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Stein v United Wind, Inc.
2021 NY Slip Op 50095(U) [70 Misc 3d 1215(A)]
Decided on February 8, 2021
Supreme Court, Suffolk County
Emerson, J.
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Decided on February 8, 2021

Supreme Court, Suffolk County

Howard M. Stein, CATHY S. STEIN AND JEREMY TARK, Plaintiffs,

against

**United Wind, Inc., EOCYCLE TECHNOLOGIES, INC., 18373510 INC.,
RUSSELL TENCER AND JOHN DOE CORPORATIONS No.1-10,
Defendants.**

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Elizabeth H. Emerson, J.

Upon the following papers read on these motions *to dismiss* ; Notice of Motion and supporting papers 15-27; 28-41 ; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 46-52; 53-59 ; Replying Affidavits and supporting papers 60-65; 66-71 ; it is,

ORDERED that the motion by the defendants Eocycle Technologies, Inc., and 18373510, Inc., for an order dismissing the complaint insofar as it is asserted against them is granted; and it is further

ORDERED that the motion by the defendants United Wind, Inc., and Russell Tencer for an order dismissing the complaint insofar as it is asserted against them is granted.

The defendant United Wind, Inc. ("United Wind") is a Delaware corporation engaged in wind-energy development and leasing. The defendant Russell Tencer is its President and Chief Executive Officer. In 2017, the plaintiffs Howard and Cathy Stein, as tenants by the entirety, invested in United Wind by entering into a subscription agreement and purchasing a convertible promissory note in the amount of \$75,000. The plaintiff Jeremy Tark also entered

into a subscription agreement with United Wind and purchased a convertible promissory note in the amount of \$100,000. The notes and the subscription agreements both provided that they shall be governed by the laws of the State of Delaware. The notes also had a forum-selection clause that provided, "The state and federal courts sitting in the State of Delaware shall have exclusive jurisdiction over any dispute arising in connection with this Note."

On September 11, 2018, United Wind entered into a term sheet with the defendant Eocycle Technologies, Inc. ("Eocycle"). Eocycle agreed to provide a secured loan to United Wind in the amount of \$100,000 and additional funding in the amount of \$776,754 to a jointly formed entity that would purchase United Wind's assets. On September 13, 2018, United Wind's noteholders, including the plaintiffs, were asked to consent to the transaction and execute a waiver-and-amendment agreement. The plaintiffs did not consent or execute the waiver-and-amendment agreement. On October 5, 2018, United Wind entered into an asset-purchase agreement with the defendant 18373510, Inc., a Delaware corporation. December 31, 2019, was the maturity date of both notes. Neither the Steins nor Tark have been repaid. They subsequently commenced this action for breach of the promissory notes, breach of the subscription agreements, fraud in the inducement, fraudulent conveyances, conversion, unjust enrichment, and an accounting.

United Wind and Tencer move and Eocycle and 18373510, Inc., separately move for dismissal of the complaint. The defendants contend, inter alia, that the forum-selection clauses in the promissory notes require that the notes be enforced in Delaware. The plaintiffs contend, in opposition, that the forum-selection clauses are unreasonable and unenforceable because they did not sign the notes, the parties have no substantive connections to the State of Delaware, and they were fraudulently induced to enter into the transactions.

The plaintiffs signed the subscription agreements, on which the promissory notes are based, and performed under the notes by paying the subscription price (\$175,000) to United Wind. Moreover, the plaintiffs have commenced this action to enforce the notes. The plaintiffs may not seek to enforce the notes against the defendants and, at the same time, argue that they did not agree to the terms contained therein. By signing the subscription agreements and performing under the notes, the plaintiffs, who are sophisticated parties, clearly manifested their assent to the terms of the subscription agreements and notes. The court finds that it was not [*2] necessary for the plaintiffs to sign each individual note (*cf.*, **RES Exhibit Servs., LLC v Genesis Vision, Inc.**, 155 AD3d 658, 1518).

Although once disfavored by the courts, it is now recognized that parties to a contract may freely select a forum to resolve any disputes over the interpretation or performance of a contract (**Brooke Group v JCH Syndicate**, 87 NY2d 530, 534). Such clauses are prima facie valid and enforceable because they provide certainty and predictability in the resolution of disputes (**Id.**). They are not to be set aside absent a strong showing that they are unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or that a trial in the selected forum would be so gravely difficult that the opposing party would, for all practical purposes, be deprived of his day in court (**Di Ruocco v Flamingo Beach Hotel & Casino, Inc.**, 163 AD2d 270, 271-272; **Shalam v KPMG, LLP**, 13 Misc 3d 1205[A], at *6 [and cases cited therein]), *affd* 43AD3d 752). General allegations that the contract was induced by fraud are not sufficient to preclude enforcement of a forum-selection clause (**Id.** at 6-7). The complaint must allege that the clause itself was procured by fraud (**Id.** at 7).

The plaintiff has failed to make a "strong showing" that the forum-selection clause should be set aside. The plaintiff's conclusory allegations that none of the parties to the notes have any substantive connection to the State of Delaware are insufficient. The record reflects that United Wind and 18373510, Inc., are both Delaware corporations. The plaintiffs contend that they were fraudulently induced to enter into the notes, but they do not contend that the forum-selection clauses themselves were procured by fraud. In any event, the plaintiffs' claims of fraud are barred by the subscription

agreement, which prominently disclosed in plain language that investment in United Wind was "speculative," involved a "high degree of risk," and should be made "only by persons of substantial means . . . who can bear the economic risk of a total loss of their investment." In addition, the plaintiffs were given a list of risk factors advising them, inter alia, that the notes involved a "high degree of risk," that they should be regarded as "speculative," and that they should be purchased "only by individuals or entities that could afford to lose all or part of their investment." Such disclosures in the written offering materials rendered any reliance on alleged contradictory oral representations unjustifiable as a matter of law (*see*, **Matter of Dean Witter Managed Futures Ltd. Partnership Litig.**, 282 AD2d 271).

Public policy favors enforcement of forum-selection clauses and supports a broad reading of those clauses (**Triple Z Postal Serv., Inc. v United Parcel Serv., Inc.**, 13 Misc 3d 1241[A] at *7). The forum-selection clause in the notes is broad and places "exclusive jurisdiction" in Delaware over "any dispute arising in connection with the Note." Such language has been held to include, inter alia, tort claims, fraud-in-the-inducement claims, and General Business Law § 349 claims, in addition to contractual claims (**Id.** at *7 [and cases cited therein]). The word "any" is all-encompassing language, indicating the parties' belief that all actions regarding their relationship will be governed by the forum-selection clause (**Id.**, *citing Travelers Prop. Cas. Co. of Am. v Centimark Corp.*, 2005 WL 1038842 [SD Ohio], at * 2). All of the plaintiffs' claims arise out of the contractual relationship between United Wind and the plaintiffs, without which there would be no relationship between the parties (**Id.**). Moreover, they all seek the same relief, repayment pursuant to the terms of the notes and subscriptions. Accordingly, the court finds that the forum-selection clause is enforceable and applies to all of the plaintiffs' claims.

Finally, although Eocycle and 18373510, Inc., are not parties to the subscription [*3] agreements and notes, the forum-selection clause is enforceable by them since their relationship to United Wind is "sufficiently close" (**Id.** at *9).

In view of the foregoing, the defendants' motions to dismiss are granted.

Dated: February 8, 2021

J.S.C.

