D.E. Shaw Composite Holdings, L.L.C. v Terraform Power, LLC
2020 NY Slip Op 34294(U)
December 22, 2020
Supreme Court, New York County
Docket Number: 651752/2016
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** IAS MOTION 54EFM

Justice

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D.E. SHAW COMPOSITE HOLDINGS, L.L.C., MADISON DEARBORN CAPITAL PARTNERS IV, L.P.,

Plaintiffs,

- v -

TERRAFORM POWER, LLC, TERRAFORM POWER, INC.,

Defendants.

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INDEX NO 651752/2016

MTN SEQ NOS 002, 003

DECISION + ORDER ON MOTIONS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 89, 90, 91, 92, 93, 94, 95, 96, 97, 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, 127, 128, 129, 130, 131, 132, 133, 134, 257, 258, 259, 260, 261, 262, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 300, 301, 306, 307, 308, 309, 310, 311, 312, 313, 314

were read on this motion for SUMMARY JUDGMENT.

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were read on this motion for SUMMARY JUDGMENT.

Motion sequence numbers 002 and 003 are consolidated for disposition.

Plaintiffs D. E. Shaw Composite Holdings, L.L.C. and Madison Dearborn Capital Partners IV, L.P. and defendants TerraForm Power, LLC (TerraForm LLC) and TerraForm Power, Inc. (TerraForm Inc.) each move for summary judgment. The motions are granted in part.

Background

The material facts are undisputed (*see* Dkt. 88).

This case concerns whether defendants are liable for an earnout payment due under a Purchase and Sale Agreement, dated as of November 17, 2014 (Dkt. 258 [the PSA]). Pursuant to the PSA, defendants, along with non-party SunEdison, Inc. (SunEdison), acquired First Wind Holdings, LLC and First Wind Capital, LLC (collectively, First Wind), a renewable energy company. The PSA defines TerraForm LLC as "Operating Buyer" and SunEdison as "Holdco Buyer"; they are collectively defined as "Buyers" (*id.* at 8). TerraForm LLC acquired First Wind's operating renewable energy facilities; SunEdison acquired the rest of First Wind's portfolio, including projects in development (*see id.* at 34). Most of the PSA's payment obligations are only imposed on a specified single one of the buyers (*see id.* at 35 ["The Holdco Closing Consideration … shall be paid by Holdco Buyer"]). Section 2.09 of the PSA, moreover, provides that all "obligations of each Buyer under this Agreement, including any payment obligations, shall be several, and not joint" (*id.* at 44 [emphasis added]).

Ordinarily, Earnout Project Payments were payable only by SunEdison (*see id.* at 37 [§ 2.04(a)]). Section 2.04(g), however, provides in no uncertain terms:

> In the event that an Acceleration Event shall occur, **Buyers** shall immediately deliver or cause to be delivered the aggregate Accelerated Earnout Payment to the Paying Agent on behalf of the Sellers for each Earnout Project for which no Earnout Project Payment has been made (*id.* at 39 [emphasis added]).

Section 2.04(g) thus unambiguously makes both Buyers liable for the Accelerated Earnout Payment on the occurrence of an Acceleration Event.

It is undisputed that SunEdison's bankruptcy filing on April 21, 2016 resulted in a defined Acceleration Event 20 days later, on May 11, 2016, and that an Accelerated Earnout Payment was due (*see id.* at 9).

In this action, plaintiffs seek to hold TerraForm LLC, one of the Buyers, liable for the aggregate Accelerated Earnout Payment and to hold TerraForm Inc. liable as a guarantor of TerraForm LLC's payment obligation (*see id.* at 82 [§ 6.21]). They move for summary judgment, arguing that the PSA unmistakably establishes TerraForm LLC's primary liability for the accelerated payment as one of the delineated Buyers and that damages are easily computed based on the PSA's definitions and formulas using the megawatts-to-dollars conversion.

Defendants counter that it is they who are entitled to judgment or, at the very least, a trial. They claim that Buyers appears in section 2.04(g) only because of a mutual mistake and that the provision should have read "Holdco Buyer" shall deliver the accelerated payment because both parties actually intended that only SunEdison would have that obligation, which, consistent with § 2.09, was not to be a joint responsibility. Defendants also urge that the acceleration obligation is unenforceable because the PSA does not clearly set forth the amount owed. Finally, defendants assert that a 2015 forbearance agreement between plaintiffs and SunEdison extinguished their liability because TerraForm LLC's consent was not procured.

Discussion

Summary judgment may only be granted if there are no material disputed facts (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). Movant bears the burden of making

a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). If a prima facie showing has been made, then the burden shifts to the opposing party to produce evidence sufficient to establish the existence of a material question of fact (*Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562). The evidence must be construed in the light most favorable to the opposing party and the motion must be denied if there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]; *Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Mere conclusions, unsubstantiated allegations or expressions of hope, however, are insufficient to defeat summary judgment (*Zuckerman,* 49 NY2d at 562).

Mutual Mistake and Liability

"The premise underlying the doctrine of mutual mistake is that 'the agreement as expressed, in some material respect, does not represent the meeting of the minds of the parties'" (*Simkin v Blank*, 19 NY3d 46, 52-53 [2012], quoting *Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453 [1993]). When a party seeks reformation based on a scrivener's error it must prove "a prior agreement between the parties, which when subsequently reduced to writing fails to accurately reflect the prior agreement" (*Warberg Opportunistic Trading Fund L.P. v GeoResources, Inc.*, 151 AD3d 465, 470-71 [1st Dept 2017]). Reformation "is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties"

(*US Bank N.A. v Lieberman*, 98 AD3d 422, 423-24 [1st Dept 2012]). "It is thus presumed that a deliberately prepared and executed document manifests the true intentions of the parties such that the proponent of reformation is required to proffer evidence, which in no uncertain terms, evinces [] mistake and the intended agreement between the parties" (*id.* at 424). Moreover, "the doctrine of mutual mistake may not be invoked by a party to avoid the consequences of its own negligence" (*Eisenberg v Hall*, 147 AD3d 602, 604 [1st Dept 2017]; *see Natixis Funding Corp. v GenOn Mid-Atl., LLC*, 181 AD3d 481 [1st Dept 2020] ["there is no basis for rescission or reformation … to correct an alleged mistake in drafting … because Natixis could easily have ascertained that there was no draw cap in the LC schedules"]).

Importantly, the mistake must truly be mutual. It must be made by both parties. Evidence that only one side was mistaken is insufficient (*Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 369 [1st Dept 2007] ["plaintiff does not allege a mutual mistake; she merely alleges that she was mistaken. A unilateral mistake, standing alone, does not suffice as a predicate for relief"]).[1]

There is no record evidence from which a reasonable finder of fact could conclude that plaintiffs made a mistake in using the word Buyers in section 2.04(g). Defendants posit that because SunEdison was acquiring the developing projects on which the Accelerated Earnout Payment would be based, and since the PSA generally requires only SunEdison to pay the earnout-payments for these projects, it makes no sense that the parties

[1] Defendants do not assert a claim of unilateral mistake or allege that the mistake was the product of fraud or wrongdoing on the part of plaintiffs (*see Quattro Parent LLC v Rakib*, 181 AD3d 518 [1st Dept 2020]).

would agree that defendants would both be liable upon an "Acceleration Event." The court disagrees. Even though the PSA limits payment obligations for each of the Buyers to their respective First-Wind acquisitions, it is not economically illogical, as part of the deal as a whole, for plaintiffs to have negotiated and for defendants to have agreed to pay the accelerated-earnout obligation in the event of, among other things, SunEdison's bankruptcy. This makes sense given that SunEdison's bankruptcy, and presumable inability to "immediately deliver" payment, is a trigger to TerraForm LLC's independent obligation. Section 2.04(g), as executed, certainly is not irrational nor is it itself indicative of inconsistency with the parties' demonstrated intent.

Even assuming that defendants submitted sufficient evidence that they themselves made a mistake, they have not submitted any evidence showing that plaintiffs made a mistake and that any mistake was, in fact, mutual. The PSA's draft history shows that the word "Buyers" was conspicuously inserted into section 2.04(g) and that defendants and their extremely competent counsel had ample opportunity to review this section, which was specifically the subject of negotiations, to ensure its terms reflected the parties' agreement (*see* Dkt. 90 at 16-18). Indeed, 22 of the 24 drafts contained the provision, which at one point was even removed and re-inserted, and all of them included the word Buyers. Whether defendants simply overlooked the term or always intended it to be reflective of the parties' agreement is irrelevant as defendants point to no evidence establishing that plaintiffs, who drafted the language (*see* Dkt. 136 at 15), did not purposely include Buyers' liability for the accelerated payment as part of the bargain that they struck. The parties made deliberate drafting decisions about when to refer to a specific Buyer and when to

refer to both Buyers. There is no evidence that plaintiffs were any less deliberate about their drafting of section 2.04(g), and defendants had ample opportunity to object to the term if it was included by mistake just as the sellers pointed out the mistake in failing to include the provision altogether in one of the drafts before it was reinserted.[2]

In sum, there is no question of fact as to whether both parties made a mistake here. Any inconsistency alleged by defendants is one sided and does not prove a mutual mistake.[3] Absent evidence that plaintiffs intended anything contrary to what the agreement says in the event of an Acceleration Event, the contract must be enforced as written. Summary judgment is therefore granted to plaintiffs on the mutual-mistake defense and on liability for breach of § 2.04(g) based on the unambiguous provision and satisfaction of its requirements. TerraForm Inc. is liable as guarantor of TerraForm LLC's obligation.

Damages

Defendants' argument that the PSA does not contain any formula for computing the Accelerated Earnout Payment and that the provision is too indefinite to be enforced is rejected. That the PSA does not recite an exact amount owed does not defeat a claim for damages. A contractual formula that requires inputs based on objective extrinsic evidence is enforceable (*Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989] ["a price term is not necessarily indefinite because the agreement fails to specify

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[2] Defendants' reliance on plaintiffs' post-drafting correspondence in which they indicate their belief that defendants are misinterpreting section 2.04(g) is unavailing (*see* Dkt. 136 at 26). This is merely more proof of a possible mistake by defendants, not a mistake by plaintiffs.

[3] There is no longer a dispute that the only reasonable interpretation of "shall immediately deliver or cause to be delivered" is that defendants were obligated to pay the amounts owed (*see* Dkt. 37 at 5).

a dollar figure, or leaves fixing the amount for the future, or contains no computational formula. … a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties; a method for reducing uncertainty to certainty might, for example, be found within the agreement or ascertained by reference to an extrinsic event, commercial practice or trade usage"]). After all, that is how earn-out payments, a typical component of the consideration for the sale of a company, are calculated (*see Demetre v HMS Holdings Corp.*, 127 AD3d 493 [1st Dept 2015]).

Plaintiffs have met their prima facie burden by demonstrating the PSA's dictates for calculating the amounts owed:

> Each relevant term is defined in the PSA. "Accelerated Earnout Payment" is defined as "the amount set forth on Annex C with respect to such Earnout Project." Annex C is a chart that lists the "Earnout Projects" (and the definition of "Earnout Projects" provides that it means "the projects listed on Annex C"). It groups the Earnout Projects into three buckets: Bucket 1, Bucket 2, and Bucket 3. Annex C. Buckets 1 and 2 list Earnout Projects by name and provide the amount of "MW" for each Earnout Project and the total for all Earnout Projects in that bucket; Bucket 3 specifies that its projects are "to be determined" and will have 135 MW in total. Bucket 1 lists nine Earnout Projects, with a "Bucket 1 Total" of 1,070 MW. Bucket 2 lists two Earnout Projects, with a "Bucket 2 Total" of 236 MW.
>
> The dollar value of each MW listed in Annex C is provided in the definition of "Per MW Earnout Payment." That definition spells out the "Earnout Payment" due "Per MW," using a simple conversion formula. It states that "Per MW Earnout Payment" means:
>
> > (a) with respect to Bucket 1 Projects, $433,947,368 divided by the aggregate MWac of such Projects set forth on Annex C,
> >
> > (b) with respect to Bucket 2 Projects, $51,052,632 divided by the aggregate MWac of such Projects set forth on Annex C, and
> >
> > (c) with respect to Bucket 3 Projects, $25,000,000 divided by the aggregate MWac of such Projects set forth on Annex C, provided that if an Additional Earnout Project replaces a Project on Annex

> C after the Closing Date, such calculation above shall utilize the MWac of the Project so replaced (Dkt. 90 at 27-28; *see also* Dkt. 258 at 20).

Having set forth the formula, plaintiffs, in accordance with the PSA, convert "the amounts listed on Annex C in MW to dollars," which "requires nothing more than the definition's conversion formula and multiplication of the dollar value of each MW by the number of MW" (Dkt. 90 at 28). This is done by "inserting the 'aggregate MWac of such Projects set forth on Annex C' into the formula," with the math for each Bucket being "straightforward": (1) "Bucket 1 has an aggregate MW of 1070" and "$433,947,368 divided by 1070, is $405,558.29"; (2) "Bucket 2 has an aggregate MW of 236" and "$51,052,632 divided by 236 is $216,324.71"; and (3) "Bucket 3 has an aggregate MW of 135" and "$25,000,000 divided by 135 is $185,185.19" (*id.*).[4] Simply put, "although the 'amount set forth in Annex C' referred to in the definition of Accelerated Earnout Payment is provided in megawatts (MW), **the PSA specifies the exact dollar value per MW, down to the cent**" (*id.* at 29 [emphasis added]). Plaintiffs calculated the actual amounts owed based on SunEdison's records, accounting for completed projects and past payments (*see id.* at 29-30). When each payment is calculated and added up, the sum is $230,975,897.96

[4] "One MW in Bucket 1 has a dollar value of $405,558.29, one MW in Bucket 2 has a dollar value of $216,324.71, and one MW in Bucket 3 has a dollar value of $185,185.19. To determine the Accelerated Earnout Payment due for any particular project listed on Annex C, the parties simply multiply that project's MW by the value of a MW in that Bucket. For example, the Idaho Solar Earnout Project in Bucket 1, worth 100 MW, requires payment of $405,558.29 per MW, or $40,555,829.00 …; the Bingham Earnout Project in Bucket 2, worth 185 MW, requires payment of $216,324.71 per MW or $40,020,071.35" (*id.* at 28).

(*id.* at 30). Based on the PSA's $510 million cap (*id.* at 31 [PSA § 2.04(a)]) and crediting amounts that SunEdison paid, a total of $230,893,998.54 is due.[5]

In opposition, defendants do not argue that plaintiffs' data or math is incorrect. Instead, they proffer what they contend is a reasonable alternative interpretation of the damages formula: that "when the PSA defines an 'Accelerated Earnout Payment' as the 'amount set forth on Annex C,' it means exactly what it says: dollar amounts" (Dkt. 267 at 30). That is not a reasonable interpretation. An exact dollar amount could not have been anticipated based on the uncertainty of the timing of any acceleration. Nor are plaintiffs relying on a "made-up formula" (*see id.* at 32). Additionally, if the parties had agreed that only "actual damages" would be payable (Dkt. 136 at 44), they would have said so and they would not have referred to the amount on Annex C, which requires calculation, in defining the accelerated payment.

Defendants' suggestion that the parties forgot to set forth the amount due after acceleration, so they are liable for nothing, is contrary to the evidence and the law (*see Cobble Hill*, 74 NY2d at 483). It ignores the import of the PSA's megawatts-to-dollars conversion applicable to Annex C in the definition of Per MW Earnout Payment (*see* Dkt. 258 at 27). Accelerated Earnout Payment simply "means, with respect to any Earnout

[5] The amount owed is not an impermissible penalty (*see* Dkt. 282 at 34 ["The value the parties themselves assigned to the Earnout Projects was $510 million, and although they expected that full amount to be paid by SunEdison as the projects were completed and sold … Sellers made sure — in the express terms of the PSA — that if one of the four Acceleration Events occurred, payment would be due immediately and collectible from both TerraForm and SunEdison. That is material and bargained-for consideration in a complex commercial contract executed by sophisticated parties"]). There is no evidence that the parties' valuation was punitive and not a reasonable approximation of the uncertain future value of the projects (*see JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 373, 385 [2005]).

Project, the amount set forth on Annex C with respect to such Earnout Project" (*id.* at 9). Reading the PSA as a whole, it is clear that the parties intended that the Accelerated Earnout Payment would be based on the list of projects and megawatts in Annex C along with the PSA's formula for converting megawatts to dollars (*see id.* at 135-48). Acceleration merely requires using this agreed-upon, contractual formula and accounting for the status of the projects and the amounts paid. The only reasonable interpretation of "the amount set forth on Annex C with respect to such Earnout Project" is that such amount incorporates the formula in the definition of Per MW Earnout Payment.

Plaintiffs are therefore entitled to an award of $230,893,998.54.

The 2015 Agreement

In a Payment Agreement dated December 29, 2015, plaintiffs and SunEdison agreed to forebear on SunEdison's liability for Earnout Project Payments under section 2.04 of the PSA (Dkt. 145 [the 2015 Agreement]). Defendants are not parties to the 2015 Agreement, nor does it affect the amounts they owe under section 2.04(g) of the PSA. But even assuming that the scope of defendants' liability was somehow changed, it was not extinguished because they are not guarantors of SunEdison. Section 2.04(g) makes plain that TerraForm LLC itself is a primary obligor for the Accelerated Earnout Payment.

The suretyship doctrine that defendants invoke is inapplicable (*see Bier Pension Plan Trust v Estate of Schneierson*, 74 NY2d 312, 315 [1989] ["the creditor and the principal debtor may not alter **the surety's** undertaking to cover a different obligation without the surety's consent. If they do so **the surety** is discharged because the parties have substituted a new contract, to which it never agreed, for the original"] [emphasis added]).

Defendants do not cite any case applying this discharge to a primary obligor. On the contrary, a contract that expressly designates a party as a primary obligor will not be construed as a guaranty (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 446 [1996] ["A guaranty . . . is a contract of secondary liability. Thus, a guarantor will be required to make payment only when the primary obligor has first defaulted"]). TerraForm LLC's independent obligation under section 2.04(g) is not conditioned on SunEdison's failure to make the Accelerated Earnout Payment in the first instance; rather, it springs directly from an Acceleration Event. Defendants certainly are not SunEdison's guarantors (*see* Dkt. 18 at 12 ["Defendants did not guarantee any of SunEdison's obligations"]). They are liable because TerraForm LLC is one of the Buyers.[6]

Attorneys' Fees

Plaintiffs are not entitled to recover their attorneys' fees under section 11.02(b) of the PSA, which obligates defendants to cover a Loss related to their breach of the PSA (*see* Dkt. 258 at 91). Though Loss is defined in section 11.02(a) to include attorneys' fees, section 11.02(b) can fairly be read to apply only to indemnification for third-party actions, and not necessarily to suits between the parties themselves. These very sophisticated parties drafted an otherwise extremely precise and clear PSA. They could have easily, but did not ultimately, make plaintiffs' right to prevailing-party fees "unmistakably clear" (*see Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 [1989]).

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[6] In any event, a forbearance that does not alter maturity does not result in a discharge (*Bier*, 74 NY2d at 316; *see SpringPrince, LLC v Elie Tahari, Ltd.*, 173 AD3d 544, 545 [1st Dept 2019] ["Indulgence or leniency in enforcing a debt when due is not an alteration of the contract"]). Of course, TerraForm Inc. is TerraForm LLC's guarantor, but since TerraForm LLC's obligations were not altered there is no basis to contend that TerraForm Inc.'s liability was extinguished.

Accordingly, it is ORDERED that defendants' motion for summary judgment is granted only to the extent that plaintiffs' claim for attorneys' fees is dismissed and their motion is otherwise denied; and it is further

ORDERED that plaintiffs' motion for summary judgment is denied on their claim for attorneys' fees and is otherwise granted, and the Clerk is directed to enter judgment in favor of plaintiffs and against defendants, jointly and severally, in the amount of $230,893,998.54 plus 9% pre-judgment interest from May 11, 2016 to the date judgment is entered.

12/22/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

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

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