SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER **PART** 45

Index Number : 602269/2009

NOBLE AMERICAS CORP.

vs

CIT GROUP/EQUIPMENT

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion To dismiss is granted per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
Dec 08 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: December 4, 2009

MELVIN L. SCHWEITZER J.S.C.
J.S.C.

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

NOBLE AMERICAS CORP.,

Plaintiff,

-against-

CIT GROUP/EQUIPMENT FINANCING, INC.,

Defendant.

Index No. 602269/2009

DECISION AND ORDER

Motion Sequence No.: 001

MELVIN L. SCHWEITZER, J.:

Defendant, CIT Group/Equipment Financing, Inc. (CIT), moves to dismiss the complaint in this action pursuant to CPLR 3211. In this action, plaintiff, Noble Americas Corp. (Noble), seeks a declaratory judgment that it is relieved from making lease payments on two leases it entered into, as lessee, with CIT, as lessor, for railroad tank cars. The leases were made as schedules to a Master Railroad Lease agreement (Master Lease) between these parties. Noble says it leased the tank cars so it could transport ethanol from two ethanol producing facilities, each of which thereafter went bankrupt and closed. The complaint alleges that the bankruptcy and closure of the two ethanol producers were unanticipated events, sufficient for Noble to avoid its lease obligations because the purpose of its tank car leases now has been frustrated.

CIT's motion to dismiss argues, *inter alia*, that this is not a justiciable issue for the court to determine because Noble continues to make its payments on the leases and, thus, its request for declaratory relief is premature in that the frustration of purpose doctrine is a defense to a breach of contract which has not occurred; in any event, the doctrine is inapplicable to this lease transaction because the parties did not agree to make the leases contingent on serving any particular ethanol facilities and CIT did not understand that to be the basis of its agreement with

Noble; and the bankruptcy of the ethanol producers was a reasonably foreseeable risk that Noble could have shifted to CIT by negotiated agreement between the parties, which it did not do.

Discussion

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.* at 88). "In assessing a motion under CPLR 3211 (a) (7), however, ... the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.* [citation and internal quotation marks omitted]).

It is well-established that where there is a conflict between allegations in a complaint and the provisions of an exhibit attached to it which forms the basis for the complaint, the exhibit controls. *See e.g. Lance Int'l, Inc. v First Nat'l City Bank*, 28 AD2d 981, 982 (1st Dept 1967) (finding no cause of action where exhibit to complaint contradicted breach of contract claims). Thus, a plaintiff's conclusion as to the meaning of the documents is not binding on the court; nor can a pleaded allegation change the character or terms of the exhibit. *See e.g. Salomon v Mahoney*, 271 AD 478 (1st Dept 1946) (finding exhibit to complaint superseded conclusory allegations therein); *Cuglar v Power Auth.*, 4 AD2d 801 (3d Dept 1957) (same); *Boro Motors Corp. v Century Motor Sales Corp.*, 18 Misc 2d 1009, 1010 (Sup Ct, Kings County, 1959) (same). Where the factual allegations in the complaint are not sufficient to state a cause of

action, a motion to dismiss must be granted. *See Mayer v Sanders*, 264 AD2d 827, 828 (2d Dept 1999); *Fillman v Axel*, 405 NYS2d 471, 472 (1st Dept 1978).

The court first addresses whether Noble has presented a justiciable controversy for purposes of obtaining a declaratory judgment action pursuant to CPLR 3001. The court disagrees with CIT's position that Noble's declaratory judgment action is premature. The very purpose of a declaratory judgment action is to "enable a party whose rights, privileges and powers are endangered, threatened or placed in uncertainty, to invoke the aid of the court to obtain a declaration of his rights or legal possession before he subjects himself to damages or loss. The remedy is intended to afford litigants an opportunity to proper cases to obtain a determination of their rights and obligations before either side has taken some action resulting in a change of position which may well result in making it impossible to restore the parties to the respective positions they occupied previously." *Dale Renting Corp. v Bard et al.*, 39 Misc 2d 266 (1963); *see also Borg v New York Majestic Corp.*, 139 NYS2d 72 (1954). According to Noble, it brings this declaratory judgment action to avoid breaching the Master Lease, which potentially would trigger an acceleration of payment clause. As Noble seeks to avoid this injury based on its allegation that the underlying purpose of the contract as it was understood by the parties has been frustrated, a declaratory judgment action is a proper vehicle for bringing this dispute before the court. Whether or not Noble has stated a viable cause of action, however, to relieve it from making payments under the frustration of purpose doctrine is a separate question to which the court now turns.[1]

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[1] The court notes there is a dearth of case law in this jurisdiction either granting or denying motions to dismiss for failure to state a cause of action on the ground that the plaintiff has not adequately pled frustration of purpose. The apparent reason for this is that the frustration of purpose doctrine typically is raised by a defendant as

The doctrine of frustration of purpose emerged in the casebook opinion *Krell v Henry* (2 KB 740 [1903]), one of the so-called "coronation cases," where the defendant was excused from his duty to pay for the use of plaintiff's apartment along the route of the coronation procession of King Edward VII when the procession was cancelled because the king became ill (*see* Calamari and Perillo on Contracts [Fifth Edition 2003] [Calamari and Perillo], § 13.12). The modern version of this doctrine, recognized by New York courts, has evolved as narrower than its application in *Krell*, however (*see, e.g. Arons v Charpentier*, 36 AD3d 636 (2d Dept 2007); *Crown II Sevs. v Koval-Olsen*, 11 AD3d 263 (1st Dept 2004)), and is limited to instances where a virtually cataclysmic, unforeseeable event renders the contract valueless to one party. *See Sage Realty Corp. v Jugobank, D.D.* 1998 WL 702272 (SDNY 1998). The doctrine also is stated in Restatement of the Law, Second, Contracts § 265 as follows:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

This Restatement, in turn, is expounded upon by Professors Calamari and Perillo as follows:

> The Restatement (Second) sets forth the same rule for frustration as it does for impracticability. A party must comply with four requirements in order to make out the defense of frustration of the venture. These are: (1) The object of one of the parties in entering into the contract must be frustrated by a supervening event. (2) The other party must also have contracted on the basis of the attainment of this object. The attainment of this object was a basic assumption common to both parties. (3) The frustration must be total or nearly total – in more modern terminology the principal purpose of the promisor (the one seeking to use the

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an affirmative defense in an answer to a complaint. The merits of the defense then are disposed of at summary judgment. Given the unusual posture of the issue in this declaratory judgment action, *i.e.*, a motion to dismiss, the court takes the atypical, yet appropriate, step of determining the validity of the frustration of purpose doctrine here at the pleading stage.

> defense) must be either totally or substantially frustrated. This distinction is akin to the distinction between impossibility and impracticability. (4) The party seeking to use the defense must not have assumed a greater obligation than the law imposes. In addition, as in the case of impracticability, the party seeking to use the defense must not be guilty of contributory fault. Thus, if the promisor was already in material breach at the time of the frustrating event, the defense is not available.

Calamari and Parillo, § 13.12.

Noble alleges in its complaint that it agreed to lease 152 railcars for the "sole commercial purpose" of distributing and transporting ethanol from Gateway Ethanol, LLC (Gateway) in Kansas (Schedule No. 5); and 148 railcars for the sole purpose of distributing and transporting ethanol from Northeast Biofuels, LLC (Northeast) in Fulton, New York (Schedule No. 6). Complaint, ¶¶ 13 and 17. Noble also alleges, upon information and belief, that CIT was aware the sole purpose for Noble's leasing the railcars was the distribution and transport of ethanol from these facilities. Complaint ¶¶ 14 and 18. After Noble signed these leases as schedules to the Master Lease (the Schedules), "the ethanol industry . . . suffered an unprecedented and unanticipated severe downturn," and both facilities are in bankruptcy proceedings and not producing any ethanol. Complaint, ¶¶ 19, 20 and 22. Noble concludes from these allegations that the commercial purpose of its contract with CIT no longer continues and, as such, has been frustrated such that the equitable doctrine of frustration of purpose should excuse it from being required to perform under the contract. Complaint, ¶¶ 30 and 33.

CIT responds that the purpose of the parties' agreement, as actually stated in the Schedules, was to lease railcars to Noble for the transport of "only ethanol" (Schedules ¶ 6; Master Lease ¶¶ 9 (A)(i)-(ii)) subject to the conditions in the Master Lease, but nowhere did the parties reference or make their agreement contingent on Noble's serving *any* ethanol facility, let

alone the specific Gateway and Northeast facilities referenced in the complaint. The continued viability of these specific ethanol suppliers was not a basic assumption common to both CIT and Noble, says CIT. It did not have a contractual relation with these facilities, and the parties did not agree in their contracts to make the leases contingent on that particular distribution. CIT points out that Noble was free to use the rail cars anywhere inside the United States and that the Schedules expressly contemplate the cars can be used up to 35% of the time *outside* the United States as well (Schedule ¶ 14 (b); and even the complaint itself alleges that only 152 of the 212 cars on Schedule ¶ 5 were to be used to transport ethanol to or from the Gateway facility (Complaint ¶ 14). CIT further argues the frustration of purpose doctrine does not apply because the bankruptcy of specific third-party shipping suppliers is a reasonably foreseeable risk in railroad car leases such as these, and this bankruptcy contingency could have been the subject of a risk sharing or shifting provision in the leases themselves.

Both sides appear to have struggled to cite case authority that precisely supports their respective positions. Neither party has cited, nor has this court identified, a New York case holding as a matter of law that the bankruptcy of a non-party to a contract either does, or does not, frustrate the purpose of an underlying contract. The closest controlling authority appears to be *State Mutual Life Assurance Co. v H.J. Gruber*, 269 AD 170, 54 NYS2d 729 (1st Dept 1945). A lessor of a factory in Cleveland, Ohio, entered into a lease with a manufacturer of naval equipment which had secured a contract with the U.S. government to produce navigational instruments in support of the American war effort in World War II. During the term of the lease, the U.S. government canceled its contract with the lessee, and the lessee, in turn, stopped making payments on its lease with the lessor. When the lessor sued to recover the unpaid rent, the lessee

argued that its refusal to perform under the lease was justified because the government's cancellation of its contract frustrated the purpose of the lease. The lessor moved for summary judgment, which the trial court denied, but on appeal, the Appellate Division, First Department, reversed. The court concluded the frustration of purpose doctrine was inapplicable, reasoning that if the lessee had wanted to protect against the consequences of the government terminating its contract, it should have provided for that possibility in the lease. The court observed that the lessee's "position is the same as if a private customer for whom they [sic] had contracted to produce merchandise in the plaintiff's factory had become bankrupt or had exercised a privilege in the contract allowing him to terminate." *Id.*, at 172-73.

Following this reasoning,[2] this court holds that the severe economic downturn of the ethanol industry and consequent bankruptcy of the third-party Gateway and Northeast facilities are not the types of unforeseeable cataclysmic events recognized by New York's frustration of purpose doctrine. For the court to hold otherwise would be to shift the risk of Noble's third-party contracts onto CIT. As the Appellate Division noted in *State Mutual*, "We fail to understand why any loss which the defendants may incur should thus be shifted from them and imposed upon a party who was in no contractual relations with the [third party]." *Id.*, at 172. Indeed, paragraph 14(f) of each of the Schedules exemplifies how CIT, as lessor, expressly addressed the possibility that the manufacturer of the tank cars CIT contracted to purchase so that it could lease them to Noble might breach the terms of its third-party contract to deliver the cars to CIT. While the paragraph provides that "neither party shall have the right to terminate or cancel its

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[2] Although the Appellate Division in *State Mutual* reviewed the trial court's ruling on a motion for summary judgment, the court finds that the reasoning in *State Mutual* is equally suited to rulings on a motion to dismiss.

obligations to lease the cars," it contains an exception "[i]f the Manufacturer breaches the terms of the [separate] Purchase Contract" and CIT terminates that contract as a result. In that event, CIT "may cancel and terminate its obligations under this Schedule with respect to any Cars not delivered at the time of termination without any liability to Lessor," and, in turn, Noble's obligation to lease any such undelivered cars also would terminate.

In a market economy, bankruptcies are commonplace events. For example, the parties did expressly contemplate the bankruptcy of Noble, the lessee, by providing remedies for CIT, as lessor, in the event that were to occur. Master Lease, ¶ 10.[3] Like the cancellation of the government contract in *State Mutual*, this was a reasonably foreseeable contingency against which Noble could have protected itself in its lease. In the absence of such a risk shifting provision here, it is Noble, not CIT, which assumed the risk that these ethanol companies might not be able to perform under its separate contracts with them, and thus Noble must bear the consequences of that risk.

The court notes the parties also have different views of the effect of the merger clause in the Master Lease. Master Lease, ¶ 14 (I).[4] CIT argues that because Noble's servicing of the

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[3] 10. Default; Remedies.

If Lessee fails to pay when due any rent or other amount required to be paid by this Agreement or to perform any of its other obligations under this Agreement, or if a petition in bankruptcy or for reorganization or similar proceeding is filed by or against Lessee, then Lessor may exercise any one or more of the following remedies and any additional rights and remedies permitted by law (none of which shall be exclusive) and shall be entitled to recover all its costs and expenses including attorneys' fees in enforcing its rights and remedies:

A. Terminate this Agreement and recover damages [etc.]. . . .

[4] 14. Miscellaneous.

I. Entire Agreement. This Agreement and all other documents, instruments, certificates and agreements executed and delivered pursuant hereto to which either Lessor or Lessee is a party

Gateway and Northeast facilities is not specified either in the Master Lease or the Schedules, the merger clause precludes reference to any other supposed understandings of the parties. It also points to ¶ 14(f) of the Schedules where neither party has the right to terminate or cancel its obligations to lease the Cars except as otherwise provided in the Schedules or the Master Agreement. Noble counters that the merger clause does not apply to this issue because Noble is not asking the court to modify or vary specific terms of the agreement between the parties, but rather seeks a declaration that it is equitably excused from performance. Here again, neither party is able to cite a case directly on point. CIT cites *Cornhusker Farms, Inc. v Hunts Point Coop. Mkt., Inc.*, 2 AD3d 201, 203-04 (1st Dept 2003), which does not involve a frustration of purpose issue. The cases cited by Noble (*see Thomas v Scutt*, 127 NY 133 (1891); and *Morrissey v General Motors Corp.*, 21 Fed Appx. 70 (2d Cir. 2001)) also do not involve frustration of purpose. If anything, the existence of the merger clause here serves to strengthen CIT's position because while the leases do not provide for Noble's right to cancel in the event of the bankruptcies of these ethanol plants or downturns in the ethanol market, they do provide for CIT's right to cancel its lease obligations in the event the third-party manufacturer of the railroad tank cars were to default on its obligation to deliver the cars to CIT (Schedules 14(f), *supra*).

The court also has considered CIT's request here for its costs and expenses, including attorneys' fees, based on the default provision of Master Lease ¶ 10, and denies this request in

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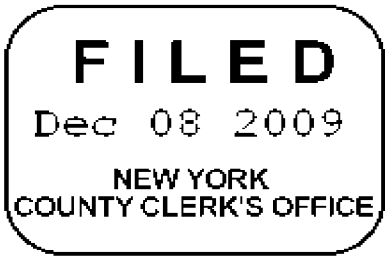
constitutes the entire agreement of the parties with respect to the subject matter hereof, and supersedes and replaces any prior or contradictory representations, warranties or agreements by Lessor and Lessee.

that Noble has not failed to make any lease payments nor otherwise defaulted as contemplated by this costs provision.

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted.



Dated: December 4, 2009

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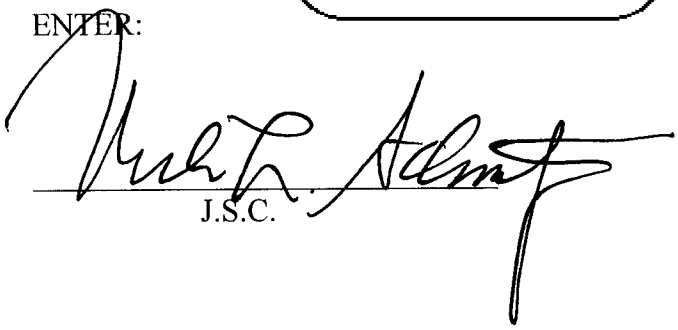

J.S.C.