

**Otoka Energy, LLC v State Street Bank & Trust Co.**

2019 NY Slip Op 32037(U)

July 10, 2019

Supreme Court, New York County

Docket Number: 653291 /2018

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 61EFM

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OTOKA ENERGY, LLC and AMADOR BIOMASS, LLC

INDEX NO. 653291/2018

Plaintiffs,

MOTION DATE 07/9/2019

- v -

STATE STREET BANK AND TRUST COMPANY and  
ANTRIM CORPORATION,

MOTION SEQ. NO. 004

Defendants.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for DISMISS

HON. BARRY R. OSTRAGER:

Presently pending before the Court is Plaintiff Otoka Energy LLC’s (“Otoka”) motion to dismiss the counterclaims asserted by Defendants State Street Bank and Trust Company (“State Street”) and Antrim Corporation (“Antrim”). For the reasons stated herein, the motion to dismiss the counterclaims is granted in part and denied in part.

**Background**

In 2009, Otoka became involved in a project to develop, operate, and invest in a wood-fired power plant in Ione, California (the “Plant”) when Otoka purchased a majority interest in Buena Vista Biomass Development, LLC (“BVBD”). Thereafter, and until June 2012, Otoka owned a two-third interest in BVBD, which wholly owned Buena Vista Biomass Power, LLC (“BVBP”), which in turn owned the Plant assets.

At the time Otoka became involved, the project had in place a long-term Power Purchase Agreement (“PPA”) with the Sacramento Municipal Utility District (“SMUD”), pursuant to

which SMUD agreed to buy electricity from BVBP for twenty years. The PPA ensured that a market for the power generated by the Plant would exist and that the price SMUD would pay for the electricity would support the cost of the Plant's construction and operation. The value and success of the Plant was heavily dependent upon the PPA for this reason.

BVBP's rights under the PPA were conditioned on the Plant's achievement of "Commercial Operation" and SMUD certification thereof by a specific deadline. However, by January 2012, the Plant had already failed to meet the contractual deadline in the PPA multiple times and had received multiple extensions from SMUD.

In June 2012, Otoka, BVBD, State Street, and Antrim Corporation ("Antrim") entered into a tax equity transaction that changed the ownership structure of the Plant. Following the transaction, BVBP was owned by Amador. Amador, in turn, was jointly owned by Otoka and Antrim. Antrim was created by State Street as a special purpose entity to own State Street's interests in the transaction. State Street allegedly provided Otoka with an unconditional guarantee for Antrim's performance, as the Class B Investor in Amador, to make its required capital contributions to Amador.

In sum, by conveying the Plant assets to Amador, Otoka conferred valuable tax benefits to Antrim and, in turn, State Street. In return, State Street, through Antrim, promised to invest \$35 million in capital contributions to Amador pursuant to the parties' Equity Capital Contribution Agreement ("ECCA") and Purchase and Sale Agreement ("PSA").

The anticipated closing date for the tax equity transaction was June 28, 2012. At some point shortly before the closing, the parties became aware that SMUD would not certify the Plant for commercial operation by the July 1, 2012 deadline under the PPA. Otoka was allegedly able

to secure an extension of the deadline to August 1, 2012. With that extension, the transaction closed on June 29, 2012.

Thereafter, the Plant struggled meet the August 1, 2012 deadline for commercial operation and Otoka was forced to seek multiple deadline extensions from SMUD. Otoka allegedly made multiple cash contributions to Amador to cover the necessary costs of the Plant until it achieved certification of commercial operation with SMUD.

On October 24, 2012, SMUD allegedly certified the Plant for commercial operation and Otoka provided notice of that certification to State Street and Antrim. Under the parties' agreements, SMUD's certification of the Plant for commercial operation was supposed to trigger Antrim's capital contribution obligations. Otoka alleges that State Street and Antrim refused to make their capital contributions to Amador under the parties' agreements.

Defendants allege, *inter alia*, that Otoka intentionally misrepresented the Plant's ability to obtain certification of commercial operation with SMUD by the July 1, 2012 deadline in order to induce Defendants to invest in the Plant in the first instance. Defendants further allege that Otoka mismanaged the Plant, provided preferential loans to Amador, and stripped Amador of an award it received from a successful arbitration with SMUD. Defendants' counterclaims, many of which are brought derivatively on behalf of Amador, sound in contract and tort and seek legal as well as equitable relief. Otoka now moves to dismiss those counterclaims.

### Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). "We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.* at 87-88.

First, Otoka moves to dismiss Defendants' derivative claims. Antrim characterized several of its counterclaims against Otoka as derivatively asserted on behalf of Amador, which is partly owned by Otoka. Otoka argues that Antrim is an inadequate derivative representative because of active litigation and economic antagonisms between Defendants and Otoka.

To disqualify a party from bringing a derivative suit, the Otoka must meet its burden to show that "a serious conflict of interest exists" with Antrim's ability to represent Amador's interests such that Defendants' "cannot be expected to act in the interests of [Otoka] because doing so would harm [Antrim's] other interests." *Priestley v. Comrie*, 2007 WL 4208592, at \*5 (S.D.N.Y. Nov. 27, 2007).

Here, Antrim is the only member that could represent the interests of Amador with respect to Otoka's alleged unlawful conduct. "To find otherwise would mean that no derivative claim could be brought on behalf of a two-member entity, except under the most civil of circumstances." *D'Angelo v. Watner*, 2018 N.Y. Slip. Op. 32324(U), at \*9 (N.Y. Sup. Ct. 2018). This case does not present any exceptional or unique circumstances such that Antrim should be precluded from bringing derivative claims against Otoka on Amador's behalf. Thus, Antrim may sue derivatively on behalf of Amador, and Otoka's motion to dismiss the derivative claims on these grounds is denied.

Additionally, Antrim and Amador seek redress for separate and distinct injuries and allege separate and distinct damages. Where, as here, a recovery would be pro rata among the affected members, the claim is properly pled as derivative in nature and is distinct from Antrim's individual claims.

"Where all of a corporation's stockholders are harmed and would recover pro rata in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature." *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008). Thus, Antrim's derivative claims on behalf of Amador are sufficiently distinct from Antrim's individual claims such that dismissal on that ground must also be denied.

Second, Otoka argues that Antrim's fraud claim is time-barred under the statute of limitations because it was not brought within six years from the date the cause of action accrued or within two years from the time Antrim could have discovered the fraud. Otoka asserts that Otoka's purportedly fraudulent statements would necessarily have been made sometime *before* the June 29, 2012 closing such that Antrim would have been induced into entering the transaction, and that this action was not commenced until June 29, 2018, over six years later.

Here, however, Antrim did not discover the factual basis for the fraud claim until Otoka's principal testified, during a 2018 deposition, about his knowledge in June 2012 that Amador would fail to obtain certification for commercial operation by the contractually mandated deadline. Thus, it is sufficiently alleged that the fraud could not have been discovered until the 2018 deposition and the claim is not, on a pre-answer motion to dismiss, barred by the statute of limitations.

Third, Antrim states a viable counterclaim for tortious interference with the BVBP Operating Agreement. Antrim alleges that Otoka wrongfully caused Amador to transfer Antrim's interests in a SMUD Arbitration Award in violation of the BVBP Operating Agreement. Thus, Defendants have adequately alleged: (1) the existence of the BVBP Operating Agreement; (2) Otoka's knowledge of the Agreement; (3) Otoka's intentional procurement of a breach; and (5) damages resulting therefrom. *See Am. Preferred Prescription, Inc. v. Health Mgmt., Inc.*, 252 A.D.2d 414, 417 (1st Dep't 1998). Therefore, Defendants have alleged a counterclaim for tortious interference sufficient to survive pre-answer dismissal.

Fourth, Antrim's claim for indemnification under the ECCA is not "wholly unambiguous" such that, as a matter of law, no "reasonably intelligent person viewing the contract objectively could interpret the language" to include State Street as one of the indemnified parties. *First Am. Int'l Bank v. Community's Bank*, 2012 U.S. Dist. LEXIS 136474, at \*20-21 (S.D.N.Y. 2012). Therefore, the

indemnification provisions are sufficiently ambiguous such that dismissal of the indemnification claim on a pre-answer motion would be premature.

Finally, many of Defendants' tort counterclaims must be dismissed as duplicative. Antrim's counterclaim for breach of the implied covenant of good faith and fair dealing, as it relates to the Amador Operating Agreement and Pledge Agreement, is duplicative of the breach of contract counterclaims. Courts routinely dismiss claims for breach of the implied covenant when they are "based on the same allegations and seek the same damages" as breach of contract claims. *Tillage Commodities Fund, L.P. v. SS&C Techs., Inc.*, 151 A.D.3d 607, 608 (1st Dep't 2017). Here, Antrim seeks the same damages in its breach of the implied covenant claim as it does in its breach of contract claim. Thus, the breach of the implied covenant of good faith and fair dealing counterclaim must be dismissed as duplicative.

Antrim's breach of fiduciary duty counterclaim must also be dismissed as duplicative of the breach of contract counterclaims. Breach of fiduciary duty claims are precluded where "fiduciary claims are substantially identical to the breach of contract claims." *Kagan v. HMC-N.Y., Inc.*, 94 A.D.3d 67, 72 (1st Dep't 2012). Here, Antrim's allegations that Otoka breached its fiduciary duties by mismanaging the Plant are subsumed by Antrim's counterclaims alleging breach of the Amador Operating Agreement and the Pledge Agreement. Therefore, Antrim's breach of fiduciary duty counterclaim must be dismissed.

Antrim's conversion counterclaim is dismissed as duplicative of Antrim's breach of contract counterclaims. A conversion counterclaim can only succeed if a defendant "alleges wrongs and damages distinct from those predicated on a breach of contract." *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 204 (S.D.N.Y. 2011). Here, Antrim merely alleges that Otoka wrongfully acquired funds pursuant to the parties' Pledge Agreement. Thus, the

conversion counterclaim is wholly duplicative of the breach of contract counterclaim and must be dismissed.

To the extent Otoka can show that Antrim has an adequate remedy at law following discovery in this action, it may move to dismiss on summary judgment Defendants' counterclaims seeking a constructive trust and an accounting. However, the Court is unwilling, at this early stage of litigation, to foreclose the need for equitable remedies. Therefore, the motion to dismiss the counterclaims for constructive trust and an accounting is denied without prejudice to renewal following discovery.

Accordingly, it is hereby

ORDERED that Otoka's motion to dismiss the counterclaims is granted in part and denied in part. The Clerk is directed to sever and dismiss the fifth, seventh, and ninth counterclaims from the action; and it is further

ORDERED that the parties appear for a compliance conference on August 27, 2019 at 9:30 a.m.

7/10/2019  
DATE

  
~~BARRY R. OSTRAGER~~  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<b>JSC</b>
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE