

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ACF LEASING, LLC; ACF SERVICES,
LLC; and GENERATION CLEAN
FUELS, LLC,

Plaintiffs,

v.

GREEN BAY RENEWABLE ENERGY,
LLC; ONEIDA SEVEN GENERATIONS
CORPORATION; and THE ONEIDA
TRIBE OF INDIANS OF WISCONSIN,

Defendants.

Case No. 2014 L 2768

**GREEN BAY RENEWABLE ENERGY, LLC'S REPLY
IN SUPPORT OF ITS MOTION TO DISMISS COUNTS I, III, & V
OF PLAINTIFFS' COMPLAINT**

INTRODUCTION

Plaintiffs' Response to Green Bay Renewable Energy LLC's ("GBRE") Motion to Dismiss, like Plaintiffs' Complaint, glosses over the fundamental fact that any obligations GBRE had to the Plaintiffs were conditional. The condition precedent was expressly outlined in Exhibit A to the Complaint, the Master Lease ("Master Lease"), and the condition was not met. Plaintiffs go to great lengths to contort an interpretation of the condition favorable to their claims, but the plain language of the express condition is unequivocal. And to the extent that Plaintiffs' allegations as pled contradict the Master Lease, the Exhibit must control. The language of the condition precedent—signed off on by the Plaintiffs—demonstrates that GBRE has no enforceable obligations to Plaintiffs, either contractual or equitable. The Court should grant GBRE's Motion to Dismiss Counts I, III and V of the Complaint.

ARGUMENT

I. Count I Fails to State a Valid Claim for Breach of Contract Because the Condition Precedent Was Not Met.

Plaintiffs claim that GBRE's motion to dismiss Count I must fail because GBRE has erroneously interpreted the Master Lease and the condition precedent language included therein. (Pls.' Resp. Br. 5.) In fact, the plain language of the contingency is clear: "the Agreement shall not become effective until such time as **Lessee has notified Lessor, in writing**, that Lessee has entered into financing arrangements with Wisconsin Bank & Trust Company . . . on such terms and conditions as are reasonable [sic] acceptable to Lessee." (See Compl., Ex. A, ¶ 1, hereinafter "Master Lease.") (emphasis added). Nowhere in Plaintiffs' Complaint do they allege facts that would establish that contingency was met. Even though the parties formed and executed a contract, an express condition precedent like the one in the Master Lease still must be met before the contract is enforceable. *Carollo v. Irwin*, 2011 IL App (1st) 102765, 959 N.E.2d 77. GBRE does not argue that the failure of the condition precedent prevented the formation of a valid contract; rather, the contract is not enforceable against GBRE in light of the unfulfilled condition.

As a threshold matter, GBRE in its motion has properly cited to facts alleged in the Complaint and has not, as Plaintiffs allege, created facts "out of whole cloth." (Pls.' Resp. Br. 4.) While Plaintiffs allege that GBRE has drawn "unreasonable inferences in its favor with respect to facts pled," they give only one purported example: GBRE's statement that the parties negotiated terms of the prospective lease "contingent on the ability of GBRE to secure and finalize financing for the project." (*Id.*) GBRE's statement, however, is supported by the contingency described in paragraph 1 of the

Master Lease, as well as the financing described in Schedule 1 of the Master Lease. While Plaintiffs may not make any specific allegation about the condition precedent in their Complaint, the exhibits to the Complaint become part of the factual allegations. If the "written instrument upon which a claim or defense is founded" is attached to the pleading as an exhibit, "it constitutes part of the pleading for purposes of ruling on motions relating to the pleadings . . ." *Bajwa v. Metro. Life Ins. Co.*, 208 Ill. 2d 414, 431, 804 N.E.2d 519, 281 Ill. Dec. 554 (2004). And when an exhibit to a complaint conflicts with the averments in the complaint, the exhibit controls. *Id.* GBRE's motion is based on the controlling language of the Complaint's exhibits, including the Master Lease, which are treated as part of the Complaint.

In their Response Brief, Plaintiffs contend that the only contingency necessary to trigger the effectiveness of the Master Lease was for GBRE to enter into "financing arrangements" with Wisconsin Bank & Trust, and that Plaintiffs have alleged as much in their Complaint. (Pls.' Resp. Br. 5.) Both contentions are erroneous.

The contingency language of paragraph 1 of the Master Lease is not limited to GBRE entering into "financing arrangements." The condition actually contains *three* elements, and is met only when 1) "[GBRE] has notified [Plaintiff ACF Leasing], in writing" that 2) GBRE has entered into financing arrangements with Wisconsin Bank & Trust Company on 3) "such terms and conditions as are reasonable [sic] acceptable" to GBRE. (Compl. Ex. A ¶ 1.) Plaintiffs have not alleged that GBRE ever delivered such a written notification to Plaintiffs, nor have Plaintiffs attached any such communication as an exhibit to the Complaint. Further, Plaintiffs have not alleged that GBRE ever represented to Plaintiffs—or anyone, for that matter—that it had entered into financing

arrangements with Wisconsin Bank & Trust Company that were reasonably acceptable to GBRE.

Plaintiffs' bare-boned allegation that Wisconsin Bank & Trust "committed to providing GBRE with the financing for the Project" is insufficient to meet the express language of the financing condition. Plaintiffs do not allege in what manner this commitment was communicated to GBRE or how it was in turn communicated to the Plaintiffs, but they are nonetheless satisfied that because at least one dictionary definition of "arrangements" is an "informal agreement," that such informality is what the parties intended in the Master Lease. (Pls.' Resp. Br. 5-6.) The specific language of paragraph 1—providing for notification "in writing," and "terms and conditions as are . . . acceptable"—dictates otherwise. (Compl. Ex. A at ¶ 1.)¹ Even accepting Plaintiffs' interpretation of the phrase "financing arrangements" as accurate, Plaintiffs' allegations ignore the other elements of the condition and are thus *still* insufficient to establish that the condition was fulfilled and the Master Lease was effective.

While the contingency does not prevent the formation of the Master Lease, it is a condition precedent to GBRE's obligation to perform under the lease. Because Plaintiffs have failed to plead sufficient facts to show that the contingency was fulfilled, Plaintiffs have not established any enforceable obligation on the part of GBRE to support a breach of contract claim.

¹ Plaintiffs seem to contend that any informal conditional commitment by the lender was sufficient to trigger the effectiveness of the Master Lease, yet Plaintiffs also tacitly recognize the significance of the complete contingency language, as they point out on two occasions in their response brief that the wording was inserted into the Master Lease by GBRE's attorneys. (Pls.' Resp. Br. 2, 5.)

For the reasons stated above and in GBRE's original brief, Count I of Plaintiffs' complaint fails to state a claim for breach of contract against GBRE and must be dismissed.

II. Plaintiffs Have Not Plead Valid Alternative Claims for Promissory Estoppel and Unjust Enrichment

Acknowledging that the existence of a valid contract would preclude their equitable claims, Plaintiffs assert that their claims for promissory estoppel and unjust enrichment must survive at least until "GBRE admits, or the Court finds, that there is an enforceable contract between the parties." (Pls.' Resp. Br. 8, 9.) But Plaintiffs misconstrue GBRE's motion—GBRE does not "deny the existence" of the Master Lease, only its enforceability against GBRE for breach of contract, in light of the failed condition precedent. By Plaintiffs' logic, any failure of a condition precedent in a negotiated agreement would give rise to equitable claims based on the same promise or performance described in the agreement. Plaintiffs' claim for promissory estoppel is explicitly based on "GBRE's contractual promises" (Compl. ¶ 56) and their claim for unjust enrichment is based on Plaintiffs' sharing of the "specifics of the Project." (*Id.* ¶ 65.) In short, Plaintiffs' equitable claims are based entirely on actions taken in furtherance of the Master Lease agreement. Having negotiated an agreement which contained an express condition precedent, Plaintiffs' now assert equitable claims as a means of enforcing the contract despite the failure of the condition. Plaintiffs' attempt to bootstrap equitable claims to an unrealized contract runs counter to the underlying purpose of those claims to promote equity.

Promissory estoppel is the "appropriate form of redress" in circumstances "where refusal to enforce a party's promise would be unjust in light of the promisee's detrimental

reliance." *Prentice v. UDC Advisory Servs., Inc.*, 271 Ill. App. 3d 505, 513, 648 N.E.2d 146, 207 Ill. Dec. 690 (1995). Such detrimental reliance must be reasonable and foreseeable. *See Levitt Homes Inc. v. Old Farm Homeowner's Ass'n*, 111 Ill. App. 3d 300, 315, 444 N.E.2d 194, 67 Ill. Dec. 155 (1982). But in this case the Plaintiffs deliberately entered into an agreement (the Master Lease) with an express condition precedent—a conditional promise by GBRE and not a definite, unambiguous promise sufficient to induce reasonable reliance. *See In re Midway Airlines, Inc.*, 180 B.R. 851, 944 (Bankr. N.D. Ill. 1995) ("Where the defendant's promise is conditional, the plaintiff's reliance is not reasonable . . .") In their response brief, Plaintiffs claim that they have pled "GBRE promised that it would do everything reasonably necessary to lease three liquefaction machines" (Pls.' Resp. Br. 9), but ignore that they actually pled reliance on "contractual promises." (Compl. ¶ 56.) In light of the express condition precedent accompanying those contractual promises, Plaintiffs have failed to plead reasonable reliance and Count III should be dismissed.

The same deficiencies are found in Plaintiffs' claim for unjust enrichment. A cause of action for unjust enrichment "must allege the defendant unjustly retained a benefit to the plaintiff's detriment" in violation of "the fundamental principles of justice, equity, and good conscience." *Galvan v. Nw. Mem'l Hosp.*, 382 Ill. App. 3d 259, 271, 888 N.E.2d 529, 321 Ill. Dec. 10 (2008). Plaintiffs do not allege any facts that would establish it was unjust for GBRE to retain the information shared with it by Plaintiffs in presentation of the Project. As noted in GBRE's initial brief, the express condition precedent in the Master Lease demonstrates that the parties contemplated the Project might not move forward, yet this possibility apparently did not deter Plaintiffs from

sharing the alleged "proprietary" information in their "oral and written presentations regarding the project to GBRE." (Compl. ¶ 66.) Plaintiffs have not pled any allegations that would establish that GBRE's retention of information under circumstances contemplated in the Master Lease, and of which Plaintiffs were aware, was somehow inequitable. Plaintiffs have failed to establish that any retention of benefit was unjust, and therefore Count V should be dismissed.

CONCLUSION

WHEREFORE, for the reasons outlined in GBRE's original brief and in the foregoing reply, defendant GBRE respectfully requests that this Court grant its motion to dismiss Counts I, III, and V of the Complaint in this action because the Counts fail to state claims upon which relief may be granted.

Dated this 21st day of August, 2014.

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