

Louis Dreyfus Energy Corp. v MG Refining & Mktg., Inc.

2004 NY Slip Op 30152(U)

June 7, 2004

Supreme Court, New York County

Docket Number: 0600053/1995

Judge: Herman Cahn

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

PRESENT: Cahn _____
Jus

PART 4em

Louis Dreyfus Energy Corp

INDEX NO.

600253/95

MOTION DATE

6/2/04

v -

MOTION SEQ. NO.

011

M.G. Refining and Marketing

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

FILED
JUN 10 2004
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN CONFORMANCE WITH ACCORD AND DECISION IN

MOTIONICASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 6/7/04

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

----- X
LOUIS DREYFUS ENERGY CORP. and LOUIS :
DREYFUS CORP., :

Plaintiffs, Index No. 600053/95

-against-

MG REFINING AND MARKETING, INC. and
MG HOLDINGS NORTH AMERICA, INC, f/k/a
METALLGESELLSCHAFT CAPITAL CORP.,

Defendants.

----- X

Herman Cahn, J.

Motion sequence numbers 11 and 12 are consolidated for disposition.

Plaintiffs move (seq. no. 11) for reargument of defendant's motion in limine, which was granted by decision and order dated April 1, 2004 (the "April Order"), CPLR 2221 (d). Plaintiffs further move (seq. no. 12) for leave to amend their expert witness disclosure statement, *id.*, 3101 (d)(1) (l), (h).

The facts and conclusions of law underlying this action are fully set forth in the court's post-trial decision and order dated June 24, 2003 (the "Post-Trial Decision") (*aff'd* 4 AD3d 149 [1st Dept 2004]), and will not be repeated here.¹ The April Order granted defendant's motion in limine to bar the proposed testimony of plaintiffs' expert witness, Professor William Silber, at the forthcoming damages phase of trial. As explained in that order, Silber's proposed testimony supports an alternative damages theory which plaintiffs previously sought to add by

¹ The Post-Trial Decision determined that defendants are in breach of two contracts for the sale of refined petroleum products; the amount of damages to be determined at further proceedings.

way of further amendment to the already amended complaint. The court had previously denied plaintiffs' motion for leave to so amend by decision and order dated January 16, 2002 (the "January 2002 Decision"), on grounds of undue delay and prejudice to defendants, as all pre-trial discovery had already come to an end. The court noted that the proposed expert testimony would have had the effect of increasing the ad damnum to \$13,000,000.00, from the \$7,600,000.00 sought under the damages theory asserted by plaintiffs throughout the entire course of the case, through the close of discovery. As the April Order observed, "[l]eave of court is ordinarily denied when a plaintiff seeks to increase its damages claim close to trial (*Nicks v Joseph*, 81 AD2d 788 [1st Dept 1981])."

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court . . ." (*William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22 [1st Dept], *lv denied* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993].) It "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact offered on the prior motion[.]" (CPLR 2221 [d] [2].)

The amended complaint (Order to Show Cause Ex. J) alleges that the contracts obligated defendants to pay the difference between the closing New York Mercantile Exchange ("NYMEX") prices for gasoline futures as of April 12, 1996 (\$0.6905 per gallon) and the contract price of \$0.6200 per gallon (Complaint ¶¶ 8-10).² The complaint further alleges that the

² The purchase quantity for each one of the contracts - gasoline and diesel - was 42,000,000 gallons (Complaint ¶¶ 9, 12).

* 4] .

contracts obligated defendants to pay the difference between the closing NYMEX prices for diesel futures as of December 16, 1998 (\$0.6905 per gallon) and the contract price of \$0.6200 per gallon (*id.*, ¶¶ 11-13). The substance of Silber's proposed testimony, which is disclosed in plaintiffs' witness list and supplemental responses to interrogatories (Order to Show Cause Exs. B, C), is that average prices for the above option exercise months, as opposed to closing prices, may serve as accurate variables in calculating plaintiffs' damages, and result in a higher quantum of damages. However plaintiffs submit nothing to overcome the plain facts that (a) leave was never granted to allow the new theory of damages by way of further amendment of the complaint; and (b) no discovery was ever taken in respect of the new theory of damages due to the lateness of plaintiffs' application to so amend.³

In addition, the actual amount demanded by plaintiffs at the time of the operative events (April 28, 1998), based on their direct assertion of rights under a July 28, 1993 guaranty delivered by defendant Metallgesellschaft Capital Corp. ("MG Capital") p/k/a MG Holdings North America, Inc., was \$7,673,000.00, as demanded in the complaint; not the inflated sums being advocated at this late stage by plaintiffs' expert witness (*see*, Post-Trial Decision at 3). Plaintiffs' late asserted demand for a higher sum is, thus, disingenuously inconsistent with their own clear understanding of economic consequence during the time that it mattered most—their formal demand of the guarantor, MG Capital, which precipitated this lawsuit.

Moreover, Silber's proposed testimony includes a variable for interest on past due

³ Although plaintiffs filed a second amended complaint (Order to Show Cause Ex. I), it could not have the effect of tacitly allowing a new theory of damages, as permission for such an amendment was expressly withheld in the January 2002 Decision. Plaintiffs' counsel's suggestion to the contrary (Barkin Aff. [5/6/04] [seq. no. 12] ¶ 5) makes a mockery of that decision.

amounts, based on his own interpretation of the contracts (*id.*). **As** the April Order states, this, too, is belatedly asserted **and** is likewise precluded.

Plaintiffs' arguments are substantially the same as those presented in opposition to the underlying motion in limine. "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." (*William P. Pahl Equip. Corp., supra.*)

Plaintiffs' motion for leave to reargue (seq. no. 11) is, therefore, denied.

Plaintiffs' motion to amend the expert witness disclosure statement (seq. no. 12) is also denied. The proposed amended statement (Order to Show Cause Ex. E) continues to press a damages theory based on price averages, and not actual closing prices as of April 12, 1996 and December 16, 1996 – the dates plaintiffs exercised their rights under the cash settlement provisions of the gasoline contract and diesel contract, respectively. **As** explained, the new "average price" theory deviates from the "closing price" theory of damages of which defendants were on notice throughout the overwhelming duration of this lawsuit. Moreover, as noted, plaintiffs themselves embraced the closing price theory of damages in their direct dealings with defendants.

Accordingly, it is

ORDERED that the motions are denied; and it is further

ORDERED that counsel for the parties shall appear before the court on June 18, 2004 at 9:30 a.m. for a pre-trial conference.

Dated: June 7, 2004

ENTER :



J. S. C.

FILED
JUN 10 2004
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