BML Props. Ltd. v China Constr. Am., Inc.
2020 NY Slip Op 30816(U)
March 17, 2020
Supreme Court, New York County
Docket Number: 657550/2017
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

----------X

BML PROPERTIES LTD.,

Plaintiff,

- v -

CHINA CONSTRUCTION AMERICA, INC.,NOW KNOW AS CCA CONSTRUCTION, INC.,CCA CONSTRUCTION, INC.,CSCEC BAHAMAS, LTD., CCA BAHAMAS LTD., DOES 1 THROUGH 10

Defendants.

----------X

INDEX NO. 657550/2017

MOTION DATE 11/13/2019

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 189, 190, 196

were read on this motion to/for DISMISS.

In this action to recover damages for, among other things, breach of contract and fraud, plaintiff BML Properties Ltd. ("BML") moves to dismiss the shareholder oppression counterclaim and demand for punitive damages asserted by defendant CSCEC (Bahamas), Ltd. ("CSCEC").

Background[1]

BML is a company organized under the laws of the Commonwealth of the Bahamas ("The Bahamas") and was the parent company of Baha Mar Ltd., an entity developing a multibillion dollar resort complex in The Bahamas. CSCEC agreed to invest $150 million into the development project in exchange for 150,000 shares of Series A

[1] Unless otherwise stated, all factual allegations are taken from the complaint (NYSCEF Dkt. No. 1) and defendants' answer and counterclaims (NYSCEF Dkt. No. 161).

Preferred Stock in Baha Mar Ltd. BML is the majority shareholder of Baha Mar Ltd., owning 100% of the common voting shares and CSCEC is a minority shareholder with no voting shares. On January 13, 2011, BML and CSCEC entered into an Investors Agreement, memorializing the terms and agreements of the parties.

The development project was projected to be completed by 2015. The parties did not meet the 2015 deadline and the development project was halted. In June 2015, Baha Mar Ltd. began bankruptcy proceedings in the United States Bankruptcy Court for the District of Delaware. In July 2015, the Government of the Bahamas filed a "winding up" action against Baha Mar Ltd. and affiliates, including BML.

Procedural History

BML commenced this action against CSCEC, and defendants China Construction America Inc., now known as CCA Construction, Inc. and CCA Bahamas, Ltd. for fraud, breach of contract, and breach of the implied covenant of good faith and fair dealing. After initial motion practice, CSCEC served an answer with counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, and shareholder oppression under the Bahamas Companies Act.[2] In its request for relief, CSCEC seeks money damages, costs and attorneys' fees, and punitive damages. BML moves to dismiss CSCEC's counterclaim for shareholder oppression on the ground, among others, that it is not viable under New York law. BML also seeks to strike the punitive damages demand as unwarranted.

[2] The remaining defendants have not asserted counterclaims.

Shareholder Oppression Counterclaim

a. Governing Law

CSCEC asserts a counterclaim against BML for shareholder oppression, pursuant to the Bahamas Companies Act. In the shareholder oppression counterclaim CSCEC alleges that BML took actions that were oppressive to CSCEC, such as diverting money to entities controlled by BML, for purposes unrelated to the development project, and that BML withheld material information from CSCEC relating to the project's design and finances.

BML argues that the shareholder oppression counterclaim is based on a Bahamian statute, the Bahamas Companies Act, which is not the law applicable to the parties' relationship. BML argues that the parties are subject to New York Law pursuant to a governing law provision in the Investors Agreement, and that CSCEC's shareholder oppression counterclaim cannot survive a motion to dismiss pursuant to New York law.

In opposition, CSCEC argues that the Investors Agreement does not mandate the application of New York law to all causes of action that may arise as a result of the parties' relationship. CSCEC claims that the New York choice of law provision should be narrowly applied only to the interpretation of the Investor Agreement itself. CSCEC further argues that, because its shareholder oppression counterclaim is not based on the Investor Agreement, but instead based on a Bahamian statute, the governing law clause in the Investor Agreement is inapplicable.

"It is the well-settled policy of the courts of this State to enforce contractual provisions for choice of law," unless the party seeking to invalidate the provision "show[s] that its enforcement would be unreasonable, unjust, or would contravene public policy, or that the clause is invalid because of fraud or overreaching." *Boss v Am. Exp. Fin. Advisors, Inc.*, 15 A.D.3d 306, 307-08 (1st Dept. 2005), *affd*, 6 N.Y.3d 242 (2006) (citations and quotation marks omitted). "[W]hen parties include a choice-of-law provision in a contract, they intend that the law of the chosen state—and no other state—will be applied. In such a situation, the chosen state's substantive law—but not its common-law conflict-of-laws principles or statutory choice-of-law directives—is to be applied, unless the parties expressly indicate otherwise." *Ministers & Missionaries Ben. Bd. v Snow*, 26 N.Y.3d 466, 476 (2015).

