Supreme Court of the State of New York
Appellate Division, First Judicial Department

Rolando T. Acosta, P.J.
Angela M. Mazzarelli
Peter H. Moulton
Lizbeth González

JJ.

Appeal No. 12133-
12133A
Index No. 650369/14
Case No. 2019-5463
2019-03308

Leonid L. Lebedev,
Plaintiff-Appellant-Respondent,

-against-

Leonard Blavatnik, et al.,
Defendants-Respondents-Appellants,

Plaintiff appeals from the judgment of the Supreme Court, New York County (Saliann Scarpulla, J.), entered August 12, 2019, dismissing the complaint and the counterclaim. Defendants appeal from the order, same court and Justice, entered July 10, 2019, which, inter alia, granted defendant Viktor Vekselberg's motion for summary judgment dismissing the complaint, denied defendant Leonard Blavatnik's motion for summary judgment on the counterclaim for indemnification, granted plaintiff's motion for partial summary judgment dismissing the counterclaim, and denied plaintiff's motion for partial summary judgment finding the existence of a contract granting him a 15% equity stake in and right to 15% of the net income earned from the oil business.

Steptoe & Johnson LLP, New York (Michael C. Miller, Evan Glassman and Charles Michael of counsel), for appellant-respondent.

Arnold & Porter Kaye Scholer LLP, New York (James M. Catterson of counsel), for appellant-respondent.

Dewey Pegno & Kramarsky LLP, New York (Thomas E.L. Dewey and Keara A. Bergin of counsel), for appellant-respondent.

Andrew W. Hayes, New York, for appellant-respondent.

Quinn Emanuel Urquhart & Sullivan LLP, New York (Richard I. Werder, Jr., Sanford I. Weisburst, Stephen A. Broome and Wesley T. Hartman and Ganfer Shore Leeds & Zauderer LLP, New York (Mark C. Zauderer of counsel), for Leonard Blavatnik and Viktor Vekselberg, respondents.

White & Case LLP, New York (Kimberly A. Havlin, Heather K. McDevitt and Isaac S. Glassman of counsel), for Victor Vekselberg, respondent.

GONZALEZ, J.

In these cross appeals we again are called upon to address the multi-billion-dollar dispute between plaintiff Leonid Lebedev and defendants Viktor Vekselberg and Leonard Blavatnik (*see Lebedev v Blavatnik*, 144 AD3d 24 [1st Dept 2016]). For the reasons that follow, we: (1) reverse dismissal of the breach of contract claim, since there are triable issues as to whether the parties' 2001 Investment Agreement was a binding contract; (2) affirm dismissal of the breach of joint venture claim; and (3) affirm the dismissal of defendants' counterclaim for indemnification.

Background

The financial relationships among the parties are lengthy and complex. Plaintiff is a Russian citizen who has been involved in the Russian oil and gas industry since the 1980s. Defendant Leonard Blavatnik is a U.S. citizen and owner of Access Industries, LLC. Defendant Victor Vekselberg is a Russian citizen who indirectly owns a group of companies known as the "Renova."

In 1997, Russia privatized a state-owned oil and gas company, Tyumen Oil Company (TNK), and auctioned 40% of its shares. Defendants formed the investment group that placed the successful bid. This group consisted of: The Alfa Group (a Russian company), Access Industries (Blavatnik's company), and Renova (Vekselberg's company) (collectively, AAR). Separately, plaintiff acquired a 1.8% equity stake in TNK through a corporate entity and an additional 10.5% equity stake through another corporate entity, Nizhnevartovskneftgaz OAO (NNG).

Plaintiff and defendants discussed the possibility of pooling their resources in order to obtain a majority stake in TNK, with each party owning a one-third interest. To

this end, Petrosol Holding, S.A. (Petrosol), a company related to plaintiff, entered into a Securities Sale and Purchase Agreement with Blusdi Financierningsmaatschappij N.V. (Blusdi), a company related to defendants. Pursuant to the agreement, Petrosol promised to make cash payments to Blusdi in the amount of $133 million. In exchange, Blusdi promised to transfer certain shares to Petrosol.

Petrosol, the company related to plaintiff, made an initial $25 million cash payment. Plaintiff alleges that he contributed his equity stake in TNK as additional consideration. Plaintiff testified during his deposition that he never received payment for his transfer of shares.

After making his initial contribution of $25 million and transferring his shares, plaintiff stopped making any further payments, including the remaining $108 million owed to Blusdi pursuant to the Securities and Sale Purchase Agreement.

By March 1998, the investment group AAR successfully gained over 50% ownership of TNK. Plaintiff alleges that despite his contributions in obtaining the majority stake, defendants never paid plaintiff what he was owed for these contributions. The parties then began to dispute their respective obligations.

In order to resolve their disputes, the parties met in New York City in March 2001 to formalize their obligations to each other. Defendants acknowledge in their Statement of Undisputed Facts under Commercial Division Rule 19-a that when plaintiff stopped making certain contributions to defendants, “the parties discussed options for compensating Lebedev for the stock and cash he had caused to be transferred.”

The parties drafted an Investment Agreement.[1] It provided that plaintiff would own 15% of the total stake of "the Parties in the Oil Business" which was defined as the oil business owned by defendants' company, Oil and Gas Industrial Partners Ltd. (OGIP). At plaintiff's deposition, he testified that the Investment Agreement was meant to be an "accounting of mutually owed payment." Defendant Vekselberg testified at his deposition that the Investment Agreement was a "mutual setoff or mutual calculations of our obligations."

The Investment Agreement states:

> "1. The Parties acknowledge that this Agreement is based on the understandings reached among the Parties in 1997 regarding their joint purchase of shares of TNK OJSC.
>
> "2. The Parties acknowledge that in 1997-98, Party 3 [plaintiff] made equity contributions to various companies, made payments to third parties, and rendered services, valued by the Parties in aggregate at 15% of the total value of the Parties' contributions toward the purchase of the Oil Business. The Parties agree that, as a result of the above-referenced contributions and payments, Party 3's contribution toward the purchase of the Oil Business, in the amount of 15% of the total stake of the Parties, has been completely paid in as of the present time."

Under the Investment Agreement, plaintiff, who had allegedly joined the business as a one-third partner, would now receive 15% of the net income generated by defendants' company, OGIP. The Investment Agreement also clarified that plaintiff did not have any claim to the income and profit of the oil business prior to October 1, 2001. Although the Investment Agreement stated plaintiff's right to share in profits, it did not contain a provision regarding shared

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[1] While drafted in Russian, the document's title translates to "Investment Agreement" in English.

losses. Paragraph 18 of the Investment Agreement provided that it prevailed over all other prior understandings and agreements among the parties.

The Investment Agreement required defendants, through OGIP, to issue promissory notes to plaintiff as payment for the income due to him. Plaintiff alleges that these promissory notes were the payment mechanism for the amounts due under the Investment Agreement, with adjustments made at the end of each year to match the 15% of OGIP's net income. It is undisputed that defendants issued promissory notes to plaintiff's nominee, Coral Petroleum Ltd. (Coral), under the Investment Agreement. Plaintiff submitted evidence in the form of OGIP's bank transactions showing that the payments from the promissory notes corresponded to 15% of OGIP's net income.

In 2003, the parties anticipated a merger between TNK and BP International Ltd. (BP). At the time, plaintiff was the subject of an ongoing criminal investigation, for which he was ultimately acquitted. Because defendants did not want this criminal investigation to potentially derail the merger, the parties allegedly agreed that defendants would buy out plaintiff's stake as reflected in the Investment Agreement. Plaintiff claims that defendants thereafter refused to pay him the full and fair value of his stake and offered only to purchase his income rights from the Investment Agreement for $600 million.

To effectuate the $600 million buy-out, OGIP's subsidiary, Rochester Resources Ltd. (Rochester or Buyer) entered into a written and fully executed Acquisition Agreement with Coral (Seller). OGIP was owned by defendants and Coral was plaintiff's nominee. Under the Acquisition Agreement, Rochester promised to issue a series of notes in the amount of $600 million to an escrow agent and pay them out to plaintiff

over the course of three years. This $600 million payment was issued to Coral, for the benefit of plaintiff through Trade Concept Limited (TCL), an intermediary company owned by plaintiff. Plaintiff acknowledged that he received the $600 million payment.

The Acquisition Agreement included an indemnification provision pertaining to Coral, in its capacity as the Seller, which states,

> "The Seller hereby undertakes to hold harmless and indemnify the Buyer and each of its Affiliates from and against any claim, threat, suit, action or other proceedings, as well as the related costs and expenses (including, but not limited to, any legal fees), related to or emanating from the Underlying Interests, the Underlying Liabilities or the Underlying Transaction, brought by the Seller against the Buyer or any of its Affiliates, with the exception of those related to the enforcement of this Agreement."

The Current Action

In March 2013, Rosneft, a Russian state-owned oil company, purchased the TNK-BP entity. Defendants received a payment of approximately $13.8 billion from the sale. Plaintiff received nothing. In 2014, plaintiff commenced this action against defendants with respect to the 2001 Investment Agreement, alleging breach of contract, breach of joint venture, breach of fiduciary duty, and fraud. Plaintiff sought to recover $2 billion, which he claimed represents his percentage of the profit from the Rosneft sale. Defendants counterclaimed for indemnification of expenses related to this action pursuant to § 7.1 of the Acquisition Agreement. The motion court dismissed plaintiff's fraud claim and his breach of fiduciary duty claim to the extent that it was rooted in fraud, but otherwise denied the motion to dismiss (*Lebedev v Blavatnik*, 49 Misc 3d 1218 [A], 2015 NY Slip Op 51770 [U] [Sup Ct, NY County 2015]). This Court affirmed, leaving in place plaintiff's causes of action for breach of contract, breach of a joint venture, and breach of fiduciary duty (*Lebedev v Blavatnik*, 144 AD3d 24 [1st Dept 2016]).

On June 22, 2018, the parties filed three motions for summary judgment. Defendant Vekselberg moved for summary judgment and dismissal of the breach of contract and breach of joint venture claims based on the Investment Agreement. Defendant Blavatnik moved for summary judgment based on the Acquisition Agreement, arguing that it released plaintiff's claims and required him to indemnify defendants. Plaintiff moved for partial summary judgment to establish that the Investment Agreement was a binding contract and for dismissal of the indemnification counterclaim.

The motion court granted defendant Vekselberg's motion for summary judgment of the breach of contract claim and denied plaintiff's motion as to this claim. The court held that the Investment Agreement was not an enforceable contract because, in its view, the Investment Agreement was not supported by present or contemporaneous consideration. The court additionally found that the Investment Agreement did not qualify as a written promise expressing past consideration under section 5-1105 of the General Obligations Law (GOL).

The court also granted defendant Vekselberg's motion for summary judgment for dismissal of the claim for breach of joint venture, because there was no provision for sharing losses in the Investment Agreement. In so holding, the court explained that a requirement to share losses reflected the current state of New York law, and raised the concern that any view to the contrary would render the loss-sharing requirement of a joint venture meaningless. Along with this claim, the court dismissed the claim for breach of fiduciary duties owed to co-venturers.[2]

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[2] Since the court dismissed the complaint based on defendant Vekselberg's arguments, it found that defendant Blavatnik's motion for dismissal was moot.

Finally, the court granted plaintiff's motion for summary judgment of the indemnification counterclaim and denied defendant Vekselberg summary judgment as to the counterclaim, since plaintiff was not individually bound by the Acquisition Agreement's indemnification provision as Coral's principal.[3]

Analysis

On a motion for summary judgment, "the proponent . . . must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing is satisfied, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324). The "facts [must be] considered in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). Since an order granting summary judgment resolves an issue as a matter of law, it is "considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The court's role on a motion for summary judgment is issue-finding, not issue-determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). With these principles in mind, we turn to the individual causes of action and counterclaim.

I. Breach of Contract

[3] On appeal, defendants submit joint briefing seeking affirmance of the complaint's dismissal and reinstatement of the counterclaim for indemnification.

The elements of a cause of action for breach of contract are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Our breach of contract analysis focuses on the first of these elements, namely, whether the Investment Agreement is a binding contract supported by consideration.

As stated by our Court of Appeals, "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other" (*Hamer v Sidway*, 124 NY 538, 545 [1891] [internal quotation marks omitted]). Indeed, "any basic contemporary definition would include the idea that [consideration] consists of either a benefit to the promisor or a detriment to the promisee" (*Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 464 [1982]). "The slightest consideration is sufficient to support the most onerous obligation" (*Mencher v Weiss*, 306 NY 1, 8 [1953]). However, "generally, past consideration is no consideration and cannot support an agreement because the detriment did not induce the promise" (*Korff v Corbett*, 155 AD3d 405, 408 [1st Dept 2017], *lv denied* 31 NY3d 912 [2018] [internal quotation marks omitted]).

Here, issues of fact preclude summary judgment as to whether contemporaneous consideration supported the Investment Agreement. "[F]orbearance is valuable consideration supporting the enforcement of an obligation," and triable issues exist as to whether plaintiff contemporaneously forbore in conjunction with the Investment Agreement (*All Terrain Prop. v Hoy*, 265 AD2d 87, 94 [1st Dept 2000]).

