

Carbures Europe, S.A. v Emerging Mkts. Intrinsic Cayman Ltd.

2019 NY Slip Op 31227(U)

April 26, 2019

Supreme Court, New York County

Docket Number: 653892/2015

Judge: Saliann Scarpulla

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

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CARBURES EUROPE, S.A., SRT CAPITAL FF LLC, NEUDER
GEDANKE, S.L.,

Plaintiff,

- v -

EMERGING MARKETS INTRINSIC CAYMAN LTD., EMERGING
MARKETS INTRINSIC, LTD., BULENT TOROS, ERIC MAASS,
NOMURA PB NOMINEES LTD.

Defendant.

INDEX NO. 653892/2015

MOTION DATE 04/17/2019

MOTION SEQ. NO. 003

DECISION AND ORDER

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171

were read on this motion to/for PRECLUDE.

Upon the foregoing documents, it is

In this lending agreement dispute, defendant Emerging Markets Intrinsic Cayman Limited (“EMI”) moves to bar plaintiffs Carbures Europe, S.A. (“Carbures”), SRT Capital FF LLC (“SRT”), and Neuer Gedanke, S.L. (“Neuer”) (collectively, “Plaintiffs”) from presenting certain evidence of Carbures’s damages allegedly incurred from an agreement for the assignment and use of assets between companies (“Neuer Agreement”) at trial, and/or for a supplemental summary judgment order.

On September 25, 2015, Plaintiffs and EMI entered into a Margin Lending Agreement and Term Sheet (collectively, “MLA”), whereby EMI agreed to loan Carbures €7 million in two installments, and Carbures pledged €14 million worth of

Carbures shares as collateral (“Share Collateral”). The day prior to executing the MLA, Neuer (a major Carbures shareholder) and Carbures executed the Neuer Agreement, whereby Neuer agreed to loan Carbures shares for Carbures to use as the Share Collateral for the MLA; in exchange, Carbures agreed to pay Neuer a 1.5% commission plus expenses, and at the end of the MLA, Carbures was required to either return to Neuer the same number of shares originally borrowed or pay the cash amount equivalent of the value of the shares as of the date that they were assigned. EMI was not a party to the Neuer Agreement. EMI was on notice, however, that Neuer was contributing a portion of the Share Collateral on behalf of Carbures.¹

On October 22, 2015, EMI disbursed €3 million as the first loan installment, and Carbures deposited 6,315,810 as the first tranche of Share Collateral. On October 23, 2015, EMI allegedly began to loan and sell the Share Collateral in contravention of the MLA, and this activity caused the value of the Carbures shares to decrease by 50% by December 21, 2015. Disputes subsequently arose between the parties based on, *inter alia*, EMI’s allegedly improper selling of the Share Collateral, and the second installment of the MLA was never completed.

Carbures argues that, because EMI improperly sold the Share Collateral, Carbures was unable to return the shares to Neuer, pursuant to the Neuer Agreement. Carbures satisfied its obligations under the Neuer Agreement partially by transferring shares it

¹ For example, MLA ¶1 provides that Neuer is “contributing such Share Collateral to SRT in connection with their subscription for a membership interest in SRT and SRT is providing the Share Collateral to [EMI] on behalf of [Carbures].”

owned or purchased and partially by recapitalization. Plaintiffs allege that, although Carbures received €3 million from EMI, it cost Carbures €6,084,051 to repay its debt under the Neuer Agreement. Plaintiffs subtract the €3 million loan principal and seek €3,084,051 in damages from EMI arising out of the Neuer Agreement (“Neuer Agreement Damages”).

EMI now moves to preclude Plaintiffs at trial from offering expert testimony of the Neuer Agreement Damages because they are consequential and therefore barred from recovery by the MLA. MLA ¶7(1) provides:

NO CONSEQUENTIAL DAMAGES. IN NO EVENT WILL [EMI] OR AGENT BE LIABLE TO [CARBURES] FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF THIS AGREEMENT or any other agreement or document executed in connection herewith or the transactions contemplated hereby or thereby or any lost profits, diminution in value of Share Collateral or loss of the use of property or Share Collateral.

In opposition, Plaintiffs argue that the Neuer Agreement Damages are general damages, not consequential damages, and that these damages were foreseeable.