Here, the Investor Agreement's Governing Law clause states:

> (a) Choice of Law and Forum. Except for those provisions which are governed by the laws of the Commonwealth of The Bahamas pursuant to the Memorandum and Articles of Association of the Company (as such organizational documents may be amended, supplemented or otherwise modified from time to time), this Agreement shall be governed by and construed in accordance with the laws of the State of New York (without giving effect to the choice of law principle thereof) applicable to agreements made and to be performed in New York and cannot be modified without the express written consent of all of the Parties. Each Party hereby irrevocably submits to the exclusive jurisdiction of the United States District Court for the Southern District of New York and any appellate courts thereto, or if federal jurisdiction is lacking, then the Supreme Court of the State of New York, New York County, and any appellate courts thereto, in connection with any suit, action, or proceeding arising out of or related to this Agreement. Each Party hereby expressly waives all rights, which it may now or hereafter have for any reason whatsoever, to commence any suit, action or proceeding arising out of or related to this Agreement in any jurisdiction other than as provided in this Section 11.3. Each Party further consents irrevocably that, if

> any suit, action, or proceeding arising out of or related this Agreement is commenced in the United States District Court for the Southern District of New York or the Supreme Court of the State of New York, New York County, or any appellate courts thereto, valid service of process may be made by delivering such process to the Parties (with copies to counsel) in accordance with Section 11.8 of this Agreement and that such service shall be of the same legal force and validity as if personally served on the entity in the State of New York.

Investors Agreement, § 11.3(a), NYSCEF Dkt. No. 174.

In the Investor Agreement's Governing Law clause, these sophisticated business entities, negotiating a multibillion dollar business agreement, plainly and broadly agreed that New York law, not Bahamian law, would govern their relationship. Moreover, the parties directly disclaimed any choice of law analysis.[3]

CSCEC has not alleged that the Governing Law clause is invalid or that its enforcement would be unreasonable or against public policy. Thus, there is no reason to ignore the parties choice of New York law simply because a Bahamian statute is more favorable to CSCEC. Further, CSCEC's argument that New York law only applies narrowly to the interpretation of the Investors Agreement is meritless. The Governing

---

[3] The Investor Agreement's Governing Law clause explicitly carves out one exception to the application of New York law – the parties agreed that Bahamian law applies to the interpretation of the "Memorandum and Articles of Association of the Company." The only reference to the Memorandum and Articles of Association of the Company is in § 4.8 of the Investors Agreement, which states, "The Company shall not take any of the following actions (each a 'Material Decision') without the consent of China State and the unanimous consent of the Board: (c) Amend the Company's memorandum or articles of association in a manner that would adversely affect the rights of the holders of the Series A Preferred Stock." (Investors Agreement, §4.8, NYSCEF Dkt. No. 174). That provision is inapplicable here and CSCEC does not invoke the provision in support of its arguments that Bahamian law should be applied.

Law clause in the Investors Agreement employs standard choice of law language that the court have consistently held evidences the parties' intent that New York law govern their relationship. *See, e.g., See ABB, Inc. v. Havtech, LLC,* 176 A.D.3d 580 (1st Dep't 2019).[4]

Lastly, CSCECs argues that the shareholder oppression counterclaim is extra-contractual because the Bahamian statute imposes an independent legal duty on the parties. First, the parties' relationship as shareholders of Baha Mar Ltd. is entirely contractual, and subject to their agreement that only New York law governs their obligations. "Generally, where parties have entered into a contract, courts look to that agreement to discover ... the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency. If the parties ... do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them." *EBC I, Inc. v Goldman, Sachs & Co.,* 5 N.Y.3d 11, 19–20 (2005). Further, applying a Bahamian statute to a dispute between parties who plainly agreed to apply New York law to their relationship would vitiate the entire purpose of the governing law provision.[5]

For the foregoing reasons I find that New York law applies to the counterclaim alleging shareholder oppression.

---

[4] *Cf. J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc.2d 7, 11 (Sup Ct, NY County 2001), *affd*, 293 A.D.2d 323 (1st Dept. 2002).

[5] This is not the first time in this action I have held that New York law governs this dispute. I previously so held, in a decision denying defendants' motion to compel arbitration and dismiss for lack of jurisdiction. *See BML Properties Ltd. v. China Construction America, Inc. et al.*, Index No. 657550/2017, NYSCEF Doc. No. 154.

b. Sufficiency of CSCEC's Shareholder Oppression Counterclaim

BML next argues that the shareholder oppression counterclaim must be dismissed because (1) to bring a cause of action for shareholder oppression in New York, a party must have voting rights, which CSCEC does not have; (2) the only remedy that New York law provides for shareholder oppression is winding up of the corporation, which has already taken place; and (3) CSCEC waived its right to bring the shareholder oppression counterclaim pursuant to the Investors Agreement, because the parties have waived all common law fiduciary duties. CSCEC argues in opposition that, even if New York law applies, the shareholder oppression counterclaim is viable.

