STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

B.S.D. CAPITAL, LLC, and
BSD CAPITAL II, LLC,
Plaintiffs,

v.

Case No. 18-168128-CB
Hon. James M. Alexander

RAPID CAPITAL FINANCE, LLC, ET AL,
Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiffs' motion for partial summary disposition as to Count I – breach of contract against Defendant Rapid Capital Finance, LLC (Rapid).

According to the Complaint, non-party BEH and Rapid entered into a Master Participation Agreement (MPA) whereby Rapid would sell, and BEH would purchase an interest in Merchant Advances made by Rapid. On October 23, 2015, the MPA was amended to substitute B.S.D. Capital (BSD I) for BEH (First Amendment). The Participation Agreement was further amended on December 11, 2015, adding B.S.D Capital II (BSD II) as a party (Second Amendment).

Plaintiffs allege that the First Amendment to the MPA provided Plaintiffs with the opportunity to invest in "Vintage Pool(s), which was "a pool of receivables consisting of the Participants Investment made under the Agreement." Further, the First Amendment provided that if the returns of the financed amounts did not equal an internal rate of return (IRR) of 18%, Plaintiffs were entitled to have the IRR refunded by Rapid – a "make-whole obligation."

Although not explicitly included in the make-whole obligation, Plaintiffs contend that the calculation is based on their entire participation interest, including commissions.

Plaintiffs allege that BSD I has funded approximately $54,702,566.10 with Vintage Pools and is currently owed $270,500 under the make-whole obligation. Plaintiffs calculate BSD I's remaining Vintage Pools make-whole payments to be $2,737,800. Plaintiffs further claim that BSD II funded approximately $1,640,205.00 with the first Vintage Pool and is owed $240,765 under the make-whole obligation. Plaintiffs calculate BSD II's remaining Vintage Pools make-whole payments to be $1,712,910.

Plaintiffs claim that Rapid has explicitly advised both BSD I and BSD II that no make-whole payments will be made. Further, Plaintiffs contend that Rapid has failed to provide adequate assurances that payments can and will be made when due. Plaintiffs claim that collectively, 4,691,975 is due and owing under Rapid's make-whole obligation.

On these general allegations, Plaintiffs filed the current case on claims titled (Count I) breach of contract, (Count II) violations of Michigan's Uniform Voidable Transactions Act, (Count III) tortious interference with an existing contract, and (Count IV) civil conspiracy.

As stated, Plaintiffs now move for partial summary disposition under MCR 2.116(C)(10). A (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).[1] Specifically, Plaintiffs seek judgment on their breach of contract claim against Defendant Rapid.

The crux of Plaintiffs' argument is whether commissions are included in the calculation of Rapid's make-whole obligation. Plaintiffs argue that the clear and unequivocal terms of

[1] In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden, 461 Mich* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

section 4.7 of the MPA, and multiple admissions from Rapid, establish that make-whole payment with commissions are due and owing to Plaintiffs, and Rapid has failed to honor the same.

In support of their motion, Plaintiffs attach (in relevant part): (1) the MPA; (2) Rapid/MetMC participation agreement; (3) the affidavit of Craig Hecker (CEO of Rapid); (4) various emails; (5) the First Amendment; (6) the Second Amendment; (7) Rapid reports evidencing Plaintiffs' funding; (8) Plaintiffs' make-whole amount worksheets; (9) Rapid's initial disclosures; and (10) UHY's valuation.

In response, Rapid argues that Plaintiffs' motion seeks to rewrite the terms of the contract which "reflect the intent of the parties to exclude commissions and fees from any payments due to Plaintiffs." Rapid argues that sections 2.3, 2.4, and 4.5 of the MPA establish that Plaintiffs are not entitled to commissions pursuant to the make-whole obligation in section 4.7. Rapid further argues that section 4.7 of the First Amendment does not reference or include commissions in the calculation of the IRR Hurdle or the Make-Whole Amount. Rapid argues that section 4.7 was included to establish that if an IRR Hurdle was not met; Rapid would pay a Make-Whole Amount.

Further, Rapid argues that the First Amendment is void as to BSD I because non-party BEH did not sign the amendment. Rapid also argues that the First Amendment does not apply to BSD II because the Second Amendment did not provide BSD II rights under the First Amendment, including the make-whole obligation.

Finally, Rapid argues that Plaintiffs failed to establish an anticipatory breach in support of their breach of contract claim. And Rapid argues that Plaintiffs support their claim with parole evidence despite an integration clause excluding the same.

In support of its position, Rapid attaches (in relevant part): (1) the affidavit of Kirk Haggerty; (2) MPA; (3) the First Amendment; (4) composite of Plaintiffs' deposition testimony; (5) composite of invoices; (6) various emails; (7) the Second Amendment; and (8) affidavit of Ryan Fletcher.

It is undisputed that Florida law governs the interpretation of the contract under Section 9.4 of the Participation Agreement.

A contract "should be governed solely by the language employed by the parties if it is without ambiguity. When contractual language is clear and unambiguous, courts cannot indulge in construction or interpretation of its plain meaning. Further, where a contract is silent as to a particular matter, courts should not, under the guise of construction, impose on parties contractual rights and duties which they themselves omitted." *BMW of North America, Inc v. Krathen*, 471 So. 2d 585, 587 (Fla. 4d DCA 1985). (Internal citations omitted).

> "The interpretation of a contract is a matter of law to be determined by the court. Nevertheless, when the terms of the contract are ambiguous, susceptible to different interpretations, parole evidence is admissible to 'explain, clarify or elucidate' the ambiguous term. The initial determination of whether a contract term is ambiguous is a question of law for the court, and, if the facts of the case are not in dispute, the court will also be able to resolve the ambiguity as a matter of law. However, 'where the terms of the written instrument are disputed and reasonably susceptible to more than one construction, an issue of fact is presented as to the parties' intent which cannot properly be resolved by summary judgment." *Strama v. Union Fidelity Life Ins Co*, 793 So. 2d 1129, 1132 (Fla. 1d DCA 2001). (Internal citations omitted).

In the instant case, the disputed provision is section 4.7 of the First Amendment to the MPA, which provides:

> If payments to Participant in respect of a Vintage Pool that has aged more than 20 months have note provided the Participant with an IRR on such Vintage Pool of at least 18% (the "IRR Hurdle"), Lead will pay to the Participant an amount that, when added to all such payments, provide the Participant with an IRR on such Vintage Pool equal to the IRR Hurdle (the Make-Whole Amount). Following the payment of the Make-Whole amount and notwithstanding anything in this

> Agreement to the contrary, Lead will be entitled to retain all payments that would have been made to the Participant in respect to such Vintage Pool until Lead has recouped the Make-Whole Amount. Thereafter, Lead will pay Participant all amounts required to be paid to the Participant in respect of such Vintage Pool in accordance to Section 4.
>
> The MPA provides:
>
> Section 4.4: On each Settlement Day, Lead shall pay to Participant its pro-rata Share of Collections . . . net of deductions for amounts due from Participant in Section 2.4.
>
> Section 2.4: Participant shall pay to Lead on each Settlement Day deducted from the daily Collections:
>
> > 2.4.1 All Extraordinary Expenses and Transaction Expenses including but but not limited to Residual Commissions;
> >
> > 2.4.2 Management Fee due from every amount Collected on that day shall be deducted from the daily payments to the Participant.

Rapid argues that sections 2.3, 2.4, and 4.4 of the MPA "*reflect the parties intent*," which was to exclude commissions in the calculation of the IRR Hurdle or Make-Whole Amount (emphasis added). Plaintiffs, on the contrary, argue that the above-mentioned sections were not referenced in the First Amendment and do not relate to the calculation of the IRR. Rather, Plaintiffs argue that they are entitled to a calculation based on the total investment.

Here, the parties have failed to define "IRR" in the MPA and the First Amendment thereto. As such, the Court must look at the plain meaning. *Black's Law Dictionary* defines internal rate of return (IRR) as "a discounted-cash-flow method of evaluating a long-term project, used to determine the actual return on an investment. (10th ed). The *Collins English Dictionary* defines IRR as "an interest rate giving the net present value of zero when applied to the expected cash flow of a project." (13th ed). Based on the plain meaning of IRR, the Court cannot conclude that the term is clear and unambiguous. Rather, the Court would necessarily have to make factual determinations regarding the IRR calculation method.

A latent ambiguity exists "where the language in a contract is clear and intelligible and suggests a single meaning, but some extrinsic fact or extraneous evidence creates a need for interpretation or a choice between two possible meanings." *Griffin v. Federal Deposit Ins Corp,* 532 So. 2d 1358, 1360 (Fla. 2d DCA 1988). When a contract contains a latent ambiguity, parol evidence is admissible to determine the intent of the parties. *Id.* The correct interpretation of a latent ambiguity in an agreement is an issue of fact which precludes summary disposition. *Id.*

Here, although the language may be clear and intelligible, the ordinary meaning of IRR does present a latent ambiguity requiring the need for interpretation as to the parties' intent. Indeed, Rapid refers to other sections of the MPA to demonstrate the "parties' intent." Based on the same, parol evidence is admissible (despite the integration clause precluding the same) to determine the parties' intent. As such, the interpretation of the IRR and Make-Whole Amount is an issue of fact which precludes summary disposition.

Further, in support of their respective positions, Plaintiffs and Rapid submit competing affidavits. Plaintiffs submit the affidavit of Craig Hecker, former CEO of Rapid. According to Hecker's affidavit, he was the CEO when the parties entered into the original MPA and both amendments. (Plaintiffs' Exhibit C, at 1). Hecker states that he actively participated in the negotiation and execution of the three agreements. *Id.* Hecker further states that commission was to be included in the calculation of the Make-Whole Amount, and Rapid was aware of the same. *Id.* at 2-3.

Rapid submits the affidavits of Kirk Haggarty, CFO of Rapid and Ryan Fletcher, the Director of Finance for North American Bancard. Haggarty states that payments under section 4.7 of the First Amendment do not include (or mention) commissions. (Defense Resp. Exhibit A, at 3). Fletcher, in his affidavit, states that he assumed the agreement at issue was identical to

the agreement between Rapid and MetMC, which included commissions. (Defense Resp. Exhibit I, at 2). Specifically, Fletcher states that the agreement did not include a sample calculation. *Id.*

It is well settled that credibility is an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, "courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion" *White*, *supra* at 625, citing *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004); and *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005).

Next, Rapid argues that the First Amendment is void because non-party BEH failed to sign the same, and the MPA required that all amendments be in writing and signed by the parties.[2] Further, Rapid argues that BSD II does not have rights under the First Amendment because the Second Amendment does not reference the first.

Plaintiffs argue that although BEH did not sign the First Amendment, the parties' conduct establish the validity and enforceability of the contract. The Court agrees. The parties continued to perform under the MPA and amendments for years despite BEH not signing the First Amendment. Further, after the First Amendment was executed, Plaintiffs and Rapid executed the Second Amendment, which explicitly referenced the First Amendment. As such, it is undisputed that the parties intended the MPA, First Amendment, and Second Amendment to be binding, valid, and enforceable.

Rapid's argument that BSD II does not have the same rights under the First Amendment also fails. As previously stated, the Second Amendment explicitly references the First Amendment. Specifically, the Second Amendment states, "the terms of the Master Participation

[2] BEH was the "Participant" in the original MPA signed September 11, 2015).

Agreement, as previously amended by the First Amendment, shall remain in full force and effect." (Plaintiffs' Exhibit H). Based on the same, the rights granted to BSD I in the First Amendment were also granted to BSD II through the Second Amendment.

Finally, Rapid argues that Plaintiffs' motion should further be denied as Plaintiffs fail to establish any evidence establishing RCF breached the Agreement as pleaded by Plaintiffs. As previously discussed, there is a question of fact regarding the interpretation of the contract, which renders summary disposition inappropriate. The Court, therefore, does not need to address Rapid's substantive argument to "further" deny Plaintiffs' motion.

For the foregoing reasons, Plaintiffs' motion for summary under (C)(10) is DENIED. And Rapid's motion under (I)(2) is also DENIED.

IT IS SO ORDERED.

April 3, 2019
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge