GSCP VI Edgemarc Holdings, L.L.C. v ETC Northeast Pipeline, LLC

2023 NY Slip Op 33721(U)

October 14, 2023

Supreme Court, New York County

Docket Number: Index No. 652906/2019

Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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GSCP VI EDGEMARC HOLDINGS, L.L.C., GSCP VI PARALLEL EDGEMARC HOLDINGS, L.L.C., WSEP AND BRIDGE 2012 EDGEMARC HOLDINGS, L.L.C., EM HOLDCO LLC,

Plaintiffs,

- v -

ETC NORTHEAST PIPELINE, LLC,

Defendant.

INDEX NO. 652906/2019

MOTION DATE N/A

MOTION SEQ. NO. 021

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 021) 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 546, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752

were read on this motion for SUMMARY JUDGMENT.

This case involves a natural gas pipeline in Western Pennsylvania. Plaintiffs[1] were investors in non-party EdgeMarc Energy Holdings, LLC ("EdgeMarc"), a now-defunct natural

[1] Plaintiffs GSCP VI EdgeMarc Holdings, LLC; GSCP VI Parallel EdgeMarc Holdings, LLC; and WSEP & Bridge 2012 EdgeMarc Holdings, LLC are investment entities affiliated with

gas production company that owned acreage in Butler County, Pennsylvania and Monroe County, Ohio. Defendant ETC Northeast Pipeline, LLC ("ETC") owns and operates the pipeline. Defendant now move for summary judgment in its favor on Plaintiffs' remaining claims for breach of contract and fraud.

For the following reasons, Defendant's motion for summary judgment is **granted** with respect to one aspect of Plaintiffs' claimed damages for breach of contract, and is **otherwise denied**.

BACKGROUND

In 2015, EdgeMarc entered into natural gas gathering agreements with Defendant ETC Northeast Pipeline, LLC ("ETC"), which owns and operates the Revolution Pipeline, to transport its natural gas from EdgeMarc's Butler County wells to downstream "long haul" pipelines (the "2015 Agreements") (NYSCEF 354 [Def's Rule 19-a Statement of Material Facts ("DSMF")] ¶7; NYSCEF 538 [Plaintiff's Response to Def's Rule 19-a Statement ("PSMF")] ¶7).

Starting in 2016, natural gas prices plummeted and EdgeMarc needed to renegotiate the 2015 Agreements to avoid bankruptcy of its Pennsylvania assets (DSMF ¶8; PSMF ¶8). In late 2016, the Equity Sponsors approached ETC to renegotiate the 2015 Agreements, asking for significant price and volume commitment concessions (DSMF ¶¶10–12; PSMF ¶¶10–12). EdgeMarc's financial situation required the Equity Sponsors to make additional equity investments (DSMF ¶9; PSMF ¶9).

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investment funds managed by Goldman Sachs (the "Goldman Sachs Plaintiffs"). Plaintiff EM HoldCo, LLC is an investment entity owned by the Ontario Teachers' Pension Plan Board ("OTPP") (collectively, the "Equity Sponsors"). By virtue of its equity investments in EdgeMarc, Goldman sat on the Board of Directors of EdgeMarc and held controlling interests in EdgeMarc.

On August 23 and 24, 2017, ETC met with the Goldman Sachs Plaintiffs (OTPP did not attend) in Wexford, Pennsylvania to continue discussions about amending the 2015 Agreements. (DSMF ¶¶ 15, 22–24; PSMF ¶¶ 15, 22–24). At this meeting, a member of ETC's commercial team purportedly stated that the Revolution Pipeline was "on track" to be in service by July 1, 2018 (DSMF ¶ 25; PSMF ¶ 25).

On November 13, 2017, EdgeMarc and ETC executed several agreements: an amended Gathering and Processing Agreement ("GPA"), Individual Transaction Confirmation No. 9532-101 ("ITC-101"), ITC No. 9532-102 ("ITC-102"), and a series of Equity Commitment Letters ("ECLs") (collectively, the "Amended Agreements") (DSMF ¶ 44; PSMF ¶ 44). At issue in this case are two ECLs, one between ETC, EdgeMarc, and OTPP (NYSCEF 317), and another between ETC, EdgeMarc and the Goldman Sachs Plaintiffs (NYSCEF 316) (collectively, the "ECLs").[2] The Amended Agreements established that the Equity Sponsors would invest $150 million in EdgeMarc and ETC would gather EdgeMarc's natural gas under the new terms (DSMF ¶ 12).

The Equity Sponsor's investment was divided into tranches. It would immediately invest $50 million and then, under the ECLs, invest $100 million over the course of three equal tranches, subject to certain conditions (DSMF ¶54; PSMF ¶ 54). The Equity Sponsors agreed to make the latter three investments (totaling $100 million) on specified "Commitment Date[s]," which would be extended if there was a "Project Delay"—*i.e.*, "any delay in the development, construction, or completion of the Gathering System described in ITC-101 that will delay the In-

[2] Other than the sponsor and the total amount of money committed, the two ECLs at issue in this case are identical (DSMF ¶46; PSMF ¶ 46).

Service Date beyond July 1, 2018"—or if conditions to funding (set forth in Section 3 of the ECLs) were not satisfied (ECLs §§ 2[a], 3).

Section 2(b) of the ECLs required ETC: (i) to provide a "Project Status Notice" before each "Commitment Date" certifying whether a Project Delay had occurred, and (ii) to "promptly notify" the Equity Sponsors "as soon as it knows of any event reasonably likely to cause a delay in the In-Service Date" (ECLs §§ 2[b]). The parties dispute the definition of "In-Service Date" (DSMF ¶53; PSMF ¶53). According to Defendant, the "In-Service Date" referenced in Section 2(b) is July 1, 2018 (DSMF ¶53). Plaintiff argues that the "In-Service Date" refers to the term as defined in the ITC-101, which is the first Day of the Month following the Day on which the pipeline is completed and placed in commercial service (NYSCEF 314 ["ITC-101"] at 3).

ETC issued Project Status Notices on January 18, March 2, and April 16, 2018, each indicating there was no Project Delay (DSMF ¶66; PSMF ¶ 66). The Equity Sponsors funded accordingly, in $33.3 million increments on February 1, March 15, and April 30, 2018 (DSMF ¶57; PSMF ¶57).

On August 27, 2018, ETC energized the Pipeline with line-pack gas (DSMF ¶99). In early September, Tropical Storm Gordon brought heavy rainfall to western Pennsylvania (DSMF ¶100). At approximately 5:00 a.m. on September 10, 2018, a landslide occurred near the right of way in Beaver County, Pennsylvania (DSMF ¶101; PSMF ¶101). The pipeline separated, released gas, and caught fire (the "Incident") (DSMF ¶101; PSMF ¶101).

According to Defendant, shortly after the Incident, the parties initially believed that the Revolution Pipeline would be back in service two to six weeks later (DSMF ¶104). Following the Incident, however, the Pennsylvania Department of Environmental Protection (DEP) issued

several enforcement orders, including a stop work order and an order precluding the use of mechanized equipment (DSMF ¶110; PSMF ¶110).

On May 15, 2019, EdgeMarc filed for Chapter 11 bankruptcy (DSMF ¶115; PSMF ¶115). Plaintiffs lost their equity investment and are seeking the return of the $150 million that they funded into EdgeMarc in late 2017 and early 2018, as well as compensation for the purported lost opportunity of deploying their funds in Ohio rather than Pennsylvania if the true status and condition of the Gathering System been disclosed (DSMF ¶116; PSMF ¶116).

On May 14, 2019, the day before EdgeMarc's bankruptcy filing, Plaintiffs filed this lawsuit (DSMF ¶114; PSMF ¶114).

In the Amended Complaint, Plaintiffs brought claims for breach of contract, unjust enrichment, negligent misrepresentation, and fraud (NYSCEF 25 ["Am. Compl."]). Plaintiffs alleged that in order to induce the Equity Sponsors to invest $150 million in EdgeMarc in late 2017 and early 2018, so that EdgeMarc would continue operations in Pennsylvania and thereby provide revenue to ETC and its affiliates, ETC repeatedly represented to the Equity Sponsors that the pipeline system it was building for use by EdgeMarc was not delayed and would be complete and ready for commercial service by mid-2018 (Am. Compl. ¶1). Plaintiffs allege that, in reality, the pipeline system was rife with problems and not remotely on track for commercial service, eventually causing an explosion and high-intensity flash fire (*id.*). Due to the explosion, Plaintiffs allege that EdgeMarc had to file for bankruptcy, and the Equity Sponsors lost their entire investment in EdgeMarc, including the $150 million in new funding provided at Energy Transfer's behest (*id.*). Plaintiffs allege that, as a result of ETC's conduct, they have suffered significant damages, and are entitled to recover from ETC on theories of breach of contract as well as fraud, negligent misrepresentation and unjust enrichment (*id.*).

On July 15, 2020, this Court granted Defendants' motion to dismiss Plaintiff's claims for unjust enrichment, negligent misrepresentation, and fraud, and denied the motion to dismiss with respect to Plaintiff's claim for breach of contract (NYSCEF 93). On appeal, the First Department reinstated Plaintiff's fraud claim in part (to the extent it was based on Plaintiffs $50 million investment in 2017), and otherwise affirmed the Court's decision (*GSCP VI EdgeMarc Holdings, L.L.C. v ETC Northeast Pipeline, LLC*, 192 AD3d 454, 454 [1st Dept 2021]). With respect to the remaining fraud claim, the court held that the complaint adequately pled that Defendant's August 2017 representations that the pipeline was "on track to be fully complete by January 2018 and ready for commercial service by July 1, 2018" were knowingly false and misleading (*id.*).

After filing Note of Issue certifying completion of discovery (NYSCEF 293), Defendant filed its motion for summary judgment dismissing Plaintiff's Amended Complaint in its entirety (NYSCEF 300).

DISCUSSION

A motion for summary judgment should be granted if "upon all the papers and proof submitted," a claim or defense is sufficiently established "to warrant the court as a matter of law" to direct judgment in favor of the moving party (CPLR 3212[b]). "The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Silverman v Perlbinder*, 307 AD2d 230, 230 [1st Dept 2003]). Once the moving party meets this burden, "the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). The

party opposing a motion for summary judgment must "produce evidentiary proof in admissible form" (*Stonehill Cap. Mgmt., LLC v Bank of the West*, 28 NY3d 439, 448 [2016]). Mere conclusions, expressions of hope, allegations or assertions are insufficient to raise a triable issue of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]).

Breach of Contract

Defendant's motion for summary judgment on Plaintiffs' breach of contract claim is denied with respect to liability and as to Plaintiffs' central claim for damages ($100 million). Based on the summary judgment record, the Court finds that there are triable issues of fact with respect to breach, causation, and damages. Although Plaintiffs will bear the burden of proof on those issues at trial, at this stage the burden is on Defendant to establish entitlement to judgment as a matter of law and undisputed fact. This they have not done.

To establish a cause of action for breach of contract, a party must establish the existence of a contract, the party's own performance thereunder, the other party's breach thereof, and resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Here, there is no dispute as to the existence of a contract between the parties. The Equity Sponsors, EdgeMarc, as well as ETC entered into the ECLs, which set forth the Equity Sponsor's funding obligations, conditioned on periodic confirmations by ETC that there was no Project Delay.

There are, however, factual disputes as to whether there were Project Delays that ETC failed to report to Plaintiffs. Giving Plaintiffs the benefit of favorable inferences for purposes of this motion, a finder of fact *could* conclude that underlying issues that purportedly plagued the pipeline well before the explosion, including its design and construction, could have been considered a "Project Delay" (*R.P. Brennan Gen. Contractors & Builders, Inc. v Bovis Lend*

Lease LMB Inc., 15 Misc 3d 1134(A) [Sup Ct 2007], *affd,* 47 AD3d 499 [1st Dept 2008] ["The court's role on a motion for summary judgment is solely to determine whether there are triable issues of fact, with all reasonable inferences drawn in favor of the non-moving party"]). Plaintiffs' contentions raise numerous factual disputes that cannot be resolved on summary judgment (*see e.g.*, *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 [1st Dept 2013] ["[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [on summary judgment]."]).

Furthermore, contrary to ETC's arguments, the "sole and exclusive" remedy provision in Section 3 of the ECL does not bar the Equity Sponsors' claims as a matter of law. Section 3 of the Commitment Agreement provides:

> [n]otwithstanding anything herein to the contrary, each Sponsor's sole and exclusive remedy for the failure of any of the conditions set forth in this Section 3 to be satisfied prior to the applicable Commitment Date shall be limited to the delay in making the applicable Commitment(s) described in Section 2 and the termination rights set forth in Section 12.

(ECLs §3). As the First Department previously held, "[t]he limitation of remedies stated in Section 3 of the Commitment Letters governs when plaintiffs can delay making a payment, and does not unambiguously foreclose plaintiffs' breach of contract claim, based on payments plaintiffs made in reliance on false Project Status Notices" (*GSCP VI EdgeMarc Holdings*, 192 AD3d at 455). Defendant's reading of the agreement suggests that the Equity Sponsor's only "remedy" for funding based on a false certification would be to "delay" funding that *already occurred* based on the false certification. As Plaintiffs argue, such a construction of the agreement could leave Plaintiffs with no meaningful remedy for ETC's breach. While ETC may seek to establish at trial that the parties intended that result, it has not carried its burden of

showing at this stage that this "sole and exclusive" remedy provision bars the Equity Sponsor's claim as a matter of law.[3]

Factual disputes also preclude summary judgment with respect to causation. Proximate cause is an essential element of a breach of contract cause of action (*Jorgensen v Century 21 Real Estate Corp*, 217 AD2d 533, 534 [2nd Dept 1995]). "Generally, it is for the trier of fact to determine the issue of proximate cause. However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts" (*Lola Roberts Beauty Salon, Inc. v Leading Ins. Group Ins. Co., Ltd.*, 160 AD3d 824, 826 [2d Dept 2018]). Here, it is sharply disputed whether Plaintiff lost its investment due to the alleged breach of the ECLs, or whether Plaintiff instead lost its investment due to "supervening" factors, such as an untimely tropical storm, landslide, shutdown, and the bankruptcy of EdgeMarc. Those disputes cannot be resolved by the Court as a matter of law on summary judgment.

Likewise, Defendant has failed to demonstrate that Plaintiffs' alleged damages of $100 million that it invested pursuant to the ETCs are "special, consequential damages" that are not recoverable as a matter of law. "General damages are those which are the natural and probable consequence of the breach, while special damages are extraordinary in that they do not so directly flow from the breach. These extraordinary damages are recoverable only upon a showing that they were foreseeable and within the contemplation of the parties at the time the contract was made" (*Am. List Corp. v U.S. News and World Report, Inc.*, 75 NY2d 38, 42-43 [1989]

[3] Plaintiff's alternative argument that ETC's purported "gross negligence" negates the agreement's exclusive-remedy provision as a matter of law is misplaced. Allegations of gross negligence may render a sole remedy provision unenforceable if it is an exculpatory or nominal damages clause (*Matter of Part 60 Put-Back Litig*, 36 NY3d 342, 355-56 [2020]). That is not the case here.

[internal citation omitted]). Here, a finder of fact could determine that Plaintiffs' alleged damages –funding $100 million in reliance on the absence of a Project Delay – are "the natural and probable consequence of the [alleged] breach" by ETC (*id*. at 43). Defendants' arguments with respect to alternative *causes* of the damage (*e.g.*, the rain, fire, regulatory shut down, and EdgeMarc's bankruptcy) go to the question of proximate causation, not whether the damages are "direct" versus "special."

By contrast, Plaintiffs' claim for lost-opportunity damages (above and beyond their funding of EdgeMarc) they could have earned by investing in Ohio rather than Pennsylvania if they had been aware of a Project Delay cannot be sustained on this record. Unlike in *Tractebel Energy Mktg., Inc. v AEP Power Mktg., Inc*. (487 F3d 89 [2d Cir 2007]), upon which Plaintiffs principally rely, the alleged breach by ETC did not create a "domino effect" resulting in Plaintiff losing other profits from *collateral business arrangements* that it otherwise would have received if there had been no breach. Rather, Plaintiffs' theory is based on an *alternative* investment that it could have pursued if ETC had not breached. Unlike the $100 million investment in EdgeMarc which is specifically referenced in the ECLs, this purportedly lost opportunity cannot be considered "general" or "direct" damages flowing from ETC's alleged breach. The fact that Plaintiffs may have modeled alternative investment opportunities in Ohio does not render such a contingency "foreseeable and within the contemplation *of the parties* at the time the contract was made" (*American List*, 75 NY2d at 42-43). Accordingly, summary judgment is granted in favor of Defendant on this branch of Plaintiffs' claim for breach of contract damages.

Fraud

Defendant's motion for summary judgment on Plaintiffs' fraud claim is denied. Plaintiffs' fraud claim alleges that ETC misrepresented the status of the pipeline system in

August 2017, in order to induce the Equity Sponsors to make $50 million of capital available. Specifically, at in-person meetings at ETC's Wexford, Pennsylvania offices on August 23 and 24, 2017, one of ETC's lead negotiators made misrepresentation to representatives of EdgeMarc and the Equity Sponsors, by saying that ETC's pipeline system was on track to be complete by January 2018 and ready to be put in commercial service by July 1, 2018.

This claim raises factual issues that cannot be resolved on a motion for summary judgment. To the extent there is a dispute about ETC's knowledge, it must be "determined at trial" (*Keena v Hudmor Corp.*, 37 AD3d 172, 174 [1st Dept 2007]). Further, the reasonableness of the Equity Sponsors' reliance is a "fact-intensive" question not susceptible to summary disposition (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 155 [2010]). Therefore, summary judgment cannot be granted at this stage.

Accordingly, it is

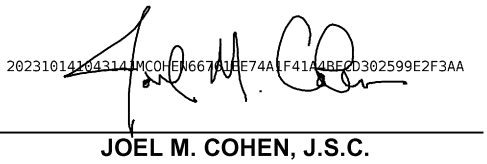
ORDERED that Defendant's motion for Summary Judgment is **GRANTED** to the extent that the branch of Plaintiffs' breach of contract claim seeking damages relating to their purported lost opportunity to invest in Ohio (rather than Pennsylvania) is dismissed; Defendant's motion is otherwise **DENIED**; it is further

ORDERED that the parties appear for an initial pre-trial conference to discuss trial scheduling and logistics on October 31, 2023 at 10:00 am, with the parties circulating dial-in information to chambers at SFC-Part3@nycourts.gov in advance of the conference; it is further

ORDERED that the parties participate in a mandatory settlement conference in accordance with Rule 30(b) of the Rules of the Commercial Division, and the parties are directed to submit a joint request or separate statements pursuant to Rule 30(b)(1) on NYSCEF within a week of this Order; and it is further

ORDERED that the parties upload the oral argument transcript to NYSCEF upon receipt.

This constitutes the Decision and Order of the Court.



10/14/2023
DATE

JOEL M. COHEN, J.S.C.

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