SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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UNCLAIMED PROPERTY RECOVERY SERVICE, INC., BERNARD GELB

Plaintiffs,

- v -

CREDIT SUISSE FIRST BOSTON CORPORATION, CREDIT SUISSE FIRST BOSTON LLC,

Defendants.

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INDEX NO. 653009/2013

MOTION DATE 11/18/2016

MOTION SEQ. NO. 007

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 185, 186, 187, 188, 189, 190, 191, 192, 193, 195

were read on this application to/for SUMMARY JUDGMENT (AFTER JOINDER)

HON. SALIANN SCARPULLA:

Plaintiffs Unclaimed Property Recovery Service, Inc. (UPRS) and Bernard Gelb (Gelb), UPRS's vice-president and general manager, bring this breach of contract action against defendants Credit Suisse First Boston Corporation and Credit Suisse First Boston LLC (collectively, Credit Suisse), alleging that Credit Suisse has refused to execute contractually required documents that would enable plaintiffs to recover unclaimed property held in Credit Suisse's name by the New York State Office of Unclaimed Funds (NYS OUF).

Credit Suisse moves for summary judgment dismissing the complaint. Plaintiffs cross-move for summary judgment and an order, pursuant to CPLR 3126, Judiciary Law § 487 and 22 NYCRR 130-1.1, imposing sanctions against Credit Suisse.

Background

In June 2001, UPRS and Credit Suisse allegedly entered an agreement permitting UPRS to act on behalf of Credit Suisse in the recovery of certain funds that the NYS OUF held as unclaimed property in Credit Suisse's name. In 2003, UPRS filed a suit against Credit Suisse, seeking to enforce the purported agreement. The parties settled the suit by executing a settlement agreement on July 14, 2005 ("2005 Settlement Agreement"). In pertinent part, the 2005 Settlement Agreement provides that:

> "1. Promptly upon the execution of this Agreement, Credit Suisse First Boston LLC shall execute and deliver to UPRS: (i) the Claim Form attached hereto as Exhibit A, listing outstanding accounts and claims for the Credit Suisse First Boston LLC entities (hereinafter 'CSFB') held by the New York State Comptroller's Office of Unclaimed Funds (the 'Unclaimed Funds'), and (ii) the letter attached hereto as Exhibit B (the 'Letter'). . . . UPRS shall submit the Claim Form and Letter to the New York State Comptroller's Office of Unclaimed Funds.
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> "2. UPRS shall be entitled to six and one eighth percent (6 1/8%) of Unclaimed Funds that are actually recovered from the New York State Comptroller's Office of Unclaimed Funds by UPRS on behalf of CSFB as a result of the filing of the attached Claim Form (the 'Settlement Payment').
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> "3. UPRS shall be entitled to the Settlement Payment only for Unclaimed Funds of which CSFB is the rightful owner, that were obtained as a result of the filing of the attached Claim Form, that are received by CSFB in the form of immediately available funds and that UPRS recovers, and not for any Unclaimed Funds that are identified and recovered by CSFB, any of its affiliates or by a third party.
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> "4. CSFB will reasonably cooperate with UPRS and the New York State Comptroller's Office of Unclaimed Funds, will provide UPRS with all necessary documentation, including, but not limited to, an executed copy of the attached Claim Form, and will take all reasonable steps necessary to facilitate the recovery of the Unclaimed Funds listed on the Claim Form from the New York State Comptroller's Office of Unclaimed Funds. This Agreement supersedes all prior Agreements between the parties.

* * *

> "10. This Agreement contains the entire agreement among the parties and cannot be modified except by a writing signed by the parties or their attorneys.
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> * * *
>
> "15. UPRS is authorized on behalf of CSFB to complete the recovery of the Unclaimed Funds held by the New York State Comptroller's Office of Unclaimed Funds and listed on the attached Claim Form. . . .
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> * * *
>
> "17. This Settlement Agreement will remain in effect from the date hereof to the date of the recovery of all outstanding Unclaimed Funds resulting from the filing of the attached Claim Form of which CSFB is the rightful owner."

