

<b>SBM Holdings, LLC v Oliveira</b>
2019 NY Slip Op 32809(U)
September 19, 2019
Supreme Court, New York County
Docket Number: 653140/2018
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 61EFM

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SBM HOLDINGS, LLC, SERIES TRUST NO. 1705,  
ROYAL SWISS CREDIT UNION & CAPITAL TRUST,  
MELIMAR, INC., and COMMERCIAL MORTGAGE  
CITY CORPORATION,

Plaintiffs,

- v -

FRANCISCO REIS OLIVEIRA, SBM HOLDINGS, LLC,  
JONATHAN CANNON, MARK OWEN, JOHN DOES,  
and XYZ CORP. 1-10,

Defendants.

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**INDEX NO.**           653140/2018  
**MOTION**  
**DATE**               08/02/2019  
**MOTION SEQ.**  
**NO.**                 003

**DECISION + ORDER ON  
MOTION**

HON. BARRY R. OSTRAGER:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59,  
60, 61, 62, 63, 64

were read on this motion to/for JUDGMENT - DEFAULT.

Before the Court is a motion by the plaintiffs SMB Holdings LCC Series Trust No. 1705 (“Trust”), Melimar Inc. (“Melimar”), and Commercial Mortgage City Corporation (“CMCC”) to enter a default money judgment against defendant Francisco Reis Oliveira. Plaintiffs commenced this action on June 22, 2018 seeking to recover significant money damages in connection with a failed bond transaction (NYSCEF No. 1). All counts against defendants SMB Holdings LLC, Jonathan Cannon, and Mark Owen have been discontinued by stipulation without prejudice (NYSCEF No. 53 and No. 65).<sup>1</sup> Oliveira, a resident of Brazil, is the sole remaining defendant in this action.

<sup>1</sup> All claims involving plaintiff Royal Swiss Credit Union & Capital Trust have been discontinued by stipulation or denied (NYSCEF Nos. 36, 49, 53, 65).

On February 15, 2019, this Court granted plaintiffs' motion for summary judgment and entered a default judgment against Oliveira on Count One for breach of contract, in favor of the Trust, and on Count Six for fraud, in favor of plaintiffs Melimar and CMCC (NYSCEF No. 49). The instant motion seeks money damages from Oliveira for breach of contract and fraud. For the reasons stated below, plaintiffs' motion is granted in part and denied in part.

### **Background**

This Court found Oliveira liable for breach of his contract with the Trust based on the November 1, 2017 Business Corporation Agreement signed by the parties ("the BCA") (NYSCEF No. 2). In the BCA, Oliveira agreed to sell the Trust a certain bond issued by the European Security Mechanism ("the ESM Bond") for 60% of the Bond's face value. Plaintiff established that Oliveira failed to complete the sale transaction, and the Trust now seeks an award of damages in this motion.

This Court also found Oliveira engaged in fraudulent conduct with respect to plaintiffs Melimar and CMCC. Plaintiffs Melimar and CMCC entered an Irrevocable Master Fee Agreement and Pay Order, dated November 14, 2017, with the Trust (the "IMFPA") (NYSCEF No. 3). Under the terms of the IMFPA, the Trust agreed to pay Melimar and CMCC 2% of the face amount of each and every tranche of the ESM Bond transferred to the Trust's sub-account as compensation for consulting and advisory services. Melimar and CMCC established that they relied on material misrepresentations of fact by Oliveira that induced Melimar and CMCC into the IMFPA and caused them to render services in connection with the Bond transaction. Because Oliveira's conduct caused the Bond transaction to fail, Melimar and CMCC received no fee for their services, and they now seek an award of damages in this motion.

### **Breach of Contract Damages**

Where there has been a breach of a contract to sell securities, the non-breaching party is entitled to expectation damages calculated as the difference between the agreed price of the security and the fair market value at the time of the breach. *See Emposimato v. CICF Acquisition Corp.*, 89 A.D.3d 418, 421 (1st Dept. 2011). This measure of damages puts the non-breaching party in the same economic position as he would have been in had the breaching party performed the contract. *Id.*

Here, the agreed price of the security was 60% of the face value of the ESM bond. The Bond's face value was € 3,999,750,000.00 (NYSCEF No. 2). Thus, plaintiffs would have purchased the Bond for 60% of that amount, or € 2,399,850,000.00. On January 17, 2018, the date of breach, the fair market value of the Bond was € 3,762,179,794 according to the supplemental affidavit of Karl N. Snow Ph.D. (NYSCEF Doc. No. 68). Accordingly, the Trust's damages are € 1,362,329,794.

Plaintiff proposes two alternative calculations of damages. Both focus on the profit the Trust would have received if Oliveira had sold the Trust the ESM Bond, and the Trust had then resold the ESM Bond to a third-party buyer as planned. The first measure accounts for value fluctuation in the market and the second measure is based on a letter of intent the Trust received from a buyer interested in the ESM Bond (NYSCEF No. 61). However, the proper measure of damages is the difference between the agreed price of the security and the fair market value at the time of the breach, not the profits the Trust might have made if plaintiff had been able to resell the ESM Bond. *See E.J. Brooks Co. v. Cambridge Sec. Seals*, 31 N.Y.3d 441, 444 (2018) (finding that "compensatory damages must return the plaintiff, as nearly as possible, to the

position it would have been in had the wrongdoing not occurred—but do no more.”)

Accordingly, as explained above, the Trust’s damages are € 1,362,329,794.

The Trust is also entitled to statutory interest at 9% per annum from the date of breach. See C.P.L.R. §5004 and *Deutsche Bank Nat'l Tr. Co. Tr. for Harborview Mortg. Loan Tr. v. Flagstar Capital Markets Corp.*, 32 N.Y.3d 139, 145 (1st Dept. 2018) (“[i]n New York, the default accrual rule for breach of contract causes of action is that the cause of action accrues when the contract is breached.”) The Court finds the date of breach is January 17, 2018 based on the affidavits of Mark Fawer, officer of Melimar (¶ 24 – 25), Jeffery Lustbar, owner of CMCC (¶ 29 – 30), and Burnette Dubose, trustee of the Trust (¶ 27 – 28) which indicate that plaintiffs learned on January 17, 2018 that Oliveira would not sell the Trust the Bond.

Since the Trust’s damages are in Euros, plaintiff is directed to contact the Judgment Clerk with evidence of the conversion rate from Euros to U.S. dollars on the date the Clerk enters the judgment.

### **Fraud Damages**

Plaintiffs Melimar and CMCC seek to recover the 2% fee they would have received under the IMFPA had Oliveira sold the ESM Bond to the Trust. If the Bond transaction had been successful, Melimar and CMCC would have received 1% of the value of the Bond when Oliveira sold it to the Trust, and 1% when the Trust resold the Bond to a third-party. Because the Bond transaction never took place, Melimar and CMCC were deprived of the 2% fee. Importantly, the IMFPA was an agreement between plaintiffs Melimar, CMCC and the Trust. Oliveira was not a party to the IMFPA. However, plaintiffs showed that, absent Oliveira’s fraud, they would not have entered into the IMFPA.

It is well settled that defrauded plaintiffs are entitled only to “out of pocket” losses rather than “benefit of the bargain” damages. See *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (2017) quoting *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421 (1996) (holding that “[i]n New York, as in multiple other states, ‘[t]he true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong’ or what is known as the ‘out-of-pocket’ rule”) (citations omitted). Plaintiffs’ reliance on *Doehla v. Wathne Ltd.*, No. 98-civ.-6087 (CSH), 2000 WL 987280 (S.D.N.Y. July 17, 2000), is misplaced. Plaintiffs emphasize the *Doehla* court’s finding that “[i]f the proof is there, a defrauded plaintiff may base a claim for actual pecuniary loss upon an economic opportunity that defendant fraudulently induced him to forego.” However, *Doehla* is readily distinguishable. In *Doehla*, the court was faced with a defrauded plaintiff who had been induced to forego an alternate employment opportunity. The contemplated potential recovery was not for the plaintiff’s speculative potential earnings, but for the identifiable damage to plaintiff’s career development (relying on *Stewart v. Jackson & Nash*, 976 F.2d 86 [2d Cir.1992])

No analogous damages are claimed here. Plaintiffs Melimar and CMCC seek only to recover their lost profits in connection with the failed Bond transaction. They have offered no evidence of any out of pocket expenses incurred as a result of Oliveira’s fraud. Therefore, this Court declines to award plaintiffs Melimar and CMCC money damages.

Accordingly, it is hereby

ORDERED that plaintiffs’ motion is granted to the extent of directing the Clerk to enter judgment in favor of plaintiff SBM Holdings, LLC, Series Trust 1705 against defendant Francisco Reis Oliveira in the amount of € 1,362,329,794, plus statutory interest at the rate of 9%

per annum from January 17, 2018, converted to U.S. dollars on the date judgment is entered; and the motion is denied as to plaintiffs Melimar and CMCC.

9-19-19

DATE

*Barry R. Ostrager*  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE