Delaware Complex Commercial Litigation Division Quarterly Update

Tuesday, February 21, 2023

In the last quarter of 2022, the Complex Commercial Litigation Division ("CCLD") remained busy, with the CCLD's four judges addressing issues stemming from contract cases, including LLC disputes. Judge Adams, who was recently appointed as a CCLD judge, also provided a helpful glimpse into how the CCLD prepares cases for trial in resolving several *Daubert* motions and pre-trial evidentiary motions in connection with an upcoming jury trial this year. Finally, the CCLD's already busy docket may become even busier, as the Delaware Court of Chancery recently wrestled with whether certain statutes that provide that cases "may" be brought in the Court of Chancery "grant[] the court discretion to decline jurisdiction over the categories of claims described in the statute where those claims do not otherwise implicate the court's subject matter." *Shareholder Representative Services, LLC v. DC Capital Partners Fund II, LP, et al.*, C.A. No. 2021-0465-KSJM, order (Del. Ch. Mar. 15, 2022) (certifying interlocutory appeal on whether 8 *Del. C.* § 111 vested the Court of Chancery with discretion to decline jurisdiction). Given the high case load, perhaps it is no surprise that the CCLD added a fifth judge, Judge Sheldon K. Rennie, effective January 1, 2023. For more information on the CCLD, please visit our website.

Judge Davis Denies Motion to Dismiss Breach of Contract Claims Stemming from LLC Dispute

In *Connorex-Lucinda, LLC v. Rex Res Holdings, LLC, et al.*, C.A. No. N22C-01-186 EMD CCLD, Judge Davis denied the defendants' motion to dismiss the plaintiff's breach of contract claims. The underlying dispute arose after Connorex-Lucinda, LLC and REX Res Holdings, LLC entered into an LLC agreement to create joint venture Rex Residential Venture, LLC ("Venture"). As part of the agreement, REX Holdings agreed to fund 98% of Venture's anticipated capital in exchange for the exclusive right to make business decisions on the company's behalf. Connorex, on the other hand, agreed to fund the remaining 2% and supervise Venture's day-to-day operations. After Venture sold all its assets for a sizable sum, Connorex sent a letter to Venture and REX Holdings requesting reimbursement for certain property-related expenses. Connorex alleged that Venture expended all its anticipated capital and that Connorex had to borrow money from its affiliates to cover Venture's expenses. Both Venture and REX Holdings refused to reimburse Connorex, and litigation ensued.

In seeking dismissal of Connorex's breach of contract claims, the defendants raised three primary arguments: (1) Connorex lacked standing, as it did not suffer an injury in fact; (2) Connorex failed to join its creditor affiliates, whom the defendants alleged were necessary and indispensable parties; and (3) Connorex's claims were barred under the Delaware Limited Liability Company Act and the parties' LLC agreement. The Court disagreed.

First, Judge Davis determined that Connorex had standing because Connorex's injury in fact was its newfound responsibility to repay its affiliates. Second, Judge Davis determined that joinder of Connorex's creditors was not required because the Court could grant complete relief against the

One Rodney Square ■ 920 North King Street ■ Wilmington, DE 19801 ■ Phone: 302-651-7700 ■ Fax: 302-651-7701

www.rlf.com

currently named parties. Finally, Judge Davis found that Connorex's breach of contract claims were well pled. After reading the plain language of the LLC Act, Judge Davis determined that the parties' LLC agreement controlled whether the defendants could be held liable for Connorex's debt. The Court found that, at such an early stage of the proceedings, Connorex's allegations of incurred expenses, if taken as true, would entitle Connorex to recover under the parties' agreement. Accordingly, the Court denied the defendants' motion.

Analysis: As the sister court to Delaware's Court of Chancery, the CCLD typically handles disputes arising under LLC agreements where money damages are the requested remedy. While parties had historically sought to manufacture Chancery jurisdiction over such disputes, the CCLD has seen an increase in such cases as the Court of Chancery confirms the limits on its jurisdiction.

Judge Adams Rules on Admissibility of Expert Testimony, Evidence, and Argument in Years-Long *Quantum Meruit* Damages Action as Case Proceeds to Trial

In *LCT Capital, LLC v. NGL Energy Partners LP and NGL Energy Holdings LLC*, C.A. No. N15C-08-109 MAA CCLD, plaintiff LCT Capital originally asserted claims for breach of contract, *quantum meruit*/unjust enrichment, and fraudulent misrepresentation against NGL arising out of NGL's failure to pay LTC for services performed in connection with its acquisition of a company called TransMontaigne. In the first trial in this case, the Superior Court dismissed the plaintiff's breach of contract claim. On appeal, the Supreme Court struck the jury verdict on fraud in favor of the plaintiff, leaving *quantum meruit* damages as the sole remaining issue for trial on remand.

As the case moved towards trial, Judge Adams was presented with two *Daubert* motions to exclude certain expert opinions and five motions *in limine* to exclude or admit various evidence, testimony, and arguments at trial.

Motion to Exclude Opinions and Testimony of Defendants' Rebuttal Expert, Lori A. Lancaster. In this motion, the plaintiff argued that Lancaster, the defendants' rebuttal expert, should be excluded from testifying because she exceeded her scope as a rebuttal expert, her opinion was unreliable, and she made an impermissible credibility determination of NGL's CEO Mike Krimbill. Judge Adams disagreed on all counts. First, the plaintiff argued that Lancaster exceeded her scope because her opinion rebutted the plaintiff's rebuttal expert, rehabilitated the defendants' affirmative expert, and presented new opinions and data. Judge Adams held that rebuttal evidence that also tends to corroborate a party's affirmative case does not need to be excluded, and that a rebuttal expert is permitted to use new methodologies for the purpose of rebutting or critiquing the opinions of the opposing expert. Next, the plaintiff argued that Lancaster's opinions were unreliable because she mainly considered free run data and focused less on the parties' fee negotiations and Krimbill's testimony from the first trial. Judge Adams ruled that Lancaster was not required to base her opinions on the negotiations or prior testimony and that experts on *quantum meruit* damages are "obligated to base their analysis on an objective valuation of the services provided by reference to data as well as their own specialized knowledge and experience in the field." Finally, Judge Adams ruled that while Lancaster disagreed with some of Krimbill's assertions, her opinion was not an impermissible credibility determination.

Defendants' Daubert Motion to Exclude the Opinions of Kevin D. McQuilkin. The defendants argued that McQuilkin's expert testimony should be excluded because he impermissibly engaged in *ipse dixit*, his opinions violated the law of the case, and he impermissibly relied on the previously rejected "value creation" theory of damages. While Judge Adams agreed that certain of McQuilkin's opinions amounted to *ipse dixit* ("he himself said it"), she denied the motion to exclude with regard to the opinions she did not consider *ipse dixit*. Judge Adams also agreed that, in violation of the law of the case and case law, certain portions of McQuillkin's opinions made reference to issues that should not factor into the sole issue of this action (*quantum meruit* damages) and should be excluded. Finally, Judge Adams concluded that McQuilkin should be precluded from testifying to his calculations of damages that are based on value creation theory because this methodology is contrary to the law of the case and applicable law.

Motion in Limine to Preclude Evidence or Argument Regarding Value Creation. The defendants argued that the plaintiff was not permitted to introduce evidence or testimony based on a value creation theory of *quantum meruit* damages. Judge Adams agreed, both because the Court already ruled that no expert would be allowed to testify to calculations of *quantum meruit* damages based on value created to the defendants by the transaction, and because Delaware case law holds that recovery under *quantum meruit* damages is the value of the services provided, not the value of the benefit received.

Plaintiff's Motion in Limine to Hold NGL to Judicial Admissions and Exclude Evidence Suggesting the Value of LCT's Services Was Less than $29 Million. At the first trial, the defendants' CEO, Krimbill, testified that $29 million was an accurate estimate of fair compensation for the plaintiff's work in connection with the TransMontaigne acquisition. In this motion *in limine*, the plaintiff argued that Krimbill's testimony was a judicial admission and therefore the asserted value of $29 million should be treated as the floor for *quantum meruit* damages. The plaintiff further argued that, due to this alleged judicial admission, the defendants should be precluded from submitting evidence or eliciting testimony that anything less than $29 million would be an appropriate measure of damages. Judge Adams disagreed, ruling that Krimbill's statements were expressions of his "beliefs and opinions," as opposed to "voluntary and knowing concessions of fact" as required for a judicial admission. Judge Adams also found that qualifying Krimbill's statements as judicial admissions would directly conflict with the Supreme Court's prior holding in this case, because "[i]f the Supreme Court intended to anchor the jury to a floor of $29 million," it would have ruled accordingly.

Plaintiff's Motion in Limine to Exclude Evidence of "Typical" Investment Banker Fees as Irrelevant to Quantum Meruit Damages. The plaintiff argued that evidence of a typical fee should be excluded because the parties never discussed typical investment banker fees during their negotiations of the plaintiff's compensation. Judge Adams disagreed. Pointing to the low evidentiary threshold for relevance and the potential relevance of expert testimony on typical investment banker fees, as well as the fact that case law does not require exclusion, Judge Adams ruled that evidence of a typical fee should not be excluded.

Defendants' Motion in Limine to Preclude Evidence or Argument Regarding Any Alleged Agreement Between the Parties. The defendants argued that all evidence and testimony concerning an alleged agreement or contract between the parties regarding compensation for the plaintiff's services in connection with the TransMontaigne acquisition should be precluded. Judge Adams agreed. Consistent with the first trial court's ruling that there was no contract, Judge Adams held that, absent a contract, there was no basis to submit evidence of compensation to which the parties allegedly agreed. But Judge Adams cautioned that this was not to be interpreted as barring the parties from submitting evidence or eliciting testimony of fee negotiations to the extent that they make no reference to value created by the transaction.

Defendants' Motion in Limine to Preclude Evidence or Argument Regarding Alleged Fraud and/or Fraudulent Statements. The defendants argued that, because the plaintiff's fraud claim failed and *quantum meruit* damages were the sole issue, any evidence or argument of fraud was not probative and should be precluded. Judge Adams agreed, holding that there was no evidentiary basis to submit evidence of fraud.

Analysis: This case highlights the evidentiary issues arising in a *quantum meruit* damages action. Unlike in the Court of Chancery, jury trials are common in the CCLD, and parties seeking a jury on damages issues frequently choose the CCLD over other alternatives. Accordingly, CCLD judges are frequently called upon to address motions *in limine* and other pre-trial motions to ensure that only the appropriate evidence comes before the jury.

Judge Davis Grants Motion for Judgment on the Pleadings and Enforces Limitation of Liability Clause

In *Gone GB LTD, et al. v. Intel Services Division, LLC, et al.*, C.A. No. N21C-05-198 EMD CCLD, plaintiffs Gone LTD and Ori Gersht asserted eight claims against Intel Services Division, LLC and Intel Corporation (jointly, "Intel") based on Intel's alleged wrongful termination of an agreement for the development of imaging technology and various related torts. Intel moved for partial judgment on the pleadings, and Judge Davis granted Intel's motion and entered judgment in Intel's favor on seven of eight counts against Intel. At the same time, Judge Davis enforced a limitation of liability clause in the applicable agreement.

The dispute arose out of an agreement between Intel and Gone LTD to create a virtual-reality based art piece utilizing Intel's volumetric imaging technology. The agreement became effective on June 1, 2019 and had a two-year expiration date. Under the agreement, Intel was to provide the services of Intel Studios, including its studio space, personnel, and use of its proprietary software. Mr. Gersht, an artist and partial owner of Gone, was to provide the creative direction for the project. In September 2020, however, Intel decided to close Intel Studios, in part due to the business impact of COVID. Shortly thereafter, Intel notified Mr. Gersht that the agreement was terminated.

In considering Intel's motion, the Court first found that a valid agreement existed between Gone and Intel. Accordingly, the Court dismissed a number of quasi-contractual claims brought by the plaintiffs. Specifically, the plaintiffs asserted claims based upon estoppel and promissory estoppel, *quantum meruit*, conversion, and unjust enrichment and restitution. In dismissing these claims, the Court emphasized that the agreement between the parties controlled, and the plaintiffs' claims were within the scope of the plaintiffs' existing contractual obligations.

For the remaining claims (breach of implied covenant of good faith and fair dealing, tortious interference with contract, and tortious interference with prospective economic relationships), the Court found that the plaintiffs failed to state valid claims upon which relief could be granted. With respect to the implied covenant of good faith and fair dealing claim, the Court found that the plaintiffs did not offer any evidence to show that Intel breached an implied contractual obligation owed to the plaintiffs beyond the terms of the agreement. With respect to the tortious interference claims, the Court found that the plaintiffs did not offer evidence of third-party contracts or actual prospective business opportunities for future contracts, and even if such contracts or opportunities existed, the plaintiffs failed to show that Intel *intentionally* interfered with those ventures.

Finally, the Court found that the limitation of liability clause in the agreement was enforceable. Although the plaintiffs argued that the clause was ambiguous, the Court found that the clause was clear on its face and limited any actual and direct damages arising from and out of the agreement to $50,000. The Court explained that if the parties intended to exclude the termination of the agreement from the $50,000 limitation, the parties would have agreed to such in the agreement.

Analysis: Since its inception, the CCLD has helped to flesh out the contours of Delaware contract law. This action reinforces the long-standing maxim that the contract itself is the best evidence of the parties' agreement, and the Court will enforce limitations of liability where agreed to by the parties.

Judge LeGrow Denies Motion to Dismiss Breach of Contract, Unjust Enrichment, and Promissory Estoppel Claims

In *Parma VTA LLC v. Parma GE 7400, LLC*, C.A. No. N22C-03-092 AML CCLD, Judge LeGrow denied a motion by defendant Parma GE 7400, LLC to dismiss claims of breach of contract, unjust enrichment, and promissory estoppel asserted by plaintiff Parma VTA LLC in its amended complaint.

In this case, the parties executed a tenants in common agreement (the "TIC Agreement") to govern their joint ownership of commercial property in Ohio (the "Property"). The TIC Agreement set out the parties' respective ownership interests in the Property. It also provided that the plaintiff would serve as property manager, who could pay all Property expenses and be reimbursed for all amounts advanced on the defendant's behalf. When the parties acquired the Property, they assumed a mortgage loan from the previous owner in proportion to their respective interests. When the loan came due, the plaintiff refinanced it with Ladder Capital Finance, which prevented foreclosure and loss of the Property. The refinancing resulted in a second mortgage to satisfy the original mortgage (the "Ladder Mortgage Loan"). In connection with that loan, the plaintiff retained counsel and a certified public accountant. The plaintiff then issued cash calls to itself and the defendant to cover the costs. The defendant did not pay its share, so the plaintiff paid the expenses in full.

Thereafter, the plaintiff sued to recover all amounts advanced on behalf of the defendant in connection with the Ladder Mortgage Loan. The plaintiff's amended complaint alleged breach of the TIC Agreement and, in the alternative, unjust enrichment and promissory estoppel. The defendant moved to dismiss all three claims.

On the breach of contract claim, the defendant argued that (1) Ohio law required a plaintiff to have performed under the agreement at issue, and the plaintiff failed to do so because it did not obtain the defendant's approval to mortgage the Property as required by the TIC Agreement; (2) the defendant's acknowledgement of its obligation to pay its portion of the Ladder Mortgage Loan was an unenforceable gratuitous promise; and (3) the plaintiff's reliance on the acknowledgement did not satisfy Ohio's statute of frauds. The Court rejected each of these arguments. Regarding the defendant's non-performance argument, the Court explained that the plaintiff did not need the defendant's approval because it was seeking not to enforce the mortgage but to recover funds expended to keep the mortgage from foreclosure. As for the defendant's gratuitous-promise argument, the Court noted that the plaintiff had alleged that the defendant acknowledged its obligation to pay under the Ladder Mortgage Loan in exchange for dismissal of the plaintiff's arbitration proceedings and to moot the plaintiff's argument in the Ohio Court of Appeals.

On the unjust enrichment and the promissory estoppel claims, the defendant argued that these claims should be dismissed because the TIC Agreement governed the parties' relationship. The Court disagreed, noting that the plaintiff had expressly pled these claims in the alternative. The plaintiff pled its unjust enrichment claim in case the Court were to find the TIC Agreement unenforceable against the defendant regarding the Ladder Mortgage Loan. And the plaintiff pled its promissory estoppel claim in case the Court were to find that the defendant was not obligated to pay the cash calls under the TIC Agreement.

Accordingly, the Court denied the defendant's motion to dismiss in its entirety.

Analysis: This case highlights the type of cases the CCLD commonly handles. Indeed, CCLD cases often involve a contract claim accompanied by quasi-contractual claims pled in the alternative. Given the liberal pleading standard, such claims routinely survive motions to dismiss when the quasi-contract claims are expressly pled in the alternative.