

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS  
*Justice*

PART 53

**E-FILE**

Caesars Bahamas

INDEX NO. 600740/09

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

Baha Mar

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

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

is decided in accordance with accompanying memorandum decision and order.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk, and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must E-File certificate requesting Entry of Judgment with a copy of the order and/or judgment attached.

*Handwritten signature/initials*

Dated: 1/22/2010

*Handwritten signature*  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

NY SUPREME COURT E-FILED AS DOCUMENT #

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION  
-----X  
CAESARS BAHAMAS INVESTMENT CORPORATION,

Plaintiff and  
Counterclaim Defendant,

-against-

Index No.  
600740/08

BAHA MAR JOINT VENTURE HOLDINGS LTD.  
and BAHA MAR JV HOLDING LTD. and BAHA  
MAR DEVELOPMENT COMPANY LTD.,

Defendants and  
Counterclaim Plaintiffs,

-----X  
BAHA MAR JOINT VENTURE HOLDINGS LTD.  
and BAHA MAR JV HOLDING LTD. and BAHA  
MAR DEVELOPMENT COMPANY LTD.,

Third-Party Plaintiffs

-against-

HARRAH'S OPERATING COMPANY, INC.,

Third-Party Defendant.

-----X

**Charles Edward Ramos, J.S.C.:**

This action arises out of a failed joint venture to develop a destination resort in The Bahamas.

Plaintiff/counterclaim defendant Caesars Bahamas Investment Corporation (CB) and third-party defendant Harrah's Operating Company Inc., (Harrah's) move for summary judgment as to their claims and to dismiss the claims of defendants/counterclaim-third-party plaintiffs Baha Mar Joint Venture Holdings Ltd. (JV Company), Baha Mar JV Holding Ltd. (Baha Mar Holding) and Baha Mar Development Company Ltd. (Baha Mar Development) (together, with Baha Mar Holding, Baha Mar), and for attorneys' fees, expert

and litigation fees and expenses.

Baha Mar cross-moves for summary judgment on their first counterclaim/third-party claim for breach of contract, the sixth third-party claim for breach of guaranty, and to dismiss CB's claim for declaratory judgment, and seek specific performance, in addition to attorneys', expert and litigation fees.

### **Background<sup>1</sup>**

On November 2, 2005, Baha Mar Development<sup>2</sup> and Harrah's signed a letter of intent to form a joint venture to develop a \$2.6 billion destination resort in The Bahamas to include hotels, a casino, a golf course, a 20-acre pool and a convention center (the Project).

On January 12, 2007, CB,<sup>3</sup> Baha Mar Holding (together, the Investors), and the vehicle created for the development of the Project, JV Company, concurrently executed a subscription and contribution agreement (Subscription and Contribution Agreement (Subscription Agreement) and a joint venture agreement (Investors Agreement) (together, Agreements).

The Subscription Agreement set forth the parties' rights and obligations with respect to contribution of capital to JV Company.

---

<sup>1</sup> The facts set forth herein are taken from the parties' Rule 19-A Statements and agreements, unless otherwise noted.

<sup>2</sup> Baha Mar Development is an affiliate of Baha Mar Holding.

<sup>3</sup> Plaintiff CB is wholly-owned by third-party defendant Harrah's.

The Investors Agreement regulated certain aspects of the Investors' relationship with respect to the Project, including the receipt of shares in the JV Company.

The Agreements required CB, Baha Mar Holding and Harrah's<sup>4</sup> to make initial capital contributions of \$280 million, at the closing. Simultaneously with their contributions, CB and Baha Mar would obtain membership shares in JV Company (Subscription Agreement, § 4.1; Investors Agreement, §§ 2.1). Further, the Agreements contemplated that after closing occurred, JV Company would obtain the remaining financing of at least \$2.1 billion needed to complete the Project (Investors Agreement, § 4).

The parties' obligation to consummate closing transactions was subject to the fulfillment of certain conditions (Subscription Agreement, § 9.1). The Agreements permitted either party to terminate the Agreements and abandon the Project at any time prior to closing (Subscription Agreement, Article 10, Investors Agreement, § 13.16). Upon termination, the parties' obligations would become null and void (*Id.*).

