STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 8248
7 MILE ADVISORS, LLC and 7M SECURITIES, LLC, Plaintiffs, v. ZAELAB, LLC, Defendant.	**ORDER AND OPINION ON DEFENDANT'S RULE 56(f) MOTION TO DENY OR CONTINUE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

1. **THIS MATTER** is before the Court on Defendant Zaelab, LLC's Rule 56(f) Motion to Deny or Continue Plaintiffs' Motion for Summary Judgment (the "Motion").[1] After considering the Motion, the parties' briefs in support of and in opposition to the Motion, the arguments of counsel at the hearing on the Motion, and other appropriate matters of record, the Court hereby memorializes its oral ruling at the hearing on the Motion and **DENIES** the Motion as moot as set forth below.

Womble Bond Dickinson (US), LLP, by Mark Henriques and Patrick Grayson Spaugh, for Plaintiffs 7 Mile Advisors, LLC and 7M Securities, LLC.

Robinson, Bradshaw & Hinson, P.A., by Andrew W.J. Tarr and Emily J. Schultz, and Faegre Drinker Biddle & Reath, LLP, by Frank F. Velocci, for Defendant Zaelab, LLC.

Bledsoe, Chief Judge.

[1] (Zaelab's Rule 56(f) Mot. Deny or Continue Pls.' Mot. Summ. J. 2 [hereinafter "Rule 56(f) Mot."], ECF No. 27.)

I.

FACTUAL AND PROCEDURAL BACKGROUND

2. Plaintiffs 7 Mile Advisors, LLC ("Advisors") and 7M Securities, LLC (together, "Plaintiffs") are North Carolina limited liability companies that provide financial advisory services for mergers and acquisitions.[2]

3. On 14 September 2021, Defendant Zaelab, LLC ("Defendant" or "Zaelab") entered into a signed letter agreement with Plaintiffs (the "Agreement") wherein Plaintiffs agreed to act as Defendant's exclusive financial advisor in connection with a sale or transfer of Zaelab's equity or assets in exchange for certain non-refundable retainer fees as well as for certain transaction-based additional compensation (a "Transaction Fee" or a "Fee") described in Section 3 of the Agreement. Under the Agreement, a Transaction Fee was payable upon the consummation of a qualifying transaction described in Section 1 (a "Transaction").[3]

4. The Transaction Fee provision in Section 3 provides as follows:

> In further consideration for [Plaintiffs'] services hereunder, if, during the period that [Plaintiffs are] retained by [Defendant] or during the 18-month period thereafter ("Tail Period"), [Defendant] consummates a Transaction or enters into an agreement regarding a Transaction (which is subsequently consummated) with an Acquiror/Investor that was introduced to [Defendant] during the term of this engagement, then [Plaintiffs] shall be paid . . . a Transaction Fee[.]

5. Plaintiffs contend in this lawsuit that they are entitled to a Transaction Fee because Zaelab entered into a Transaction during the Tail Period with Superstep

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[2] (Compl. ¶¶ 4–5, ECF No. 3.)

[3] (Compl. ¶¶ 10–11; Compl. Ex. 1, §§ 1, 3 [hereinafter "Agreement"], ECF No. 3.)

Capital ("Superstep"), an investor Plaintiffs allege was "introduced to Zaelab during the term of the Agreement."[4] When Defendant refused to pay Plaintiffs a Transaction Fee after consummation of the Superstep transaction, Plaintiffs filed this action to recover the Fee, asserting claims against Defendant for breach of contract and, in the alternative, for unjust enrichment.[5] Defendant denies all liability and, among other defenses, contends that the parties' agreement to "pause" the Agreement in February 2022 because of the Russo-Ukrainian War effected a termination of the Agreement long before Superstep was introduced to Defendant.[6]

6. The Court entered a Case Management Order in the above-captioned case on 16 August 2023, setting a fact discovery deadline of 19 January 2024[7] and providing that "[u]nless the parties otherwise agree, no depositions may be taken by either side prior to 30 October 2023."[8] The parties have initiated written discovery, with Defendant producing documents to Plaintiffs on 3 August 2023 and Plaintiffs producing documents to Defendant on 22 September 2023.[9]

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[4] (Compl. ¶¶ 33, 41.)

[5] (Compl. ¶¶ 39–47.)

[6] (Zaelab's Reply Further Supp. Rule 56(f) Mot. 7 [hereinafter "Reply Br."], ECF No. 32; Aff. Ilia Ulianchuk Supp. Pl. 7 Mile Advisors, LLC's Mot. Summ. J., dated Sept. 13, 2023, at ¶ 12 [hereinafter "Ulianchuk Aff."], ECF No. 23.)

[7] (Case Management Order ¶ 11, ECF No. 18.)

[8] (Case Management Order ¶ 12.)

[9] (Zaelab's Br. Supp. Rule 56(f) Mot. 2–3 [hereinafter "Br. Supp."], ECF No. 28; Br. Supp. Ex. A, Aff. Frank Velocci Supp. Zaelab's Rule 56(f) Mot., dated Sept. 25, 2023, at ¶¶ 6, 9 [hereinafter "Velocci Aff."], ECF No. 28.1.)

7. On 13 September 2023, Advisors filed its Motion for Summary Judgment[10] (the "SJ Motion") and supported that motion with an affidavit from Ilia Ulianchuk, Advisors' Vice President (the "Ulianchuk Affidavit").[11]

8. Shortly thereafter, on 25 September 2023, Defendant filed the current Motion, seeking the denial or continuance of the SJ Motion until discovery has been completed.[12]

9. The Court convened a hearing on the Motion on 18 October 2023 (the "Hearing"), at which all parties were represented by counsel. At the Hearing, the Court indicated that it intended to grant the Motion. Thereafter, on 25 October 2023, Advisors withdrew its SJ Motion.[13] The Court issues this Order and Opinion to memorialize its oral ruling at the Hearing granting the Motion and to deny the Motion as moot in light of the subsequent withdrawal of the SJ Motion.

II.

LEGAL STANDARD

10. "[M]otions for summary judgment generally should not be decided until all parties are prepared to present their contentions on all issues raised." *Ussery v. Taylor*, 156 N.C. App. 684, 686 (2003). Rule 56(f) of the North Carolina Rules of Civil Procedure ("Rule") accordingly provides that:

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[10] (Pl. 7 Mile Advisors, LLC's Mot. Summ. J., ECF No. 21.)

[11] (Ulianchuk Aff.)

[12] (Rule 56(f) Mot.) The Court notes that Defendant's Motion mistakenly represents that both Plaintiffs, rather than just Advisors, brought the SJ Motion.

[13] (Pl. 7 Mile Advisors, LLC's Notice Withdrawal Mot. Summ. J., ECF No. 34.)

> [s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

11. "To prevail on a Rule 56(f) motion, the moving party has the burden of showing why additional discovery is necessary and how that discovery will create a genuine issue of material fact." *Ripellino v. N.C. Sch. Bds. Ass'n*, 158 N.C. App. 423, 426 (2003). "Sufficient time for the completion of discovery is one major goal of Rule 56(f)," and the Rule should be applied liberally, especially if the party opposing summary judgment has been diligent and acted in good faith. *Ipock v. Gilmore*, 73 N.C. App. 182, 190 (1985). "[T]he decision to grant or deny a continuance is solely within the discretion of the trial judge and will be reversed only when there is a manifest abuse of discretion." *N.C. Council of Churches v. State*, 120 N.C. App. 84, 92 (1995).

III.

ANALYSIS

12. In accordance with Rule 56(f), Defendant submitted the affidavit of Frank Velocci, one of Defendant's attorneys, to support the Motion.[14] Velocci averred in the affidavit that Defendant had not been afforded sufficient discovery to oppose Advisors' SJ Motion, asserting that Zaelab had not yet been able to "(1) assess Plaintiffs' [discovery] productions to determine whether they thoroughly respond to Zaelab's requests; (2) analyze the contents of Plaintiff[s'] productions to determine

[14] (Velocci Aff.)

whether they evidence various defenses raised by Zaelab; and/or (3) depose Plaintiff[s'] key witnesses, including Ilia Ulianchuk, whose affidavit supports [Advisors'] Motion for Summary Judgment."[15] Despite these limitations, Defendant offered several fact-based defenses at the Hearing, discussed below, based on discovery conducted up to that point in the litigation. Defendant also argued that the terms "introduced" and "during the term of this engagement" in the Agreement were ambiguous and must be interpreted in light of extrinsic evidence that Defendant contended it should be permitted to develop in discovery.[16]

13. In response, Advisors asserted that additional discovery was unnecessary because the Agreement is an unambiguous, integrated agreement requiring payment of a Transaction Fee after an "introduc[tion]" of an Acquiror/Investor to Defendant during the term of the Agreement, regardless of whether or not Plaintiffs were the source of the introduction to Defendant. As a result, Advisors argued that parol evidence was inadmissible to interpret the Agreement's terms, and, further, that because the undisputed facts established that Superstep was introduced to Defendant during the term of the Agreement, Advisors was entitled to summary judgment on its breach of contract claim as a matter of law at this stage of the litigation.[17]

14. After careful review, the Court concluded at the Hearing that Defendant's Motion should be granted. First, Defendant argued that the Superstep opportunity

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[15] (Velocci Aff. ¶ 11.)

[16] (Br. Supp. 6; Agreement § 3.)

[17] (Pl. 7 Mile Advisors, LLC's Opp'n Def.'s Rule 56(f) Mot. 2–3, ECF No. 31.)

was developed within Defendant's board of directors and thus that no party "introduced" Superstep to Defendant at all.[18] Defendant also offered evidence that the parties did not handle the Superstep opportunity consistent with the parties' established course of dealing for potential transactions they agreed could result in a Transaction Fee to Plaintiffs if consummated.[19] Further, Defendant offered evidence that the Superstep opportunity was introduced to Defendant when the Agreement was either paused or terminated and, thus, no enforceable right to a Transaction Fee had ever accrued.[20] Finally, Defendant noted that the Ulianchuk Affidavit contained substantive allegations that bore on Plaintiffs' claims, including factual averments concerning the introduction of Superstep to Defendant and the parties' course of dealing under the Agreement, that Defendant argued it should have an opportunity to explore in discovery.[21]

15. The Court agreed at the Hearing that Defendant should be permitted to explore more completely all of these fact-based defenses to Plaintiffs' claims through discovery before Defendant should be required to respond to, and the Court render its decision on, Advisors' SJ Motion because such discovery may reveal facts that are essential to justify Defendant's opposition to the SJ Motion. Accordingly, the Court ruled, in the exercise of its discretion, that it intended to enter a written order

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[18] (Reply Br. 4)

[19] (Reply Br. 5–6; Reply Br. Ex. A, ECF No. 32.2.)

[20] (Reply Br. 6–8.)

[21] (Ulianchuk Aff. ¶¶ 9–10.)

granting Defendant's Motion and staying the period within which Defendant must respond to Advisors' SJ Motion. Prior to the entry of this written Order and Opinion, however, Advisors, in reliance on the Court's oral ruling, withdrew its SJ Motion, thereby rendering Defendant's Motion moot. *See, e.g.*, *Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 398–99 (1996) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

IV.

CONCLUSION

16. **WHEREFORE**, based on the foregoing, the Court hereby **DENIES** Defendant's Motion as moot.

SO ORDERED, this the 8th day of November, 2023.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge