D.E. Shaw Composite Holdings, L.L.C. v TerraForm Power, LLC
2018 NY Slip Op 30232(U)
February 6, 2018
Supreme Court, New York County
Docket Number: 651752/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH Justice

PART 54

Index Number : 651752/2016
D.E. SHAW COMPOSITE
vs.
TERRAFORM POWER, LLC
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 11/30/17
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). 17-23
Answering Affidavits — Exhibits _____ | No(s). 26
Replying Affidavits _____ | No(s). 27-32

Upon the foregoing papers, it is ordered that this ~~motion is~~

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

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

Dated: 2/6/18

SHIRLEY WERNER KORNREICH, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
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: PART 54

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D.E. SHAW COMPOSITE HOLDINGS, L.L.C. and MADISON DEARBORN CAPITAL PARTNERS IV, L.P.,

Index No.: 651752/2016

DECISION & ORDER

Plaintiffs,

-against-

TERRAFORM POWER, LLC and TERRAFORM POWER, INC.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants TerraForm Power, LLC (TerraForm LLC) and TerraForm Power, Inc. (TerraForm Inc.) move (1) pursuant to CPLR 3211(a)(10) and 2201, to either dismiss or stay this action based on pending bankruptcy proceedings of a non-party; and (2) pursuant to CPLR 3211(a)(7), to dismiss the demand for injunctive relief in the amended complaint (the AC). Plaintiffs D.E. Shaw Composite Holdings, L.L.C. and Madison Dearborn Capital Partners IV, L.P. oppose the motion. For the reasons that follow, defendants' motion is granted in part and denied in part.

I. Factual Background & Procedural History

This case concerns defendants' alleged liability under a Purchase and Sale Agreement dated as of November 17, 2014 (the PSA), pursuant to which they acquired a renewable energy company, First Wind Holdings, LLC, and some of its subsidiaries (collectively, the Company). *See* Dkt. 20.[1] Plaintiffs, as agents of the sellers, seek approximately $231 million in earn-out payments that are allegedly due, *inter alia*, by virtue of a contractual acceleration event – the

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

bankruptcy filing of SunEdison, Inc. (SunEdison). SunEdison, a party to the PSA, is subject to the automatic stay and is not a party to this action.

Defendants' liability is disputed, but is not the subject of the instant motion. Aside from challenging the validity of the AC's demand for permanent injunctive relief, defendants have not moved to dismiss for failure to state a claim. Defendants, however, contend that SunEdison is a necessary party to this action and that, as a result of its absence, this action should either be dismissed or stayed pending the conclusion of SunEdison's bankruptcy proceedings. Given the limited issues raised by defendants' motion, the court's recitation of the underlying facts and governing contractual terms is limited to that necessary to address this motion. That said, since this is a motion to dismiss, the facts recited are taken from the AC (Dkt. 11) and are assumed to be true unless utterly refuted by documentary evidence.[2]

The PSA is an extensive, complex agreement drafted with the aid of the parties' sophisticated counsel. It is governed by New York law and contains a forum selection clause that provides for jurisdiction in this court. *See* Dkt. 20 at 101-102. Section 2.03 of the PSA, which sets forth the "Total Purchase Price", provides that part of the consideration for the sale of the Company are certain "Earnout Project Payments", which are defined in section 2.04. *See id.* at 36-37. At issue in this action are those Earnout Project Payments owed by TerraForm LLC, which, pursuant to section 6.21 of the PSA, were "irrevocably and unconditionally" guaranteed

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[2] On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

by TerraForm Inc. *See id.* at 82. TerraForm LLC is defined in the PSA as "Operating Buyer", and SunEdison is defined as "Holdco Buyer"; they collectively are defined as "Buyers". *See id.* at 8. Section 2.09 of the PSA provides that "[a]ll obligations of **each** Buyer under this Agreement, including any payment obligations, **shall be several, and not joint**." *See id.* at 44 (emphasis added). Plaintiffs are defined as "Sellers' Representative" and indisputably have standing to bring this action. *See id.* at 8.

Section 2.04(a) provides, in pertinent part:

> with respect to each Earnout Project that achieves Earnout Project Completion on or before the Earnout Project Completion Outside Date, **[SunEdison] shall pay** in accordance with Section 2.04(b) an amount in cash equal to the As-Built MW of such Earnout Project multiplied by the Per MW Earnout Payment (each, an "Earnout Project Payment").

Dkt. 20 at 37 (emphasis added). "Earnout Projects" are defined as: "(a) the projects listed on Annex C as of the date hereof (b) one or more Additional Earnout Projects added to Annex C, as supplemented after the date hereof, with Holdco Buyer's consent (such consent not to be unreasonably withheld) with aggregate capacity up to 135 MWac and (c) any Additional Earnout Projects." *Id.* at 19; *see id.* at 135 (Annex C).[3] Section 2.04(b), as indicated above, sets forth how the Earnout Project Payments are to be computed.[4]

Some of the amounts owed by the Buyers under the PSA could, subject to certain conditions, be deferred and paid incrementally upon "completion" of certain projects. Nonetheless, upon the occurrence of certain "Acceleration Events", the amounts owed by the

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[3] The other capitalized terms in section 2.04(a) also are defined in the PSA, but are not discussed since their meaning is not pertinent to the instant motion. *See* Dkt. 20 at 18-19. Likewise, the court has no occasion, at this juncture, to discuss most of the other, extensive provisions of section 2.04.

[4] The merits of any disputes over the meaning or application of this provision are not germane to this decision. The import of the court's ruling on any such disputes on defendants' stay application (i.e., how SunEdison's rights are supposedly prejudiced) is addressed herein.

Buyers would be immediately payable. Acceleration Event is defined to include a bankruptcy filing by SunEdison: *See* Dkt. 20 at 9. Since SunEdison filed for (and remains) in bankruptcy, there is no question of fact that an Acceleration Event occurred. Section 2.04(g) provides that:

> In the event that an Acceleration Event shall occur, **Buyers** shall immediately **deliver or cause to be delivered** the aggregate Accelerated Earnout Payment to the Paying Agent on behalf of the Sellers for each Earnout Project for which no Earnout Project Payment has been made.

Id. at 39 (emphasis added). Hence, while section 2.04(a) provides that, ordinarily, only one of the Buyers (SunEdison) is liable for Earnout Project Payments – which, under section 2.09, is a several obligation not borne by the other Buyer, TerraForm LLC – section 2.04(g) makes it clear that, upon an Acceleration Event, both "Buyers" (i.e., SunEdison *and* TerraForm LLC) have the obligation to "deliver or cause to be delivered the aggregate Accelerated Earnout Payment."

The parties appear to dispute whether the phrase "deliver or cause to be delivered" in section 2.04(g) has the same meaning as "shall pay" in section 2.04(a).[5] In other words, the question is whether, upon an Acceleration Event, SunEdison's *several* obligation to pay Earnout Project Payments becomes a *joint and several* obligation on the part of *both* SunEdison and TerraForm LLC (and, effectively, TerraForm Inc. as TerraForm LLC's guarantor).

Since resolution of this question is not pertinent to this motion, the court will not opine on whether section 2.04(g) is ambiguous or whether it is susceptible to only one commercially reasonable interpretation without resort to extrinsic evidence.[6] All that matters for the purposes of the instant motion is that the court's eventual ruling on this issue cannot prejudice SunEdison.

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[5] In their opposition brief, plaintiffs argue, with citation to controlling and persuasive authority, that "New York courts do not recognize a difference between an obligation to 'deliver' a payment and an obligation to pay." *See* Dkt. 26 at 29 n.9. Since the court, as discussed herein, is not ruling on this issue, the court will not address these cases.

[6] *See Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 (1st Dept 2017), citing *Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 (2014).

The only issue is whether *defendants* are liable and, if so, how much *they* owe plaintiffs. That SunEdison has liability is uncontroverted. Indeed, SunEdison might benefit from defendants being held liable (which could, to be sure, impel them to seek contribution from SunEdison in the bankruptcy proceedings). As discussed herein, the absence of any prejudice to the debtor is the principal reason why a stay is not warranted.

Between November 18, 2015 and February 26, 2016, the parties exchanged letters regarding defendants' liability under the PSA. On April 3, 2016, plaintiffs commenced this action against defendants by filing their original complaint, which sought a declaratory judgment that SunEdsion filing for bankruptcy would be an Acceleration Event that would trigger defendants' liability under section 2.04(g). *See* Dkt. 2 at 4 (noting "SunEdsion is on the verge of bankruptcy"). On April 21, 2016, SunEdsion filed a voluntary Chapter 11 bankruptcy petition in the Southern District of New York. Dkt. 23; *see In re SunEdison, Inc.*, 572 BR 482, 486 (Bankr SDNY 2017) (Bernstein, J.) (noting pendency of this action and instant motion).[7]

On May 27, 2016, plaintiffs filed the AC, which alleges the occurrence of Acceleration Events[8] and asserts causes of action against (1) TerraForm LLC for breach of section 2.04(g), and (2) TerraForm Inc., as guarantor, for breach of section 6.21. In addition to seeking monetary

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[7] As discussed herein, it is undisputed that the automatic stay does not apply to the claims asserted in this action. Neither defendants nor SunEdison have filed a motion in the bankruptcy court to extend the automatic stay, and Judge Bernstein does not appear to have opined on how this court should decide this motion. This is telling. This court has no desire to interfere with the orderly administration of federal bankruptcy proceedings and, in this court's experience, where a litigant has bona fide basis to contend that a state court action inequitably affects the rights of a debtor, such a litigant usually is not shy about raising that issue with the bankruptcy court or removing the action to district court as a related matter under 28 USC § 1452 (a tactic, unfortunately, often employed frivolously to delay).

[8] In addition to SunEdison's Bankruptcy, the AC alleges another Acceleration Event [*see* AC ¶¶ 34-39] that the court need not discuss because it has no bearing on the question of whether a stay should be granted.

damages, the AC also seeks injunctive relief prohibiting "[d]efendants from taking any actions inconsistent with the Court's judgment requested above." *See* Dkt. 11 at 15. Defendants filed the instant motion on July 5, 2016, and the court reserved on the motion after oral argument. *See* Dkt. 33 (1/24/17 Tr.).[9]

II. Discussion

CPLR 1001 governs the necessary joinder of parties. CPLR 1001(a) provides that "[p]ersons ... ought to be parties if **complete relief** is to be accorded between the persons who are parties to the action or who might be **inequitably affected by a judgment** in the action shall be made plaintiffs or defendants," and that "[w]hen a person who should join as a plaintiff refuses to do so he may be made a defendant." *See L-3 Commc'ns Corp. v SafeNet, Inc.*, 45 AD3d 1, 10 (1st Dept 2007) ("Under CPLR 1001(a), a person or entity ought be joined as a party to an action if such person or entity 'might be **inequitably** affected by a judgment' in the action.") (emphasis added), citing *Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards & Appeals*, 5 NY3d 452, 457 (2005). Here, there is no question that plaintiffs can obtain complete relief from defendants (the amounts allegedly due under the PSA). While defendants dispute their joint and several liability under section 2.04(g) of the PSA, if they are indeed jointly and severally liable, plaintiffs can obtain compete recovery from defendants, regardless of the absence of SunEdison. That is the very point of joint and several liability.

That said, defendants contend that SunEdison is a necessary party because it would be inequitably affected by the judgment. While the court rejects this argument below, even if

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[9] The court regrets the extreme delay in issuing this decision. This was due, unfortunately (and ironically given the purpose of plaintiffs' opposition to the motion), to the parties' failure to provide a hard copy of the transcript to the part clerk. It also should be noted that the bankruptcy proceedings update filed by plaintiffs on January 4, 2018 (*see* Dkts. 34-36) does not affect the disposition of this motion, as those proceedings remain ongoing and the automatic stay remains in effect.

defendants were correct, "a finding that a person or entity is a necessary party under CPLR 1001(a) **does not mandate dismissal** of the action." *L-3 Commc'ns*, 45 AD3d at 10 (emphasis added). Rather, under CPLR 1001(b), joinder of a necessary party is excused "[i]f jurisdiction over him can be obtained only by his consent or appearance." *See id.* That is the case here, since SunEdison cannot be joined because it is subject to the automatic stay. CPLR 1001(b) provides that, in such an instance, "the court, when justice requires, may allow the action to proceed without his being made a party", and dictates that, "[i]n determining whether to allow the action to proceed, the court shall consider: 1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder; 2. the **prejudice** which may accrue from the nonjoinder to the defendant or to the person not joined; 3. whether and by whom **prejudice** might have been avoided or may in the future be avoided; 4. the feasibility of a protective provision by order of the court or in the judgment; and 5. whether an **effective judgment** may be rendered in the absence of the person who is not joined (emphasis added). "The Court of Appeals has cautioned that each of the five factors, where applicable, must be considered, and that the motion court's **discretionary determination** should be guided by the principle that dismissal for failure to join a necessary party should eventuate only as a '**last resort**.'" *L-3 Commc'ns*, 45 AD3d at 11 (emphasis added; internal citation omitted), citing *Saratoga Cty. Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 821 (2003).[10]

[10] A separate analysis under CPLR 2201 is not warranted since the court's discretion to grant a stay is to be made "upon such terms as may be just." The court sees no reason to issue a discretionary stay where, as here, the court concludes as part of its CPLR 1001(b) analysis that there is no prejudice warranting dismissal. *See Island Intellectual Prop. LLC v Reich & Tang Deposit Solutions, LLC*, 155 AD3d 542, 543 (1st Dept 2017) ("The court also providently exercised its discretion in denying defendants' motion for a stay in this action pending the subsequently commenced federal actions seeking to invalidate the patents that are the subject of the licensing agreement.").

The fifth factor is the easiest to address since, as discussed above, plaintiffs' can obtain an effective judgment against defendants in the absence of SunEdison. Regrading the first factor, while plaintiffs, in theory, might also be able to recover against defendants in the bankruptcy action, the court notes that forcing plaintiffs to do so imposes an undue burden on plaintiffs (and, indeed, the already complicated bankruptcy case). The parties bargained in the PSA to litigate in this court, and the court will hold defendants to that bargain.

The court now turns to the critical question of prejudice, which is relevant to the court's CPLR 1001(a) analysis, and also the third and fourth factors of CPLR 1001(b). Courts, naturally, take a cynical view of a defendant's self-serving assertions of prejudice to the debtor when that debtor, indisputably aware of the state court action, does not seek to intervene. *See 27th St. Block Ass'n v Dormitory Auth. of State of New York*, 302 AD2d 155, 163 (1st Dept 2002) ("FIT, obviously aware of the proceeding, could have avoided any prejudice by seeking intervention, although not required to do so."). Thus, "[c]ourts have routinely recognized that the ability of a nonjoined party to intervene in an action to avoid prejudice is a compelling factor in determining whether to dismiss a case for failure to join a necessary party." *L-3 Commc'ns*, 45 AD3d at 13 (collecting cases). Hence, it is not only telling, but also legally significant, that neither SunEdison nor its other creditors have taken the position that SunEdison will be prejudiced if plaintiffs proceed with this action while the bankruptcy proceedings are pending. They are indisputably aware of this action, as evidenced by Judge Bernstein's mention of it in one of his decisions [*see In re SunEdison,* 572 BR at 486], but have not sought to extend the automatic stay or intervene to seek a stay of this action.

This is unsurprising because the only possible *adverse* affect on SunEdison is a ruling by this court that the proper computation of the Earnout Project Payments is greater than what

SunEdison may believe that amount should be. Yet, since SunEdison is not a party to this case and since it is not in privity with defendants, it is not bound by this court's decision on this issue. *See ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 227 (2011). Were it worried about possibly conflicting decisions, it presumably would have sought a stay. Moreover, as noted earlier, a judgment against defendants in this action would actually *decrease* SunEdison's liability to plaintiffs. To be sure, a finding of liability on the part of defendants might impel them to seek contribution from SunEdison. That possibility, however, does not warrant a stay. *See Lottes v Slater*, 114 AD2d 580, 582 (3d Dept 1985) ("If plaintiffs prevail, Slater will be able to seek contribution from Johns-Manville once the bankruptcy proceeding against Johns-Manville is completed. That the severance will result in multiple litigation is a direct by-product of bankruptcy law. As such, the duplication to the extent it may exist, is Congressionally created and sanctioned.") (citation and quotation marks omitted). Simply put, SunEdison suffers no prejudice by virtue of this action proceeding, and it may well stand to benefit. Defendants face no prejudice other than the prospect of a more expeditious adjudication of their potential liability (which, on its own, is certainly not grounds for a stay).

Finally, the fourth factor weighs against dismissal. To the extent there is some incidental procedural complexity that results from the pendency of this action, given the extremely competent counsel of record here and in federal court, this court has confidence that all of the parties' interests can be adequately protected. Additionally, where warranted, discovery may be coordinated, not only to ensure efficiency, but also to ensure that no one seeks to evade Judge Bernstein's order that discovery in state court litigation not be used as an end run around what is permitted in the bankruptcy proceedings. *See In re SunEdison,* 572 BR at 490.

For these reasons, the court declines to reach the parties' arguments about when an absent party with either several or joint and several liability for an underlying debt is considered a necessary party within the meaning of CPLR 1001(a). That is because even if SunEdison is a necessary party, the circumstances of this case warrant the court's exercise of its discretion to excuse it absence. This simply is not a case where the drastic, "last resort" remedy of dismissal under CPLR 1001 is warranted.[11]

Finally, plaintiffs' claim for equitable relief is dismissed. They cite no authority that, where the plaintiff prevails and the clerk is directed to enter a monetary judgment in its favor, the

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[11] *See Leeward Isles Resorts, Ltd. v Hickox*, 61 AD3d 622 (1st Dept 2009) ("Assuming the non-joined parties are necessary parties within the meaning of CPLR 1001(a), defendant has not shown as a matter of law that he is entitled to dismissal of the complaint for failure to join them. Defendant contends that these parties are beyond the jurisdiction of the court and cannot be joined. However, even if these parties were shown to be beyond the jurisdiction of the court, consideration of the factors enumerated in CPLR 1001(b) would support allowing the action to proceed, especially as dismissal for failure to join a necessary party should eventuate only as a last resort.") (citation and quotation marks omitted); *see also Genger v Genger*, 87 AD3d 871, 874 (1st Dept 2011) ("Dalia should have been joined as a party to this action, because her rights, if any, in the subject instruments might be inequitably affected by a judgment (*see* CPLR 1001[a]). Furthermore, Sagi could well be placed in the position of being obligated to both his parents separately for the same debts. However, the complaint need not be dismissed on this basis.").

It should be noted that similar concerns arise on a motion for severance under CPLR 603 when a defendant files for bankruptcy prior to trial and where the other defendants not subject to the automatic stay seek to delay the trial. In that situation, courts often permit the action to proceed against the non-debtor defendants. *See Kharmah v Metro. Chiropractic Ctr.*, 288 AD2d 94 (1st Dept 2001). The result should be no different just because the debtor was never named as a defendant in this action (perhaps because plaintiffs, admittedly in their original complaint, anticipated SunEdison's bankruptcy). *See Golden v Moscowitz*, 194 AD2d 385, 385-86 (1st Dept 1993) ("Appellate courts in this State have repeatedly held that a bankruptcy stay does not prevent a plaintiff from proceeding on causes of action against nonbankrupt defendants, which do not involve the bankrupt's property. Here, the guarantees of the contract between plaintiff and Multigas by the individual defendants-appellants were absolute and unconditional. ...the prejudice to plaintiff in being required to await the conclusion of lengthy and complex reorganization proceedings before obtaining any remedy outweighs any potential inconvenience to the defendants.") (internal citations and quotation marks omitted).

court also should issue an injunction mandating that defendant satisfy that judgment. Indeed, it is well settled that injunctive relief should not be issued where plaintiff has "an adequate remedy at law, namely monetary damages." *Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596, 597 (1st Dept 2011); *see Zodkevitch v Feibush*, 49 AD3d 424, 425 (1st Dept 2008) ("plaintiffs failed to demonstrate that an award of monetary damages would not adequately compensate them."). The supposedly contrary authority cited by plaintiffs concern situations where injunctive relief was requested to guard against defendant's dissipation of assets. *See* Dkt. 26 at 30. No such concern is pleaded, nor do plaintiffs purport to have made the requisite showing for an injunction or attachment. *See Wimbledon Financing Master Fund, Ltd. v Bergstein*, 2016 WL 4410881, at *4-5 (Sup Ct, NY County 2016), *aff'd*, 147 AD3d 644 (1st Dept 2017). Accordingly, it is

ORDERED that plaintiffs' demand for injunctive relief is stricken, and defendants' motion to dismiss or stay this action is otherwise denied.[12]

Dated: February 6, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

[12] Counsel are reminded that a preliminary conference has been scheduled for February 22, 2018 at 11:30 am, and that the pre-conference letter requirement has been waived.