Discussion

General damages “are the natural and probable consequence of the breach,” *Kenford Co., Inc. v County of Erie*, 73 NY2d 312, 319 (1989), while consequential damages are those which “do not so directly flow from the breach,” *Bi-Economy Mkt., Inc. v Harleystville Ins. Co. of New York*, 10 NY3d 187, 192 (2008) (citation and quotation marks omitted), “but which stem from losses incurred by the nonbreaching

party in its dealings with third parties” *437 Madison Ave. Assoc. v A.T. Kearney, Inc.*, 127 Misc 2d 37, 38 (1st Dept, App Term 1985) (citations omitted).

In the MLA Plaintiffs and EMI agreed, in plain and well-disclosed terms, that EMI would only be liable for the direct consequences of a breach, not collateral damages incurred by Plaintiffs for which EMI could not control or insure against. The Neuer Agreement Damages sought are from alleged liability incurred by Carbures in a separate contractual agreement with Neuer, unrelated to EMI and to which EMI was not a party.

When EMI allegedly breached the MLA, Carbures elected to refinance and issue new shares to satisfy its separate contractual obligations to Neuer, without any input from EMI. Further, review of the Neuer Agreement demonstrates that there were extension periods available to Carbures which would have extended its time to return the Share Collateral, and which do not appear to have been exercised. Instead, Carbures proceeded by fulfilling its initial contractual obligations to Neuer to return the Share Collateral: a course of action which EMI neither participated in nor agreed to in the MLA. *See PNC Bank, Nat. Ass'n v Wolters Kluwer Fin. Services, Inc.*, 73 F Supp 3d 358, 374-75 (SDNY 2014) (“The refunds PNC paid its . . . customers cannot fairly be termed general damages, reflecting ‘the value of the very performance promised.’ It is undisputed that PNC elected to make these payments on its own. No provision of its contract with [defendant] obliged it to do so” (citations omitted)).

The Neuer Agreement Damages are not a “natural and probable consequence” of EMI’s alleged breach of the MLA, “but instead a form of consequential damages because

it was one step removed from the naked performance promised by [EMI].” *Id.* at 374 (citations and quotation marks omitted). *See Net2Globe Intern., Inc. v Time Warner Telecom of New York*, 273 F Supp 2d 436, 449 (SDNY 2003) (barring consequential damages from lost profits incurred because of plaintiff’s “continued performance of its contracts with [third parties]” after defendant’s breach); *see also Qube Films Ltd v Padell*, 13-CV-8405 (AJN), 2016 WL 881128, at *6 (SDNY 2016) (Defendants’ breached an escrow agreement by failing to release funds – “out-of-pocket expenses lost when the production of the movie fell through ‘indirectly’ resulted from Defendants’ breach due to Plaintiffs’ inability to secure other financing for the movie are properly categorized as consequential damages.” (citations omitted)).²

Instead, the damages sought are the result of the diminution in value of the Share Collateral arising from a collateral transaction, for which EMI plainly and unambiguously disclaimed liability. Therefore, MLA ¶7(1) bars recovery of the Neuer Agreement Damages.

Contrary to Plaintiffs’ position, the foreseeability of the Neuer Agreement Damages is not dispositive because “the distinction between direct and consequential damages does not turn on the foreseeability of downstream damages. Rather, the concept of foreseeability is relevant where consequential damages are authorized because

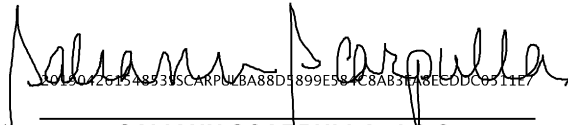
² *Cf. Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 806 (2014) (Lost profits on collateral business arrangements constitute general damages when “the non-breaching party bargained for such profits and they are the direct and immediate fruits of the contract.”) (citation and quotation marks omitted).

foreseeability serves as a limit on the extent to which consequential damages, when available, may be awarded.” *PNC Bank, Nat. Ass'n*, 73 F Supp 3d at 374-75.³

In accordance with the foregoing, it is

ORDERED that the portion of defendant Emerging Markets Intrinsic Cayman Limited’s motion *in limine* to preclude evidence of damages arising out of the Neuer Agreement is granted for the reasons set forth above, and the motion is otherwise denied.

This constitutes the decision and order of the Court.

<u>4/26/2019</u> DATE		 SALIANN SCARPULLA, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
	<input type="checkbox"/> DENIED	<input type="checkbox"/> REFERENCE

³ Although not specifically addressed above, I have reviewed Plaintiffs’ additional arguments and find them to be without merit.