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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

S.A. DE OBRAS Y SERVICIOS, COPASA,

Plaintiff,

-against-

THE BANK OF NOVA SCOTIA, *et al.*,

Defendants.

INDEX NO. 651231/2012

MOTION DATE March 14, 2013

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to dismiss.

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion to dismiss is decided in accordance with the accompanying decision and order.

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

Dated: March 22, 2013

O. PETER SHERWOOD, J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

---x

S.A. DE OBRAS Y SERVICIOS, COPASA,

Plaintiff,

DECISION AND ORDER

–against-

Index No. 651231/2012
Mot. Seq. 001

THE BANK OF NOVA SCOTIA and SCOTIABANK GLOBAL BANKING AND MARKETS f/k/a SCOTIA CAPITAL, INC.,

Defendants.

---x

COINTER CHILE, S.A. and AZVI CHILE, S.A. AGENCIA EN CHILE,

Plaintiffs,

–against-

Index No. 651555/2012
Mot. Seq. 001

THE BANK OF NOVA SCOTIA and SCOTIABANK GLOBAL BANKING AND MARKETS f/k/a SCOTIA CAPITAL, INC.,

Defendants.

---x

O. PETER SHERWOOD, J.:

These two related actions were consolidated for pretrial purposes by a so ordered stipulation. By separate motions in each case, defendants, The Bank of Nova Scotia and Scotiabank Global Banking and Markets f/k/a Scotia Capital, Inc. (collectively, "Scotiabank") move to dismiss the complaints under CPLR 3211 (a) (1) and (7).

BACKGROUND

As these are motions to dismiss, the facts are taken from the complaints and are assumed to be true. On March 26, 2010, plaintiffs Cointer Chile, S.A. and Azvi Chile, S.A. Agencia en Chile (collectively, "Cointer"), and S.A. de Obras Y Servicios, COPASA ("COPASA") (collectively, plaintiffs or "Sponsors"), executed an Engagement Letter with defendant Scotiabank pursuant to which Scotiabank would act as the Sponsors' exclusive financial advisor in connection with their bids for the concession of three major road projects in Chile being auctioned by the Government of

Chile through its Ministerio de Obras Publicas, i.e., Ministry of Public Works ("MOP"). Each concession was worth hundreds of millions of dollars. The Engagement Letter divided the scope of Scotiabank's work into two phases. During Phase I ("Bid Stage") Scotiabank was responsible for assisting the Sponsors in the preparation of their bids by "developing and managing the detailed financial models" (the Bid Models) upon which the Sponsors' bids would be based "in accordance with [the] tender requirements" for each project. Phase II was to be triggered upon the Sponsors being selected as the preferred bidder for any project. In that event, Scotiabank was responsible for procuring funding for the project "on the best terms available in the bank and/or capital markets" and assisting the Sponsors in their negotiations through the financial close.

The Sponsors tendered a bid for one of the three road projects: Ruta Norte, Tramo La Serena-Vallenar (the "Project"). Sponsors allege that Scotiabank expressly agreed to undertake responsibility for ensuring the Bid Model was accurate and fully in compliance with the tender specifications. Scotiabank further knew the Sponsors intended to rely "solely on Scotiabank's calculations in the Bid Model" in tendering their final bid to the MOP.

Each bidder for the Project was required to submit, along with its bid, a certificate backed by a bank worth approximately $10 million (the "Bid Bond"). In the event that a bidder withdrew from the Project after acceptance of its bid, the bidder would forfeit the Bid Bond. COPASA and Cointer each contributed approximately $5 million to the Bid Bond.

The Project would be awarded to the party that bid the lowest net present value of the toll road's projected income ("VPI"). The tender documents contained a formula to assist bidders in calculating VPI, and explicitly instructed potential bidders to calculate VPI as of the date on which it was estimated that construction work on the first tranche of the Project would be completed (the "Provisional Completion Date").

Section 2 of the Engagement Letter, under the heading "Fees," provides that "[t]he 'Success Fee' will be payable on a success basis upon the Sponsors reaching Closing for each Project and does not include any standard financing upfront fees." Accordingly, Scotiabank agreed to work without compensation and to be paid by the Sponsors only upon reaching a closing on the Project. A closing never occurred.

Section 20 of the Engagement Letter, titled "Special Damages and Limitation of Liability" provides:

> "Nothing in this Agreement shall be construed as rendering Scotia Capital, its affiliates, its representatives or its external advisers liable, under any circumstances and under any theory of law, to the Sponsors, any member of the Consortium or any other party in respect of any indirect, incidental, special, consequential or punitive damages even if Scotia Capital, its affiliates, its representatives or its external advisers have been advised as to the possibility thereof. The aggregate liability to the Sponsors and any other party, in contract or tort or under statue [sic] or otherwise, for any direct loss or damage suffered by such party arising from or in connection with the services provided hereunder, however the direct loss or damage is caused, including negligence or willful misconduct by Scotia Capital, shall be limited to 50% of the amount of the Success Fee actually received to [sic] any one or more of such persons."

Schedule A of the Engagement Letter (the "Indemnification Agreement") provides:

> "[T]he Sponsors agree to indemnify and hold harmless Scotia Capital . . . from and against all losses, claims (including shareholder actions, derivative or otherwise) damages, expenses, actions or liabilities, joint or several, of any nature (including the reasonable fees and expenses of their respective counsel and other reasonable out-of-pocket expenses), incurred in investigating, defending and settling any pending or threatened action, suit, proceeding, investigation or claim that is made or threatened against any Indemnified Party or in enforcing this indemnity (collectively, the "Claims"), to which an Indemnified Party becomes subject or otherwise involved in any capacity insofar as the Claims arise out of or are based upon, directly or indirectly, the Engagement. This indemnity shall not apply to the extent that any losses, claims, damages, expenses or liabilities are determined by a final non-appealable judicial determination of a court of competent jurisdiction to have resulted solely from the gross negligence or willful misconduct of the Indemnified Party."

The complaints allege that Scotiabank was aware that millions of dollars were at stake with respect to the Sponsors' bid for the Project, that the Sponsors were relying on Scotiabank to provide a model that properly calculated VPI as of the Provisional Completion Date, and that improper calculation of VPI would cause fully foreseeable, significant losses to the Sponsors in the tens of millions of dollars.

Scotiabank expressly agreed that the team responsible for its preparation and review of the Bid Model would be comprised of specific Scotiabank professionals that, according to Scotiabank, collectively possessed the requisite skill and experience to ensure the model conformed with tender specifications. Scotiabank further agreed that in the event that it decided to replace any of the team members, it would first "consult with the Sponsors and ensure that any replacement personnel are qualified and competent to provide the services contemplated hereunder" (Engagement Letter, §22). Despite these obligations, Scotiabank did not inform the Sponsors when members of its team, including Conor Kelly, the managing director overseeing the engagement, were terminated or resigned before the Sponsors tendered their bid. Additionally, Scotiabank did not consult with Sponsors about finding suitable replacements. Instead, Scotiabank delegated "total responsibility for the execution of the Bid Model" to the most junior member of its team, Cesar Bodden, and failed to adequately supervise or review his work for accuracy. (Cointer Compl. ¶36). Bodden was not qualified to develop and manage, without effective supervision and review, a complex financial model that was intended to serve as the basis for a bid worth hundreds of millions of dollars.

The Bid Model Bodden prepared contained serious errors and miscalculations in that it improperly calculated VPI as of the Concession Commencement Date (January 1, 2011), rather than the Provisional Completion Date (January 1, 2014). The errors which ultimately were discovered by the Sponsors, caused the Sponsors' bid to be undervalued by approximately $82 million, nearly $92 million less than the next lowest bid. Had Scotiabank made accurate calculations in the Bid Model, the Sponsors' bid still would have been the lowest, but they would have been selected as the preferred bidder at a price $82 million higher.

As the preferred bidders, Sponsors were requested to formalize their contract for the Project at the awarded price or forfeit the $10 million Bid Bond. Under the tender specifications and Chilean law, the Sponsors were not permitted to change the terms of their bid even though it was based on a serious miscalculation. The Sponsors' selection as the preferred bidders also triggered Scotiabank's Phase II obligations under the Engagement Letter to procure financing for the Project. The engagement letter required Scotiabank to, "work with the Sponsor to achieve timely financial close." The associated scope of work was to include, "[p]rocure funding for the Project on the best terms available in the bank and/or capital markets," "[p]repare an Information Memorandum ("PIM") presenting the Project . . . to prospective funders [and] to [p]resent the PIM to all potential financiers for both bank and capital market executions," "[p]resent the Project to rating agencies . . . to obtain an indicative rating for the Project if a bond infrastructure is a viable option," and "[c]onduct a funding competition among prospective lenders and/or underwriters." (Engagement Letter, §1 at p. 4).

During a December 3, 2010 phone call between the parties, Scotiabank's Co-Head of Global Infrastructure, Matt Giffen, stated that Scotiabank "had never experienced this kind of situation before," and assured the Sponsors that Scotiabank would do its utmost to mitigate the consequences of its error. Scotiabank agreed that it would participate in financing the Project itself on terms that would enhance the Project's profitability. During the negotiations over the terms of Scotiabank's investment, COPASA demanded that Scotiabank take a 49% equity interest in the Project. Scotiabank refused and COPASA terminated its participation in the Project.

Thereafter, Scotiabank continued to negotiate with Cointer in order to salvage the Project. On March 3, 2011, Scotiabank agreed to terms under which it would provide financing for the Project in exchange for 33.3% of the common equity in a corporation that would be set up to manage the Project and upon completing diligence on a third-party construction company to replace COPASA. Scotiabank sent Cointer an email attaching a written "offer" memorializing the parties' oral agreement (the "March 2011 Agreement"). The email and the attachment requested that Cointer "[p]lease confirm acceptance of this offer by way of return email." Cointer responded by email the same day that they accepted the terms of Scotiabank's offer. In reliance on the March 2011 Agreement, Cointer assured the MOP, including in meetings attended by Scotiabank, that it remained committed to the Project.

Despite Scotiabank's agreements in the Engagement Letter and in the March 2011 Agreement to procure and/or provide financing for the Project, by August 2011 Scotiabank had not satisfied either of those obligations. On August 8, 2011, Scotiabank rejected the construction company proposed by Cointer to replace COPASA, and stated that it would not proceed with financing the Project unless Cointer agreed to additional concessions, including a $10 million structuring fee to be paid to Scotiabank.

Cointer rejected Scotiabank's proposed new terms but continued negotiations. On October 10, 2011, Scotiabank sent Cointer another "offer" setting forth Scotiabank's conditions for financing the Project, which it was already obligated to do (the "October 2011 Agreement"). Under the October 2011 Agreement, Scotiabank was to provide financing for the Project in exchange for 50%

of the common equity, with syndication of 50% of that interest to SNC Lavalin, a Canadian engineering and construction company that Scotiabank proposed to replace COPASA. The October 2011 Agreement allegedly stated "[p]lease confirm your acceptance of this offer by way of return email." On October 13, 2011, Cointer sent Scotiabank an email attaching a copy of the October 2011 Agreement signed by Cointer's executives along with a letter that, although expressly reserving their rights under the parties' prior agreements, agreed to proceed under the terms of the October 2011 Agreement, subject to certain conditions, in order to move forward with the Project.

Scotiabank then retreated from its obligations and demanded additional concessions that were inconsistent with the parties' agreement, including a demand that Cointer advance several million Euros of equity financing without Scotiabank and SNC Lavalin making reciprocal contributions. On October 26, 2011, Scotiabank informed Cointer that it had decided not to participate in financing the Project at all. Scotiabank also failed to procure financing from third parties as it was obligated to do under the Engagement Letter.

Due to Scotiabank's failure to provide equity financing for the Project under the March and October 2011 Agreements and/or procure third-party financing for the Project under the Engagement Letter, and because Cointer could not shoulder the costs of the Project alone, Cointer informed the MOP that they were withdrawing from the Project. The Sponsors' inability to complete the Project in accordance with the bid resulted in forfeiture of the $10 million Bid Bond posted by the Sponsors and other damages.

In its complaint COPASA asserts a single cause of action for breach of contract. Cointer asserts eight causes of action: (1) breach of contract (Engagement Letter); (2) gross negligence/recklessness; (3) breach of implied duty of good faith and fair dealing (engagement letter); (4) breach of contract (March 2011 Agreement); (5) breach of implied duty of good faith and fair dealing (March 2011 Agreement); (6) breach of contract (October 2011 Agreement); (7) breach of implied duty of good faith and fair dealing (October 2011 Agreement); and (8) promissory estoppel.

DISCUSSION

I. CPLR 3211 (a) (1) Standard

To succeed on a motion to dismiss, pursuant to CPLR 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180 [1st Dept 2006]). A motion to dismiss pursuant to CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009] [citation omitted]).

CPLR 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, "the contents of which are 'essentially undeniable'" (*id.* at 84-85).

II. CPLR 3211 (a) (7) Standard

On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [citation omitted]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). Indeed, "[s]o liberal is the standard under these provisions that the test is simply whether the proponent of the pleading has a cause of action, not even whether he has stated one" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998] [internal quotation marks omitted]).

While affidavits may be considered on a motion to dismiss for failure to state a cause of action, unless the motion is converted to a 3212 motion for summary judgment the court will not consider them for the purpose of determining whether there is evidentiary support for properly pleaded claims, but, instead, will accept such submissions from a plaintiff for the limited purpose of remedying pleading defects in the complaint (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 "*unless* they 'establish conclusively that [plaintiff] has no cause of action" (*Lawrence v Miller*, 11 NY3d 588, 595 [2008], citing *Rovello v Orofino Realty Co.*, 40 NY2d at 636). In this posture, the lack of an affidavit by someone with knowledge of the facts will not necessarily serve as a basis for denial of a motion to dismiss.

III. Breach of Engagement Letter Agreement

Scotiabank argues that the Engagement Letter indemnifies and otherwise limits the Sponsors' ability to look to Scotiabank to recover their losses, because plaintiffs do not adequately allege that the losses arose from Scotiabank's gross negligence.

A. The Exculpatory, Limitation of Liability and Indemnification Clauses

Scotiabank contends that the express terms of the Engagement Letter bars plaintiffs' recovery. Specifically, in the Engagement Letter, plaintiffs agreed: (1) to exculpate Scotiabank from all consequential damages that might arise in connection with the Project, (2) to limit Scotiabank's liability for direct damages suffered by the Sponsors to 50% of any Success Fee Scotiabank actually received, and (3) to indemnify Scotiabank for all losses incurred as a result of any claim or loss arising from the Engagement, except to the extent that such losses were later determined by a court of law to have resulted solely from Scotiabank's gross negligence or willful misconduct.

"As a general rule, parties are free to enter into contracts that absolve a party from its own negligence . . . or that limit liability to a nominal sum" (*Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d 675, 682-683 [2012]). "However, it is New York's public policy that a party cannot 'insulate itself from damages caused by grossly negligent conduct'" (*id.* at 683, citing *Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]). "Therefore, exculpatory clauses and liquidated damages clauses in contracts are not enforceable against allegations of gross negligence. . . . [G]ross negligence, when invoked to pierce an agreed upon limitation of liability in a commercial contract, must smack of intentional wrongdoing. . . . It is conduct that evinces a reckless disregard for the rights of others (*Abacus*, 79 NY2d at 683 [citations and internal quotation marks omitted]).

Scotiabank maintains that under the exculpatory clause and limitation of liability provision, it is responsible only for direct damages, recovery of which is limited to 50% of the Success Fee it earned. It contends that since Scotiabank did not earn a Success Fee (because the Project never closed), Scotiabank is not liable for any direct damages unless the court finds it was grossly negligent. In that event, the exculpatory and limitation of liability clauses would be rendered void as a matter of public policy.

The Sponsors argue that "by its own terms, the Engagement Letter limits Scotiabank's liability for direct damages to '50% of the Success Fee actually received to Scotia Capital' only in the event that a Success Fee is paid 'upon a Sponsor successfully reaching financial close' . . . —an event that did not occur here. Scotiabank's contention . . . that, prior to a successful financial close, its liability for direct damages is limited to 50% of a $0 fee is based on a flawed interpretation of the contract that plainly was not intended by the parties."

Sponsors misread the relevant provision. The limitation on liability provision provides:

> The aggregate liability to the Sponsors and any other party, in contract or tort or under statue [sic] or otherwise, for any direct loss or damage suffered by such party arising from or in connection with the services provided hereunder, however the direct loss or damage is caused, including negligence or willful misconduct by Scotia Capital, shall be limited to 50% of the amount of the Success Fee actually received to [sic] any one or more of such persons.

The provision plainly applies to the entire Engagement Agreement, at whatever point in time the alleged loss or damage occurs. There is no language in this provision limiting its applicability to the period after a financial close. For the same reason, the court rejects COPASA's claim that the motion must be denied because contracts limiting liability are to be strictly construed against the party seeking to avoid liability (*see Terminal Cent. v Modell & Co.*, 212 AD2d 213, 218-19 [1st Dept 1995]) and the limitation of liability clause is ambiguous in that it is susceptible to more than one interpretation. The court's construction of the provision is consistent with the financial arrangements of the parties which provide that Scotiabank would only be paid if the Sponsors reached a financial close. Understandably, Scotiabank would have little reason to accept exposure to substantial liability when it had no promise of compensation.

Scotiabank also contends that the indemnification provision of the Engagement Agreement insulates Scotiabank from *all damages*, including direct damages. Plaintiffs argue that the indemnification provision does not cover claims between the parties to the Engagement Letter; it applies only to claims brought by third parties against Scotiabank. The court agrees. "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty to which the parties did not intend to be assumed . . . . The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). "[F]or an indemnification clause to cover claims between the contracting parties rather than third-party claims, its language must unequivocally reflect that intent" (*Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 206 [1st Dept 2010]). The indemnification clause in this case does not contain unequivocal language demonstrating an intent for it to apply to claims between the parties.

B. Gross Negligence

Scotiabank argues that plaintiffs have not sufficiently alleged gross negligence. The Court of Appeals recently held that "[g]ross negligence, when invoked to pierce an agreed upon limitation of liability in a commercial contract, *must smack of intentional wrongdoing*. . . . It is conduct that evinces a reckless disregard for the rights of others (*Abacus*, 79 NY2d at 683 [citations and internal quotation marks omitted] [emphasis added]). Gross negligence "differs in kind, not only degree, from ordinary negligence" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823 [1993] [holding that "[t]he failure to wire a skylight, while perhaps suggestive of negligence or even 'gross negligence' as used elsewhere, does not evince the recklessness necessary to abrogate [plaintiff's] agreement to absolve [defendant] from negligence claims"]).

Relying on affidavits prepared by their employees, Scotiabank contends that the error in the Bid Model was a mis-referenced single cell for a single variable in a multi-step equation. Specifically, Scotiabank mistakenly referenced a cell containing the Concession Commencement Date rather than the correct cell which contained the Provisional Completion Date. Defendants contend that this constituted a mere mistake or typo, rather than a failure in comprehension or a failure to check the MOP tender requirements. Defendants add that the COPASA complaint acknowledges that Scotiabank's worksheets which accompanied the Bid Model contained the correct calculation, that Scotiabank shared multiple versions of the model with plaintiffs before plaintiffs accepted and submitted the results for their bid, and plaintiffs failed to identify the error themselves before submitting the bid, despite the plaintiffs working on the Bid Model for many months along with Scotiabank. Defendants therefore contend that they were thus at most guilty of a mistake, rather than conduct which "smacks of intentional wrongdoing."

Plaintiffs contend that the motion must be denied because the issue of gross negligence cannot be decided as a matter of law. "Where the inquiry is to the existence or nonexistence of gross negligence, the ultimate standard of care is different [from ordinary negligence], but the question nevertheless remains a matter for jury determination" (*Internationale Nederlanden (U.S.) Capital Corp. v Bankers Trust Co.*, 261 AD2d 117, 123 [1st Dept 1999]). To the contrary, courts routinely dismiss gross negligence claims on motions to dismiss where the allegations do not "smack of intentional wrongdoing" (*see, e.g.*, *Platinum Partners Value Arbitrage Fund LP v Kroll Associates, Inc.*, 102 AD3d 483, 483 [1st Dept 2013]; *Retty Fin. v Morgan Stanley Dean Witter & Co.*, 293 AD2d 341 [1st Dept 2002]; *Sutton Park Dev. Corp. Trading Co. v Guerin & Guerin Agency*, 297 AD2d 430 [3d Dept 2002]).

Plaintiffs also assert that they have alleged much more than a simple typo or mistake. Rather, they set forth "a unified course of reckless behavior which disregarded the rights of [plaintiffs] and, viewed in its entirety, constituted gross negligence" (*Matter of New York Tel. Co. v Public Serv. Commn. of State of N.Y.*, 271 AD2d 35, 41 [3d Dept 2000]). Specifically, plaintiffs contend that Scotiabank acted recklessly and was grossly negligent in performing the tasks it was specifically hired to perform. For example, despite having represented itself as an expert financial modeler with particular knowledge of Chilean road projects, despite having agreed in the Engagement Letter to prepare a financial model in accordance with the tender documents and inputs received from the Sponsors, despite being fully aware of the crucial nature of proper VPI calculation to the Sponsors' bid for the Project as well as the dire consequences of an improper calculation, and despite having been expressly asked by a COPASA employee to check the Bid Model prior to its finalization, Scotiabank (i) designed and provided the Sponsors with a defective Model that under-calculated by $82 million the very result that the Model was supposed to yield, (ii) failed to incorporate information about the Provisional Completion Date that the MOP itself expressly set forth in the tender documents, (iii) failed to incorporate the Provisional Completion Date input that Scotiabank received from Cointer and (iv) failed during any point over the seven months it was working on the financial Model, to take care to run even the most basic checks on the Bid Model to ensure that it had properly calculated the VPI as of the Provisional Completion Date in accordance with the MOP's instructions in the tender documents. Plaintiffs do not contend that the Model was defectively designed. They contend however that the error was imbedded in the Model and was not readily detectible. The complaint alleges that the correct information was in the parties' workpapers and that plaintiffs, not Scotiabank discovered the error.

Cointer also contends that Scotiabank's staffing and management of the Project constituted a grossly negligent breach of the Engagement Letter because "most of the proposed members of the core team" departed from Scotiabank before Plaintiffs' bid submission in October 2010. Cointer asserts that as a result, Cesar Bodden had primary responsibility for creating the Bid Model and was left unsupervised. Defendants observe that Cointer's complaint actually alleges that the only member of the team who left Scotiabank during the lead-up to the Bid submission was Conor Kelly. After Kelly left, Joao Carneiro and Yann Megret remained on the team after Kelly's departure.

Defendants maintain that plaintiffs fail to allege any breach of the Engagement Letter regarding staffing of the Project. Specifically, Paragraph 22 of the Engagement Letter states, in relevant part, "Scotia Capital will endeavor not to change any member of the proposed team and, prior to the replacement of any Scotia Capital team member, Scotia Capital shall consult with the Sponsors and ensure that any replacement personnel are qualified and competent to provide the services contemplated hereunder." Scotiabank notes that Kelly, the only team member alleged to have left the Project, departed Scotiabank, and thus his continued involvement in the Project was impossible. Cointer does not allege that Kelly was ever replaced. Accordingly, no duty to consult was ever triggered.

Taken as a whole, plaintiffs allege only that the defendants carelessly used one date instead of another, that the error was not caught prior to acceptance of the bid and that the error had "dire" financial consequences. The allegations concerning staff changes within the Scotiabank team assigned to the Project do not alter the character of the claim. The facts alleged do not amount to conduct that "smacks of intentional wrongdoing," as the applicable law requires (*Abacus*, 18 NY3d at 683).

IV. Other Claims

"[A]llegations that a breach of contract occurred as a result of gross negligence does not give rise to a duty independent of the contractual relationship" (*Abacus*, 18 NY3d at 684-685 [dismissing tort claims where breach of contract sounded in gross negligence]). Accordingly, Cointer's gross negligence/recklessness cause of action must be dismissed.

As to Cointer's three causes of action for breach of the duty of good faith and fair dealing and promissory estoppel claim, they were not pleaded in the alternative (as Cointer asserts) and are barred (*see, e.g. Ahead Rlty LLC v India House*, 92 AD3d 424, 425 [1st Dept 2012]). Even if plaintiffs had pleaded in the alternative, they could not plead facts sufficient to overcome the pleading deficiencies discussed above.

Regarding Cointer's causes of action for breach of contract arising out of the March 2011 and October 2011 Agreements, Scotiabank contends that these claims must be dismissed under CPLR 3211 (a) (1) because the agreements are marked "Privileged & Confidential – For Discussion Purposes Only," and thus do not constitute binding contracts. Cointer responds that defendants ignore the emails alleged to have been attached to these contracts where Scotiabank specifically stated these were offers that could be accepted. The documentary evidence utterly refutes this assertion as to the March 2011 Agreement. The documents are two iterations of proposals the parties were negotiating in an effort to salvage the Project. Both contain the legend "For Discussion Purposes Only." The March 3, 2011 document also contains a legend at the foot of each page as follows: "Strictly Private and Confidential-Chile Toll Road Update." The March 2011 document has no designated space for affixing authorized signatures. It is nothing more than a draft "update" of the parties' negotiations.

The October 2011 document also contains the "For Discussion Purposes Only" legend but appears to have been executed on behalf of the parties. It contains a number of provisions that the complaint alleges were unacceptable to Cointer, including provisions for payments by COPASA and Cointer without corresponding payments by Scotiabank. Thus it is not clear that the October 2011 Agreement reflects a meeting of the minds. It also contains a number of conditions which would have to be satisfied before the parties could proceed with the Project. Nevertheless, it cannot be said to a certainty that Scotiabank assumed no binding obligations under the terms of the October 2011 document, including a conditional commitment of up to €29 million for an equity stake in 50% of the Project. Whether the parties had an agreement and whether Scotiabank proceeded in good faith to reach "a mutual agreement with [third party] Grupo Azvi" on the conditions set forth in the October 2011 Agreement are matters that are sufficient to require denial of the motion to dismiss Cointer's Seventh Cause of Action.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint in the action bearing Index No. 651555/2012 is GRANTED except as to the Seventh Cause of Action (breach of the October 2011 Agreement); and it is further

ORDERED that the motion of defendants to dismiss the complaint in the action bearing Index No. 651231/2012 is GRANTED and the complaint in said action is DISMISSED in its entirety with costs and disbursements to defendants, The Bank of Nova Scotia and Scotiabank Global Banking and Markets, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the separate action bearing Index No. 651555/2012 shall continue;

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the caption of the surviving case; and it is further

ORDERED that counsel for the parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption, as necessary; and it is further

ORDERED that defendants shall serve and file their answer to the complaint in the surviving action within twenty (20) days of service of a copy of this Order together with Notice of Entry; and it is further

ORDERED that counsel shall appear for a preliminary conference on Wednesday, June 19, 2013 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the Court.

DATED: March 22, 2013

E N T E R,

O.P. Sherwood

O. PETER SHERWOOD
J.S.C.