

Macalloy Corp. v Metallurg, Inc.

2000 NY Slip Op 30011(U)

August 16, 2000

Supreme Court, New York County

Docket Number: Index No. 605123/98

Judge: Martin Schoenfeld

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

-----X
MACALLOY CORPORATION,

Plaintiff,

Index No. 605123/98

- against -

DECISION AND ORDER

METALLURG, INC.,

Defendant.

-----X

MARTIN SCHOENFELD, J.:

FILED

AUG 30 2000

NEW YORK
COUNTY CLERK'S OFFICE

Background

Significant prior motion practice and the parties' submissions for and against defendant's instant motion for summary judgment make clear that the sole legal issue in this declaratory judgment action is whether the *force majeure* clause in the parties' Sale Agreement of May 19, 1998, relieves plaintiff from its obligations thereunder to purchase certain chrome ore. As here relevant, the *force majeure* clause reads as follows:

ARTICLE 7

FORCE MAJEURE

7.01 **Force Majeure**. Neither party hereto shall be liable for any failure to comply with any of the terms or provisions of this Agreement to the extent any such failure is caused directly or indirectly by Acts of God, fire, flood, strike, union or other labor problems, shortages, war (whether or not declared), riots, insurrection, sabotage, plant shutdown, equipment failure, inability to obtain material (including power and fuel), inability to obtain equipment or transportation, changes in Applicable Law, government restrictions imposed subsequent to the date without fault on the part of either of them.

Plaintiff contends that its failure to purchase the ore was caused by a "plant shutdown" and/or by "government restrictions."

Plaintiff's plant produced a hazardous solid waste. In 1997 South Carolina environmental officials agreed to allow plaintiff to use a "dry treatment process" on the waste on its site. The waste was then transported to an offsite landfill. However, in April of 1998, federal environmental officials directed plaintiff to use a "wet treatment process" on the site. Plaintiff initially hoped to convince the officials to rescind this decision. In May of 1998 the parties entered into the Sale Agreement. In late June or early July of 1998 the federal officials confirmed their directive. Later in July of 1998 plaintiff concluded that the cost of the wet treatment and of shipping the heavier wet waste was prohibitive and shut down the plant. (See, generally, Opposition Affidavit of Hanno D. Mott, ¶¶ 5-18).

Plaintiff states (id. ¶ 33) that compliance with the federal directives

would have required new equipment, new procedures for acceptance and unloading of ore, different waste disposal procedures and substantial changes in its process for the production of ferrochrome. All of these would have caused substantial additional cost which would have eliminated any viability of the operation.

Thus, plaintiff claims, at best, that compliance would have cost plaintiff to lose money, not that compliance would have been impossible. Defendant concedes that the plant that was to process the ore has been shut down. The legal question is whether this shutdown triggers the *force majeure* clause if plaintiff itself did the shutting down.

Discussion and Disposition

Force Majeure clauses are no stranger to the law. "The purpose of a *force majeure* clause is to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties." United Equities Co. v. First National City Bank, 52 AD2d 154, 157 (1st Dept 1976) (emphasis added). Here, the government did not order plaintiff to shut down the plant. Since plaintiff was in control of whether or not to shut down the plant, plaintiff cannot rely on the "plant shutdown" clause in the *force majeure* clause.

Plaintiff claims that it intended that the clause could be invoked by a voluntary shutdown. However, "[i]n adjudicating the rights of parties to a contract, courts . . . are required to discern the intent of the parties, "to the extent that [the parties] evidenced what they intended by what they wrote'". Slatt v Slatt, 64 NY2d 966, 967 (1985) (citations omitted); accord, Peripheral Equipment, Inc. v Farrington Mfg. Co., 29 AD2d 11, 13 (1st Dept 1967) ("The relevant contractual intent is that expressed in the contract, even though it may not accord with the subjective intent of the parties."). Furthermore, that the "plant shutdown" exception was contained in a self-described *force majeure* clause, along with numerous other events that would have been beyond plaintiff's control, militates against construing "plant shutdown" to include a voluntary shutdown by plaintiff.

Nor can plaintiff rely on "government restrictions imposed subsequent to the date." It is uncontested that the restrictions were imposed prior to the date. Plaintiff's subjective (and incorrect) belief that plaintiff could convince the government to modify its restrictions does not change the date of "imposition."

Plaintiff also argues that the purpose of the Sale Agreement was frustrated. However, "the doctrine of frustration of purpose . . . is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence." Rebell v Trask, 220 AD2d 594, 598 (2d Dept 1995). Plaintiff obviously could have foreseen that the federal environmental officials would not change their mind. Finally, we note that plaintiff has not, and could not, rely on the related defense of "impossibility":

the excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, *vis major*, or by law. Thus, where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused.

407 East 61st Garage Inc. v Savoy Fifth Avenue Corp., 23 NY2d 275, 281 (1968) (citations omitted). As then-Judge Breitel noted (at 282-83), a promisor does not necessarily have to perform the promise, only to pay the consequences for failing to perform.

Conclusion

Thus for the reasons set forth herein, defendant's motion for summary judgment is granted, and the clerk is hereby directed to enter judgment in favor of defendant dismissing the instant action with prejudice.

This opinion constitutes the decision and order of the Court.

Dated: August 16, 2000

Feb

J.S.C.

FILED
AUG 30 2000
NEW YORK
COUNTY CLERK'S OFFICE