

**Constellation Energy Servs. of N.Y., Inc. v New
Water St. Corp.**

2016 NY Slip Op 30470(U)

March 1, 2016

Supreme Court, New York County

Docket Number: 651972/2015

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
-----x

CONSTELLATION ENERGY SERVICES OF
NEW YORK, INC.,

Plaintiff,

Index No. 651972/2015

- against -

NEW WATER STREET CORP.,

Defendant.
-----x

Hon. C. E. Ramos, J.S.C.:

In motion sequence number 001, defendant New Water Street Corp. ("NWSC") moves to dismiss the complaint of plaintiff Constellation Energy Services of New York, Inc. ("Constellation") pursuant to CPLR § 3211. For the reasons set forth below, NWSC's motion to dismiss is denied.

Background

The facts set forth herein are taken from the parties' submissions and are undisputed except where noted.

This action arises from NWSC's alleged breach of an energy contract with Constellation. NWSC owns and operates 55 Water Street (the "Building"), a large commercial office building in downtown Manhattan (Complaint, ¶ 3). Constellation is a retail energy supplier (*id.* at ¶ 2).

Constellation agreed to sell energy to NWSC pursuant to a "Power Sale Agreement" executed on June 28, 2011 and an accompanying "Confirmation" (collectively, the "Agreement") (Complaint, ¶ 6). The Agreement covered the period from the first

meter read date occurring after December 20, 2012 to the first meter read date occurring after December 20, 2013 (Spaeth Aff., Ex. A, Confirmation).

Pursuant to the Agreement, NWSC agreed to purchase energy from Constellation at a rate of \$0.089640 per kilowatt-hour (kWh) (Complaint, ¶¶ 6, 7). NWSC also agreed to meet a baseline for energy usage equaling its 12-month historical usage as of June 28, 2011 (the "Baseline") (*id.* at ¶ 7). The Baseline was a schedule containing a specific number of kWh per month, ranging from about 9,000,000 kWh to 11,000,000 kWh (*id.* at 10). If the usage were to deviate below the Baseline and the parties were unable to agree to a pricing adjustment to reflect Constellation's resulting decreased revenue, NWSC would be obligated to pay at the Baseline level (*id.* at ¶ 7).

On October 29, 2012, Hurricane Sandy struck New York City, flooding the lobby and all the space in the Building below grade with more than 40 million gallons of seawater (Acero Aff., ¶¶ 5, 6). Most tenants moved back into the Building by the end of March, although tenants with space below grade could not move back into the Building until mid-2015 because of the extensive water damage (*id.* at ¶ 7).

Initially, the Building was completely without electric service as a result of the storm (*id.* at ¶ 9). On January 16, 2013, in an email from Brian McDermott, an energy consultant for

NWSC (the "January 16 E-mail"), NWSC informed Constellation that Hurricane Sandy had damaged the Building extensively and impacted the Building's operation, and that NWSC considered the storm a force majeure event (*id.* at ¶ 11; Ex. 2). NWSC claims that Con Edison restored power to the Building in stages starting February 2013, while Constellation claims that it started supplying electricity to the Building on January 2, 2013 (Spaeth Aff., ¶ 10). Both parties agree that electricity was completely restored by March 25, 2013 (Acero Aff., ¶ 9).

Throughout 2013, the Building's energy usage deviated significantly below the Baseline (see Spaeth Aff., ¶ 10). As a result, Constellation served NWSC with its complaint on June 4, 2015, alleging that NWSC breached the terms and conditions of the Agreement (Complaint, ¶ 15). Constellation claimed damages of \$1,290,865 in "decreased revenue...as a result of [NWSC]'s material and sustained change in its historical Energy usage during the term of the Agreement" (*id.* at ¶ 10).

Discussion

In its motion to dismiss, NWSC alleges that the consequential damages and force majeure clauses in Sections VII and VIII of the Power Sale Agreement, respectively, provide an absolute defense to Constellation's cause of action for breach of contract. NWSC also claims that the complaint fails to state a cognizable claim under New York law.

I. The Documentary Evidence Does Not Establish An Absolute Defense To The Asserted Claims.

To prevail on a motion to dismiss under CPLR § 3211(a)(1), the moving party must establish that the documentary evidence conclusively refutes the plaintiff's allegations (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013]). The papers only constitute evidentiary evidence if they are essentially undeniable and support the motion on their own (*Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc.*, 120 AD3d 431, 432 [1st Dept 2014]).

A. The Force Majeure Clause Does Not Provide An Absolute Defense To Constellation's Cause Of Action For Breach Of Contract.

A force majeure event is an event beyond the control of the parties that prevents performance under a contract and may excuse non-performance (*Beardslee v Inflection Energy, LLC*, 25 NY3d 150, 154[2015]). Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused (*Kel Kim Corp. v Central Markets, Inc.*, 70 NY2d 900, 902-903 [1987]).

Titled "Force Majeure," Section VIII of the Power Sale Agreement states, in relevant part:

Force Majeure shall include, without limitation: a condition resulting in the curtailment or disruption of firm Energy supply or the transmission on the electric transmission and/or distribution system; restraint by court order; any action or non-action by, or the

inability to obtain necessary authorizations or approvals from any Authorized Entity; or a Force Majeure event experienced by an Authorized Entity. Force Majeure shall not include loss or failure of either Party's markets or supplies (Spaeth aff, Ex. A, Power Sale Agreement, Section VIII).

The Power Sale Agreement defines an "Authorized Entity" as a state or governmental agency having jurisdiction over Constellation (*id.* at Section III).

NWSC has failed to show that the financial hardships caused by Hurricane Sandy - namely, NWSC's decreased electricity usage because of vacancies in the flooded lower levels of the Building - fit within the scope of the claimed force majeure event as set forth in the Agreement. Although Hurricane Sandy resulted in the "curtailment or disruption" of the transmission of electricity to the Building and was experienced by state and governmental agencies, the same cannot be said of the lingering flood damage in the Building's lower levels and the resulting tenant vacancies. NWSC has admitted that Con Edison restored full power to the Building by March 25, 2013 (Acero Aff., ¶ 9), long before the tenants in the space below grade began moving back in (*id.* at ¶ 7). A scenario in which the Building receives electricity but is uninhabitable due to flooding damage or other defects does not involve the "curtailment or disruption" of the transmission of electricity, nor does it meet any of the other specified categories in Section VIII of the Power Sale Agreement.

Furthermore, NWSC has not shown that the expectations of the parties were frustrated due to circumstances beyond its control. Force majeure clauses excuse non-performance of contracts only where the reasonable expectations of the parties have been frustrated due to circumstances beyond the control of the parties (*Macalloy Corp. v Metallurg, Inc.*, 274 AD2d 227 [1st Dept 2001]). While it is clear that Hurricane Sandy and the resulting flooding to the Building's floors below grade were beyond the control of the parties, NWSC has not shown that its failure to restore occupancy to the floors below grade several months after the hurricane, resulting in energy usage far below the Baseline, was beyond its control.

In addition, NWSC has not shown that Section VIII includes NWSC's loss of tenants in its force majeure claim. A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*Beinstein v Navani*, 131 AD3d 401, 405 [1st Dept 2015]). Constellation claims that the term "markets" includes tenants under Section VIII of the Power Sale Agreement, which states that "Force Majeure shall not include loss or failure of either Party's markets or supplies" (Spaeth Aff., Ex. A, Power Sale Agreement, Section VIII). The Agreement does not explicitly define the terms "markets." However, NWSC generates income from the tenant rental market, and NWSC's deviation below the Baseline

is primarily due to the loss of tenants, which places NWSC's tenants squarely within the plain meaning of "markets" under the exception. NWSC argues that the term "markets" does not refer to its tenants, but fails to provide another interpretation that does not exclude the loss of tenants from a force majeure claim.

Therefore, Section VIII of the Power Sale Agreement does not conclusively establish a defense to Constellation's cause of action for breach of contract.

B. The Consequential Damages Clause Does Not Provide An Absolute Defense To Constellation's Alleged Damages.

NWSC further argues that Constellation is seeking consequential damages, which have been waived by the terms of the Agreement. Sections VII and XI of the Power Sale Agreement read as follows:

NOTWITHSTANDING ANY PROVISION OF THIS AGREEMENT TO THE CONTRARY, NEITHER BUYER NOR SELLER... SHALL BE LIABLE OR RESPONSIBLE TO THE OTHER PARTY... FOR ANY INCIDENTAL, INDIRECT, PUNITIVE, SPECIAL, OR CONSEQUENTIAL DAMAGES WHATSOEVER, CONNECTED WITH OR RESULTING FROM PERFORMANCE OR NON-PERFORMANCE OF THIS AGREEMENT, OR ANYTHING DONE IN CONNECTION HEREWITH... (Spaeth Aff., Ex. A, Power Sale Agreement, Section VII).

If the terms of any effective Confirmation modify, change or otherwise conflict with any provisions of this Agreement, the terms of the Confirmation shall govern (*id.* at Power Sale Agreement, Section XI).

The pricing section of the Confirmation, in relevant part, reads as follows:

If Seller determines that there has been a material and sustained change from an Account's Baseline for reasons other than Force Majeure which results in an increased cost or decreased revenue to Seller ("Cost"), Seller may request that Buyer and Seller meet and agree on a Pricing adjustment to reflect such Cost, provided however, if Buyer and Seller cannot mutually agree, then Seller may pass-through the Cost, without markup (*id.* at Confirmation).

Whether the damages alleged by Constellation constitute consequential damages is irrelevant to the present motion. The Confirmation's damages provision supersedes Section VII of the Power Sale Agreement. Constellation contends that NWSC failed to meet the Baseline for reasons other than force majeure, so the terms of the Confirmation allow it to pass through the costs of the resulting decreased revenue to NWSC.

Therefore, Section VII does not conclusively establish a defense to Constellation's claim for damages.

II. Constellation Has Alleged A Legally Cognizable Cause Of Action For Breach Of Contract.

In deciding a motion to dismiss under CPLR § 3211(a)(7), the court must consider whether there can be a legally cognizable cause of action based on the allegations (*Ackerman v 305 East 40th Owners Corp.*, 189 AD2d 665, 666 [1st Dept 1993]). All facts alleged in the pleadings must be accepted as true, and the court must accord a plaintiff the benefit of every possible favorable inference (*id.*).

The elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage (PJI2d 4:1 [2015]).

Constellation's sole claim for breach of contract is a legally cognizable cause of action under New York law. There is no dispute as to whether the Power Sale Agreement and accompanying Confirmation constitute a duly executed contract, nor that Constellation performed pursuant to the contract by providing the Building with electricity during the contract period. It is undisputed that NWSC's energy usage deviated from the Baseline. Moreover, Constellation has adequately pled damages in lost revenue resulting from the alleged breach (see Complaint, ¶ 16).

Therefore, the complaint cannot be dismissed under CPLR § 3211(a)(7) for failure to state a legally cognizable cause of action.

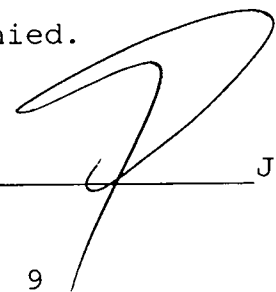
The Court has reviewed NWSC's remaining arguments and finds them unpersuasive.

Accordingly, it is

ORDERED that the motion of defendant New Water Street Corp. to dismiss the complaint is denied.

DATED: March 1, 2016

ENTER:



J. G. **CHARLES E. RAMOS**

3/1/16