When plaintiff first agreed to join defendants in the oil business, he allegedly did so as a one-third partner. According to the Undisputed Statement of Facts, the parties

disputed their respective obligations and "discussed [for several years] options for compensating [plaintiff] for the stock and cash he caused to be transferred." In 2001, when the parties drafted the Investment Agreement, plaintiff agreed to a 15% stake and a 15% share of the profits, a marked reduction in what he would have expected to receive as an alleged one-third partner. Plaintiff also agreed to forego any right to profits pre-dating October 2001.

Paragraph 18 of the Investment Agreement provided that it "prevailed over all other prior understandings and agreements among the Parties with regard to the matters covered by this Agreement," which necessarily encompassed the understandings reached among the parties in the late 1990s.[4] At his deposition, defendant Vekselberg referred to the Investment Agreement "as a mutual set-off or mutual calculation of [the parties'] obligations."

The record thus suggests, and indeed a trier of fact might reasonably conclude, that the 2001 Investment Agreement was a binding contract supported by plaintiff's forbearance. Notably, as plaintiff highlights, defendants began to perform under the agreement (for example, by issuing promissory notes to Coral), further suggesting that it was a binding accord for which plaintiff's forbearance had supplied consideration.

Defendants argue that the Investment Agreement was never intended to settle or cause plaintiff to relinquish any claim he may have held prior to 2001. However, defendants' competing interpretation only supports our conclusion that summary judgment is properly denied; it does not compel summary judgment in defendants'

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[4] For this reason, we reject defendants' arguments that this language constituted a form integration clause as a matter of law.

favor.[5] The same holds true as to defendants' characterization of Vekselberg's testimony. Vekselberg's use of the term "mutual setoff" may have referred only to plaintiff's compensation for his past contributions as defendants suggest, or it may have referred to the parties' mutual resolution of their obligations as plaintiff suggests. The correct interpretation must be determined at trial. Our task at this juncture is issue finding, not issue determination (*see Sillman*, 3 NY2d at 404).

Our decision in *Korff v Corbett* (155 AD3d at 405), does not compel a contrary result. *Korff* concerned a one-page letter agreement, which purportedly secured payment for work previously performed by plaintiff and his law firm in the 1980s (*id.*). We held that the letter agreement was not supported by contemporaneous consideration and, in so holding, emphasized that it "b[ore] no indicia of a settlement agreement, such as an obligation by plaintiff to tender a release of his claims or otherwise incur a new detriment." We also noted that "[nothing] in the record otherwise indicate[d] that plaintiff had agreed not to assert his rights against defendants" (*id.*). Unlike *Korff*, the record before us suggests that the Investment Agreement extracted a contemporaneous forbearance from plaintiff.

We reject defendants' contention that we cannot consider extrinsic evidence in reaching our holding. We have previously considered such evidence with regard to the issue of consideration (*see Reddy v Mihos*, 160 AD3d 510, 515 [1st Dept 2018], *lv denied* 32 NY3d 902 [2018]; *Cammeby's Equity Holdings LLC v Mariner Health Care, Inc.,* 106 AD3d 563, 564 [1st Dept 2013]; *Rupert v Singhi*, 212 App Div 630, 635 [1st Dept 1925]). However, *Schron v Troutman Sanders LLP* (20 NY3d 430, 436-437 [2013]),

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[5] This conclusion is not changed by the absence of explicit settlement or release language in the Investment Agreement.

cited by defendants, does not limit our review in that *Schron* turned on the settled principle that "Parol evidence—evidence outside the four corners of the document—is admissible only if a court finds an ambiguity in the contract" (*id.*). *Schron* concerned the interpretation of specific contractual language regarding consideration (*id.*). Here, the issue before us concerns consideration as a necessary element of contract formation.

Since we conclude that there are issues of fact as to contemporaneous consideration, we need not address the parties' alternative arguments related to past consideration under GOL 5-1105.

II. Breach of Joint Venture and Breach of Fiduciary Duty

The elements of a joint venture are "acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses" (*Slabakis v Schik,* 164 AD3d 454, 455 [1st Dept 2018], *lv denied* 32 NY3d 912 [2018] [internal quotation marks omitted]).

This Court has, at times, dispensed with the requirement that a joint venture agreement expressly provide for the sharing of losses, but only where the record in a particular case establishes that there was "no reasonable expectation of losses" (*see Don v Singer*, 92 AD3d 576, 577 [1st Dept 2012]; *see also Cobblah v Katende,* 275 AD2d 637, 639 [1st Dept 2000]). Plaintiff contends that, on application of these prior decisions, his joint venture claim should not have been dismissed. We disagree.

The Court of Appeals has stated: "An indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and submit

to the burden of making good the losses" (*Matter of Steinbeck v Gerosa*, 4 NY2d 302, 317 [1958]). Accordingly, it is the rare case where this guidance does not control. Our exception, articulated in *Don* and *Cobblah,* was intended only to apply in a situation where there is no expectation of loss.

Here, plaintiff has failed to establish that his case falls within the scope of this limited exception. Indeed, a commodity such as oil is inherently volatile (*see e.g.* Haig, Commercial Litigation in New York State Courts § 98:27 at 177 [4 West's NY Prac Series 5th ed]). Given the ever-changing, and often unanticipated, vagaries which can affect that particular market, such as political unrest, climate, economic downturns and global pandemics, plaintiff did not meet his burden.

Plaintiff's alternative arguments, raised in the event that, as we do, we required an agreement to share losses, are unavailing. Plaintiff's argument that he satisfied the loss sharing requirement because he stood to lose his initial capital investment overlooks that if a joint venturer "stands to lose only his or her contribution to the joint venture, the risk of loss element becomes 'indistinguishable from the separate requirement that each joint venturer make some contribution of property, financing, skill, knowledge or effort to the venture'" (*Cosy Goose Hellas v Cosy Goose USA Ltd.*, 581 F Supp 2d 606, 622 [SD NY 2008], quoting *B. Lewis Prods., Inc. v Angelou*, 2003 WL 21709465, *12, 2003 US Dist LEXIS 12655, *34 [SD NY 2003], *affd in part, vacated in part, remanded*, 99 F Appx 294 [2d Cir 2004]).

As to plaintiff's argument that he satisfied the loss sharing requirement because he agreed to fund the business's ongoing expenses, this merely shows that plaintiff agreed to "act in concert [with defendants] to achieve some stated economic objective,"

which by itself "creates no more than a contractual obligation" (*Steinbeck*, 4 NY2d at 317).[6]

III. Indemnification

Indemnity contracts must be strictly construed to avoid the creation of a duty which the parties did not intend to assume. In *Hooper Assoc. v AGS Computers* (74 NY2d 487, 491 [1989] [internal citations omitted]), the Court of Appeals held,

> "Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule. It is not uncommon, however, for parties to a contract to include a promise by one party to hold the other harmless for a particular loss or damage and counsel fees are but another form of damage which may be indemnified in this way."

Here, the motion court correctly dismissed defendants' counterclaim for indemnification, because plaintiff is not individually bound by the indemnification provision in the Acquisition Agreement. The agreement provided that the "Seller" (Coral) would indemnify the "Buyer" (Rochester) and each of its respective "Affiliates" against any suit related to the Acquisition Agreement. The parties were aware of plaintiff's identity and relationship with Coral, yet specifically drafted this provision to apply only to Seller and not to "Seller's Affiliates," a defined term that would have included plaintiff. We find no reason to conclude that plaintiff can be substituted as Seller and bear the obligation to indemnify, especially because indemnification provisions must be narrowly construed (*Hooper* at 491). Thus, no triable issues exist with respect to this counterclaim and we affirm its dismissal.

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[6] Since the breach of fiduciary duty claim is intrinsically linked to the joint venture claim, it necessarily fails and was properly dismissed.

Accordingly, the judgment of the Supreme Court, New York County (Saliann Scarpulla, J.), entered August 12, 2019, dismissing the complaint and the counterclaim, should be modified, on the law, to the extent of reinstating the cause of action for breach of contract, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered July 10, 2019, which, inter alia, granted defendant Viktor Vekselberg's motion for summary judgment dismissing the complaint, denied defendant Leonard Blavatnik's motion for summary judgment on the counterclaim for indemnification, granted plaintiff's motion for partial summary judgment dismissing the counterclaim, and denied plaintiff's motion for partial summary judgment finding the existence of a contract granting him a 15% equity stake in and right to 15% of the net income earned from the oil business, should be dismissed, without costs, as subsumed in the appeal from the judgment.

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 12, 2019, modified, on the law, to the extent of reinstating the cause of action for breach of contract, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered July 10, 2019, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by González, J.P. All concur

Acosta, P.J., Mazzarelli, Moulton, González, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: February 16, 2021

Susanna Molina Rojas
Clerk of the Court