

Duferco SA v Inspectorate Intl. Ltd.

2009 NY Slip Op 32603(U)

November 9, 2009

Supreme Court, Albany County

Docket Number: 5970-09

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT
DUFERCO SA,

COUNTY OF ALBANY

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 5970-09
RJI NO. 01-09-97938

INSPECTORATE INTERNATIONAL LIMITED,
INSPECTORATE AMERICA CORPORATION and
MARINE INSPECTION & LOGISTICS, LLC,

Defendant.

Supreme Court Albany County All Purpose Term, October 20, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Cain Hibbard & Myers, PC
Lucy Prashker, Esq.
Attorneys for Plaintiff
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TERESI, J.:

Plaintiff commenced this breach of contract, negligence and gross negligence action on July 10, 2009. Prior to answering, defendants Inspectorate International Limited and Inspectorate America Corporation (hereinafter collectively referred to as "Inspectorate"¹) move to dismiss

¹ This action, in part, is based upon Inspectorate International Limited's contract with Plaintiff. Plaintiff alleges that Inspectorate International Limited "delegated" their perform of the contract here in New York to Inspectorate America Corporation. Neither Inspectorate entity

Plaintiff's complaint pursuant to CPLR §§ 3211(a)(1) and 201, alleging that documentary evidence demonstrates that this action is barred by the parties' contractually set statute of limitations. Plaintiff opposes the motion, and moves for an order lifting CPLR §3214(b)'s automatic stay of discovery while Inspectorate's motion is pending. Because Inspectorate failed to demonstrate its entitlement to dismissal based upon documentary evidence, its motion is denied. Further, as Inspectorate's motion is no longer pending, Plaintiff's motion is denied as moot.

In the context of a CPLR §3211 motion the Court must "accept the facts as alleged in the complaint as true, [and] accord plaintiffs the benefit of every possible favorable inference". (Leon v. Martinez, 84 NY2d 83, 87-88 [1994]). On a motion to dismiss on the ground that the action is barred by documentary evidence, pursuant to CPLR §3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Erie Ins. Group v. National Grange Mut. Ins. Co., 63 AD3d 1412 [3d Dept. 2009]; Goshen v. Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]). The documentary evidence submitted must resolve "all factual issues as a matter of law and definitively dispose... of the plaintiff's claim". (Wallach v. Hinckley, 12 AD3d 893 [3d Dept. 2004]).

Accepting the facts alleged in Plaintiff's complaint as true, on this motion Plaintiff demonstrated the following. On or about April 17, 2008, Plaintiff contracted with non-party "Tube City" to purchase scrap metal, with the purchase price based, in part, upon the weight and

disputes such allegation. While the exact nature of the relationship between Inspectorate International Limited and Inspectorate America Corporation has not been demonstrated, because this motion has been brought by both Inspectorate entities jointly, both entities will be considered as a single entity for purposes of this motion only.

purity of the product delivered. To confirm such weight and purity, Plaintiff hired Inspectorate to inspect the product delivered at the port of loading (Albany, New York) and the discharge port (Trieste, Italy). Plaintiff alleges that it offered Inspectorate the port of loading inspection job by its facsimile “nomination” dated June 5, 2008, and that Inspectorate accepted such “nomination” by e-mail dated June 5, 2008. Plaintiff further alleges that it offered Inspectorate the discharge port inspection job by facsimile “nomination” dated June 20, 2008, but does not specify Inspectorate’s written acceptance of their offer. Nor did Plaintiff attach to its complaint the correspondence set forth above. Plaintiff does allege, however, that Inspectorate performed inspection services for Plaintiff at both the loading port and the discharge port.

In support of its motion, Inspectorate submits the above referenced correspondence, along with additional correspondence, claiming that this documentary evidence establishes the parties’ contractual terms. In accord with Plaintiff’s allegation, the documentary evidence demonstrates that Plaintiff’s June 5, 2008 facsimile constituted its offer to Inspectorate to perform inspection services at the port of loading. Such facsimile set forth Plaintiff’s specific quality requirements and stated “KINDLY CONFIRM A/M INSPECTION AT YOUR BEST RATE.” Such facsimile included no price for Inspectorate’s services, but rather only requested Inspectorate’s services at its “best rate.” Inspectorate’s subsequent June 5, 2008 e-mail, which Plaintiff claims accepted its earlier offer, also failed to include a price quote for its services. Rather, Inspectorate’s e-mail states that “we confirm that we have informed and instructed our US office accordingly and will revert soonest with Our rates for this work, in meantime we urgently await contact details for vessel’s agent”. Inspectorate, contrary to Plaintiff’s claim, alleges that its June 5, 2008 e-mail did not accept the Plaintiff’s offer. Rather, Inspectorate claims its June 10, 2008 e-mail accepted

Plaintiff's offer by informing Plaintiff of its rates and its "General Terms and Conditions of Business" (hereinafter "General Terms"). Inspectorate's General Terms state: "[Inspectorate] shall be discharged from all liability to [Plaintiff] for all claims for loss, damage or expense unless proceedings are issued and served on [Inspectorate] within 6 (six) months after the date of the performance by [Inspectorate] of the service which gives rise to the claim or in the event of any alleged non-performance within 6 (six) months of the date when such service should have been completed." Inspectorate also submits Plaintiff's subsequent June 20, 2008 facsimile "nomination", which Plaintiff alleges was an offer, to perform inspection services at the discharge port. Inspectorate claims that it accepted such offer by its e-mail, dated June 30, 2008, again referring to the "terms and conditions as sent previously."

While the above "documentary evidence" may be considered on this motion, it fails to demonstrate Inspectorate's entitlement to dismissal. Parties may, by written agreement, shorten the statute of limitations applicable to a cause of action. (CPLR §201; Architectural Builders Inc. v. Pollard, 267 AD2d 704 [3d dept. 1999]). Here, the "documentary evidence" does not consist of a single written document signed by both parties, whose terms are unambiguously agreed upon and clearly demonstrates the parties' intent to shorten the statute of limitations. Rather, the numerous correspondences and their legal impact may only be analyzed and interpreted within their broader context of the parties' respective performance and generally agreed upon industry standards. As such, the "documentary evidence" submitted on this motion fails to "conclusively establish[... Inspectorate's] defense as a matter of law." (Venture Silicones, Inc. v. General Electric Company, 14 AD3d 924, 925 [3d Dept. 2005]; Weston v. Cornell University, 56 AD3d

1074 [3d Dept. 2008])².

Moreover, at this procedural stage, “documentary evidence” cannot conclusively establish that a shortened statute of limitations controlled. Where parties to a contract shorten the applicable statute of limitations pursuant to CPLR §201, the shortened period must be “reasonable”. (John J. Kassner & Co., Inc. v. City of New York, 46 NY2d 544 [1979]). Reasonableness is measured “in the light of the provisions of the contract and the circumstances of its performance and enforcement.” (Fitzpatrick & Weller, Inc. v. Miller, 309 AD2d 1273, 1273 [2d Dept. 2003] quoting Brown & Guenther v. North Queensview Homes, Inc., 18 A2d 327 [1st Dept. 1963]). As the circumstances of performance and enforcement cannot be demonstrated by documentary evidence, Inspectorate cannot demonstrate the reasonableness of the shortened statute of limitations on this motion. Nor at this procedural stage, where Plaintiff is accorded the benefit of every possible favorable inference, can Inspectorate demonstrate with documentary evidence that the contract is not “one of adhesion or the product of overreaching”. (Saltaire v. Zagata, 280 AD2d 547 [2d Dept 2001]; Jamaica Hospital Medical Center v. Carrier Corporation, 5 AD3d 442 [2d Dept. 2004]).

Accordingly, Inspectorate’s motion is denied. The parties’ remaining contentions have been examined and found to be lacking in merit or moot.

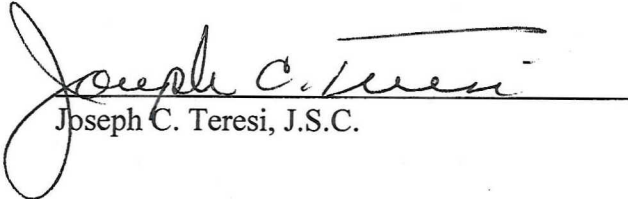
This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to

² Additionally, Inspectorate’s choice of law argument is not considered. Even if Inspectorate demonstrated that the General Terms were incorporated into the parties’ agreement, which they did not, because contractual choice of law provisions apply only to substantive issues not procedural rules, such as the statute of limitations, its analysis is inapplicable. (Portfolio Recovery Associates, LLC v. King, 55 AD3d 1074 [3d Dept. 2008]).

the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 9, 2009
Albany, New York


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated September 9, 2009; Affidavit of Andy Roberts, dated September 9, 2009, with attached Exhibits A-G; Affirmation of Casey Howard, dated September 9, 2009, with attached Exhibits H-M.
2. Notice of Motion, dated September 25, 2009; Affirmation of Lucy Prashker, dated September 24, 2009, with Attached Exhibit A; Affidavit of Robert Stein, dated September 24, 2009, with Attached Exhibits A-E.
3. Reply Affirmation of Lucy Prashker, dated October 16, 2009.



STATE OF NEW YORK
 SUPREME COURT CHAMBERS
 ALBANY COUNTY COURTHOUSE
 ALBANY, NEW YORK 12207
 (518) 285-8949

JOSEPH C. TERESI
 JUSTICE

JOSHUA L. FARRELL
 LAW CLERK

November 9, 2009

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Re: DUFERCO SA v. INSPECTORATE INTERNATIONAL LIMITED, ET. AL.
 INDEX NO. 5970-09
 RJI NO. 01-09-97938

Dear Counselor:

Enclosed please find the original Decision and Order, with respect to the above referenced matter.

Very truly yours,

Joseph C. Teresi

JCT/jf
 Encl.

cc: Locke Lord Bissell & Liddell, LLP
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 (w/ copy of Decision and Order)

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Albany County Clerk
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 (w/ copy of Decision and Order and original motion papers)