Rutherford Chems. LLC v Cambrex Corp.
2007 NY Slip Op 30025(U)
March 2, 2007
Supreme Court, New York County
Docket Number: 0601176
Judge: Richard B. Lowe, III
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 56

Index Number : 601176/2006

RUTHERFORD CHEMICALS, LLC

VS

CAMBREX

Sequence Number : 008

AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____

MOTION DATE 12/14/06

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

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

FILED
MAR 09 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/2/07

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

Check one: FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
RUTHERFORD CHEMICALS LLC,
RUTHERFORD CHEMICALS UK, LTD. and
SEAL SANDS, LTD.

Plaintiffs, Index No. 601179/06

-against-

CAMBREX CORPORATION, NEPERA, INC.,
CASCHEM, INC., ZEELAND, INC.,
NEPCAM, INC. and CAMPBREX, LTD.

Defendants.

----------X

Hon. Richard B. Lowe, III:

Defendants Cambrex Corporation, Nepera, Inc., Caschem, Inc., Zeeland, Inc., Nepcam, Inc. and Cambrex, Ltd. (collectively, "Cambrex" or "Defendants") move pursuant to CPLR § 3025(b) for leave to file a second amended answer and additional counterclaims .

Background

On April 4, 2006, Rutherford Chemicals LLC, Rutherford Chemicals UK, Ltd. and Seal Sands, Ltd. (collectively, "Rutherford" of "Plaintiffs") filed a complaint alleging that Cambrex breached its obligations under the parties' Amended and Restated Asset Purchase Agreement dated October, 2003 ("APA"). Pursuant to the APA, Cambrex sold five chemical plants to Rutherford for a total of $55 million, plus certain contingent payments based on the performance of the chemical plants. Specifically, the complaint alleges that Cambrex breached certain representations and warranties in the APA relating to equipment that Cambrex sold to Rutherford as part of the sale of the five chemical plants. Rutherford also alleges that Cambrex breached

certain covenants to perform environmental remediation at each of the five chemical plants.

Many of the environmental claims relate to one of the five chemical plants sold pursuant to the APA –the Nepera facility. Rutherford alleges Cambrex is liable pursuant to the APA for costs incurred for environmental remediation obligations at the Nepera facility triggered after the plant was closed by Rutherford.

On April 24, 2006, Cambrex filed its answer. The answer specifically denied Rutherford's claims and asserted several affirmative defenses. In August 2006, Cambrex filed a motion to amend the answer and to assert three counterclaims. The motion was unopposed and the answer was amended.

In the instant motion Cambrex seeks leave to file a second amended answer and to add two additional counterclaims for reformation of the APA. Cambrex argues the counterclaims arise, in part, out of information first disclosed by Rutherford on October 23, 2006, in its Responses to Cambrex's First Request for Interrogatories, served on Rutherford on August 25, 2006.

Generally, the proposed counterclaims allege that in the event the court interprets the APA to impose upon Cambrex the costs of environmental remediation at the Nepera facility arising from Rutherford's decision to close the Nepera facility, this interpretation would be inconsistent with the parties' intent that Rutherford would continue to operate the Nepera facility as a chemical plant and that Cambrex would not be liable for the costs of environmental remediation triggered by Rutherford's decision to close the Nepera facility.

In the proposed counterclaims Cambrex alleges that Cambrex and Rutherford made a mutual mistake of fact regarding whether Rutherford would continue operating the Nepera

facility after the sale, or in the alternative, that Cambrex made a unilateral mistake of fact regarding Rutherford's intent to continue operating the Nepera facility after the sale.

The APA allocates responsibility between Rutherford and Cambrex for environmental remediation at the five Rutherford chemical facilities, including the Nepera facility. Cambrex must also perform certain corrective action at the Nepera facility. It also obligates Cambrex to indemnify Rutherford for certain other specified environmental liabilities that have been or will be incurred at each of the five chemical facilities including the Nepera site. Cambrex and Rutherford disagree as to the scope of Cambrex's indemnification obligations for these liabilities.

The proposed counterclaims allege that Cambrex and Rutherford negotiated the APA under the assumption that Rutherford would continue to run the Nepera facility as a chemicals business, and that Rutherford would not change the use of the facility as a chemicals business or close the facility. They allege the parties understood that Cambrex would assume responsibility for certain historic environmental contamination at the facility contingent upon Rutherford's continuing operation. Allegedly this was the basic assumption underlying the APA and Cambrex would not have agreed to its terms otherwise because closing the Nepera facility triggered environmental remediation obligations and costs that would not have otherwise been incurred.

