Luxor Capital Group, L.P. v Seaport Group LLC
2016 NY Slip Op 30728(U)
April 15, 2016
Supreme Court, New York County
Docket Number: 654406/2013
Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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LUXOR CAPITAL GROUP, L.P., LUXOR CAPITAL PARTNERS, LP, OC 19 MASTER FUND, L.P.-LCG, LUXOR WAVEFRONT, LP, and LUXOR CAPITAL PARTNERS OFFSHORE MASTER FUND, LP,

Plaintiffs,

-against-

THE SEAPORT GROUP LLC and SEA PORT GROUP SECURITIES, LLC,

Defendants.

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DECISION AND ORDER

Index No.: 654406/2013
Motion Seq. Nos.: 002-and-003

SEA PORT GROUP SECURITIES, LLC,

Third-Party Plaintiff,

-against-

OMAR S. AMANAT,

Third-Party Defendant.

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Third-Party Index No.: 590102/2014

O. PETER SHERWOOD, J.:

Motion sequence Nos. 002 and 003 are consolidated for disposition, and are disposed of in accordance with the following decision and order.

Defendants The Seaport Group LLC and Sea Port Group Securities, LLC (together, Seaport) move for summary judgment dismissing the complaint (motion sequence No. 002). Plaintiffs Luxor Capital Group, L.P., Luxor Capital Partners, LP, OC 19 Master Fund, L.P.-LCG, Luxor Wavefront, LP, and Luxor Capital Partners Offshore Master Fund, LP (collectively, Luxor) move for summary judgment on their complaint (motion sequence No. 003).

This action involves a single claim for breach of contract for the failure to settle a trade, communicated in instant messages, involving Luxor's purported purchase in November 2013 of 270,000 shares of Twitter, Inc. common stock shortly before Twitter's initial public offering. Seaport, which acted as an intermediary for the trade, urges that there was merely an agreement to

agree, and that no final, enforceable agreement was reached as a matter of law. Seaport highlights that the trade messages clearly included language requiring a written agreement, and that important terms were missing from the preliminary agreement. It also urges that even if there was a binding agreement, it simply acted as a matchmaker, putting Luxor in touch with the seller, third-party defendant Omar Amanat (Amanat), and since Amanat never delivered the shares to Seaport, Seaport could not deliver the shares and complete the sale to Luxor. Finally, it argues that Luxor fails to allege the date of breach and seeks an improper measure of damages.

Luxor counters that Seaport, in bringing its third-party complaint and obtaining a default judgment against Amanat based on the same transaction, conceded that the transaction was enforceable, and is judicially estopped from arguing otherwise. Luxor also argues that the "subject to documents" language is not fatal to the formation of the contract, and that Seaport's trade tickets are binding. It further urges that Amanat's failure to sell the shares to Seaport does not excuse Seaport's failure to sell the shares to Luxor, because the sale was not impossible as a matter of law.

BACKGROUND

Plaintiff Luxor Capital Group, L.P. is an investment manager which receives fees for managing the assets of hedge funds (defendants' Rule 19-a statement of material facts [defendants' rule 19-a], ¶ 5; plaintiffs' Rule 19-a statement of undisputed material facts and response [plaintiffs' Rule 19-a], ¶ 5). In November 2013, among the funds it managed were plaintiffs Luxor Capital Partners, LP, OC Master Fund, L.P.-LCG, Luxor Waterfront, LP, and Luxor Capital Partners Offshore Master Fund LP (*id.*, ¶ 6).

The Seaport Group LLC (Seaport Group) does fixed income and equity sales and trading, and Sea Port Group Securities, LLC is a SEC-registered broker-dealer and a wholly-owned subsidiary of Seaport Group (*id.*, ¶ 1). Seaport matches buyers and sellers of securities, bank debt or other assets (*id.*, ¶ 4). Since 2010, Luxor and Seaport have conducted numerous transactions (*id.*, ¶ 7).

Trade and Instant Messages

On November 7, 2013, an initial public offering of Twitter, Inc. (Twitter IPO) was anticipated to take place (Levy aff, exhibit D). Several days before the IPO, Nicholas DuBray, a broker representing third-party defendant Amanat, had contacted David Storper, a Seaport salesman, indicating that he had a client that wanted to sell 270,000 shares of Twitter that the client acquired

before the IPO, referred to as "pre-IPO" shares (Blum aff, exhibit 25, *DuBray tr*, at 23-24; *see also* Levy aff, exhibits D and E). Seaport began looking for a potential buyer for the shares (Blum aff, exhibit 29, *Moller tr*, at 40-41; Blum aff, exhibit 31, *Stedman tr*, at 90-91).

On November 5, 2013 at 12:13 p.m., Matthew Stedman, a Seaport salesman, sent an instant message to Stephen Arena at Luxor Capital Group, asking whether Luxor was interested in buying a "block of pre ipo twitter common . . . 270K at 26.5 [$26.50 per share] to start the discussion" (Blum aff, exhibit 1 at 1; defendants' Rule 19-a, ¶ 25). Arena responded that he "probably will have something to say here" and "obvi need to go through the language" (Blum aff at 1-2).

Also on November 5, 2013, in internal Luxor emails exchanged around the same time, Arena stated that the restrictions being considered were "6 month lock up" and "[n]o hedging restriction," and that "[w]e can trade this subject to language/mutually agreed upon docs (the seller can provide and we can go through after a trade is agreed upon (size/price) and reserve the right to break if there is something in the language we don't like)" (Blum aff, exhibit 3). Arena testified at his deposition that "[s]o I wanted that language, the no hedging restriction six-month lockup, I wanted that on a document presented to us, so we can go through it and our legal team could go through it" (Levy aff, exhibit Q, *Arena tr*, at 69). About half an hour later, Arena wrote "[a]gain this is all subject to language so we have an out if we want" and "[a]gain, all subject to language in the docs which I should have shortly" (Blum aff, exhibit 4). He wrote in another internal email at 1:53 p.m. that "[w]e bought 270, paid 26.25. Subject to docs - will coordinate with legal when I have them" (Blum aff, exhibit 5). The next morning, in response to an internal Luxor email asking if the trade had closed, Arena wrote: "We agreed on price/size but still subject to us agreeing to language/docs" (Blum aff, exhibit 9). Arena's boss, Jared Goldstrum, wrote "My understanding is we have an out as well based on docs so that's only reason I say doesn't hurt to pursue" (*id.*).

At about 12:57 p.m., Arena wrote back to Stedman (Seaport) by instant message offering $26.25 "to you for the 270,000 shares subject to language" (Blum aff at 2). Stedman asked which Luxor entity would be buying the shares, and Arena wrote that it "depends," that it "might be one, might be several," and that "language in the docs may influence that" (*id.*).

At around the same time, Storper (Seaport) was communicating by email with DuBray, on behalf of Amanat, in which Storper was proposing that Seaport would buy 270K shares of pre IPO

Twitter at $25 per share (Blum aff, exhibit 6). If the trade went through, Seaport would keep the difference between the price it paid Amanat and the price to be paid by Luxor, approximately $300,000 (Blum aff, exhibit 30, *Nissim tr*, at 110; Blum aff, exhibit 24, deposition of Rebecca Siegel Baron [*Siegel Baron tr*] at 61). DuBray confirmed that the "[n]ext step will be to execute Stock Purchase Agreement and Escrow Agreement," and that he was working on getting those agreements for review and comment (*id.*). Both Storper and Gregory Moller, Seaport's Managing Director, understood that Seaport's purchase of the Twitter shares also was subject to documentation (Levy aff, exhibit E, deposition of David H. Storper [*Storper tr*] at 102; Levy aff, exhibit L, deposition of Gregory L. Moller [*Moller tr*] at 60-61).

The next day, November 6, 2013, Stedman sent an instant message to Arena, stating "Trade Date 11/5 Settlement Date:TBD. Seaport Selles [sic], Luxor buys 270K shares of Twitter pre ipo common at 26.5 Subj to mutually satisfactory documentation" (Blum aff, exhibit 2 at 1). Luxor responded "great thank you" (*id.*).

Seaport's Role in Transaction

Arena learned that Seaport was selling the Twitter pre-IPO shares on behalf of a third-party seller, and not from Seaport's own inventory, during the negotiation of the price and quantity (Blum aff exhibit 23, deposition of Stephen Arena [*Arena tr*] at 62). On November 6, 2013, Seaport gave Arena the contact information for the seller's counsel (Blum aff, exhibits 2 and 8).

Records Fail to Reflect Completed Trade

On November 5, 2013, Luxor Capital Group entered a trade into its system for the Twitter pre-IPO shares, but on November 7, 2013, the day of the Twitter IPO, Luxor removed the trade from its system, because it had not received any documentation for due diligence. As Luxor's General Counsel, Norris Nissim, testified at his deposition, "[t]here was uncertainty regarding whether the transaction would close as we had not yet received any documentation," including information about how the securities were held, and issues about the six month lockup, ownership of the shares, and the mechanics of the transfer (*Nissim tr* at 69, 72, 78-79). Seaport never entered this trade into its electronic system at all (Blum aff, exhibit 26, deposition of Steven Dudowitz [*Dudowitz tr*] at 27-29, 38).

Luxor submits Seaport's internal trade tickets as proof of the sale and purchase of the Twitter shares (Levy aff, exhibits U and V). These tickets are forms used by Seaport internally to memorialize a private securities transaction (Levy aff, exhibit B, deposition of Markus Witthaut, CFO Seaport [*Witthaut tr*] at 59). Luxor submits two separate trade tickets, both of which are dated November 5, 2013. The first, time-stamped 5:25 p.m., indicates a sale from Seaport to Luxor stating that it was for 270K of Twitter with a price $26.25 (Levy aff, exhibit V). The second, time-stamped 5:28 pm, indicates Seaport's purchase of the 270K for a price of $25 from Amanat (Levy aff, exhibit U). Seaport considered this purchase and sale a simultaneous transaction (*Witthaut tr* at 71), with Luxor as buyer, Amanat as seller, and Seaport as a riskless principal in the middle (Levy aff, exhibit N, *Siegel Baron tr* at 29). While Seaport usually would then input these trade tickets into its electronic system, these particular tickets were never entered into it (*Dudowitz tr* at 27-29, 38).

Further Negotiation and Open Issues

On November 6, 2013, Seaport introduced Amanat's representatives, including DuBray, directly to Luxor's general counsel, Nissim (Levy aff, exhibits AA and BB). Nissim and DuBray then had numerous conversations, by email and phone, between November 7 and November 23, 2013 (Blum aff, exhibits 13-15; *Nissim tr*, at 79). The various open issues discussed included: negotiation of a purchase agreement; negotiation of escrow and security agreements; resolution of the issue in the event of non-delivery of the shares; details on delivery; due diligence documents requested by Luxor, such as evidence of share ownership, and documents showing owner could deliver on closing; mechanics of transfer; documents regarding restrictions on the shares delivered, such as applicable market standoff/lockup provision; and whether Luxor would have the ability to hedge its purchase of the shares (*Nissim tr* at 78-79, 95-96). Nissim testified at his deposition that Luxor required that these terms be resolved before it would execute the documents necessary to settle this trade (*Nissim tr* at 78-79, 95-96). DuBray also understood that Luxor had concerns, and believed from his experience that the parties to this private securities transaction needed to agree to and execute a purchase and sale agreement (*DuBray tr* at 57, 131, 154-155). The issue of whether Luxor would be able to hedge the pre-IPO shares was an open issue which Luxor sought to resolve after the initial instant messages on November 5 and 6 (Blum aff, exhibit 1 at 1-3; *DuBray tr* at 154-155; Blum aff, exhibit 13 at 1).

Through emails on November 13 and 14, DuBray and Nissim continued to negotiate the draft purchase agreement, and Nissim expressed concerns about the lack of documentation and communication from Amanat (Levy aff, exhibits MM and NN). On November 18, 2013, DuBray sent an email with "the details of the proposed transaction", proposing an amendment to provide that if Amanat did not deliver the shares at the end of the six-month lockup period, then funds in escrow would be returned to Luxor and it would also be paid a fee of 10% of the gross transaction value ($675,000) in settlement, as a breakup fee (Levy aff, exhibit OO). On November 21, 2013, Nissim sent an email to Stedman and Moller at Seaport counterproposing "the following transaction to replace the agreed upon trade," which included, among other things, that Amanat would place $3 million into escrow pending settlement as a breakup fee (Blum aff, exhibit 16). Seaport apparently forwarded this to DuBray, who made another counteroffer on November 23 (*id.*). Negotiations ended on November 23, 2013, without a resolution of the open terms (*DuBray tr* at 165-166).

Pleadings

On December 23, 2013, Luxor brought this action for breach of contract against Seaport for its failure to settle the Twitter trade (Levy aff, exhibit UU, complaint). It alleges that the instant messages between Luxor and Seaport on November 5 and 6 constituted a binding contract. It alleges that the "Subj to mutually satisfactory documentation" in Seaport's response refers only to customary industry documents, including any provisions regarding lockup and hedging (*id.*, ¶¶ 9-11). Seaport answered the complaint, denying its liability to Luxor, and filed a third-party complaint against Amanat, DuBray, and Emerson Equity LLC, asserting claims for breach of contract, specific performance, unjust enrichment, and indemnification, alleging that the third-party defendants had obligations to sell the 270,000 shares of Twitter to Luxor, with Seaport acting as broker and riskless principal (Levy aff, exhibit Y).

By order entered on June 11, 2014, this court granted Seaport Group Securities, LLC's motion for a default judgment against Amanat as to liability, and dismissed the claims against DuBray and Emerson (NYSCEF Docket No. 19). The adjudication of remedies was stayed until the damages phase of the main action, or further order of this court (*id.*). Seaport dismissed the third-party complaint as against DuBray and Emerson, and commenced a FINRA arbitration, which has been stayed pending the outcome of this action (Blum aff, exhibit 38).

These Motions

Seaport contends that the parties did not enter into an enforceable agreement, because the purported agreement was explicitly subject to mutually satisfactory documentation. Seaport urges that the parties did not intend those instant messages to be binding until their agreement was reduced to writing and signed, which never happened. Seaport maintains Luxor requested that the trade be subject to documentation, and Luxor's internal emails demonstrate that it knew and intended that the "subject to" language meant there was an "out." Seaport also points to Luxor's counsel's many direct communications with DuBray between November 7 and November 23, regarding open issues that were material to closing the transaction (*Nissim tr* at 78-79, 95-96). In addition, Seaport contends that this type of agreement was usually in writing, as was customary between these two parties, and in the industry, in general. As to industry practice, Seaport submits the report of its expert, Stanley Fortgang, who contrasted public securities trades, which are usually completed upon agreement as to quantity, price, and security, with private securities transactions, which, by their nature, often require further documents and satisfaction of terms of closing before the trade is considered complete (Blum aff, exhibit 37, Steven Fortgang report at 10-11). Based on this proof, Seaport urges that it was an unenforceable agreement to agree.

Next, Seaport argues that even if Luxor could prove a binding agreement, they cannot prove breach, because both Luxor and Seaport knew that Seaport could perform only if Amanat sold and delivered the shares. It contends it is undisputed that Luxor was aware that Seaport matches buyers and sellers, and does not and was not trading here off its own balance sheet. It maintains there is no judicial estoppel based on its answer and third-party complaint, which is argued as an alternative, in the event Luxor was to obtain a judgment against it. Finally, Seaport urges Luxor has failed to present evidence of the amount of it damages, or even of the date of the alleged breach.

In its response and in support of its summary judgment motion, Luxor argues there are no triable issues that there was a trade, and that Seaport intended to be bound. It points to Seaport's internal trade tickets as additional proof of this binding transaction. It contends Seaport is estopped from denying the agreement based on its admissions in its answer and third-party pleading in which it asserts that "the parties reached agreement concerning the transfer and sale" of the Twitter shares, and that "the terms of the transfer and sale agreement were confirmed in writing." It also urges that

Seaport has affirmatively averred, in its third-party pleading, upon which it has received a judgment, that it had a binding contract with Amanat, and has stated that it does not buy something unless it knows it sold it, all of which is a single transaction. Thus, according to Luxor, Seaport may not deny this, and it proves that Seaport intended to be bound by its agreement with Luxor.

Luxor further argues that Seaport's defenses fail as a matter of law, because Seaport is inappropriately seeking to have this court read numerous conditions into the parties' unambiguous agreement. Luxor asserts that the language "subject to documents" does not negate the binding effect of the parties' argument. It points to the fact that Seaport's trade tickets did not make note of any particular documents to be executed and it contends that Seaport's impossibility defense, based on Amanat's failure to deliver the shares, fails because Seaport's performance was not objectively impossible– it could have purchased the shares on the open market, or paid Luxor the price difference between the purchase price and the market value. Further, Luxor urges that Seaport is not excused simply because it was acting as a riskless principal. Finally, Luxor clarifies that it seeks damages measured at the time that Seaport breached, which it believes to be somewhere between November 7 and November 23, 2013.

DISCUSSION

Luxor's motion for summary judgment is denied, and Seaport's motion for summary judgment is granted, and the complaint is dismissed.

Luxor's Motion for Summary Judgment

In order to prevail on this claim, Luxor must demonstrate: (1) the existence of a contract between it and Seaport; (2) Luxor's performance; (3) Seaport's failure to perform its obligations; and (4) damages resulting from the breach (*see El-Nahal v FA Mgt., Inc.*, 126 AD3d 667, 668 [2d Dept 2015]; *PFM Packaging Mach. Corp. v ZMY Food Packing, Inc.*, 131 AD3d 1029, 1030 [2d Dept 2015]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). "[W]here the language [of a contract] is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language," and the "writing should as a rule be enforced according to its terms" (*R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32 [2002] [internal quotation marks and citations omitted]). "Interpretation of the contract is a legal matter for the court" (*805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983] [citations omitted]).

First, Luxor's contention that Seaport is judicially estopped from denying that the instant message was a binding agreement because of its answer with its third-party pleadings is unpersuasive. Under the doctrine of judicial estoppel, a party which assumed a particular position in a prior legal action, and obtained a judgment in its favor, is precluded from taking a contrary position in another action just because its interests in the subsequent action are different (*see Wells Fargo Bank N. A. v Webster Bus. Credit Corp.*, 113 AD3d 513, 516 [1st Dept 2014]). It applies to facts, not legal arguments (*see id.*). The statements must be genuinely inconsistent (*Matter of Thrift Assns. Serv. Corp. v DeBuono*, 255 AD2d 809, 813 [3d Dept 1998]). "Inherent in third-party practice is a defendant's ability to deny liability to a plaintiff but also to alternatively argue that, if liability is found, then the third-party defendant is liable to it" (*see Schenectady Steel Co. v Guardian Life Ins. Co. of Am.*, 300 AD2d 854, 855-856 [3d Dept 2002] [citation omitted]; *see* CPLR 3014; *Mathis v Central Park Conservancy*, 251 AD2d 171, 171-172 [1st Dept 1998]; *Matter of Kriete v Port Auth. of N.Y. & N.J.*, 208 AD2d 1075, 1077 [3d Dept 1994]). In *Schenectady Steel Co.*, the defendant denied that it was an agent of its codefendant in defending the main complaint, but asserted the agency relationship in its third-party complaint against the codefendants (*id.* at 854-855). The Court held that judicial estoppel did not bar defendants from maintaining contrary positions (*id.* at 856). Courts have recognized that third-party plaintiffs, such as Seaport, here, have the "difficult tactical position of having to defend one action while simultaneously prosecuting another" (*id.* [citation omitted]). Therefore, third-party plaintiffs are not estopped from taking contrary positions in their answer and third-party complaint (*see id.*; *River House Realty Co. v Lico Contr.*, 172 AD2d 426, 427 [1st Dept 1991] [legal positions in third-party complaint are permissible inconsistent pleadings]).

Although Seaport has obtained a judgment against Amanat on its third-party complaint, that judgment was obtained upon Amanat's default, and is subject to the outcome of Luxor's complaint against Seaport. Seaport's allegations regarding the legal effect of the parties' "agreement concerning the transfer and sale of" the shares, that is, whether they constituted an enforceable contract, are legal arguments and permissible inconsistencies in third-party pleadings. Therefore, judicial estoppel does not bar Seaport from arguing now that the Luxor-Seaport transaction is not enforceable.

In order to demonstrate that Luxor and Seaport entered into a binding and enforceable contract, Luxor must show that there was an objective meeting of the minds with respect to the

material terms of the agreement (*see Metropolitan Enters. NY v Khan Enter. Constr., Inc.*, 124 AD3d 609, 609 (2d Dept 2015); *Mode Contempo, Inc. v Raymours Furniture Co., Inc.*, 80 AD3d 464, 465 (1st Dept 2011). That is, "there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999] [citation omitted]; *see Silber v New York Life Ins. Co.*, 92 AD3d 436, 439 (1st Dept 2012); *Minelli Constr. Co., Inc. v Volmar Constr., Inc.*, 82 AD3d 720, 721 (2d Dept 2011). Whether a writing constitutes an enforceable contract or a preliminary, unenforceable agreement to agree turns on "whether the agreement contemplated the negotiation of later agreements and if the consummation of those agreements was a precondition to a party's performance" (*IDT Corp.v Tyco Group, S.A.R.L.*, 13 NY3d 209, 213 n 2 [2009]). A "mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (*Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981] [citations omitted]). When a party gives a clear, reasonable signal that it intends "to be bound only by a written agreement, that intent is honored" (*Kowalchuk v Stroup*, 61 AD3d 118, 123 [1st Dept 2009] [internal quotation marks and citation omitted]; *Brown v Cara*, 420 F3d 148, 153 [2d Cir 2005] ["(o)rdinarily, where the parties contemplate further negotiations and the execution of a formal instrument, a preliminary agreement does not create a binding contract" (internal quotation marks and citation omitted)]; *see Teachers Ins. & Annuity Assn. of Am. v Tribune Co.*, 670 F Supp 491, 499 [SD NY 1987] ["(t)here is a strong presumption against finding binding obligation in agreements which include open terms, call for future approvals and expressly anticipate future preparation and execution of contract documents"]).

Under New York law, absent a written agreement between the parties, "'a contract may be implied in fact where inferences may be drawn from the facts and circumstances of the case and the intention of the parties as indicated by their conduct'" (*Ellis v Provident Life & Acc. Ins. Co.*, 3 F Supp 2d 399, 409 [SD NY 1998], *affd* 172 F3d 37 [2d Cir 1999], quoting *Matter of Boice*, 226 AD2d 908, 910 [3d Dept 1996] [other citations omitted]). An implied-in-fact contract is "just as binding as an express contract arising from declared intention, since in the law there is no distinction between agreements made by words and those made by conduct" (*id.* [internal quotation marks and citation omitted]). However, no contract may be implied in fact where the facts "are inconsistent

with its existence; . . . or where there is an express contract covering the subject-matter involved; or against the intention or understanding of the parties . . . " (*Miller v Schloss*, 218 NY 400, 406-407 [1916]). The assent of the party to be charged is required, and if that assent may not be inferred from that party's conduct, then there is no contract (*see id.*).

In determining if the parties intended to be bound without an additional executed writing, courts consider four factors:

> "'(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing'"

(*Kowalchuk v Stroup*, 61 AD3d at 123, quoting *Winston v Mediafare Entertainment Corp.*, 777 F2d 78, 80 [2d Cir 1985]; *see Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399-400 [1977] [look at totality of circumstances]; *Shearson Lehman CMO, Inc. v TCF Banking & Sav., F.A.*, 710 F Supp 67, 70 [SD NY 1989]).

Here, Luxor's complaint relies on the instant messages as proof that the parties entered into a binding agreement. The instant messages, however, specifically the one by Arena, Luxor's representative, on November 5, 2013 at 12:57 p.m., explicitly stated that the offer was "26.25/ to you for the 270k shares subject to language" (Blum aff, exhibit 1 at 2), and the responding instant message by Stedman the next morning was also "Subj to mutually satisfactory documentation" (Blum aff, exhibit 2 at 1). Arena's response to that message was "great thank you" (*id.*). Contrary to Luxor's contentions, this and other proof unequivocally indicates that the parties reserved the right not to be bound absent "mutually satisfactory documentation," or, at the least, "subject to language." To ignore these expressions of the parties' intent would violate the fundamental principle that the court must interpret the agreement to give every provision meaning (*see Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 54 [1st Dept 2015]). Moreover, Seaport presents proof that Arena's internal emails to others at Luxor specifically state and even emphasize that the trade is subject to "language/mutually agreed upon docs" and "reserve the right to break if there is something in the language we don't like" (Blum aff, exhibit 3), and that "[a]gain this is all subject

to language so we have an out if we want" (Blum aff, exhibit 4; *see also* Blum aff, exhibits 5, 7, and 9). On these facts, the "agreement" was at best preliminary and therefore is unenforceable *(see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 424-426 [1st Dept 2010] [preliminary agreement not enforceable because clearly depended on definitive agreement which was never reached or executed], *Chatterjee Fund Mgt. v Dimensional Media Assoc.*, 260 AD2d 159, 159 [1st Dept 1999] [preliminary summary agreement which was explicitly subject to negotiation of definitive agreement and documentation was unenforceable]; *cf. Kowalchuk v Stroup*, 61 AD3d at 123-124 [Court found that none of parties' correspondence indicated intent not to be bound until agreement executed by both sides, and parties' conduct established without question that both understood and intended to be bound]).

Luxor's reliance in its motion on Seaport's trade tickets as proof of the parties' agreement is unavailing. Those trade tickets were internal documents of Seaport, and while they may be some evidence of Seaport's active plan to enter into an agreement, the fact that they were not entered into its electronic trading system weighs against this evidence as definitive proof of a binding deal. Moreover, assuming a parties treatment of trade tickets is seen as some evidence of the existence or not of an agreement, Luxor's decision to take the trade off its system suggests that it too recognized that there was no agreement (*Nissim tr*, at 69-70, 72). At most, this evidence suggests that Seaport expected to strike a deal, not that it had one.

As to the second and third factors for determining the parties' intent, Luxor fails to present any proof that there was partial performance, as there was no exchange of money or shares, and there clearly were a number of important terms never finalized or agreed to, including whether Luxor could hedge the investment, security upon non-delivery of the shares, the mechanics of the transfer, and which entity or entities of Luxor were going to effect the transfer. There is no binding contract where material terms remain to be negotiated (*see Ciaramella v Reader's Digest Assn. Inc.*, 131 F3d 320, 325 [2d Cir 1997]). Luxor's own counsel testified that these issues would have to be addressed in the purchase and sale agreement, and "needed to be resolved before the trade settled" (*Nissim tr*, at 78-79, 95-96). An issue that "needs to be resolved" to complete the trade necessarily falls within the definition of material (*see Silber v New York Life Ins. Co.*, 92 AD3d at 439 [party statement that there was no point in moving forward without resolving one of terms, indicates it is material]).

While there is some dispute as to whether Luxor would have entered into a purchase agreement without clarity about whether it could hedge the shares (*Nissim tr.* at 78-79, 95-96), with Luxor claiming, after the fact, that it would have gone forward with the transaction either way, its internal and external statements in November 2013 show that did not intend to proceed until a number of material issues were resolved (*see*. e.g. Nissim tr. at 78-79, NYSCEF Doc. No. 77).

Luxor negotiated all of these terms directly with Amanat's representative, Nicholas DuBray, for the next several weeks, with counterproposals offered by both sides, particularly on the issue of security for non-delivery of the shares and whether Amanat could just pay Luxor a nominal breakup fee if he decided not to sell and deliver the shares after the six-month lockup was over (Levy aff, exhibits QQ and RR; Blum aff, exhibits 13-16). Even where parties agree to some of the material terms, such as price and quantity, there is no binding contract until they agree upon all material terms (*see e.g. Galesi v Galesi*, 37 AD3d 249, 249 [1st Dept 2007] [while plaintiffs presented evidence that negotiating parties had agreed as to quantity and price, subsequent discussion, the exchange of drafts, and the totality of circumstances showed no meeting of the minds on all essential terms]; *Angelo, Gordon & Co. v Dycom Indus., Inc.*, 2006 WL 870453, *9-10, 2006 US Dist LEXIS 15784 [SD NY Mar 31, 2006] [parties agreed on trade and price and referred to customary documentation, but because representations and terms in customary documentation remained unresolved, court held no binding contract existed]; *Shearson Lehman CMO, Inc. v TCF Banking & Sav., F.A.*, 710 F Supp at 71-72 [where party clearly understood that concerns of other party about tax and accounting implications had to be resolved before party would purchase the securities, agreement not binding until agreement on all material terms]). Because material terms of an agreement remained unresolved as late as November 23, 2013, there was no binding contract.

Luxor's reliance on *Deephaven Distressed Opportunities Tradings, Ltd. v 3V Capital Master Fund Ltd.* (2011 NY Slip Op 34007[U], 2011 WL 11415362 [Sup Ct, NY County 2011], *affd* 100 AD3d 505 [1st Dept 2012]), is misplaced, as that case is distinguishable on the facts. In *Deephaven*, after the parties agreed to a trade, they executed three separate trade confirmations, which set forth price, quantity, identity of the asset, purchaser name and seller name, but provided that the trade was subject to the negotiation, execution and delivery of an assignment agreement containing customary provisions (*see id.*). Before the documentation was signed, defendant openly took ownership of the

asset, referring to it as one of its own assets and attempting to sell it to a third party pre-closing, thus treating the trade as complete. Moreover, when defendant was attempting this sale, it declined to sign a trade confirmation with the prospective purchaser when the purchaser sought additional concessions (*see id.* at *2-3). The court determined that defendant believed that signing the trade confirmations was binding and enforceable. Thus, it concluded that the parties had intended to be bound by the trade confirmations they had signed.

In this case, neither party treated the trade as complete. Seaport did not enter the trade into its electronic trading system, and Luxor removed the trade from its system on November 7, just a day after the last instant message, and the date of the IPO (*Dudowitz tr* at 38; *Nissim tr* at 69-70, 72). Seaport's in-house counsel, Rebecca Siegel Baron, attests that it was her job to close trades. She testified that she began the process of drafting a trade confirmation when she received Seaport's internal trade ticket but stopped because she did not have information regarding the identity of the purchaser and other key terms (*Siegel Baron tr* at 65, 72-73, 105-106, 139, 148-149). She also attested that it was Seaport's practice to work as a riskless principal, with simultaneous transactions to purchase and sell securities, and not to hold them in inventory. She affirmed that "there were material terms of the trade" that were missing, and discussions regarding these terms continued after the Twitter IPO (*Siegel Baron tr* at 148). This trade simply was not as fleshed-out as the one described in *Deephaven*. Luxor and Amanat both continued to negotiate in an attempt to resolve the open issues, but ultimately were unsuccessful. In addition, the instant message involved here, indicated that the deal was "subj to mutually satisfactory documentation," and not restricted to standard industry terms, as the writing was in *Deephaven*.

On the fourth factor, the parties dispute whether this was the type of agreement that is customarily committed to writing. Seaport submits the testimony of Siegel Baron who attests that, in prior trades between these parties, written agreements were executed by buyer, seller and Seaport, which agreements listed the Luxor entity that was buying or selling the shares (*Siegel Baron tr* at 65). Seaport also submits Stanley Fortgang's expert report, in which he opines that private, as opposed to public, securities transactions typically require more documentation and satisfaction of terms of closing before a trade is considered complete (Blum aff, exhibit 37). Luxor disputes that in every prior trade between Seaport and Luxor the parties entered into trade confirmations or notices of execution (*see* plaintiff's response to defendants' rule 19-a, ¶ 46). This factor cannot be determined

on these papers. In any event, as to the trade that is at issue in this case, the record shows that Luxor insisted that the deal was "subject to language". (Blum aff at 2 and 4). The parties never reached agreement on the "language" and no mutually satisfactory "documentation" (Blum aff, exhibit 2 at 1)[1] was ever completed. Accordingly, Luxor's summary judgment motion must be denied.

Seaport's Motion for Summary Judgment

Seaport's motion for summary judgment, is granted. Seaport demonstrates that Amanat's failure to perform his portion of the transaction, the selling of the Twitter shares, excuses Seaport from performing, and, thus, Luxor cannot show breach. Seaport shows that Amanat's presentation or delivery of the shares was a precondition, a condition implied in fact, to a Seaport-Luxor transaction. "Implied in fact conditions are similar in their nature to express conditions except that the parties have expressed their intentions not in words but in the nature of their undertakings" (15 Williston on Contracts § 48.1 [4th ed 2015] [citations omitted]). In such a case, neither party promises that a particular event will take place, but they understand that the promisor is excused if the event does not happen (*id.*).

It is undisputed that since 2010, Seaport and Luxor have conducted numerous transactions (*Arena tr* at 45-46, NYSCEF Doc No 70), and that Seaport operates as a riskless principal shop, which means that it does not purchase stock for its own account or balance sheet, or trade from its own inventory. Rather, it trades on behalf of a third party, and brings two counterparties together (*Arena tr* at 29-30, 35-36 ["Seaport brings together buyers and sellers and takes a commission for themselves. So they are not facing [Luxor]. They are bringing two counterparties together"]; *Moller tr* at 89; *see also Nissim tr* at 26-27). Seaport matches buyers and seller of securities (NYSCEF Doc No 79, deposition of Markus Witthaut [*Witthaut tr*] at 35). Here, Luxor was aware generally from their prior dealings, and specifically with regard to the pre-IPO Twitter shares, that Seaport was acting on behalf of an ultimate seller of these pre-IPO Twitter shares, and that Seaport was not independently promising to sell Luxor the Twitter shares (*Arena tr* at 29, 35-36, 62). By November 6, 2013, Luxor was aware that Seaport was getting the shares from a third-party seller, and who the seller's counsel and broker were (*Arena tr* at 62; Blum aff, exhibit 2 at 5; Blum aff, exhibit 8). In

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[1]*See also* Blum aff, exhibits 3, 4, 5, 7 and 9 all to the effect that the transaction was "subject to documentation"

fact, Luxor's counsel had direct contact both of them by November 7 (Blum aff, exhibit 11, NYSCEF Doc No 59). It also is undisputed that Amanat did not perform his part of the trade of selling the pre-IPO Twitter shares. In this context, it is evident that Seaport's promise to sell the shares to Luxor was implicitly conditioned on its ability to obtain the shares from Amanat (*see e.g. Elvin Assocs. v Franklin*, 735 F Supp 1177, 1183-1184 [SD NY 1990] [theater producer's inability to obtain financing released him from duty to perform because plaintiff could not reasonably believe he committed unconditionally to produce the show without first obtaining sufficient funding]).

