DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2012

PROGRESS ENERGY, INC., a North Carolina corporation,
EFC SYNFUEL, LLC, a Delaware limited liability company,
SOLID ENERGY, LLC, a Delaware limited liability company,
SOLID FUEL LLC, a Delaware limited liability company,
CEREDO SYNFUEL LLC, a Delaware limited liability company, and
SANDY RIVER SYNFUEL LLC, a Delaware limited liability company,
Appellants,

v.

U.S. GLOBAL, LLC, a limited liability company,
Appellee.

No. 4D09-5130

[December 19, 2012]

ON APPELLEE'S MOTION FOR CLARIFICATION AND REHEARING

PER CURIAM.

We grant appellee's motion for clarification and deny appellee's motion for rehearing. We withdraw our opinion issued October 3, 2012, and substitute the following opinion in its place.

Progress Energy and its related subsidiaries (collectively "Progress Energy") appeal a final judgment for damages in U.S. Global's favor. Progress Energy primarily argues that the trial court erred in denying its motions for summary judgment and directed verdict on U.S. Global's claim for benefit-of-the-bargain damages under an asset purchase agreement. We agree and reverse as to that portion of damages included in the final judgment. We affirm the remaining portion of damages included in the final judgment without further discussion.

The asset purchase agreement contained the following general limitation-on-damages provision:

> 7.10 *General Limitation of Damages*. In no event shall any party be liable to any other party under any provision of this Agreement for any lost profits, lost sales, business interruption, lost business opportunities, lost Tax Credits, lost Tonnage Fees or consequential, incidental, punitive or exemplary damages incurred or suffered by a party; *provided, however,* that this limitation shall not limit a

> party's right to indemnification pursuant to Sections 7.1, 7.2 or 7.3 hereof for losses or damages incurred by a party to third parties claiming such damages.

The asset purchase agreement also provided that New York law applied to its interpretation.

In its motions for summary judgment and directed verdict, Progress Energy argued that the general limitation-on-damages provision in the asset purchase agreement precluded U.S. Global from seeking benefit-of-the bargain damages under that agreement, and limited U.S. Global's sole remedy to specific performance under that agreement. The trial court disagreed. The trial court construed the general limitation-on-damages provision in the asset purchase agreement as precluding U.S. Global from seeking only consequential damages under that agreement, but not benefit-of-the-bargain damages under that agreement.

After U.S. Global obtained a final judgment for benefit-of-the-bargain damages under the asset purchase agreement, this appeal followed. Our review is de novo. *See Fina v. Hennarichs*, 19 So. 3d 1081, 1084 (Fla. 4th DCA 2009) (review of a trial court's rulings on motions for summary judgment and directed verdict is de novo).

Our de novo review revolves around the application of New York law to interpret the asset purchase agreement. Applying New York law, we conclude that the trial court erred in interpreting the asset purchase agreement and denying the motions for summary judgment and directed verdict as to that agreement.

Under New York law (like Florida law), "when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms." *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (N.Y. 2004) (citations and quotations omitted). "Hence, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *Id.* (citation and quotations omitted).

Here, the asset purchase agreement contained the following unambiguous general limitation-on-damages provision:

> 7.10 *General Limitation of Damages*. In no event shall any party be liable to any other party under any provision of this Agreement for any lost profits, lost sales, business interruption, lost business opportunities, lost Tax Credits, lost Tonnage Fees or consequential, incidental, punitive or exemplary damages incurred or suffered by a party; *provided*, *however*, that this limitation shall not limit a party's right to indemnification pursuant to Sections 7.1, 7.2 or 7.3

> hereof for losses or damages incurred by a party to third parties claiming such damages.

Such general limitation-on-damages provisions are enforceable under New York law. As New York's highest court has observed:

> A limitation on liability provision in a contract represents the parties' Agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor. Thus, Professor Corbin states:
>
> > "[W]ith certain exceptions, the courts see no harm in express agreements limiting the damages to be recovered for breach of contract. Public policy may forbid the enforcement of penalties against a defendant; but it does not forbid the enforcement of a limitation in his favor. Parties sometimes make agreements and expressly provide that they shall not be enforceable at all, by any remedy legal or equitable. They may later regret their assumption of the risks of non-performance in this manner; but the courts let them lie on the bed they made . . . ."

Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc., 84 N.Y.2d 430, 436 (N.Y. 1994) (footnote omitted). *See also Flightsafety Int'l, Inc. v. Flight Options, LLC*, 418 F. Supp. 2d 103, 108-09 (E.D.N.Y. 2005) ("[P]laintiff argues that if it was precluded from recovering the damages it seeks as a result of the alleged breach of the . . . Contract, this would render defendant's obligations illusory. However, the plain language of the . . . Contract is clear that both parties are relieved from liability for, *inter alia,* 'loss of profits,' in the event that there is a breach of any provision of the agreement. Far from being illusory, this provision is mutual."), *vacated in part on other grounds*, 194 F. App'x 53 (2d Cir. 2006).

Based on the foregoing, we direct the trial court to vacate that portion of the final judgment awarding benefit-of-the-bargain damages to U.S. Global under the asset purchase agreement. We remand for the court to determine whether U.S. Global is entitled to the sole remedy of specific performance under that agreement.

Progress Energy also appeals that portion of the final judgment awarding damages to U.S. Global under four separate commission and services agreements. We affirm that portion of the final judgment without further discussion.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

POLEN and GERBER, JJ., concur.[1]
CONNER, J., dissents with opinion.

CONNER, J., dissenting.

I respectfully dissent. Applying New York law, I conclude the trial court reached the right decision in interpreting the asset purchase agreement and denying Progress Energy's motions for summary judgment and directed verdict as to that agreement.

New York law recognizes "the basic principle of recovery for a breach of contract is that the injured party should be placed in the same position it would have been in had the contract been performed." *ATI Telecom v. Trescom Int'l, Inc.*, 1996 WL 455010 at 2 (S.D.N.Y. Aug. 12, 1996); *see also U.S. W. Fin. Servs., Inc. v. Marine Midland Realty Credit Corp.,* 810 F. Supp. 1393, 1397 (S.D.N.Y. 1993) (*quoting Teachers Ins. & Annuity Ass'n v. Butler,* 626 F. Supp. 1229, 1236 (S.D.N.Y. 1986)). It also identifies two broad categories of damages: "general" and "special." "General damages are those which are the natural and probable consequence of the breach, while special damages are extraordinary in that they do not so directly flow from the breach." *Am. List Corp. v. U.S. News & World Report*, 75 N.Y. 2d 38, 42-43 (N.Y. 1989) (internal citation omitted). The term "consequential damages" is synonymous with special damages. *In re CCT Commc'ns, Inc.,* 464 B.R. 97, 117 (Bankr. S.D.N.Y. 2011).

The critical language for my analysis is: "In no event shall any party be liable to any other party under any provision of this Agreement for *any lost profits, lost sales, business interruption, lost business opportunities, lost Tax Credits, lost Tonnage Fees* ***or*** *consequential, incidental, punitive or exemplary damages* incurred or suffered by a party. . . ." (emphasis added). Progress Energy argues the itemized list of "lost profits," "lost sales," "lost business opportunities." "lost tax credits," and "lost tonnage fees" are examples of general damages defined by New York caselaw. The majority agrees the listing is an unambiguous general limitation-on-damages provision. However, I fail to see how the listing can be an unambiguous general limitation-on-damages provision when, under New York law, "lost profits," "lost sales," "lost business opportunities," "lost tax credits," and "lost tonnage fees" can be either general or special damage.

In contrast, New York caselaw treats "business interruption" damages as special or consequential damages, not general damages. *World-Link, Inc. v. Citizens Telecomms. Co.*, 2000 WL 1877065 (S.D.N.Y. Dec. 26, 2000); *see also Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187 (N.Y. 2008) (business interruption insurance coverage was deemed to permit award of

[1] GERBER, J., did not participate in oral argument, but has reviewed the entire proceedings.

consequential damages). Therefore, the itemized list of damages preceding the "or" with bold emphasis above cannot be categorized as general damages because it includes a type of damage which is considered as only special damages within it. I agree with the trial court that by including "business interruption" within the itemization, the list contemplates special damages, not general damages. Had the parties intended to exclude general damages in total, they need only have said so. By failing to do so, the parties are stuck with those damages itemized within the damage limitation provision. Under New York law, "[c]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (N.Y. 2004) (citations and quotations omitted).

In reaching an opinion as to the amount of the damages suffered for the breach of the asset purchase agreement, neither of U.S. Global's damage experts relied on any calculations of "lost profits," "lost sales," "business interruption," "lost business opportunities," "lost tax credits," or "lost tonnage fees." As to the calculation of damages for breach of the commission and services agreements, it is true that U.S. Global's expert conducted a calculation using "monetized tons" and "monetization rate per ton," but I do not equate calculations using those terms with "lost profits," "lost sales," "lost business opportunities," "lost tax credits," or "lost tonnage fees."

I note that all the parties to the agreements were sophisticated business entities. In the end, this case revolves around the meaning of words in the asset purchase agreement. The parties chose New York law to govern the agreement. The general limitation-on-damages provision in the agreement was a two-edged sword designed to cut both ways. If U.S. Global had signed the agreement and then turned around and sold the assets to another company for a higher price, it is hard to imagine that Progress Energy would have agreed the general limitation-on-damages provision limits them to specific performance as the sole remedy.[2] If the parties truly intended to cut off entitlement to all general damages, they could have plainly and explicitly said so. If the parties intended to limit the remedy for breach of contract to specific performance, as Progress Energy contends, the parties could have written the asset purchase agreement that way.

Based on the foregoing, I would affirm the final judgment in U.S. Global's favor.

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[2] The federal government allowed the generation of synfuel tax credits for a limited period of time, and the length of time to litigate the case would make the effectiveness of specific performance questionable.

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jeffrey E. Streitfeld, Judge; L.T. Case No. 03-4028 (19).

Bruce S. Rogow and Cynthia E. Gunther of Bruce S. Rogow, P.A., Fort Lauderdale, for appellants.

Eugene E. Stearns, Matthew W. Buttrick, Andrew E. Stearns, and Julie Fishman Berkowitz of Stearns, Weaver, Miller, Weissler, Alhadeff, & Sitterson, P.A., for appellee.

Not final until disposition of timely filed motion for rehearing.