Veolia Energy N. Am. Holdings, Inc. v Enwave W. Coast Holdings, LLC
2025 NY Slip Op 30552(U)
February 14, 2025
Supreme Court, New York County
Docket Number: Index No. 651265/2024
Judge: Joel M. Cohen

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

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VEOLIA ENERGY NORTH AMERICA HOLDINGS, INC.,

Plaintiff,

- v -

ENWAVE WEST COAST HOLDINGS, LLC,BROOKFIELD DISTRICT ENERGY WEST USA LLC,DISTRICT ENERGY HOLDINGS, LP, BROOKFIELD INFRASTRUCTURE FUND II-A, L.P., BROOKFIELD INFRASTRUCTURE FUND II-A(CR), L.P., BROOKFIELD INFRASTRUCTURE FUND II-B, L.P., BROOKFIELD INFRASTRUCTURE FUND II-C, L.P., BROOKFIELD INFRASTRUCTURE FUND II-D, L.P., BROOKFIELD INFRASTRUCTURE FUND II-D(CR), L.P., BIP DISTRICT ENERGY US HOLDINGS, L.P., BIP DISTRICT ENERGY HOLDINGS, L.P., BROOKFIELD INFRASTRUCTURE FUND GP II LLC,CENTRIO ENERGY LLC,

Defendants.

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INDEX NO. 651265/2024

MOTION DATE 06/10/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 33, 35, 36, 37, 38, 39, 40, 41, 46, 52

were read on this motion to DISMISS.

Plaintiff Veolia Energy North America Holdings, Inc. ("Veolia" or "Plaintiff") brings causes of action for breach of contract, conversion, declaratory judgment, and breach of the implied covenant of good faith and fair dealing arising out of a Purchase and Sale Agreement ("PSA") concerning the sale of certain Veolia-affiliated-entities that provided energy-related operation and maintenance services to commercial customers. Defendants Brookfield District Energy West USA, LLC ("Brookfield"), Enwave West Coast Holdings, LLC ("Enwave"), CenTrio Energy, LLC ("Centrio"), District Energy Holdings, L.P., Brookfield Infrastructure Fund II-A, LP, Brookfield Infrastructure Fund II-A(Cr), L.P., Brookfield Infrastructure Fund II-

B, L.P., Brookfield Infrastructure Fund II-C, L.P., Brookfield Infrastructure Fund II-D, L.P., Brookfield Infrastructure Fund II-D(Cr), L.P., BIP District Energy US Holdings, L.P., BIP District Energy Holdings, L.P, and Brookfield Infrastructure Fund GP II LLC (collectively, "Defendants") move to dismiss the complaint in its entirety. For the reasons set forth below, Defendants' motion is **granted**.

BACKGROUND

According to the Complaint, the factual allegations of which are assumed to be true for the purposes of this motion, Brookfield entered into a Purchase and Sale Agreement dated as of April 14, 2017 with Veolia's predecessors in interest,[1] Thermal North America, Inc. and Thermal Western Holdings, Inc. (together, the "Thermal Entities"), by which Brookfield acquired certain Veolia affiliates (NYSCEF 2 ["Complaint"] ¶¶ 1-3]). At the time, these affiliates were parties to operations and maintenance agreements ("O&Ms") with the Venetian Casino Resort, LLC ("Venetian"), Loews Hollywood Hotel, LLC ("H&H"), and Queen's Seaport Development, Inc. ("Queen Mary") (*id.* ¶¶ 2-3). The PSA provides for a base purchase price, with an additional "End Date Contingent Payment" of $32,100,100.00 due by December 31, 2023 (*id.* ¶ 4).

The amount of the End Date Contingent Payment was subject to reduction if the O&Ms with Venetian, H&H, and Queen Mary were not renewed by the Purchaser and one or more of the counterparties to the O&Ms (Complaint ¶ 5). Section 5.13 of the PSA provides, in relevant part, as follows:

> (a) Following the Closing, Purchaser shall use commercially reasonable efforts to obtain a renewal of each O&M Agreement from the counterparty thereto (each counterparty, a "Customer"), with a substantially similar scope of

[1] The Thermal Entities assigned the PSA to Veolia (Complaint ¶ 32). Brookfield subsequently assigned the PSA to Enwave, which later changed its name to CenTrio (Complaint ¶¶ 25, 65).

> services and on terms and conditions no less favorable to the Customer than its respective existing agreement, subject to the other terms and conditions of this Section 5.13.
>
> …
> (d) Notwithstanding anything to the contrary in this Section 5.13, Purchaser shall not be required to renew any O&M Agreement (i) with a Contract EBITDA of less than seventy percent (70%) of the Target EBITDA for the applicable O&M Agreement or (ii) with or on any other terms that Purchaser, after consultation with Sellers and taking reasonable steps to mitigate the impact of such terms, deems commercially unacceptable (acting reasonably, with reference to customary industry terms).

(NYSCEF 37 [PSA Excerpts] § 5.13 [a], [d]).

About a year before the Venetian O&M was set to expire, Venetian's owner, Las Vegas Sands Corp. ("Sands"), issued a Request for Proposal (RFP) for the services provided under the Venetian O&M (Complaint ¶¶ 41-42). Though the RFP (and representatives of Sands) advised Defendants that they would prefer proposals with a five-year term, Defendants instead proposed a 10-year term, which was the term length of the existing Venetian O&M at the time the parties entered the PSA (Complaint ¶¶ 43-47; NYSCEF 27 ["Existing Venetian O&M"] at 3). Prior to submitting a response to the Venetian RFP, Nick Perreten of Enwave informed Steven Weafer of Veolia that a 10-year term would be more beneficial to Enwave than a five-year term (Complaint ¶ 46). Perreten also stated that if Enwave were to propose a five-year term, it would want to amend the earnout schedule in the PSA and add a payment that would be contingent on an extension of the Venetian O&M following a five-year term, but Weafer "explained to Mr. Perreten why this would be a problem for Veolia" (*id.*).

With respect to the H&H and Queen Mary O&Ms, Plaintiff alleges: "On information and belief, the initial terms of the H&H O&M Agreement and the Queen Mary O&M Agreement expired and have been renewed and/or extended prior to December 31, 2023, precluding any No

Renewal Rebates. In addition, the Purchaser has not provided Veolia with any information or documentation demonstrating that it complied with Section 5.13(a-c) of the Agreement, which is necessary to any claim of entitlement to the No Renewal Rebates" (Complaint ¶ 11). As noted below, the factual basis for this assertion appears to be that the customers have continued to receive service coupled with an assumption that the service is being provided by Purchaser (Complaint ¶¶ 60, 63).

DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211(a)(7), the court accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018] [internal quotations and citations omitted]). However, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence" are not presumed true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000] [internal quotations citations omitted]).

I. Plaintiff's Cause of Action for Breach of Contract is Dismissed

Plaintiff alleges Defendants Brookfield, Enwave, and Centrio (collectively, "Purchaser Defendants") breached the PSA by not paying the Contingent End Date Payments with respect to the Venetian, the Queen Mary, and the H&H O&Ms. As discussed below, the Venetian claim fails on the merits (and is dismissed with prejudice) and the Queen Mary and H&H claims are inadequately pleaded (and are dismissed without prejudice).

A. *Venetian O&M*

Plaintiff's claim with respect to the Venetian O&M hinges on whether the Purchaser Defendants used "commercially reasonable efforts" to renew the agreement. Veolia contends that it cannot be said as a matter of law that offering Venetian a 10-year term was commercially reasonable because the customer advised there was likely no appetite for a 10-year deal. While it would be unusual for the Court to be able to determine what constitutes "commercially reasonable efforts" at the motion to dismiss stage (*see Holland Am. Cruises, N.V. v Carver Fed. S&L Assn.*, 60 AD2d 545 [1st Dept 1977] [noting that determining what constitutes reasonable commercial standards was a fact intensive question that precluded summary judgment]), here the parties' agreement supplies a clear benchmark for the renewal terms the Purchaser Defendants were required to exercise commercially reasonable efforts to obtain: namely, the terms of the existing O&M at the time the parties entered the PSA.

Section 5.13(a) of the PSA provides that the Purchaser "shall use commercially reasonable efforts to obtain a renewal of each O&M . . . with a substantially similar scope of services and *on terms and conditions no less favorable to the Customer than its respective existing agreement*" (NYSCEF 37 [PSA Excerpts] § 5.13 [a] [emphasis added]). Proposing a renewal of the existing 10-year term (i.e., an agreement to provide a substantially similar scope of services on terms and conditions no less favorable than the existing agreement) satisfies the contractual requirement to which the parties agreed. Plaintiff's reading, by contrast, would define "commercial reasonableness" to require Veolia to negotiate a different agreement that was *more* favorable to the Customer than the existing agreement. Such a reading conflicts with the unambiguous terms of the contract.

In addition, Section 5.13(d) of the PSA provides that Purchaser shall not be required to accept a renewal "with or on any other terms that Purchaser, after consultation with Sellers and taking reasonable steps to mitigate the impact of such terms, deems commercially unacceptable" (NYSCEF 37 [PSA Excerpts] § 5.13 [d]). Enwave communicated to Veolia that it deemed a five-year renewal unacceptable, but it nonetheless offered modifications to the PSA to mitigate the impact of a shorter renewal, which Veolia declined (Complaint ¶ 46). Thus Section 5.13 provides an alternative basis for dismissing Plaintiff's claim with respect to the Venetian O&M.

Accordingly, Defendants' motion to dismiss the cause of action for breach of contract with respect to the Venetian O&M End Date Contingent Payment is **granted** and this branch of Plaintiff's breach of contract claim is dismissed with prejudice.

B. *H&H and Queen Mary O&Ms*

Plaintiff alleges that the Purchaser Defendants breached the PSA with respect to the H&H and Queen Mary O&Ms because, "on information and belief," those O&Ms were in fact renewed within the relevant timeframe under the PSA (Complaint ¶ 11). However, as the basis for this belief, the Complaint alleges only that H&H and Queen Mary are receiving "the same or similar services[,]" but it does not state that those services are being provided *by the Purchaser Defendants* (Complaint ¶¶ 60, 63). When asked for more detail at oral argument, Plaintiff's counsel argued that the basis for this belief was the fact that the Purchaser Defendants had not complied with § 5.13(g) of the PSA, which provides that "Purchaser shall cooperate and provide each Sellers [sic] access to their . . . respective books, records and employees, to the extent related to O&M Agreements, as reasonably requested in connection with the matters addressed

in this Section 5.13" (NYSCEF 37 [PSA Excerpts] § 5.13 [g]; NYSCEF 52 [Oral Argument Transcript] at 35:9-39:21). But this has no bearing on whether the O&Ms were in fact renewed.

While the Court is obliged to give Plaintiff the benefit of every favorable inference, it need not give Plaintiff the benefit of a *non sequitur*. Accordingly, Plaintiff has failed to state a viable claim for breach of contract with respect to the H&H and Queen Mary O&Ms (*see Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 451 [1st Dept 2009] ["[T]he mere hope that discovery might provide some factual support for a cause of action is insufficient to avoid dismissal of a patently defective cause of action"], *affd* 16 NY3d 173 [2011] [internal citations omitted]), though as discussed below the Court provides leave to replead if Plaintiff can allege supporting facts that are sufficient to plead a viable claim.

Plaintiff also argues that the Purchaser Defendants breached the PSA with respect to these O&Ms by virtue of their failure to comply with § 5.13(g) as described above (NYSCEF 52 at 35:9-39:21; NSYCEF 35 [Plaintiff's Memorandum in Opposition] at 8). Though the Complaint does not plead breach on this basis explicitly, it does state that "Purchaser has not provided Veolia with any information or documentation that the Purchaser complied with Section 5.13(a-c) of the Agreement" with respect to the Queen Mary and H&H O&Ms (Complaint ¶¶ 61, 64). Further, in Plaintiff's demand letters to various alleged guarantors, which are annexed to the Complaint as an exhibit, Veolia communicated that "[Purchaser Defendants] also appear to be in breach of § 5.13(g)" (NYSCEF 12).[2] However, Plaintiff has failed to allege that it made a request for any documentation from Purchaser Defendants with respect to the

[2] The Court may consider facts alleged in documents attached in documents attached as exhibits to the complaint in assessing the legal sufficiency of a claim (*Dragonetti Bros. Landscaping Nursery & Florist, Inc. v Verizon New York, Inc.*, 71 Misc 3d 1214(A) [Sup Ct 2021], *affd* 208 AD3d 1125 [1st Dept 2022]).

H&H and Queen Mary O&Ms as required under the PSA (NYSCEF 37 [PSA Excerpts] § 5.13 [g] ["Purchaser shall cooperate and provide each Sellers [sic] access to their . . . respective books, records and employees, to the extent related to O&M Agreements, *as reasonably requested* in connection with the matters addressed in this Section 5.13"] [emphasis added]).

The cause of action for breach of contract with respect to the Queen Mary and H&H O&M End Date Contingent Payments is **dismissed without prejudice, with leave to replead** if Plaintiff can allege facts (not speculation) giving rise to a viable claim.

II. Plaintiff's Causes of Action for Conversion and Breach of the Implied Covenant of Good Faith and Fair Dealing are Dismissed

Plaintiff did not oppose the motion to dismiss with respect to these causes of action, which in any event are duplicative of the breach of contract claims. Accordingly, the causes of action for conversion and breach of the implied covenant are **dismissed.**

III. Plaintiff's Cause of Action for a Declaratory Judgment Is Dismissed

Plaintiff seeks a declaratory judgment that Defendants District Energy Holdings, LP, Brookfield Infrastructure Fund II-A, L.P., Brookfield Infrastructure Fund II-A(CR), L.P., Brookfield Infrastructure Fund II-B, L.P., Brookfield Infrastructure Fund II-C, L.P., Brookfield Infrastructure Fund II-D, L.P., Brookfield Infrastructure Fund II-D(CR), L.P., BIP District Energy US Holdings, L.P., BIP District Energy Holdings, L.P., and Brookfield Infrastructure Fund GP II LLC (collectively "Guarantor Defendants") are jointly and severally liable for paying the full amount of the End Date Contingent Payment to Veolia, as well as other fees, costs, and interest provided in the PSA and related guarantees (Complaint ¶ 99). Because this claim is premised on the success of Plaintiff's remaining claims, which have all been dismissed (some

with prejudice and some without), the declaratory judgment claim is **dismissed, with leave to replead** a request for declaratory relief in connection with the Queen Mary and H&H O&Ms.

Therefore, it is:

ORDERED that Defendants' motion to dismiss is **granted**;

ORDERED that Plaintiff is granted leave to serve and file an amended complaint to the extent set forth above within 30 days after the date of this decision and order; it is further

ORDERED that, in the event Plaintiff fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied and the foregoing dismissals will be with prejudice.

This constitutes the decision and order of the Court.

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2/14/2025
DATE

JOEL M. COHEN, 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**