In *United States SEC v Zwick* (2007 WL 831812, *11, 2007 US Dist LEXIS 19045 [SD NY 2007], *affd* 317 Fed Appx 34 [2d Cir 2008]), the court in discussing the issue of the propriety of the markup charged by a riskless principal, acknowledged that such a party provides a service of matching buyers with sellers for the securities, and exacts a transaction fee for its service. In dicta, the court recognized that these transactions posed no risk to that party. The court also quoted from the SEC's expert in that case, who explained that a riskless transaction "is one in which the trader incurs little or no risk because the trader purchases and sells the security simultaneously" (*id.* at *3).

Luxor contends that the non-delivery of shares is an insufficient defense, and that Seaport was obligated to go out and purchase the securities on the open market if its seller failed to deliver them. In support, it submits a Federal Reserve Bulletin, dated December 1989 (Levy aff, exhibit DDD at 7) which states, in part, that where a counterparty fails to deliver the securities in a riskless principal transaction, the broker would have to "proceed against the defaulting party for breach of the agreement to buy or to sell securities." That Bulletin, however, also explains that a riskless principal "does not confirm the transaction with its customer until the securities have been purchased from the third-party dealers. In other words, if the broker-dealer for some reason does not complete the purchase of the securities ordered by the customer, it has not [sic] obligation to provide the securities to the customer " (*id.* at 5 [citation omitted]). It further explains that as a riskless principal, the company "would not be obligated to its customer to buy or sell securities until after an offsetting purchase or sale of the securities has already been executed" (*id.* at 6). As defendants argue, this makes sense, because, otherwise, either party could walk away from a trade prior to settlement and leave the riskless principal responsible.

Luxor's reliance on *Clarex Ltd. v Natixis Sec. Americas LLC* (2014 WL 4276481, *12, 2014 US Dist LEXIS 121335 [SD NY 2014]), to support its assertion that a principal is not excused if its counterparty fails to deliver the securities where delivery was not an express condition, is unpersuasive. The case is distinguishable both procedurally and on the facts. First, it is factually distinguishable because the defendant in that action was not a broker or riskless principal. Rather, it was a principal to a two-party contract claiming impossibility of performance based on market conditions. The court found, after a jury verdict and on request for a new trial and judgment, that the defendant had previously waived this defense, and could not rely on it now. The court's statement on the substance of the impossibility defense was dicta. Here, in contrast, Seaport was a riskless principal and is not claiming impossibility, but the failure of a predicate condition to a Seaport-Luxor contract, the delivery of the shares by Amanat.

Lehman Bros., Inc. v Piper Jaffray & Co. (2008 NY Misc LEXIS 8016 [Sup Ct, NY County 2008]), relied upon by Luxor, also is factually distinguishable from this action. That case involved a settled securities trade of a publicly traded security, in which a number of sophisticated investors were mistaken about the number of securities that were being sold. The defendant had agreed to purchase the certificates from a third party, and then immediately resell them "in a back–to-back 'riskless principal' transaction" (*id.* at *6, *12). After the transfer was settled, the mistake was discovered, which resulted in the shares being worth significantly less than the contract price (*see id.* at *22-23). The plaintiff buyer brought claims for breach of contract and rescission. When the defendant seller urged that the court deny plaintiff buyer relief because of the defendant's prior transactions in which it obtained the securities with the same mistaken number, the court rejected the request, finding that defendant failed to present any evidence demonstrating that the plaintiff had any knowledge of the prior trading history (*see id.* at *27). Moreover, that court noted that while the defendant argued that there was a mutual mistake, defendant had failed to assert such an affirmative defense, which, in any event, would have required rescission of the contract, the precise relief the plaintiff was seeking (*see id.* at 27-28).

Here, it is undisputed that Luxor was fully aware that Seaport was acting on behalf of an ultimate seller, Amanat, at least immediately prior to the IPO (defendants' Rule 19-a statement, ¶ 33; plaintiffs' response to defendants' Rule 19-a, ¶ 33). In fact, on November 6, 2013, the day before the

IPO, Luxor was given the name of Amanat's counsel and contact information (Blum aff, exhibit 2 at 5). Luxor then negotiated directly with Amanat (defendants' Rule 19-a statement, ¶ 57; plaintiffs' response to defendants' Rule 19-a, ¶ 57; plaintiffs' Rule 19-a statement, ¶ 74; defendants' response to plaintiffs' Rule 19-a statement, ¶ 74). These negotiations included extended discussion of the amount Amanat would pay Luxor as compensation in event that Amanat failed to deliver the shares. Therefore, even assuming there was a binding contract between Seaport and Luxor, Amanat's delivery of the shares to Seaport was a well understood condition precedent to Seaport's performance, and Amanat's failure to perform excuses Seaport's performance as a matter of law. Summary judgment shall be granted to Seaport, dismissing the complaint.

Accordingly, it is

ORDERED that defendants' motion for summary judgment (motion sequence No. 002) is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiffs' motion for summary judgment (motion sequence No. 003) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: April 15, 2016

E N T E R,

O. PETER SHERWOOD
J.S.C.