Jones v Credit Agricole Corp.
2016 NY Slip Op 30779(U)
April 26, 2016
Supreme Court, New York County
Docket Number: 162372/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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BARBARA S. JONES, solely in her capacity as SUCCESSOR TRUSTEE OF THE GSC LIQUIDATING TRUST,

Plaintiff,

Index No.: 162372/14

Mot. seq. no. 2

-against-

DECISION AND ORDER

CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK NEW YORK BRANCH, f/k/a CALYON NEW YORK BRANCH, et al.,

Defendants.

---x

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In this action, plaintiff seeks money damages for defendants' alleged breach of agreements entered into during a bankruptcy proceeding which, plaintiff alleges, caused the bankruptcy debtors to incur additional expenses.

Defendants move pursuant to CPLR 3211(a)(7) for an order dismissing the complaint.

I. BACKGROUND

The pertinent undisputed background is set forth in plaintiff's amended complaint:

GSC Liquidating Trust (Trust) is composed of a group of affiliated business entities (GSC entities), some of which borrowed substantial sums of money in 2004 from a syndicate of

lenders, including defendants. To secure the loan, the GSC entities pledged collateral consisting of almost all of their assets, including their asset management business. The loan is governed by a credit agreement and a security agreement. Defendants are among the secured creditors. (NYSCEF 32).

In 2009, the GSC entities defaulted on the loan, and in 2010, they filed for bankruptcy protection. They are debtors in the bankruptcy proceeding at issue here.

A. Security agreement

On February 15, 2006, the GSC entities and a collateral agent entered into the "Second Amended and Restated Pledge and Security Agreement," which granted the collateral agent, for the benefit of the secured lenders, the exclusive authority to enforce the agreement and obtain the collateral in the event of a default. Each pledging GSC entity is described therein as a "grantor," and the execution of the agreement by each entity was a condition precedent to the loan. (NYSCEF 57).

To satisfy the condition precedent, each entity entered into covenants and agreements with the collateral agent, to wit, by assigning, transferring, and pledging to the agent, for the lenders' benefit, a priority security interest of "all of the right, title and interest of such grantor in, to and under" the pledged assets. (*Id.*).

Special provisions concerning the GSC entities' bank accounts and securities included obligations by the entities intended to render more secure the agent's access to the collateral in the event of a default. The pledged assets included their bank accounts, investment property, contracts, receivables, limited liability company interests, claims, and many other assets, such as rights derived from relationships or status, an example of which would be any right an entity had

under partnership or operating agreements. These assets apparently constituted "substantially all" of the GSC entities' assets. (*Id.*).

Article VI of the security agreement provides the collateral agent with remedies and methods to obtain the collateral on default, including withdrawing moneys from the GSC entities' accounts, accelerating the entities' notes, or selling, assigning or otherwise liquidating collateral. In section 6.2 of article VI, the entities waived notice and a judicial hearing in connection with the agent's acts in taking or disposing of the collateral. Section 6.5 provides that the moneys collected by the agent, upon the disposition of the exercise of its remedies under article VI, or any other moneys received under that article, must be applied and distributed to defendants pro rata. (*Id.*).

The agreement more specifically provides, in section 6.1, entitled Remedies; Obtaining the Collateral Upon Default, that:

> [i]f there shall have occurred and be continuing an Event of Default, then and in every such case, the Collateral Agent shall be entitled to exercise all of the rights, powers and remedies (whether vested in it by this Agreement, or any other Secured Debt Agreement or by law) for the protection and enforcement of its rights in respect of the Collateral, and the Collateral Agent shall be entitled to exercise all the rights and remedies of [defendants] under the [UCC] as in effect in any relevant jurisdiction and also shall be entitled, without limitation, to exercise the following rights . . ."
>
> [It] being understood that each [GSC entity]'s obligation so [sic] to deliver the Collateral is of the essence of this Agreement and that, accordingly, upon application to a court of equity having jurisdiction, the Collateral Agent shall be entitled to a decree requiring specific performance by each [entity] of said obligation. By accepting the benefits hereof, [defendants] agree that this Agreement may be enforced only by the action of the Collateral Agent, in each case acting upon the instruction of the Required Banks (or, after the date on which all Credit Document Obligations have been paid in full, the holders of at least the majority of the outstanding Other Obligations) and that no other [defendant] shall have any right individually to seek to enforce or to enforce this Agreement or to realize upon the security to be granted hereby, it being understood that such rights and remedies may be exercised by the Collateral Agent or (after such date) the holders of at

> least a majority of the outstanding Other Obligations, as the case may be, for the benefit of the [defendants] upon the terms of this Agreement.

Article VI also contains an indemnity/hold harmless provision in section 7.1 which provides as follows:

> Each [GSC entity] . . . agrees to . . . indemnify, reimburse and hold the Collateral Agent, each [defendant] and their respective . . . employees [and] agents . . . ([defendants]) harmless from any and all liabilities, obligations, damages, injuries, penalties, claims, demands, actions, suits, judgments and any and all costs, expenses or disbursements (including attorneys' fees and expenses) . . . (expenses) of whatever kind and nature imposed on, asserted against or incurred by any of the [defendants] in any way relating to or arising out of this Agreement, . . . any other Credit Document, or any other document executed in connection herewith or therewith or in any way connected with the administration of the transactions contemplated hereby or thereby or the enforcement of any of the terms of, or in the preservation of any rights under any thereof, or in any way relating to or arising out of the ownership, purchase, delivery, control, acceptance, possession, condition, sale, return or other disposition, use of the Collaterals, the violation by any [entity] of the laws of any country, state or governmental body or unit, any tort by any [entity], or any contract claims against any [entity], in each case relating in any way to the Collateral; provided that the [entities] shall not be required to pay for the legal fees and expenses of more than one outside counsel for all [defendants] under this clause . . . unless so expressly provided in an applicable Credit Document or, if, in the written opinion of outside counsel reasonably satisfactory to the [entity], representation of all such [defendants] would be inappropriate due to the existence of an actual or potential conflict of interest, and provided, further, that no [defendant] . . . shall be indemnified pursuant to this Section 7.1 (a) for losses, damages or liabilities to the extent caused by bad faith, gross negligence or willful misconduct of any such [defendant]. . . . Each [entity] agrees that upon written notice by any [defendant] of the assertions of such a liability, obligation, damage, injury, penalty, claim, demand, action, suit or judgment, the relevant [entity] shall assume full responsibility for the defense thereof. Each [defendant] agrees to use its best efforts to promptly notify the relevant [entity] of any such assertion of which such [defendant] has knowledge.

(*Id.*).

B. Bankruptcy and plan for auction

After the 2009 default and August 2010 bankruptcy filing in the United States Bankruptcy Court, Southern District, New York, the GSC entities unsuccessfully attempted a

business reorganization. In 2012, the Trust, created under a later plan of reorganization, was confirmed by the bankruptcy court, and includes as beneficiaries the unsecured creditors of the GSC entities. The Trust is successor to the GSC entities' interests.

When the GSC entities filed for bankruptcy, defendants were minority lenders. The majority lender was nonparty Black Diamond Capital Management, with 48 percent of the loan interests. Black Diamond is a defendant in a separate action before me, *Credit Agricole Corporate and Investment Bank New York Branch v BDC Finance, LLC* (Sup, Ct NY County, Index No. 651989/10).

As the GSC entities' bankruptcy reorganization attempts were unsuccessful, an auction of their assets was planned for October 2010, and in September 2010, the entities filed a motion in the bankruptcy court seeking authorization to implement auction bidding procedures that had been negotiated by the entities and the collateral agent.

On September 14, 2010, defendants objected to the sale of the collateral, and asked the bankruptcy court to delay the sale and revise the bidding procedures. The parties engaged in discovery related to defendants' objection, but they ultimately resolved the objections without judicial intervention. The final bidding procedures were confirmed by the court on September 23, 2010.

C. The auction and the October 2010 letter

The three-day auction began on October 26, 2010. A financial advisor hired by the GSC entities in preparation for the auction, having determined that a joint bid by Black Diamond and the collateral agent would increase the GSC entities' estate, approached defendants to obtain their consent to joint bidding, explaining that the risk of such a bid was the allocation of a greater

percentage of assets to Black Diamond as a cash bidder, and a lesser percentage of assets to the agent in exchange for its credit bid, permitting the taking of collateral in exchange for a release of the debt up to the amount of the bid. The advisor also promised that the bidding procedures would not change absent defendants' consent.

On October 27, 2010, defendants' representative executed a letter agreement, whereby defendants confirmed their consent to modifying the bidding procedures to include joint bidding, including a joint bid by Black Diamond and the collateral agent. The letter, addressed to defendants, reflects not only their consent, but that the GSC entities had been approached by a number of bidders asking for permission to bid on lots for which they did not originally bid, and that Black Diamond and the collateral agent had sought permission to submit a joint bulk bid. The letter also contains details of how defendants' consent was obtained. After asking for defendants' view on the modification, the letter recites that defendants were asked:

> specifically including whether to permit [Black Diamond] and the [Collateral] Agent to submit a joint bulk bid for substantially all of [the GSC entities'] assets [and that defendants] have advised the [entities] that you question the propriety of the Agent joining in a joint bid with [Black Diamond] and that such joinder and other action taken by the [Collateral] Agent in the course of the auction constitute an improper use by the Agent of the credit bid to further the interests of [Black Diamond] as bidder to the detriment of [defendants] in disregard for the Agents's obligations to use the credit bid solely to protect the interests of [defendants] in the [C]ollateral.

(NYSCEF 58).

The letter also provides that the GSC entities had advised defendants that they would not agree to the joint bidding modifications unless defendants consented to a joint bid by the collateral agent and Black Diamond, and that

"[y]ou [defendants] have advised us that, based on the foregoing, you consent to

> the modification of the bidding procedures referenced herein (including a joint bid by the Agent and [Black Diamond]. We note, however, that you reserve all claims and causes of action that you may have against the [Collateral] Agent and [Black Diamond] for the improper use by the Collateral Agent of the credit bid to the detriment of the [defendants] and that your consent to the modifications referenced herein should not be construed as a waiver of any such claims or cause of action.

(*Id.*).

On October 29, 2010, the GSC entities determined that the joint Black Diamond/ collateral agent bid was the winning bid as it provided the greatest value to their estates.

D. Post-auction events

The day of the auction and 12 hours after it ended, defendants filed an emergency motion in the bankruptcy court for an order nullifying certain aspects of the winning bid. The motion was denied a day later by the bankruptcy court.

On November 13, 2010, defendants commenced the aforementioned suit against Black Diamond. On November 23, 2010 and December 2, 2010, in the bankruptcy court, defendants filed objections to the allocation of assets pursuant to the joint bid and conducted discovery in connection with the motions, allegedly requiring the GSC entities to incur significant expenses, and delaying the hearing on the motion to confirm the sale of the collateral.

On December 20, 2010, defendants filed a motion for the appointment of a chapter 11 trustee, which was granted, and the bankruptcy court appointed a chapter 11 trustee, the predecessor to plaintiff, whose fees and those of his legal counsel were paid from the GSC entities' estates. The trustee conducted an independent review of the joint bid and auction and ultimately concluded that a sale to Black Diamond, based on the joint bid, had been the best offer and in the best interest of the GSC entities' estates.

On April 25, 2011, defendants filed their own plan of reorganization. The bankruptcy trustee objected to the plan, asserting that it merely resurrected the bid that defendants had favored, and that in any event, it was part of the intercreditor dispute that should not be charged to the GSC entities' estates.

On June 8, 2011, the trustee announced his intention to consummate two agreements for the sale of the collateral. Defendants objected to the proposed sale, arguing against its approval by the bankruptcy court; after discovery and an evidentiary hearing, the court granted the trustee's motion concluding the sale transaction, and denied defendants' motion to confirm their plan.

On February 17, 2012, the bankruptcy court confirmed a final plan for reorganization for the assets that had not been sold in 2011, including the formation of the Trust for the purpose of collecting on those assets and claims. By order dated December 18, 2013, plaintiff was appointed as successor trustee.

E. Plaintiff's claims

In the first cause of action, plaintiff alleges that defendants' conduct violated the security agreement by impermissibly attempting to enforce it and realize on the loan collateral. In the second cause of action, based on the letter, plaintiff alleges that defendants breached the covenant of good faith and fair dealing implied within the security agreement. Plaintiff contends that defendants' campaign against Black Diamond in the bankruptcy court constituted a breach of both the security agreement and the letter, causing millions of dollars of damages to the GSC entities and their estates in the form of costs and expenses to administer the bankruptcy, including their attorney fees, and the fees of the appointed trustee.

II. DISCUSSION

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]).

However, when the court considers evidentiary material submitted by the parties, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one," and the motion should be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.* 115 AD3d 128, 145-146 [1st Dept 2014]).

It is well-settled that the construction of an unambiguous contract is a matter of law for the court and that the parties' intention is to be divined from its four corners. The court's construction of the contract should give "full meaning and effect to the material provisions [and] should not render any portion meaningless." It "should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose." (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-325 [2007] [internal quotation marks and citation omitted]).

In determining the parties' intent as to a particular section, a court should "consider the

entirety of the agreement in the context of the parties' relationship and circumstances," so that provisions are not read in isolation. (*Matter of Riconda*, 90 NY2d 733, 738 [1997]). "[T]he aim is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations." (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977] [internal quotation marks and citation omitted]).

A. Breach of the security agreement (first cause of action)

In seeking dismissal of the first cause of action, defendants argue that their liability is precluded by: (1) the agreement's indemnity/hold harmless provision; (2) plaintiff's defaults on the loan and failure to allege that she had met her own contractual obligations under the agreement; (3) section 6.1, which may only be used defensively; and (4) the fact that their alleged conduct in the bankruptcy proceeding did not violate section 6.1.

1. Section 7.1

Defendants argue that the indemnity/hold harmless provision precludes plaintiff from holding them liable here absent any evidence of bad faith, gross negligence, or willful misconduct, and assert that plaintiff admits that their conduct in connection with the bankruptcy court proceeding was intended to maximize their legitimate economic interests, which does not constitute bad faith.

In opposition, plaintiff argues that the section, read as a whole with its written notice requirement, pertains only to claims made against "secured creditors" by third parties outside of the agreement and does not prohibit claims made between the parties, characterizing as absurd a reading that would result in her being required to indemnify defendants' defense of the claims that she asserts against them.

While contracting parties may agree that one party would hold the other harmless and/or indemnify the other for a particular loss or damage and attorney fees, such a provision "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). In the absence of contractual or statutory liability, attorneys fees and expenses incurred in litigating a claim are not recoverable, and a prevailing party ordinarily cannot recover its attorney fees from its unsuccessful opponent, except when the party has incurred attorney fees in an action against a third party where the action arose due to the wrongful act of the current opponent. However, the exception does not apply when the alleged third-party wrongdoer is same as the current opponent. (*Hunt v Sharp*, 85 NY2d 883 [1995]). Given the general rule that parties are responsible for their own attorney fees, any intention to waive the benefit of that rule must be "unmistakably clear." (*Hooper*, 74 NY2d at 491).

At issue in *Hooper* was whether the plaintiff, who had successfully sued the defendant in an action for breach of the contract between them, was entitled to recover attorney fees incurred in prosecuting the action pursuant an indemnity clause in the contract, whereby the defendant agreed to indemnify the plaintiff for reasonable attorney fees. As the clause contemplated the plaintiff's reimbursement by the defendant for damages owed on a third-party claim, and as the subjects covered by the clause were not "exclusively or unequivocably referable to claims between the parties themselves," and did not "support an inference that defendant promised to indemnify plaintiff for counsel fees in an action on the contract," the Court held that the clause contained no clear indication that the plaintiff may recover from the defendant attorney's fees incurred in a suit against the defendant. The Court also observed that other provisions requiring

that the plaintiff notify the defendant promptly of any claims against it and that the defendant assume the plaintiff's defense of any such claims also unmistakably related to third-party claims. Consequently, the Court held that the plaintiff was not entitled to recover attorney fees incurred in prosecuting the breach of contract action. (74 NY2d at 492-3).

Here, section 7.1 requires plaintiff to hold defendants harmless for any liabilities or damages, including costs or expenses, asserted against them relating to or arising from the security agreement or from the sale or other disposition of the collateral. Undisputably, and as with most indemnity provisions, including the one in *Hooper*, section 7.1 encompasses third-party claims asserted against defendants; nothing in it clearly encompasses damages incurred by plaintiff, such as those arising from defendant's alleged breach of the security agreement. Moreover, and again as in *Hooper*, the clause provides for notification and the undertaking of a defense against claims, thereby warranting the inference that it was intended to require that plaintiff indemnify defendants for all claims relating to the agreement and to pay damages caused by defendants in breaching the agreement, without excluding those damages incurred by plaintiff against defendants. In other words, in the event that defendants cause any damages in breaching the agreement, defendants are insulated from liability.

And, as plaintiff sues to recover attorney fees, and related costs and expenses, from defendants, given the general rule against liability for such fees, and absent any indication that the parties intended it, the provision does not clearly permit plaintiff to recover from defendants attorney fees incurred in a suit against them. (*Compare Parkway Pediatric and Adolescent Med. LLC v Vitullo*, 72 AD3d 1513 [4th Dept 2010] [plaintiff not required to pay defendant's legal fees in lawsuit filed by plaintiff against defendant for breach of parties' agreement, as indemnification

clause did not refer to litigation between parties and thus did not make it unmistakably clear that parties intended that plaintiff pay defendant's fees in litigation], *with G2 FMV, LLC v Thomas*, 135 AD3d 421 [1st Dept 2016] [LLC required to pay LLC member's legal fees in lawsuit between them as indemnification agreement applied expressly to any claim or action, whether brought by third party or member of LLC]).

Moreover, in agreeing to indemnify and hold defendants harmless, plaintiff essentially waived the right to seek damages from defendants, and in any event, she neither alleges nor demonstrates that defendants engaged in conduct evincing bad faith, gross negligence, or willful misconduct.

For all of these reasons, defendants have shown that plaintiff's claim for damages related to their alleged breach of the security agreement finds no support in the indemnification provision, which does not permit plaintiff to recover the damages sought herein from defendants.

2. Section 6.1

Defendants deny that section 6.1 of the security agreement constitutes a covenant not to take legal action or that they expressly promised to forego taking legal action in bankruptcy court. Rather, they characterize section 6.1 as an acknowledgment of the collateral agent's rights, and their own lack of certain rights as individual minority lenders, to take possession of collateral securing the loan. They maintain that the provision was intended by the parties to be used defensively only, and deny having breached the provision by filing motions and objections in bankruptcy court.

In opposition, plaintiff argues that section 6.1 is a central component of "the unitary enforcement scheme" agreed upon for the disposition of the collateral in the event of a loan

default, and that it is tantamount to a "no action" provision and a promise not to sue or take other legal action. She relies on cases in which bankruptcy courts have dismissed proceedings initiated by parties that, like here, delegated to an agent the power to enforce agreements, or entered into no action or standstill agreements, and maintains that section 6.1 affords the GSC entities the contractual benefit of dealing with only the collateral agent on behalf of the multitude of lenders.

While similar clauses in intercreditor agreements have been successfully used to thwart certain creditor's claims, the issue of whether the GSC entities would have prevailed in using the provision as a shield in the bankruptcy court to thwart defendants' attacks, in aid of the collective enforcement scheme, need not be addressed. Rather, the issue here is whether the parties intended that the GSC entities use section 6.1 as a sword to recover from defendants damages for breaching it. Narrowly construing the provision on which plaintiff relies, and viewing the provision in light of the purpose of the entire agreement and article VI, and the parties' relationship, the clause is fairly construed as an acknowledgment that it was intended to support enforcement of the collective enforcement scheme, and ultimately, to effect and support the intended pro rata distribution scheme, not as a waiver of the right to sue or a covenant not to sue.

However, even if the provision constitutes a waiver of defendants' independent right to sue or assert objections in the bankruptcy court, a determination that the provision thereby entitles the GSC entities or trustee to damages for its breach is neither practical nor reasonable. Had this been the parties' intent, especially given its drafting, the intention should have been expressed.

Directly on point is *Collins v Aikman Prods. Co. v Sermatech Engineering Group, Inc.*, where the a seller sued a buyer for breach of contract based on allegations that in the contract, the

buyer had waived its right to sue the seller, but had nonetheless commenced lawsuits against it. (297 AD2d 248 [1st Dept 2002]). The Court held that the waiver of the right to sue was defensive in nature and not the equivalent of an express covenant not to sue, and did not support a claim for damages. The Court also observed that the waiver was framed in the negative and did not appear in the covenants section of the agreement. The plaintiff's claim for breach of contract based on the waiver to sue was thus dismissed. (*Id.* at 249-250).

In *Ion Media Networks*, a second lien debt holder, subject to an intercreditor agreement, had "agreed to remain silent in the event of a chapter 11 case." The Court held that the lienholder had no standing under the agreement, and might be liable for breaching the agreement by suing on the agreement. (419 BR 585, 597 [SD NY 2009]). There, however, the lienholder had engaged in obstructionist behavior, and in any event, the case does not bind me.

Given this result, I need not determine: (1) whether or not plaintiff has adequately pleaded facts demonstrating its performance under the security agreement; or (2) whether the particular actions defendants took in bankruptcy court come within the language of section 6.1.

B. Breach of the implied covenant of good faith and fair dealing (second cause of action)

A covenant of good faith and fair dealing is implicit in every contract, and encompasses promises that a reasonable promisee would understand are included as part of an agreement. (*See New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). The implied covenant is "a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." It is not limitless, and no obligation may be implied that "would be inconsistent with other terms of the contractual relationship." (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] [internal quotation marks and

citation omitted]). Whether a party has breached the implied covenant of good faith and fair dealing is generally a fact issue. (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]).

Defendants argue that: (1) the October 2010 letter does not contain an implied promise not to challenge the results of the auction in the bankruptcy court; (2) an implicit promise not to take legal action is unenforceable, and that the letter, as a waiver, may be used only defensively; (3) the letter does not prohibit them from doing anything, including challenging the auction in court, and does not imply a promise not to take action in the bankruptcy court; (4) the implied covenant may only be used in furtherance of other terms in the agreement, and does not add new terms to a commercial contract between represented sophisticated parties; and (5) the indemnity/ hold harmless provision of the security agreement also constitutes a defense to plaintiff's claim related to the letter.

Defendants contend that even if their consent to modify the bidding procedures implies a promise not to take legal action, the scope of the prohibition would have been limited to the validity of the modifications to the bidding procedures. They deny that they contested the modifications in bankruptcy court or the concept of the joint bid, and argue that they contested the actual terms of the joint bid, which, they argued, gave rise to cause to disqualify the bid under Bankruptcy Code (11 USC) § 363(k), and would result in Black Diamond acquiring valuable assets for an inappropriately low price.

Plaintiff alleges that both parties to the October 2010 letter understood that it was intended to benefit the GSC entities' estates by: (1) securing defendants' consent to bidding procedures that were designed to produce the most value for those estates; (2) legitimizing the

results of an auction conducted with those bidding procedures; and (3) insulating the GSC entities from intercreditor disputes about the auction, and that defendants reasonably understood that, by signing the letter, they had agreed to refrain from contesting the results of the auction and promised to pursue any legal claims against Black Diamond outside of the bankruptcy court.

Plaintiff also contends that defendants ignore allegations in the complaint and agreement that supports her claim as to the implied promises. She argues that the letter clarifies defendants' consent to the modifications and preserves their right to assert claims against Black Diamond and the collateral agent, and from this it is reasonably implied that defendants would not object to the sale.

Here, defendants' consent to the bidding modifications constitutes acquiescence, not an affirmative promise to act or refrain from acting, and it contains no waiver, much less a promise not to engage in activity or sue. The reservation of rights was for defendants' benefit, and is defensive, as such reservations are intended to prevent Black Diamond or the collateral agent from using the letter to demonstrate defendants' waiver of claims against them. The interpretation of the letter as reflecting an intention that it be used defensively comports with its emphasis on defendants' knowing consent to the modifications. Plaintiff's interpretation of the reservation of rights, as implying an affirmative promise in defendants' favor, is not supported by the letter. In any event, even if the letter constitutes defendants' waiver of the right to sue, it does not entitle plaintiff to damages for breach of the waiver. (*See Collins v Aikman Prods. Co. v Sermatech Engineering Group, Inc.*, 297 AD2d 248 [1st Dept 2002] [plaintiff's claim for breach of contract based on defendants' waiver to sue plaintiff dismissed as provision did not entitle plaintiff to damages for its breach]).

III. CONCLUSION

In light of the foregoing, it is

ORDERED, that the defendants' motion to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER:

BARBARA JAFFE, JSC

Dated: April 26, 2016
New York, New York