

Sempra Energy Trading Corp. v BP Prods. N. Am. Inc.
2007 NY Slip Op 32201(U)
July 12, 2007
Supreme Court, New York County
Docket Number: 0600322/2007
Judge: Richard B. Lowe
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

HON. RICHARD J. ...

PRESENT: _____

PART 56

Index Number : 600322/2007

SEMPRA ENERGY TRADING CORP.

vs

BP PRODUCTS NORTH AMERICA

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 5/10/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

C

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

FILED
JUL 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

ENTION IS RECEIVED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DEVISION

HON. RICHARD J. ...
[Signature]

Dated: 7/12/07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X
SEMPRA ENERGY TRADING CORP.

Index No: 600322/07

Plaintiff

-against-

DECISION AND ORDER

BP PRODUCTS NORTH AMERICA INC. and BP
NORTH AMERICA PETROLUEM

Defendants

-----X
RICHARD B. LOWE, III, J:

Plaintiff Sempra Energy Trading Corp. ("Sempra") brings the instant action against defendants BP Products North America, Inc. ("BP Inc.") and BP North America Petroleum ("BP Petroleum"), collectively referred to as "BP," for breach of contract.

In Motion Sequence 001, Defendant BP moves to dismiss pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7).

BACKGROUND

Sempra is a Delaware corporation with its primary place of business in Stamford, Connecticut. It markets and trades physical and financial energy products, including fuel oil.

Sempra entered into an agreement with BP, a Delaware corporation that sells and produces petroleum products, on approximately August 2, 2005. The agreement provided that Sempra would purchase No. 6 Fuel Oil from BP, subject to written confirmation by the parties. On or about August 3, 2005, BP supplied Sempra with proposed terms for the agreed upon sale (the "BP Proposal"). The BP Proposal stated that BP would deliver high sulphur fuel oil to

FILED
JUL 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Sempra with a minimum API gravity of 11.3. API gravity indicates the gravity or density of liquid petroleum products. Fuel oil with a higher API gravity denotes a lighter oil, which is more valuable than fuel oil with a relatively lower API gravity. During August 14, 2005 to August 20, 2005, the oil would be delivered to the port of St. Eustatius, Antilles, Sempra's leased shore tanks.

On August 4, 2005, Sempra responded with a counter-proposal (the "Sempra Counter-Proposal"), rejecting certain clauses and suggesting modifications and additions to the BP Proposal. The Sempra Counter-Proposal included a clause which provided that the API gravity would be determined by a mutually acceptable independent inspector. The gravity would be based on laboratory analysis prior to discharge, and the inspector's results would be binding on both parties, except in the event of fraud or manifest error. Furthermore, should a dispute arise, both proposals agreed upon the application of New York law and exclusive jurisdiction of the federal or state courts located in Manhattan.

After further correspondence, BP faxed Sempra a confirmation dated August 9, 2005 for the delivery of a minimum of 250,000 barrels of high sulphur oil. Both sides agreed upon a minimum API gravity of 11.3. The agreement for the purchase of fuel oil, along with the correspondence exchanged in August 2005, will further be referred to as the "Purchase Agreement."

On or about August 20, 2005, BP's oil tanker M/T Surfer Rosa discharged approximately 260,000 barrels of fuel oil to Sempra's leased shore tanks in St. Eustatius, Antilles. Intertek Caleb Brett ("Intertek"), an entity elected by both parties, conducted an independent inspection of the pre-discharge inspection to determine the API gravity of the fuel oil. Intertek revealed that the API gravity of samples of fuel oil were 11.3. However, a post-discharge inspection was

conducted by Intertek at Sempra's request to confirm that the minimum API gravity was met. The post-discharge sample tests revealed that the API gravity of shore tank No.44 was 8.4. Further, Intertek found the composite API gravity of all the oil discharged from the M/T Surfer Rosa was 9.9, an amount below the specified minimum.

On August 23, 2005, Sempra notified BP via e-mail that the fuel oil discharged from the M/T Surfer Rosa to shore tank No.44 was below the API gravity agreed upon under the Purchase Agreement. Arguing it was bound by the pre-discharge report, BP rejected Sempra's request to provide a solution.

In the instant action, Plaintiff Sempra claims that Defendant BP breached the Purchase Agreement by failing to deliver high sulphur fuel oil at the agreed API gravity of 11.3. As a result, Sempra claims to have suffered a substantial loss of an amount in excess of \$1,150,000. In the instant motion, Defendant BP contends that Sempra fails to sufficiently plead a cause of action, and moves to dismiss pursuant to CPLR 3211(a)(1) and (a)(7).

DISCUSSION

I. Breach of Contract Claim

"An action for breach of contract requires proof of (1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages." (*WorldCom Inc. v. Sandoval*, 701 N.Y.S.2d 834 [1999]). Neither party disputes the existence of a contract. Sempra claims to have fully performed all of its obligations under the Purchase Agreement with BP. However, Sempra alleges that BP failed to meet the terms of the agreement by delivering fuel oil which was below the agreed upon minimum API gravity of 11.3.

In support of their contention, BP directs this Court to the documentary evidence (the pre-discharge inspection report), which shows that BP complied with the agreement by

delivering fuel oil with an API gravity of 11.3. Therefore, the inspection report and the Agreement provide a sufficient basis to refute Sempra's allegations. Therefore, the motion to dismiss pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is granted.

II. *Dismissal Pursuant to CPLR 3211(a)(1)*

"A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that a defense is grounded in documentary evidence." (*CPLR 3211(a)(1)*). To succeed under CPLR 3211(a)(1), "the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Teitler v. Max J. Pollack & Sons*, 733 N.Y.2d 122-123 [2d Dep't 2001]).

Here, there is no dispute that the Purchase Agreement between BP and Sempra provided that the fuel oil have a minimum API gravity of 11.3 *prior* to discharge, and that the official pre-discharge report established that the minimum specification was met. There is also no dispute over the clauses in the Purchase Agreement which stated that, "Quality will be based on laboratory analysis...prior to discharge," and "Save in the event of fraud or manifest error, independent inspector's findings to be final and binding on both parties." (Exhibit B – Affirmation of Renaldo). BP argues that they have fully complied with these terms of the agreement that Sempra itself proposed in their Counter-Proposal. (Exhibit B – Affirmation of Renaldo). In support of their contention, BP asserts that this provision is a customary practice in the fuel oil trading business as a method to achieve certainty in oil transactions and to avoid disputes that may arise from inspections separately conducted by parties. (Aff. of Joanne Radke). The Defendant avers and the Court agrees that the Purchase Agreement and the pre-discharge report are sufficient documentary evidence to resolve all factual issues and to dispose

of Sempra's claim for breach of contract. The Court finds for these reasons that Sempra is contractually bound to accept the results of the original report.

a. *Exception to the Purchase Agreement under the claim of "Manifest Error"*

Sempra, in the converse, alleges that the documentary evidence does not establish a conclusive defense and it refers to the *post*-discharge report provided by Intertek upon Sempra's request. The report indicates that the composite API gravity level was at 9.9, and not 11.3. While the Agreement states that only the pre-discharge report was binding, Sempra stresses the provision in the Purchase Agreement which states that the report would not be binding "in the event of manifest error or fraud." Sempra claims that the original report showed manifest error, as evidenced by the post-discharge report. According to Sempra, Intertek was unable to obtain an accurate reading of the API gravity level due to the method in which BP loaded the oil onto the M/T Surfer Rosa. (P's Memo in Opposition, P.9). Thus, Sempra contends that there are factual issues as to whether the original report was accurate or whether it was manifestly erroneous due to the inconsistent results of the pre- and post-discharge reports.

Manifest error must be obvious and "needing no evidence to make it more clear." (*Hermance v. The Bd. of Supervisors of Ulster Cnty.*, 71 N.Y. 481 [Ct. of App. 1877]). The error from the original report had to have been evident on its face, and "[N]ot errors which may be shown to have been committed by extrinsic evidence . . ." (*id.* at 486). Here, the original report did not indicate any errors in the inspection of the API gravity. Instead, Sempra relies on the post-discharge report which was not agreed upon by the parties, to establish a possibility of error. However, since the mistake had to be obvious in the *original* report to satisfy the standard of manifest error, and not a *separate* report, Sempra contradicts their own argument by contending that factual issues still remain regarding the accuracy of the pre-discharge report.

The Court finds that Sempra has not adequately shown that the pre-discharge report contained an error so clear on its face to amount to a finding of manifest error. Accordingly, the claim for manifest error must be dismissed.

b. *Exception to the Purchase Agreement under the allegation of "Fraud"*

Sempra raises further factual inquiries as to whether BP may have committed fraud by purposely loading the M/T Surfer Rosa in a manner intended to conceal the low gravity oil. Sempra suggests that BP used a non-standard method to blend and load the fuel oil, thereby causing the heaviest oil with the lower API gravity to remain in the lower compartment of the vessel, which Intertek did not have access. (Spataro Aff. ¶ 17). Moreover, Sempra claims that this method may have contributed to an inaccurate pre-discharge inspection report.

However, the Complaint does not contain any pleading that indicates to this Court that the pre-discharge report may have been a result of fraud. In addition, pursuant to CPLR 3016(b), Sempra has not met the burden of pleading facts regarding any alleged fraud with the requisite specificity. Where explicit facts have not been asserted, allegations of fraud are dismissed. (*Desideri v. D.M.F.R. Group (USA) Co.*, 660 N.Y.S.2d 714 [1st Dep't 1997]). Furthermore, Sempra has not even claimed, nor provided evidence, that BP has engaged in fraud, only that there is a possibility that BP *may* have committed fraud. In order to sustain a cause of action for fraud, the following five elements must be satisfied: (i) a material misrepresentation of fact, (ii) made with knowledge of its falsity, (iii) with the intent to deceive, (iv) justifiable reliance and (v) damages. (*id.* at 716). The Court concludes that these elements have not been pled in their Complaint. Since Sempra has not adequately pled a claim for fraud with specificity, its allegations do not fall under the exception of fraud. Thus, the claim for fraud must be dismissed.

III. *Dismissal Pursuant to CPLR 3211(a)(7)*

“A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of action.” (*CPLR 3211(a)(7)*). Although all factual allegations in the plaintiff’s Complaint must be assumed to be true, if they are clearly contradicted by documentary evidence they are not entitled to such consideration. (*Skillgames, LLC v. Brody*, 767 N.Y.S.2d 418, 421). Here, there is no dispute that the parties agreed that the pre-discharge inspection report would be binding on both parties. Intertek’s inspection, conducted prior to discharge as agreed upon by both parties, confirms that the API gravity was 11.3, which was within the minimum standard pursuant to the Purchase Agreement. The inspection report and the provision in the Purchase Agreement establish that Sempra’s Complaint is flatly contradicted by the documentary evidence.

Furthermore, Sempra has ignored the indisputable facts of the official, pre-discharge inspection that confirms BP’s compliance with the Purchase Agreement. They now bring forth allegations and theories of manifest error and fraud that were not initially brought up in their Complaint. However, even if the Court were to allow these new allegations, Sempra has failed to sufficiently prove that manifest error has occurred, nor has it alleged fraud with specificity. Because Sempra has failed to state a cause of action, the Court grants BP’s motion to dismiss.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that BP’s motion to dismiss the complaint is granted and the Clerk of the court is directed to enter judgment in favor of BP, dismissing the complaint against it, with costs

and disbursements to Plaintiff as taxed by the Clerk.

Dated: July 12, 2007

ENTER:


~~HON. RICHARD B. LOWE, III~~
RICHARD B. LOWE, III, J.S.C.

FILED
JUL 20 2007
NEW YORK
COUNTY CLERK'S OFFICE