

Fifth Circuit Court of Appeal State of Louisiana

NO. 25-C-514

KENSINGTON CAPITAL ADVISORS, LLC, ET AL.

VERSUS

DELOS CAPITAL MANAGEMENT LP, ET AL.

IN RE DELOS CAPITAL MANAGEMENT LP, DELOS EDGARD, LP, GULF COAST CONSTRUCTION & MATERIALS, LLC, EDGARD CONSTRUCTION MATERIALS, LLC, ST. JAMES CONSTRUCTION MATERIALS, LLC, RIVER PARISHES CONSTRUCTION MATERIALS, LLC, HAWK RDF, L.L.C., ROBERT D. FIELD, BAK ADVISORS, INC., AND BERNARD A. KATZ APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE JUNE B. DARENSBURG, DIVISION "C", NUMBER 851-721

November 14, 2025



Panel composed of Judges Susan M. Chehardy,
Fredericka Homberg Wicker, and Stephen J. Windhorst

WRIT DENIED

Relators, Delos Capital Management LP (“Delos”), Delos Edgard, LP, Gulf Coast Construction & Materials, LLC f/k/a/ Edgard Construction Materials Holdings, LLC, (“GCCM”), Edgard Construction Materials, LLC, St. James Construction Materials, LLC, River Parishes Construction Materials, LLC, Hawk RDF, L.L.C., Robert D. Field, BAK Advisors, Inc., and Bernard A. Katz (collectively “Defendants”),¹ and non-party, Delos Investment Fund, II, LLP (“DIF

¹ Defendants that are not a part of this writ application include Grayson Data Services, LLC, and Kenneth Grayson.

II”),² seek this Court’s supervisory review of the trial court’s September 19, 2025 judgment denying, in part, its partial motion for summary judgment as to the trucking claims brought against them by respondents, Kensington Capital Advisors, LLC, Kensington Realty Group, LLC, Allied Transportation of Louisiana, LLC (“Allied”), Pelican Barge and Transportation, LLC, and John Ohle (collectively “Plaintiffs”).³ Finding genuine issues of material fact exists precluding partial summary judgment, we deny the writ application.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

At the heart of Defendants’ motion for partial summary judgment are two trucking agreements related to the mining of clay from two borrow pits located in St. James Parish; namely the Willow Bend pit and the Big Shake pit. According to Plaintiffs, in 2017, River Parishes Dirt & Gravel, LLC (an affiliate of Kensington Capital Advisors, LLC (“KC”)) obtained the rights to purchase the Willow Bend pit through the former pit owner’s bankruptcy proceedings. Thereafter, KC sought to partner with various equity groups, including certain Defendants, Edgard Construction Materials Holdings, LLC (“ECMH”) and Delos Capital Management LP (“Delos”),⁴ to purchase and develop the Willow Bend pit. Plaintiffs allege that, in exchange for the assignment of the purchase rights for the Willow Bend pit to ECMH, ECMH agreed to refer all trucking and transportation contracts to KC’s affiliate, Pelican Barge and Transportation, LLC, or a newly formed entity (Allied Transportation of Louisiana, LLC). This agreement was memorialized in a Letter Agreement dated June 8, 2018 (“2018 Trucking Agreement”), which provided, in part:

Trucking Opportunity

² The trial court granted DIF II’s motion for partial summary judgment. That ruling is not at issue in this writ application.

³ Plaintiff, Museum of Sports History, LLC, is not a part of this writ application.

⁴ KC also partnered in this venture with Chelan Advisors LLC (“Chelan”), who is not a party in this litigation.

After the Property Closing, Newco shall refer all trucking and transportation contracts related to the operation of the Assets to KC's affiliate, Pelican Barge and Transportation, LLC or a newly formed entity ("Pelican"), provided that Pelican's services are provided at market rates in the local Edgard, Louisiana area. Newco shall have the right to immediately terminate any such contracts with Pelican upon Newco's sale of the Assets or determination by Newco that such services may be provided by a third party at a lower cost and/or higher quality.

KC agrees and acknowledges that Delos and Chelan or their applicable affiliates shall be entitled to participate and receive fifty percent (50%) of the profits interest of Pelican generated from any and all transportation revenue related to the operations of the Assets, whether through mineral sales or landfill related operations (the "Transportation Opportunity"), KC or its assigns shall retain fifty percent (50%) of the profits interests in any and all transportation revenue related to the Transportation Opportunity. No Party hereto shall be obligated to contribute any capital to Pelican in connection with the Transportation Opportunity.

