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| **Schorsch v Luxor Capital Partners, LP** |
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| 2021 NY Slip Op 50698(U) |
| Decided on July 26, 2021 |
| Supreme Court, New York County |
| Borrok, J. |
| Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| This opinion is uncorrected and will not be published in the printed Official Reports. |

Decided on July 26, 2021

Supreme Court, New York County

**Nicholas Schorsch, Edward Weil, William Kahane, Peter Budko, RCAP Holdings LLC, Plaintiff,**

**against**

**Luxor Capital Partners, LP, Michael Conboy, Defendant.**

657017/2019

Plaintiffs by Friedman Kaplan Seiler & Adelman LLP, 7 Times Square, 28th Fl., NY NY 10036

Defendants by Skadden, Arps, Slate, Meagher & Flom LLP, One Manhattan West, NY NY 10001

Andrew Borrok, J.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 104, 105, 108 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 106, 109 were read on this motion to/for SEAL.

The Defendants are not entitled to dismissal of the instant action with respect to the breach of contract claim. The parties to the broad Release (NYSCEF Doc. No. 91) agreed to release the ARC Related Parties from any and all claims that relate, directly or indirectly, to the transactions contemplated by the Transaction Documents. The Transaction Documents include the Agreement between Apollo Global Management LLC (**Apollo**) and AR Capital, an agreement between Apollo and the ARC Principals, and an agreement between Apollo and RCAP approved by the Board on August 6, 2015. The Release necessarily includes claims by the creditor trust that Mr. Schorsch and his affiliates refused to allow RCAP to pursue any deal beside the deal with Apollo and threatened the Special Committee into rejecting the Centerbridge Capital Partners II, LP (**Centerbridge**) transaction.

More specifically, upon the record before the court (including the findings of the Delaware court in *RCS Creditor Trust v Nicholas S. Schorsch, et al.*), RCAP needed an infusion of capital to meet its then obligations. In response, RCAP's Special Committee considered transactions with Apollo, Centerbridge and Ladenburg Thalmann (**Ladenburg)** to address the capital needs of RCAP.

The original deal was with Apollo pursuant to which Apollo would purchase RCAP's [*2]wholesale distribution business and take a majority stake in AR Capital. While it was being negotiated, Centerbridge entered the scene. The proposed Centerbridge transaction involved (i) a potential $300-$350 investment in convertible stock and (ii) a reworking of RCAP's management arrangement because RCAP was managed by RCS Capital Management, LLC, which was controlled by Mr. Schorsch, and (iii) a surrender of Mr. Schorsch's Voting B shares. The Centerbridge transaction also contemplated that the Series B preferred stock by Luxor would be repaid and the Series C convertible preferred stock, also held by Luxor, would be converted into common stock. Ladenburg also made an offer that the Special Committee did not pursue both because it was not written and because the offer, as a stock for stock merger, would not address the company's short-term needs.

The Special Committee elected to end negotiations with Apollo. Talks however did not end and the Special Committee explored deals with Apollo and Centerbridge. Centerbridge indicated that it wanted a break-up fee and expense reimbursement, and Apollo indicated that it wanted exclusivity. The Special Committee did not agree to either set of conditions.

Although the Special Committee was generally of the view that the deal with Centerbridge was superior, it involved the surrender of control by Mr. Schorsch. Mr. Schorsch, for his part, indicated that he was not willing to do the Centerbridge deal both because it was dilutive to existing shareholders and also because of its requirement that he surrender control (NYSCEF Doc. No. 100). Ultimately as the deadline approached and based on certain other conditions imposed by Centerbridge described above, which the Special Committee rejected, RCAP decided to consummate a modified transaction with Apollo — i.e., without Apollo acquiring an interest in AR Capital. In connection with the transaction, the parties executed a broad Release dated November 8, 2015. Pursuant to the Release, the Luxor Related Parties agreed to release the ARC Related Parties and the RCAP Related Parties from all claims arising out of or related to the transactions contemplated by the Transaction Documents. To wit, the Release provides in relevant part:

> Luxor, for and on behalf of itself and the Luxor Related Parties, does hereby unequivocally release and discharge (1) the ARC Related Parties and (2) the RCAP Related Parties, from any and all past, present or future liabilities, actions, claims or damages of any kind or nature, in law, equity or otherwise, asserted or that could have been asserted, under any Applicable Law to which a Party is subject or otherwise, whether known or unknown, suspected or unsuspected, foreseen or unforeseen, anticipated or unanticipated, disclosed or undisclosed, accrued or unaccrued, apparent or not apparent, foreseen or unforeseen, matured or not matured, liquidated or not liquidated, fixed or contingent, whether or not concealed or hidden, from the beginning of time until the date of execution of this Agreement, that in any way, and to the extent, arises from or out of, are based upon, or are in connection with or relate in any way to or involve, directly or indirectly, any of the actions, transactions, occurrences, statements, representations, misrepresentations, omissions, allegations, facts, practices, events, claims or any other matters, things or causes whatsoever, or any series thereof, that were, could have been, or in the future can or might be alleged, asserted, set forth or claimed, directly or indirectly, based on: (i) the Transaction Documents and the transactions contemplated by the Transaction Documents, (ii) any breach, non-performance, action or failure to act under any of the Transaction Documents, (iii) the Amended Purchase Agreement and the transactions contemplated thereby, (iv) the events leading to the [*3]termination of the Transaction Agreement and the Guaranty Agreement and the execution of the Amended Purchase Agreement, (v) any deliberations or negotiations in connection with the Transaction Documents, and (vi) any SEC filings, public filings, periodic reports, press releases, proxy statements or other statements issued, made available or filed relating, directly or indirectly, to the transactions contemplated by the Transaction Documents

(NYSCEF Doc. No. 91, § 1[c]).

Following the transaction, RCAP eventually went bankrupt, and the creditor trust brought the Delaware lawsuit against Mr. Schorsch and his affiliates alleging, among other things, claims for breach of fiduciary duty (NYSCEF Doc. No. 97). The factual allegations that form the basis for the claim in the Delaware action involve the (i) Core claim, (ii) Cole claim and (iii) Apollo claim. For the avoidance of doubt, the Apollo claim is the relevant claim to the instant matter. It arises out of RCAP's 2015 negotiation with Apollo to the exclusion of a deal with Centerbridge, as described above.

In the Delaware action, the Delaware court held that dismissal of the claims against the ARC Principals alleging breach of fiduciary duty on account of the Apollo transaction was mandated because Mr. Schorsch merely indicated that he was not going to vote his shares against his own personal interest, in favor of the Centerbridge transaction, and that such indication did not constitute threatening conduct depriving the Special Committee of independence or otherwise assuming fiduciary duties to which he could have breached (NYSCEF Doc. No. 100). The Delaware court did not reach the issue as to whether the Release barred the claims asserted in that action because it held as a matter of law that the Apollo claim was without merit. Previously, this court granted in part the defendants' application for a stay of this proceeding pending the Delaware action as:

> Delaware is the first and primary forum as to the core lawsuit. It is the prior pending proceeding as to the core facts and claims. Contextually, the NY proceeding is the tail on the dog both contractually and logically. But for the forum selection clause in the Release, the claims alleged here would be brought in Delaware. Thus, this is a secondary proceeding that only becomes relevant if, in the primary proceeding, the Release applies because the claims are Released Claims. If they are not, then all of the allegations here necessarily require dismissal.

(NYSCEF Doc. No. 51).

As discussed above, although the Delaware court had no need to reach the issue of whether the claims were barred by the Release, based in part on the specific findings of the Delaware court, it is now clear that the bringing of the Delaware lawsuit states a claim for breach of the Release. The court has considered the remaining arguments of the defendants and finds them unavailing. Among other things, the record does not support a finding that there was a knowing, intelligent and voluntary waiver by the plaintiffs of their rights under the Release, or that the defendants in any way relied on or were otherwise prejudiced by any conduct of the plaintiffs with respect to the Release. Putting aside, as the plaintiffs argue, that

the creditor trust as successor to RCAP with two Luxor appointed board members was aware of the Release, the creditor trust did not in any way change its position or discontinue the lawsuit when the plaintiffs asserted the Release in the Delaware action. Thus, the motion to dismiss the claims for breach of the Release (first cause of action) is denied.

With respect to the claim for tortious interference with contract against Luxor (second [*4]cause of action), that claim must be dismissed because the plaintiffs argue that the creditor trust is the successor to RCAP and it is well settled under New York law that a party cannot interfere with its own contract (*Ahead Realty LLC v India House, Inc.*, 92 AD3d 424, 425 [1st Dept 2012] ["asserting that a defendant tortiously interfered with its own contract 'quite clearly does not state a legally sufficient cause of action.'"]). The claim for tortious interference with contract against Mr. Conboy personally is also dismissed, without prejudice, because the amended complaint fails to allege that Mr. Conboy acted with malice or illegality outside of his role at Luxor (*see Collins v E-Magine, LLC*, 291 AD2d 350, 351 [1st Dept 2002] [""[E]conomic interest precludes a claim for tortious interference with a contract unless there is a showing of malice or illegality . . . ."]).

The motion to seal (seq. no. 006) is denied as moot (*see* NYSCEF Doc. No. 109).

Accordingly, it is

ORDERED that the motion to dismiss is granted in part to dismiss the second and third causes of action only, and is otherwise denied; and it is further

ORDERED that Luxor Capital Partners, LP is directed to file an answer to the amended complaint within 30 days; and it is further

ORDERED that the motion to seal is denied as moot.

Dated: July 26, 2021
Hon. Andrew Borrok
J.S.C.

Return to Decision List