Annexed to the 2005 Settlement Agreement (as exhibits A and B, respectively) are a claim form listing outstanding accounts and claims for Credit Suisse (the "2005 Claim Form"), and a letter stating that "[UPRS] is authorized to represent [Credit Suisse] and complete the recovery of the unclaimed funds listed on the attached [2005] Claim Form and held by the New York State Comptroller's Office of Unclaimed Funds in [Credit Suisse's] name." *Id.*

According to the affirmation of Lawrence Schantz ("Schantz"), the director of the NYS OUF, the NYS OUF holds two types of unclaimed property: "cash items (such as vendor checks and bank accounts) and security-related items (such as stocks and mutual funds)." Schantz affirmation, ¶ 8. Schantz explains that the beneficial owner of cash items is generally apparent from the account title, whereas the owner of a securities-related items is not so readily apparent. This is because brokerage firms, such as Credit Suisse, hold securities for the benefit of their clients, as well as for their own investment purposes, and "[t]he limited information reported to

[the NYS] OUF does not allow it to determine whether the ultimate beneficial owner of the security is the brokerage or its client." *Id.*, ¶ 12.

In September 2005, UPRS filed a claim with the NYS OUF, on behalf of Credit Suisse, for cash and security-related items. Schantz states that the NYS OUF informed UPRS that the security-related items "would not be processed unless UPRS provided documentation demonstrating that Credit Suisse, and not its brokerage clients, was the beneficial owner of those funds." *Id.*, ¶ 13. Rather than provide such documentation, Schantz states that UPRS inquired "whether OUF would be willing to enter into an agreement with Credit Suisse that would address the security-related items." *Id.*, ¶ 15.

On May 12, 2006, the NYS OUF proposed a settlement agreement for the securities-related items ("Securities Settlement Agreement"). The Securities Settlement Agreement provided that "all future security related claims" having a value of $100 or less, as well as older items[1] and items missing payable date information, would be paid upon the presentation of a corporate surety bond. All other security-related items would require "presentment of documentation which the COMPTROLLER deems satisfactory to prove that [Credit Suisse] has beneficial ownership of such items." *Id.*, ¶ 1 (c). According to Schantz, "while this is not an agreement that [the NYS] OUF requires to process security-related items, [the NYS] OUF was

[1] There are discrepancies in the record with respect to the payable date of such older items. The Securities Settlement Agreement that NYS OUF sent on May 12, 2006, leaves the payable date for such items blank. Klein affirmation, exhibit H. Schantz states that the payable date cutoff for such items is September 1, 1998. Schantz affirmation, ¶ 15. However, the draft agreement he submits with his affirmation is dated 2008 and deals with claim number 10371930. (*id.*, exhibit 1), whereas this exchange took place in 2006 and regarded claim number 10264888. Klein affirmation, exhibits D, H. In a later exchange, the NYS OUF informs Gelb that the cutoff date for older items is December 31, 1995. *Id.*, exhibit J.

generally amenable to potentially agreeing to the framework for such an agreement, provided that Credit Suisse agreed" to its terms. Schantz affirmation, ¶ 15.

By letter dated May 23, 2006, UPRS informed Credit Suisse that it had convinced the NYS OUF to process Credit Suisse's claim in two parts, processing the cash items first and the security-related items later. In the same letter, UPRS advised Credit Suisse of the requirements to recover $1,005,439.67 in cash items, including, among other things, the issuance of a corporate claim bond for $671,245.30, the execution of a "Hold Harmless Form" pledging to reimburse the Office of the Comptroller for any funds that may be due to other persons, and the purchase of surety bonds totaling $332,194.37. Klein affirmation, exhibit D at 1. Credit Suisse worked with UPRS to recover these funds by providing, among other things, an executed "Corporate Hold Harmless Form," a "Corporate Claim Bond" for $1,005,439.67, and an "Indemnity Agreement with Corporate Surety bond no. 6507270" for $190,695.74. *Id.*, exhibits F, G. In September 2007, UPRS recovered $875,613.37 and was paid its fee.

In the meantime, UPRS continued to negotiate with the NYS OUF regarding the security-related items. On May 26, 2006, UPRS sent the NYS OUF a revised Securities Settlement Agreement, which broadened the scope of the security-related items that would be paid upon the presentation of a corporate surety bond, without proof of ownership. The NYS OUF responded that the Securities Settlement Agreement was "not subject to negotiation." *Id.*, exhibit J.

UPRS nevertheless continued to negotiate, arguing, in a May 26, 2006 email, that, among other things, "compliance could be impossible due to the destruction and evacuation of the World Trade Center on September 11, 2001." *Id.*, exhibit K. Again, the NYS OUF informed UPRS that "the terms of the agreement . . . [were] non negotiable [sic]." *Id.*, exhibit L. On December 7, 2006, UPRS again requested that the NYS OUF process the outstanding security-

related items. The NYS OUF responded, on January 19, 2007, that "[o]ur terms are standard for all broker agreement[s], so there is no room for negotiation." *Id.*, exhibit N.

In May 2007, plaintiffs commenced an Article 78 proceeding against the Office of the State Comptroller, seeking a judgment ordering respondents to "process [Credit Suisse's] Claim for the outstanding security related items and disclose to petitioners the exact dollar amount of the outstanding security items." *Id.*, exhibit O at 29

In October 2007, UPRS informed the NYS OUF that it was seeking to recover additional cash items that the NYS OUF had received since May 2006. Credit Suisse cooperated with this recovery, by providing a corporate claim bond in the amount of $387,180 and executing a hold harmless agreement. In December 2007, UPRS recovered $352,910.28 and Credit Suisse paid UPRS its fee.

By decision and order dated June 1, 2008, the claims in the Article 78 proceeding were severed. Subsequently, plaintiffs abandoned the Article 78 proceeding.

By letter dated June 26, 2008, UPRS informed Credit Suisse that it had claims for $1 million in cash and $10 million in security-related items pending with the NYS OUF, and requested that Credit Suisse execute the attached Securities Settlement Agreement to enable the recovery of the latter. In response, Credit Suisse requested that UPRS provide:

> "(1) anything additional that was sent to the [NYS OUF] in support of any of the claims listed on the [2005 Claim Form], in particular, anything beyond that claim form that shows that [Credit Suisse] is the rightful owner of such claims, and any other documentation relating to that claim form, and (2) any documentation you have that can help us match the payments we have received to date, or might expect in the future . . . with the specific claim for such payment that is listed on the [2005 Claim Form]."

Id., exhibit W. To this, UPRS responded that "the information requested . . . does not exist" and that UPRS is not contractually required to "create or produce information that does not exist."

Id., exhibit Q. At his deposition, Gelb testified that, in his 20 years of recovering funds, he has never had to provide evidence of ownership, and that he does not know of what such evidence would consist.

By letter dated February 17, 2009, UPRS asked Credit Suisse to execute a set of documents, including a corporate claim bond, to recover $778,411.38 in cash items that had been reported to the NYS OUF since UPRS's previous recovery. UPRS submitted these forms to Credit Suisse twice more, on April 20, 2009 and June 28, 2009. Credit Suisse did not execute these documents.

On November 14, 2011, UPRS submitted documents to Credit Suisse, including a hold harmless agreement and a Securities Settlement Agreement, for the recovery of $11 million in unclaimed funds. Credit Suisse never executed any of the proffered documents. According to Schantz, "UPRS did not provide the documentation required by [the NYS] OUF to demonstrate Credit Suisse's beneficial ownership to the security-related items and, therefore, UPRS's claim for these items has not been processed or paid." Schantz affirmation, ¶ 21.

On August 28, 2013, plaintiffs commenced this action. By decision and order dated July 15, 2014, I granted in part, denied in part, Credit Suisse's motion to dismiss the complaint, by dismissing all but the breach of contract claim. By decision and order dated May 11, 2016, I denied plaintiffs' motion for summary judgment. Defendants now move for summary judgment dismissing the breach of contract cause of action, and plaintiffs cross-move, a second time, for summary judgment on the complaint.

Discussion

The parties do not dispute that they entered into the 2005 Settlement Agreement and that Credit Suisse refused to execute various documents presented to it by UPRS, who was

attempting to recover unclaimed property held by the NYS OUF. The parties do dispute whether the 2005 Settlement Agreement was subsequently amended to include items not listed on the 2005 Claim Form, whether Credit Suisse was obligated under the 2005 Settlement Agreement to execute the documents supplied by UPRS at all, and whether its failure to do so, rather than UPRS's inability to prove that Credit Suisse was the beneficial owner of the securities-related items, prevented UPRS from recovering the unclaimed property.

In interpreting a contract, the court must consider the parties' intentions, "[t]he best evidence of [which] . . . is what they say in their writing." *Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 (1st Dept 2012) (internal quotation marks and citation omitted). A clear and unambiguous document on its face "must be enforced according to the plain meaning of its terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous." *Id.*; *see also Matter of Hirschfeld, Stern, Moyer & Ross*, 286 AD2d 611, 612 (1st Dept 2001) (stating that, where the contract is unambiguous, "there is no need to resort to consideration of the subsequent course of dealings of the parties . . .").

The unambiguous terms of the 2005 Settlement Agreement limit the parties' contractual relationship to the items listed on the 2005 Claim Form. Every paragraph describing the benefits to, and the obligations of, the parties under the 2005 Settlement Agreement limits those benefits and obligations to the 2005 Claim Form. Specifically, the 2005 Settlement Agreement provides that: UPRS will be paid a percentage of the funds it actually recovers "*as a result of the filing of the [2005] Claim Form*"; UPRS is entitled to such payment "only for Unclaimed Funds of which CSFB is the rightful owner, that were *obtained as a result of the filing of the [2005] Claim Form*"; Credit Suisse "will reasonably cooperate with UPRS and the [NYS OUF], will provide

UPRS with all necessary documentation, . . . and will take all reasonable steps necessary to facilitate the recovery of the Unclaimed Funds *listed on the [2005] Claim Form*"; "UPRS is authorized . . . to complete the recovery of the Unclaimed Funds . . . *listed on the [2005] Claim Form*"; and it will remain in effect until "the date of the recovery of all outstanding Unclaimed Funds *resulting from the filing of the attached Claim Form* of which CSFB is the rightful owner." Klein affirmation, exhibit B, ¶¶ 2-4, 15, 17 (emphasis added).

To the extent Gelb claims that, "in July 2005, [he] redlined and removed all references from the [draft 2005 Settlement Agreement] that had sought to impose limits on UPRS's fee and limits on UPRS's recovery" by "*cross[ing] out* . . . the words 'listed on the Claim Form' from ¶¶ 2 and 3," and that "the agreement signed in July 2005 did not contain [these] words," he fails to provide any supporting evidence. Gelb aff, ¶ 30. He submits a marked-up, unexecuted draft of the agreement (*id.*, exhibit 23), and the executed 2005 Settlement Agreement (*id.*, exhibit 24), which, contrary to his affidavit, contains the allegedly deleted language.

Ultimately, Gelb only confirms what is plain from the unambiguous language of the 2005 Settlement Agreement, *i.e.*, that UPRS's ability to recover unclaimed property, and Credit Suisse's obligation to cooperate with such efforts, is limited to the items listed on the 2005 Claim Form. *See Banco Espírito Santo, S.A.*, 100 AD3d at 106; *Regal Realty Servs.*, LLC, 62 AD3d at 501; *see also Bank of N.Y. v 125-127 Allen St. Assoc.*, 59 AD3d 220, 220 (1st Dept 2009) (citation omitted) (finding that defendants failed to raise triable issues of fact with an affidavit that "was contradicted by documentary evidence . . . , and thus the allegations with respect to said issues were 'not genuine, but feigned'").

In support of its motion, Credit Suisse has demonstrated that UPRS sought to recover items not listed on the 2005 Claim Form. On its face, the Securities Settlement Agreement is not

limited to items listed on the 2005 Claim Form. If executed, it would allow UPRS to recovery "any and all future security items." Klein affirmation, exhibit H at 2, ¶ 1; *see also* Gelb deposition at 63-64 (testifying that the execution of the Securities Settlement Agreement would result in the payment of all outstanding unpaid claims up to the date of execution). As the execution of the Securities Settlement Agreement would have permitted the recovery of items that post-dated the 2005 Claim Form, Credit Suisse had no obligation to execute it and its failure to do so did not breach the 2005 Settlement Agreement.

To the extent that UPRS argues that it is impossible to identify any items recovered as those listed on the 2005 Claim Form, because "New York . . . recently changed the counting or the identification system that they were using . . . [s]o . . . payments could never be matched back to the claim form" (Gelb deposition at 144:5-10), and because "[the NYS OUF] just send[s] you a check . . . you have no idea what items specifically they paid" (*id.* at 152:15-19), this does alter the fact that the 2005 Settlement Agreement plainly limits Credit Suisse's obligation to cooperate with UPRS only to "the recovery of the Unclaimed Funds listed on the Claim Form."

In addition, Credit Suisse has established that it was not required to cooperate with UPRS's efforts to recover an addition $778,411.38 in cash items, as it is undisputed that these funds post-dated the 2005 Claim Form. *See* Klein affirmation, exhibit R[2]; Gelb deposition at 153:8-155:25.

