SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. EMILY MORALES-MINERVA** **PART** **42M**

Justice

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ARENA INVESTORS, LP

Plaintiff,

- v -

PROTON GREEN LLC F/K/A PLATEAU CARBON, LLC,

Defendant.

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INDEX NO. 650965/2022

MOTION DATE 02/20/2024, 03/01/2024

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 167, 168

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 165, 166, 169

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

APPEARANCES:

Mark Joseph Lawless, Esq., East Hampton New York, of counsel for plaintiff.

Spencer Fane LLP, Kansas City, Missouri (Angus Dwyer, Esq., of counsel), for defendant.

HON. EMILY MORALES-MINERVA:

In this action to collect a breakup fee, plaintiff ARENA INVESTORS, LP, moves, pursuant to CPLR § 3212, for an order granting it summary judgment as a matter of law and directing the clerk of the court to enter judgment in its favor as against defendant PROTON GREEN LLC F/K/A PLATEAU CARBON, LLC, in the amount of $1,000,000.00, plus interest from December 13, 2021.

Plaintiff also seeks costs and disbursements, as well as attorneys' fees. Defendant submits written opposition to the motion, and cross moves for an order, pursuant to CPLR § 3212, granting it summary judgment, dismissing plaintiff's claims, and granting defendant $75,000.00.

Upon review of the submissions, plaintiff's motion for summary judgment is granted, in part, to the extent that plaintiff shall have a judgment in the amount requested and denied, in part, to the extent that plaintiff seeks attorneys' fees. Defendant's cross-motion is denied in its entirety.

BACKGROUND

Plaintiff ARENA INVESTORS, LP (Arena), is a business entity that provides alternative debt financing to companies seeking capital. On August 27, 2021, Arena and defendant PROTON GREEN LLC F/K/A PLATEAU CARBON, LLC (defendant), entered a commitment letter (see NY St Cts Elec Filing [NYSCEF] Doc. No. 158). Therein, Arena -- as "Lender" -- and defendant PROTON GREEN LLC F/K/A PLATEAU CARBON, LLC, -- as "Company" -- acknowledged that defendant sought financing from Arena. The letter of intent states that defendant wanted the funds to acquire "the assets of [nonparty entity] Paradox Resources and [to] obtain incremental

liquidity to fund day to day operations and costs associated with the [defendant's] ongoing operations" (id. at p 1).

As to "[c]osts and [e]xpenses," the commitment letter's statement includes the following language:

> "[Defendant] Company shall pay to Arena a non-refundable administrative fee deposit in an amount not to exceed $100,000 (the "Maximum Work Fee") with an initial amount of $75,000 due upon execution of the Commitment Letter (the "Initial Work Fee"). The Pre-Funded Work Fee shall be applied to the reasonable costs and expenses actually incurred by Arena during the due diligence and document preparation phases (including, without limitation, legal fees, title review costs and other costs and expenses associated with the allocation of internal resources, and the engagement of a third-party advisory firm) in connection with the negotiation, preparation, execution and delivery of this letter, [among other things] . . . regardless of whether the Proposed Senior Secured Term Loan Facility is consummated"

(id. at p 3 [emphasis added]).

The commitment letter also includes a "breakup fee" provision, which reads as follows:

> "[Plaintiff] Arena's diligence will commence upon payment of the Pre-Funded Work Fee [of $75,000.00]. Following receipt of the Pre-Funded Work Fee, a Break Up Fee will become active. If the closing of the Proposed Senior Secured Term Loan Facility does not occur for any reason other than Arena's failure to close on terms and conditions substantially similar to those set forth herein, the Company agrees to immediately pay Arena a break-up fee of $1,000,000 (the "Break Up Fee"). The Company acknowledges

> and agrees that its obligations to pay the Break Up Fee is in addition to its obligations to pay the Pre-Funded Work Fee and its obligation to reimburse Arena for out-of-pocket costs and expenses"

(id. at p 2 [emphasis added]).

Finally, the commitment letter explicitly provides that the letter of commitment created "[n]o [b]inding [c]ommitment to [c]onsummate the [p]roposed [s]enior [s]ecured [t]erm [l]oan [f]acility" (id. at p 4 [emphasis added]). The parties agreed therein that each "has an absolute right to not consummate the [loan], for any or no reason and may make such decision in its sole discretion without incurring any liability, unless otherwise expressly noted" (id. [emphasis added]). The commitment letter defines "sole discretion" as "discretion . . . to be exercised as arbitrarily and capriciously as the party may wish, for any reason, subject to no standard of reasonableness or review" (id.).

Following the execution of the commitment letter, defendant paid Arena $75,000.00, representing the agreed upon pre-funded work fee. A month or so later, on October 18, 2021, defendant executed a letter of intent to merge with a nonparty entity (NYSCEF Doc. No. 104). This letter of intent expired on October 29, 2021, and the merger did not occur.

Instead, on or about December 31, 2021, the nonparty entity publicly announced an agreement to merge with a second nonparty entity (NYSCEF Doc. No. 106).

Defendant then contacted Arena to indicate that it was not consummating the proposed loan set forth in their commitment letter, explaining the reason as the merger falling through. At that time, defendant also demanded Arena return the $75,000.00 work fee paid in accordance with the commitment letter.

However, plaintiff refused to return the work fee, and requested payment of the $1,000,00.00 breakup fee as the consummation of the proposed loan did not occur for reasons other than Arena's "failure to close on terms and conditions substantially similar to those set forth" in the commitment letter (NYSCEF Doc. No. 158, p 2). Thereafter, on or around January 31, 2022, Arena served on defendant a written demand for payment of the breakup fee no later than February 04, 2022 (NYSCEF Doc. No. 161).

Following said deadline, Arena commenced this declaratory action, seeking the $1,000,000.00 fee with interest, costs, disbursements, and attorneys' fees. Defendant filed a verified answer with counterclaims.

As affirmative defenses, defendant first provides that the complaint fails to state a claim upon which relief can be granted. Second, defendant states as an affirmative defense

that Arena is not entitled to a breakup fee because -- according to their commitment letter -- the right to a breakup fee is not triggered where the loan agreement fails due to "Arena's failure to close on terms and conditions substantially similar to those set forth in the contract [commitment letter]" (NYSCEF Doc. No. 18, p 2, ¶ 2).

Defendant further asserts as affirmative defenses: third, the breakup fee is unenforceable on its face; fourth, "Arena has acted in bad faith and has unclean hands;" fifth, "Arena's damages are the consequence of its own conduct;" sixth, "Arena failed to mitigate its damages;" seventh, "Arena defrauded [defendant] into entering the contract [commitment letter]);" and eighth, Arena failed to properly effectuate service (id.).

Finally, defendant asserted a counterclaim for breach of contract -- the very commitment letter -- seeking return of its $75,000.00 fee as damages for the alleged breach.

By motion (seq. no. 005), defendant initially moved for an order, pursuant to CPLR § 3211 (a) (7), dismissing the complaint for failure to state a cause of action. The Court (N. Bannon, J.S.C.), issued a Decision and Order, dated November 06, 2023, denying the motion in its entirety (NYSCEF Doc. No. 84). Affording the complaint liberal construction, the same Court

reasoned that Arena alleged "a cognizable breach of contract claim" (id.).

Now, Arena moves (seq. no. 006), pursuant to CPLR § 3212, for an order, granting it summary judgment as a matter of law and directing the clerk to issue a judgment in Arena's favor against defendant in the amount of $1,000,00.00 with interest, costs, and disbursements. Arena also seeks attorneys' fees.

Defendant opposes the motion, and cross moves for an order, pursuant to CPLR § 3212, granting it summary judgment dismissing the complaint and granting it $75,000.00 on its breach of contract counterclaim.[1]

ANALYSIS

Governing Law

In this action, the parties agree that the governing choice of law is Texas law, and that the governing forum state is New York State.[2]

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[1] During oral arguments on this motion and cross motion, defendant, through counsel on record, confirmed withdrawal of its cross motion for summary judgment to the limited extent that the motion seeks a judgment of $75,000.00. Accordingly, the Court will dismiss that portion in the decretal paragraph and address only the remaining portion of defendant's cross motion in its analysis.

[2] The commitment letter's governing law clause provides that Texas law shall govern the agreement "without regard to conflict of law principles" and that the parties accept "unconditionally the exclusive jurisdiction and venue of State of New York and appellate courts" (NYSCEF Doc. No. 146, p 4).

Pursuant to "New York common-law principles," the procedural law of the forum state governs an action, even where the choice of law is found outside the state (see Davis v Scottish Re Group Ltd., 30 NY3d 247, 252 [2017]; Tanges v Heidelberg N. Am., 93 NY2d 48, 53 [1999]; Martin v Dierck Equip. Co., 43 NY2d 583, 588 [1978]). Further, the law of the forum generally determines if "a given question is one of substance or procedure" for purposes of applying the appropriate state law (Davis, 30 NY3d at 252, citing Tanges, 93 NY2d at 54 [internal quotation marks omitted]).

As the burden on a motion for summary judgment is considered procedural in New York State, our State's standard applies to this application (see Matter of Kosmo Family Trust(Savino), 207 AD3d 934, 936 [3d Dept 2022], citing Davis, 30 NY3d at 252; see also Nestor v Putney Twombly Hall & Hirson, LLP, 153 AD3d 840, 842 [2017], lv denied 30 NY3d 907 [2017]; Ground to Air Catering v Dobbs Intl. Servs., 285 AD2d 931, 932 [3d Dept 2001]).

Summary Judgment Motion

"On a motion for summary judgment, the moving party must 'make prima facie showing of entitlement to judgment as a matter of law, tendering [evidentiary proof in admissible form] to demonstrate the absence of any material issues of fact'" (Nomura

Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP, 26 NY3d 40, 49 [2015], citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; CPLR 3212[b]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1066, [1979] [providing movant must support the subject application with "'evidentiary proof in admissible form'"]).

Where the movant produces such evidence, the non-moving party then has the burden "'to establish the existence of [factual issues] which require a trial of the action'" (Nomura, 26 NY3d at 49, citing Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012], quoting Alvarez, 68 NY2d at 324).

The court must view the facts in the light most favorable to the non-movant, giving it the benefit of all reasonable inferences (De Lourdes Torres v Jones, 26 NY3d 742 [2016]).

Here, plaintiff argues that it is entitled to an order granting it summary judgment as the parties did not consummate the loan for reasons other than plaintiff's fault. Plaintiff argues breakup fees are common practice and binding on parties, pursuant to Texas Law, when they are set forth in a negotiated agreement. Defendant counters that, pursuant to Texas Law, the letter of intent is completely nonbinding because it lacks mutuality of obligation.

Neither party submits case law directly on point, and the Court approaches this matter simply as one of contract

interpretation, recognizing that written agreements may plainly contain both binding and "nonbinding" provisions.

Under Texas law, "[t]he construction of an unambiguous contract is a question of law for the court" (Willis v Donnelly, 199 SW3d 262, 275 [Tex. 2006], citing MCI Telecomms. Corp. v Tex. Utils. Elec. Co., 995 SW2d 647, 650 [Tex. 1999] [providing: "When a contract is not ambiguous, the construction of the written instrument is a question of law for the court"]). In construing a written contract, the court's primary concern is to ascertain the true intentions of the parties as expressed in the instrument (U.S. Polyco, Inc. v Tex. Cent. Bus. Lines Corp., 681 SW3d 383, 387 [2023]; URI, Inc. v Kleberg County, 543 SW3d 755, 763 [Tex. 2018]).

This effort requires examination and consideration of "*the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless" (Coker v Coker, 650 SW2d 391, 393 [Tex. 1983] [emphasis in original], citing Universal C.I.T. Credit Corp. v Daniel, 243 SW2d 154, 158 [1951]; U.S. Polyco, Inc., 681 SW3d at 390).

"The principle of freedom of contract requires [recognition] that sophisticated parties [as here] have broad latitude in defining the terms of their business relationship, and courts are obliged to enforce the parties' bargain according

to its terms" (Sundown Energy LP v HJSA No. 3, Ltd. P'ship, 622 SW3d 884, 889 [2021] [quotations and citations omitted] [emphasis added]). "If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous, and the court will construe the contract as a matter of law" (id.; see also Devon Energy Prod. Co. v Sheppard, 668 SW3d 332, 343 [Tex. 2023] [stating: when a contract is unambiguous, it will "be enforced as written without considering extrinsic evidence bearing on the parties' subjective intent"]).

Here, the parties executed a commitment letter which is unambiguous on plain reading. The written instrument creates binding commitments, even to the extent that the parties agreed therein not to be bound to enter the proposed loan. In other words, while the parties agreed not to be bound to enter the loan, they agreed to be bound by that promise itself.

Indeed, defendant heavily relies on the provision, entitled: "**No Binding Commitment to Consummate the Proposed Senior Secured Term Loan Facility**" (NYSCEF Doc. No. 158, p 4) [emphasis as in original). According to the language that immediately followed this heading, both parties promised each other "an absolute right to not consummate the [proposed loan], for any reason . . . subject to no standard of reasonableness or

review, unless otherwise expressly noted" (id. [emphasis added]).

This language - "unless otherwise expressly noted" - is easily harmonized with the breakup fee provision, which "otherwise expressly note[s]" an exception. The exception is not to the parties' agreed upon and absolute right to decline to enter the loan, but to the prohibition against reviewing a party's reason for not consummating the loan.

A party's reason would be subject to review for the limited purpose of determining if either party declined to close on the loan because Arena offered terms and conditions for the loan that differed from those contemplated in the commitment letter. This is because, in the commitment letter's plain language, only in that scenario would defendant be excused from paying Arena the $1,000,000.00 (one million dollar) breakup fee, which became "active" when Arena began its due diligence (NYSCEF Doc. No. 158, at p 2).

If the loan failed to close for any other reason, including the parties' absolute right of no reason, "the Company [defendant] agree[d] to immediately pay Arena a break-up fee of $1,000,000.00" (the "Break Up Fee")" (id. at p 2) [emphasis added]). "The Company [further] acknowledge[d] and agree[d] that its obligations to pay the Break Up Fee is in addition to its obligations to pay the Pre-Funded Work Fee [$75,000.00, which

defendant paid Arena] and its obligation to reimburse Arena for out-of-pocket costs and expenses" (id.).[3]

While defendant does now protest, it is undisputed that the Court has before it "sophisticated parties" who thoughtfully exercised "broad latitude in defining the terms of their business relationship" (Sundown Energy LP, supra, 622 SW3d at 889 [2021]).

Further, unlike the provision governing the right to decline the loan -- explicitly providing the parties had "no binding" commitment in that regard -- the language in the breakup fee clause has no such qualification (see generally Pro Health, LLC v Elite Jet Sols., LLC, 2024 Tex. App. LEXIS 2722, *11 [2024] [providing: "we [the Texas courts] presume that 'using different language in different parts of a contract means the parties intended different things'"], citing Sundown Energy LP, supra, 622 SW3d at 888; PopCap Games, Inc. v MumboJumbo, LLC, 350 SW3d 699, 708 [Tex App 2011], pet denied [applying the same]; Mr. W Fireworks Inc. v Ozuna, 2009 Tex App LEXIS 8237, at

[3] The subject clause provides: "[Plaintiff] Arena's diligence will commence upon payment of the Pre-Funding Work Fee [of $75,000.00]. Following receipt of the Pre-Funded Work Fee, a Break Up Fee will become active. If the closing of the Proposed Senior Secured Term Loan Facility does not occur for any reason other than [plaintiff's] failure to close on terms and conditions substantially similar to those set forth herein, the Company [defendant] agrees to immediately pay [plaintiff] a break-up fee of $1,000,000.00 (the 'Break Up Fee'). The [defendant] acknowledges and agrees that its obligations to pay the Break Up Fee is in addition to its obligations to pay the Pre-Funded Work Fee and its obligation to reimburse Arena for out-of-pocket costs and expenses" (NYSCEF Doc. No. 158 [emphasis added]).

*7 [Tex App 2009], pet denied). To the contrary, the language is clear of defendant's "obligations" in this regard (see NYSCEF Doc. No. 158, p 2; see also Merriam-Webster.com Dictionary, s.v. "obligation," accessed September 3, 2024, https://www.merriam-webster.com/dictionary/obligation ["obligation" plainly means: "the action of obligating oneself to a course of action (by promise or vow)"]; Merriam-Webster.com Dictionary, s.v. "obligating," accessed September 3, 2024, https://www.merriam-webster.com/dictionary/obligate ["obligating" is "1: to bind legally or morally: CONSTRAIN"]).

In addition, defendant's contention that the entire commitment letter is void is in tension, at best, with defendant's reliance and actions in accordance with the terms of the commitment letter. These include, but are not limited to, payment of the pre-funded work fee, commencing Arena's undisputed due diligence, and to mutual promises of discretion to not enter the loan, of confidentially in written communications,[4] of choice of law, and of exclusivity during the life of the commitment letter.[5]

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[4] The provision of **"confidentiality"** governing nondisclosure of the letter and communications during the negotiation process, it delineates that defendant may not disclose the commitment letter and written communications, except that "Arena hereby consents to [defendant's] disclosure" of information listed therein to those "directly involved in the consideration of the [proposed loan]" under specific circumstances (NYSCEF Doc. No. 158, p 1 [emphasis in original]).

[5] The provision of "**[e]xclusivity**" provides, among other things, that "[f]rom and after the [defendant] Company's acceptance of the attached Commitment

Having found, for the reasons above, that Arena has established its prima facie case of entitlement to the breakup fee, defendant now has the shifted burden of establishing defense as a matter of law or of establishing issues of fact (see generally Nomura Asset Capital Corp., 26 NY3d at 49; Vega, 18 NY3d at 503 [2012]. However, defendant presents no availing rebuttal.

It's argument that, pursuant to Texas law, the commitment letter is not binding because there is no mutuality, is unsupported by Texas caselaw addressing the particular facts at bar.

The issue appears to be developing in Texas court's (see generally Culbertson v Brodsky, 788 SW2d 156, 157 [1990] [providing: "An option contract requires consideration for both the option and the underlying contract"); see also Maharishi Sch. of Vedic Sci. v Olympus Real Estate Corp., No. 05-01-00140-CV, 2002 Tex App LEXIS 4104, at *1 (Tex App June 7, 2002, pet. denied) [holding: "A promise that is illusory, and therefore fails to bind the promisor, who retains the option of discontinuing performance, does not support a contract"]).

Letter, and up to and including September 30, 2021, the [defendant] Company agrees to work exclusively with Arena to accomplish Debt Financing . . ." and to not solicit such financing or proposal elsewhere (see id. [emphasis in original]).

Recently in Maverick Nat. Res., LLC v Glenn D. Cooper Oil & Gas, Inc., No. 02-23-00183-CV, 2024 Tex App LEXIS 4140, *7 [Tex App June 13, 2024]), a Texas court noted it was bound by Culbertson, supra, in deciding the enforceability of a letter, setting forth an option to purchase real estate. Because there, only the buyer retained the "sole discretion" to walk away, and seller received no separate consideration for defendant's "sole discretion," the court found the promise to purchase illusory and the letter unenforceable (id.).

No discussion existed about other promises within the letter, if any, or about breakup fees, which are at issue before this Court. Further, the commitment letter here provides both parties with the discretion to enter the loan, while also establishing continuing obligations between them beyond entering the loan itself.

In sum, the court is presented with no controlling authority to disregard the negotiated provisions in the commitment letter. "[S]ophisticated parties [as the ones present before this court] have broad latitude in defining the terms of their business relationship, and [the court is] obliged to enforce the parties' bargain according to its terms" (Sundown Energy LP v HJSA No. 3, Ltd. P'ship, 622 SW3d 884, 889 [Tex 2021] [quotations and citations omitted] [emphasis added]).

ATTORNEYS' FEES

Moving next to plaintiff's request for attorneys' fees, the Court denies summary judgment as plaintiff does not establish entitlement to such fees.

Texas applies the American Rule that parties to litigation must pay their attorneys' unless a statute or contract authorizes fee-shifting (see Hillegeist Family Enterprises, LLP v Hillegeist, 667 SW3d 349, 356-57 [Tex App 2022]; see also Rohrmoos Venture v UTSW DVA Healthcare, LLP, 578 SW3d 469, 483-84 [Tex 2019]). If fee-shifting is so authorized, the factfinder must determine the reasonable hours worked multiplied by a reasonable hourly rate (see Hillegeist Family, 667 SW3d at 356, citing Rohrmoos Venture, 578 SW3d at 498).

Texas courts presume the calculation of attorneys' fees is a reasonable and necessary amount for fee shifting, so long as the amount is supported by sufficient evidence (Rohrmoos Venture, supra, 578 SW3d at 499). Sufficient evidence includes evidence of "(1) particular services performed; (2) who performed those services; (3) approximately when the services were performed; (4) the reasonable amount of time required to perform the services; and (5) the reasonable hourly rate for each person performing such services" (id. at 498).

Further, a party seeking attorneys' fees in Texas must plead for them, specifying the legal standard under which the fees are sought (see Intercontinental Grp. P'ship v KB Home Lone Star L.P., 295 SW3d 650, 658-59 [Tex 2009] [holding: party waived right to recover attorneys' fees under contractual provision by pleading for attorneys' fees only under statutory provision]); see also Alan Reuber Chevrolet, Inc. v Grady Chevrolet, Ltd., 287 SW3d 877, 885 [Tex App 2009, no pet.] [stating: general prayer for relief like "such other and further relief at law or in equity" does not support attorneys' fee award]).

Here, plaintiff presents no support for fee shifting or for reasonable and necessary attorneys' fees due.

Accordingly, it is

ORDERED that plaintiff ARENA INVESTORS, LP motion (seq. no. 006) is granted, in part, to the extent that it shall have summary judgment directing the Clerk of the Court to enter judgment in its favor against defendant PROTON GREEN LLC F/K/A PLATEU CARBON LLC, and denied, in part, to the extent it seeks attorneys' fees; it is further

ORDERED that the Clerk shall enter judgment in favor of ARENA INVESTORS, LP, and against PROTON GREEN LLC F/K/A PLATEU CARBON LLC in the amount of $1,000,000.00 (one million dollars),

plus statutory interest from December 13, 2021; and it is further

ORDERED that defendant PROTON GREEN LLC F/K/A PLATEU CARBON LLC's cross-motion (seq. no. 007) is denied in its entirety.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

9/3/2024
DATE

EMILY MORALES-MINERVA, 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