Atlantic Refining & Mktg. Corp. v Atlantic Richfield Co.
2008 NY Slip Op 30280(U)
January 16, 2008
Supreme Court, New York County
Docket Number: 0602239/2006
Judge: Richard B. Lowe
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 1/29/2008

[* 1]

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

PRESENT: HON. RICHARD B. LOWE, III PART 56

Index Number : 602239/2006

ATLANTIC REFINING & MARKETING

vs

ATLANTIC RICHFIELD COMPANY

Sequence Number : 001

DISMISS COMPLAINT

INDEX NO. ______

MOTION DATE 10/26/07

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 IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED JAN 29 2008 NEW YORK COUNTY CLERK'S OFFICE

FILED JAN 29 2008 NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 1/16/08

HON. RICHARD B. LOWE, III

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 56

---X

ATLANTIC REFINING & MARKETING CORPORATION.,

Plaintiff,

-against-

ATLANTIC RICHFIELD COMPANY, BP AMERICA, INC., and BP NORTH AMERICA, INC.,

Defendants

---X

Index No. 602239/06

DECISION AND ORDER

FILED
JAN 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

RICHARD B. LOWE, III, J.:

In this action alleging breach of an indemnity agreement, defendants Atlantic Richfield Company ("ARCO"), BP America, Inc., and BP North America, Inc.[1] move, pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint.

COMPLAINT

The complaint alleges that in 1985, plaintiff, Atlantic Refining and Marketing Corporation's ("Atlantic") parent, Atlantic Petroleum Corporation, ("APC") purchased assets, including an oil refinery located in Philadelphia, Pennsylvania, from ARCO. APC then assigned its rights under the Purchase Agreement to Atlantic[2].

In Article 14.1.3 of the Purchase Agreement, ARCO agreed to fully defend, and indemnify Atlantic for:

> All loss, liability, damage, deficiency, or expense, including attorney's fees, resulting from any

[1] BP America is the successor in interest to ARCO. It is defendants' position that there is no existing entity named "BP North America Inc."

[2] Section 16.12 of the Purchase Agreement permitted APC, as buyer, to "designate one or more subsidiary entities to take title to some or all of the Assets."

[* 3]

> misrepresentation, breach of warranty or covenant, default or non-fulfillment of any representation, warranty, covenant, agreement, condition or other provision on the part of the Seller under this Agreement.

One of the many warranty provisions to which Article 14.1.3 applied was Article 5.32 of the Purchase Agreement which states that Arco had:

> [M]aintained and managed the [Refinery], including any materials contained or deposited therein or thereon, in a manner in which [ARCO] reasonably believed at the time of the activity would protect the health of the workers, the public and the environment, and which was in compliance with all laws.

In Article 14.1.8 of the Purchase Agreement , ARCO undertook to indemnify Atlantic against "all claims, suits, proceedings, demands, assessments, judgments, costs and fees, including attorney fees relating to [ARCO]'s ownership, operation, or conduct of the BUSINESS up to closing, or to [ARCO]'s ownership or transfer of the Assets up to the Closing Date."

On September 1, 1989, Atlantic leased the refinery to Sunoco[3], an affiliated company. In paragraph 17(c) of the refinery lease, Atlantic indemnified Sunoco with respect to matters covered by ARCO's indemnity obligations to Atlantic.

Plaintiff alleges that in 2000, a sudden rupture in the carbon steel piping in an oil refining unit at the refinery resulted in the release of hydrogen-rich gas, that exploded and caused a fire that damaged not only the reformer and the refinery but also caused property damage to approximately 250 homes located outside of the refinery. Following the fire, Sunoco shut down the refinery for approximately one month to repair the damage to the facility and replace the piping in the oil refining unit.

---

[3] At that time Sunoco was known as Sun Refining and Marketing Company.

Plaintiff alleges that the explosion and fire occurred because, in 1978, ARCO undertook a major redesign and reconstruction of the subject oil refining unit that included the installation of carbon steel piping. Plaintiff claims that carbon steel piping is vulnerable to chemical and physical changes if it is exposed to hydrogen at temperatures and pressures in excess of certain operating limits that are designated in an industry standard known as the "Nelson Curves". Contact between the carbon steel piping and hydrogen under conditions that are in excess of the operating limits designated by the Nelson Curves results in High Temperature Hydrogen Attack ("HTHA"), that leads to deterioration of the carbon steel piping over time causing microscopic fissures, bubbles and cavities that are not apparent through visual inspection but which ultimately lead to rupture of the pipe.

Plaintiff contends that at the time that ARCO installed the carbon steel pipe, the American Petroleum Institute ("API") recommended against installing carbon steel piping under conditions, such as those in the subject oil refining unit, because the carbon steel piping would cause HTHA based on the Nelson Curves. Plaintiff also claims that in 1980, ARCO acknowledged, in an internal memo, that the high operating temperatures at the refinery would place ARCO's carbon steel piping at risk .

Pursuant to the indemnification provision in the lease agreement between Atlantic and Sunoco, plaintiff has reimbursed Sunoco for its costs, losses, damages in the amount of $14,917,968. In August of 2000, Sunoco, Inc., the ultimate parent of APC, Atlantic and Sunoco, provided ARCO with written notice of the claims and of ARCO's alleged indemnification obligation. In January, 2005, ARCO responded to Sunoco Inc.'s notice denying that it had any indemnification obligation for the money that Atlantic paid to Sunoco.

[* 5]

CONTENTIONS

In support of the motion to dismiss, defendants argue that ARCO sold the refinery to APC with the understanding that Atlantic would operate the refinery and, on that basis, ARCO extended indemnities to Atlantic for certain claims, including the indemnities under Articles 14.1.3 and 14.1.8. ARCO claims that, at the time it entered into the Purchase Agreement with Atlantic, it did not contemplate or intend that Atlantic would lease the refinery to Sunoco and that expenses arising out of Atlantic's voluntary agreement to indemnify Sunoco do not relate to Atlantic's operation of the refinery and are not within the scope of ARCO's indemnity.

In opposition to dismissal, plaintiff argues that the broad indemnity provisions in the Purchase Agreement must be interpreted to include Atlantic's payment to Sunoco which is within the scope of ARCO's indemnities; that Atlantic's ongoing management and operation of the refinery was not a condition precedent to application of the indemnities; and that it is the custom and practice in the petroleum industry that companies, such as Atlantic, that own refineries, hire other entities or have contractual arrangements with other companies to operate the refineries and that at the time of the explosion and fire Atlantic still owned the refinery even though the refinery was being operated through an affiliated company.

DISCUSSION

A. Legal Standard

Under CPLR 3211, "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the pleading fails to state a cause of action." (*Tal v. Malekan,* 305 A.D.2d 281[1st Dept. 2003]) or that the claim is "utterly refuted" by documentary evidence. (*See, 511 West 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144

[2002]) On a motion addressed to the sufficiency of the complaint, the Court must afford the complaint liberal construction, accept as true the facts pleaded therein and determine only whether the facts fit within any cognizable legal theory. (*See, e.g. 1455 Washington Ave Assoc. v. Rose & Kiernan, Inc.*, 260 A.D.2d 770 [3rd Dept 1999]) However, if the allegations set forth in the complaint do not state a valid cause of action, even when taken as true, the court must dismiss the complaint, as a matter of law. (*See, Bailey v. Grey, Siefert & Co., Inc.*, 300 A.D.2d 258 [1st Dept. 2002])

The well established law of contract interpretation provides that:

> In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give meaning and effect to all its provisions. Words and phrases are given their plain meaning . . . . Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. *On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, ...*"

(*American Express Bank Ltd. V. Uniroyal, Inc.*, 164 A.D.2d 275, 277 [1st Dept 1990], *lv denied* 77 N.Y.2d 807 [1991] [internal citations omitted] [emphasis added]); *South Rd. Assocs. V. IBM Corp.*, 4 N.Y.3d 272 [2005])

Consistent with the fundamental principles of contract interpretation in New York, the right "to recover indemnification in the basis of a contract provision, depends upon the intent of the parties and the manner in which that intent is expressed in the contract." (*Kurek v. Port Chester Housing Authority*, 18 N.Y. 2d 450, 456 [1966]; *Vey v. Port Authority of New York and New Jersey*, 54 N.Y.2d 221, 226-227[1981]).

Here, reading the Purchase Agreement as a whole and considering the sharply contested averments of the parties, the court finds that it is unable to determine the intent of the parties from the four corners of the contract (*See, Greenfield v. Phillies Records, Inc.*, 98 N.Y.2d 562 [2002]) and therefore an issue of fact exists as to whether indemnification, in the situation presented here, was contemplated by the parties. (*See, Pollak v. Lincoln Center of Performing Arts,* 276 A.D.2d 403, 404 [1st Dept 2000][where an ambiguity exists, parol evidence may be received "to elucidate the intention of the parties."]; *Steuben Contracting, Inc. V. Griffith Oil Co., Inc.*, 283 A.D.2d 1008 [4th Dept 2001])

In this case, the contract's ambiguity does not arise from the particular language of the indemnity provision, but from the ambiguity in the larger contract about whether the terms and conditions of the Purchase Agreement were specific to APC and Atlantic. (*See, e.g. Apartment Recycle Co. Of Manhattan Inc. v. AIU Ins. Co.,* 2005 WL 360171 [Sup. Ct. N.Y. County]) Defendants cite to several sections of the Purchase Agreement[4] and assert that ARCO's indemnity obligation was predicated on APC's intent to operate the refinery as an ongoing business. ARCO asserts that it did not contemplate, and that the Purchase Agreement does not suggest, that its indemnity obligation would continue if Atlantic relinquished control over the refinery. It claims that indemnity agreements must be narrowly construed "to avoid reading into [them] a duty which the parties did not intend to be assumed." (*Hooper Assocs. Ltd. v. AGS Computers, Inc.,* 74 N.y.2d 487, 491[1989)

[4] For instance, Article 6.5, APC's promise to maintain and manage the refinery in a safe and lawful manner; Article 15.3, APC's agreement to abide by all laws and regulations governing the operation of the refinery. In addition, defendants reference Articles 4.1; 7.19; 7.31; 7.32 and 8.7 in support of their argument that the terms and conditions of the Purchase Agreement reflect the parties intent that APC and/or Atlantic would operate the refinery.

On the other hand, plaintiff argues that the broad language in the indemnity provisions does not limit ARCO's indemnification obligation in any way. Plaintiff argues that ARCO, a sophisticated seller, elected to indemnify Atlantic "at all times, from and after the Closing date". Plaintiff also states that, even though it was entirely within the parties contemplation that a related company such as Sunoco, or an outside contractor, could be involved in the operation of the refinery, the indemnification provision fails to include limiting language. Moreover, at oral argument, plaintiff claimed that it is the practice in the petroleum industry that refinery owners hire entities to operate the refineries all the time (11/15/07 Trans. pp. 10-11).

As the Court of Appeals stated in *Hooper Assocs. Ltd. v. AGS Computer, Inc.,* 74 N.Y.2d at 491-492, a promise to indemnify "should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances."

Here, given the ambiguity regarding whether the parties contemplated that Atlantic would lease the refinery to a third party and the extremely broad language of the indemnity provisions, the court finds that parol evidence is needed to determine whether, at the time the parties executed the agreement, they intended the indemnification provision to apply to claims that arose after Atlantic had transferred management and operation of the refinery to a third party.

Conclusion

Accordingly, it is ORDERED that defendants motion to dismiss the complaint is denied with leave to renew following limited discovery regarding whether the parties intended that ARCO would indemnify Atlantic for sums that Atlantic paid to Sunoco pursuant to Atlantic's

[* 9]

contractual indemnity obligation in the lease agreement with Sunoco.

This decision constitutes the order of the court.

Dated: January 16, 2008

ENTER:

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

FILED
JAN 29 2008
NEW YORK
COUNTY CLERK'S OFFICE