Renewable Energy Trust Capital, Inc. v PV2 Energy, LLC
2018 NY Slip Op 31449(U)
January 31, 2018
Supreme Court, New York County
Docket Number: 656520/2016
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SALIANN SCARPULLA** **PART 39**
Justice

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RENEWABLE ENERGY TRUST CAPITAL, INC., A DELAWARE CORPORATION,

Plaintiff,

- v -

PV2 ENERGY, LLC, A CALIFORNIA LIMITED COMPANY, DER ACQUISITIOIN, LLC, A DELAWARE LIMITED LIABILITY COMPANY, JOHN PIMENTAL

Defendant.

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INDEX NO. 656520/2016
MOTION DATE 3/3/2017
MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this application to/for Dismiss

Upon the foregoing documents, it is

In this action for, inter alia, breach of contract and fraud, defendants PV2 Energy, LLC ("PV2"), DER Acquisition LLC ("DERA") and John Pimentel ("Pimentel") (collectively, "Defendants") move, pursuant to CPLR § 3211 (a) (1), (5), (7) and (8), to dismiss Renewable Energy Trust Capital, Inc.'s ("RETC") complaint.

This action arises from a set of agreements regarding the Panoche Valley Solar Project (the "Solar Project"), a proposed 240-megawatt, utility-scale photovoltaic power station in the Panoche Valley, San Benito County, California. PV2 acquired the rights to develop the Solar Project in 2011.

In 2014, Pimentel, the President/CEO of PV2 and DERA, met with representatives of RETC, a firm that invests in wind and solar projects, in New York to obtain financing for the Solar Project (the "2014 Meeting").[1] At the 2014 Meeting, Pimentel "portrayed himself and his entities as experienced and sophisticated solar plant developers" and said that he'd already undertaken the groundwork for the Solar Project, including meeting with the permitting authorities. During the 2014 Meeting, Defendants also represented to RETC that '[a]ll related federal and state permits' were 'expected in Q1 2015' with 'an outside date of Q2.'"

RETC alleges that, based on PV2 and DERA's representations about the Solar Project's status, value and costs and Pimentel's representations about his qualifications and experience, RETC executed a set of agreements in August 2014, including a financing agreement (the "Financing Agreement"), pursuant to which it agreed to provide the holding company for the project, Panoche Valley Solar, LLC (the "Solar Project Company"), with a short-term loan of $21 million (the "Loan"). The purpose of the Loan was to offer bridge financing for immediate development costs and it was due to be repaid in full by April 15, 2015.

Section 5.18 of the Financing Agreement, entitled "Disclosure," states that:

> To the best of the [Defendants'] knowledge and as of the Closing Date, all written information including this Agreement and the other Financing Documents (other than any projections or forward-looking statements, reports prepared by third party consultants, budget or information of a general economic nature or financial statements of [Defendants]) provided

[1] RETC is incorporated in Delaware with a principal place of business in California. PV2 is a California limited liability company. DER is a limited liability company organized under Delaware law with its principal place of business in California.

> directly or indirectly by or on behalf of the [Defendants] to the Administrative Agent or any Lender in connection with the transactions contemplated hereunder, when taken as a whole and taking into account all other documentation furnished by or on behalf of [Defendants], to the Administrative Agent, the Lenders or the Independent Consultants on or prior to the Closing Date, does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading in any material respect (giving effect to any supplements and updates thereto). The Lenders and the Administrative Agent acknowledge and agree that all projections, estimates and forecasts are subject to significant uncertainties and contingencies, many of which are beyond [Defendants] control and that no assurance can be given that the projections or estimates provided to the Lenders or the Administrative Agent will be realized.

The Financing Agreement also contained, in Schedule 5.14(a), a list of permits that Defendants intended to procure for the Solar Project as well as the projected timeframe for their approval. RETC states that Defendants did not obtain the promised permits, which were required pre-construction, until six to fifteen months after the dates anticipated in Schedule 5.14(a).

In exchange for the Loan, RETC received a financial return and an exclusive option to buy the Solar Project Company for $105 million, subject to certain reductions if appropriate (the "Purchase Option").[2] PV2 and DERA guaranteed the Loan in a concurrently executed Guaranty. To secure the Loan, PV2 and DERA pledged the Solar Project Company as collateral.

The Loan enabled the Solar Project Company, on October 22, 2014, to enter an Engineering, Procurement, and Construction agreement (the "EPC Contract") with

[2] According to the complaint, Pimentel represented to RETC that the Solar Project Company would "generate $1.45 billion in EBITDA over thirty years."

AMEC Kamtech, Inc. ("AKI"). The EPC Contract was crafted to ensure that the Solar Project met the December 31, 2016 Investment Tax Credit deadline. Further, the EPC Contract was one of several contracts defined in Section 6.11 of the Financing Agreement as "Material Project Documents."

Under Section 6.11 of the Financing Agreement, Defendants agreed to

> (i) perform and observe all of its covenants and obligations contained in each of the Material Project Documents to which it is a party, (ii) take all reasonable and necessary action to prevent the termination or cancellation of any Material Project Documents to which it is a party in accordance with the terms of such Material Project Documents or otherwise...and (iii) enforce against the relevant Major Project Participant each material covenant or obligation of such Material Project Document to which it is a party in accordance with its terms, unless, in each case, Borrower's failure to take such action could not be reasonably expected to cause a Material Adverse Effect. For the avoidance of doubt, any breach by Borrower of its obligations under this Section 6.11 shall be solely subject to relevant provisions of Section 9.5(a) or Section 9.6, as applicable.

RETC alleges that it let its Purchase Option expire on December 31, 2014, because Defendants' misrepresentations had rendered the Purchase Option worthless.

By the first quarter of 2015, the Solar Project Company owed approximately $7 million dollars in unpaid invoices to AKI and faced an additional $5 million early termination charge to extract itself from the EPC Contract. In February 2015, Defendants solicited a $5.25 million loan from Seminole Financial Services ("Seminole") for the Solar Project and asked RETC for a carve-out to allow for this additional loan.

In response, RETC drafted and delivered to Defendants an amendment to the Financing Agreements that would allow the Seminole loan (the "Seminole Loan"). However, Defendants did not sign the documents provided to them by RETC but instead,

without notice to RETC, executed the Seminole Loan documents to make up the funds due from the Solar Project Company, PV2 and DERA.

The complaint states that, except for the Seminole Loan, Defendants were unable to find other investors/buyers of the Solar Project Company. As a result, the Solar Project Company was not able to repay RETC for the Loan when it came due on April 15, 2015. Following negotiations, RETC and PV2 and DERA agreed that RETC would acquire the Solar Project Company through a "friendly foreclosure" of the Loan pursuant to a second set of agreements (the "Acquisition Agreements").

In May 2015, the parties executed the Acquisition Agreements through which: (a) RETC acquired sole ownership of the Solar Project via a Collateral Transfer Agreement (the "CTA"); (b) PV2 and DERA were released from their obligations under the Guaranty; (c) PV2 and DERA retained a right to potential "earn-out payments" under certain circumstances, that would come into play if and only if RETC achieved an agreed-upon return through a simultaneously executed letter agreement (the "Earn-Out Side Letter"); and (d) RETC agreed to make payments to PV2 and DERA which would allow them to repay the Seminole Loan.

RETC alleges that during the negotiations, Defendants represented to RETC that the Solar Project Company held approximately $1.6 million in its bank account, and that as an asset of the Solar Project Company as defined in the CTA, the money was to be transferred to RETC upon the agreement's execution. Once the CTA was signed, RETC learned that there was no longer any money in the bank account and "confronted" Pimentel, who then transferred most of the missing money back to the Solar Project

Company. Pimentel retained approximately $400,000 to pay down the Seminole Loan, which he had personally guaranteed.

Following the "friendly foreclosure," RETC ran a competitive process to choose a co-developer for the Solar Project. As a result, on September 4, 2015, the Solar Project Company issued new shares equal to a half stake in the Project and sold them to Consolidated Edison Development, Inc. ("ConEd").

On March 18, 2016, Defendants sent a letter to RETC and ConEd from PV2/DERA's major investor, the private equity firm Industry Capital Advisors, LLC ("Industry Capital"), which threatened to seek "an injunction preventing both the sale of RETC's interest and commencement of construction activities . . . ." On July 20, 2016, PV2 and DERA filed a lawsuit in California Superior Court, San Francisco County, Case No. CGC-16-553135, alleging, among other things, breach of the CTA (the "California Action").

Then, on October 2, 2016, RETC and ConEd executed a second Membership Interest Purchase Agreement through which ConEd bought all of RETC's interest in the Solar Project. RETC states that, following the close of this transaction, it never recognized a return at or in excess of the "Earn-Out Side Letter hurdle rate."

RETC filed the complaint in this action on December 16, 2016, alleging the following causes of action: Breach of Contract (the Loan), Breach of Representations and Warranties in the CTA, Fraudulent Inducement, Negligent Misrepresentation, Breach of Contract (Performance Under the CTA and Earn-Out Side Letter), and Breach of the Implied Covenant of Good Faith and Fair Dealing.

Defendants now move to dismiss the complaint based on documentary evidence, a release contained in one of the parties' agreements, failure to state a cause of action and for lack of personal jurisdiction.

Discussion

On a motion to dismiss, a court must accept as true the facts alleged in the complaint as well as any reasonable inferences that may be gleaned from those facts. *See Amaro v. Gani Realty Corp.*, 60 A.D.3d 491, 492 (1st Dept. 2009); *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1st Dept. 2003). The court may only determine whether the complaint states a legally cognizable claim. *Skillgames,* 1 A.D.3d at 250. If dismissal is sought based on documentary evidence, the defendant must show that the documentary evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002).

Personal Jurisdiction

On a motion to dismiss for lack of personal jurisdiction, the burden of proof is on the plaintiff to establish that the court has jurisdiction over each defendant. *Shore Pharm. Providers, Inc. v. Oakwood Care Ctr., Inc.*, 65 A.D.3d 623, 624 (2009); *see also Marist Coll. v. Brady*, 84 A.D.3d 1322, 1323 (2d Dept. 2011). To successfully oppose a motion based on lack of personal jurisdiction, a plaintiff "need not make a prima facie showing of jurisdiction, but instead must only set forth 'a sufficient start, and show[] their position not to be frivolous.'" *Shore Pharm. Providers, Inc.,* 65 A.D.3d at 624 (citation omitted).

1. PV2 and DERA

RETC states that this Court has jurisdiction over PV2 and DERA pursuant to CPLR § 301 and New York General Obligations Law § 5-1402 because PV2 and DERA consented to this Court's jurisdiction in valid forum selection clauses that were included in the contracts governing the transactions at issue.

Defendants challenge jurisdiction under both general jurisdiction, CPLR §301, and long-arm jurisdiction, CPLR §302. They argue that because RETC bases jurisdiction on the forum selection clauses found in the Loan Agreement, Guaranty, and Earn-Out Side Letter – and Defendants do not believe that RETC has any valid claims under those agreements – all RETC's remaining claims must be dismissed for lack of personal jurisdiction.

Under New York law, the "parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract." *Brooke Grp. Ltd. v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 (1996). Forum selection clauses are prima facie valid and enforceable as "they provide certainty and predictability in the resolution of disputes." *Id.*; *Sterling Nat. Bank as Assignee of NorVergence, Inc. v. Eastern Shipping Worldwide, Inc.*, 35 A.D.3d 222, 223 (1st Dept. 2006).

Many of the agreements in this case contain permissive forum selection clauses. The Financing Agreement, section 13.12, states that:

> Consent to Jurisdiction. The Administrative Agent, the Lenders and Borrower agree that any legal action or proceeding by or against Borrower or with respect to or arising out of this Agreement, the Notes or any other Financing Document may be brought in or removed to the courts of the State of New York and of the United States of America in and for the

> Southern District of New York, as the Administrative Agent may elect. By execution and delivery of the Agreement, the Administrative Agent, the Lenders and Borrower accept, for themselves and in respect of their property, generally and unconditionally, the jurisdiction of the aforesaid courts. Nothing herein shall affect the right to serve process in any other manner permitted by law or the right of the Administrative Agent or the Lenders to bring legal action or proceedings in any other competent jurisdiction.

The Guaranty, Section 20, also provides that any legal actions related to the Guaranty "may be brought in or removed to the courts of the United States of America for the Southern District of New York, or, to the extent that such courts are not available or decline to accept jurisdiction over such legal action or proceeding, the State of New York."

The CTA does not mention forum. However, the CTA, Loan, Guaranty, and Earn-Out Side Letter all provide that New York law governs any suit brought with respect to those agreements.[3]

In contrast to the parties' other agreements, the Earn-Out Side Letter states that "all parties hereby submit to the exclusive jurisdiction of the State of New York for purposes of any dispute with respect to this letter agreement." The "exclusive

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[3] Section 13.5 of the Loan provides that it "shall be governed by, and construed under, the laws of the state of New York applicable to contracts made and to be performed in such state and without reference to conflicts of law (other than Sections 5-1401 and 5-1402 of the New York General Obligations Law)"; Section 20 of the Guaranty provides that it "shall be construed and enforced in accordance with, and the rights of the parties shall be governed by, the law of the State of New York"; Section 9.7 of the CTA provides that it "shall be governed by and construed in accordance with the laws of the State of New York"; and the Earn-Out Side Letter provides that it "shall be governed by the laws of the State of New York."

jurisdiction" language in the Earn-Out Side Letter's forum selection clause makes that clause mandatory. I therefore find that RETC may assert jurisdiction over PV2 and DERA based on the forum selection clauses and deny PV2's and DERA's motion to dismiss on the grounds of lack of personal jurisdiction.

2. Pimentel and Alter Ego Liability

RETC asserts that the Court has jurisdiction over John Pimentel, President/CEO of PV2 and DERA as well as a direct or indirect shareholder of those entities, because Pimentel used those entities as his alter ego.

Defendants argue that even if a claim "implicating a forum selection clause goes forward, there is no basis for personal jurisdiction in New York over Pimentel" because: 1) he only signed the parties' agreements in his capacity as the principal of PV2 and DERA; 2) he neither works nor resides in New York; and 3) RETC's alter ego claims are merely conclusory.

"Where personal jurisdiction exists over a defendant, jurisdiction over his alter-ego is proper as well." *Transasia Commodities Ltd. v. Newlead JMEG, LLC*, 45 Misc.3d 1217[A], 7 N.Y.S.3d 245, 2014 NY Slip Op 51612[U] (Sup. Ct. N.Y. County 2014) (citation omitted). To state a claim for alter-ego liability, a "plaintiff is generally required to allege 'complete domination of the corporation. . . in respect to the transaction attacked' and 'that such domination was used to commit a fraud or wrong against plaintiff which resulted in plaintiff's injury.'" *Baby Phat Holding Co., LLC v. Kellwood Co.*, 123 A.D.3d 405, 407 (1st Dept. 2014) (*quoting Morris v. New York State Dep't. of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993)). As a decision to pierce the corporate veil in a

particular case depends on the accompanying facts and equities, "there are no definitive rules governing the varying circumstances when this power may be exercised." *Id.*

Here, RETC alleges, "[o]n information and belief, Pimentel completely controlled and dominated those entities and, despite representations to the contrary (1) knowingly overstated his investment in the entities; (2) intermingled his personal funds with the funds of these companies; (3) diverted funds of these entities to satisfy his own personal debts, including but not limited to paying down an over $5 million loan he personally guaranteed; (4) used PV2 and DERA as an instrumentality for a single enterprise to the detriment of Plaintiff; and (5) failed to maintain an arms-length relationships with the entities...." The complaint also alleges that to "induce RETC to invest in the Solar Project, Pimentel, through PV2 and DERA, misrepresented both the true financial status of the Solar Project and the obstacles that stood in the way of its successful completion," including the status/timing of permits.

RETC alleges that Pimentel, through his position as President/CEO of PV2 and DERA, had actual knowledge that "the written information he had supplied in models and otherwise... was inaccurate, and the permitting dates he promised were unattainable, but he intentionally misrepresented those facts, and caused PV2 and DERA to purposefully, willfully, and falsely represent and warrant those facts, so as to complete his deal with RETC." The aforementioned allegations together with RETC's assertion that Pimentel commingled personal funds and corporate funds are a sufficient start, at this stage, to support an alter ego theory and permit jurisdictional discovery. *See Peterson v.*

Spartan Indus., 33 N.Y.2d 463, 466-467 (1974). Accordingly, Defendants' motion to dismiss as to Pimentel on the basis of personal jurisdiction is denied.

California Action and Breach of the CTA

Defendants next argue that RETC's second and fifth causes of action based on a breach of the CTA must be dismissed because they arise out of the same transaction at issue in the California Action, which was commenced prior to this case.

RETC contends that New York is the appropriate forum for all disputes between the parties. RETC states that because the parties' Acquisition Agreements were executed at the same time, the Earn-Out Side Letter's exclusive New York jurisdiction provision applies to the CTA even though the latter agreement lacks a forum selection clause.

The court in the California Action denied RETC's motion to dismiss, in an order dated March 23, 2017, finding that "[p]er both California and New York contract law, this court interprets the quoted language as mandating a New York forum only for claims that seek relief as to the Side Letter Agreement." The court further found that because none of the causes of action asserted by PV2 and DER sought relief under the Earn-Out Side Letter, its forum selection clause was inapplicable to their claims.

Generally, written contracts which were executed simultaneously and for the same purpose will be read and interpreted together. *Oak Hill Capital Partners, L.P. v. Cuti*, 148 A.D.3d 504, 504 (1st Dept. 2017); *BWA Corp. v. Alltrans Exp. U.S.A., Inc.*, 112 A.D.2d 850, 852 (1st Dept. 1985). However, this rule "does not require that the two separate instruments must be deemed consolidated and one for all purposes or that a separate and independent provision of one, such as the jurisdictional paragraph, which

has no bearing on the construction to be placed on the two instruments, is to be deemed incorporated in the other." *Kent v. Universal Film Mfg. Co.*, 200 A.D. 539, 550 (1st Dept. 1922).

In this case, the parties did not specifically make the forum selection clause in the Earn-Out Side Letter a part of the CTA. Consequently, I agree with the California court that the only agreement under which New York is the exclusive jurisdiction is the Earn-Out Side letter agreement which does not encompass claims stemming from the parties' other agreements. *See, e.g. CooperVision, Inc. v. Intek Integration Technologies, Inc.*, 7 Misc.3d 592, 599-601, 794 NY.S.2d 812, 818-820 (Sup Ct., Monroe County 2005) (finding that "the presence in one agreement of a forum selection clause and the absence in the other agreement of a similar clause does not concern the 'subject matter' of these agreements", and that "the parties could not have intended to incorporate the forum selection clause of [one] Agreement into the [other] Agreement, because they did not…choose sufficiently specific language [to] do so").

Based upon the omission of a forum selection clause in the CTA, the pre-existing California Action regarding the CTA, and in the interest of judicial economy, I dismiss RETC's cause of action for breach of the CTA (second and part of the fifth causes of action). Because the CTA claims concern the same subject matter as the California Action they should be brought in California to avoid two courts rendering inconsistent decisions.

Non-CTA Breach of Contract Claims

1. Breach of the Loan Agreement

Defendants argue that RETC's claim for breach of the Loan must be dismissed because RETC previously released Defendants from their obligations under the Loan and Guaranty pursuant to the "friendly foreclosure" and cannot now maintain an action for breach of the original agreement.

Generally, "a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim which is the subject of the release" in the absence of "fraudulent inducement, fraudulent concealment, misrepresentation, mutual mistake or duress." *Global Precast, Inc. v. Stonewall Contracting Corp.*, 78 A.D.3d 432, 432 (1st Dept. 2010); *see also Global Minerals and Metals Corp. v. Holme*, 35 A.D.3d 93, 98 (1st Dept. 2006).

In RETC's letter to PVS, PV2, and DERA, dated May 13, 2015, (the "Forbearance Agreement"), it states:

> We hereby inform you that one or more Events of Default currently exist under the [Financing] Agreement, including under Section 9.1 thereof, in that the Borrower failed to pay when due, on April 15, 2015 (the "Default Date"), principal, interest and fees on the Loan and such failure has continued for a period of more than three days.
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> ***
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> Nevertheless, in furtherance of Section 3.2.3 of the Collateral Transfer Agreement, dated April 19, 2015 (the "CTA"), between PV2 and DERA, as the Guarantors, and RET, as the Lender, RET hereby agrees to forbear from exercising any of its remedies available to it under Section 9.13 of the [Financing] Agreement for the period of time starting on the Default Date and continuing through the closing of the CTA (such period of time, the

"Forbearance Period") and upon the closing of the CTA such Event of Default shall be expressly waived.

While the release states that "one or more" defaults exist, only one default -- Defendants' failure to make a payment -- was specifically named as being waived upon the closing of the CTA. Because the release language is ambiguous, the release does not bar the breach of contract action as a matter of law. Because of this ambiguity, at this time, RETC's claim for breach of the Loan agreement is sufficient to survive Defendants' motion to dismiss.

2. Earn-Out Side Letter

RETC alleges that Defendants breached the Earn-Out Side Letter when they: 1) commenced the California Action in violation of their agreement that the State of New York would be the exclusive jurisdiction for any disputes in connection with the Earn-Out Side Letter; and 2) interfered with RETC's efforts to sell to ConEd.

Defendants argue that RETC's cause of action for breach of the Earn-Out Side Letter must be dismissed because the damages claimed are too speculative. They further argue that to the extent that the claim is based upon improper forum choice, RETC's claim is not ripe.

The Earn-Out Side Letter does provide for exclusive New York jurisdiction.[4] However, as the California court held, and I agree, the Earn-Out Side Letter's forum

[4] The agreement states: "This letter agreement shall be governed by the laws of the State of New York and all parties hereby submit to the exclusive jurisdiction of the State of New York for purposes of any dispute with respect to this letter agreement."

selection clause is inapplicable in the California Action because none of the causes of action asserted by PV2 and DER in the California Action see relief under the Earn-Out Side Letter. Consequently, RETC's claim here that Defendants breached the Earn-Out Side Letter's forum selection clause by bringing the California Action is dismissed.

RETC also alleges that Defendants breached the Earn-Out Side Letter by interfering with RETC's efforts to sell to ConEd. RETC claims that its damages include expenses incurred by the delay of the resolution of the ConEd agreement as well as legal costs and fees. I find that this sufficiently states a claim for breach of the Earn-Out Side Letter and accordingly deny Defendants' motion to dismiss with respect to this portion of the claim.

Breach of the Implied Covenant of Good Faith and Fair Dealing

All contracts contain an implied covenant of good faith and fair dealing. *Aventine Inv. Management, Inc. v. Canadian Imperial Bank of Commerce*, 265 A.D.2d 513, 514, 697 N.Y.S.2d 128 (2d Dept. 1999). A breach of the covenant occurs where "a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." *Id.* To state a claim for breach of the implied covenant of good faith and fair dealing, "the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." *Id.* However, such a claim will be dismissed if it is accompanied in the complaint by a breach of contract claim that arises from the same set of facts. *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dept. 2010).

Defendants argue that RETC's cause of action for breach of the implied covenant of good faith and fair dealing must be dismissed because it is based on breach of the agreements and "does not assert any duty independent of, and separate from, these agreements that would give rise to an independent claim."

In opposition to Defendants' motion to dismiss, RETC contends that its breach of the implied covenant of good faith and fair dealing allegations show that Defendants unfairly interfered with RETC's right to receive the benefits of the Financing Agreements and the CTA and do not simply restate its breach of contract allegations.

Contrary to RETC's assertion, the allegations against Defendants for breach of the implied covenant of good faith and fair dealing are the same as those supporting RETC's breach of contract claims. RETC states that the implied covenant of good faith and fair dealing was breached when Defendants sold the Solar Project Company to RETC "based upon a series of misrepresentations and material omissions in violation of express representations and warranties" in the CTA. This is identical to RETC's second cause of action for breach of representations and warranties contained in the CTA.

Because the causes of action for breach of the CTA belong in California, I dismiss the portion of RETC's implied covenant of good faith and fair dealing that relates to the CTA on the same grounds. It is also dismissible as duplicative.

RETC's allegation that Defendants' failure to execute an owners' guarantee as required by the EPC Contract constituted a breach of the implied covenant of good faith and fair dealing is the same as its claim that this failure was "a breach of Section 6.11 of the Loan." Similarly, RETC's allegation about the Seminole Loan also forms the

basis for its claim that "the Seminole Loan impermissibly encumbered RETC's collateral in breach of covenants against indebtedness and guarantees set forth in Sections 7.4 and 7.5 of the Loan." Further, the complaint concedes that "PV2 and DERA also had an agreed upon duty of confidentiality under [the Financing Agreements and the Acquisition Agreements]." Lastly, RET's claim that there was a breach of an implied covenant by Defendants' alleged interference with RET's ability to obtain partners, including Con Ed, is duplicative of RET's claim in its cause of action for breach of the CTA and Earn-Out Side Letter. RETC's remaining allegations under this claim are also identical to other claims in the complaint. Accordingly, I dismiss RETC's claim for breach of the implied covenant of good faith and fair dealing in its entirety as duplicative. *See Carbures Europe, S.A. v. Emerging Markets Intrinsic Cayman Ltd.*, 148 A.D.3d 421, 422 (1st Dept. 2017); *Engelhard Corp. v. Research Corp.*, 268 A.D.2d 358, 358-359 (1st Dept. 2000).

The Tort Claims

Defendants argue that RETC's fraud claims must be dismissed because RETC previously released any such claims. In support, Defendants again cite to the language contained in the Forbearance Agreement. RETC argues that the words "in that" in the release limits the default to the Defendants' failure to pay and thus does not mean that fraud claims were released. RETC alleges that its damages are the difference between the $21 million loan and the value of the property that it received.

As noted above, to serve as a bar to an action on a claim that is the subject of a release, the release must be facially "clear and unambiguous." Further, "[i]n order to set aside a release… a plaintiff must establish the basic elements of fraud…." *Global*

Minerals and Metals Corp., 35 A.D.3d at 98. The release language in this case is not "clear and unambiguous." Thus, even though releases may encompass unknown fraud claims where the parties intend for the release to do so, and the agreement is knowingly made, the release before me lacks such specificity and intent on its face. *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276.

At this early stage in the litigation it cannot be said that the release constitutes a bar to RETC's fraud claims as a matter of law. For this reason, I review the fraud claims to determine whether they must be dismissed on other grounds.

1. Fraudulent Inducement (regarding the Loan)

To sufficiently state a fraudulent inducement claim based on a misrepresentation, a plaintiff "must allege that the defendant intentionally made a material misrepresentation of fact in order to defraud or mislead the plaintiff, and that the plaintiff reasonably relied on the misrepresentation and suffered damages as a result." *Connaughton v. Chipotle Mexican Grill, Inc.*, 135 A.D.3d 535, 537 (1st Dept. 2016). New York law permits a plaintiff to plead a fraud claim, in addition to a contract claim, if the former alleges "a misrepresentation of present fact, unlike a misrepresentation of future intent to perform under the contract...." *GoSmile, Inc. v Levine*, 81 A.D.3d 77, 81 (1st Dept. 2010) (finding that concurrent causes of action for fraud and breach of contract may be appropriate because "a misrepresentation of present fact, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty.").

Defendants argue that RETC's fraudulent inducement claim must be dismissed as duplicative of its breach of contract claim because Defendants' allegedly fraudulent statements were incorporated into the Loan agreement and are thus actionable as breaches of contract. RETC opposes, arguing that, the facts alleged in support of this claim are that Defendants misrepresented present facts in order to persuade RETC to enter into the Loan and that this alleged misrepresentation may form the basis of a separate fraud claim.

The First Department has held that a plaintiff may assert a fraudulent inducement claim and a breach of contract claim, even where "a fraud claim [is] based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim." *Wyle Inc. v. ITT Corp.*, 130 A.D.3d 438, 440 (1st Dept. 2015). In its decision, the court cited *First Bank of Americas v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 292 (1st Dept. 1999), in which "plaintiff[] claim[ed] [] that defendant[] intentionally misrepresented material facts about various [present facts] so that they would appear to satisfy these warranties." *Wyle Inc. v ITT Corp.*, 130 A.D.3d 438, 441 (1st Dept. 2015) (*citing First Bank of Americas*, 257 A.D.2d at 292).

Here, RETC's cause of action for fraudulent inducement alleges that: Defendants made fraudulent representations concerning the procurement of permits at the time of the 2014 Meeting; that Defendants, during the 2014 Meeting, did not actually expect the permits in the time frame given to RETC because they knew that various government agencies already raised issues about allowing the Solar Project to proceed; and these fraudulent representations were incorporated in Schedule 5.14(a) of the Financing Agreement. In accordance with *Wyle Inc. v ITT Corp.*, these alleged misrepresentations

may form both a claim for breach of the Loan, and fraud in the inducement. Therefore, Defendants' motion to dismiss the fraudulent inducement cause of action is denied.

2. Negligent Misrepresentation (regarding the Loan)

A cause of action for negligent misrepresentation requires a plaintiff to allege: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 (2007).

"In commercial cases 'a duty to speak with care exists when the relationship of the parties, arising out of contract or otherwise, [is] such than in morals and good conscience the one has the right to rely upon the other for information'" and a defendant may be liable for negligent misrepresentation if it possesses unique or specialized expertise justifying a plaintiff's reliance. *J.P. Morgan Securities, Inc. v. Ader*, 127 A.D.3d 506; 506-507 (citing *Kimmell v. Schaefer,* 89 N.Y.2d 257, 263, [1996]). However, in general, "an arm's length business relationship between sophisticated parties will not give rise to a confidential or fiduciary relationship that would support a cause of action for negligent misrepresentation." *J.P. Morgan Securities, Inc.*, 127 A.D.3d at 507; *see also U.S. Express Leasing, Inc. v. Elite Technology (N.Y.) Inc.*, 87 A.D.3d 494, 497 (1st Dept. 2011) (holding that a "special relationship does not arise out of an ordinary arm's length business transaction between two parties.").

Additionally, "[i]t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been

violated." *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389, 516 N.E.2d 190, 521 N.Y.S.2d 653 (1987).

Defendants contend that RETC's negligent misrepresentation claim must be dismissed because RETC cannot establish "a special or privity-like relationship" between the parties and because the claim is duplicative of the breach of contract claim. RETC counters that the complaint alleges that Defendants possessed specialized knowledge and was in a unique position therefore Defendants' argument that RETC failed to plead a special relationship should be rejected.

In the allegations relating to this claim in its complaint, RETC references all prior allegations, cites to representations contained in the Loan and inserts language that it relied on Defendants' statements, based on Defendants' "exclusive knowledge," to its detriment. RETC's claim is predicated on the same allegedly wrongful conduct as its breach of Loan claim in that both involve Defendants' representations about the permitting timeline. I dismiss RETC's cause of action for negligent misrepresentation because it is not "separate and apart" from its breach of contract claim. *OP Solutions, Inc. v. Crowell & Moring, LLP*, 72 A.D.3d 622, 622 (1st Dept. 2010).[5]

In accordance with the foregoing, it is hereby

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[5] Because I dismiss this claim as duplicative, I do not address whether RETC adequately established that a "special or privity-like relationship" existed between the parties.

ORDERED that the motion by defendants PV2 Energy, LLC, DER Acquisition LLC and John Pimentel to dismiss plaintiff Renewable Energy Trust Capital, Inc.'s complaint is granted as to plaintiff's causes of action pertaining to the CTA (*i.e.* the second and part of the fifth causes of action) because these claims concern the same subject matter as the pre-existing California Action; and it is further

ORDERED that the motion by defendants PV2 Energy, LLC, DER Acquisition LLC and John Pimentel to dismiss plaintiff Renewable Energy Trust Capital, Inc.'s complaint is also granted as to plaintiff's causes of action for breach of the earn-out side letter with respect to the claim regarding breach of the forum-selection clause (part of the fifth cause of action), negligent misrepresentation (fourth cause of action), and breach of the implied covenant of good faith and fair dealing (sixth cause of action); and it is further

ORDERED that the motion by defendants PV2 Energy, LLC, DER Acquisition LLC and John Pimentel to dismiss plaintiff Renewable Energy Trust Capital, Inc.'s complaint is denied as to plaintiff's causes of action for breach of the loan (first cause of action), breach of the earn-out side letter concerning interference with efforts to sell to ConEd (part of the fifth cause of action), and fraudulent inducement (third cause of action); and it is further

ORDERED that defendants are directed to serve an answer to the remaining claims in the complaint within twenty (20) days after the date of this decision and order; and it is further

ORDERED that counsel are directed to appear for a conference in Room 208, 60 Centre Street, on March 7, 2018, at 2:15 PM.

This constitutes the decision and order of the Court.

1/31/2018
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

APPLICATION: [ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER

[ ] SETTLE ORDER [ ] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE