

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:) Chapter 11
)
LMI LEGACY HOLDINGS, INC.,)
)
Debtor.) Case No. 13-12098 (CSS)
)
_____)
EDWARD L. LIPSCOMB, AS SPECIAL GUC)
TRUSTEE OF THE LMI GUC TRUST,)
)
Plaintiff,)
)
v.) Adv. Proc. No. 15-51069 (CSS)
) Adv. Docket No.: 190
CLAIRVEST EQUITY PARTNERS)
LIMITED PARTNERSHIP, et al.,)
)
Defendants.)

MEMORANDUM ORDER

Upon consideration of *Plaintiff's Motion for Reconsideration of Dismissal of Fiduciary Duty Claims*¹ (the "Motion for Reconsideration") filed May 11, 2017; the *Response of Defendants, Louis P. Rocco and Saverio D. Burdi in Opposition to the Trustee's Motion for Reconsideration*² filed June 2, 2017; the *Objection of RBC Capital Markets, LLC to Plaintiff's Motion for Reconsideration of Dismissal of Fiduciary Duty Claims*³ (the "RBC Objection") filed on June 2, 2017; the *Objection of Defendants The Clairvest Entities and The Clairvest Directors to Plaintiff's Motion for Reconsideration of Dismissal of Fiduciary Duty Claims*⁴ (the "Clairvest

¹ D.I. 190.

² D.I. 193.

³ D.I. 194.

⁴ D.I. 195.

Objection”) filed on June 2, 2017; the *Opposition of Defendants David Finley, Clifford Schorer, and Thomas Blum to Plaintiff’s Motion for Reconsideration of Dismissal of Fiduciary Duty Claims*⁵ (the “Non-Clairvest Directors Objection”) filed on June 2, 2017; and the *Plaintiff’s Reply in Further Support of Motion for Reconsideration of Dismissal of Fiduciary Duty Claims*⁶ filed on June 16, 2017; the Court hereby FINDS and ORDERS:

1. On August 14, 2015, Edward L. Lipscomb, as Special Trustee of the LMI GUC Trust, filed a Complaint alleging eighteen claims against various parties associated with LMI, Clairvest, and the failed LMR Merger.⁷

2. On April 27, 2017, this Court dismissed, in relevant part, the breach of fiduciary duty claims alleged against the Clairvest Entities, the Clairvest Directors, Rocco, Burdi, Finley, Schorer, and Blum, and dismissed the aiding and abetting breach of fiduciary duty claim against RBC Capital Markets, LLC (collectively, the “Defendants”).⁸

3. **Dismissal of the breach of fiduciary duties claim relating to the notes (Count XII).** The Plaintiff argues that even if New York’s three-year statute of limitations is applied to Count XII’s fiduciary duty claims related to the Notes, Count XII could not be dismissed as it relates to the September 2010 Note and February 2011 Note because the limitations period would not have expired before the Petition Date, and would have automatically extended for an additional two years pursuant to Bankruptcy Code section

⁵ D.I. 196.

⁶ D.I. 197.

⁷ See *In re LMI Legacy Holdings, Inc.*, 2017 WL 1508606 (Bankr. D. Del. Apr. 27, 2017).

⁸ Id.

108(a). Additionally, the Plaintiffs point out that no party moved to dismiss Count XII on limitations grounds.

4. Regarding the New York three-year statute of limitations, the Plaintiff contends that, pursuant to Bankruptcy Code section 108(a), the claims are not barred, as the limitations period for these Notes expired *after* the Petition Date (August 16, 2013), and since the Complaint was filed on August 14, 2015, the Trustee claims that Count XII as to the September 2010 and February 2011 Notes is timely.

5. The Plaintiff is correct that the claims were timely filed under either the three-year limitations deadline with 108(a) extension or the six-year limitation deadline. However, regardless of the timely filing of the claims, there are still sufficient reasons to dismiss Count XII in its entirety, specifically based on the issues of control and the common factual allegations serving as the Court's basis for dismissal of Counts I, II, and III.

6. **Dismissal of the duty of care claims due to the presence of an exculpation clause (Counts I, II, and III).** The Plaintiff argues that under Third Circuit law, the protection of an exculpatory clause is an affirmative defense, which courts shall not consider on a motion to dismiss under Rule 12(b)(6). Essentially, the Plaintiff argues that this is a conflict of laws issue, such that the application of the exculpatory clause to form the basis of a motion to dismiss is procedural, in that it is an affirmative defense, and not substantive, and, therefore, Third Circuit law controls, which precludes the use of an exculpatory clause for purposes of a 12(b)(6) motion.

7. The Court correctly applied New York law, as federal courts sitting in diversity are permitted to grant motions to dismiss breach of fiduciary duty claims “based upon the existence of an exculpatory clause *where the law of the state of incorporation permitted such a dismissal.*”⁹ The use of an exculpatory clause to form a basis upon which to dismiss a breach of fiduciary duty claim on a motion to dismiss is just as substantive as it could be procedural, and as such, the Court was correct in its application and subsequent determination to dismiss the breach of fiduciary duty claims on such a basis.

8. **Dismissal of non-exculpated fiduciary claims (Counts I and II).** The Plaintiffs argue that the Complaint alleges facts that the defendant fiduciaries engaged in conduct that, under New York law, is sufficient for a claim for breach of fiduciary duties to survive, specifically through the defendant fiduciaries entering into transactions they knew caused the Company to operate in violation of compliance laws.

9. The Court exhaustively analyzed the facts alleged in the Complaint related to breach of fiduciary duties, and the Plaintiff makes no argument that would satisfy the standard for granting its motion for reconsideration.

10. **Dismissal of the fiduciary duty claims against Rocco and Burdi (Count III).** The Plaintiff argues that the Court should reconsider its dismissal of Count III for two primary reasons: first, on the ground that Rocco and Burdi admitted the Trustee’s

⁹ Objection of Defendants the Clairvest Entities and the Clairvest Directors to Plaintiff’s Motion for Reconsideration of Dismissal of Fiduciary Duty Claims, D.I. 195, ¶ 22, citing *Lemond v. Manzulli*, No. 05 CIV. 222 (ILG), 2009 WL 1269840, at *5 (E.D.N.Y. Feb. 9, 2009) (New York federal court dismisses duty of care claims against a board of directors of a Delaware corporation based upon an exculpatory clause in the Delaware certificate of incorporation because Delaware law permitted such consideration).

allegations concerning the payments they made to themselves and other employees who left LMI stated a viable claim for breach of fiduciary duty, and, second, the Court overlooked discrete and unique factual allegations pertaining only to Rocco's and Burdi's alleged misconduct that forms the basis for Count III. Specifically, the Plaintiff argues that Rocco and Burdi violated their duty of loyalty to the corporation, by way of promoting their own personal interests which were incompatible with those of the corporation.

11. The Trustee did not allege sufficient facts to support a finding that Rocco and Burdi pursued interests that were incompatible with LMI's interests when they resigned, accepted bonus payments, and allegedly attempted to solicit LMI employees. Specifically, evidence was presented to the Court relating to the release both defendants entered into, pursuant to a related employment lawsuit, which, on its face, barred the Trustee from asserting claims against Rocco and Burdi relating to improper solicitation of LMI employees.¹⁰ With respect to the exculpation clause provision, see *supra*, paragraph 6.

12. **Dismissal of the aiding and abetting breach of fiduciary duties claim against RBC (Count XIII).** The Plaintiff alleges that the Court did not analyze the alleged

¹⁰ D.I. 193, Exhibits A and B ("The settlement agreement released claims regarding the non-solicitation provisions contained in Rocco and Burdi's employment agreements. The non-solicitation provisions prohibited Rocco and Burdi from soliciting former employees. However, the release explicitly provides that Rocco and Burdi are released from any and all manner of actions, causes of actions, losses, claims relating to the solicitation of former employees.").

lack of disclosures, conflicts of interest, or the assistance RBC gave to Clairvest to the exclusion and detriment of other LMI shareholders.

13. The Plaintiff may not seek to relitigate an issue already briefed or decided by the Court, which is exactly what it seeks to do with respect to Count XIII against RBC for aiding and abetting breaches of fiduciary duty. The Court ruled properly and the Plaintiff has not satisfied the standard necessary for reconsideration.

14. As previously mentioned, the Court exhaustively analyzed the facts alleged in the Complaint related to breach of fiduciary duties – such as the fact that Rocco and Burdi presented the Court with documents and oral argument regarding the release that they entered into in a related employment lawsuit, which bars the Trustee from asserting that Rocco and Burdi improperly solicited LMI employees at or about the time they resigned¹¹ – and the Plaintiff makes no argument that would satisfy the standard for granting its motion for reconsideration.

15. **Dismissal of the fiduciary duty claims “with prejudice.”** The Plaintiff argues that if a complaint is subject to dismissal for failure to state a claim, courts in the Third Circuit are required to permit a curative amendment, unless an amendment would be inequitable or futile. As such, the Plaintiff argues that the Court should allow the Trustee to amend, or at least provide explanation for, the basis of a “with prejudice” dismissal.¹²

¹¹ D.I. 193, p. 7 (fn. 30).

¹² D.I. 190, ¶¶ 55-56.

16. Futility exists where the complaint, as amended “would fail to state a claim upon which relief could be granted.”¹³ The determination to grant leave to amend rests squarely with the Court, and, in the instant case, the Trustee provided no facts or allegations suggesting that amendment of the Complaint would cause the Court to reach different results with respect to the dismissed claims.

CONCLUSION

17. As set forth *supra*, the Court hereby DENIES the Motion for Reconsideration.



Christopher S. Sontchi, Judge
United States Bankruptcy Court

Dated: August 10, 2017

¹³ *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997).