GE Oil & Gas, Inc. v Turbine Generation Servs., L.L.C.
2017 NY Slip Op 30275(U)
February 10, 2017
Supreme Court, New York County
Docket Number: 652296/2015
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

GE OIL & GAS, INC.,

Plaintiff,

-against-

TURBINE GENERATION SERVICES, L.L.C., and MICHAEL B. MORENO,

Defendants.

----------X

TURBINE GENERATION SERVICES, L.L.C., and MICHAEL B. MORENO,

Third-Party Plaintiffs,

-against-

GENERAL ELECTRIC COMPANY,

Third-Party Defendant.

----------X

Index No.: 652296/2015

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

The court assumes familiarity with this action and its prior decisions, including its orders dated March 4, 2016 (the SJ Decision) (Dkt. 159),[1] March 30, 2016 (Dkt. 171), and May 27, 2016 (Dkt. 257). The court's discussion of the underlying facts and procedural history in this decision is limited to matters not addressed in these prior decisions.[2]

Plaintiff GE Oil & Gas, Inc. (GEOG) and third-party defendant General Electric Company (GE) (collectively, the GE Parties) move, pursuant to CPLR 3211, to dismiss the amended counterclaims (the Counterclaims) (Dkt. 178) and amended third-party complaint (the ATPC) (Dkt. 182) (collectively, the TGS Parties' Claims) filed on April 6, 2016 by defendants/third-party plaintiffs Turbine Generation Services, L.L.C. (TGS) and Michael B.

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

[2] Capitalized terms not defined herein have the same meaning as in the prior decisions.

Moreno (collectively, the TGS Parties). The TGS Parties oppose the motion (except with respect to dismissal of certain claims, which, as explained herein, they did not oppose). The court reserved on the motion after oral argument. *See* Dkt. 283 (11/29/16 Tr.).

By order dated December 8, 2016 (Dkt. 284), the court permitted supplemental briefing on the applicability of Louisiana law to the TGS Parties' non-contractual claims, which was fully submitted on January 18, 2017. *See* Dkt. 285 & 286. For the reasons that follow, all of the TGS Parties' Claims are dismissed with prejudice, with the exception of TGS's claim against the GE Parties for failure to negotiate in good faith, which is dismissed without prejudice to TGS's ability to move for leave to amend to the extent set forth herein.

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st

Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

The Counterclaims and ATPC of the TGS Parties are virtually identical. The Counterclaims allege: (1) breach of the Term Sheet; (2) breach of the duty of good faith and fair dealing; (3) promissory estoppel; (4) fraud and fraudulent inducement; and (5) unjust enrichment. The ATPC is the same, except for the pleading of a sixth cause of action for contribution and indemnity. The TGS Parties have not opposed dismissal of the unjust enrichment and contribution and indemnity claims. Therefore, those claims are dismissed. The facts recited herein regarding the remaining four causes of action are drawn from the Counterclaims, the ATPC, and the documentary evidence submitted by the parties.

The TGS Parties allege that prior to executing the Note, Guaranty, and Term Sheet on May 13, 2013 (*see* SJ Decision at 2-4), the parties conducted "extensive negotiations for the formation of a joint venture involving fracking and power generation services through the use of new technology." *See* Dkt. 266 at 10. They claim that, as reflected in the Term Sheet, the parties were contemplating a complex, multi-step process by which the GE Parties would *possibly* invest more than $100 million in the proposed venture. That being said, as discussed in the court's prior decisions, the Term Sheet provides:

> This summary of principal terms **does not constitute a contractual commitment of any party but merely represents the proposed terms of a transaction**. Any commitments will be subject to, among other things, completion of due diligence, acceptable definitive documentation, with among other things, acceptable

> representations, warranties, covenants and events of default, and requisite [GE] internal approvals.

SJ Decision at 4 (emphasis added), quoting Dkt. 2 at 29. Based on this clear and unequivocal expression of the parties' intent, this court (as well as the Louisiana federal court) held that there is no merit in TGS Parties' claim that the parties entered into a binding joint venture agreement. Rather, the parties merely entered into an agreement to agree (to negotiate in good faith). *See* SJ Decision at 8-10.

The TGS Parties have now pleaded a claim for breach of the GE Parties' good faith negotiation obligations.[3] They do not, however, explain how the GE Parties failed to negotiate in good faith or what they actually did that amounts to bad faith, other than claiming that the GE Parties repeatedly assured the TGS Parties that the proposed venture would go forward. Then, "on or about September 29, 2013, Moreno was informed that GE was not 'comfortable' about participating in the joint venture." *See* Dkt. 266 at 13, quoting Counterclaims ¶ 242. The TGS Parties admit that GE informed it that "Green Field's 'financial situation' was the reason." *See id.* Indeed, Green Field filed for bankruptcy on October 27, 2013. *See* Counterclaims ¶ 245. It was only afterward that the GE Parties demanded repayment of the $25 million due on the Note and Guaranty.

The TGS Parties suggest that the Greenfield excuse was pretextual and that the GE Parties never intended to invest more than the first $25 million (this claim, as discussed below, also forms the basis of a fraudulent inducement claim). However, they do not allege any facts

---

[3] The claim for breach of the implied covenant is duplicative of the first cause of action for breach of the Term Sheet, which includes the GE Parties' alleged breach of their duty to negotiate in good faith. *See Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 (1st Dept 2009) ("The claim that defendants breached the implied covenant of good faith and fair dealing was properly dismissed as duplicative of the breach of contract claim because both claims arise from the same facts.").

that permit a reasonable inference that the GE Parties acted in bad faith. The fact that the TGS Parties ultimately did not go forward with the joint venture after conveying a willingness to further invest, standing alone, is not sufficient to infer bad faith. "[T]he obligation to negotiate in good faith 'can come to an end without a breach by either party' because 'not every good faith negotiation bears fruit.'" SJ Decision at 9, quoting *IDT Corp. v Tyco Group, S.A.R.L.*, 23 NY3d 497, 503 (2014). As discussed more fully below with respect to the fraud claim, the TGS Parties do not plead any non-conclusory allegations about the GE Parties supposedly lying about their intention to further invest (either before the Note was executed or afterward).

Moreover, should the TGS Parties prevail, the value of this claim is limited to out-of-pocket expenses. *See* SJ Decision at 9 (collecting cases). As a set-off, unlike the previously rejected joint-venture claim, it is minuscule relative to the outstanding judgment of approximately $40 million (*see* Dkt. 277).[4] That being said, TGS may well have a valid cause of action for the GE Parties' breach of their obligation to negotiate in good faith. Such a cause of action, however, has not been properly pleaded. Since the dismissal is based on insufficient

[4] It should be noted that Moreno waived his right under the Guaranty to assert defenses based on breach of the Term Sheet (or for fraudulent inducement) by unconditionally guaranteeing the Note and waiving such claims. As the Court of Appeals explained:

> Guaranties that contain language obligating the guarantor to payment without recourse to any defenses or counterclaims, i.e., guaranties that are 'absolute and unconditional,' have been consistently upheld by New York courts. Absolute and unconditional guaranties have in fact been found to preclude guarantors from asserting a broad range of defenses.

Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro, 25 NY3d 485, 493 (2015) (internal citations and quotation marks omitted); *see Sterling Nat'l Bank v Biaggi*, 47 AD3d 436, 436-37 (1st Dept 2008), citing *Citibank v Plapinger*, 66 NY2d 90 (1985). Moreno, therefore, has no right of set-off for his personal liability under the Guaranty.

pleading, it is without prejudice.[5] While TGS is being permitted to move for leave to amend to properly allege what acts (aside from declining to further invest, which is not, in and of itself, wrongful) amount to bad faith negotiations, staying the judgment is no longer warranted in light of dismissal of the fraud claim.

The fraud claim is palpably devoid of merit. "The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009); *see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 (1st Dept 2014). Fraud claims must be pleaded with the specificity required by CPLR 3016(b). *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008); *see CIFG Assur. N. Am., Inc. v J.P. Morgan Secs. LLC*, 146 AD3d 60 (1st Dept 2016) ("CPLR 3016(b) 'imposes a more stringent standard of pleading' than otherwise applicable.") (citation omitted). "Thus, 'conclusory allegations are insufficient.'" *Id.*, quoting *Schroeder v Pinterest Inc.*, 133 AD3d 12, 25 (1st Dept 2015).

As an initial matter, the TGS Parties have not pleaded the element of scienter, the requisite intent to defraud. *See Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 (1st Dept 2015) ("Allegations regarding an act of deceit or intent to deceive must be stated with particularity; the claim will be dismissed if the allegations as to scienter are conclusory and factually insufficient.") (internal citation omitted). To be sure, "[p]articipants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud" and,

[5] While this is not the first time the TGS Parties' claims have been rejected, it is the first time their good faith negotiation claim has been considered on a formal motion to dismiss. Thus, affording them a second chance to make out a claim that may well have merit is appropriate. Nonetheless, as discussed herein and in the court's prior decisions, the same cannot be said about the TGS Parties' other claims.

therefore, "an intent to commit fraud is to be divined from surrounding circumstances." *Oster v Kirschner*, 77 AD3d 51, 55-56 (1st Dept 2010), citing *Eurycleia*, 12 NY3d at 559 ("CPLR 3016(b) is satisfied when the facts suffice to permit a 'reasonable inference' of the alleged misconduct.") *see Aozora Bank, Ltd. v J.P. Morgan Secs. LLC*, 144 AD3d 440, 441 (1st Dept 2016) (complaint must include "sufficient facts to support the reasonable inference of fraud and scienter."). Here, the TGS Parties do not plead facts that permit a reasonable inference of the GE Parties' scienter. While the TGS Parties claim that the GE Parties never intended to invest more than the initial $25 million, they do not plead any facts in support of this conclusory allegation. While a lie about one's intent to perform may give rise to a fraudulent inducement claim [*see Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 169 (1st Dept 2015)], such a bare allegation, unsupported with any facts that permit a reasonable inference of scienter, is inadequate. For example, the GE Parties may well have originally intended to further invest, but later changed their mind, for instance, due to Green Field's financial troubles. While a post-contract change of heart might give rise to a claim for breach of the GE Parties' good faith obligations under the Term Sheet (i.e., if the GE Parties did not disclose such intent while permitting the TGS Parties to expend more funds on the venture), it certainly cannot give rise to a claim for fraudulent inducement because, by definition, fraud post-dating the contract cannot have induced its execution. The TGS Parties have not alleged any fact that permits the court to reasonably infer that, at the time the Note was executed on May 13, 2013, the GE Parties intended to call the Note and had no intention of further investing in the proposed venture. At best, the facts pleaded by the TGS Parties suggest that, after the Note was executed, the GE Parties chose not to do so.[6]

[6] Again, the question of whether the GE Parties' post-execution decision not to further invest was

That being said, the fraud claim also fails for lack of reasonable reliance. While the element of reasonable reliance is usually not amenable to resolution on a motion to dismiss [*see ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 (2015)], that is not always the case. *See MP Cool Investments Ltd. v Forkosh*, 142 AD3d 286, 291 (1st Dept 2016) ("Plaintiff is an experienced and sophisticated investor. It did not plead facts to support the justifiable reliance element of fraud."). For instance, where, as here, the fraud claim is refuted by the contract itself, the claim is not viable. *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 (1st Dept 2011) ("a party claiming fraudulent inducement cannot be said to have justifiably relied on a representation when that very representation is negated by the terms of a contract"); *see Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479 (1st Dept 2010) ("since the language of the contract variation contradicts plaintiff's allegations that it relied on defendant's predictions ..., those allegations are not presumed to be true.").

The TGS Parties claim that the GE Parties lied when they told Moreno that they would never call the Note and, instead, would only convert it to equity. Any reliance on this promise is unreasonable because it is in direct contravention of the Note, which provides for no such protection. Neither the Note nor the Term Sheet support the TGS Parties' claims; they, in fact, utterly refute them by making clear the debt was unconditionally enforceable and that the parties had not yet entered into a definitive agreement regarding the *proposed* venture. While the TGS Parties make much of the GE Parties' involvement with the purchase and use of the equipment, that is irrelevant. The TGS Parties cannot claim to have spent the $28 million in reasonable reliance on the GE Parties' promise to invest more money, since the Term Sheet, negotiated and

---

made in contravention of their good faith obligations under the Term Sheet has no bearing on the viability of the TGS Parties' fraud claim since, again, the propriety of the GE Parties' conduct is distinct from when it occurred.

drafted by the parties, makes clear that the GE Parties had no obligation to do so. By spending the $28 million after obligating themselves to be unconditionally liable on the $25 million loan, the TGS Parties were taking a risk that the GE Parties might choose not to further invest, a decision that would require the TGS Parties to pay back the loan. Had the TGS Parties not wanted to take this risk, they could have insisted on different contractual terms or chosen not to execute the Note and Guarantee. Then too, if it really was the parties' intention to only permit a conversion and not collection on the $25 million debt, the parties would have papered their agreement very differently. The parties are extremely sophisticated and well counseled. They surely knew how to paper a convertible debt instrument or a note with preconditions to enforcement. They, instead, papered a classic debt obligation that reflected an unconditional obligation to repay the Note.

In any event, scienter is not properly pleaded. Even if the GE Parties promised not to call the Note, the TGS Parties do not plead any facts to reasonably infer that the GE Parties were lying when they made such an alleged promise. Approximately five months passed between the Note's execution in May 2013 and when GEOG sought to collect in October of that year. The GE Parties may well have changed their mind about their intention not to call the Note, for instance, due to Green Field's issues and/or problems in the energy market. Absent an intent to deceive at the outset, there cannot be a claim for fraud. A basis to infer such intent is not pleaded.

That it was unreasonable for Moreno to rely on such a promise is best exemplified by the unconditional nature of his Guaranty, which precludes his ability to assert a claim for fraudulent inducement of the Note as a defense. *See supra,* n.4. If he thought he had the right to reasonably

rely on the fact that GEOG would not call the Note, he would not (and should not) have expressly agreed to permit GEOG to do so. A sophisticated party cannot expressly and unconditionally grant a party a contractual right and then later claim that he was promised that such right would never be exercised. It is hard to fathom an example of more unreasonable reliance. If parties do not intend to provide for a right, or if exercising a right is subject to limitations, they fashion their contracts accordingly. Here, GEOG was granted the contractual right to call the Note and enforce the Guaranty; nowhere in the extensive contracts is there mention of GEOG's promise to further invest or convert the debt to equity. *See Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 (2002) ("if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity.").

The TGS Parties' promissory estoppel claim fails on similar grounds. As with fraud, reasonable reliance is an essential element. *See MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 841-42 (1st Dept 2011) ("The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) **reasonable reliance on the promise by a party**; and (3) injury caused by the reliance.") (emphasis added). As explained above, that element is not present here. Also, promissory estoppel is a quasi-contractual claim. The existence of governing written contracts precludes its maintenance. *Coleman & Assocs. Enterprises, Inc. v Verizon Corp. Servs. Grp., Inc.*, 125 AD3d 520, 521 (1st Dept 2015) ("The court also properly dismissed the promissory estoppel claim, as the alleged conduct underlying the claim was governed by the written contracts, and plaintiff failed to allege a duty independent of the contracts."); *Susman v Commerzbank Capital Markets Corp.*, 95 AD3d

589, 590 (1st Dept 2012) ("to the extent the second cause of action was for promissory estoppel, such a claim cannot stand when there is a contract between the parties."); *see Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987).

Finally, based on the disposition of this motion, there is no basis to hold that non-party MOR DOH Holdings, L.L.C. (MOR) is a necessary party. MOR is a Delaware LLC controlled by Moreno; TGS is MOR's sole member, and Moreno is its CEO. *See* SJ Decision at 2 n.2. Absent a claim based upon the alleged joint venture agreement (which, again, is not viable), there is no authority cited by the parties suggesting that the TGS Parties' only possibly viable claim (for breach of the Term Sheet's good faith obligations) requires MOR's involvement. There simply is no reason to believe MOR will be inequitably affected by the judgment in this action. *See* CPLR 1001; *Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 NY3d 543, 550 (2012). To the extent any party disagrees (including MOR which, being controlled by Moreno, is aware of this action), MOR could be impleaded or seek leave to intervene (assuming there is a non-frivolous basis to do so). That this has not occurred (in contrast to what occurred in the Louisiana State Court Action) suggests that MOR's participation is unnecessary.

In sum, the TGS Parties have not pleaded any viable claim. TGS may seek leave to amend to properly assert a claim against the GE Parties for failure to negotiate in good faith. However, even if it does, the possible damages available on such claim do not warrant a stay of the judgment.[7] Accordingly, it is

[7] The court has reviewed the parties' supplemental submissions regarding the supposed applicability of Louisiana law to the TGS Parties' non-contractual claims. The question of whether New York or Louisiana law applies need not be decided because the outcome would not differ under Louisiana law. Dkt. 286 at 7-8; *see Excess Ins. Co. v Factory Mut. Ins. Co.*, 2 AD3d 150, 151 (1st Dept 2003) ("In a conflicts of law analysis, the first consideration is whether there is any actual conflict between the laws of the competing jurisdictions. If no conflict exists, then the court should apply the law of the forum state in which the action is being heard"), *aff'd* 3

ORDERED that the GE Parties' motion to dismiss the TGS Parties' Claims is granted, and all such claims are dismissed with prejudice with the exception of TGS's claim for breach of the Term Sheet based on the GE Parties' failure to negotiate in good faith, which will be dismissed with prejudice unless a motion for leave to amend to assert such claim is filed within 30 days of the entry of this order on NYSCEF; and it is further

ORDERED that if TGS does not timely move for leave to amend, the GE Parties may submit a proposed order directing the entry of judgment dismissing all of the TGS Parties' claim with prejudice; and it is further

---

NY3d 577 (2004), accord *Matter of Allstate Ins. Co. (Stolarz-N.J. Mfrs. Ins. Co.)*, 81 NY2d 219, 223 (1993). As the GE Parties correctly explain, under Louisiana law, where, as here, there is a lack of reasonable reliance, a claim to alter the clear and unambiguous terms of a written contract based on fraudulent inducement or "simulation" is not tenable. *See* Dkt. 286 at 8-9. It should be noted that even if a "simulation" claim is distinct from any claim recognized by New York law, it is merely another iteration of the allegation that the parties' written contract does not reflect the true nature of their actual purported joint venture agreement. *See Pine Prairie Energy Ctr., LLC v Soileau*, 141 So3d 367, 372 (La Ct App 2014) ("Simulation is defined by La.Civ.Code art. 2025: 'A contract is a simulation when, by mutual agreement, it does not express the true intent of the parties.'"). The court's ruling that the terms of the Note and Guarantee cannot be altered by resort to an alleged oral joint venture agreement cannot be eschewed by couching it as one for "simulation". In any event, under Louisiana law, if consideration is given for a contract such as a note (as is the case here since the $25 million was dispersed), a simulation claim is not viable. *See Guilbeau v Domingues*, 149 So3d 825, 828-29 (La Ct App 2014), citing *Pine Prairie* 141 So3d at 372; *see also In re Robinson*, 541 BR 396, 402 (Bankr ED La 2015) ("a transaction in which 'any consideration is given for the conveyance ... is not a simulation', and the party alleging that a transaction is a simulation must show with reasonable certainty that none was received.") (citation omitted). It also should be noted that the TGS Parties have not actually pleaded a cause of action for simulation, but leave to do so would be denied since such a claim would be devoid of merit. The court further notes that it is specious for the TGS Parties to have contended that they did not plead claims under Louisiana law or address Louisiana law in their original opposition brief [*see* Dkt. 283 (11/29/16 Tr. at 35-36)] because this court already ruled that New York law applies to their non-contractual claims. *See* Dkt. 257 at 5 (noting that "even if Louisiana law might apply to the TGS Parties' tort claims", that was "**an issue this court need not reach at this juncture.**") (emphasis added).

ORDERED that the stay of GEOG's right to enforce the judgment entered on August 3, 2016 against the TGS Parties (Dkt. 278) is hereby vacated.

Dated: February 10, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C