

MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 17

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x

DAVID PENG, et al.

-against-

WILLETS POINT ASPHALT CORP.,  
et al.

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x

INDEX NO. 11972/07

MOTION DATE: JANUARY 20, 2010

MOTION CAL. NO. 50

MOTION SEQ. NO. 5

DATED: MARCH 23, 2010

The plaintiffs have moved for summary judgment on their first and fifth causes of action and for summary judgment dismissing the defendants' counterclaims. The defendants have cross-moved for, inter alia, summary judgment on the issue of liability arising under their counterclaims for breach of contract.

On or about May 9, 2006, the plaintiffs, as purchasers, and defendant Willets Point Asphalt Corp. (WPAC), as seller, entered into a contract for the sale of premises known as 35-32 College Point Boulevard, Queens, New York. The contract set the closing date for "on or before January 31, 2007" with time of the essence, although the agreement further provided that "[t]he failure or refusal of the Purchaser to close title on or before March 1, 2007 shall constitute a willful default hereunder and shall entitle the Seller to retain the contract down payment as liquidated damages." Paragraph 11 of the contract essentially provided that in the event of a default by the purchaser, the seller's sole remedy was the retention of the down payment as liquidated damages. The plaintiffs made a down payment of \$650,000 on the contract price of \$13,000,000. Defendant WPAC used the 1.2 acre property to manufacture asphalt, and toward that end the defendant maintained,

inter alia, a two-story building, a laboratory building, two large vertical asphalt tanks, a hot oil heater system, blower stills, saturators, above ground asphalt silos, conveyors, and underground storage tanks at the premises.

Concerned about the environmental consequences of the defendant's use of the property to manufacture asphalt, the plaintiff buyers insisted on the inclusion of paragraph 16 in the rider to the contract which provided in relevant part: "This agreement is contingent upon the following: 1. Proper demolition and removal by the Seller at its own cost and expense of all existing structures, equipment, and personal property on the premises so that the premises shall be restored to a ready to build condition, vacant and free of the above items; 2. Delivery by Seller at its own cost and expense of Environmental Phase I \*\*\* and Phase II reports \*\*\* 3. Completion of all required remedial measures by Seller at its own cost and expense concerning environmental hazardous conditions, if any \*\*\*. 4. All of the above must be done in a timely manner and on or before the Closing. Failure on the part of the Seller to perform any of the above shall be deemed a material breach of the contract \*\*\*." (On or about August 18, 2006, the parties amended the contract to eliminate the seller's obligation to demolish the largest building on the premises.) Paragraph 17 of the rider provided in relevant part: "It shall be a condition to Purchaser's obligation to close title that: \*\*\* (d) Seller shall deliver possession of the Premises to Purchasers on the Closing Date in the condition required by this Agreement and in accordance with the terms, covenants, and conditions of this Agreement." The contract further provided that in the event that defendant WPAC failed to fulfill the conditions of the agreement, the plaintiff buyers could terminate it and would receive their down payment back.

In or about December 2006, plaintiff David Peng, allegedly concerned by defendant WPAC's delay in securing the Phase I environmental report, obtained one from Hydro Tech Environmental Corp. which he showed to plaintiff John Leagh, Esq. In a letter to Richard H. Wynn, Esq., an attorney for WPAC, which enclosed the Phase I report, Leagh alleged that the report had disclosed "various hazardous conditions at the premises" which

he wanted corrected or the purchasers would regard the seller as being in material breach of the contract. Wynn responded by alleging that the defendant seller had sent a Phase I report to the sellers on August 24, 2006, and he promised to provide a Phase II report by the middle of February. Wynn asserted “you have totally mischaracterized the conclusions contained in the Hydro Tech Environmental Corp. Phase I study. There are no ‘hazardous conditions’ at the premises as defined by the March 9, 2006 Contract of Sale and therefore, the Seller has not made any false representations and covenants.” By letter dated January 29, 2007, Leigh again asserted that environmental conditions contrary to the seller’s representations and covenants did exist on the property and that the seller had to correct them to avoid a material breach. On or about February 16, 2007, defendant WPAC sent Leigh a Phase II report which disclosed the presence of three underground petroleum storage tanks and raised levels of semi-volatile organic compounds in the soil and volatile organic compounds in the groundwater. The Phase II report included photographs of the premises which revealed to Leigh that the defendant seller had not begun to demolish the asphalt facilities as promised, and visits to the site by several other plaintiff purchasers also revealed that the seller had not yet begun the removal work required by the contract. By letter to Wynn dated February 28, 2007, Leigh asserted that WPAC had failed to comply with Articles 16 and 17 in the rider to the contract, since “as of this day the items required to be demolished and removed remain on the premises and environmental hazardous conditions have not been fully remedied.”

Wynn responded by letter dated March 1, 2007 denying any default by the seller and raising the seller’s concern about the buyers’ finances. The letter reads in part: “When you called me on or about January 18, 2007, you informed me that your clients were having difficulty raising the necessary funds to close and you asked me to consider finding another purchaser. Now you are complaining that the Seller has not demolished the existing Asphalt Plant and restored the site to “a ready to build” condition, a task which could be completed within weeks. *The Sellers [sic] are not going to dismantle their valuable asset until they are absolutely positive that your clients are ready and financially able to close.*”

(Italics added.) Wynn demanded “readily ascertainable concrete proof that your clients are financially able to close.” In an affidavit submitted with the instant cross motion for summary judgment, Wynn recounts the telephone conversation using more definite language than “difficulty” and “consider.” Wynn alleges: “[H]e asked that WPAC find another purchaser because his partners were experiencing difficulty in raising the cash to close, \$9,350,000.00.” Wynn understood Leigh to have said that the purchasers “could not afford to close on January 31, or March 1, or any other time for that manner \*\*\*.” At their depositions, plaintiff Leigh and plaintiff Chen testified that they expected to borrow their share of the money to close (\$1,300,000 each), the former from a Mr. Lai, whose address he did not know, and the latter from a “cousin” in China.

By letter dated March 5, 2007, Leigh informed Wynn that the purchasers regarded the seller to be in default of the contract, and by letter dated March 22, 2007, Wynn informed Leigh that the seller regarded the buyers to be in default for failure “to provide the necessary documentation to demonstrate that they are ready and financially able to close.”

This action ensued on or about May 9, 2007. The first and fifth causes of action upon which the plaintiffs seek summary judgment are for breach of contract. Defendant WPAC and defendant Wynn served an answer with counterclaims, the first and second for breach of contract, the third for a judgment directing the turnover of the down payment held in escrow, and the fourth for fraud.

Summary judgment is warranted where there is no issue of fact which must be tried. (*See, Alvarez v Prospect Hospital*, 68 NY2d 320.) In the case at bar, neither side established a right to summary judgment regarding the claims for breach of contract.

The first issue presented, whether anticipatory breach of the contract can be attributed to the plaintiff purchasers, cannot be decided here as a matter of law. Pursuant to the doctrine of anticipatory breach, a wrongful repudiation of a contract by one party before the time for performance entitles the other party to immediately claim a total breach. (*See, American List Corp. v U.S. News and World Report, Inc.*, 75 NY2d 38.) A wrongful

repudiation by one party excuses the other from tendering performance, and the other party need not prove its ability do so. (See, *American List Corp. v U.S. News and World Report, Inc.*, *supra*.) In order to establish a claim of anticipatory repudiation, a party must prove that there was a renunciation of the contract in which the repudiating party made an “unqualified and clear refusal” to perform the entire contract. (*De Lorenzo v Bac Agency Inc.*, 256 AD2d 906, 908; *Highbridge Development BR, LLC v Diamond Development, LLC*, 67 AD3d 1112; *O’Connor v Sleasman*, 37 AD3d 954.) The refusal make take the form of an “unequivocal” statement or act (*Highbridge Development BR, LLC v Diamond Development, LLC, supra*, 656), but anticipatory breach can also be found “if a repudiating party is seeking ‘to avoid its obligations by advancing an “untenable” interpretation of the contract, or has communicated its intent to perform only upon the satisfaction of extracontractual conditions \*\*\*.’ ” (*O’Connor v Sleasman, supra*, 956, quoting *SPI Communications v WTZA-TV Assoc. Ltd. Partnership*, 229 AD2d 644, 645.) In the case at bar, there are issues of fact and credibility concerning whether Leigh made an “unequivocal” statement that the plaintiff purchasers would not perform the contract. While Wynn’s letter of March 1, 20007 states “you [Leagh] informed me that your clients were having *difficulty* raising the necessary funds to close and you asked me to *consider* finding another purchaser,” (italics added) his affidavit submitted on the motion and cross motion states more definitely “he [Leagh] asked that WPAC find another purchaser \*\*\*.” The inconsistency concerning the alleged unequivocal refusal to perform raises issues of fact and credibility which cannot be decided here. (See, *Knepka v Tallman*, 278 AD2d 811; *Nova v K & B Furniture Co., Inc.*, 262 AD2d 243; *Meyer v Moreno*, 258 AD2d 315.) There are also issues of fact concerning whether anticipatory breach of contract can be attributed to the plaintiff purchasers by reason of their insisting on the defendant’s remediation of allegedly non-existent environmental problems. (See, *O’Connor v Sleasman, supra*; *SPI Communications v WTZA-TV Assoc. Ltd. Partnership, supra*.) Under all of the circumstances of this case, including the deposition testimony of plaintiff Leigh that he

intended to borrow his share of the purchase price (\$1,300,000) from an individual whose address he did not know and the deposition testimony of plaintiff Chen that he intended to borrow his share of the purchase price (\$1,300,000) from a “cousin” in China, the issue of whether anticipatory breach can be attributed to the plaintiff purchasers is one of fact. (See, e.g., *Veeraswamy v Novak Juhase & Stern, LLP*, 50 AD3d 1127.)

The next issue presented is whether the defendant seller had the right to demand adequate assurance of future performance from the plaintiff buyers. One court succinctly explained the rule as follows: “The doctrine of anticipatory repudiation is related to but distinct from the rule that allows an obligee to demand adequate assurance of future performance. An obligor’s statement or voluntary act may be equivocal, and not provide clear grounds to declare an immediate breach. In that situation, the obligee declares a repudiation at his peril. Or the obligor may say or do nothing that suggests his unwillingness or inability to perform, but the circumstances may nonetheless indicate that performance is not likely. In these situations, the obligee is entitled--but not required--to seek assurances from the obligor that he will perform when the time for performance arrives. *Restatement (Second) of Contracts* § 251(1). If the demand is proper and reasonable assurance is not forthcoming, the obligee may treat the failure as a repudiation. *Id.*, at § 251(2). The right to demand adequate assurance of future performance was initially limited in New York to situations involving the sale of goods covered by N.Y.U.C.C. § 2-609. In *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 682 N.Y.S.2d 664, 705 N.E.2d 656 (1998), the Court of Appeals adopted the U.C.C. rule of adequate assurance as part of the common law of contracts.” (*In re Asia Global Crossing, Ltd.*, 326 BR. 240, 250 [Bkrcty. SDNY 2005], *rearg* 332 BR. 520.) Although the Appellate Division, First Department apparently limits the common-law extension to situations analogous to that involving a sales contract (see, *Bank of New York v River Terrace Associates, LLC*, 23 AD3d 308), the Court of Appeals in *Norcon* merely advised the courts to proceed warily in extending the rule in common-law situations. The Court of Appeals also observed that

commentators “have cogently identified the need for the doctrine to be available in exceptional and qualifying common-law contractual settings and disputes because of similar practical, theoretical and salutary objectives (e.g., predictability, definiteness, and stability in commercial dealings and expectations) \*\*\*.” (*Norcon Power Partners, L.P. v Niagara Mohawk Power Corp.*, *supra*, 465.) This court notes that the rule has already been treated as relevant in real estate cases from other jurisdictions. (*See, e.g., Drinkwater v Patten Realty Corp.*, 563 A2d 772 [Me]; *Lo Re v Tel-Air Communications*, 490 A.2d 344 [NJ] [cited by Court of Appeals]; *Conference Ctr. v TRC-The Research Corp. of New England*, 455 A.2d 857 [Conn] [cited by Court of Appeals]; *Jonnet Development Corp. v Dietrich Industries, Inc.*, 463 A.2d 1026 [Pa].) This court holds that the rule is applicable to the case at bar and that under all of the circumstances, including the prospective demolition of an entire asphalt facility, whether the defendant made a reasonable demand for adequate assurances of performance is an issue of fact. (*See, Phibro Energy, Inc. v Empresa De Polimeros De Sines Sarl*, 720 F Supp 312 [applying New York law]; 4 Anderson UCC § 2-609:15 [3d ed].)

Accordingly, those branches of the plaintiffs’ motion which are for summary judgment on their first and fifth causes of action are denied. Those branches of the plaintiffs’ motion which are for summary judgment dismissing the first and third counterclaims are denied. The defendants’ cross motion for, inter alia, summary judgment on the issue of liability arising under their counterclaims for breach of contract is denied.

In regard to the second counterclaim, which seeks \$2,000,000 in damages for “economic loss,” paragraph 11 of the contract provided that the seller’s retention of the down payment as liquidated damages would be its sole remedy in the event of a breach. (*See, Zullo v Varley*, 57 AD3d 536; *Anah v Dudek*, 25 Misc 3d 1210[A] [Table], 2009 WL 3199221 [Text].) In regard to the fourth counterclaim, which asserts fraud, the defendant did not adequately allege a breach of duty independent of the contract itself. (*See, Marcantonio v Picozzi*, 70 AD3d 655.)

Accordingly, those branches of the plaintiffs' motion which are for summary judgment dismissing the second and fourth counterclaims are granted.

Short form order signed herewith.

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J.S.C.