Invictus Global Mgt., LLC v Corbin Capital Partners, LP.
2025 NY Slip Op 32573(U)
July 8, 2025
Supreme Court, New York County
Docket Number: Index No. 652977/2023
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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INVICTUS GLOBAL MANAGEMENT, LLC,INVICTUS SPECIAL SITUATIONS I GP, LLC,

Plaintiff,

- v -

CORBIN CAPITAL PARTNERS, L.P., CEOF HOLDINGS LP, CORBIN OPPORTUNITY FUND, L.P.

Defendant.

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INDEX NO. 652977/2023

MOTION DATE 12/23/2024, 12/23/2024

MOTION SEQ. NO. 004 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 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, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 239, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 288, 289, 290, 291, 292

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

The following e-filed documents, listed by NYSCEF document number (Motion 008) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 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, 376

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

In this breach of contract case, plaintiffs assert that defendants breached the parties' co-investment agreements by failing to pay plaintiffs performance fees for positive returns on one distressed asset investment. The court previously dismissed plaintiffs' causes of action, other than the breach of contract claim, and the parties have since completed discovery. Now, in Motion Seq. No. 04, defendants move for summary judgment dismissing the complaint (Doc 74 et seq.). In Motion Seq. No. 08, plaintiffs move for partial summary judgment on the issue of liability for their breach of contract claim. Both motions are opposed.

At oral argument, the court ruled on the "prior company investments" interpretation issue (4/2/25 tr at 50-51). However, the court reserved on the potentially dispositive termination issue. Now, the court grants motion seq. no. 04 and denies motion seq. no. 08 for the reasons stated below.

BACKGROUND

In July 2019, Invictus Global Management, LLC (IGM), Corbin Opportunity Fund LP (COF), and Corbin Capital Partners, L.P. (Corbin) entered into the Corbin Opportunity Fund, L.P. Sub-Advisory Agreement (COF Sub-Advisory). On the same day, IGM, CEOF HOLDINGS LP (CEOF), and Corbin entered into the CEOF Holdings LP Sub-Advisory Agreement (CEOF Sub-Advisory). Plaintiffs invested in a Perry Sanders Law Firm legal claims portfolio under the CEOF Sub-Advisory. In December 2021, the parties modified and replaced these sub-advisory agreements with the corresponding Corbin Opportunity Fund, L.P. Amended and Restated CoInvestment Agreement (COF Agreement) and CEOF Holdings, L.P. Amended and Restated Co-Investment Agreement (CEOF Agreement).

The COF and CEOF Agreements are virtually identical (*compare* Doc 69 [COF Agreement] *with* Doc 70 [CEOF Agreement]). Under these agreements, COF and CEOF [the "Companies"] delegated investment decision-making authority to Corbin [the "Investment Manager"], and Corbin retained plaintiff IGM [the "Co-Investment Manager"] to find and "manage . . . co-investment opportunities" (e.g. Doc 69 at 1). The agreements both include a list of "Company Investments" at Exhibit B (Doc 69 at 19-20; Doc 70 at 20-21). The Perry Sanders investment is listed as a CEOF Investment (Doc 70 at 21). The company investment lists annexed as Exhibits B to the agreements do not include the dates on which the investments were consummated.

Plaintiff agreed to present investment opportunities to COF and CEOF, and Corbin would either veto the opportunities or approve them. If COF or CEOF purchased more than the "Pro Rata Share" of any given opportunity [a "Fee Bearing Amount"], IGM could earn a "Performance Fee" (*see* Doc 60-70, exs. A [concerning fees]).

On February 28, 2023, defendants terminated the COF and CEOF Agreements before calculating performance fees at the end of the quarter (Doc 160 [termination email]). The COF and CEOF agreements were terminable as follows: (a) the parties could mutually terminate at any time, (b) Invictus could terminate upon 10 days' written notice with certain limitations, or (c) Corbin could terminate with or without cause "at any time upon ten [] days' prior written notice" (Doc 69-70, section 11).

In addition, the agreements are clear that

> "[t]he terms and conditions of Sections 6 (Standard of Care), 9 (Indemnification), 10 (Non-assignability), 12 (Co-Investment Manager Independent), 13 (Confidentiality), 15 (Miscellaneous) and this Section 11 (Term; Termination) shall survive and remain in full force and effect beyond the Termination Date, provided that the terms and conditions of Section 13 (Confidentiality) shall survive and remain in full force and effect only until the first anniversary of the Termination Date"

(*id.*, section 11 [c]).

DISCUSSION

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the non-moving party must then establish the existence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In MS#4, defendants contend that Corbin properly terminated the COF and CEOF Agreements before plaintiffs earned or accrued any performance fees. In opposing defendants' motion, plaintiffs attempt to isolate one profitable investment (the Perry loan) from the numerous investments in the parties' co-investment portfolios. Plaintiffs argue that they earned performance fees for the Perry loan investment before defendants terminated the agreements. In addition, plaintiffs argue that the performance fees would be "illusory" if defendants could terminate the agreements without paying performance fees. However, plaintiffs arguments are contradictory in that plaintiffs contend that the agreements are not ambiguous, and the performance fee provisions plainly state that these fees cannot be earned until quarter-end calculations are completed. Moreover, plaintiffs submit no proof tending to show that defendants acted in bad faith when they terminated the COF and CEOF Agreements. Indeed, plaintiffs disavowed any claims of bad faith at oral argument (4/2/25 tr at 80 ["we're not alleging a wrongful termination case here. They had the right to terminate without cause . . . ."]).

Under the agreements, performance fees "shall be **calculated** and paid . . . as of each calendar quarter-end" [i.e., 3/31/23] (Doc 69-70, exs A). Further, the agreements are unambiguous in stating

> "pursuant to Clause (A) of the Waterfall, the Co-Investment Manager must recoup any realized or unrealized net losses attributable to the Fee-Bearing Amounts of prior Company Investments **before earning any Performance Fees** with respect to the Fee-Bearing Amount of a Company Investment"

(*id.* [the Waterfall's clause (A) requires "Reversal of Net Losses" before paying out any performance fees to Invictus]).

Unlike the provisions governing performance fees, that accrue when they are calculated and earned [if at all] at each quarter-end, the management fees accrue monthly[1] and are "payable

[1] Fee-bearing amounts were calculated and payable on a quarterly basis after 12/31/22 (Docs 69-70, exs A).

monthly in arrears" (*id.*). Also, unlike the performance fees, the Management fees "shall be pro-rated with respect to any partial periods based on the number of calendar days in such period" (*compare id.* Ex A [Management Fees accrue monthly/quarterly, are paid in arrears, and can be pro-rated for partial periods] *with id.* [Performance Fees must be calculated against losses before being earned at quarter-end]). These distinctions are illuminating as they demonstrate, as a matter of law, that the performance fees had not yet accrued when defendants terminated on 2/28/23. This is because performance fees could not accrue and be deemed "earned" until the defendants assembled the quarter-end calculations on 3/31/23. Thus, based on the COF and CEOF Agreements' plain, unambiguous language, defendants terminated the agreements before plaintiffs earned performance fees for the Perry loan.

Plaintiffs do not raise a triable issue of fact with respect to the termination or the accrual date for earned performance fees. Plaintiffs, at most, speculate without support that defendants terminated in bad faith in order to prevent plaintiffs from earning a performance fee for the Perry loan. However, "a party has an absolute, unqualified right to terminate a contract on notice pursuant to an unconditional termination clause without court inquiry into whether the termination was activated by an ulterior motive" (*A.J. Temple Marble & Tile, Inc. v Long Is. R.R.*, 256 AD2d 526, 527 [2d Dept 1998]; *see also e.g. Red Apple Child Dev. Ctr. v Community School Districts Two*, 303 AD2d 156, 157 [1st Dept 2003] ["when a contract affords a party the unqualified right to limit its life by notice of termination that right is absolute and will be upheld in accordance with its clear and unambiguous terms."]). Moreover, again, plaintiffs took the position at oral argument that they are not asserting wrongful termination.

Instead, plaintiffs argue that the COF and CEOF Agreements are fundamentally unfair. First, plaintiffs suggest that the court should not "adopt a reading of the Agreements that would

yield an[] absurd and unjust result," while arguing elsewhere in their papers that the Agreements are unambiguous (*compare* Doc 243 [pls' mem opp] at 8 *with id.* at 9-10).

The court agrees that the Agreements are unambiguous. The unambiguous language provides that plaintiffs did not 'earn' performance fees for the Perry Loan investment prior to termination. Further, the Agreements are not fundamentally unfair, and the performance fee consideration is not illusory, simply because defendants had the negotiated right to terminate the Agreements without cause. The Perry Loan was one of many investments listed in Ex B to the Agreements, and plaintiffs were scheduled to earn management fees for many of these other opportunities. The fact that plaintiffs were not scheduled to earn a management fee for the Perry Loan does not render the Agreements' plain language unenforceable.

Thus, defendants have established prima facie entitlement to summary dismissal of plaintiffs' breach of contract cause of action because plaintiffs did not earn the performance fees for the Perry Loan before defendants permissibly terminated the Agreements without cause. The termination provisions in the Agreements, that do not provide for post-termination performance fees, further support this conclusion.

Under the COF and CEOF Agreements, the only provisions that survive termination are those in sections 6, 9, 10, 11, 12, 13, and 15. The court disagrees with plaintiffs that the performance fee section and exhibit A must survive termination because the termination clause does not explicitly state that they will not. The termination provisions clearly delineate the sections that do survive termination, and section 4 [compensation] and Exhibit A are omitted from that list (Docs 69-70, section 11).

Alternatively, defendants have also demonstrated that summary dismissal based on termination would be appropriate even if the COF and CEOF Agreements' termination

provisions were ambiguous. "Even where there is ambiguity, if parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission" (*Quadrant Structured Products Co., Ltd. v Vertin*, 23 NY3d 549, 560 [2014] [applying the maxim *expression unius est excluusio alterius*]). Here, the Sub-Advisory Agreements that preceded the COF and CEOF Agreements, explicitly provided that "the applicable Performance Fee shall accrue and remain payable to the Sub-Advisor after such termination" (Docs 30-31 [sub-advisory agreements], section 11 [b]).

Turning to plaintiffs' opposition, plaintiffs do not raise a triable issue of fact with respect to the performance fee provisions' accrual date, or the agreements' termination clauses. The court rejects plaintiffs' suggestion that defendants breached the implied covenant of good faith and fair dealing by terminating just a few weeks before the quarter-end date. The court also rejects plaintiffs' contention that the performance fee provisions are "illusory" if they do not survive termination. These contentions are unavailing because "defendant, in terminating its agreement with plaintiff, acted entirely within the agreement termination provision" (*Phoenix Capital Investments LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008] [rejecting breach of implied covenant of good faith and fair dealing claim concerning negotiated termination and tail provisions]).

Plaintiffs point out that the court declined to dismiss the contract claim based on the termination provision at the motion to dismiss stage, before discovery was completed. While this is true, the court acknowledged that defendants may have acted in bad faith when they terminated (*see* Doc 52 [12/13/23 tr at 22 ["It seems like a bad faith use of . . . your termination rights . . . . I'm not sure I can dismiss it at this stage."]). Now that discovery is over, plaintiffs

have not produced any credible evidence to raise an issue of fact as to whether defendants acted in bad faith when they terminated the agreements.

CONCLUSION

Thus, for the reasons stated above, the court grants defendants' summary judgment motion (MS#4) and denies plaintiffs' partial summary judgment motion (MS#8). The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that defendants' summary judgment motion is granted, and the complaint is dismissed; and it is further

ORDERED that plaintiffs' partial summary judgment motion is denied; and it is further

ORDERED that the Clerk shall mark this case disposed; and it is further

ORDERED that there shall be no further motion practice without a pre-motion conference with the court.

7/82025
DATE

MELISSA A. CRANE, J.S.C.

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