

W Mgt. Servs. LTD v Fanning
2021 NY Slip Op 32519(U)
November 30, 2021
Supreme Court, New York County
Docket Number: Index No. 650727/2021
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK **PART** **53**

Justice

-----X

W MANAGEMENT SERVICES LTD

Plaintiff,

- v -

OISIN FANNING,

Defendant.

-----X

INDEX NO. 650727/2021

MOTION DATE 04/08/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 13 were read on this motion to/for DISMISS.

Oisín Fanning's motion to dismiss, or in the alternative, to strike the claim for liquidated damages by W Management Services Ltd. (**W Management**) must be granted. Simply put, the Make Whole Payment set forth in the Margin Lending Agreement Term Sheet (the **Term Sheet**; NYSCEF Doc. No. 3) and incorporated into the Margin Lending Agreement (the **MLA**¹; the **MLA** together with the Term Sheet, hereinafter, collectively the **Loan Documents**; NYSCEF Doc. No. 2), each dated as of February 12, 2020 by and between W Management and Mr. Fanning, pursuant to which W Management agreed to make a £15,000,000 margin loan facility (the **Loan**) to Mr. Fanning is an unenforceable penalty (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005]) when viewed from the time that the MLA was executed because it calculates damages based on default interest on the entire Loan balance for the entire term when no Loan was advanced by the lender, W Management and there was no outstanding loan amount for a single day. W Management's argument that the Make Whole Payment is not a

¹ Capitalized terms used but not otherwise defined herein shall have the meaning ascribed thereto in the Loan Documents.

penalty because it reflects their potential lost trading profits on the collateral when compared to returns on exchange trade funds or the S&P 500 fails. This analysis and assumption of success is simply too speculative to save these otherwise unenforceable liquidated damage penalty provision.

Pursuant to the terms of the Loan Documents, Mr. Fanning was required to deliver capital shares of SLE:LN no later than December 11, 2020. Section 2 of the Term Sheet provides that the failure to deliver the Collateral relieved W Management of its obligation to fund the Loan. It also provided that W Management was entitled to liquidated damages equal to the default interest rate multiplied by the entire principal amount of the Loan as if, and regardless of whether, such amount had been advanced for the entire term of the Loan even when no portion of the Loan was outstanding for a single day (NYSCEF Doc. No. 3, at 2):

The Make Whole Payment, pursuant to the Repayment provision of the Term Sheet:

The Make Whole Payment is equal to the maximum Interest Rate on the aggregate principal amount of the Loan from the date of default, Hard Trigger Event or repayment until the Maturity Date, less the amount of interest on such principal amount that Lender would have earned if such principal amount was invested at the now-current US Fed Funds rate, plus all of Lender's cost, expense and exposure to break, unwind and/or cancel any trade, hedging or derivative contract or agreement related to the Collateral. (the "Breakage Expense"), provided, however, that in no event will Borrower be responsible for Breakage Expense greater than GBP 1.5 million.

(*id.* at 4).

It is undisputed that Mr. Fanning never delivered the shares and that as a result W Management never advanced one penny of the contemplated £15,000,000 loan and that no portion of the loan was outstanding for any portion of the anticipated term of the loan.

W Management sent Mr. Fanning a default letter on December 18, 2020 and sued Mr. Fanning on February 2, 2021 for breach of contract. Mr. Fanning filed a motion to dismiss on March 8, 2021 to dismiss, or alternatively to strike, W Management's liquidated damages claim.

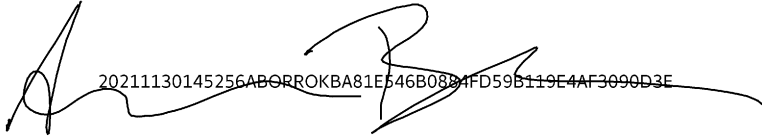
For a liquidated damages provision to be enforceable, the provision must (a) be reasonably proportional to the probable loss caused by the breach and (b) the amount of damages is incapable or difficult to estimate (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d at 380). Showing that the liquidated damages amount is grossly disproportionate to the actual suffered losses makes the provision an unenforceable penalty (*id.*). Loss of future profits may be recovered only when the damages can be determined with reasonable certainty and are not merely speculative (*Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]). It is well established law that the appropriate measure of damages is the loss sustained or gains prevented at the time of the breach, even when the breach is the non-delivery of stock, the value of which subsequently changes (*Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1 [1st Dept 2008]).

W Management's argument that the liquidated damages provision is valid because the stipulated that they are sophisticated (NYSCEF Doc. No. 2, § 11(o)) and that they agreed the provision was not a penalty (*id.*, § 3(a)) fails. This is a determination to be made by the court as a matter of law (*PacifiCorp Capital v Tano, Inc.*, 877 F Supp 180, 184 [SDNY Feb 27 1995]). The formula of

the Make Whole Payment provision is fatally flawed because it calculates a loss to W Management where they have advanced no money whatsoever as if they have advanced the entire amount of the potential loan for the entire loan term. This is not reasonably proportional to any ascertainable loss. It is of no moment that W Management may have been able to make money on the Collateral had it been delivered. It may have lost money too. The loss, if any, where no loan was advanced and no risk was taken by W Management, was any due diligence and transaction costs it may have incurred in underwriting and putting together the deal. Therefore, the motion must be granted and cause of action for damages for liquidated damages must be dismissed.

Accordingly, it is

ORDERED that Oisin Fanning’s motion to dismiss W Management’s claim for liquidated damages is granted.

<u>11/30/2021</u> DATE	 20211130145256ABORROKBA81E546B0894FD59B119E4AF3090D3E _____ ANDREW BORROK, J.S.C.				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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					REFERENCE