Closing was originally scheduled for March 15, 2007 (Subscription Agreement, § 10). By letter agreements, the Investors twice extended the closing date, to June 30, 2007, and to December 31, 2007 (Exhibit E, annexed to the Kearney Aff.).

---

<sup>4</sup> Contemporaneously with the execution of the Agreements, Harrah's executed the "Baha Mar Joint Venture Guaranty" (Guaranty), under which Harrah's agreed to guarantee certain obligations of CB to make capital contributions to the JV Company in accordance with the Agreements.

Closing did not occur on December 31, 2007. Nonetheless, the Investors continued to work to satisfy the conditions contained in the Subscription Agreement, including obtaining government approvals, deliverance of a trademark license agreement, procurement of insurance, and Baha Mar Development's negotiation and execution of a supplement to the "Heads of Agreement"<sup>5</sup> (SHOA) that it had previously entered into with the Bahamian government (Subscription Agreement, § 9.1 [b, g, j, k]).

On December 29, 2007, Baha Mar requested that CB execute a written agreement extending the closing date from December 31, 2007 to January 31, 2008. CB declined to sign the proposed extension (Exhibit L, annexed to the Kearney Aff.).

On January 31, 2008, Baha Mar Development, JV Company and the Bahamian government executed the SHOA (Exhibit G, annexed to the Kearney Aff.). CB executed the SHOA in its capacity as a shareholder of JV Company, "and not as a party to the HOA" (*Id.*). In addition to providing for the lease and sale of certain real property for the Project, the SHOA memorializes the increase in the scope of the Project and JV Company's participation (SHOA, §§ 1, 4.2).

---

<sup>5</sup> The initial Heads of Agreement, executed by Baha Mar Development and the government of The Bahamas in April 2005, provided for the sale and lease of certain land for the construction of the Project, in addition to detailing the scope, time frame, and cost of the Project and the cooperation of the parties.

As set forth in the Subscription Agreement, the SHOA was to be assigned by Baha Mar Development to the JV Company at closing.

On February 13, 2008, Baha Mar requested that CB execute a written agreement extending the closing date to April 30, 2009 (Exhibit M, annexed to the Kearney Aff.). CB declined to sign it. At the time, Harrah's became concerned about the prospects for obtaining financing for the Project in a tightening credit market (Ludwig Deposition 26:6-10, 41:7-19; Izmirlian Deposition 158:21-24, 159:2-7).

On March 6, 2008, CB notified Baha Mar that it was exercising its right to terminate the Agreements after concluding that "it is unlikely the project can succeed as currently structured" (Exhibit V, annexed to the Kearney Aff.).

According to Baha Mar, CB and Harrah's misrepresented that Harrah's new private equity owners<sup>6</sup> had already decided not to proceed with the Project long before CB's purported termination.

A week after sending its notice of termination, CB commenced this action seeking a declaration that it validly exercised its right to terminate the Agreements.

Baha Mar filed an answer with counterclaims and a third-party complaint against Harrah's for breach of the Investors Agreement, breach of fiduciary duty, promissory estoppel, equitable estoppel, negligent misrepresentation, breach of Guaranty against Harrah's, and fraud. In addition to damages, Baha Mar seeks specific performance of the Agreements.

---

<sup>6</sup> On January 28, 2008, investment vehicles managed by Apollo Management L.P. and Texas Pacific Group closed a leveraged buyout to acquire the parent company of Harrah's and CB (CB's Rule 19-A Statement, ¶ 28).

## Discussion

CB moves for summary judgment dismissing Baha Mar's counterclaims and seeks a declaration that, under the plain meaning of Article 10 of the Subscription Agreement, CB properly exercised its right to terminate. Further, CB asserts that no triable issues of fact remain concerning whether it agreed to extend the closing date, or otherwise, that it waived its right to termination by agreeing to the SHOA.

In opposition and in support of its own cross-motion for summary judgment, Baha Mar contends that, by executing the SHOA, CB committed the Investors to the Project, and Article 10 of the Subscription Agreement cannot be interpreted to permit the breach of the SHOA. Furthermore, Baha Mar argues that, in any event, CB waived its right to terminate the Project by executing the SHOA, or alternatively, that CB should be estopped from terminating.

