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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

OAKLAND BULK AND OVERSIZED TERMINAL, LLC, a California limited liability company, and OAKLAND GLOBAL RAIL ENTERPRISE, LLC, a California limited liability company

Plaintiffs,

v.

CITY OF OAKLAND, a California municipal corporation,

Defendant.

CITY OF OAKLAND

Counter-Plaintiff,

v.

OAKLAND BULK AND OVERSIZED TERMINAL, LLC, and CALIFORNIA CAPITAL INVESTMENT GROUP,

Counter-Defendants.

Consolidated Case Nos. RG18930929 / RG20062473

Unlimited Civil Case/Assigned to Dept. 514 (Hon. Noël Wise)

CITY OF OAKLAND'S REPLY IN SUPPORT OF TRIAL BRIEF ON PRIOR FEDERAL LITIGATION

Action Filed: December 4, 2018
Trial Date: July 10, 2023

The City submits this reply to respond to two important legal issues addressed in Plaintiffs' Response to City of Oakland's Trial Brief on Prior Federal Litigation ("OBOT Br.") (filed 8/17/2023).

First, Plaintiffs assert that because they did not bring a "claim" under the Ground Lease in the federal action, they may now pursue the same remedy (extension of the Ground Lease deadline) predicated on the same conduct (the coal ordinance) that they previously challenged in the federal case. But res judicata bars a plaintiff from seeking the same remedy for the same injury/primary right in successive cases. Plaintiffs' decision to abandon their request for an extension of the August 14, 2018 deadline based on the coal ordinance (and other alleged breaches of the DA) in the federal case precludes them from pursuing that same request now.

Second, Plaintiffs ignore the rules governing how California courts interpret force majeure provisions when extensively describing their contentions throughout this brief. Under California law, the Ground Lease's force majeure provision may not be read to extend the performance deadline simply because an event allegedly delayed or hindered OBOT's performance. Rather, governing precedent requires that any force majeure event (i) be unanticipated at the time of contract, and (ii) despite the party's diligent efforts, (iii) rendered its performance impossible or unreasonably expensive, even where (as here) the contractual language refers to an action of a party to the contract that "hinders or delays" a party's performance.

First, California law is clear that what matters for the application of res judicata is the injury at issue: "A primary right is the right to be free of a particular injury," and the "cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory … advanced." *Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 675-76 (quotations omitted); *see also Burdette v. Carrier Corp.* (2008) 158 Cal.App.4th 1668, 1685, 1686 ("the significant factor in determining whether the cause of action in the two proceedings is the same is the harm suffered," and "*one injury* gives rise to only one claim for relief") (emphasis in original; quotations omitted); *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798 ("under the primary rights theory, the determinative factor is the harm suffered.").

Res judicata is not limited, as OBOT asserts, to the same "claim." *E.g.*, OBOT Br. at 13. Under California res judicata law, the "injury" that may not be relitigated is the "wrong suffered," not the legal claim asserted. Thus, in *Boeken*, the California Supreme Court held that the death of the plaintiff's husband was the "harm suffered," so she could not assert a statutory wrongful death claim after voluntarily dismissing an earlier loss of consortium claim. 48 Cal.4th at 798-99. Similarly, *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 905-907, held that a plaintiff could not bring a second lawsuit seeking *different relief* for an injury on which the plaintiff had sued in an earlier lawsuit—even if the need for that different relief was only speculative at the time of the earlier lawsuit.

In the federal action, OBOT asked the District Court to enjoin the City from contending that Plaintiffs had breached the West Gateway Ground Lease by failing to perform in view of any delays allegedly occasioned by the coal Ordinance: OBOT requested "relief prohibiting the City from asserting that ***OBOT has breached*** the DA, the LDDA, ***and the Ground Lease for West Gateway, dated February 16, 2016, by any failure to perform resulting from the City's misconduct.***" Ex. 120-42 (Prayer for Relief ¶D) (emphasis added).

Despite having previously sought that relief, OBOT now argues that a claim for breach of the Ground Lease was not ripe because the City had not yet called default. OBOT Br. at 14. But there was undeniably a ripe dispute as to whether the Ordinance was interfering with OBOT's performance under the Ground Lease (as OBOT claimed then, and now claims again in this case), whether the City should be enjoined from enforcing the Initial Milestone deadline, and whether that deadline should be extended beyond August 14, 2018. No speculation is required as to that point, because OBOT directly asked the federal court to preclude the City from requiring OBOT to perform by this deadline. OBOT asserted, and then abandoned, that requested relief under the Ground Lease. Had OBOT actually pursued that relief, the very deadlines at the heart of this case either would or would not have been extended, in light of the facts existing at the time. That ruling would have resolved many of the claims that Plaintiffs pursue here.[1] OBOT does not cite

[1] OBOT explains over and again that its claims and defenses *in this case* arise, in substantial

any authority for the proposition that res judicata does not bar reassertion of the same request for relief predicated on the same facts, because there is none.[2]

Second, in setting forth their claims and defenses of excuse of performance and force majeure as pled in this case, Plaintiffs do not accurately characterize the legal effect of the force majeure provision at issue. Force majeure provisions are a somewhat special case under California law in that the language of any force majeure provision must be interpreted against a long line of case law regarding the meaning of force majeure provisions. *West Pueblo Partners, LLC v. Stone Brewing Co., LLC* (2023) 90 Cal.App.5th 1179, 1188.

Plaintiffs present the question as simply being whether any of the City's actions, at any time, "hindered and delayed" OBOT's performance. *E.g.*, OBOT Br. at 5. But although the force majeure provisions use the words hinder and delay, the West Gateway Ground Lease provision defines Force Majeure events to include only "events which result in delays in a Party's performance of its obligations hereunder *due to causes beyond such Party's control*." Ex. 68-132 (definition of "Force Majeure") (emphasis added). California courts have long interpreted this "beyond [the] party's control" language, which applies equally to the entire list of triggering events, to impose two related requirements: (a) force majeure events can only include those events that are unknown or not foreseeable at the time of contract; and (b) the party claiming force majeure must first prove that it acted with skill and diligence to perform.

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part, from exactly the same City conduct that it challenged in the federal litigation. OBOT asserts that its delays in performing under the West Gateway Ground Lease were "*caused by"* the City's "improper exercise of its regulatory power" in enacting the 2016 Ordinance and Resolution, and that "*of course it should not be penalized for delays caused by that improper exercise*." OBOT Br. at 8 n. 12 (emphases added). OBOT argues, in this case, that the "conduct that breached the Development Agreement"—meaning the conduct at issue in the federal litigation—"does support Plaintiffs' Force Majeure claims." *Id*. at 5. And OBOT admits that it seeks a remedy—"only extensions of the time to perform" —that is *based on* the City-caused "delays and hinderances," which it affirmatively contends include "the City's enactment of the ordinance and resolution." *Id*. at 7.

[2] This conclusion applies not just to OBOT's contention that the Ordinance hindered and delayed its performance, but likewise to the other related "misconduct," which OBOT says "all" arises from the same "political opposition to coal" that it jointly contends "hindered" its performance. OBOT Br. at 3, 5, 12, 17 n.20. OBOT cannot co-mingle causation for multiple acts of "misconduct" for one purpose (attempting to prove force majeure and excuse), and then disavow the obvious implications of its position for res judicata purposes.

With respect to (a), "[u]nder California law, unless a contract explicitly identifies an event as a force majeure, the event must be unforeseeable at the time of contracting to qualify as such." *Free Range Content, Inc. v. Google Inc*. (N.D. Cal., May 13, 2016, No. 14-CV-02329-BLF) 2016 WL 2902332, at *6; *see also Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.* (C.D. Cal. 2001) 178 F.Supp.2d 1099, 1111; *London Guarantee & Accident Co,. Ltd. v. Industrial Accident Comm'n of Cal.* (1927) 202 Cal. 239, 242 ("force majeure" events are those "which human vigilance and industry can neither foresee nor prevent"); *Aristocrat Hwy. Displays Inc. v. Stricklen* (1945) 68 Cal.App.2d 788, 790 (citing *Mitchell v. Ceazan Tires* (1944) 25 Cal.2d 45, 47); *Conlin v. Coyne* (1937) 19 Cal.App.2d 78, 86-87; Black's Law Dictionary, 657 (7th Ed.1999) (defining Force Majeure Clause as "[a] contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties *could not have anticipated or controlled*") (emphasis added); 30 WILLISTON ON CONTRACTS §77:31 (4th ed. 2020).[3] Therefore, any City acts that OBOT was aware of or could reasonably foresee at the time of the contract, and so could have *negotiated* terms to address, cannot constitute force majeure.

With respect to (b), California courts have long interpreted language in these clauses requiring that a force majeure event be "beyond the party's control" to require a showing that the party acted with "skill, diligence and good faith" to meet its own performance requirements. *Oosten v. Hay Haulers Dairy Emp. & Helpers Union* (1955) 45 Cal.2d 784, 788-89; *Butler v. Nepple* (1960) 54 Cal.2d 589, 599; *see also Horsemen's Benevolent & Protective Ass'n v. Valley Racing Ass'n* (1992) 4 Cal.App.4th 1538, 1564, *opinion modified* ("Force majeure is not necessarily limited to the equivalent of an act of God, but the test is whether under the particular

[3] This is consistent with the notice requirement triggered by the claiming party's "actual knowledge of the scope and magnitude of the applicable Force Majeure event." Ex. 68-85 (§16.1). It is an extremely old and long-standing rule of law: *E.g.*, *Crossman v. Burrill* (1900) 179 U.S. 100, 113 (explaining the 'vis major' defense "so pleaded was, in the words of opinions above cited, a 'superior force acting directly upon the discharge of the cargo;' 'a direct and immediate vis major;' an 'unusual and extraordinary interruption that could not have been anticipated when the contract was made…'").

circumstances there was such an insuperable interference occurring without the parties' intervention as could not have been prevented by prudence, diligence and care."); *accord Pacific Vegetable Oil Corporation v. C.S.T., Ltd*. (1946) 29 Cal.2d 228, 238.

Adding "acts of the other party" to the laundry list of triggering events does not alter the applicability of the above requirements.

Next, OBOT must show that notwithstanding its own diligent efforts to perform, the force majeure event rendered timely performance "impossible or unreasonably expensive.'" *West Pueblo Partners*, 90 Cal.App.5th at 1188; *see also Butler*, 54 Cal.2d at 593–99; *Oosten*, 45 Cal.2d at 787–89; *Watson Laboratories*, 178 F.Supp.2d at 1109–10. "[A]cts that merely make performance unprofitable or more difficult or expensive do not suffice to excuse a contractual obligation." *SVAP III Poway Crossings, LLC v. Fitness International, LLC* (2023) 87 Cal.App.5th 882, 895. And, because force majeure "derives from the doctrines of impossibility and impracticability," the *Oosten* standard applies even where the clause in question uses terms like "delay," or "interfere" or "hinder" rather than impossibility. *West Pueblo Partners*, 90 Cal.App.5th at 1182, 1187-88 ("delay"); *SVAP III Poway Crossings*, 87 Cal.App.5th at 892 ("hinder").[4]

Further, in this complex and highly-negotiated contract, there are numerous terms whereby OBOT expressly assumed risk. That list includes OBOT's express agreement to assume the risk that the City of Oakland might enact regulations applicable to the project and OBOT might need to challenge them in court. A general exculpatory term may not be used to invalidate the specific express terms to which the parties agreed. *See Glenn R. Sewell Sheet Metal, Inc. v. Loverde* (1969) 70 Cal.2d 666, 676–78 (J. Traynor) (holding that party who has expressly assumed risk of some event in contract, including risk of "undertaking for himself the duty to comply with all laws and orders respecting the premises," cannot claim excuse of performance); *see also Guthrie v. Times-Mirror Co*. (1975) 51 Cal.App.3d 879, 885 ("Where parties are aware

[4] *West Pueblo Partners* in particular rejected plain meaning arguments that ignored this long history of the meaning of the term "force majeure," holding that "the ordinary definitions of 'delayed' 'interrupted,' or 'prevented'" did not lessen the burden imposed per *Oosten*. 90 Cal.App.5th at 1186.

at the time the contract is entered into that a doubt exists in regard to a certain matter and contract on that assumption, the risk of the existence of the doubtful matter is assumed as an element of the bargain.").

As a further example, the parties entered into the Ground Lease with the express understanding that OBOT would submit Schematic Drawings as the first step of the landlord approval process for Construction Documents. Ex. 68-35 (§6.2.1). The parties expressly agreed to a process and timeframes for the City's response, and to an exclusive remedy for any delay or failure by the City to comply with those timeframes. *Id*. Now, OBOT contends that the City's alleged failed to approve the drawings in the 2015 TLS Basis of Design constitutes a force majeure event preventing its timely performance. But OBOT cannot rewrite this contract in this manner. That reading impermissibly permits the force majeure clause to conflict with the more specific intentions of the parties in the substantive contract provisions. *Contra* Civil Code §§1636; 1638; 1641. While the language of the Initial Milestone provision says that it can be extended by Events of Force Majeure, OBOT cannot read the general definition of Events of Force Majeure to conflict with other more specific provisions agreed to by the parties.

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Plaintiffs' response brief raises myriad additional points with which the City disagrees, but the City addresses only those issues that merit a separate written response at this stage. The City respectfully requests argument, prior to the submission of the proposed Statements of Decision, to address these and other issues addressed in the parties' respective briefs.

Dated: August 31, 2023

Respectfully submitted,

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