

Active Media Services, Inc. v Grant Prideco, Inc.

2005 NY Slip Op 30362(U)

November 22, 2005

Supreme Court, New York County

Docket Number: 603909/2004

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----x
ACTIVE MEDIA SERVICES, INC.,

INDEX NO. 603909/2004

Plaintiff,

MOTION DATE _____

-against-

MOTION SEQ. NO. 001

GRANT PRIDECO, INC.,

MOTION CAL. NO. _____

Defendant.
-----x

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
FILED
NOV 23 2005
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: November 22, 2005

Karla Moskowitz
KARLA MOSKOWITZ 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 3

-----x
 ACTIVE MEDIA SERVICES, INC.,

Plaintiff,

Index No. 603909/2004

-against-

DECISION and ORDER

GRANT PRIDECO, INC.,

Defendant.

-----x
KARLA MOSKOWITZ, J.:

This is an action arising under a trade barter agreement. Plaintiff Active Media Services, Inc. ("Active") moves to dismiss or stay the counterclaims of defendant Grant Prideco ("Grant") (CPLR 3211[a][7], 3016[b] and 7503[a]) and seeks summary judgment as to liability on its complaint (CPLR 3212[c]). Grant cross-moves for summary judgment in the amount of \$4.65 million as assignee of certain claims of National Westminster Bank, PLC ("NatWest") or, alternatively, in the amount of \$3.25 million on Grant's own claims.

FACTS/PROCEDURAL HISTORY

The court takes the following undisputed facts from the parties' statements pursuant Rule 19-a of the Rules of the Justices of the Commercial Division and the affidavits and documentary evidence submitted with the motion papers. Defendant Grant is the world's largest supplier of drill pipe for oil and gas drilling. Non-party Weatherford International, Inc. ("Weatherford"), f/k/a EVI, Inc., is Grant's former parent company. Plaintiff Active is an international corporate trading company that, *inter alia*, purchases its clients' underperforming assets in exchange for trade credits.

At a time when Grant was attempting, unsuccessfully, to sell a parcel of commercial

property in Bastrop Texas (the "Bastrop Property") for \$1.8 million, a real estate broker introduced Grant to Active in 1997. The broker suggested Active's insured trade credit program as a possible way to achieve the property's listing price. The negotiations ultimately led to a multi-party agreement in March 1998, in which (1) Active agreed to issue Grant \$4.65 million in trade credits, expiring March 31, 2001, (2) NatWest advanced Grant \$3,443,542.33, (3) Grant agreed to pay Active \$1,993,542.33 for the trade credits, \$750,000 payable from the sale of the Bastrop Property to a third party and \$1,243,542.33 from the NatWest advance, (4) Grant agreed to make cash payments to NatWest corresponding to the dollar value of trade credits used until the bank received \$4.65 million, and (5) Reliance National Insurance Company ("Reliance") agreed to issue an insurance policy (the "Policy") indemnifying Grant (with NatWest as loss payee) for the value of trade credits unspent at the end of the term.

The parties memorialized their understandings in a series of agreements: a Trade Finance Agreement (the "Trade Finance Agreement") between Active and Grant, a Trade Credit Cash Advance Agreement (the "Trade Credit Cash Advance Agreement") between Grant, Weatherford and NatWest, a Trade Credit Payment Agreement (the "Trade Credit Payment Agreement") between Grant, NatWest and Active and a Trade Credits Insurance Policy (the "Policy") that Reliance issued.

The Trade Finance Agreement required that Grant, as a condition of the issuance and continuation of Policy, comply with the terms of a Countertrade Consumption Procedure (the "CCP"). In section A of the CCP, Grant agreed, *inter alia*, to use its "reasonable efforts" to:

- (i) Introduce Active to [Grant's] qualified suppliers of goods and services, which at a minimum will be those identified in attachment 'A' hereto [U.S. Steel, Siderca Corp., Timken Company, Navasota Industrial Supply and Primex Technologies];

provided that, if [Grant] discontinues its purchase from those suppliers, the parties will mutually agree on the addition of alternate suppliers of [Grant] to attachment "A"; and

(ii) Arrange and participate in meetings between Active and such suppliers to encourage such suppliers to accept partial payment in the form of trade credits issued by Active for goods or services to be purchased on behalf of [Grant];

(iii) Purchase from suppliers introduced by Active, and qualified by [Grant] in accordance with their existing procedures, materials, equipment and services as identified in Attachment "B" to this schedule [oilfield tubular products, etc.] should their commercial offers as to all material aspects of the purchase, including price, service levels, delivery dates, quantity and quality, be as good or more favorable than those of [Grant's] other suppliers.

Grant also agreed to include in proposals to suppliers involving expenditures of \$2 million or more a request to accept partial payment in trade credits and to give preference to suppliers accepting these credits (CCP ¶ B). Additionally, Grant undertook to use reasonable efforts to provide Active with costs and other relevant information regarding its operating expenses to assist Active in providing goods and services for cash and trade credit (CCP ¶ G). Finally, paragraph H of the CCP provided that:

[Grant] agrees to use reasonable efforts to provide Active with information on a semi-annual basis regarding [Grant's] performance of its obligations under the above-referenced procedures, during the semi-annual period to permit Active to evaluate [Grant's] compliance with the above-referenced procedures. Active shall advise [Grant] in writing accordingly.

Under Section 1 of the Policy, Reliance agreed "[t]o reimburse [Grant] for LOSS

resulting from any TRADE CREDITS issued to [Grant] and not CONSUMED before the expiration date of the POLICY PERIOD.” However, the Policy set forth an exclusion for “the failure on the part of [Grant] to perform, to the reasonable satisfaction of the INSURER, any material obligations set forth for [Grant] in the [CCP]” (Policy, section III ¶ C). Further, section VI of the Policy, “NOTICE OF LOSS,” provided that:

When written notice of LOSS is given to the INSURER, Grant] shall provide the INSURER with a written document warranted by [Grant] and [Active] that [Grant] has performed the material obligations set forth for [Grant] in the COUNTERCLAIM CONSUMPTION PROCEDURE to the best of [Grant’s] ability. Such written document must be accompanied by a letter from a public accounting firm, approved and recognized by the INSURER, in accordance with professional standards, which states that the public accounting firm has reviewed [Grant’s] compliance with the COUNTERCLAIM CONSUMPTION PROCEDURE and has found that [Grant] has materially complied with such procedure.

Finally, section XI of the Policy, “ARBITRATION,” provided that “[a]ny dispute arising in regard to the determination of LOSS hereunder between [Grant], [Active] and/or the INSURER shall be settled by arbitration.”

It is undisputed that Grant, despite annual expenditures of approximately \$200 million annually on semi-finished goods, did not use any trade credits before the expiration date of March 31, 2001. Although the parties participated in a presentation to U.S. Steel in August 1998, that company declined because it had earlier lost \$5 million in another trade credit transaction. Preliminary discussions regarding a transaction with Voest Alpine Stahl, AG, an Austrian Steel manufacturer, took place in late 1999 and early 2000 but did not progress further. Ultimately, Grant made no purchases through Active or its clients, and NatWest received no

payments toward the \$4.65 million due to it.

In May 2001, NatWest requested that Grant either repay the advance or perfect its insurance claim under the Policy. Grant did not do so. In February 2002, however, Active submitted a notice to Reliance asserting that Grant was “not in compliance with an agreed to consumption procedure.”

In December 2002, NatWest commenced an action against Grant, EVI, Inc. and Active in the United States District Court for the Southern District of New York (Natl. Westminster Bank v Grant Prideco, Inc. et al. [No. 02 Civ 9926 (LAK)])(the “Federal Action”), seeking to recover the \$4.65 million it contributed to the transaction. As is relevant here, the bank alleged that Grant and Active both materially breached the underlying agreements. In particular, NatWest alleged that Grant failed to acquire goods and services through Active and its customers and failed to comply with the terms and procedures of the CCP. Similarly, NatWest alleged that Active failed to cooperate with Grant to achieve the level of purchases necessary to repay the bank’s advances plaintiff, failed to provide Grant with sufficient opportunities to make purchases directly from Active or its customers and failed to provide goods and services of equivalent quality to those Grant could obtain elsewhere and at competitive prices.

Grant and Active both moved to dismiss the Federal Action. The court denied the motions by order dated April 29, 2003 (see Natl. Westminster Bank v Grant Prideco et al., 261 F Supp 2d 265 [SDNY 2003]). In upholding the contract claims against each of those parties, the court rejected Grant’s argument that Active’s alleged breaches of the agreements excused Grant from performance and rejected Active’s argument that NatWest was not an intended third party beneficiary of the Trade Finance Agreement.

Grant thereafter filed cross-claims against Active for breach of contract and fraud.

Active did not assert any claims in the Federal Action against Grant. In July 2003, Grant settled with NatWest, paying \$3.25 million in exchange for an assignment of the bank's claims, including its claim for the full \$4.65 million as against Active. After the completion of discovery in January 2004, Grant and Active each filed separate motions for summary judgment. However, by decision dated November 12, 2004, the district court ruled that the settlement with NatWest had defeated diversity of citizenship insofar as Grant and Active were both Delaware corporations. In exercising its discretion to decline supplemental jurisdiction over Grant's pending cross-claims, the court noted that "[t]he extensive discovery taken by the parties is readily available for use in the state courts."

Active commenced this state court action in November 2004. The complaint seeks a declaration that Active did not breach the various agreements and asserts, for the first time, claims for monetary relief. Grant asserts as counterclaims the contract and fraud claims it previously interposed as cross-claims in the Federal Action, together with additional claims for tortious interference with contract, violation of the Texas insurance law and those assigned from NatWest.

Although Active's original motion was made under CPLR 3211[a][7] and was thus addressed to the face of the cross-claims, Grant moved for summary judgment and both sides have submitted statements and counter-statements of material fact pursuant to Rule 19-a of the Rules of the Justices of the Commercial Division together with affidavits and other evidentiary material. The parties have charted a summary judgment course (Mihlovan v Grozavu, 72 NY2d 506 [1st Dept 1988]; Four Seasons Hotels, Ltd. v Vinnik, 127 AD2d 310 [1987]). Accordingly, at oral argument this court gave notice, without objection, that plaintiff's motion would be converted to that procedure pursuant to CPLR 3212(c). However, as it also noted at the

argument, the court will only consider the question of the arbitrability of the Texas insurance law claim insofar as Grant did not seek relief on the merits of that cause of action in its summary judgment motion.

DISCUSSION

For the following reasons, the parties' motions for summary judgment are denied. However, Active's motion to stay the Texas insurance law claim in favor of arbitration is granted.

The Motions for Summary Judgment

In their summary judgment motions, each party disputes the other's compliance with the terms of the various agreements governing the trade credit transaction. Summary judgment is generally inappropriate in contract cases involving a "battle of the breaches," wherein each party submits "conflicting affidavits and documentary evidence which cast the other party in the role of the primary contract offender" (Boston Concession Group, Inc. v Criterion Center Corp., 200 AD2d 543, 545 [1st Dept 1994]). Where both sides appear to be out of compliance with a contract, questions as to which party breached first may preclude summary disposition (see MTI Image Group v Morning Studios, Inc., 223 AD2d 514 [1st Dept 1996]). Similarly, where the agreements require the parties to work together, the degree of cooperation may present a question for trial (see Ocap Acquisition Corp. v Paco Pharmaceutical Services, Inc., 209 AD2d 232 [1st Dept 1994]), as may whether the participants' course of conduct modified the contractual obligations. (Duane Reade v Block 247, LLC, 20 AD3d 448 [2d Dept 2005]). Even where one party is in clear breach of a contractual provision, summary judgment may be inappropriate in light of evidence that the other party frustrated compliance or performance (Boley v Pavarini Const. Co., 201 AD2d 263 [1st Dept 1994]). The sufficiency of a party's

compliance with a “reasonable efforts” clause is also fact-sensitive, particularly where the contract is ambiguous about the nature of the efforts required (1000 Northern of NY Co. v Great Neck Med. Assocs., 7 AD2d 592 [2d Dept 2004]).

Here, each party has presented a detailed narrative blaming the other for the failure to exhaust timely the trade credits. Grant submits evidence that Active promised, and originally undertook, to promote aggressively the use of the credits, only effectively to abandon those efforts after a failed attempt to exhaust all of the credits through a presentation to U.S. Steel. In particular, Grant notes that the Active employee responsible for originating the insured trade credit program became involved in a contentious dispute with his employer and left the company a year before the credits expired and that Active disbanded the insured trade credit department without designating another qualified employee to handle the account. Additionally, Grant points to Active’s failure to give prior written notice of Grant’s default under the Consumption Compliance Procedures. In this connection, Grant notes that Active waited a full year after the expiration of the credits to notify the insurer of Grant’s alleged non-compliance and Grant submits evidence that Active gave the notice as part of an overall scheme to help the insurer reduce its loss reserves. The record also indicates that at the time Grant’s trade credits expired, Active’s clients had retired only \$30,634,119 insured credits out of Active’s issued total \$99,998,382.

As evidence of its own compliance, Grant identifies its participation in the U.S. Steel and Voest Alpine solicitation efforts, as well as calls to Siderca and Navasota advising them of possible meetings to discuss the trade credit program. Grant avers that the parties had regular conversations at least every 30 to 60 days and that Grant never refused to provide Active with any information it requested. Grant contends that, in view of the slump in the oil and gas

industry during the relevant period, its efforts to promote the trade credits were reasonable.

Active, on the other hand, faults Grant for failing to “pressure” U.S. Steel by stressing the importance of trade credit acceptance to the companies’ continued business relationship. Active further asserts that Grant failed to make introductions to any other of the suppliers identified on the CCP and never even contacted two of them, Timken and Primex, about the program. Active contends that Grant had tightly controlled distributor relationships that it was unwilling to disturb to facilitate the use of the credits and that Grant failed to include language in its requests-for-quotations indicating that it would give a preference to bidders willing to accept trade credits.

Further, Active claims that Grant ignored the program after its chief executive officer left the company, failing to designate a successor responsible for overseeing trade credit usage. Active accuses Grant of a pattern of ignoring letters and telephone calls regarding the program, and of postponing and canceling meetings. Active also points to Grant’s failure to obtain a letter from a public accounting firm certifying compliance with the CCP.

On the present conflicting record, the court cannot resolve the question of liability for the failed trade credit program as a matter of law. There is evidence of inattention, inaction and missed opportunities on both sides. It is left to the trier of fact to determine whether one party’s misconduct or negligence or industry conditions or personnel changes caused the failure.

Active nevertheless insists that it is entitled to summary judgment because the agreements placed the initial burden upon Grant to solicit specifically-enumerated suppliers, to place certain language in its proposals requesting acceptance of trade credits and to make periodic reports to Active of operating costs and usage of the credits. However, the agreements did not impose strict liability for any failure to comply with those provisions. Rather, Grant was required only to make “reasonable efforts” to fulfill them. As Active recognized through its

conduct, the agreements affirmatively obligated it to cooperate with Grant in promoting the credits. Whether Grant's efforts were reasonable in light of the support it received from Active is a question of fact.

Grant similarly argues that Active's failure to give written notice of non-compliance under paragraph H of the CCP precludes any challenge to Grant's performance. However, the vague requirement that Active "advise [Grant] in writing accordingly" does not set forth the consequences of failing to do so. Moreover, assuming that clause required Active to advise Grant of the sufficiency of its efforts to use the trade credits, the clause did not trigger unless Grant made reasonable efforts to provide information regarding its progress. That issue, as noted above, raises questions of fact.

The Motion to Stay the Texas Insurance Law Claim

Active's motion to stay the fifth counterclaim under Texas insurance law in favor of arbitration is granted. "It is settled that where parties have entered into an agreement containing a broad arbitration provision, the court's inquiry is limited to whether or not the subject matter of the dispute is encompassed by its provisions; the question of whether the arbitration clause governs a particular aspect of the controversy, as well as the determination of the merits of the dispute, are matters within the exclusive province of the arbitrator" (De Shazo v Hirschler, 282 AD2d 257, 258 [1st Dept 2001]). Grant's argument, in a footnote, that its claims seek relief under an insurance statute rather than "under the Policy," is without merit. The fifth counterclaim alleges, *inter alia*, that the Policy violated Texas law, that Active was unlicensed as an insurance broker, and that "Grant could never make a successful claim under the policy of insurance." Regardless of which of these theories is pursued, Grant cannot recover unless it first proves that it suffered a loss under a Policy. Resolution of that question would necessarily

require an examination of the terms of the contract of insurance and the parties' compliance (see e.g. Natl. Westminster Bank v Grant Prideco et al., 2003 WL 22362406, *2 [SDNY 2003] [rejecting Grant's similar argument that its claim against the insurer was not "under the policy"]).

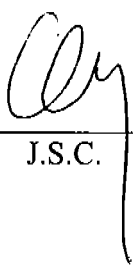
Accordingly, it is

ORDERED, that the motions for summary judgment are denied, and is

ORDERED, that plaintiff's motion to stay the Fifth Counterclaim in favor of arbitration is granted.

Dated: November 22, 2005

ENTER:



J.S.C.

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