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Summarizing recent significant
New York appellate cases

When two sophisticated commercial entities bargain for a commercial agreement, they are bound by the provisions, broad or narrow, that they draft and the consequences that flow from the language that they choose. Courts are not free to alter those agreements merely because they end up being a bad bargain for one side or the other. Thus, as the First Department cautioned, parties should be careful to think through the consequences of their agreements and bargain for the precise language they would like *before* they enter multimillion-dollar commercial transactions. Let's take a look at that opinion and what else has been happening in New York's appellate courts over the past few weeks.

FIRST DEPARTMENT

CONTRACTS

Iberdrola Energy Projects v Oaktree Capital Mgt. L.P., 2024 NY Slip Op 03798 (1st Dept July 11, 2024)

Issue: **May a nonrecourse provision in a contract between two sophisticated commercial actors relating to the construction of a power plant insulate certain nonparties to the contract from liability?**

Facts: Defendants created a special-purpose entity, nonparty Footprint Power Salem Harbor Development LP, to serve as the company charged with constructing a new gas generation power plant to replace a coal plant in Salem, Massachusetts. Defendants owned, controlled, and managed Footprint, and were Footprint's majority and controlling equity holders. Footprint retained plaintiff to be the project's engineering, procurement, and construction contractor. "Footprint was permitted to terminate the contract for convenience or for a material breach by plaintiff. In the event of termination for the former, Footprint would incur substantial payment obligations; termination for the latter would not. Under the contract, plaintiff was required to post a standby letter of credit in the amount of 20% of the contract price (approximately $140 million) as security for plaintiff's performance. Footprint was permitted to draw on the letter of credit only 'upon any Contractor's breach or failure to perform, when and as required, any of its material obligations under the Contract with five Business Days prior written notice to Contractor.'" The contract also contained a broad nonrecourse provision, providing: "Owner's [i.e., Footprint's] obligations hereunder are intended to be the obligations of Owner and of the corporation which is the sole general partner of Owner only and no recourse for any obligation of Owner hereunder, or for any claim based thereon or otherwise in respect thereof, shall be had against any incorporator, shareholder, officer or director or Affiliate, as such, past, present or future of such corporate general partner or any other subsidiary or Affiliate of any such direct or indirect parent corporation or any incorporator, shareholder, officer or director, as such, past, present or future, of any such parent or other subsidiary or Affiliate." And any disputes under the agreement were required to go to binding arbitration.

When construction began, the relationship between Footprint and plaintiff soured. When Plaintiff failed to complete the project by the guaranteed completion date, the parties began to negotiate to resolve their disputes and find a path to finishing the project. Although Footpath argued it was negotiating in good faith, the plaintiff characterized these negotiations as a ruse to keep plaintiff working on the job. Nearly a year later, when the project was 98% complete, "Footprint gave plaintiff notice of termination for cause, citing, among other things, plaintiff's failure to achieve substantial completion by the required date. Simultaneously, Footprint gave plaintiff notice of Footprint's intent to draw on the letter of credit. Later, Footprint drew the $140 million afforded by the letter of credit. A replacement contractor was retained by Footprint and the modest remaining work was completed." Plaintiff initiated arbitration, alleging, among other things, Footprint breached the contract. Footprint appeared and asserted counterclaims. Following the arbitration, the panel issued a $236 million award in plaintiff's favor, which was confirmed by Supreme Court. Footprint then declared bankruptcy, which significantly reduced plaintiff's chance of any recovery.

In April 2021, while the arbitration was still pending, plaintiff commenced this action against Defendants, Footprint's owners, alleging tort claims that argued that "as plaintiff's work on the project progressed, defendants were concerned that the projected revenues of the gas generation plant were diminishing; defendants did not want to make significant, additional investments in the project; the confluence of diminishing projected revenues and increasing completion costs caused defendants to face losses on their investment; and, to avoid that eventuality, defendants devised a scheme to force plaintiff, through the funds available under the letter of credit, to pay for completion of the work." Defendants moved to dismiss, relying on the nonrecourse provision as a bar to the tort claims. "Supreme Court granted the motion, denied (sub silencio) plaintiff leave to replead or amend, and dismissed the amended complaint with prejudice. The court observed that plaintiff was seeking to hold Footprint's principals liable for its conduct because it would not be able to satisfy the arbitration award,

and concluded that the nonrecourse provision barred all of plaintiff's claims except for fraud. The court found, however, that plaintiff failed to adequately plead the element of detrimental reliance necessary to sustain a cause of action for fraud."

Holding: The First Department held that the parties' broad nonrecourse provision insulated Footprint's principals from any liability for the tort claims arising out of the parties' agreement, rejecting Plaintiff's argument that the nonrecourse provision barred contractual causes of action, not tort claims. The Court explained, "[f]reedom of contract, particularly between sophisticated commercial actors, dealing at arm's length, is an important right, and, absent some violation of law or transgression of a strong public policy, the parties to a commercial contract are basically free to make whatever agreement they wish, no matter how unwise it might appear to a third party." Here, the Court held, the nonrecourse provision is "as broad as it is clear: no liability could be imposed upon various individuals and entities for 'any claim based [on the contract] or otherwise in respect thereof.' Elsewhere, the contract defines 'claims' as 'all liability (including strict liability), claims, suits, demands, penalties, actions, [and] causes of action . . .' Giving the commercial contractual language its plain meaning and effect, defendants are exculpated from any breach of contract liability and any other claims related to or in connection with the contract."

The Court noted, "[h]ad plaintiff wanted to limit the nonrecourse provision to breach of contract claims, it should not have agreed to such a sweeping nonrecourse provision. Plaintiff could have insisted that the nonrecourse provision state expressly that it was limited to breach of contract claims, or that it did not apply to tort claims. Instead of insisting on a narrow nonrecourse provision, plaintiff assented to a broad one. Plaintiff, a sophisticated commercial actor, knew that it was entering into a significant contractual undertaking with a special-purpose entity, and the contract provided for a specific dispute-resolution mechanism — arbitration — that carried with it a risk that the special-purpose entity would not be able to satisfy an ensuing award. Plaintiff could have bargained for protections to avoid or mitigate losses occasioned by the conduct of a judgment-proof special-purpose entity (e.g., conditions on Footprint's ability to draw on the letter of credit, a payment guaranty from one or more of defendants, a narrow nonrecourse provision), but it chose to enter into the contract as written. We cannot provide rough justice to plaintiff by dint of distorting the plain meaning of the contract to relieve plaintiff of the consequences of its contractual arrangement."

SECOND DEPARTMENT

TORTS, DAMAGES

Molina v Goldberg, 2024 NY Slip Op 03818 (2d Dept July 17, 2024)

Issue: **May a plaintiff in a medical malpractice and wrongful death action recover damages for the decedent's "pre-impact terror" as emotional pain and suffering?**

Facts: Decedent was treated at Westchester Medical Center after he was coughing up blood and experiencing shortness of breath and mild burning in his chest. While in WMC's care, decedent suffered a heart attack, and WMC found he had a completely obstructed vessel in his heart. Insertion of a stent failed, and he was treated over the next three years for congestive heart failure, including insertion of a left ventricular assist device in June 2011 at a different hospital. Decedent died from complications from the LVAD and died in October 2011. Plaintiff sued, among others, WMC, alleging that WMC's internal medicine residents and cardiology fellow departed from good and accepted standards of medical practice by failing to timely diagnose and treat the decedent's heart attack. Following trial, the jury awarded Plaintiff $1 million "for emotional pain and suffering the decedent endured between the moment he believed that he was going to die and the moment he died, characterized by the plaintiff as pre-impact terror" and a separate $1 million "for the decedent's pain and suffering and loss of enjoyment of life . . . from the moment of the heart attack to the moment of death." WMC moved to set aside the verdict, and Supreme Court denied the motion.

Holding: Addressing the issue of first impression, the Second Department held "pre-impact terror delineated as emotional pain and suffering should not have been considered as a separate category of damages from pain and suffering and loss of enjoyment of life. Damages for pre-impact terror are designed to compensate the decedent's estate for the fear the decedent experienced during the interval between the moment the decedent appreciated the danger resulting in the decedent's death and the moment the decedent sustained a physical injury as a result of the danger. PJI 2:320 distinguishes the damages chronologically, by describing 'emotional pain and suffering' as that which the decedent actually endured between the moment he or she realized that he or she was going to be gravely injured or die and the moment the decedent sustained a physical injury, and describing pain and suffering as that which the decedent experienced during the subsequent time period from the moment of injury to the moment of death." In contrast here, the Court held, the damages awards here overlapped chronologically, and were therefore duplicative.

Additionally, the Court held, "pre-impact terror delineated as emotional pain and suffering as a separate item of damages is inappropriate in this medical malpractice and wrongful death action and would represent an inappropriate extension of the law with respect to this issue. Traditionally, damages for pre-impact terror have been awarded in cases involving motor vehicle accidents and other types of accidents. Here, where the 'impact' was the decedent's heart attack, the damages for emotional pain and suffering cannot accurately be characterized as damages for pre-impact terror, because they were intended to compensate for the fear the decedent experienced after the heart attack occurred in January 2008 at Westchester Medical Center until his death more than three years later on October 27, 2011, at Yale-New Haven Hospital. Further, unlike a motor vehicle accident where the defendant driver causes the impact, the WMC defendants

did not cause the decedent's heart attack. To the extent that the Appellate Division, First Department, determined otherwise in ***Small v City of New York* (213 AD3d 475 [1st Dept 2023])**, we decline to follow that decision."

THIRD DEPARTMENT

CIVIL PROCEDURE, STANDING

***Matter of Seneca Lake Guardian v New York State Dept. of Envtl. Conservation*, 2024 NY Slip Op 03856 (3d Dept July 18, 2024)**

Issue: **Does a nonprofit organization whose purpose is to preserve and protect the health of the Finger Lakes and the surrounding environment have organizational standing to challenge a Department of Environmental Conservation permit to operate a solid waste and recyclables processing facility?**

Facts: County Line MRF, LLC applied for a permit from DEC to operate a solid waste and recyclables processing facility, and identified that the operation of the proposed facility would produce leachate that would be transported to an offsite treatment facility. The application identified Ithaca Area Wastewater Treatment Facility as the offsite facility that would receive the leachate for treatment and disposal and that, after treatment, it would be discharged to Cayuga Lake. Following a public comment period, DEC issued a permit conditioned on County Line's compliance with its application. Seneca Lake Guardian sued to annul the DEC permit, and respondents moved to dismiss, arguing that SLG lacked standing. Supreme Court granted the motions and dismissed the proceeding, holding that "petitioner's allegations of harm are insufficient as both 'too speculative to confer standing' and no different than harm that would be felt by the public at large."

Holding: The Third Department reversed, holding that SLG had sufficiently alleged organizational standing. The Court explained, "an organization can establish organizational standing by asserting a claim on behalf of its members, provided that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members. To establish standing to challenge respondent's governmental action, petitioner must demonstrate both that at least one of its members might suffer an injury in fact — i.e., actual harm by the action challenged that differs from that suffered by the public at large — and that such injury falls within the zone of interests of the [regulations] through which the government acted. In reviewing these motions to dismiss, we must accept the allegations in the petition/complaint as true and construe them in the light most favorable to petitioner. Even so, petitioner maintains the burden of establishing . . . an injury-in-fact, which must be based on more than conjecture or speculation. If an alleged harm is reasonably certain to occur, then it cannot be considered speculative."

Because respondents did not dispute "that petitioner's claims are representative of its organizational purposes—to preserve and protect the health of the Finger Lakes and the surrounding environment," that the harms alleged fall within the zone of interest of the DEC's solid waste management regulations, and that participation of SLG's members was not required, the Court noted that "the sole issue on this appeal is whether petitioner sufficiently pleaded that at least one of its members would suffer an injury-in-fact that is different from harm suffered by the public at large, such as to confer petitioner with standing." The petition alleged that "its members would be harmed by the leachate produced by County Line, which would be treated by the Ithaca treatment facility and then dumped into Cayuga Lake. According to petitioner, the type of solid waste that County Line would handle would create leachate that contains per- or polyfluoroalkyl substances (hereinafter PFAS), a by-product linked to adverse health outcomes and which the Ithaca treatment facility is not capable of completely filtering out of the treated leachate. Because the Ithaca treatment facility dumps treated leachate into Cayuga Lake and is incapable of completely filtering out PFAS, petitioner alleged that if County Line was permitted to operate its facility in accordance with its application, as DEC's permit requires, PFAS would enter the lake and cause petitioner's members harm. In setting forth this harm, petitioner specifically identified a member whose potable drinking water is only filtered through the ground in 'beach wells' on Cayuga Lake. As these wells do not filter out PFAS, allowing PFAS to be dumped into the lake would render this member's water contaminated and unsafe to drink." Respondents never disputed these allegations in their motions to dismiss, and construing them as true on the motion to dismiss, the Court held that those allegations of harm established "a nonspeculative injury-in-fact to the individual member that is different from the harm to the public at large, thereby conferring standing upon petitioner." The Court therefore remanded the proceeding to Supreme Court for a disposition of the issues raised on their merits.

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