The following year, Plaintiff, John Ohle, identified the opportunity to acquire the Big Shake pit. Plaintiffs contend that, similar to the 2018 Trucking Agreement, in exchange for the assignment of the Big Shake pit opportunity to ECMH, ECMH agreed to refer all trucking and transportation contracts to KC, who required that all trucking and transportation contracts for the Big Shake pit be referred to KC's affiliate, Pelican, or a newly formed entity (Allied Transportation of Louisiana, LLC ("Allied")). This agreement was memorialized in another Letter Agreement dated February 21, 2020 (the "2020 Trucking Agreement").⁵ Other than the 2018 Trucking Agreement applying New York law, the material terms of the two contracts are identical.

The instant writ application shows that Plaintiffs sued Defendants for, among other things, breach of the Trucking Agreements and breach of the implied

⁵ Following the successful acquisition of the Big Shake pit, ECMH changed its name to Gulf Coast Construction and Materials, LLC ("GCCM").

covenant of good faith and fair dealing, based on the same allegations forming the basis of Plaintiffs' breach of contract claim. Plaintiffs further seek a declaratory judgment that the Trucking Agreements at issue remain "valid and enforceable," and that GCCM must continue to refer all trucking business to Plaintiffs.

In response, Defendants filed a motion for partial summary judgment to dismiss Plaintiffs' contract claims on the basis that the language of the Trucking Agreements is clear and unambiguous, *i.e.*, that Plaintiffs owe to Defendants 50% of the profit interests, that Plaintiffs have admittedly not paid any amounts due pursuant to the Trucking Agreements in breach thereof, and that due to Plaintiffs' failure to perform, Defendants are relieved of their obligation to perform under the contract. In short, Defendants contend that Plaintiffs' non-payment of the 50% profit interests entitles them to unilaterally terminate and dissolve the Trucking Agreements. According to Defendants, Plaintiffs' non-payment is a classic material breach that excuses them, the non-breaching party, from performance, thereby warranting partial summary judgment of these contract claims.

In opposition, Plaintiffs conceded that the Trucking Agreements "are the best evidence of the parties, terms, and obligations therein," and that they have not paid Defendants for any share of the profit interests to which Defendants may have been entitled to participate pursuant to the Trucking Agreements. Plaintiffs argued, however, that in 2020, Plaintiffs and Defendants agreed to a joint venture, whereby KC would form Allied Transportation of Louisiana, LLC ("Allied"), who would be the exclusive trucking operator for the Willow Bend and Big Shake pits, and that ECMH would have a 30% interest in Allied.⁶ Plaintiffs argued that after

⁶ Plaintiffs attached to its opposition memorandum an August 8, 2020 email from Kenneth Picache (former CEO of GCCM and GCCM Board Member) to various GCCM Board Members and counsel for Delos, which was admitted into evidence at the hearing on GCCM Defendants' motion, stating: "Trucking will be subcontracted to Allied Transportation of Louisiana with ECMH obtaining a 30% interest in exchange for the exclusive trucking relationship."

Allied was formed, they attempted to execute an operating agreement for Allied with GCCM, formerly ECMH, but GCCM refused to sign it because Defendants did not want Plaintiffs to retain a controlling interest in Allied. Plaintiffs averred that, with the knowledge of Defendants, they nevertheless continued the operation of Allied (and its trucking operations of the Willow Bend and Big Shake pits). Plaintiffs argued that without an operating agreement for Allied, the “50% of the profit interest” in the trucking operations, for which Defendants were entitled to participate pursuant to the Trucking Agreements, could not be calculated. Additionally, without an operating agreement, the recipients and amounts of the “50% of the profit interests”—and what constituted “net profit”—could not be determined; *i.e.*, what portion of the 50% profit interest went to Chelan and what portion of the 50% profit interest went to Delos).

According to Plaintiffs, although the Trucking Agreements afforded Defendants with the opportunity to participate in sharing 50% of the profit interests of the trucking operations, by refusing to execute an operating agreement, Defendants, effectively, chose not to exercise that right to participate. In short, until an operating agreement for Allied was agreed upon and executed by the parties, Plaintiffs argued that Allied could not issue any payments to Defendants to which they may have been entitled, and thus, could not have been in breach of the Trucking Agreements for non-payment of the profit interests.

Defendants’ motion for partial summary judgment came for hearing on September 16, 2025. After hearing the argument of counsel, and reviewing the briefs and exhibits submitted by the parties, the trial judge denied Defendants’ motion. In written reasons, the trial judge stated that “[t]he Trucking Agreement does not specify how the profits are to be calculated or how GCCM Defendants shall receive the profits.” Moreover, despite the parties agreeing that the Trucking Agreements were “the best evidence of the parties, terms, and obligations therein,”

the trial court stated “it simply cannot look to the four corners of the contracts for all answers[,]” and that there remain “genuine issues of material fact regarding the Trucking Agreements and how GCCM Defendants were to be paid.” Further, the trial court noted that discovery is ongoing (on October 31, 2025, this Court denied two GCCM writ applications pertaining to discovery), and thus summary judgment is not proper. We agree.

DISCUSSION

In their writ application, Defendants argue that the exclusivity provisions of the Trucking Agreements are ripe for partial summary judgment because the parties have agreed that the terms of the Trucking Agreements are unambiguous and Plaintiffs have admitted they have not shared 50% of the profits with Defendants as required by the agreements. According to Defendants, because Plaintiffs have failed to perform their obligation under the agreements by splitting the profits, Defendants are relieved of their responsibility to perform their obligations under the agreements.

Defendants contend that by denying their motion, the trial court has effectively ruled that Plaintiffs can keep 100% of the profit interests under the Trucking Agreements. This is incorrect. Instead, the trial court merely held there are genuine issues of material fact regarding whether Defendants were “excused from their performance,” and therefore “cannot be held to have breached the contracts for non-performance,” precluding resolution of the breach of contract issue at this time, as discovery is still ongoing. This issue will still need to be litigated at trial. Moreover, even when apparently clear, contract terms can become ambiguous when viewed in the context of the parties’ course of dealing, requiring factual development. Such is the case here.

A court shall grant a motion for summary judgment if the motion, memorandum, and supporting documents show that there is no genuine issue of

material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3). The mover's burden on the motion is to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense if the mover does not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment. La. C.C.P. art. 966(D)(1). The adverse party then has to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. *Id.*

Appellate courts review the grant or denial of a motion for summary judgment *de novo*, using the same criteria applied by the trial court, to determine whether any genuine issue of material fact exists and whether the mover is entitled to judgment as a matter of law. *Simon v. State Farm Mut. Auto. Ins. Co.*, 16-46 (La. App. 5 Cir. 9/8/16), 201 So.3d 1007, 1009.

Our *de novo* review of the application and its exhibits show that several issues of fact exist which preclude the granting of a partial summary judgment at this state of the proceedings, especially since discovery remains ongoing.

As stated above, the Trucking Agreements provided that Defendants were "entitled to participate in and receive fifty percent (50%) of the profit interests" generated from the transportation revenue related to the operation of the Willow Bend and Big Shake clay pits. Whether Defendants exercised the right to participate is a genuine issue of material fact. Plaintiffs claim they did not because they refused to execute an operating agreement for Allied. Whether an operating agreement for Allied was necessary is also an unresolved factual issue. Even assuming Defendants did exercise their right to participate, the Trucking Agreements do not delineate how the 50% profit interests were to be calculated or how Defendants were to be paid; *i.e.*, in what portions Plaintiffs were to disburse the 50% profit interests as between Chelan and Delos, respectively.

Further, based on the unique and complex facts of this case, we find that resolution of these issues will likely require the court to make credibility determinations amongst the parties and witnesses. The Louisiana Supreme Court has clearly stated that “[a] trial judge cannot make credibility determinations on a motion for summary judgment.” *Hutchison v. Knights of Columbus, Council No. 5747*, 03-1533 (La. 2/20/04), 866 So.2d 228, 234. This Court has echoed that sentiment in *Foster v. Ochsner Clinic Foundation*, 25-205 (La. App. 5 Cir. 5/14/25), 2025 WL 1392247, *2 (unpublished writ disposition), stating that “[i]n determining whether a genuine issue of material fact exists, the court cannot make credibility determinations, evaluate testimony, or weigh evidence. When valid summary judgment evidence is conflicting, creating a genuine issue of material fact, the court must determine credibility and weigh the evidence; in this instance, summary judgment is not warranted.” *Id.* [Citations omitted.] Moreover, it is not the trial court’s function on a motion for summary judgment to determine or even inquire into the merits of the issues raised. “[F]actual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent’s favor.” *Willis v. Medders*, 00-2507 (La. 12/8/00), 775 So.2d 1049, 1050.

CONCLUSION

For these reasons, and on the showing made, we deny the writ application.

Gretna, Louisiana, this 14th day of November, 2025.

SMC
FWW
SJW

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
STEPHEN J. WINDHORST
JOHN J. MOLAISSON, JR.
SCOTT U. SCHLEGEL
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JUDGES



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NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **11/14/2025** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

25-C-514

E-NOTIFIED

24th Judicial District Court (Clerk)
Honorable June B. Darensburg (DISTRICT JUDGE)
W. Spencer King (Relator)

Mark R. Beebe (Respondent)
Matthew W. McDade (Relator)

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