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Commercial division update: Construing separate contractual instruments as one

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It is common in complex commercial transactions, and even in some less complex ones, for the parties to enter into a series of contracts setting forth their various agreements. Such agreements executed at the same time can address different aspects of the transaction, different rights and obligations, or involve different parties. Contracts related to a common matter can also be executed at different times as a transaction matures or as circumstances change.

At times, disputes arise among such parties as to whether multiple contracts involving a common matter should be read as a single, integrated contract, or as separate and distinct agreements. This issue often surfaces where one or more such agreements contain arbitration clauses, but other related contracts do not. Another area where this issue arises is in very complex deals, such as the securitization and sale of mortgage-backed securities, which can involve multiple parties and dozens of legal instruments.

We examine below the factors that New York courts and its Commercial Division consider in making these determinations.

Appellate precedent

The First Department has held that "documents executed at about the same time and covering the same subject matter are to be interpreted together, even if one does not incorporate the terms of the other by reference, and even if they are not executed on the same date, so long as they are substantially contemporaneous." *Brax Capital Group, LLC v. WinWin Gaming, Inc.*, 83 A.D.3d 591, 591 (1st Dep't 2011). Conversely, that court has also held that "separate written agreements involving different parties, serving different purposes and not referring to each other were not intended to be interdependent or somehow combined to form a unitary contract." *Schonfeld v. Thompson*, 243 A.D.2d 343, 343 (1st Dep't 1997).

While, as the above cases indicate, courts consider a number of factors in addressing this issue, not all factors are created equal. Courts usually place greater weight on the contracts' purposes and whether they formed a part of the same transaction, and may at times forgive the fact that the contracts were executed on different dates. *See Nau v. Vulcan Rail & Construction Co.*, 286 N.Y. 188 (1941) ("Even though [the agreements] had been made at different dates, that fact would not affect the rule since they were to effectuate the same purpose and formed a part of the same transaction."). In *Arciniaga v. General Motors Corp.*, 460 F.3d 231, 237 (2d Cir. 2006), the Second Circuit, applying New York law, considered several factors relevant to deciding whether multiple contractual instruments should be construed together: (1) the identity of the parties of the two agreements; (2) mutual dependence of the contracts; (3) absence of cross-reference; and (4) the contracts' purposes.

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Arbitrability disputes

Commercial Division cases have applied these factors to resolve disputes over arbitrability where one or more agreements contain an arbitration claim, but other related contracts do not.

For example, in *Astoria Equities 200 LLC v. Halletts A Dev. Co., LLC*, 47 Misc. 3d 171, 180 (Queens Co. 2014), the parties were involved in the development of a $1.5 billion waterfront project in Astoria, New York, known as Hallet's Point. By contract dated June 26, 2007, plaintiff agreed to sell property to be used as part of the development in exchange for cash and an equity interest. That contract was amended by Letter Agreement dated August 15, 2008, containing an arbitration clause for all disputes arising thereunder or related thereto. Separately, the parties entered into an August 15, 2008, Operating Agreement granting plaintiff certain equity interests and other rights.

Plaintiff brought suit seeking a declaration that it was not required to deliver a deed to its property as it had contracted to do. The defendant moved to compel arbitration as to certain claims, contending they were brought under the Letter Agreement containing the arbitration clause. The plaintiff countered that those claims were inextricably linked to the Operating Agreement, which did not have an arbitration clause. Justice Martin Ritholtz of the Queens County Commercial Division agreed with Defendant, finding that the Letter Agreement's arbitration clause carried over to the Operating Agreement. The court relied on several factors, noting that the two agreements had been executed simultaneously, by the same parties, and both governed the same subject matter: *inter alia*, the business relationship between the parties. The Letter Agreement also was directly referenced in the Operating Agreement. The court held that the intent of the parties, as manifested at the time of contracting and viewed in light of all surrounding circumstances, was that the contracts should be read together.

In *Golden Touch Transp. of NY, Inc. v. G.E.H.S. Transp., Inc.*, No. 239901/2010, 34 Misc. 3d 1209(A), 2011 WL 7006506 (Queens Co. Nov. 21, 2011), the defendant entered into five franchise agreements with plaintiff for the rights to transport airport customers. Each of those agreements contained non-compete provisions. The first four franchise agreements, governed by New York law, contained arbitration clauses that excluded from their reach actions to enforce the non-compete clauses. The arbitration clause in the fifth agreement, which was governed by Delaware law, contained no such exclusion.

After plaintiff sued to enforce the non-compete, the defendant moved to stay the action and compel arbitration. Defendant argued that the court should ignore the arbitration carve-out in the first four agreements because the fifth agreement with no such carve-out superseded the first four. Justice Marguerite Grays of the Queens County Commercial Division held that this argument was without merit as "[c]ontracts are separate unless their history and subject matter show them to be unified." The court posited that each agreement granted a separate franchise, and the Delaware agreement did not mention or expressly modify the earlier franchises. Justice Grays also relied on the fact that the plaintiff represented it was suing only on the first four agreements.

Complex transactions

Not surprising, the issue of whether to consider multiple contracts as a single agreement often arises in complex financial transactions involving a number of related agreements.

The court in *U.S. Bank Nat. Ass'n v. Greenpoint Mortg. Funding, Inc.*, No. 600352/2009, 2016 WL 392706 (N.Y. Co. Jan. 28, 2016), *aff'd as modified sub nom., U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 157 A.D.3d 93 (1st Dep't 2017), determined that three agreements in dispute "must be read together, even though they were made at different dates . . . since they were to effectuate the same purpose and formed a part of the same transaction." In *U.S. Bank*, defendant Greenpoint sold pools of loans collateralized by residential mortgage-backed securities. Greenpoint entered into two types of contracts with entities that purchased loans: Flow Agreements governing the general framework for those sales, and Purchase Price and Term Letters, which supplied specific terms governing individual trades. The Flow Agreements contained representations and warranties regarding the quality of the loans at issue.

Through a series of assignments of these agreements, the plaintiff Trust became the owner of the residential mortgage loan collateral. The Trust brought suit and defendant Greenpoint asserted a defense of lack of standing challenging

the assignments of all applicable agreements to the Trust, claiming that the assignment of the Flow Agreement was ineffective due to the failure to use the assignment form specified therein, whereas the Purchase Price and Terms Letter permitted assignment without the use of such form. Although those agreements were executed on different dates, Justice Marcy Friedman of the New York Commercial Division held that they must be read together "since they were to effectuate the same purpose and formed part of the same transaction." The court also considered the existence of cross-references between the agreements as further evidence of the parties' intent to have the agreements read together.

In *Schron v. Grunstein*, 32 Misc. 3d 231 (N.Y. Co. 2011), the parties entered into two agreements on the same date: an Option Agreement and a Term Loan Agreement. Under the Option Agreement, the plaintiff had the option to purchase membership units in an LLC for $100 million. The Term Loan called for that plaintiff to make a $100 million loan to the LLC. After plaintiff exercised the option, the defendants refused to honor it alleging that the $100 million loan was never funded, which they contended was a condition precedent to the exercise of the option.

Justice James Yates of the New York County Commercial Division evaluated whether two contracts were independent agreements or parts of a singular integrated transaction requiring them to be read jointly. In making its determination, the court looked at the dates of execution and amendment, the identity and sophistication of the parties, and the purposes of the agreements. Although the agreements were originally executed on the same date and amended on the same date, the court found that the two agreements were separate and independent written agreements with two separate assents rather than a single assent. Further, the court noted, there was only a partial identity between the parties, and the agreements ultimately served two distinct purposes. The court also considered the sophistication of the parties, and noted that the parties were sophisticated enough and had two opportunities to attach the agreements to each other, or incorporate mention of the same, were that their intent. Yet, both agreements lacked express cross-references to each other, indicating the parties' intention to keep them separate.

In *Stonebridge Cap., LLC v. Nomura Int'l PLC*, 24 Misc. 3d 1218(A), 897 N.Y.S.2d 672 (N.Y. Co. 2009), *aff'd*, 68 A.D.3d 546 (1st Dep't 2009), Justice Bernard Fried of the New York County Commercial Division held that certain indentures issued to different investors must be construed together because "it is a well-established rule of contract law that all contemporaneous instruments between the same parties relating to the same subject matter are to be read together and interpreted as forming part of one and the same transaction." The indentures in question were all part of the same transaction, and they were executed at the same time, by the same parties, and for the same purpose. The court cited the Restatement (Second) of Contracts § 202 which stated that "a writing is interpreted as a whole and all writings that are part of the same transaction are interpreted together." As such, and in the absence of anything to indicate a contrary intention, the court harmonized the disputed agreements and interpreted them together.

Conclusion

As evidenced by the cases discussed above, courts focus on the language of the contracts at issue and their surrounding circumstances to attempt to glean the intentions of the contracting parties in determining whether distinct contracts should be read together as one. As discussed, in making this determination, the courts consider a variety of factors, including the identity of the parties, the purpose of the agreements, the time of execution, and the context of the overall transaction. Where possible, courts also limit themselves to the four corners of the agreements, examining the language used to determine the relatedness of the agreements at issue.

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