Cambrex argues these counterclaims were not initially plead because it only learned of Rutherford's intent to close the facility prior to the sale, through responses to Cambrex's first request for interrogatories. They were served eight days prior to the filing of this motion.

The responses allegedly reveal that in a January 2004 analysis of Nepera, Rutherford recognized that several cost factors threatened the profitability of Nepera. Further, Rutherford

disclosed that in or about March 2004, less than five months after the sale, Rutherford approached a competitor of Nepera for the purpose of exploring a possible business combination between the two entities. It was also learned that in or about August 2004 Rutherford began discussing a sale of the Nepera facility with a third party which lead to a call option to purchase the property if the facility were shut down. In mid 2005, Rutherford discontinued operations at the Nepera facility and took steps to close it.

Because Rutherford closed the Nepera facility, substantial environmental remediation obligations have been triggered for which it seeks recovery from Cambrex. Cambrex's proposed counterclaims assert a mutual mistake whereby it was Cambrex's understanding Rutherford would keep the facility open after the sale.

Discussion

Leave to amend pleadings is to be freely given unless the proposed amendment is palpably improper or would cause substantial prejudice to the opposing party (CPLR § 3025(b); *McCasley, Favies and Assoc., Inc. v New York City Health and Hospitals Corp.*, 59 NY2d 755, 757 [1983]). Absent unfair prejudice, leave to amend is to be freely given and should be denied only when the causes of action set forth in the amendment are palpably insufficient on their face. A court may not examine the merits or legal insufficiency of the proposed amendments (*Lanpont v Savvas Cab Corp., Inc.*, 244 AD2d 208, 209-210 [1st Dept 1997]).

Rutherford argues the inclusion of an integration clause in the APA precludes the proposed counterclaims. Secion 14.09 of the APA states that the language of the APA constitutes "the entire agreement between the parties with respect to the subject matter of this Agreement and supersedes all prior agreements and understandings, both oral and written,

between the parties with respect to the subject matter of this Agreement" (*Schilling Aff. Ex. A)*.

While there is an integration clause, the allegation in the proposed counterclaim for reformation of the contract is that Rutherford fraudulently represented that it would continue to keep the Nepera facility open after the sale. Allegations of pre-contractual representations with the intent to not perform, which were relied upon by a party, are not precluded by an integration clause. If a party makes a promise with an undisclosed intention of not performing it, the party's promise constitutes a misrepresentation that could give rise to a claim for fraud (*Sabo v Delman*, 164 NYS2d 714, 718 [1959]).

Cambrex alleges that the discovery process produced documents evidencing Rutherford never intended to keep the Nepera facility open post-closing of the transaction, despite a representations made to the contrary during the negotiation process. Such allegation of a material misrepresentation to induce Cambrex to enter into the contract is not "palpably insufficient" to warrant this court to deny the counterclaim based upon the intergration clause.

Rutherford also argues the motion should be denied because the allegations of the proposed counterclaims are clearly refuted by the terms of the APA. For example, Rutherford points to Section 2.11 of the APA. This provision is relied upon by Cambrex in support of its claim that Rutherford purportedly owes certain earn out payments to Cambrex because of the Nepera sale. The provision states that earnings targets from operations of the Rutherford facilities must be adjusted if Rutherford "sells assets or a business division." The earn-out provision lasts only three years, so arguably Cambrex contemplated Rutherford potentially selling some of the plants within the first three years after the sale. Cambrex argues this provision only applies when there is a *sale* of the Nepera facility, but not a *closure* of the facility

and therefore is irrelevant.

Rutherford also points to other provisions of the APA which appear to, although not specifically, contradict Cambrex's proposed counterclaims. Each in turn are addressed by Cambrex and it is clear that they are issues which go to the interpretation of the agreement. These are not issues which are properly resolved by the court on a motion to amend the answer. The court may not address the legal sufficiency of the claims, but only search the pleadings for a cognizable cause of action. Cambrex has met this burden.

Furthermore, there is no prejudice in allowing the amended answer with proposed counterclaims to be filed. This matter is still in the early stages of discovery. The counterclaims will not open up the door to discovery outside of the APA as the issues turn on the competing interpretations of the APA provisions and the additional discovery will be focused on the parties' negotiation of the APA. There is no basis for arguing that allowing the counterclaims would cause burdensome delays and discovery requests.

Conclusion

Accordingly, based on the foregoing, the motion is granted and it is hereby

ORDERED, the second amended answer with counterclaims is deemed served in the form annexed to the moving papers upon service of a copy of this order with notice of entry.

This shall constitute the order and decision of the court.

Dated: March 2, 2007

FILED
MAR 09 2007
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

HON. RICHARD LOWE III J.S.C.