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[2] Plaintiffs' argument, that defendants have failed to submit competent evidence in support of summary judgment, is unavailing. An attorney affirmation may "serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e. g., documents, transcripts." *Zuckerman v City of New York*, 49 NY2d 557, 563 (1980). Here, Klein's affirmation serves just such a purpose by attaching, among its exhibits, the parties' executed 2005 Settlement Agreement, the transcript of Gelb's deposition, documents about which Gelb testified during that deposition, and documents produced by the NYS OUF in response to a subpoena. Further, plaintiffs mischaracterize the Schantz affirmation as being based entirely on information and belief. Only the fourth paragraph is based on information and

For the foregoing reasons, Credit Suisse has demonstrated its entitlement to summary judgment dismissing plaintiffs' complaint, and plaintiffs have failed to raise an issue of fact in opposition. Plaintiffs argue that Credit Suisse is attempting to recover the unclaimed property on its own and through newly hired professionals (*see* Gelb aff, ¶ 20, exhibits 1, 2, 6), but this evidence is irrelevant because it is not the basis of plaintiffs' breach of contract claim. *See* complaint, ¶¶ 77-80 (alleging that Credit Suisse breached the 2005 Settlement Agreement by refusing to cooperate and execute necessary documents).

Plaintiffs also point to the parties' alleged previous course of conduct, whereby, in December 2007, UPRS recovered cash items that were not listed on the 2005 Claim Form. Plaintiffs argue that this alleged conduct demonstrates that, subsequent to its execution, the parties amended the 2005 Settlement Agreement to allow plaintiffs to pursue all unclaimed funds, without reference to the 2005 Claim Form, and that Credit Suisse consented to execute all documents, without exception.

However, the 2005 Settlement Agreement expressly provides that it "contains the entire agreement among the parties and cannot be modified except by a writing signed by the parties or their attorneys." Klein affirmation, exhibit B, ¶ 10. Therefore, extrinsic evidence of the parties' conversations and alleged course of dealings may not be used to vary the terms of the agreement. *See Torres v D'Alesso*, 80 AD3d 46, 56 (1st Dept 2010) (finding that a "contract . . . which extinguishes all prior understandings, provides that it constitutes the parties' complete agreement,

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belief. The remainder of the affirmation is based on Schantz's personal knowledge as the director of the NYS OUF, and as a recipient of UPRS's emails to NYS OUF. *See* Klein affirmation, exhibits I, J, K, L (demonstrating that Schantz was carbon copied on emails between UPRS and NYS OUF); *see also* Gelb deposition at 100:17-24 (testifying that he included Schantz on UPRS's emails to the NYS OUF, "because he's the one in charge").

and specifies that it cannot be modified except in a further writing, precludes the parties from introducing extrinsic evidence to vary the terms of the written contract . . ."); *see also Tierney v Capricorn Invs.*, 189 AD2d 629, 631 (1st Dept 1993) ("[w]hen a written contract provides that it can only be changed by a signed writing, an oral modification of that agreement . . . is not enforceable"). In addition, because the 2005 Settlement Agreement is unambiguous, "there is no need to resort to consideration of the subsequent course of dealings of the parties." *Matter of Hirschfeld, Stern, Moyer & Ross*, 286 AD2d at 612.

For the foregoing reasons, Credit Suisse's motion for summary judgement dismissing the complaint is granted, and plaintiffs' cross motion, to the extent it seeks summary judgment, is denied.[3] Further, plaintiffs' request to strike Klein and Schantz's affirmations is denied. Plaintiffs have provided no legitimate ground upon which to impose this sanction against defendants.

Accordingly, it is hereby

ORDERED that the summary judgment motion of defendants Credit Suisse First Boston Corporation and Credit Suisse First Boston LLC is granted, and the complaint is dismissed in its entirety as against these defendants, with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion of plaintiffs Unclaimed Property Recovery Service, Inc. and Bernard Gelb is denied in its entirety; and it is further

[3] Although not expressly discussed herein, I have also considered plaintiffs' remaining arguments, but do not find these arguments sufficient to warrant denial of summary judgment to Credit Suisse.

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

1/25/2018
DATE

SALIANN SCARPULLA, U.S.C.

CHECK ONE:	[X]	CASE DISPOSED			[ ]	NON-FINAL DISPOSITION	
	[X]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[ ] OTHER
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