### I. Breach of Contract

#### A. Right of Termination

Article 10 of the Subscription Agreement states,

"This Agreement may be terminated and the transactions contemplated hereby may be abandoned **at any time prior to Closing by either Investor** if the Closing has not occurred by March 15, 2007 or such other date, if any, as the Investors shall agree (the "Outside Closing Date"), to be consummated on or prior to the Outside Closing Date. Upon such termination ... all further obligations of the Parties shall be null and void and no Party (...) shall have any liability to any other Party, unless the basis for such termination was the failure by such Party to fulfill its covenants and agreements set forth herein" (emphasis

added).<sup>7</sup>

"Closing" is earlier defined in the Subscription Agreement as follows:

"The closing of the transactions contemplated by this Agreement (the "Closing") shall be held ... (...) within ten (10) Business Days **after the conditions to Closing set forth in Article 9 hereof have been satisfied or waived**, or such other time or date as the Parties may mutually agree upon in writing" (emphasis added).

A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms, without reference to extrinsic evidence (*RM Realty Holdings Corp. v Moore*, 64 AD3d 434, 440 [1<sup>st</sup> Dept 2009]).

Under the plain meaning of Article 10 of the Subscription Agreement, the parties unambiguously agreed that either CB or Baha Mar had the unconditional right to terminate the Subscription Agreement and abandon the Project at any time prior to the Outside Closing Date.

It is undisputed that the Outside Closing Date was extended by letter agreement to December 31, 2007, that this date passed without a closing, and that the parties did not mutually agree in writing, as the Agreements required, to extend Closing beyond this date.

---

<sup>7</sup> Section 13.16 of the Investors Agreement contains a parallel provision that states,

"Notwithstanding anything to the contrary contained in this Agreement, if the Subscription and Contribution Agreement is terminated in accordance with Article 10 thereof prior to the Closing, this Agreement shall automatically terminate and be of no force and effect."

Consequently, unless Closing did not occur as the result of either Investors' failure to fulfill a contractual obligation (which neither party alleges), Article 10 permitted the parties to terminate the Subscription Agreement and abandon the Project.

Baha Mar rejects the Court's construction of Article 10 on the ground that it requires an assumption that the parties intended the Subscription Agreement to authorize the breach of a third-party contract, the SHOA. According to Baha Mar, this is an unlawful result, which is unenforceable.

Regardless of whether the parties actually intended to permit the breach of third-party agreements by inclusion of Article 10, the plain language of Article 10 grants either party an unconditional right to terminate the Agreements and abandon the Project at any time prior to Closing.

The Court also rejects Baha Mar's contention that execution of the SHOA committed CB to go forward with the Project.

The SHOA did not, and could not, have bound the JV Company to complete the Project. As set forth in the Agreement, the parties were not obligated to fund the JV Company, nor was the JV Company obligated to obtain financing, until after Closing of the Agreements<sup>8</sup> (Subscription Agreement §§ 4.1, 4.2; Investor Agreement §§ 2.1, 4).

---

<sup>8</sup> Incidentally, the Prime Minister of The Bahamas was quoted in the online edition of The Bahamas Journal, just two days after CB sent its notice of termination to Baha Mar, that Harrah's "have no legally binding commitment to The Bahamas. All of their agreements are with Baha Mar" (Exhibit B, annexed to the Kearney Aff.).

Further, the SHOA is an agreement between the Bahamian government, Baha Mar Development and JV Company. According to the SHOA, JV Company "**will be beneficially owned**" fifty-seven percent by Baha Mar, and forty-three percent by CB (emphasis added) (SHOA, § D).

CB itself is not a party to the SHOA or the original HOA. The original HOA is between the Bahamian government and Baha Mar Development (Exhibit 5, annexed to the Carroll Aff.). CB executed the SHOA as a shareholder of JV Company and "not as a party to the HOA or this Supplement [the SHOA]." <sup>9</sup> Baha Mar points to no language in the SHOA that states that, by agreeing to the SHOA in the capacity as a shareholder of JV Company, CB intended to modify or otherwise waive any of its rights under the Agreements, including its right of unconditional termination prior to Closing. Neither does the SHOA specify an alternative or extended Outside Closing Date.

For these reasons, the SHOA is not incompatible with the party's maintenance of a termination right under the Agreements.

#### B. Express Conditions Precedent

In addition, the Subscription Agreement contains the unmistakable language of intent to create express conditions precedent to the duty of either party to consummate Closing (see *Seaport Park Condo. v Greater New York Mut. Ins.*, 39 AD3d 51, 55

---

<sup>9</sup> The Subscription Agreement required the execution of the SHOA in order to memorialize the expansion of the Project and JV Company's participation (Subscription Agreement, § 9.1 [g]; SHOA, § F).

[1<sup>st</sup> Dept 2007]).

Baha Mar's assertion that the execution of the SHOA was the only relevant condition precedent to Closing (Forelle Aff., ¶ 15), and that the parties did not intend to maintain a walk-away right after execution of the SHOA, is meritless.

Execution of the SHOA was one of at least nineteen express conditions precedent that had to be fulfilled prior to Closing (Subscription Agreement, § 9.1).

Notably, Baha Mar does not contend that all of the conditions precedent were satisfied at the time that CB purported to exercise its Article 10 termination right. Rather, Baha Mar urges this Court to ignore the plain meaning of the language contained in the Subscription Agreement that calls for the fulfillment of conditions precedent before the duty to consummate Closing arises.

In the alternative, Baha Mar argues that CB and Harrah's "should not be permitted to use the existence of certain minor closing items as of March 6, 2008 to excuse its termination ... [CB and Harrah's] understood when they signed the SHOA that the remaining closing items were uncontroversial and would be quickly satisfied" (Baha Mar's Opp., 22). However, express conditions must be literally performed, unless the condition is excused by waiver, forfeiture or modification (*Oppenheim & Co. v Oppenheim*, 86 NY2d 685, 690 [1995]).

In the alternative, Baha Mar maintains that CB waived its rights to terminate and insist on performance of the remaining

conditions precedent, and/or should be estopped from relying upon the failure of conditions precedent.

### C. Waiver and Estoppel

The parties acknowledged that the Agreements "constitute the entire agreement between the Parties pertaining to the subject matter of this Agreement," and that no amendment or waiver would be binding unless executed in writing by the Party to be bound (Subscription Agreement, § 11.11, Investors Agreement, § 13.5).

Unambiguous non-waiver clauses are uniformly enforced (*Rosenweig v Givens*, 62 AD3d 1, 7 [1<sup>st</sup> Dept], affirmed 13 NY3d 774 [2009]). Nonetheless, contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]). Such abandonment may be established by affirmative conduct or by failure to act "so as to evince an intent not to claim a purported advantage" (*Id.*). However, waiver should "should not be lightly presumed" and must be based upon "a clear manifestation of intent to relinquish a contractual protection" (*Id.*).

Baha Mar offers no evidence from which a clear manifestation of intent by CB to abandon its contractual right of termination or of insistence of satisfaction of conditions prior to the scheduling of Closing could be reasonably inferred.

The record demonstrates CB's continuing efforts to insist on fulfillment of the conditions to Closing before and after the execution of the SHOA, thereby negating a showing of affirmative

conduct or a failure to act so as to evince an intent to waive rights under the Agreements.

For instance, in an e-mail authored by Scott Wiegand, Harrah's in-house counsel, to Baha Mar, he comments on his review of a draft of the SHOA. Wiegand states,

"It looks as if you [Baha Mar] are seeking our agreement that all conditions to closing are satisfied by this SHOA. **That certainly isn't the case.** There are a list of others, including parliamentary approvals and the like, which remain outstanding" (emphasis added) (Exhibit AA, annexed to the Kearney Aff. at 00223639).

Several days later, Wiegand states,

"We will fix to state that this SHOA satisfies only certain specific conditions precedent in the subscription agreement, not all conditions" (Exhibit LL, annexed to the Kearney Aff. at 0095161).

Thereafter, Baha Mar proposed a contractual term in the draft SHOA that stated that CB "acknowledges that ... the HOA as modified ... satisfies the conditions for the Closing contemplated by the Joint Venture Agreement." In response, Wiegand states,

"WE CAN'T SAY THIS: THIS TEES UP A LARGER DISCUSSION THAN THIS SUPPLEMENTAL HEADS [SHOA]. **THIS [SHOA] MIGHT SATISFY CERTAIN CONDITIONS IN THE SUBSCRIPTION AGREEMENT, NOT ALL OF THEM,** AND THERE REMAIN A NUMBER OF ISSUES OF CLOSING AND IN THE JV AGREEMENT ITSELF" [caps in original] (emphasis added) (Exhibit AA, annexed to the Kearney Aff. at CBIC 00223652).

Further, Baha Mar twice requested that CB execute written agreements extending the Closing date. First, on December 29, 2007, Baha Mar requested that CB agree to an extension to January 31, 2008, and on February 13, Baha Mar sought CB's agreement to extend to April 30, 2009 (Exhibits L-N, annexed to the Kearney

Ex.). CB declined to agree to extend the Closing date on both occasions, the second of which occurred subsequent to the signing of the SHOA.

In light of documentary evidence demonstrating that CB continued to insist on completion of contractual conditions after execution of the SHOA, Baha Mar fails to establish its prima facie entitlement to summary judgment on its claim for breach of contract, or to raise a triable issue that CB's conduct demonstrates waiver of the contractual protection of Articles 2 and 10 of the Subscription Agreement that permits termination of the Subscription Agreement and abandonment of the Project prior to Closing.

Additionally, Baha Mar fails to raise a triable issue that it was misled or otherwise relied upon CB's conduct into believing that CB intended to abandon its right to termination or that CB would not insist on satisfaction of conditions prior to Closing.

In actuality, the record contains evidence that Baha Mar understood that execution of the SHOA was one of several conditions to Closing that remained to be satisfied.

For instance, an early draft of the SHOA provided that Closing of the Investors Agreement was conditioned, "among other things," upon execution of the SHOA (Exhibit BB, annexed to the Kearney Aff, 85367). In circulating a draft, Baha Mar counsel indicated by e-mail that,

"There are other things that must be completed before the

joint venture becomes effective. These things include finalization of an agreement with Issa, parliamentary resolutions, transfer of property to the Joint Venture, Central Bank approval etc. (*Id.*).

CB requested that the phrase "among other things" remain in the final draft of the section of the SHOA applicable to Closing of the Investors Agreement.

Initially, Baha Mar's counsel responded that it will change the wording of the section, stating, "We [Baha Mar] will fix to state that this SHOA satisfies only certain specific conditions precedent in the subscription agreement, not all conditions" (Exhibit LL, annexed to the Kearney Aff., 95161).

Ultimately, the phrase was removed from the final draft. Baha Mar's vice president explained to CB that the phrase was deleted so as not to "risk upsetting the apple cart. For one thing, technically the language doesn't say the SHOA is the sole condition necessary for closing, it isn't exclusive as a matter of plain English interpretation" (Exhibit CC, annexed to the Kearney Aff., 530481).

In the absence of raising a triable issue that Baha Mar was misled or that it significantly or justifiably relied, an essential element of estoppel is lacking (*see Fundamental Portfolio Advisors*, 7 NY3d at 106-07).

In contrast, CB has met its prima facie burden demonstrating entitlement to summary judgment based on the plain language of the Subscription Agreement and its valid exercise of the termination right set forth in Article 10.

#### D. Specific Performance

In light of the Court's determination that CB did not breach the Agreements by validly exercising its right to terminate, specific performance, that is only available in the event of a breach of the Agreements, is unavailable as a remedy (Investors Agreement § 13.1).

In any event, specific performance is untenable, in light of Baha Mar's disclosure that, on March 9, 2009, it entered into transactions with the Export-Import Bank of China and China State Construction Engineering to develop a replacement project, in the same location and scope as this Project.

#### II. Breach of the Guaranty

Harrah's moves to dismiss the claim for breach of contract based upon the Guaranty on the ground that it cannot be maintained in the event of the Court's dismissal of the breach of contract claim asserted against CB.

As is plainly set forth therein, the Guaranty only becomes effective at Closing. If the Subscription Agreement is terminated prior to Closing, the Guaranty automatically terminates. The Guaranty states,

"This Guaranty shall be effective on the Closing Date ... if the Subscription and Contribution Agreement is terminated in accordance with Article 10 thereof prior to the Closing Date, this Agreement shall thereupon automatically terminate and be of no force and effect" (underline in original) (Guaranty, § 1).

In light of this Court's determination that the Subscription Agreement was properly terminated prior to Closing, the Guaranty

never became effective. Thus, no breach of contract claim can lie.

## II. Baha Mar's Tort Counter-Claims

### A. Fraud

Baha Mar's fraud claim is premised upon evidence that CB and Harrah's misrepresented their intent to proceed to Closing when CB committed to go forward with the Project by agreeing to the SHOA on January 30, 2008, while concealing that Harrah's new private equity owners had no intent to go forward with the Project. The intent not to proceed to Closing was purportedly made at a Harrah's meeting on January 28, 2008, just days prior to the execution of the SHOA.

A false statement of intention may be sufficient to support an action for fraud, even where that statement relates to an agreement between the parties (*Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 122 [1995]), where the alleged fraud is independent of the contractual obligations of the parties, and based on some additional representation, omission or conduct other than the agreement itself (e.g. *Century 21, Inc. v F.W. Woolworth Co.*, 181 AD2d 620, 625 [1<sup>st</sup> Dept 1992]).

Baha Mar's fraud claim fails because it is unsupported by any evidence that CB and Harrah's knowingly intended to deceive Baha Mar with respect to unconditionally going forward with the Project (*First Nat. State Bank of New Jersey v Irving Trust Co.*, 91 AD2d 543, 544 [1<sup>st</sup> Dept 1982], *affirmed* 59 NY2d 991 [1983]), and as to the requisite element of reasonable reliance (*J.A.O.*

*Acquisition Corp. v Stavitsky*, 23 AD3d 200, 201 [1<sup>st</sup> Dept 2005],  
*rearg denied* 8 NY3d 939 [2007]).

First, there is simply no evidence that CB and Harrah's made a definitive decision on January 28, 2008 to abandon the Project, while agreeing to the execution of the SHOA just days later.

According to Baha Mar, it discovered the fraud during the deposition of Harrah's CEO, Gary Loveman, who testified that "a view was forming in the late part of January that proceeding with the project was probably not a good idea at that time," a sentiment raised and discussed at the January 28 meeting (Loveman Deposition 50:17-19). However, Loveman further testifies that he did not recall anyone actually discussing the possibility of termination of the Project at that meeting (*Id.* 59:9-13).

CB's Marc Rowan, who also attended the meeting, similarly testified that, although CB's and Harrah's "were not prepared to move forward at that point" with the Project in its "current iteration," "there had been no plan decided" with respect to whether or not to proceed (Rowan Deposition, 219:1-11, 221:2).

Further, while Harrah's was concerned about the ability to procure financing in a tightening credit market (Halkyard Dep. 102:15-19), CB and Harrah's communicated these concerns to Baha Mar, thereby undermining any contention that CB and Harrah's was intending to deceive it.

For several weeks following the signing of the SHOA, the parties openly worked to address Harrah's financing concerns, and even participated in several conferences with banks to discuss

financing options (see e.g. Exhibits T, Y-X annexed to the Kearney Aff.; Izmirlian Deposition 158:9-25, 159:2-16).

Other evidence in the record demonstrates that Baha Mar was aware that Harrah's had developed concerns about the prospects for procuring financing, and that it may even elect to abandon the Project (Forelle Deposition 69:14-19, 71:2-25<sup>10</sup>; Ludwig Deposition 15:10-25, 26:6-25; Exhibits 40<sup>11</sup>, 43-44, 50 annexed to the Carroll Aff.). One Baha Mar attorney even testified that, on or about February 18, 2008, he discussed the prospect for litigation with Harrah's over the possibility of termination (Djerejian Deposition 245:6-13).

Therefore, because Baha Mar fails to raise triable issues of fact with respect to requisite elements of a fraud claim, the claim must be dismissed.

#### B. Breach of Fiduciary Duty

Baha Mar's breach of fiduciary duty claim is similarly based upon CB's and Harrah's false assurances regarding its commitment to the Project. Baha Mar maintains that a heightened duty arose by virtue of the parties' co-venture relationship.

CB and Harrah's assert that this claim, in addition to all

---

<sup>10</sup> Counsel for Baha Mar, John Forelle, testified that he began to develop concerns during the first week of February 2008 that CB and Harrah's would elect to abandon the Project.

<sup>11</sup> On February 7, 2008, Baha Mar's CFO and CEO, Ludwig and Izmirlian, exchanged e-mails concerning conference calls with representatives of CB and Harrah's and Barclays and Nova Scotia Bank to discuss "the fears of the current market conditions," and what Harrah's feedback following the call had been.

of Baha Mar's tort claims, fail because they are not separate and distinct from the breach of contract claim.

First, the parties' agreement explicitly disclaims the existence of a fiduciary relationship between Baha Mar and CB, and limits liability to a contract claim. Section 13.9 of the Investors Agreement states,

"To the extent any fiduciary duties are inconsistent with, or would have the effect of modifying, limiting or restricting, or expanding the obligations of the Parties under, the express provisions of this Agreement: (a) the terms of this Agreement shall prevail; (b) this Agreement shall be interpreted in accordance with general principles of contract interpretation without regard to the common law principles of agency (...); and (c) any liability between the Parties shall be based solely on principles of contract law and the express provisions of this Agreement ..."

Although a contractual provision providing that a fiduciary duty will not arise by virtue of an agreement does not automatically preclude the existence of a fiduciary duty (*Frydman & Co. v Credit Suisse First Boston Corp.*, 272 AD2d 236, 237 [1<sup>st</sup> Dept 2000]), Baha Mar fails to raise a triable issue that a heightened relationship arose independent of the Agreements or the Guaranty that Harrah's executed.

Baha Mar merely alleges that a heightened duty arose by virtue of the parties' contractual relationship, absent any evidence of higher trust or confidence that distinguishes an arms-length contractual relationship from a fiduciary one (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19-20 [2005]). In the absence of such evidence, the claim is duplicative of the breach of contract claim (*Pane v Citibank, N.A.*, 19 AD3d 278, 279 [1<sup>st</sup>

Dept 2005])).

C. Promissory and Equitable Estoppel

Baha Mar asserts that Harrah's promise to proceed with the Project by virtue of its signing of the SHOA supports its claims for promissory and equitable estoppel.

A finding of estoppel requires a clear and unambiguous promise upon which the plaintiff reasonably and foreseeably relied to its detriment (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1<sup>st</sup> Dept 2003]).

CB's conduct in signing the SHOA as a shareholder of the SHOA did not manifest a clear and unambiguous promise to proceed with the Project (*see Connaught Tower Corp. v Nagar*, 59 AD3d 218 [1<sup>st</sup> Dept 2009]; *Committee to Save St. Brigid v Egan*, 30 AD3d 356, 356-57 [1<sup>st</sup> Dept 2006]). Neither the language of the SHOA, or CB's conduct, reflects a specific, unambiguous promise on its part to unconditionally commit to the Project.

In other words, CB's signing of the SHOA did not give rise to a legal duty independent of the parties' contractual relationship (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 61 AD3d 614, 615-16 [1<sup>st</sup> Dept 2009]). The Agreements clearly and unambiguously set forth the parties' rights and obligations. Thus, the estoppel claims are duplicative of the claim for breach of contract.

Moreover, even if the CB made subsequent representations inconsistent with the Agreements to the extent of unconditionally committing to the Project, the unambiguous and integrated

Agreements, that contain express conditions to Closing, render reliance on these representations unreasonable as a matter of law (*Ixe Banco, S.A. v MBNA America Bank, N.A.*, 2008 WL 650403, \*12 [SD NY 2008]; see also *Prospect Street Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d 213, 214 [1<sup>st</sup> Dept 2005]).

Accordingly, because Baha Mar fails to raise a triable issue that CB made a clear and unambiguous promise or that it detrimentally relied, the claim must be dismissed.

#### D. Negligent Misrepresentation

Baha Mar's claim for negligent misrepresentation is also premised upon CB's signing of the SHOA, in addition to Harrah's alleged false representations made in early December 2006 that CB had the authority to carry out the Project despite the anticipated private equity buyout of Harrah's.

A claim for negligent misrepresentation requires the existence of a special relationship of trust or confidence, thereby creating a strict duty on the defendant to impart correct information (*Hudson River Club v Consolidated Edison Co.*, 275 AD2d 218, 220 [1<sup>st</sup> Dept 2000]).

Baha Mar fails to raise a triable issue of fact that a heightened duty arose independently of the contractual relationship, and thus, is indistinct from its breach of contract claim.

Further, in January 2007, the month following Harrah's communication of the alleged misrepresentation, CB and Baha Mar agreed that any prior understandings between them was superseded

by the fully integrated Agreements and could not be amended absent a writing signed by both parties (Subscription Agreement, § 11.11; Investors Agreement, § 13.5).

Otherwise, even assuming that Harrah's made representations concerning CB's authority to carry out the Project in December 2006, the parties addressed the issue in a letter agreement (Letter Agreement) on October 4, 2007. In addition to extending the Closing date to December 31, 2007 in the Letter Agreement, CB and Baha Mar agreed in writing that,

"Caesars anticipates that if and when an understanding is reached among principals of Baha Mar and Caesars on the conditions precedent to Closing and related matters, certain Harrah's corporate approvals may be need [sic] to be obtained, and no assurance is provided herein that any such approvals will be forthcoming (Letter Agreement, § 10)."

Thus, to the extent that Baha Mar claims reliance upon oral representations that are inconsistent with the Letter Agreement, a written amendment to the Agreements, the plain terms of the Letter Agreement controls. Therefore, the claim for negligent misrepresentation must be dismissed.

#### IV. Request for Attorneys' and Expert Fees

Both parties request attorneys' and expert fees in addition to litigation costs based upon section 11.5 (c) of the Subscription Agreement that permits the prevailing party in any litigation to cover reasonable fees and costs. It states,

"The prevailing Party in any litigation or other legal action or proceeding arising out of or relating to this Agreement shall be entitled to recover from the losing Party all reasonable fees, costs and expenses incurred by the prevailing Party in connection with such litigation or other legal action or proceeding (...), including reasonable fees,

expenses and disbursements for attorneys, experts and other third parties engaged in connection therewith."

In light of the dismissal of all of Baha Mar's counterclaims, and the award of summary judgment in CB's favor, CB is entitled to recover reasonable attorneys' fees, expert fees and other costs incurred in litigating this action.

Accordingly, it is

ORDERED that Caesars Bahamas Investment Corporation's and Harrah's Operating Company's motion for summary judgment is granted in its entirety and the Clerk is directed to enter judgment in their favor against defendants; and it is further

ORDERED that Baha Mar Joint Venture Holdings Ltd.'s, Baha Mar JV Holding Ltd.'s, and Baha Mar Development Company Ltd.'s cross-motion for summary judgment is denied in its entirety; and it is further

ORDERED and ADJUDGED that Caesars Bahamas Investment Corporation validly exercised its right to terminate the Subscription Agreement, that the Subscription Agreement has been terminated, and that Caesars Bahamas Investment Corporation has no obligation to consummate the transactions contemplated in the Subscription Agreement;

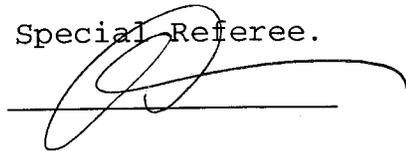
ORDERED that the issue of reasonable attorneys' fees, expert fees and litigation costs incurred by Caesars Bahamas Investment Corporation is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR

4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that following the receipt of the report and recommendations of the Special Referee or designated referee, the parties shall move pursuant to CPLR 4403; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office to arrange a date for the reference to a Special Referee.

Dated: January 22, 2010



J.S.C.

**CHARLES E. RAMOS**

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk, and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must E-File certificate requesting Entry of Judgment with a copy of the order and/or judgment attached.**