In New York, a cause of action for shareholder oppression is typically brought under § 1104-a of New York Business Corporation Law. The statute states:

> (a) The holders of shares *representing twenty percent or more* of the votes of all outstanding shares of a corporation, other than a corporation registered as an investment company under an act of congress entitled "Investment Company Act of 1940," no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:
> (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;

(emphasis added)

It is undisputed that CSCEC did not receive any voting shares in Baha Mar Ltd. (NYSCEF Dkt. No. 161 at ¶ 82). Because CSCEC does not satisfy BCL§ 1104-a's requirement that, to assert a claim for shareholder oppression, a shareholder must hold

twenty percent or more of the corporation's outstanding shares, CSCEC may not assert a shareholder oppression counterclaim under the New York BCL.

In any event, BCL § 1104-a specifically provides for the remedy of dissolution in the case of alleged shareholder oppression, not damages. CSCEC does not cite to any caselaw holding that it is entitled to seek a remedy under BCL § 1104-a, other than dissolution, for BML's alleged oppressive action. Because CSCEC does not own 20% voting shares and because Baha Mar Ltd. has already been dissolved,[6] there is no basis for CSCEC's shareholder oppression counterclaim.

Finally, BML notes that, while a shareholder oppression claim may be pled as a common law breach of fiduciary duty cause of action, here it cannot because the parties have waived their common law fiduciary obligations to each other in the Investors Agreement. In opposition, CSCEC argues that the Investors Agreement does not contain clear and unambiguous language waiving fiduciary duties.

[S]ophisticated parties can release fiduciaries from their obligations and from claims. However, such an agreement must contain a broad general release, or an express release of fiduciary claims." *DeBenedictis v Malta*, 140 A.D.3d 438, 438–39 (1st Dept. 2016). Here, section 11.9 of the Investors Agreement is entitled "Limitations on Fiduciary Duties; Exculpation and Indemnification" and states in relevant part:

> For purposes of assessing the Parties' fiduciary duties and obligations under this Agreement, including, without limitation, Baha Mar's and its designees duties and obligations under Section 4, the Parties acknowledge that the terms and provisions of this Agreement and the duties and obligations set

[6] In its memorandum of law (NYSCEF Dkt. No. 176 at p. 7) BML states that Baha Mar Ltd. was dissolved in January 2019. CSCEC does not dispute this statement.

> forth herein are intended to satisfy the fiduciary duties which may exist as a result of the relationship between the Parties, including, without limitation, all duties of loyalty, good faith, fair dealing, full disclosure or any other duty deemed to exist under the common law principles of agency or otherwise.

Investors Agreement § 11.9, NYSCEF Dkt. No. 174

The fiduciary duties waiver clause in the Investors Agreement is broad and clear. The parties specifically chose to replace any existing common law fiduciary duties with only those duties delineated in the Investors Agreement. Thus, CSCEC may not base its shareholder oppression claim on a New York common law breach of fiduciary duty theory.

For the foregoing reasons, BML's shareholder oppression counterclaim is dismissed for failure to state a claim.

Punitive Damages

In its prayer for relief, CSCEC seeks "[a]n order allowing Counterclaim-Plaintiff to recover its costs and attorneys' fees, as well as punitive damages." NYSCEF Doc. No. 161 at p. 64. BML moves to dismiss the demand for punitive damages on the ground that this is not the rare type of action in which a punitive damages award would be warranted.

Even though the compensatory damages demands in this action are quite large, this action is, at its core, a private dispute between two contracting parties over the development of real property. CSCEC's counterclaims (other than the shareholder oppression counterclaim) allege breach of contract and breach of the covenant of good faith and fair dealing. Punitive damages are generally not applicable to contractual and quasi-contractual claims. Moreover, CSCEC's counterclaims do not allege "such wanton

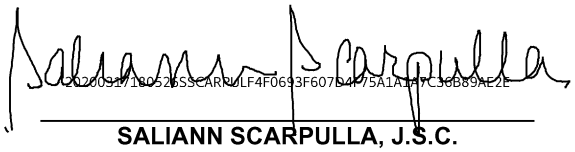
dishonesty as to imply a criminal indifference to civil obligations" *Walker v. Sheldon*, 10 N.Y.2d 401, 405 (1961); *see also Weiss v. Lowenberg*, 95 A.D.3d 405 (1st Dept. 2012). I therefore strike CSCEC's demand for punitive damages.

In accordance with the foregoing, it is

ORDERED that the motion by BML Properties Ltd. to dismiss the counterclaim for shareholder oppression is granted, the counterclaim for shareholder oppression is dismissed, and the remaining counterclaims are severed and will continue; and it is further

ORDERED that the motion by BML Properties Ltd. to strike the demand in the counterclaims for punitive damages is granted, and the punitive damages demand is stricken.

This constitutes the decision and order of the Court.



3/17/2020
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE