Carbures Europe, S.A. v Emerging Mkts. Intrinsic Cayman Ltd.
2018 NY Slip Op 33028(U)
November 29, 2018
Supreme Court, New York County
Docket Number: 653892/2015
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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CARBURES EUROPE, S.A., SRT CAPITAL FF LLC, NEUDER GEDANKE, S.L.,

Plaintiffs,

- v -

EMERGING MARKETS INTRINSIC CAYMAN LTD., EMERGING MARKETS INTRINSIC, LTD., BULENT TOROS, ERIC MAASS, NOMURA PB NOMINEES LTD.

Defendants.

INDEX NO. 653892/2015

MOTION DATE 07/05/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126

were read on this motion to/for JUDGMENT - SUMMARY.

In this lending agreement dispute, defendants Emerging Markets Intrinsic Cayman Ltd. and Emerging Markets Intrinsic, Ltd. (together, "EMI") move, pursuant to CPLR 3212, for summary judgment. Plaintiffs Carbures Europe, S.A., SRT Capital FF LLC, and Neuder Gedanke, S.L. (collectively, "Carbures") oppose.

Carbures is a publicly traded company, and EMI is a hedge fund. On September 25, 2015, Carbures and EMI entered into a Margin Lending Agreement and Term Sheet (together, "Loan Agreement"). Pursuant to the Loan Agreement, EMI agreed to loan Carbures €7 million, and Carbures pledged €14 million worth of company shares as collateral ("Collateral Shares"). The Loan Agreement provides that the Collateral Shares are EMI's sole recourse in the event of loan default. In a separate agreement, Carbures

additionally issued EMI a warrant to purchase Carbures stock at a discounted price under specified terms ("Warrant").

Section 5(c) of the Loan Agreement provides that, "[e]xcept under or after an Event of Default scenario or allowed as a hedge . . ., the Collateral [Shares] will not be . . . sold or traded in any exchange or over the counter transactions." The Loan Agreement further provides that EMI "has the right to hedge Exposure in Shares using any strategy [EMI] deems suitable . . . ."[1]

On October 22, 2015, EMI disbursed €3 million as the first loan installment, and Carbures deposited 6,315,810 shares as the first tranche of collateral. The next day, Carbures started to sell the Collateral Shares. On October 30, 2015, Carbures emailed EMI that it observed trading activity in contravention of the Loan Agreement. Although EMI responded that it was hedging the Collateral Shares pursuant to the Loan Agreement, the parties continued to dispute the propriety of Carbures' conduct.

On November 4, 2015, Carbures demanded, *inter alia*, that EMI cease its trading activities and provide it with requested documentation. In response, EMI raised concern regarding Carbures' intention to proceed with the second installment, in which Carbures would deliver the second tranche of collateral, and EMI would loan an additional €4 million. As the parties' continued to espouse their respective positions and demands, EMI ultimately issued Carbures a notice of default on November 11, 2015. The parties

[1] "A hedge is an investment to reduce the risk of adverse price movements in an asset." *Hedge Definition*, https://www.investopedia.com/terms/h/hedge.asp.

thereafter never completed the second installment of the Loan Agreement, and EMI proceeded to liquidate the Collateral Shares after declaring default.

Carbures filed a complaint against EMI in December 2015. In 2016 I granted in part and denied in part EMI's preanswer motion to dismiss the complaint. That dismissal was largely upheld on appeal, thus Carbures' remaining claim is for breach of contract for allegedly trading the Collateral Shares in contravention to the Loan Agreement.

In January 2016, EMI attempted to exercise the Warrant based on Carbures' purported default on the Loan Agreement. Carbures responded that the Warrant was not yet exercisable. In its answer, EMI asserts that its trading activity prior to November 11, 2015 constituted permissible hedging, and EMI additionally asserts a counterclaim for breach of the Warrant.

Discussion

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Smalls v AJI Indus., Inc.*, 10 N.Y.3d 733, 735 (2008). "*Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers*[.]" *Smalls*, 10 N.Y.3d at 735 (emphasis in original). Here, to make out a *prima facie* case for dismissal of the breach of contract claim EMI must show as a matter of law that it was hedging when it initially started selling the Collateral Shares.

EMI argues that it was engaging in a hedging strategy known as the Black-Scholes option pricing model ("Black-Scholes"). Neither party disputes that Black-Scholes

determines, through a series of inputs, whether to buy or sell the Collateral Shares, including the amount, to neutralize the risk. To demonstrate that it was hedging using Black-Scholes, EMI relies on its expert Stuart McCrary ("McCrary").

Review of McCrary's deposition testimony demonstrates that he is "only [opining] how [he] would hedge it" without any knowledge of the inputs, specifically volatility, that was used to hedge. McCrary Tr. 225:20-226:10. In addition, McCrary's expert opinion relies on some factual assumption that are inconsistent with the events at issue.

For example, even though McCrary concludes that EMI had to sell 728,471 Collateral Shares from the outset to hedge the first tranche, it is undisputed that EMI only sold 61,718 Collateral Shares on October 23, 2015. To reconcile this discrepancy, McCrary postulates, without citing any factual support, that "the most logical explanation" for EMI underselling the Collateral Shares is that EMI "decided there was [only] enough liquidity to sell 61,000." McCrary Tr. 134:16-21. For these reasons, McCrary's expert opinion is insufficient, by itself, to warrant dismissal of the breach of contract claim.

EMI also submits the deposition testimony of its managing director, Bulent Toros ("Toros"). Toros testified that in using Black-Scholes as a hedging strategy, EMI engaged in nondiscretionary trading. *See* Toros Tr. 41:11-16. According to Toros, unlike discretionary trading, Black-Scholes determines whether to buy or sell the Collateral Shares. However, there is a dispute as to whether EMI sold less than it needed to neutralize its risk. This dispute raises an issue as to whether the trading was

nondiscretionary under the Black Scholes model, or discretionary trading done for another purpose.

There are other inconsistencies in EMI's proof submitted on this summary judgment motion. For example, Toros testifies that EMI was hedging both the loan amount and Warrant, but McCrary concludes that the volume of shares sold was far from adequate to fully hedge EMI's exposure to the loan amount and Warrant. *Compare* Toros Tr. 199:14-21, *with* McCrary Expert Rep. 21.

Because EMI's moving papers fail to show its entitlement as a matter of law to dismissal of the breach of contract claim, I deny the summary judgment motion. EMI additionally seeks summary judgment based on Carbures' purported lack of recoverable damages. EMI argues that Carbures may not recover excess proceeds because Carbures owes EMI €4.68 million from the first installment, and EMI only received €3,959,858.00 for selling the first tranche of Collateral Shares. EMI calculates €4.68 million based on the principal amount of €3 million plus interest on €7 million (totaling €1.68 million) that Carbures would owe on the maturity date. EMI argues that it could accelerate the principal repayment and interest after it declared default.

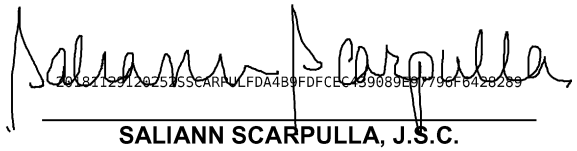
However, given the existence of disputes as to the underlying factual allegations and which party is in breach, it would be inappropriate to determine the extent to which EMI may be entitled to interest. Based on the disputed issues of fact, I also deny EMI's

motion for summary judgment on its counterclaim for breach of the Warrant.[2] In accordance with the foregoing, it is

ORDERED that the motion by defendants Emerging Markets Intrinsic Cayman Ltd. and Emerging Markets Intrinsic, Ltd. for summary judgment dismissing the complaint is denied.

The parties are directed to appear for a pretrial conference on January 30, 2019 at 2:15 p.m.

This constitutes the decision and order of the Court.



DATE		SALIANN SCARPULLA, J.S.C.	
CHECK ONE:	[ ] CASE DISPOSED	[X] NON-FINAL DISPOSITION	
APPLICATION:	[ ] GRANTED [X] DENIED	[ ] GRANTED IN PART	[ ] OTHER
CHECK IF APPROPRIATE:	[ ] SETTLE ORDER	[ ] SUBMIT ORDER	
	[ ] INCLUDES TRANSFER/REASSIGN	[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE

[2] I have considered all the parties' arguments, even if an argument is not specifically addressed in this decision and order.