New York Wheel Owner LLC v Mammoet Holding B.V.
2022 NY Slip Op 30293(U)
January 14, 2022
Supreme Court, New York County
Docket Number: Index No. 656661/2020
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET CHAN** **PART** **49M**

Justice

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NEW YORK WHEEL OWNER LLC

Plaintiff,

- v -

MAMMOET HOLDING B.V.,

Defendant.

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INDEX NO. 656661/2020

MOTION DATE 01/15/2021, 01/15/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 20, 22, 24

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 19, 21, 23, 25

were read on this motion to/for STAY.

In this action for breach of contract arising out of a failed project to construct a giant observation wheel (the Wheel or the Project), defendant Mammoet Holding B.V. (MBV) moves pursuant to CPLR 3211(a) (1) and (7) to dismiss the complaint, and separately moves to stay discovery pending the resolution of the dismissal motion. Plaintiff New York Wheel Owner, LLC (New York Wheel) opposes the motions.

Background[1]

This action has its genesis in a March 5, 2014 design-build agreement ("DBA") between Mammoet-Starneth LLC, known as the Design Build Team ("DBT"), and New York Wheel, the developer of the Project, under which DBT agreed to design and build the Wheel (NYSCEF # 9-Complaint, ¶¶ 2,3; NYSCEF #10-DBA). The Wheel was to be located at the Staten Island waterfront as part of New York City's economic revitalization plan (NYSCEF # 9, ¶ 1; NYSCEF #10, at 2).

[1] Unless otherwise noted, the following facts are based on the allegations in the complaint which, for the purposes of this motion must be accepted as true, and the documentary evidence submitted by the parties.

DBT had two members – Mammoet USA North, Inc. (MUSA) and Starneth, LLC (*id.*, ¶ 12). MBV is DBT's parent company, and owns and controls DBA and numerous Mammoet-affiliated entities (NYSCEF # 9; ¶¶ 2, 11). Non-party New York Metropolitan Regional Center (New York Regional), which loaned money for the Project to New York Wheel, secured a guaranty from non-parties Mammoet USA Holding, Inc. (Mammoet Holding) and Starneth B.V.[2] (together Guarantors) under which in the event of DBT's breach of the DBA, the Guarantors agreed to fulfill DBT's obligations under the DBA or to pay damages (NYSCEF # 11-Completion Guaranty, § 1.1[a], 1.2[c]).

Shortly after the parties entered into the DBA, the Project ran into difficulties and in 2017, New York Wheel filed an action in the United States District Court for the Southern District of New York against DBT, its two members, and various companies associated with DBT, asserting claims for breach of contract, fraudulent inducement and breach of a guarantee[3] (*New York Wheel Owner LLC v Mammoet Holding B.V.*, 17-CV-4026 [SD NY 2017] (the Federal action). DBT answered the complaint and asserted various counterclaims including against New York Wheel. During the pendency the Federal action, DBT filed for bankruptcy, and DBT's claims were assigned to MUSA.

By Decision and Order dated August 21, 2020, Hon. Jesse M. Furman, the judge presiding over the Federal action, addressed various motions to dismiss, and a motion to amend. Of relevance here, Judge Furman decided one of the issues that is now before this court – whether New York contract law applies to MBV, which is being sued under an alter ego theory under Delaware law such that a non-recourse clause in the DBA does not preclude the claims against MBV – and found in favor of New York Wheel (*New York Wheel Owner LLC v Mammoet Holding, B.V.*, 481 F Supp 3d 216, 229-232 [SD NY 2020]).

In November 2020, Judge Furman dismissed the Federal action for lack of subject matter jurisdiction after it was disclosed that there was an absence of diversity. Because the Federal action was dismissed for lack of subject matter jurisdiction, the parties agree that Judge Furman's decision is not binding on this court.

As a result of the dismissal of the Federal action, the litigation arising out of the Project is now before this court. In this action, New York Wheel asserts a single

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[2] Starneth B.V. filed for bankruptcy in 2019.

[3] The guaranty alleged to have been breached in the Federal action was not the Completion Guaranty issued in favor of New York Regional at issue here. A separate federal action was brought by New York Regional seeking recovery under the Completion Guaranty (*Regional v Mammoet USA Holding, Inc.* 1:20-cv-09477 [SD NY 2020]); however, that action was dismissed for lack of subject matter jurisdiction due to an absence of diversity (*New York Metropolitan Regional Center, L.P.*, 2021 WL 3475626 [SD NY 2021]).

cause of action for breach of contract against MBV under a theory of alter ego liability, alleging that DBT did not follow corporate formalities and co-mingled assets with various related entities, and that MBV exercised complete control over DBT, which was deliberately undercapitalized by MBV (NYSCEF # 9, ¶¶ 101-137). The alter ego theory is also based on allegations, *inter alia*, that DBA misled New York Wheel as to the risk of cost overruns (*id.*, ¶¶ 140-141), submitted false invoices (*id.*, ¶¶ 63, 49-63), and deceptively siphoned money to its parent entities, including MBV, before DBT declared bankruptcy (*id.*, 97-100).

In another action titled *Mammoet USA North v New York Wheel Owner LLC;* Index No. 656224/2020 (the MUSA action), MUSA and Mammoet Holding variously assert seven counts against three defendants including New York Wheel and New York Regional (MUSA action; NYSCEF # 2).[4] Of relevance to MBV's dismissal motion, the MUSA action includes a counterclaim by New York Regional against Mammoet Holding for damages for breach of the Completion Guaranty[5] (MUSA action; NYSCEF # 71, Counterclaims, ¶¶ 85-103).

MBV's Motion to Dismiss

MBV argues that the complaint should be dismissed under sections 19.10 and 11.14.2 of the DBA. Section 19.10 provides that "[n]o personal liability shall arise out of the Work...[or] this Agreement...as against any direct or indirect ...shareholder [or] member...of...the [DBT] or its constituent entities...."[6] (NYSCEF

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[4] This court has granted separate motions to dismiss counts three and six of the complaint (MUSA action; NYSCEF #'s 69, 73).

[5] Mammoet Holding has asserted a claim against New York Regional seeking a declaration that it has no liability under the Completion Guaranty (MUSA action; NYSCEF # 2, ¶¶ 227-229).

[6] Section 19.10 provides that:

> No Personal Liability. No personal liability shall arise out of the Work, this Agreement or the other Design Build Documents as against any individual or any direct or indirect officer, director, shareholder, member, employee, partner, representative or fiduciary of Developer or the Design Build Team or its constituent entities, absent criminal conduct as determined by a court of competent jurisdiction after all appeals have been exhausted. Each party hereto, as applicable, shall look solely to the assets of Developer and/or the Design Build Team, in respect of the obligations of Developer and/or the Design Build Team under this Agreement or the other Design Build Documents.

(NYSCEF #10, § 19.10).

10, § 19.10). MBV argues that under this section, as a parent company and an indirect member of DBT, it cannot be held liable for breach of the DBA, including on an alter ego theory.

Specifically, MBV argues that under New York law, which applies to this dispute based on the choice of law clause in the DBA,[7] section 19.10 negates its liability for non-fraudulent or grossly negligent conduct and thus provides a complete defense to this breach of contract action (citing e.g., *Metro. Life Ins. Co. v Noble Lowndes Int'l, Inc.*, 84 NY2d 430, 436 [1994]; *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 [1983]). Moreover, MBV argues that the provision applies despite allegations against it seeking to impose alter ego liability (citing *e.g.*, *Hillcrest Realty Co. v Gottlieb,* 208 AD2d 803 [2d Dept 1994]; *Treeline Mineola, LLC v Berg*, 21 AD3d 1028, 1029 [2d Dept 2005]). In this connection, MBV asserts that the cases relied on by New York Wheel and cited by the court in the Federal action, which apply Delaware law to hold that a stand-alone claim for alter ego liability sounds in equity and not in breach of contract, are contrary to applicable New York law (citing *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993] ["an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation..."]).

New York Wheel counters that while Judge Furman's decision is not binding law, it provides persuasive authority (citing *Glob. Disc. Travel Servs., LLC v TWA*, 960 F Supp 701, 708 [SD NY 1997] [another court's interpretation of the same contract is "persuasive authority" that "will undoubtedly have a practical effect on any subsequent action"]). In any event, New York Wheel argues that Delaware law governs the alter ego claim since DBT, the alleged sham corporation, is organized in Delaware, under which an alter ego claim is the type of fraud-like equitable claim beyond the scope of section 19.10 (citing *LaSalle Nat'l Bank v. Perelman,* 141 F Supp 2d 451, 460-463 [D Del 2001]). Moreover, New York Wheel argues that even if New York law were applied, as the claim includes allegations of fraudulent conduct as a basis for alter ego liability, such claim is not barred by the plain language of section 19.10, and the cases cited by MBV are not dispositive here.

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must "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 into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable

[7] Section 19.2 of the DBA provides that "[t]his Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to its conflict of law provisions."

inference'" (*Morgenthow & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). However, dismissal based on documentary evidence may result "only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it'" (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001], quoting, *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Here, accepting the allegations in the complaint as to the basis of MBV's alter ego liability as true, including that DBT, which was controlled by MBV and was intentionally undercapitalized, submitted false invoices and deceptively siphoned money to MBV and other related entities, the court finds that section 19.10 of the DBA does not insulate MVA from liability. As for the choice of law issue, while Delaware law applies to the substance of the alter ego claim since DBT is organized under Delaware law, New York law governs the interpretation of the DBA and the issue of whether section 19.10 bars the claim against MBV (*LaSalle Nat. Bank v Perelman*, 141 F Supp 2d at 459 [finding that New York law governed dispute regarding whether no-recourse provision in indenture agreements with New York choice of law clause barred claims against officers, directors and shareholders of Delaware corporation]).

Under New York law, the no recourse provision at issue, which bars "personal liability" under the DBA "as against any direct or indirect ... shareholder [or] member ... of ... the [DBT] or its constituent entities," does not shield DBT's related entities from liability for allegedly fraudulent acts aimed at depriving creditors of their ability to recover from DBT (*see Bankers Trust Co. v Hale & Kilburn Corporation*, 84 F2d 401, 405 [1936][holding that a clause in note agreement providing for "'[n]o recourse shall be had to or against ... any past, present or future stockholder of the Company...for payment of ... any such Notes ' ... does not protect stockholders who so appropriate property of the corporation"]; *see also Small v Sullivan*, 245 NY 343, 356, *rearg denied* 245 NY 621 [1927][holding that recourse provision in trust agreement "did not and could not cover the future fraudulent acts of the directors"]).

Furthermore, the New York cases relied on by MBV are not to the contrary as they do not hold that a limitation of liability provision bars a plaintiff from asserting a breach of contract claim when the complaint includes allegations of conduct that "is fraudulent ... or prompted by the sinister intention of one acting in bad faith" (*Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d at 385]). As for *Hillcrest Realty Co. v Gottlieb* (208 AD2d 803) and *Treeline Mineola, LLC v Berg*, (21 AD3d 1028), these cases, in which the courts enforced lease provisions limiting the liability of the individual defendants for rent obligations of corporate entities, are factually distinguishable including because they do not involve fraudulent conduct of the kind alleged here (*see CC Ming (USA) Ltd. Partnership v Champagne Video Inc.*, 232 AD2d 202, 202 [1st Dept 1996][affirming grant of

summary judgment against corporate defendant for obligations of tenant under lease where uncontroverted facts showed that "the corporate form was being used not to limit a contracted liability...but to evade it"]).

Accordingly, defendant's motion to dismiss based on section 19.10 of the DBA is denied.

The remaining issue on the dismissal motion is whether this action is barred by section 11.14.2 of the DBA which provides that:

> The Parties agree that the Completion Guaranty shall be enforceable strictly according to its terms, and in consideration of entering into such Completion Guaranty, Mammoet USA Holding, Inc. and Starneth B.V, jointly and severally, as Guarantor under the Completion Guaranty, shall not be exposed to duplicate liability to Developer for the exposures enumerated in the Completion Guaranty. For the avoidance of doubt, (i) in no event shall Developer be entitled to recover under [the DBA] with respect to the same subject matter giving rise to any liability of Guarantor under the Completion Guaranty, (ii) in no event shall Developer be entitled to recover under [the DBA] with respect to any matter for which the Beneficiary (as defined in the Completion Guaranty) (i.e. New York Regional) has sought recovery under the Completion Guaranty, and (iii) in no event shall the Beneficiary (i.e. New York Regional) be entitled to recovery under the Completion Guaranty with respect to any matter for which Developer shall recover under this Agreement.

(NYSCEF # 10, § 11.14.2).

MBV argues that this provision precludes this action in which New York Wheel seeks recovery under the DBA since New York Regional's counterclaim in the MUSA action seeks duplicative recovery from Mammoet Holding under the Completion Guaranty. Specifically, MBV notes that New York Wheel in this action and New York Regional in the MUSA action both seek to recover the cost of completing the Wheel.

New York Wheel counters that when read as a whole, it is evident that Section 11.14.2 is solely intended to preclude duplicative liability against the Guarantors who are not parties to this action, and that any ambiguity as to the provision must be resolved in favor of New York Wheel at the pleading stage (citing *LDIR, LLC v DB Structured Prods., Inc.*, 172 AD3d 1, 5-6 [1st Dept 2019][where a "disputed provision is reasonably susceptible to more than one interpretation . . . it cannot be construed as a matter of law, and dismissal . . . is not appropriate"]).

In reply, MBV argues that New York Wheel's interpretation of the provision as protecting only the Guarantors ignores that the second sentence of the provision specifically prevents New York Wheel from obtaining duplicate recovery under the DBA – an agreement under which the Guarantors, as non-parties, would have no right to recovery.

In interpreting section 11.14.2, the court notes that "[w]hen parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms" (*W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *see South Rd. Assocs., LLC v. Intl. Bus. Machines Corp.*, 4 NY3d 272, 277 [2005]). A written contract should be read as a whole to give each clause its intended purpose, and "[p]articular words should be considered, not as if isolated from the context, but in the light of the obligations as a whole and the intention of the parties as manifested thereby" (*Matter of Stravinsky*, 4 AD3d 75, 81 [1st Dept 2003] [internal citation and quotation omitted]). In accordance with these principles, a court should interpret a contract "so as to give full meaning and effect to material provisions" and so as not to "render any portion meaningless" (*Beal Savings Bank v Sommer*, 8 NY3d 318, 324-325 [2007], quoting *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]). And, "[e]xtrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (*Greenfield v Phillies Records, Inc.*, 98 NY2d 562, 569 [2002]).

Under these principles, the court finds that section 11.14.2 is intended to protect the Guarantors from being exposed to duplicative liability from New York Regional and New York Wheel, and that the second sentence of the provision which is prefaced with the phrase "for the avoidance of doubt" specifies the types of recovery prohibited as against the Guarantors. To find otherwise would be to ignore the meaning of the two sentences as read together and the purpose of the provision as a whole, which is to protect the Guarantors and not the DBT or its related entities. This intent is further evidenced by the references in each of the subdivisions of the second sentence to recovery sought under the Completion Guaranty which is not at issue in this action, and under which MBV has no potential liability.

Finally, as the dismissal motion has been denied, MBV's motion for a stay is moot.

Conclusion

In view of the above, it is

ORDERED that MBV's motion to dismiss the complaint (motion sequence 001) is denied; and it is further

ORDERED that MBV's motion for a stay of discovery is denied as moot; and it is further

ORDERED that MBV shall answer complaint within 20 days of entry of this decision and order; and it is further

ORDERED that a preliminary conference shall be held by telephone on February 28, 2022 at 11:30 am, with the call-in number to be provided by the court.

This constitutes the Decision and Order of the court.

01/14/2022
DATE

MARGARET A. CHAN, J.S.C.
MARGARET A. CHAN, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED			[x]	NON-FINAL DISPOSITION	
APPLICATION:	[ ]	GRANTED	[x]	DENIED	[ ]	GRANTED IN PART	[ ] OTHER
	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	