'s motion to dismiss third-party plaintiff NCG Capital Partners LLC's First Amended Third Party Complaint, Motion Sequence No. 002, is granted and the third party complaint is dismissed; and it is further

ORDERED that Plaintiff Hanover Community Bank is directed to serve a reply to defendant NCG Capital Partners LLC's sixth counterclaim within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on May 1, 2012, at 10:15 AM.

Dated: New York, New York
March 21, 2012

ENTER:

Hon. Eileen Bransten, J.S.C.