

BML Props. Ltd. v China Constr. Am., Inc.

2024 NY Slip Op 32719(U)

July 24, 2024

Supreme Court, New York County

Docket Number: Index No. 657550/2017

Judge: Andrew Borrok

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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 53

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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,

Defendant.

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INDEX NO. 657550/2017

MOTION DATE 06/12/2024

MOTION SEQ. NO. 014

**DECISION + ORDER ON
MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 014) 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729

were read on this motion to/for EXAMINATION ORDER.

Upon the foregoing documents, China Construction America Inc., now known as CCA Construction, Inc. (**CCA**), CSCEC (Bahamas), Ltd. (**CSCEC**), and CCA Bahamas, Ltd.’s (**CCAB**; CCA, CSCEC, and together with CCAB, hereinafter, collectively, the **Defendants**) motions *in limine* to preclude BML Properties Ltd. (**BMLP**) from presenting at trial (i) evidence and testimony concerning BMLP’s initial equity contribution in the Project and Baha Mar Ltd. (**BML**)’s expenditures made in support of the Project (**Motion 1**) as relevant to BMLP’s damages, and (ii) certain “parol evidence” that the Defendants claim would vary the meaning of Section 4.7 of the Investors Agreement (the **IA**) (**Motion 2**), are DENIED.

I. Preclusion of Evidence of the initial investment is denied because it is evidence of direct not consequential damages

Relying primarily on *Five Star Dev. Resort Communities, LLC v iStar RC Paradise Val., LLC*, 09 CIV. 2085 (LTS), 2012 WL 13069913, at *5 [SDNY Dec. 10, 2012]; *Diamond v Calaway*, 2019 WL 8955300, at *11 [SDNY Oct. 25, 2019]; *ERC 16W Ltd. Partnership v Xanadu Mezz Holdings LLC*, 46 Misc 3d 1210(A) [NY Sup 2015], *affd*, 133 AD3d 444 [1st Dept 2015], the defendants argue that initial investment damages are consequential and not direct damages and are thus barred by the waiver of consequential damages provided in Section 11.10 of the IA such that evidence as to the initial investment should be precluded from introduction at trial. They are not correct.

The project at issue was a joint venture, and the loss of initial investment in the joint venture is a direct not consequential damage of the Defendants' alleged breach of contract and fraud, if proven at trial (*see, e.g., GSCP VI Edgemarc Holdings, L.L.C. v ETC Northeast Pipeline, LLC*, 2023 N.Y. Slip Op. 33721[U], 9 [N.Y. Sup Ct, New York County 2023]; *Gerritsen v Glob Trading, Inc.*, 2009 WL 262057, at *10 [EDNY Feb. 4, 2009]; *NMR E-Tailing LLC v Oak Inv. Partners*, 216 AD3d 572, 573 [1st Dept 2023]). The cases relied upon by the Defendants are simply inapposite. They primarily involve lending transactions where the loan transaction was separate and apart from the investment or acquisition transaction. As such, the courts in those cases held that the lender was not responsible for the loss of initial investments. What is at issue in this case is not a separate loan transaction but the joint venture transaction itself and damages as to the investment in the joint venture transaction are not remote consequential damages not within the contemplation of the parties at the time of contract. They are direct damages. These damages thus do not run afoul on the contractually agreed upon limit on consequential damages or the Appellate Division's decision limiting the plaintiff's ability to recover lost profits.

Evidence as to lost profits, consequential damages and damages not contemplated at the time of contract are precluded (*BML Properties*, 226 AD3d at 584 [“[t]he request for lost profits damages should also have been dismissed because the parties did not contemplate liability for lost profits at the time of contracting.”]). For the avoidance of doubt, the Court notes that the Defendants’ arguments regarding causation (*see* NYSCEF Doc. No. 710, at 10-14) do not make the damages consequential and involve factual issues properly determined at trial.

II. Evidence of Breach is not precluded and does not alter Section 4.7 of the IA

The Defendants argument that BMLP should be precluded from presenting certain unidentified “parol evidence” is also denied. In denying the Defendants’ appeal of this Court’s holding that the Defendants were not entitled to summary judgment that they did not breach Section 4.7 of the IA, the Appellate Division held that “[i]ssues of fact exist as to whether the representatives of defendant CSCEC Bahamas, Ltd. (CSCECB) failed to act in the best interests of the company by diverting resources to other projects and authorizing the removal of 700 workers from the project as it was nearing its deadline, despite concerns about meeting that deadline, which they did not communicate to the company” (*BML Properties*, 226 AD3d at 583). The Appellate Division did not limit evidence of any breach of the IA solely to the “China State Board Member” and the “China State Representatives” (NYSCEF Doc. No. 710, at 17-18):

Order, Supreme Court, New York County (Andrew Borrok, J.), entered on or about May 25, 2023, which, insofar as appealed from as limited by the briefs, denied defendants’ motion for summary judgment dismissing the complaint and granted plaintiff’s motion for summary judgment dismissing the counterclaims for breach of §§ 4.7, 4.8 (g), and 4.8 (l) of the Investors Agreement and the affirmative defenses that plaintiff’s claims were derivative and released, unanimously modified, on the law, to grant defendants motion as to the unjust enrichment and implied covenant of good faith and fair dealing claims and request for lost profits damages, to deny plaintiff’s motion as to the counterclaims for breach of IA §§ 4.7 and 4.8 (g), and otherwise affirmed, without costs.

Plaintiff's claims are not derivative because they involve the breach of a duty independent of any duty owed to the company (*see generally Abrams v Donati*, 66 NY2d 951, 953 [1985]). Plaintiff was a party to the subject Investors Agreement and there is no indication that § 4.7's "best interests" obligation was owed to the company alone. Indeed, § 4.10 of the agreement specifically authorized plaintiff to bring suit individually. "[W]here an independent duty exists, a shareholder may sue on his own behalf even for the loss of value in his investment" (*Solutia Inc. v FMC Corp.*, 385 F Supp 2d 324, 332 [SD NY 2005]; *see also Lawrence Ins. Group v KPMG Peat Marwick*, 5 AD3d 918, 919 [3d Dept 2004]). In view of our disposition of this issue, we need not reach the parties' arguments with respect to the disproportionate loss exception to the derivative claims rule.

The motion court properly denied summary judgment dismissing plaintiff's breach of contract claim. Issues of fact exist as to whether the representatives of defendant CSCEC Bahamas, Ltd. (CSCECB) failed to act in the best interests of the company by diverting resources to other projects and authorizing the removal of 700 workers from the project as it was nearing its deadline, despite concerns about meeting that deadline, which they did not communicate to the company. It does not matter that the focus of the Investors Agreement is not construction management, as the CSCECB representatives were required to act "at all times" in the company's best interests (*see Falle v Metalios*, 132 AD2d 518, 520 [2d Dept 1987]).

The motion court also properly denied summary judgment dismissing plaintiff's fraud claims. This Court has already decided that the fraud claims are not duplicative of the breach of contract claim (*BML Props. Ltd. v China Constr. Am. Inc.*, 174 AD3d 419, 419 [1st Dept 2019]). Fact development has not created a basis to modify this legal determination. Issues of fact exist with respect to justifiable reliance. Evidence was presented that plaintiff, which had day-to-day responsibility for the company, relied on defendants' misrepresentations by taking reservations, preparing for opening, and refraining from seeking additional financing or labor. Evidence was also presented that, although plaintiff had some sense that defendants were not telling the truth, it lacked the ability to definitively verify their claims—especially in view of defendants' apparent concealment of information.

The breach of the implied covenant of good faith and fair dealing claim should, however, have been dismissed as duplicative of the breach of contract claim because "both claims arise from the same facts" and the conduct at issue clearly falls within the ambit of the contractual best efforts obligation (*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). Even if the unjust enrichment claim is not duplicative, it should also have been dismissed because plaintiff did not establish that it made the subject payments or otherwise had a legal entitlement to the funds used to make them (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *cf. 245 E. 19 Realty LLC v 245 E. 19th St. Parking LLC*, 223 AD3d 604, 606 [1st Dept 2024]).

The request for lost profits damages should also have been dismissed because the parties did not contemplate liability for lost profits at the time of contracting (*see generally Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986] [*Kenford I*]; *Awards.com v Kinko's, Inc.*, 42 AD3d 178, 183 [1st Dept 2007], *affd* 14 NY3d 791 [2010]). It is not enough that CSCECB expected that the project would make money, as that is not the same thing as expecting to be held liable for lost profits (*see Kenford Co. v County of Erie*, 73 NY2d 312, 319-320 [1989]; *Awards.com*, 42 AD3d at 184; *Bersin Props., LLC v Nomura Credit & Capital, Inc.*, 74 Misc 3d 1209[A], 2022 NY Slip Op 50084 [U], *16 [Sup Ct, NY County 2022]). Section 11.10 of the Investors Agreement expressly waived consequential damages—notwithstanding “[a]nything herein contained, and anything at law or in equity, to the contrary” (*see Kenford I*, 67 NY2d at 262; *Awards.com*, 42 AD3d at 183-184). The lost profits sought here are consequential in nature because they stem from collateral business arrangements—i.e., the loss of contracts with potential hotel guests (*see generally Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 805-808 [2014]). Section 11.10 is not unenforceable because “the misconduct for which it would grant immunity smacks of intentional wrongdoing” as “a party can intentionally breach a contract to advance a ‘legitimate economic self-interest’ and still rely on the contractual limitation provision” (*Electron Trading, LLC v Morgan Stanley & Co. LLC*, 157 AD3d 579, 580-581 [1st Dept 2018]). In view of our disposition of this issue, we need not reach the parties' arguments with respect to causation and the capability of measuring damages with reasonable certainty.

Defendants' affirmative defense that plaintiff's claims are derivative was properly dismissed for the reasons stated above. Defendants' affirmative defense that plaintiff's claims were released was properly dismissed because plaintiff was not a party to the releases, which at any rate applied to claims under a separate contract.

CSCECB's counterclaim for breach of § 4.7 of the Investors Agreement should not have been dismissed. There is evidence in the record of at least one unanswered request for books and records, in a March 13, 2015 letter, which was reiterated in March 25 and May 6, 2015 letters. Although the company was not obliged to create new documents in response to this request, it should have had some existing documentation responsive thereto. Issues of fact exist also exist as to whether the company's failure to provide this information caused CSCECB damages, as it could have taken steps to mitigate if it had evidence of financial mismanagement.

CSCECB's counterclaim for breach of § 4.8 (g) of the Investors Agreement also should not have been dismissed. It is undisputed that plaintiff breached this provision by filing for reorganization without CSCECB's consent and issues of fact exist as to whether CSCECB was damaged as a result. CSCECB's counterclaim for breach of § 4.8 (l) of the Investors Agreement was, however, properly dismissed, as there is no evidence that the subject loan damaged CSCECB in any way.

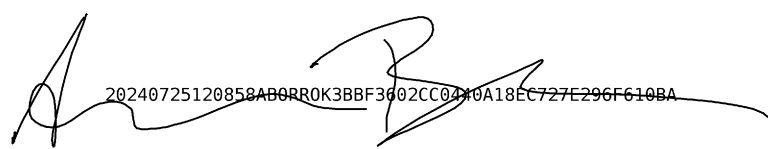
(*BML Properties Ltd.*, 226 AD3d at 582-85). As discussed above, direct and circumstantial evidence of breach is thus relevant and does not serve to alter the terms of the IA.

The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that the Defendants' motions *in limine* are DENIED.

7/24/2024
DATE



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ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
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