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ERC 16W L.P. v Xanadu Mezz Holdings LLC
2015 NY Slip Op 50035(U)
Decided on January 14, 2015
Supreme Court, New York County
Friedman, J.
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Decided on January 14, 2015

Supreme Court, New York County

ERC 16W Limited Partnership, Plaintiff,

against

Xanadu Mezz Holdings LLC and LEHMAN BROTHERS REAL ESTATE MEZZANINE PARTNERS, L.P., Defendants.

600870/2009

Counsel for the plaintiff is Sheron Korpus, Esq., Kasowitz, Benson, Torres & Friedman LLP, 1633 Broadway, New York, New York 10019. Counsel for the defendants is Jacob S. Pultman, Esq., Allen & Overy LLP, 1221 Avenue of the Americas, New York, New York 10020.

Marcy S. Friedman, J.

This is an action brought by plaintiff ERC 16W Limited Partnership (ERC), the borrower under a loan agreement to fund the redevelopment of the Meadowlands Sports Complex. Defendant Xanadu Mezz Holdings LLC (XMH) held a participation interest in the construction loan, and defendant Lehman Brothers Real Estate Mezzanine Partners, L.P. (Lehman) was XMH's guarantor. The complaint pleads breach of contract causes of action against defendants based on XMH's alleged failure to meet its obligation to fund certain advances of the loan. Defendants move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss ERC's claim for consequential damages asserted in the second amended complaint (SAC).

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (*see*, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]. *See 511 W. 232nd Owners Corp. v Jennifer Realty*

Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]. *See also Water St. Leasehold LLC v Deloitte & Touche LLP*, 19 AD3d 183 [1st Dept 2005], *lv denied* 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a) (1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Leon*, 84 NY2d at 88.)

Background

In an appeal of a determination by this Court (Fried, J.) of defendants' motion to dismiss ERC's first amended complaint, the Appellate Division held that the complaint adequately pleaded causes of action against defendants for breach of contract based on defendant XMH's alleged failure to meet its contractual obligation to fund advances on the loan to ERC, and defendant Lehman's failure to guarantee the advances. At the times the motion to dismiss and appeal were heard, plaintiff's sole damages claim for the alleged breach of contract was the approximately $23 million of advances that XMH was allegedly required but failed to fund, and which ERC itself funded after XMH's default. The Appellate Division allowed this direct damages claim to stand. The issue of whether consequential damages were available to ERC based on XMH's default was not before the Appellate Division. (*ERC 16W Ltd. Partnership v Xanadu Mezz Holdings LLC*, 95 AD3d 498 [1st Dept 2012].)

ERC alleges that after the service of the prior motion to dismiss the first amended complaint, ERC sustained additional damages, in the form of the loss of its entire $1.3 billion investment in the project, as a result of XMH's continued failure to make contractually required advances on the loan. (SAC, ¶¶ 1-4.) ERC filed the second amended complaint to set forth the allegations supporting its claim for the consequential damages exceeding the $23 million in direct damages upheld by the Appellate Division.

As alleged in the second amended complaint, in November 2006, ERC took over "all of the assets and liabilities" of a predecessor developer to create "an entertainment and retail complex in the area surrounding the Continental Airlines Arena at the Meadowlands" in New Jersey. (SAC, ¶¶ 10-13.) On March 30, 2007, ERC entered into a Construction Loan Agreement (Loan Agreement) to borrow up to $1.015 billion from four specified lenders (Lenders) to fund the project. (*Id.*, ¶¶ 16, 19.) One of the four Lenders, Column Financial, Inc. (Column), agreed to fund $485 million of the loan and issued a promissory note to ERC for that amount. (*Id.*, ¶ 19.)

Also on March 30, 2007, Column created four participation interests in the $485 million promissory note pursuant to a Participation and Servicing Agreement (Participation Agreement) between Column and Capmark Finance, Inc., the administrative agent under the Loan Agreement. (*Id.*, ¶¶ 16, 20.) Column and XMH entered into an Assignment and Assumption Agreement (Assumption

Agreement), also on March 30, 2007, pursuant to which XMH accepted [*2]and assumed "all of the obligations of the Participation B Holder" for $208 million of the $485 million promissory note. (*Id.*, ¶ 21.) The "Participation B" interest was a junior participation interest and was subordinate to the other three participation interests in the Column $485 million promissory note. (Loan Agreement, § 2.9.2 [e] [Ex. B to SAC].) The four participation holders of the $485 million promissory note, including XMH, were identified in the Loan Agreement as "Closing Date Participants," and each executed the Loan Agreement "for the sole purpose of acknowledging its agreement to Sections 2.9.2 (e), (f) and (g) and Section 2.11 of this Agreement." (Loan Agreement at signature pages.) As discussed further below, these sections set forth the shares of the advances required to be made by the holders of the participation interests, and procedures governing the failure of any holder to fund its share. (*Id.*, § 2.9.2 [e].) Lehman guaranteed XMH's funding obligations under the Loan Agreement and the Participation Agreement. (SAC, ¶ 22.)

The second amended complaint further alleges that XMH failed to make the October and November 2008 advances due under the Loan Agreement. (SAC, ¶ 35.) On November 10, 2008, ERC entered into a Cure and Reinstatement Agreement (Cure Agreement) with XMH, Lehman, and the other Lenders and Closing Date Participants. (SAC, ¶ 36.) The Cure Agreement reaffirmed all of XMH's obligations under the Loan Agreement. (*Id.*) It is undisputed that XMH cured the October and November 2008 funding deficiencies. (*Id.*, ¶ 39.)

As set forth in the Appellate Division decision, ERC's claim for direct damages is premised on XMH's failure, in January and February 2009, to advance funds and its resulting default under the Loan Agreement. (SAC, ¶¶ 40-47. *See also ERC 16W Ltd. Partnership*, 95 AD3d at 499-501.)

Pursuant to the terms of the Loan Agreement, ERC self-funded those two advances in addition to those for March and April 2009, in a total amount of $22,883,063 plus fees and interest. (*Id.*, ¶¶ 48-53.) In May 2009, however, ERC was forced to suspend construction on the project. (*Id.*, ¶ 64.) In June 2009, ERC and the non-defaulting Lenders and Closing Date Participants entered into an Interim Period Agreement and an Amended and Restated Construction Loan Agreement pursuant to which the principal face amount of the loan was reduced to approximately $499 million, the amount ERC had borrowed as of that date. (*Id.*, ¶ 65.) Further pursuant to the agreements, ERC was authorized to use $100 million that it had placed into escrow and was given until March 31, 2010 to secure a new loan to complete the project. (*Id.*) In exchange for this relief, ERC executed a deed in lieu and consensual foreclosure documents that were held in escrow pending specified events of default, including ERC's inability to procure replacement financing. (*Id.*, ¶ 66.) ERC was unable to procure such financing, and, in August 2010, abandoned its interest in the project and transferred control of the project to the non-defaulting Lenders pursuant to the foreclosure documents. (*Id.*, ¶¶ 67-68.)

As alleged in the second amended complaint, the predecessor developer, whose assets and liabilities were transferred to ERC, invested approximately $650 million in the project. (*Id.*, ¶ 14.) From 2006 through 2008, ERC invested $550 million in the project and deposited an additional $100 million into a completion collateral escrow account, pursuant to the Loan Agreement. (*Id.*, ¶ 18.) The amounts of these investments comprise the $1.3 billion consequential damages that ERC seeks in the second amended complaint.

In the second amended complaint, ERC alleges that "[a]t the time that the Loan Agreement and the [Lehman] Guaranty were executed, it was entirely foreseeable to both XMH [*3]and [Lehman] that the loss of ERC's entire equity investment in the Project would be the natural and probable consequence of any breach by XMH and [Lehman] of their funding obligations under the Loan Agreement and the Guaranty." (SAC, ¶ 70.) In support of this claim, the second amended complaint alleges that defendants knew that they were responsible for approximately 20% of the participated loan, that ERC was committed to invest more than $500 million in the project, and that ERC's predecessor "had been forced to abandon the Project. . . ." (*Id.*, ¶ 71.) According to ERC, the necessity for the Cure Agreement to cover defendants' initial failures to advance funds and its timing — the fall of 2008, when "the capital markets were in disarray" — made it "even more foreseeable to both [defendants] that the loss of ERC's entire equity investment in the Project would be the natural and probable consequence of any breach by [defendants] of their future funding obligations under the Cure Agreement, the Loan Agreement, and the Guaranty."[FN1] (*Id.*, ¶¶ 72-73.)

Discussion

The Court of Appeals set forth the standard for recovery of consequential damages for breach of contract in *Kenford Company, Inc. v County of Erie* (67 NY2d 257 [1986]) ("*Kenford I*") and *Kenford Company, Inc. v County of Erie* (73 NY2d 312 [1989]) ("*Kenford II*"). In the *Kenford* cases, the plaintiff and Erie County entered into a contract pursuant to which the plaintiff agreed to donate land to the County and the County agreed to build a stadium on the property. (*Kenford II*, 73 NY2d at 315-316.) As part of the contract, the plaintiff was to lease or manage the stadium once constructed for a number of years. (*Id.*) As a result of financing difficulties, the County ultimately did not build the stadium. The plaintiff sought damages both for lost profits, as no stadium existed for it to manage or lease, and for lost appreciation in the value of the land surrounding the stadium site, which the plaintiff had acquired in anticipation of the construction of the stadium. (*Id.* at 316-317.)

In *Kenford I*, the Court of Appeals addressed only the portion of the award of money damages for lost profits which the plaintiff would have received under a proposed twenty-year management agreement. (67 NY2d at 261.) The Court held that lost profits may only be awarded where (1) the plaintiff "demonstrate[s] with certainty that such damages have been caused by the breach"; (2) "the alleged loss [is] capable of proof with reasonable certainty"; and (3) the plaintiff makes "a showing that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made." (*Id.*)

The Court cautioned that "the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes." (67 NY2d at 261.) In addition, "[i]f it is a new business seeking to recover for loss of future profits, a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty." (*Id.*)

The Court denied plaintiff's claim for lost profits both because plaintiff did not demonstrate that damages for lost profits were within the contemplation of the parties at the time of contracting and because the assessment of income that might have been generated from an unrealized construction project was speculative. Specifically, the Court found that

"the provisions in the contract providing remedy for a default do not suggest or provide for such a heavy responsibility on the part of the County. In the absence of any provision for such an eventuality, the commonsense rule to apply is to consider what the parties would have concluded had they considered the subject. The evidence here fails to demonstrate that liability for loss of profits over the length of the contract would have been in the contemplation of the parties at the relevant times."

(*Id.* at 262.) The Court further held that plaintiff's assumptions "that the facility was completed, available for use and successfully operated by it for 20 years, providing professional sporting events and other forms of entertainment, as well as hosting meetings, conventions and related commercial gatherings" could not "satisfy the legal requirements of proof with reasonable certainty." (*Id.*)

In *Kenford II*, the Court of Appeals addressed whether the plaintiff could recover damages for the loss of "anticipated appreciation" in the land owned by the plaintiff surrounding the proposed stadium site. The Court reiterated that in a breach of contract action, "the nonbreaching party may recover general damages which are the natural and probable consequence of the breach." (73 NY2d at 319.) However, "to impose on the defaulting party a further liability than for damages [which] naturally and directly [flow from the breach], i.e., in the ordinary course of things, arising from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting." (*Id.* [internal quotation marks and citations omitted] [brackets in original].) As the Court further explained: "In determining the reasonable contemplation of the parties, the nature, purpose and particular circumstances of the contract known by the parties should be considered, as well as what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made." (*Id.* [internal quotation marks and citations omitted].)

Applying these principles, the Court held that at the time the contract was executed, the parties "harbored an expectation and anticipation" that the proposed stadium "would bring about an economic boom in the County and would result in increased land values. . . ." (*Kenford II*, 73 NY2d at 319.) However, the Court found that there was "no provision in the contract between Kenford and the County, nor [wa]s there any evidence in the record to demonstrate that the parties, at any relevant time, reasonably contemplated or would have contemplated that the County was undertaking a contractual responsibility for the lack of appreciation in the value of Kenford's peripheral lands in the event the stadium was not built." (*Id.* at 320.) The fact that the defendant was aware at the time of contracting that the plaintiff had acquired and planned to continue acquiring additional lands surrounding the site of the proposed stadium was insufficient to impose liability on the defendant for lost appreciation in value of the lands "since the County never contemplated at the time of the contract's execution that it assumed legal responsibility for these damages upon a breach of the contract." (*Id.*)

New York courts have consistently applied the standards set by the *Kenford* cases and [*4]imposed liability for consequential damages only where the parties contemplated the imposition of such damages at the time of contracting, and the damages were capable of proof with reasonable certainty. (*E.g.*, *Ashland Management Inc. v Janien*, 82 NY2d 395 [1993]; *Bi-Economy Market, Inc. v Harleysville Ins. Co. of NY*, 10 NY3d 187 [2008], *rearg denied* 10 NY3d 890].)

In moving to dismiss ERC's consequential damages claim, defendants argue that the Loan Agreement by its terms contradicts ERC's claim that it was foreseeable that it could lose its entire investment in the project as a result of a default by a Closing Date Participant in funding the loan. (Ds.' Memo. In Support at 6-9). More particularly, defendants argue that the four provisions of the Loan Agreement, to which XMH and the other Closing Date Participants agreed, specifically contemplated the unavailability of replacement funding and provided "fail-safe mechanisms" to prevent the loss of the project in the event of a Closing Date Participant's default. (*Id.* at 8.) These mechanisms included: affording non-defaulting Participants the option to take over the defaulting Participant's share (Loan Agreement, § 2.9.2 [f]); requiring non-defaulting Participants to fund the defaulting Participant's share for a specified 60-day period (§ 2.9.2 [g]); imposing an obligation on ERC, as Borrower, and on the Agent to use commercially reasonable efforts during the 60-day period to find an Eligible Assignee to take over the defaulting Participant's share (*id.*; *see also* § 2.11 [specifying procedures for replacement of a defaulting Participant]); and imposing the obligation on ERC to fund the defaulting Participant's share on an on-going basis if an Eligible Assignee were not found to assume the defaulting Participant's share. (*Id.*; Ds.' Memo. In Support at 8.) Defendants further assert that the provisions of § 2.9.2, requiring ERC to cover any funding deficiencies by a Closing Date Participant if no replacement funding could be found, reflect the parties' contemplation of what would happen if a Closing Date Participant defaulted. (Ds.' Memo In Support at 8-9.)

ERC counters that the Appellate Division's determination of defendants' prior motion to dismiss rejected defendants' contention that the Loan Agreement precluded ERC's damages claims by instead requiring ERC to self-fund the project following a Closing Date Participant's default if a replacement Participant could not be found. (P.'s Memo. In Opp. at 1, 8.) ERC notes that in upholding its direct damages claim, the Appellate Division relied on section 2.9.2 (f) of the Loan Agreement, which affords ERC the right to proceed against XMH "in respect of any right or claim arising out of" XMH's default in funding the loan. ERC appears to argue that this section also authorizes ERC's claim for consequential damages. (*See* P.'s Memo. In Opp. at 1 ["For the same reasons that the First Department held the Loan Agreement does not foreclose ERC's claim for the $23 million in damages, it similarly does not foreclose its claim for the additional consequential damages set forth in the SAC"].)

The Appellate Division decision expressly rejected a claim by XMH that ERC's remedies in the event of XMH's default in funding the loan were limited to the remedies provided in sections 2.9.2 (e), (f) and (g), and 2.11. (95 AD3d at 500-501.) The Court held this construction "untenable," noting that section 2.9.2 (f) of the Loan Agreement expressly provided that in the event of a Closing Date Participant's default, ERC, Agent or any of the other Closing Date Participants "*shall have the right to proceed directly against any Defaulting Closing Date Participant in respect of any right or claim arising out of the default of such Defaulting Closing Date Participant hereunder*." (*Id.* at 500, quoting § 2.9.2 [f] [Appellate Division's emphasis].) The Court reasoned: "If these sophisticated parties had intended, at the same time they agreed that ERC would have the right to proceed directly against any Defaulting Closing Date [*5]Participant,' to bar ERC from seeking the aid of the courts to require a defaulting participant to honor its obligation to fund the loan under sections 2.9.2 (e) and (f), they would have expressly so provided." (*Id.* at 501.) The Appellate Division concluded that "nothing in the relevant contractual provisions suggests that this right to proceed' does not include a lawsuit for breach of contract." (*Id.* at 504.) The Court upheld ERC's then-pleading of a direct damages claim against XMH for XMH's $23 million share of the loan which ERC became obligated to and did fund upon XMH's default.

ERC is thus correct that the Appellate Division rejected XMH's reading of the Loan Agreement as limiting ERC's remedies against XMH to those specified in the four provisions of the Loan Agreement to which it agreed. Significantly, however, the Appellate Division's holding that ERC's right to proceed against XMH included a right to bring a breach of contract action against XMH for direct damages falls far short of supporting ERC's further contention that this right also encompasses a claim for consequential damages. As discussed above, the Appellate Division did not have this issue before it, and nothing in its decision addresses whether the provisions of the contract "suggest or provide" that consequential damages were within the contemplation of the parties in the event of XMH's default. (*See Kenford I*, 67 NY2d at 262.)

This court must therefore undertake its own inquiry as to whether the Loan Agreement evidences that consequential damages were within the contemplation of the parties at the time of contracting. ERC does not claim that any express term of the contract between ERC and XMH obligates XMH to pay consequential damages in the event of default. Nor does XMH claim that any express term precludes an award of such damages. As discussed above, although the four provisions of the Loan Agreement subscribed to by the Closing Participants provide for self-funding by ERC in the event replacement funding cannot be located upon a Closing Participant's default, these provisions are not by their terms the "exclusive" remedies available to

ERC as borrower upon such default. (95 AD3d at 501.) Moreover, these four provisions afford remedies that are "primarily for the benefit of parties other than the borrower" (*id.*), and are silent as to the remedies to which ERC might be entitled if ERC itself defaulted.

As the Appellate Division has reiterated, "[w]here a contract is silent on the subject [of consequential damages], courts, employing a commonsense' approach, must determine what the parties intended by considering the nature, purpose and particular circumstances of the contract known by the parties . . . as well as what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made.'" (*Awards.com, LLC v Kinko's, Inc.*, 42 AD3d 178, 183-184 [1st Dept 2007] [quoting *Kenford II*, 73 NY2d at 319].)

Here, ERC does not point to any provision of the Loan Agreement to which XMH subscribed which supports a claim that XMH agreed to assume, or that ERC was warranted in supposing that XMH assumed, liability for consequential damages. ERC alleges that the factual circumstances were such that it was foreseeable to XMH that ERC would lose its entire investment if XMH were to default in its funding obligations. (SAC, ¶ 70.) However, the language of the contract is to the contrary and, at most, supports a claim that ERC's default was one possible result of XMH's failure to fund the advances, and not, as ERC claims, a necessary or "natural and probable" result. (*See* SAC, ¶¶ 70, 72-73.) Even in the wake of XMH's default, ERC could have continued in the project under several different scenarios. For example, the remaining lenders had the contractual option of taking over XMH's participation interest, ERC [*6]could have found a replacement lender, or ERC could have taken over the funding obligations itself. XMH's failure to fund therefore did not necessitate ERC's default. Indeed, ERC continued its participation in the project for approximately a year and a half after XMH defaulted.

Moreover, ERC's claim of $1.3 billion in consequential damages in addition to $23 million in direct damages is vastly disproportionate to XMH's monetary commitment to the project and its potential upside. (*See Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 107 [1st Dept 2002] [dismissing claim for lost commissions, the court reasoning that the contract terms did not provide for such relief and the "magnitude of damages" was "out of proportion to any liability contemplated by the contract"].) It is undisputed that XMH was one of several lenders and that it committed itself to a maximum participation of $208 million. (*See* SAC, ¶¶ 16-21; *ERC 16W Ltd. Partnership*, 95 AD3d at 499.) XMH did not hold equity in the project, and its contracted for benefit, as a Closing Date Participant, was repayment of the loan with interest. To hold that XMH consciously assumed a risk of $1.3 billion for a maximum participation of $208 million would be to ignore the "commonsense rule" of *Kenford I* described above. (67 NY2d at 262; *see also Awards.com*, 42 AD3d at 184 [rejecting claim for $276 million in lost profits for a start-up venture and holding that the defendant's view of the contractual relationship "as one having value and potential is not to say that the parties contemplated being liable for each other's losses"].) As held by the Appellate Division on defendants' prior motion to dismiss: "It is a longstanding principle of New York law that a construction of a contract that would give one party an unfair and unreasonable advantage over the other, or that would place one party at the mercy of the other, should, if at all possible, be avoided." (95 AD3d at 503.) As in *Kenford II*, the provisions of the parties' contract do not "suggest or provide for" placement of "such a heavy responsibility" (73 NY2d at 320) on XMH, one of several lenders, as to render it potentially liable for damages for loss of 100 percent of ERC's capital investment, whether or not the project was completed.

The court thus holds that the parties' contract does not on its face provide for, or support, ERC's claim that consequential damages were within the contemplation of the parties.

Further, this is not a case in which ERC offers other evidence in support of this claim.The *Kenford* cases hold, and subsequent cases reaffirm, that evidence outside the contract may be relevant to the issue of whether the parties contemplated consequential damages. (*See Kenford I*, 67 NY2d at 262 [considering evidence submitted at trial as to whether consequential damages were within the contemplation of the parties]; *Kenford II*, 73 NY2d at 320 [same]; *see e.g. Awards.com*, 42 AD3d at 183 [upholding dismissal of lost profits claim on summary judgment motion, the court reasoning that "[t]he agreement fails to reflect that the parties contemplated lost profits as a potential basis for damages in the event of a breach. Nor, even if admissible, is there any extrinsic evidence that lost profits were within the parties' contemplation"]; *Maimis-Knox Group, Ltd. v Grand Central Zocalo, LLC*, 5 AD3d 129, 129-130 [1st Dept 2004] [upholding dismissal on summary judgment motion of claim for lost profits, where contract did not provide for damages for construction delays, and plaintiff "offered no extrinsic evidence that the parties had ever discussed economic loss as a potential basis for damages in the event of construction delays"]; *Kantor v 75 Worth St., LLC*, 95 AD3d 718 [1st Dept 2012] [affirming dismissal of lost profits claim on motion to dismiss, the court holding that "[t]he allegations in the complaint and the supporting materials do not establish that plaintiff's lost profits were within the contemplation of the parties at the time the contract was entered [*7]into'. . . ."] [internal citation omitted].)

Significantly, although ERC was a party to the Loan Agreement, and knowledge of the contemplation of the parties was presumably within its ken, ERC offers no affidavit or other evidence in support of its claim that the parties contemplated the allocation of the risk of ERC's loss of its entire capital investment to XMH, or any other consequential damages. Nor does ERC claim, or make any showing, that discovery may lead to relevant evidence on the issue of whether the parties contemplated consequential damages.

Rather, ERC stands on its pleaded allegations as to foreseeability. ERC's wholly conclusory legal assertion that the loss was foreseeable (SAC, ¶ 70) is supported solely by allegations that XMH had knowledge of the amount of ERC's investment and of ERC's predecessor having had to abandon the project (*id.*, ¶ 71), and that XMH entered into a Cure Agreement after defaulting on its November and December 2008 advances, at a time when the capital markets were in disarray. (*Id.*, ¶¶ 72-73.) These allegations as to XMH's knowledge are insufficient on their face to support the claim that XMH agreed to assume the risk of ERC's loss of its investment. The allegations as to XMH's entry into the Cure Agreement in fact undercut ERC's claim, as the Cure Agreement could have included a provision for consequential damages but did not do so and, instead, expressly provided that it did not expand the provisions of the Loan Agreement to which XMH had previously subscribed. (*See supra* at 6 n 1.) The court accordingly holds that the second amended complaint fails to adequately plead that consequential damages were within the contemplation of the parties at the time the contract was made. ERC thus fails to state a claim for consequential damages under the *Kenford* cases and their progeny.

The court rejects ERC's contention that dismissal of its claim for consequential damages is inappropriate at the pleading stage because it would require the court to make findings of fact. (P.'s Memo. In Opp. at 14-15.) A court may properly dismiss a claim for consequential damages at the pleading stage where the allegations are insufficient on their face to state a claim, or the documentary evidence demonstrates that the damages were not within the contemplation of the parties at the time of contracting and therefore are not recoverable as a matter of law. (*See e.g. Kantor*, 95 AD3d at 718; *Joan Hansen & Co.*, 296 AD2d at 107-109; *compare Red Oak Fund, L.P. v MacKenzie Partners, Inc.*, 90 AD3d 527, 528 [1st Dept 2011] [upholding denial of motion to dismiss consequential damages claim where "the complaint sufficiently alleges that the consequential damages plaintiff seeks were contemplated by the parties at the time of contracting"].)

The court also rejects ERC's claim that the amount of its consequential damages —whether $1.3 billion or some other amount — presents an issue of fact precluding dismissal. (P.'s Memo. In Opp. at 17-20.) As the Loan Agreement does not support ERC's claim that the parties contemplated that XMH would assume the risk of ERC's loss of equity, and the second amended complaint does not sufficiently plead allegations that consequential damages were within the parties' contemplation, the claim for consequential damages must be dismissed. The court therefore need not and does not reach issues regarding the sufficiency of ERC's pleading of the amount of its damages.**[FN2]**

Accordingly, it is hereby ORDERED that defendants' motion to dismiss is granted to the following extent: The claim in plaintiff's second amended complaint for consequential damages is dismissed with prejudice.

This constitutes the decision and order of the court.

Dated:New York, New York

January 14, 2015

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MARCY FRIEDMAN, J.S.C.

Footnotes

Footnote 1: ERC seeks damages for breach of both the Loan Agreement and the later Cure Agreement. The latter expressly provides that it was "not intended to expand any of said covenants, agreements or obligations" of XMH or Lehman under the Loan Agreement or related agreements. (Cure Agreement, §3[d] [Ex. F to Pultman Aff. In Support].) As the Appellate Division held in its determination of defendants' prior motion to dismiss, "[w]hile the cure agreement expressly provides that it reaffirms, without expanding, XMH's preexisting obligations . . , a breach of those preexisting obligations would constitute a breach of the cure agreement, as well." (95 AD3d at 504.)

Footnote 2: As the court does not reach the amount of ERC's damages, it also does not reach the issue of whether or to what extent the amount of ERC's (or its predecessor's) investment is a proper measure of the value of its lost equity. The court notes, however, that a serious question exists as to whether ERC pleads a sufficient, non-speculative basis for its claim of $1.3 billion damages. As support for this amount, ERC alleges merely that "the assets and liabilities" of a predecessor partnership were "transferred" to it and that ERC contributed an additional $650 million. (SAC, ¶¶ 13, 17-18.) The complaint treats the capital that ERC and its predecessor invested as a proxy for the value of its interest in the project; but ERC pleads no allegations as to what, if anything, ERC's interest would have been worth had XMH not defaulted and had the entertainment and retail complex been completed. (*See Kenford I*, 67 NY2d at 261 ["If it is a new business seeking to recover for loss of future profits, a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty"].) A related issue is whether awarding ERC 100 percent of what it and the prior developer contributed to the project would place it in a better position than if it had continued to perform under the contract. (*See generally Goodstein Constr. Corp. v City of New York*, 80 NY2d 366, 373 [1992] ["Contract damages are ordinarily intended to give the injured party the benefit of the bargain by awarding a sum of money that will, to the extent possible, put that party in as good a position as it would have been in had the contract been performed"].)

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