

Simco Mgt. Co. v Amoco Oil Co.

2010 NY Slip Op 31626(U)

June 21, 2010

Sup Ct, Nassau County

Docket Number: 021092/2007

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

P R E S E N T :

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 8

SIMCO MANAGEMENT CO.,

Plaintiff,

INDEX NO.: 021092/2007
MOTION DATE: 6/9/10 and
6/11/10
MOTION SEQUENCE: 003 and
004

- against -

AMOCO OIL COMPANY, BP PRODUCTS
NORTH AMERICA, INC. and MOTOR PARKWAY
ENTERPRISES, INC.,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed	1
Affirmation of Jonathan K. Cooperman in Opposition & Exhibits Annexed	2
Memorandum of Law in Opposition to Plaintiff's Second Motion for Partial Summary Judgment and an Inquest	3
Order to Show Cause, Affirmation & Exhibits Annexed	4
Affirmation of J. Jamari Buxton & Exhibit Annexed	5
Defendants Amoco Oil company and BP Products North America, Inc.'s Opposition to Plaintiff's Anticipated Motion to Appoint a Temporary Receiver	6
Defendants Amoco Oil Company and BP Products North America, Inc.'s Opposition to Plaintiff's Motion to Appoint a Temporary Receiver	7
Reply Affirmation of Robert M. Calica in Support of Plaintiff's Motion for Partial Summary Judgment & Exhibit Annexed	8

PRELIMINARY STATEMENT

Plaintiff seeks summary judgment on the issue of liability and the conduct of an inquest to ascertain damages. Defendants oppose this motion, essentially contending that the amount demanded in the complaint far exceeds a fair level of damages, and that they have acted in good faith in seeking to resolve the matter. Plaintiff also seeks the appointment of a Receiver for property of BP Products North America, Inc. (BP) located within the State of New York, up to a value of \$1,527,329 plus statutory costs and interest, amounting in total to \$2,000,000 upon the grounds of insolvency or impending and threatened insolvency. Defendant BP is claimed to be a wholly owned subsidiary of BP plc, whose current travails in the Gulf of Mexico allegedly jeopardize the economic stability of the company. Defendants oppose the application for the appointment of a Receiver in that plaintiffs are not seeking to impose receivership on property which is the subject of the action, but on other property in an effort to secure assets in satisfaction of a judgment which it does not have.

BACKGROUND

The essence of this action is the replacement cost of a 2400 ft.² gasoline service station with a small Dunkin' Donuts facility attached. Simco Management ("Simco") is the owner of the property on motor Parkway in Brentwood Long Island. The property was leased to Amoco, subsequently BP, and assigned to Motor Pkwy., Enterprises, Inc. ("Motor Parkway"). The term of the lease expired on December 31, 2008. Among the obligations of Amoco/of BP the terms of the lease was to maintain adequate insurance against fire damage, to promptly rebuild and replace any fire – damaged structures and to take no actions which would jeopardize the use of the premises as the gasoline service station, and prior legal non– conforming use. The premises were destroyed by fire on February 4, 2007 and, despite the provisions of the lease agreement, Simco was forced to reconstruct of the building. It did not duplicate the former structure, but rather built a 3,100 square foot facility at a slightly different location on the site so as to the plight with town of Islip setback requirements. Defendants agree that it is their financial responsibility under the terms of the lease to restore the premises, but they have not been able to reach agreement with plaintiffs as to what the cost would be to duplicate the original rather than the actual cost of the

expanded facility.

DISCUSSION

Summary Judgment

When presented with a motion for summary judgment, the function of a court is “not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact.” (*Quinn v. Krumland*, 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept. 1965]); (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. (*Tortorello v. Carlin*, 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must “ ‘ accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ”. (*Braddock v. Braddock*, 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney’s affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

There is no serious quarrel but that defendants are responsible to restore the premises destroyed by fire. They contend, and the Court agrees, that they are not required to pay for the construction of a larger or more lavishly equipped station. Paragraph 18 of the Lease Rider # 6,

Exh. "B" to Motion, provides as follows:

In the event of loss or damage by fire or other casualty, the Lessee agrees that it, at its own cost and expense, will promptly rebuild or repair or restore, as the case may be, the premises so damaged. In the event, however, of the failure of the Lessee to do so rebuild within a reasonable time, the Lessor may, at its sole expense, commence and complete the rebuilding of said buildings or structures and to charge the Lessee therefor.

Defendants' arguments as to their good efforts to arrive at a fair and reasonable cost in accordance with the terms of the lease, the parties have been unable to achieve an agreement. Plaintiff's motion for partial summary judgment on the issue of liability is granted and the matter is referred to Court Attorney/Referee Thomas Dana (Room 206, Second Floor), on August 3, 2010, at 10:00 A.M., for a determination of the replacement cost of the structure as it existed on February 4, 2007. Counsel for Plaintiff shall serve Defendants and file with the Clerk of the Court a Notice of Inquest and Note of Issue and pay all appropriate fees for the filing thereof on or before July 23, 2010. The assignment to the Court Attorney/Referee is to hear and determine, unless the parties disagree to the acceptance of the determination of the Court Attorney/Referee, in which case the reference will be to hear and report.

Appointment of a Receiver

It is clear that plaintiff is anxious about the security of any judgment which may be obtained. But what it is presently seeking is a pre-judgment attachment which is, under the circumstances of this case, considered inappropriate. The Court is not convinced that BP is in danger of insolvency to the extent that it would not be able to make good, even if the cost of repair or replacement were \$2,000,000 as suggested by plaintiff. While the reports from the Gulf of Mexico disaster are truly disturbing, and will cost BP perhaps multi-billions of dollars over time, they have suspended payment of a \$10 billion dollar dividend, and essentially placed \$20 billion in escrow for various forms of future compensation and clean-up costs. For 2009 the reported income was \$50 billion on sales of \$200 billion, hardly putting them in economic jeopardy.

Article 62 of the Civil Practice Law and Rules authorizes attachment of property in the

same manner as provided for post-judgment pursuant to § 5201.

§ 6202. Debt or property subject to attachment; proper garnishee.

Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a “judgment debtor” in section 5201 and in subdivision (i) of section 105 shall be construed to mean “defendant.”

The types of property against which a judgment may be enforced are very broad, including tangible and intangible, and essentially exclude only property specifically exempted from attachment:

§ 5201

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

...


Defendants point out that the level of damages sustained as a result of the collapse of a drilling rig, and the release of vast amounts of oil into the Gulf of Mexico are hearsay; but there is no real controversy that this has happened. We are overwhelmed with television coverage of the gushing oil and the horrifying damage to the environment and local businesses. Nevertheless, the Court is unconvinced that this jeopardizes the ultimate financial stability of BP plc. While some social commentators are calling for a government takeover of BP’s United States operation, the reasons cited are not their potential insolvency, as was the case with AIG and General

Motors, but because we presently do not exercise enough control over BP to force it to spend even more money on resolving the Gulf disaster.

For the foregoing reasons, the motion to appoint a Receiver for assets of BP in order to secure the efficacy of a judgment of up to \$2,000,000 is denied.

This constitutes the Decision and Order of the Court.

Dated: June 21, 2010


J.S.C.

ENTERED
JUN 28 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE