SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** 54

Justice

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INDEX NO. 654819/2018

GULF LNG ENERGY, LLC, GULF LNG PIPELINE, LLC,

MOTION SEQ. NO. 005

Plaintiffs,

- v -

DECISION & ORDER ON MOTION

ENI S.P.A.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175

were read on this motion to/for SUMMARY JUDGMENT.

There is one dispositive reasonable interpretation of the parties' guarantee agreement (Guarantee Agreement, Dkt. 156). Defendant is only liable to pay "all amounts that become due and payable by the Customer . . . under the TUA" (*id.* § 3.1). There are no longer any amounts due and payable under the TUA. The arbitration between Gulf and Eni USA definitively established that there are no monthly-fee payments as of March 1, 2016 that could ever be due and payable by Eni USA. Additionally, the tribunal awarded Gulf over $400 million in compensation that it elected to seek for "Decommissioning Costs" to shut down the facility. Those amounts--the only amounts that could ever "become due and payable by the Customer"--were wholly satisfied and paid in full. If anything remained "due and payable" then § 3.2 would govern defendant's ability to assert defenses but that provision does not come into play unless there is first an "amount due and payable." The guarantee cannot reasonably be interpreted as requiring payment that could never become "due and payable" in the first place. This is confirmed by the position that Gulf advanced in arbitration that if the TUA were abrogated, Gulf would be "on the hook for at least hundreds of millions of dollars in loan commitments without the guaranteed, minimum fees that were the single express 'essential inducement'" to enter into the bargain (Dkt. 122 ¶ 2; *see also* Dkt. 123 ¶¶ 47-48, 50 ["In each of the years since the facility become operational, Gulf has provided the contracted services to Eni and Eni has paid for those services according to the terms of the TUA. As such, the fees paid by Eni to date are not reasonably considered as a pre-payment on any future services to be rendered by Gulf under the TUA. Rather, an early termination of the contract will result in Gulf losing the future monthly Reservation and Operating Fees for which it contracted and which Eni guaranteed in the TUA. . . . The fact that Gulf will lose far more than the costs

to mothball (or decommission) the facility if there is an early termination can further be demonstrated by considering the provision in the TUA that governs situations where Eni will no longer be able to pay (or is unwilling to pay) the required Reservation and Operating Fees. Article 18 of the TUA, and specifically Article 18.3(a), provides that in the event of certain circumstances where Eni will no longer pay the contracted fees (or will no longer guarantee those fees), Termination Liquidated Damages are to be computed as the difference between the 'Contract Value' and the Market Value' of the remaining monthly Reservation and Operating Fees through the end of the primary term of the TUA. . . . [If] the TUA is terminated in 2017, Eni will receive a windfall by being excused from the obligation to pay Reservation and Operating fees for the remaining 14+ years of the contract"]). It is therefore unreasonable to read the guarantee as requiring defendant to pay for services that will never be provided after Gulf was compensated for shutting the facility down. Indeed, it is hard to understand the point of having arbitrated the frustration of purpose defense of defendant's subsidiary, a judgment proof special purpose vehicle, if defendant was going to be on the hook anyway under the guarantee. Because all sums that were due and payable have already been paid and Customer's liability fully satisfied, the Guarantee obligations have been fully satisfied too. Plaintiffs' action on the Guarantee Agreement must be dismissed.

Accordingly, it is ORDERED that defendant's motion for summary judgment is GRANTED and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon submission of an appropriate bill of costs and the Clerk is to enter judgment accordingly.

11/24/2021
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER