

Rutherford Chems. LLC v Cambrex Corp.

2007 NY Slip Op 30354(U)

March 23, 2007

Supreme Court, New York County

Docket Number: 0601176

Judge: Richard B. Lowe

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

PRESENT: Lowb
Justice

PART 56

Index Number : 601176/2006
RUTHERFORD CHEMICALS, LLC
vs
CAMBREX
Sequence Number : 009
COMPEL DISCLOSURE

INDEX NO. 601176/06
MOTION DATE 1/30/07
MOTION SEQ. NO. 009
MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

MAR 27 2007

COUNTY CLERK'S OFFICE
NEW YORK

MOTION GRANTED IN ACCORDANCE
WITH APPLICABLE CASE STANDARDS
DECISION

Dated: 3/23/07

RICHARD BLOWE III
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

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

-----X
RUTHERFORD CHEMICALS LLC,
RUTHERFORD CHEMICALS UK, LTD and
SEAL SANDS, LTD

Index No: 601176/06

Plaintiffs

-against-

DECISION AND ORDER

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

Defendants

FILED
MAR 27 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Sequence numbers 009 and 010 are consolidated for disposition.

Plaintiffs Rutherford Chemicals LLC, Rutherford Chemicals UK Ltd, and Seal Sands, Ltd (collectively "Rutherford") bring this action against Defendants Cambrex Corporation, Nepera Inc, Caschem Inc, Zeeland Inc, Nepcam Inc, and Cambrex Ltd (collectively, "Cambrex") for indemnification, breach of warranty, breach of covenants, declaratory relief, and injunctive relief. In Motion Sequence 009, Rutherford seeks the production of environmental-contamination documents that Cambrex contends are privileged. In Motion Sequence 010,

Cambrex requests documents that Rutherford avers are protected by the in-anticipation-of-litigation privilege.

BACKGROUND

Rutherford is a speciality-chemicals company that manufactures and sells chemical products. It is a Delaware Limited Liability Corporation, and has its principal place of business in Bayonne, New Jersey.

Defendant Cambrex Corporation is a life-sciences company that manufactures and markets research and pharmaceutical products. It is a publicly traded company organized under Delaware law with its principal place of business in East Rutherford, New Jersey. Nepara, Inc; Caschem, Inc; Zeeland, Inc, Nepcam, Inc, Cambrex Ltd are Cambrex Corporation's subsidiaries.

In August 2003, the Rutherford Acquisition Corporation executed an Asset Purchase Agreement with Cambrex. Pursuant to the agreement, Rutherford purchased five chemical plants: Nepara, CasChem, Heico, Zeeland, and Seal Sands. In addition, it acquired from Cambrex all "the assets, properties, rights, and interests of every kind and nature owned or leased by Sellers and primarily related to or used in the Rutherford Chemicals Business. . ." (*Schilling Aff Ex B at paragraph 1.01*) This sale included all related files, documents, instruments, papers, books, and records. However, a subset of Cambrex's assets and liabilities were excluded from the sale.

On November 11, 2003, the parties closed on the sale. Rutherford is the successor to the Rutherford Acquisition Corporation, and holds all its rights and obligations contained in the agreement. Rutherford thereby assumed the five plants' operations, which included the utilization of the same employees; equipment; and contractual obligations.

The agreement contains two warranties: an equipment/infrastructure warranty and an environmental warranty. In the equipment/infrastructure warranty, Cambrex summarily provides that to the best of their knowledge, there are no defects in the property. (*Ashby Aff'd, Ex at page 24, Section 3.12(h)*) In the environmental warranty, Cambrex warrants that it complied with all applicable environmental laws. (*Id, at page 35, Section 3.18*)

There are also environmental covenants in the agreement that are applicable to the remediation of any environmental hazards located at the plants. Summarily, Cambrex is liable for any environmental-law violations that existed prior to the November 11, 2003 sale date, even if it is discovered post-sale date; Rutherford is liable for environmental issues that arise post-sale date, due to their operation of the facilities. (*Id, at pages 52-56, Sections 7.07 & 7.08*)

Rutherford contends that on or about March 2004, it discovered that much of the infrastructure and equipment were defective. They also allege that several of the facilities contain environmental hazards caused by Cambrex. In March 2005, Rutherford first contacted Cambrex about indemnifying it for the alleged warranty breaches. In April 2006, Rutherford commenced this instant action against Cambrex.

In Motion Sequence 009, Rutherford seeks the production of environmental-contamination documents that were created prior to the November 11, 2003 closing. It is their contention that they are entitled to these documents pursuant to the agreement and, in the alternative, as a matter of law. Cambrex avers that these documents are protected by the attorney-client privilege and are among those assets/liabilities excluded from the sale.

On November 20, 2006, the parties appeared before this Court. Rutherford requested the opportunity to file a motion to compel. They were directed to address the issue before a Special

Master. The issue was briefed before the Special Master, who determined that Cambrex's privilege assertion is a legal issue that must be resolved by this Court.

In Motion Sequence 010, Cambrex seeks the production of documents it claims relate to Rutherford's breach-of-equipment-warranty claims against it. Rutherford argues that the in-anticipation-of-litigation qualified privilege protects their disclosure.

DISCUSSION

I. Motion Sequence 009

a. Matter of Contract Law

Rutherford argues that the sought-after documents belong to it as per the terms of the Asset-Purchase Agreement. Cambrex contends that these records were specifically excluded from the purchase agreement.

Where "the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language." (*R/S Assocs. v N.Y. Job Dev. Auth.*, 98 NY2d 29, 32 [2002].) "When parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." (*Id.*)

Here, the agreement provides that Rutherford purchased "all files, documents, instruments, papers, books, and records relating to the business, operations, condition (financial or other) or results of operations of the Rutherford Chemicals Business. . ." (*Schilling Aff'd, Ex B at Annex F, paragraph 9*). The Rutherford Chemicals Business is defined as "the business of manufacturing, selling, and distributing the Products as currently conducted" by Cambrex.

(*Liubicic Aff'd, Ex A at page 10*) This agreement's plain-meaning provides that Rutherford purchased all documentation pertaining to the assets that were the subject of the transaction.

The documents Rutherford seeks here can be categorized into two groups: (1) environmentally-related and (2) the Harriman Trust's assets. Each will be examined in turn.¹

I. Environmentally-Related

The majority of documents listed on Cambrex's privilege log are those that can be classified as environmentally-related. (*Liubicic Aff'd, Ex B*) Indeed, these are letters, emails, and memos identified as items connected with environmental permits and compliance-obligations.

Cambrex argues that these documents are part of the Excluded Assets and the Excluded Liabilities enumerated within the agreement. Ownership, therefore, arguably did not pass to Rutherford upon the November 11, 2003 closing.

The agreement specifically excludes certain assets from the sale. These are cash; Cambrex's right to receive payment from certain transactions; Cambrex's insurance policies; pre-closing tax credits and refunds; the Cambrex-employee plan's assets; rights under any transition and supply agreements; Cambrex's rights, title, and interest under its name; Cambrex's rights, title and interest in the Maybrook Property; all assets of the Maybrook and Harriman Trust and the Nepara Master Environmental Trust; Cambrex's rights under any third party software; and Cambrex's rights in the capital stock of certain enumerated companies. (*Id, Annex*

¹ Cambrex avers that a portion of the documents requested apply to its confidential communications with its attorneys during the agreement's drafting process, and are therefore privileged. Indeed, the attorney client privilege protects communications "made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship. . ." (*US Bank National Ass'n v APP Intern Finance Co*, 33 AD 3d 430 [1st Dept 2006].) However, Rutherford noted in its Memorandum of Law that it is not seeking these documents at this time. (*See, Rutherford's Mem. Law at page 2, footnote 1*)

B) Furthermore, these excluded assets' books and records; rights under any contract therein; and all Cambrex's assets not primarily related or used in Rutherford's Chemicals Business are not included. (*Id*)

To be sure, the parties articulated which assets were not included in the sale, and these environmentally-related documents are not connected to any of those listed, *supra*. For example, these files did not relate to pre-closing tax refunds, insurance policies, or third-party software agreements.

The agreement also provides for the exclusion of certain Cambrex liabilities that arose prior to the November 11, 2003 closing. Leases for personal property; obligations to perform under contracts and licenses; liabilities arising out of any action or omission pending before a court, arbitrator, or regulatory authority; indebtedness; taxes; issues related to ERISA plans; changes related to transition or supply agreements; any liability connected to Excluded Assets; and damages sought for injuries suffered due to product defects were not included in the sale. (*Id, Annex C, paragraphs 1-10*)

Moreover, environmental liabilities that arose pre-sale were excluded. (*Id, paragraphs 11-13*) Per the terms of the agreement, environmental liabilities excluded are:

- Section 7.07: Cambrex is responsible for environmental hazards that arose pre-closing.
- Section 7.07(b): Cambrex is liable to complete remediation at the Nepera plant in accordance with an order from the New York Department of Environmental Conservation dated March 1997.
- Section 7.07(c): Cambrex will remediate the CasChem facility as required by the New Jersey Industrial Site Recovery Act.

- Section 7.08(a): after an annual deductible of \$78,000.00, Cambrex is responsible for all remediation costs not covered by Section 7.07 that relate to the presence of hazardous materials in, on, beneath, or adjacent to any of the plants on or prior to the closing date.

(See Id, Ex A at pages 52-56)

Indeed, Rutherford did not assume these liabilities as per the terms of the agreement. But the issue here is not Rutherford's assumption of an obligation to the agreement's contravention; rather it is the access to documents connected to that liability. Excluded from the asset sale were "all documents. . .and records relating primarily to. . . Excluded Liabilities." (*Id, Ex B, Annex B, paragraph 6*) This contract's plain meaning provides that all documentation pertaining to Cambrex's pre-closing liabilities are not included in the sale. Rutherford therefore cannot claim their ownership under the APA.

ii. The Harriman Trust

The Harriman Trust operates as a funding vehicle for Cambrex's pre-closing remediation obligations at the Nepara facility. Cambrex objects to Rutherford's request for documentation pertaining to this Trust because its assets were excluded from the sale. (*Liubicic Aff'd, Ex A at page 9*) Rutherford does not dispute that the Trust's *assets* were excluded; rather it seeks the production of documents related to the Nepara site's remediation.

As discussed, *supra*, the agreement provides that any documents pertaining to Cambrex's liabilities were excluded from the sale. The Harriman Trust's Assets are used to fund Cambrex's remediation liabilities for the Nepara Facility. Rutherford did not purchase this liability and therefore did not purchase files and documents connected thereto. As a under the terms of the APA, Rutherford does not own these documents

b. Matter of Law

Rutherford argues that under New York law, the attorney-client privilege Cambrex is now asserting passed to it when it purchased the five plants and its operations. Cambrex argues that the privilege did not transfer to Rutherford because it pertains to assets and liabilities that it retained.

“[W]here efforts are made to run the pre-existing business entity and manage its affairs, successor management stands in the shoes of prior management and controls the attorney-client privilege with respect to matters concerning the company’s operations.” (*Tekni-Plex, Inc v Meyner and Landis*, 89 NY 2d 123 [1996].) “By contrast, the mere transfer of assets with no attempt to continue the pre-existing operation generally does not transfer the attorney-client relationship.” (*Id.*)

Here, Rutherford purchased certain assets related to the five plants and intended to continue their operations. Indeed, Rutherford kept the same employees, equipment, and certain contractual obligations. While Rutherford may have contemplated divesting the Nepara facility in January 2004, there is no finding that this was its intention prior to or at the November 2003 closing. (*Liubicic Aff’d, Ex K*) Indeed, Rutherford continued operating Nepara until the facility’s shutdown.² Rutherford purchased a five-plant, pre-existing business that was managed by Cambrex, and continued its operations after the asset-sale was completed.

“When ownership of a corporation changes hands, whether the attorney-client relationship transfers as well to the new owners *turns on the practical consequences* rather than

² The facility closed in May 2005.

the formalities of the particular transaction.” (*Tekni-Plex, supra, quoting Commodity Futures Trading Commn v Weintraub, 471 US 343 [1985], emphasis added*) In *Tekni-Plex*, the Court of Appeals held that the old business-entity, which sold all of its assets and liabilities to the new entity, continued to exist under new management. The practical consequence of this transaction was that the privilege concerning business operations passed from the prior management to the replacement management. Indeed, if “successor management stands in the shoes of prior management”, it is practical for the attorney-client relationship to alter one of its parties. (*Id.*)

Cambrex distinguishes *Tekni-Plex* from the instant action because it retained the liabilities that it avers the privilege protects. To be sure, the Cambrex-Rutherford asset sale was not a complete one, as found in *Tekni-Plex*. Here, one entity owns 5 chemical plants but shares remediation liabilities with the previous owner. Following the sale, contamination was discovered, and each party avers that the other bears the burden of the environmental clean-up. Cambrex now stands on privilege to avoid furnishing environmentally-related documents that go to the crux of the instant action and affect property now owned by Rutherford. It is this privilege-assertion that runs afoul of this transactions’ practical consequences.

The practical consequence of this asset sale’s structure is that the pre-closing environmental hazards impact both Cambrex and Rutherford. The agreement’s language is clear that Cambrex retained certain liabilities and did not transfer them in the asset sale. But this simply means that under the agreement’s stipulated conditions, Cambrex bears the clean-up cost for its generated-contamination. This does not mean that Rutherford is not at all affected by this. To be sure, Rutherford is now the owner and operator of these plants and whatever

environmental hazards that exist there - whether caused by it or not - impacts its daily operations.

Rutherford, unlike the new owner in *Tekni-Plex*, did not purchase all liabilities. But like the successor management in that case, Rutherford “stands in the shoes” of Cambrex because it purchased and took over the plants’ operations. (*See Tekni-Plex, supra*). It is true that Rutherford does not stand in Cambrex’s shoes with respect to the latter’s remedial liabilities; that is, Rutherford will not have to undertake the remediation process attributed to Cambrex. But aside from this particular obligation, Rutherford is nevertheless the plants’ current manager.

Since Rutherford stands in Cambrex’s shoes with respect to the plants operations, the privilege transferred to it under the *Tekni-Plex* doctrine. Furthermore, the documents at issue concern the plants’ pre-2003 environmental conditions. They may clarify the origination of the present contamination at the sites, which is the instant action’s core. Accordingly, Cambrex must disclose the requested documents to Rutherford.

II. Motion Sequence 010

Cambrex seeks from Rutherford the disclosure of documents that pertain to the latter’s claim that the former knowingly sold it defective equipment. Rutherford argues that these documents were prepared in anticipation of its litigation against Cambrex. These documents are therefore protected by the asserted privilege.

When a party reasonably believes that she/he will be engaged in a lawsuit, and generates documents and data to assist her/him in it, those materials are in fact prepared in anticipation of litigation. (*See, Aetna Cas. & Sur. Co v Certain Underwriters at Lloyd’s of London*, 263 AD 2d 367 [1st Dept 1999].) However, if the documents generated have a “multi-use purpose” beyond

preparation for trial, the privilege is inapplicable. (See, *Chemical Bank v National Union Fire Ins.*, 70 AD 2d 837 [1st Dept 1979].) The documents' preparation time-frame is also crucial: materials prepared before the party deliberated that it would be engaged in litigation is not afforded the privilege's protection. (See, *Equitable Life Assurance Society v Rocanova*, 615 NYS 2d 880 [1st Dept 1994].)

Here, this Court conducted an *in camera* review of the documents in which Rutherford argues are protected by this qualified privilege. These documents were indeed prepared in anticipation of litigation against Cambrex. These consist of charts and correspondences regarding what Rutherford avers are equipment defects whose genesis is when Cambrex was these assets' owner.

While some of these documents discuss costs that Rutherford incurred or will incur because of its need to replace certain equipment, this costs-analysis does not fall into the "multi-use" exception to the privilege. The purpose for the preparation of these documents was for Rutherford to analyze its claims against Cambrex. Since these claims pertain to allegedly defective equipment, it is only logical for a cost-analysis to be embedded within these documents.

The time-frame exception to the privilege is also inapplicable. Rutherford began these documents' preparation when it developed its contention that Cambrex breached the asset-purchase agreement's warranty provisions. Indeed, this was a time-consuming process that required Rutherford to examine the equipment/plants when it came to its belief that they were sold to it in a defective-state. Furthermore, there is no indication on the documents themselves that they were prepared for some other purpose and re-packaged so as to be connected to a

potential litigation against Cambrex. Moreover, “it is of no moment that the [documents] in question [were] prepared well in advance of [this action’s commencement].” (*See, Equitable Life Assurance Society, supra*). Rutherford needed to collect and compile data and develop its arguments prior to its notification to Cambrex. Cambrex’s contention that the time-frame between the documents’ compilation and the instant action’s commencement is too long for the privilege to apply is without merit.

While this Court finds that these documents were indeed created in anticipation of litigation, the analysis does not end here. This privilege is qualified, and can therefore be overcome if “the party seeking the discovery has substantial need of the materials in preparation for the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” (*CPLR 3101(d)(2)*)

Cambrex argues that it will suffer the type of hardship contemplated by CPLR 3101(d)(2) because the privileged documents go to the heart of this litigation. To be sure, whether Cambrex sold Rutherford defective equipment and to what extent said equipment was flawed is a pertinent issue in this case. Nevertheless, the burden is on Cambrex to demonstrate that it will indeed suffer a hardship and has no other means to access the information contained in these documents other than actually accessing them.

Cambrex avers that the equipment, which is the subject of the instant action, has been idle for the better part of two years. In order to determine its condition at the time of the asset sale, it must examine these documents since too much time has passed to properly surmise said equipment and the plant’s pre-2003 condition. (*See, Cambrex Memo of Law at page 19*) Moreover, it argues that Rutherford disassembled the amide plant, one of the equipment at issue,

and because its current non-existence, they have no other alternative to ascertain its pre-2003 condition other than these documents. (*Id.*)

Rutherford disputes Cambrex's asserted hardship. It argues that it has indeed supplied Cambrex with "tens of thousands of documents detailing the state of the equipment at issue. . ." (*Rutherford Memo in Opp'n at page 18*) These documents included repair and maintenance records, as well as Rutherford-generated memos and emails between its employees discussing the issue. (*Id.*) Furthermore, it avers that it has given Cambrex ample opportunities to examine the plants. Specifically, Cambrex retained experts who examined the Nepara facility. (*Id.*)

In reply, Cambrex furnishes the affidavit of Todd G. Schwendeman, the Vice President of ENSR International ("ENSR"). This is the firm Cambrex retained to examine the Nepara plant. Schwendemen attests that while Cambrex, through ENSR, was given the opportunity to examine the site, the examination was aborted after four hours. (*Schwendemen Aff'd at page 4, ¶ 8*) Rutherford's reasoning was that they discovered a conflict of interest between them and ENSR. (*Id.*)

Cambrex has failed to demonstrate it has or will continue to suffer an unreasonable hardship if this Court does not lift Rutherford's privilege assertion over these documents. First, Schwendemen's attestation that Rutherford prevented his firm from further examination *does not* indicate that it would *not allow any other firm* to examine Nepara. Rather, it simply attests that Rutherford believes a conflict exists between itself and ENSR. Second, Rutherford avers it has indeed provided Cambrex with documents pertaining to the pre-2003 conditions. Cambrex should have or should be in the process of receiving, the "tens of thousands of documents" that Rutherford contends it did indeed provide. Third, by Cambrex's own admission, it "could depose

those witnesses” - the witnesses being Rutherford’s employees. (*Camrex Reply Memo at page 10*) With the documents it has or should be receiving, coupled with the opportunity to question those individuals involved in ascertaining Rutherford’s claims, Cambrex is in a position to defend itself in the instant action. Therefore, Cambrex would experience no undue hardship if the requested documents retain their privileged status. Accordingly, the motion is denied.

CONCLUSION

For the foregoing reasons, it is hereby


ORDERED that Rutherford’s motion to compel Cambrex to disclose pre-closing documents is granted; and it is further

ORDERED that Cambrex’s motion to compel Rutherford to disclose documents prepared in-anticipation-of-litigation is denied.

This shall constitute this Court’s decision and order.

Dated: March 23, 2007

FILED
MAR 27 2007
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ENTER:

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