

Stobie Cr. Invs., LLC v S3 Partners, LLC

2025 NY Slip Op 33070(U)

July 24, 2025

Supreme Court, New York County

Docket Number: Index No. 650650/2024

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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STOBIE CREEK INVESTMENTS, LLC,	INDEX NO.	650650/2024
Plaintiff,	MOTION DATE	03/15/2024
- v -	MOTION SEQ. NO.	MS 003
S3 PARTNERS, LLC,	DECISION + ORDER ON MOTION	
Defendant.		

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 15, 16, 17, 18, 19, 20, 21, 22, 27, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 53, 63, 64, 65, 66, 83, 84 were read on this motion to/for DISMISSAL.

This action arises from plaintiff Stobie Creek Investments LLC’s allegation that defendant S3 Partners LLC (defendant or the Company) failed to provide notice of a material adverse change in defendant’s business in breach of the parties’ loan agreement. Plaintiff brings causes of action for breach of contract and a declaratory judgment that defendant has suffered a material adverse change and that plaintiff validly exercised its rights under the relevant contract clauses. Defendant now moves to dismiss pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiff opposes the motion. For the reasons below, the motion is granted in part as to the declaratory judgment claim and denied in part as to the breach of contract claim.

Background

The following facts are drawn from plaintiff’s complaint, the LLC Agreement, the Loan Agreement, and several exhibits from defendant.

Early Relationship Between Parties

Defendant is a “technology and financial data analytics company that provides financial data solutions to asset managers, financial intermediaries, and hedge funds” (NYSCEF # 27, Def’s Mol at 2). Defendant is run by its founder, non-party Robert Sloan, who is also defendant’s managing member under the currently operative LLC Agreement (NYSCEF # 1, Complaint, ¶ 36).

Plaintiff is an investment firm and current member of defendant. Plaintiff alleges that it has been investing in defendant since 2011 and is now defendant's "largest outside investor" (*id.* ¶¶ 1, 26-30).

As relevant here, on September 14, 2021—a decade into their relationship—the parties entered an Omnibus Loan Consolidation Agreement by which plaintiff loaned \$50 million to defendant (Loan Agreement) (*id.* ¶¶ 1, 30-31). The loan's maturity date is December 31, 2027 (NYSCEF # 18, Loan Agreement, § 2.1).

The Loan came at the same time as a new investment by non-party Fidessa Corporation (Fidessa) in which Fidessa would invest tens of millions in exchange for equity in defendant (Complaint ¶ 32). According to defendant, the investment was actually split in "two tranches"—first a \$33.75 million investment (which is referenced in the complaint), and then another "investment of several million dollars more at [defendant's] call" (Def's Mol at 2-3). The Fidessa deal also resulted in an amendment to defendant's LLC Agreement by establishing "for the first time a Board of Managers," although the Board only had power over "certain enumerated matters" (Complaint ¶¶ 34-38).

Relevant Provisions of the Loan Agreement

At the center of this case are §§ 9.1 and 9.4 of the Loan Agreement, which deal with "material adverse changes" (MACs). Section 9.4 defines MACs as "any actual material adverse change in the business, operations or financial condition of [defendant], taken as a whole" (Loan Agreement § 9.4). Pursuant to § 9.1, defendant must provide plaintiff "written notice" of any MAC "[w]ithin five Business Days following the date upon which [defendant] first has knowledge" of it (*id.* § 9.1). Plaintiff then has "the right to terminate" the Loan Agreement and accelerate the outstanding loan principal and interest within 90 days (*id.*). Notably, nothing in the contract allows plaintiff to pre-emptively provide notice of an MAC.

Plaintiff may also accelerate the loan if an "event of default" occurs (*id.* § 7.1). The Loan Agreement defines certain "events" of default in §§ 7.2, 7.3, and 7.4. As relevant here, insolvency and/or bankruptcy is an event of default (*id.* § 7.4). Failure to issue a notice of a MAC is not.

Plaintiff's MAC Letter

Over two years later on December 22, 2023, plaintiff sent defendant a letter stating there were four separate MACs that defendant should be aware of, all related to ways that plaintiff believed Sloan was mismanaging defendant (MAC Letter) (Complaint ¶ 91). The most relevant¹ of these is the fourth, which claimed

¹ The MAC Letter also asserted Sloan used false information to obtain an SBA loan from a non-party bank, made personal loans to the Company in violation of the LLC Agreement, and used Company funds to finance his personal lifestyle, hiding these actions by making strategic repayments.

that “[u]nder Sloan’s mismanagement, [defendant’s] business and financial condition [] have materially deteriorated” (*id.* ¶¶ 75-88). Plaintiff alleges many details on this point, but as relevant here, plaintiff alleges that defendant significantly decreased its expected revenue projections before and after entering the Loan Agreement. Plaintiff alleges that at the time of the Loan Agreement, “Sloan projected that [defendant] would earn more than \$71 million in 2022 revenue and \$142 million in 2023 revenue” (*id.* ¶ 76). But just three months later, at a January 20, 2022 Board of Managers meeting, Sloan forecasted just \$19 million in revenue for 2022 and \$35 million for 2023 (along with “\$50 million+” for 2025), representing a 73% and 75% decrease in future projected revenue, respectively (*id.* ¶ 77). Defendant then failed to reach even those projections, ending 2022 with “revenue of \$14.8 million, with a net loss of \$13 million” (*id.* ¶ 78). Plaintiff provides the following table:

Table A

Year	Pre-Loan Projections	Post-Loan Projections	Post-Loan Projections as % of Pre-Loan Projections	Actual Revenue	Actual Revenue as % of Pre-Loan Projections
2022	\$71 million	\$19 million	-73%	\$14.8 million	-79%
2023	\$142 million	\$35 million	-75%		
2025		\$50+ million			

Plaintiff points out that defendant’s poor fiscal performance occurred in the same year that Sloan incurred over \$1 million in personal expenses and hid underperformance by making the strategically placed repayments (*id.* ¶¶ 80-87). Plaintiff also alleges Sloan further “disguise[d] [defendant’s] financial condition” by changing the way defendant calculated and recognized revenue (*id.* ¶ 88). Plaintiff alleges defendant “ran out of cash before the end of October 2022” as a result (*id.* ¶ 85).

Defendant’s Response to the MAC Letter

Defendant responded to plaintiff’s MAC Letter with its own letter dated December 28, 2023 (*id.* ¶ 91 [misciting date as December 27]; *see also* NYSCEF # 20, Def’s Response Letter). Defendant asserted plaintiff itself caused any financial difficulties by inducing Fidessa to withhold certain funding (Def’s Response Letter at 1). Defendant made other accusations, but “nowhere in its response did [defendant] deny that a Material Adverse Change has occurred” (Complaint ¶ 91).

Defendant also did not issue a MAC notice as required under § 9.1 of the Loan Agreement despite now having “knowledge” of the four MACs raised in plaintiff’s MAC Letter (*id.* ¶ 90). Plaintiff asserts that the failure to issue the notice constituted a breach of the Loan Agreement (*id.*). Therefore, on January 2, 2024,

plaintiff sent defendant a letter purporting to activate plaintiff's termination and acceleration rights under the § 9.1 (*id.* ¶ 92). Plaintiff alleges defendant then breached a second time by failing to repay the loan (*id.*).

Defendant asserts that plaintiff is actually just searching for ways out of the loan and is using the MAC clause as an excuse. Defendant asserts that in 2022 and 2023, plaintiff repeatedly "provided Fidessa with baseless pretext to refuse to comply with its obligation" to release the second "tranche" of funding under Fidessa's deal with defendant (Def's Mol at 5). Defendant also asserts that plaintiff "demanded and received a \$2.5 million payment from [defendant] to which it was not entitled" (*id.*). Defendant argues that plaintiff is "putting its interest as a creditor before the interest of [defendant company that plaintiff owns equity in] . . . in order to put pressure on [defendant] to buy it out" (*id.*).

Current Action

On February 8, 2024, plaintiff filed this case and alleged two causes of action. Plaintiff's first cause of action is for breach of the Loan Agreement. As clarified at oral argument, plaintiff has two theories of breach: First, defendant breached the Loan Agreement by failing to issue an MAC notice after gaining knowledge of four MACs from plaintiff's December 22, 2023 MAC Letter as required under § 9.1 of the Loan Agreement (NYSCEF # 84, Hearing Tr., at 23:24-24:14). Second, defendant breached by failing to repay the loan after plaintiff accelerated it per § 9.1 (*id.* at 24:15-24).

Plaintiff's second cause of action requests a declaratory judgment that there was a MAC, that plaintiff validly exercised its termination rights as a result of that MAC, and that defendant must now repay the loan (Complaint ¶¶ 100-102).

Defendant now moves to dismiss the complaint in its entirety. The court held a hearing on this motion on November 19, 2024 (*see* Hearing Tr.).

Defendant argues the declaratory judgment claim should be dismissed as duplicative of breach of contract (Def's Mol at 13). Defendant also argues that plaintiff fails to plead breach because (a) plaintiff's right to terminate and accelerate does not arise until defendant calls a MAC, and (b) the plain language of the Loan Agreement unambiguously gives defendant the sole right to determine whether a MAC has occurred (*id.* at 7-10).

Defendant next argues that none of the four alleged MACs are actually MACs, and makes arguments about each one (*id.* at 10-12). Regarding defendant's allegedly deteriorating finances specifically, plaintiff fails to explain how "a downward revision in *future* projections constitutes an actual material adverse change" or why a company would give a lender the unilateral right to terminate a loan solely upon missed projections (*id.* at 12 [emphasis in original]). Defendant also

argues that plaintiff does not allege defendant ever turned a profit or ever regularly met revenue projections despite the parties decade-long relationship (*id.*).

Plaintiff responds that it has properly stated a breach of the Loan Agreement by alleging a MAC occurred and that defendant misinterprets portions of the Complaint (NYSCEF # 53, Plt's Response). Plaintiff claims that the test for a MAC in this action is broad: "any actual material, adverse change in the business, operations, or financial condition of [defendant], taken as a whole," which can be summarized as "an actual, negative change to *any* of [defendant's] overall business, its operations, or its financial condition" (*id.* at 8). Plaintiff first argues that defendant has been taken to "near insolvency" by Sloan's mismanagement, thus effecting a MAC (*id.* at 9). Plaintiff next asserts that each of the four alleged MACs is in fact an MAC (*id.* at 9-12). As relevant here, plaintiff argues that the material deterioration of the business and financial conditions is shown by the lack of profits since 2021, Sloan's secret infusions of money into defendant, and the significant drop in the financial projections (*id.* at 13-14). Plaintiff argues defendant misinterprets the Complaint in that plaintiff is not merely alleging defendant failed to meet future projections, but rather that there was "a pervasive, actual deterioration in the Company's business and financial performance that has left the Company on the verge of insolvency" (*id.* at 15).

Plaintiff further argues that defendant does not have the unilateral right to decide if there is a MAC, as the MAC clause is meant to protect plaintiff rather than defendant (*id.* at 16-17). Plaintiff adds that defendant's arguments also violate New York's "prevention doctrine," which holds "a party may not insist upon performance of a condition precedent when its nonperformance has been caused by the party itself" (*id.* at 17-18, quoting *Pac. Life Ins. Co. v U.S. Bank N.A.*, 636 F Supp 3d 366, 423 [SDNY 2022]).

Finally, as to the declaratory judgment claim, plaintiff asserts only the following:

"Insofar as [defendant's] motion to dismiss is denied in its entirety as to [plaintiff's] breach of contract cause of action, [plaintiff] intends to prosecute its breach of contract claim, rather than an alternative declaratory judgment cause of action"

(*id.* at 19).

Defendant first replies that plaintiff's "negative impact" standard for an MAC is significantly less than what is actually required, which is an "actual material adverse change" (NYSCEF # 66, Reply, at 1). Defendant argues that the best plaintiff does is make allegations that Sloan did bad things, mostly related to raising money for the Company, which cannot and should not be an MAC (*id.* at 2).

Defendant further argues that plaintiff's assertion that defendant is "on the brink of insolvency" does not reference anything in the complaint and is an unsupported assertion (*id.*). Defendant reiterates that per the Loan Agreement, it is the only party that can call a MAC, which is reinforced and balanced by the fact that only plaintiff can call defaults (*id.* at 11).

Regarding the MACs, after addressing plaintiff's arguments on the other three MACs, defendant reiterates that the allegations merely state defendant failed to meet revenue projections (*id.* at 8-9). Defendant distinguishes plaintiff's case, *Akorn, Inc. v Fresenius Kabi AG* (CV 2018-0300-JTL, 2018 WL 4719347, at *53 [Del Ch Oct. 1, 2018] [emphasis added], *aff'd*, 198 A3d 724 [Del 2018]), in which the Delaware Chancery Court ruled that a MAC requires an event that is "durationally significant," not a mere short-term fall (Reply at 8, citing *Akorn*). Defendant argues there is no durational significance alleged (*id.* at 9). Defendant argues that plaintiff's arguments relating to defendant's (un)alleged "near-insolvency" cannot meet the definition for a MAC given that *actual* insolvency is already considered an event of default (*id.*).

Defendant concludes that plaintiff essentially does not dispute that the declaratory judgment claim is duplicative, and therefore concedes it.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff...can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *iv denied* 12 NY3d 713 [2009])

At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference'" (*Morgenthau & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). However, dismissal based on documentary evidence under 3211(a)(1) may result "only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it'" (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Moreover, "affidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the

purpose of determining whether there is evidentiary support for the complaint ... and do not otherwise conclusively establish a defense to the asserted claims as a matter of law” (*Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]).

I. Declaratory Judgment

Plaintiff offers no defense of its declaratory judgment claim. The claim is therefore dismissed as duplicative of the breach of contract claim. This would be the result even if plaintiff had made an argument. The declaratory judgment claim asks for a declaration that there was a MAC and that plaintiff appropriately used its termination remedy. Similarly, the breach of contract claim requires a finding that there was a MAC and/or that plaintiff appropriately used its termination remedy such that defendant should have repaid the loan. Both claims effectively ask for recovery of the loan, whether directly or as damages. These claims are duplicative.

II. Breach of Contract

The breach of contract claim, however, survives. Defendant is correct that per § 9.1 of the Loan Agreement, it must provide notice that a MAC has occurred before plaintiff can utilize the termination right (Loan Agreement § 9.1). However, this does not mean defendant has the sole authority to decide whether an MAC has occurred. Any event that meets § 9.4’s broad definition of a MAC must be declared via notice within five days per § 9.1, and nothing in the Loan Agreement gives defendant the discretion not to send such notice. Thus, if a MAC has occurred, defendant has the duty to notify plaintiff, and the failure to do so constitutes a breach.²

The question, then, is whether plaintiff adequately alleged an MAC occurred. The answer is yes. Specifically, plaintiff’s allegations of defendant’s financial deterioration survive.

To be sure, defendant makes a strong case that the financial deterioration allegations do not constitute a MAC. Defendant is correct that to show a “material adverse change” there must in fact be a change. Defendant also correctly points out that under persuasive Delaware case law, an event should not be considered an MAC unless it “substantially threaten[s] the overall earnings potential of the target *in a durationally-significant manner*” (*Akorn, Inc. v Fresenius Kabi AG*, CV 2018-0300-JTL, 2018 WL 4719347, at *53 [Del Ch Oct. 1, 2018] [emphasis added], *affd*, 198 A3d 724 [Del 2018]). Defendant points out that plaintiff only shows a snapshot of defendant’s future and actual revenues in 2022 and 2023, without alleging that defendant had ever met its revenue projections during the parties’ decade-long relationship. Defendant is also correct that its decrease in its projected revenues for

² This does not give plaintiff the right to declare an MAC on its own, as simply asserting events occurred does not make them MACs.

2022 and 2023, standing alone, would not constitute a change, much less and material and adverse one, because such projections are merely forecasts of events that have not happened yet. Changing future projections does not mean that defendant is doing poorly, but rather that the future projections need work. Finding otherwise would effectively punish companies for accurately revising their future outlooks.

However, plaintiff is not arguing that the change to the future projections themselves are the MAC, but rather that the drop in the projections are evidence that there was some sort of MAC behind the scenes. As mentioned in *Akorn*, “most courts which have considered decreases in profits in the 40% or higher range found a material adverse effect to have occurred” (*Akorn*, CV 2018-0300-JTL, 2018 WL 4719347, at *53). While profits are different than future revenue projections, the logic still applies. Small adjustments in future projections might be attributable to calculation errors or small changes to a situation. Adjustments as large as 40% indicate a more dramatic change in circumstances affecting the Company’s position.

Here, defendant slashed its 2022 and 2023 revenue projections by 73% and 75%, respectively, which is almost double 40% (*see supra* Table A). Making all inferences in the light most favorable to plaintiff, this dramatic fall in future projections implies that a “material adverse change” occurred that required significant revision to the Company’s future prospects. Plaintiff has therefore met its burden, and the motion to dismiss the breach of contract claim is denied.³

Conclusion

For the reasons above, it is hereby

ORDERED that defendant S3 Partners LLC’s motion to dismiss the complaint is granted in part and the cause of action for declaratory judgment is dismissed, and denied in part as to the cause of action for breach of contract; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days of the e-filing of this order; and it is further

ORDERED that within 20 days of service of the answer, the parties shall contact the court’s Part Clerk to schedule a preliminary conference; and it is further


ORDERED that defendant shall serve a copy of this Decision and Order with notice of entry on the Clerk of the Court in accordance with the procedures set forth

³ The court does not reach any arguments about the other three alleged MACs, plaintiff’s second theory of contract breach/the prevention doctrine, nor arguments that plaintiff may have had a hand in defendant’s financial condition due to the breakdown in the Fidessa relationship.

in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page and on the court's website).

This constitutes the Decision and Order of the court.

7/24/2025
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE