

STATE OF VERMONT

SUPERIOR COURT  
Lamoille Unit

CIVIL DIVISION  
Docket No. 22-CV-1922

STOWE AVIATION, LLC and,  
STOWE AIRPORT INVESTMENT, LP  
Plaintiffs

v.

STATE OF VERMONT AGENCY OF  
COMMERCE AND COMMUNITY DEVELOPMENT,  
Defendant

**DECISION: MOTION TO DISMISS FIRST AMENDED COMPLAINT (Motion #16)**

Defendant State of Vermont Agency of Commerce and Community Development (“ACCD”) moves to dismiss the First Amended Complaint pursuant to V.R.C.P. 12(b)(1) and 12(b)(6). For the reasons stated below, the court grants ACCD’s motion on the grounds that Stowe Aviation, LLC and Stowe Airport Investment, LP (together, “SA”) have failed to state a claim for which relief can be granted, V.C.R.P. 12(b)(6).

When ruling on a motion to dismiss, the court assumes that the facts pleaded in the complaint are true and makes all reasonable inferences in the plaintiff’s favor. *Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶ 10, 209 Vt. 514. “A court should grant a motion to dismiss for failure to state a claim only when ‘it is beyond doubt that there exist no facts or circumstances that would entitle [the plaintiff] to relief.’” *Id.* (quoting *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002)). A motion to dismiss tests “‘the law of the claim, not the facts which support it.’” *Id.* (quoting *Powers*, 173 Vt. at 395).

*First Amended Complaint*

SA asserts two causes of action in its First Amended Complaint: breach of contract and breach of the covenant of good faith and fair dealing. The contract at issue is the Memorandum of Understanding (“MOU”) between SA and ACCD that is attached as Exhibit A to the First Amended Complaint. The court may properly consider the MOU in ruling on this motion, without transforming the motion into one for summary judgment, because the pleading is based on this document and it is attached as an exhibit. *Vt. State Auditor v. OneCare Accountable Care Org., LLC*, 2022 VT 29, ¶ 9 n.1; *Davis v. Am. Legion, Dep’t of Vt.*, 2014 VT 134, ¶ 13, 198 Vt. 204.

In its First Amended complaint, SA alleges the following facts:

- ACCD represented to SA that the Jay Peak EB-5 Projects were an example of its competence to administer, operate, and oversee investor funds generated as part of the EB-5 program and SA justifiably relied on this representation in entering into the MOU with ACCD. Amended Complaint, ¶ 8.
- SA's EB-5 project was the development, improvement, and expansion of the Morrisville-Stowe State Airport ("KMVL Project"). *Id.*, ¶ 7.
- Unbeknownst to SA, when it entered into the MOU with ACCD, the Vermont Resource Center ("VRC") had failed to perform sufficient and appropriate oversight responsibilities related to the development of investor funds earmarked for the Jay Peak Projects. This failure by the VRC resulted in the allowance of fraud by the principals of the Jay Peak Projects. *Id.*, ¶ 15.
- In its first year of operation, SA acquired four EB-5 immigrant investors. *Id.*, ¶ 20.
- Nearly seven months after executing the MOU, ACCD/VRC executed a separate MOU with Vermont's Department of Financial Regulation ("DFR"). Without SA's approval or consent, DFR assumed VRC's obligations relating to the EB-5 programs, including SA's KMVL Project. *Id.*, ¶ 21.
- After assuming VRC's obligations relating to the EB-5 programs, DFR demanded that SA enter into a new MOU or face a shutdown of the KMVL Project and cancellation of the MOU between SA and ACCD. *Id.*, ¶ 24.
- SA met with VRC and DFR in June 2016. At that meeting, DFR told SA that it could not (1) use any EB-5 funds until SA acquired United States Customs and Immigration Services ("USCIS") approval for five immigrant investors or (2) solicit any additional investors unless it executed a new MOU. *Id.*, ¶ 26.
- SA served VRC with a Notice of Breach of the SA MOU in July 2016. *Id.*, ¶ 30.
- VRC issued a Notice of Cancellation of the MOU in October 2016 and provided a copy of this notice to SA's lender, which caused the lender to suspend financing of the KMVL Project. *Id.*, ¶ 32.

SA alleges that DFR's actions, attributed to ACCD, "were the result of VRC's failure to perform its oversight obligations related to the Jay Peak Projects and the fall out resulting therefrom regarding VRC's failure to timely discover the fraud committed by the principals of the Jay Peak Projects. [SA]'s development of KMVL was directly undermined because of VRC's failure to perform appropriate oversight of the Jay Peak Projects contrary to representations made to [SA]." Amended Complaint, ¶ 33. SA asserts that its KMVL Project sustained substantial damages as a result of ACCD/VRC's failure to conduct the oversight of the Jay Peak Projects "which it was obliged to perform as represented to [SA] by ACCD to secure execution of the SA MOU." *Id.*, ¶¶ 39, 40.

In setting forth its breach of contract claim, SA asserts that it selected VRC as its regional center based on ACCD's representations regarding VRC's "'gold standard' oversight" of its EB-5 projects that were made before the parties executed the MOU. *Id.*, ¶¶ 47, 48. SA asserts that ACCD breached the MOU by "fail[ing] to fulfill the promises and representations it made

to [SA]" regarding overseeing the projects under its sponsorship and that "the Jay Peak fraud caused the failure of the KMLV Project and damaged [SA]." *Id.*, ¶ 49.

In its claim for breach of the covenant of good faith and fair dealing, SA asserts that the covenant required ACCD to cooperate with SA in performing the MOU and "prohibited ACCD from hindering, preventing, or interfering with [SA]'s ability to perform its duties under the contract." *Id.*, ¶ 54. SA asserts that ACCD "undermined and destroyed [SA]'s right to receive the benefit of the SA MOU" by "continuing to represent to [SA] that it was performing oversight obligations of capital investments in the EB-5 Projects under its sponsorship despite knowledge that it was not doing so." *Id.*, ¶ 55. According to SA, "ACCD acted in bad faith and with a reckless disregard of the integrity of its operational oversight obligations of EB-5 projects in its domain including the Jay Peak Projects." *Id.* It alleged that "ACCD's actions and inactions hindered, prevented, and interfered with [SA]'s ability to perform the SA MOU," *Id.*, ¶ 56.

### **Conclusions of Law**

#### **Breach of Contract**

To prevail on a breach of contract claim, SA must show that it was damaged by a breach of contract by ACCD. *Smith v. Country Vill. Int'l, Inc.*, 2007 VT 132, ¶ 9, 183 Vt. 535. "Two types of damages are recoverable: 'direct damages that naturally and usually flow from the breach itself, and special or consequential damages, which must pass the tests of causation, certainty and foreseeability.'" *Id.* (quoting *Waterbury Feed Co. v. O'Neil*, 2006 VT 126, ¶ 25, 181 Vt. 535). A plaintiff seeking consequential damages must show that the damages were reasonably "'in the contemplation of both parties at the time they made the contract.'" *Foti Fuels, Inc. v. Kurrle Corp.*, 2013 VT 111, ¶ 34, 195 Vt. 524 (quoting *A. Brown, Inc. v. Vt. Justin Corp.*, 148 Vt. 192, 196 (1987)). "Failure to prove damages is fatal to a claim for breach of contract." *Smith*, 2007 VT 132, ¶ 10. While "proof" is not required in a complaint, there must be at least allegations of damages and causation since those are essential elements of a claim.

SA asserts that it relied on ACCD's representations regarding its oversight obligations and that SA was damaged as a result of VRC's failure to timely discover the fraud committed by the principals of the Jay Peak Projects. SA alleges that its development of KMLV was undermined by VRC's failure to perform appropriate oversight of the Jay Peak Projects. A review of the MOU, however, reveals that neither the Jay Peak Projects nor ACCD's oversight responsibilities with regard to the Jay Peak Projects is mentioned anywhere in the document. The MOU between SA and ACCD pertains only to SA's KMLV Project. While there are many "Whereas" paragraphs setting forth the background and details of the SA/ACCD contractual relationship, there is nothing describing ACCD's oversight experience with the Jay Peak Projects or indicating reliance by SA on it. MOU at 1-2.

A contract "'must be interpreted according to the parties' intent as expressed in the writing.'" *Sutton v. Purzycki*, 2022 VT 56, ¶ 37 (quoting *Lussier v. Lussier*, 174 Vt. 454, 455 (2002)). When interpreting a contract and determining the parties' intent, a court will not look beyond the four corners of a contract unless the contract is ambiguous. *Sutton v. Vermont*

*Regional Center*, 2019 VT 71A, ¶ 66, 212 Vt. 612; see also *Towslee v. Callanan*, 2011 VT 106, ¶ 5, 190 Vt. 622 (“If unambiguous, the language of the [contract] controls and the Court does not look to external evidence.”). The MOUs at issue in *Sutton* are nearly identical to the MOU at issue here, and the *Sutton* Court determined that the MOUs in that case were not ambiguous. *Id.*, ¶¶ 65 n.11 and 66. SA does not contend that the MOU is ambiguous, and the court concludes that the MOU at issue here is not ambiguous. As a result, the court, in construing the MOU, does not consider any representations ACCD may have made to SA before the parties executed the MOU.

The fact that the MOU contains no merger clause does not change the analysis although SA suggests that it does. Opposition at 6. Merger clauses are “design[ed] to bypass ‘the confusion created when parties may have several agreements or contracts between them prior to completing a written agreement.’” *Kneebinding, Inc. v. Howell*, 2018 VT 101, ¶ 113, 208 Vt. 578. SA does not allege in the amended complaint that the parties had reached any agreements or contracts prior to executing the MOU.

SA relies on the *Sutton* opinion to argue that its contract claim “[has] already been assessed and accepted by the Vermont Supreme Court.” According to SA, its First Amended Complaint “present[s] the exact elements that have already supported the same unilateral contract claim, yet the Defendant nevertheless tries again to impute extra-textual requirements and present arguments barred by collateral estoppel.” Opposition at 5. Neither of these statements is correct. Although ACCD is a defendant in both cases, the facts of *Sutton* are very different from the facts SA alleges here. To start with, the *Sutton* plaintiffs are foreign investors, *Sutton*, 2019 VT 71A, ¶ 1, whereas SA is the creator/proponent of the EB-5 project KMVL. SA is a party to the MOU, whereas the *Sutton* plaintiffs are not parties to the MOUs at issue in that case.

Unlike the situation in this case, the MOUs in *Sutton* “did not create obligations running from ACCD to plaintiffs [investors]” because the *Sutton* plaintiffs were not parties to the MOUs. *Sutton*, 2019 VT 71A, ¶ 65. The *Sutton* Court concluded that the investor plaintiffs had stated a claim for a unilateral contract based on ACCD’s alleged promise to “provide ‘oversight, administration, management, and regulatory compliance of the Jay Peak Projects for the specific benefit of [p]laintiffs’” in exchange for the plaintiffs’ investments in the Jay Peak Projects. *Id.*, ¶ 61. That is a very different scenario than exists here, where both SA and ACCD are parties to the MOU, SA is not a foreign investor seeking permanent residency in the United States, and the contract forming the basis for SA’s claim states nothing about any promise to provide oversight, administration, management, or regulatory compliance of the Jay Peak Projects for the benefit of SA.

The court finds that SA alleges a basis for a breach of contract claim in ¶¶ 21, 24, 26, 30, and 32, with regard to ACCD/VRC’s unauthorized and unilateral transfer of the MOU to DFR, DFR’s action in making additional demands on SA, and VRC’s cancellation of the MOU. Despite asserting that SA’s lender suspended financing of the KMVL Project after being notified of the MOU’s cancellation, however, SA does not identify any damages it suffered as a result of the suspension of financing or as a result of the unauthorized transfer of the MOU to DFR.

Instead, SA asserts only that its “development of KMVL was directly undermined because of VRC’s failure to perform appropriate oversight of the Jay Peak Projects contrary to representations made to [SA].” First Amended Complaint, ¶ 33. Because SA fails to allege any direct, special, or consequential damages resulting from the transfer of the MOU to DFR, VRC’s cancellation of the MOU, or the suspension of its lender’s financing, the court concludes that SA has failed to state a claim for breach of contract on this basis. See *Smith*, 2007 VT 132, ¶ 9.

### **Breach of the Covenant of Good Faith and Fair Dealing**

The covenant of good faith and fair dealing is based on the “underlying principle implied in every contract [] that each party promises not to do anything to undermine or destroy the other’s rights to receive the benefits of the agreement.” *Carmichael v. Adirondack Bottled Gas Corp. of Vt.*, 161 Vt. 200, 208 (1993). The covenant “ensure[s] that parties to a contract act with faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” *Sutton*, 2019 VT 71A, ¶ 62 (quoting *Monahan v. GMAC Mortg. Corp.*, 2005 VT 110, ¶ 36, 179 Vt. 167).

SA’s cause of action for breach of the covenant of good faith and fair dealing suffers from the same deficiency as its breach of contract claim. SA bases this claim on ACCD’s continuing representation to it that ACCD was performing oversight obligations of capital investments for EB-5 projects under its sponsorship, alleging that “ACCD acted in bad faith and with a reckless disregard of the integrity of its operational oversight obligations of EB-5 projects in its domain including the Jay Peak Projects.” First Amended Complaint, ¶ 55.

In asserting that ACCD’s “actions and inactions hindered, prevented, and interfered with [SA]’s ability to perform the SA MOU,” First Amended Complaint, ¶ 56, SA bases its breach of the covenant claim on ACCD’s failure to oversee the proper use of investors’ funds in projects unrelated to SA’s KMVL Project. As discussed above, the MOU did not obligate ACCD to act in any particular way with respect to any EB-5 project other than the KMVL Project. Because SA fails to identify any damages it suffered from breach of the covenant or tie them to anything ACCD did, or did not do, vis-à-vis the MOU, the court concludes that SA has failed to state a claim for breach of the covenant of good faith and fair dealing.

### **Order**

For the reasons stated above, SA’s First Amended Complaint is dismissed for failure to state a claim for which relief can be granted. Motion #16 is *granted*.

Electronically signed May 3, 2023 pursuant to V.R.E.F. 9 (d).



Mary Miles Teachout  
Superior Judge (Ret.), Specially Assigned