

NYSCF D SUPREME COURT OF THE STATE OF NEW YORK 12/30/2016
NEW YORK COUNTY

PRESENT: BARRY R. OSTRAGER
JSC Justice

PART 61

Index Number : 654765/2016
TILLAGE COMMODITIES FUND, L.P.
vs.
SS&C TECHNOLOGIES, INC.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is *granted to the extent provided in the accompanying memorandum decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12-22-16

Barry R. Ostrager, J.S.C.

BARRY R. OSTRAGER
 NON-FINAL DISPOSITION
JSC

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

_____ X
TILLAGE COMMODITIES FUND, L.P.,

Plaintiff,

Index No. 654765/2016

-against-

Motion Seq. No. 001

SS&C TECHNOLOGIES, INC.,

Defendants.

_____ X
OSTRAGER, J:

Before the Court is a motion by defendant SS&C Technologies, Inc. (SS&C) to dismiss this action in its entirety pursuant to CPLR § 3211(a)(1) and (7) based on documentary evidence and failure to state a cause of action. For the reasons stated below, the motion is granted in part and denied in part.

Simply stated, plaintiff Tillage Commodities Fund L.P. (Tillage) is an investment fund started in March 2012 solely to trade commodity futures through its single account at a U.S. futures broker. Defendant SS&C is one of the largest hedge fund and private equity fund administrators. The parties entered into an Agreement to Provide Administration Services dated December 6, 2011 which, among other things, authorized SS&C to transfer funds from Tillage's account in a secure manner pursuant to Tillage's instructions (the "Services Agreement", Exh 1 to motion).

Beginning in or about March 2016, SS&C transferred via wire from the Tillage account sums totaling \$5.9 million. When SS&C contacted Tillage with a question about accounting reporting requirements, Tillage allegedly learned of the transfers for the first

time, and the parties realized that the transfers had resulted from third-party fraud allegedly involving a Chinese technology company and a Hong Kong bank. The matter was reported to the Hong Kong police, and an investigation was completed. Tillage then commenced this action against SS&C to hold defendant responsible for the fraudulent transfers. The causes of action asserted include breach of contract, breach of the implied covenant of good faith and fair dealing, violation of General Business Law (GBL) §349, and violation of GBL §350.

In support of its request to dismiss the breach of contract claim, SS&C argues that its obligations under the contract were limited and did not include, for example, a duty “to ensure that all fund activities are subject to appropriate authorization and oversight” as alleged in the complaint. Further, and more significantly, SS&C argues that the Services Agreement contains a broad limitation of liability clause that provides in relevant part that: “SS&C shall not be liable to a Fund or Management except for damages resulting from the gross negligence, willful misconduct, fraud, or bad faith of SS&C.” SS&C asserts that Tillage has failed to allege any conduct that rises to that level.

The Services Agreement is a lengthy document that imposes significant responsibilities on SS&C. Accepting the allegations in the complaint as true, as the Court must on a pre-answer motion to dismiss, the Court finds that the pleadings suffice to state a cause of action. The Court further declines to find that the limitation on liability clause bars this action as a matter of law. “Ordinarily the question of gross negligence is a matter to be determined by the trier of fact.” *Lubell v Samson Moving & Stor.*, 307

AD2d 215, 216 (1st Dep't 2003), citing *Food Pageant v Consolidated Edison Co.*, 54 NY2d 167, 172-73 (1981). What is more, the First Department has construed "gross negligence" to include "conduct that evinces a reckless disregard for the rights of others"; while "intentional wrongdoing" also qualifies, such proof is not required. *Lubell*, 307 AD2d at 216. Therefore, the breach of contract claim survives dismissal at this stage of the litigation, including claims relating to the investigation of the fraud as the Court sees no need to carve out that time period based solely on the terms of the contract.

Turning to the Second Cause of Action for breach of the implied covenant of good faith and fair dealing, Tillage acknowledges that the claim overlaps with the breach of contract claim but seeks to include it as an alternative theory of liability in the event the Court finds ambiguities in the contract. As so limited, the Court will allow the claim to stand, without prejudice to renewal of the motion after some discovery has completed.

Dismissal of the remaining two causes of action is warranted. Simply stated, GBL §349 deals with deceptive practices, and GBL §350 deals with false advertising. Both statutes are directed at "consumer-oriented" conduct; that is, "acts or practices [that] have a broader impact on consumers at large. Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute ..." *Oswego Laborers' Local 215 Pension Fund, et al., v Marine Midland Bank, N.A.*, 85 NY2d 20, 24 (1995) (citations omitted). Allegations made by Tillage based on statements SS&C allegedly made to the general public when advertising its services are not sufficiently tied to any

injury suffered by plaintiff to state a claim for relief under the GBL in this action based on a business relationship between two private parties.

Accordingly, it is hereby

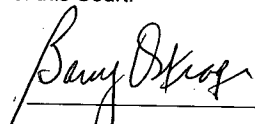
ORDERED that defendant's motion is granted to the extent of directing the Clerk to sever the Third and Fourth Causes of Action and to enter judgment dismissing those claims; and it is further

ORDERED that the balance of the motion is denied and the remaining claims shall continue; and it is further

ORDERED that defendant shall serve its Answer by January 20, 2017 and the parties shall appear for a compliance conference on January 31, 2017 at 9:30 a.m. in Room 341.

This constitutes the decision and order of this Court.

Dated: December 22, 2016



J.S.C.

BARRY R. OSTRAGER
JSC