

Titan Atlas Mfg., Inc. v Meier
2013 NY Slip Op 31486(U)
July 8, 2013
Supreme Court, New York County
Docket Number: 150239/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **EILEEN A. RAKOWER**
Justice

PART 15

Index Number : 150239/2013
TITAN ATLAS MANUFACTURING,
vs
MEIER, FRANZ X.
Sequence Number : 001
DISMISS ACTION

INDEX NO. 150239/13

MOTION DATE _____

MOTION SEQ. NO. 1

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, 3

Answering Affidavits — Exhibits _____ | No(s). 4

Replying Affidavits _____ | No(s). 5, 6, 7

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: 7/8/13

 J.S.C.

EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

TITAN ATLAS MANUFACTURING, INC.,

Index No.
150239/2013

Plaintiff,

Decision and
Order

Mot. Seq. 1

vs.

FRANZ X. MEIER, STRUCTURTECH, INC.,
FXM & CO., STRUCTURTECH
CONSTRUCTION SYSTEMS, LLC, AND
XJM CO, LLC,

Defendants

-----X

HON. EILEEN A. RAKOWER, J.S.C.

In this action, Plaintiff Titan Atlas Manufacturing, Inc. (“Plaintiff” or “Titan”) seeks indemnification from Defendants pursuant to the parties’ Asset Purchase Agreement for sums that it expended in an action entitled *Frank A. Sisk and Precision Mine Repair, Inc. v. Titan Atlas Manufacturing, Inc. and Strata Mine Services, LLC*, filed in the United States District Court for the Western District of Virginia, Abington Division (“the Patent Action”). In the Patent Action, Frank Sisk and Precision Mine Repair, Inc. made claims against Titan, as successor of StructurTech, for StructurTech’s alleged infringement of a patent owned by Mr. Sisk and licensed to Precession Mine Repair, Inc.

As alleged in the Complaint, on March 29, 2010, Titan entered into an Asset Purchase Agreement with defendants FXM & Co., Structurtech, Inc., Structurtech Construction Systems, LLC, and Frank Meier. XJM became subject to the agreement by way of assignment dated July 6, 2011. Defendants were in the business of manufacturing, among other things, “3D Panels,” which are one of the component parts of “steel anchored and reinforced seals” having numerous commercial uses.

Pursuant to the Agreement, Titan purchased the assets of Defendants, including

the inventory, equipment, intellectual property, and 10.26 acres of land and the factory building where the 3D panels were manufactured.

The Complaint alleges that pursuant to the Agreement, Defendants represented that they had not been threatened with proceedings that “challenge the validity of the ownership by [the defendants] of any such Intellectual Property” and “that there has been no use or infringement of any such Intellectual Property.” Defendants further represented that they were unaware of any violation relating to the Assets or the manufacture or sale of the Products or the use of the Assets, and that they had good, marketable, and exclusive title to the Assets.

The Agreement further provides that Titan does not “assume any liabilities of [the defendants] relating to the Assets which were incurred by the [defendants] prior to the Closing Date.” The Agreement provides that the representations and warranties made by Defendants survive the closing of the Asset Purchase Agreement and that Defendants agree “jointly and severally to indemnify [Titan] and each of its Affiliates, and agrees to hold it and them harmless from, any Losses incurred or suffered by [Titan] or any of its affiliates relating to or arising out of” the “breach of, or inaccuracy in, any representation or warranty” made by Defendants and the failure to perform any covenant or obligation in the Agreement. The Agreement provides that Titan, “in satisfaction of any indemnification obligations of [the defendants] . . . setoff such indemnification obligations against (and withhold payment of) any cash payable to Meier . . .”.

The Complaint further alleges that on February 16, 2011, the Patent Action was commenced, in which Frank Sisk and Precision Mine Repair, Inc. asserted claims against Titan, as the successor of StructurTech, for Structur Tech’s alleged infringement of what is known as the 231 Patent owned by Mr. Sisk and licensed to Precision Mine Repair, Inc. They alleged that StructurTech sold 3D Panel in a manner that constituted knowing infringement of the 231 Patent.

In this action, Titan alleges that as a result of the acts of and/or omissions of StructurTech and the other defendants, Titan expended hundreds of thousands of dollars in attorneys’ fees. Titan demanded that Defendants provide indemnification pursuant to the Agreement, and Defendants refused in alleged breach of the Agreement.

Based on these allegations, the Complaint alleges three causes of action: (1) a breach of contract claim based on Defendants’ failure and refusal to indemnify Titan pursuant to the parties’ Agreement in the Patent Action, (2) indemnification, (3) and misrepresentation/fraud in inducement based on Defendants’ alleged material

misrepresentations regarding their ownership and use of certain intellectual property.

Defendants move, pursuant to CPLR §3211(a)(7) and CPLR §3016(b), for an order dismissing Plaintiff's Complaint on the grounds that (i) the Plaintiff's causes of action are barred by res judicata; (ii) the pleading fails to state a cause of action; (iii) this Court lacks personal jurisdiction as to Defendant XJM, pursuant to CPLR § 3211(a)(8); and, (iv) Count III fails for failure to plead scienter with particularity required by CPLR § 3016(b).

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (7) the pleading fails to state a cause of action;
 - (8) the court has not jurisdiction of the person of the defendant . . .

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

In their motion to dismiss, Defendants first allege that res judicata bars Plaintiff's action because these claims were subject to a prior foreclosure action in South Carolina and Plaintiff failed to assert the right of setoff that it now seeks in this instant action.

As part of the parties' Agreement, Titan gave Defendants a \$1,000,000 note and mortgage on one of the parcels of property being purchased. On August 3, 2011, Defendants commenced a foreclosure action against Plaintiff in Charleston County, South Carolina ("Prior Foreclosure Action"), based on its failure to pay the mortgage payments and a Judgement of Foreclosure was entered on April 30, 2012. On October 11, 2012, a deficiency judgment was entered in the amount of \$351,907.52.

Defendants also assert that Plaintiff's claim for indemnification fails as a matter of law because the Agreement's indemnity provision provides coverage only for "patent(s) owned" by Defendants, not patents held by others, and Plaintiff failed to plead that Defendants owned Sisk's '231 Patent that is the subject of the Patent Action.

“Under New York's transactional approach to res judicata issues, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy” (*Fifty CPW Tenants Corp. v. Epstein*, 16 A.D.3d 292, 293 [1st Dept. 2005]) (citation and internal quotes omitted).

The Prior Foreclosure Action and Titan's instant claims arising out of the indemnification provisions of the Agreement are different claims arising out of different transactions. Furthermore, as Plaintiff points out, the Agreement states, “Neither the exercise of nor the failure to exercise such right of setoff will constitute an election of remedies or limit [Titan] in any manner in the enforcement of any other remedies that may be available to it.” As the four corners of the Complaint state a claim for indemnification, Plaintiff's first cause of action alleging breach of contract and second cause of action seeking indemnification stand.

Defendants also contend that the Court lacks personal jurisdiction over XJM because “[t]he mere assignment of a mortgage interest conveying South Carolina property, between two South Carolina persons, without more, does not give New York personal jurisdiction over XJM.” However, based on Plaintiff's allegation, XJM was not merely assigned a mortgage interest, but rather assumed the right and liabilities of the original Sellers which were contained in the Agreement. Article 12 of that Agreement provides that the courts of New York have exclusive jurisdiction over disputes arising out of the Agreement.

Defendants also contend that Plaintiff's misrepresentation/fraud claim fails to state a claim based on a failure to plead fraud with particularity pursuant to CPLR §3016(a). Here, based on the four corners of the Complaint, and the allegations that among other representations, Defendants “represented that they were ‘unaware of any violation of any law, rule, regulation . . . relating to the Assets or the manufacture or sale of the Products or the use of the Asset’” and plaintiffs in the Patent Action alleged that “StructurTech sold 3D panel in a way that constitutes knowing infringement upon the 231 Patent,” Plaintiff states a claim for misrepresentation/fraud. Taking the allegations as true, if indeed StructurTech sold 3D Panel in a way that constituted a knowing infringement on the 231 Patent, then Defendants misrepresented that they were “unaware of any violation of any law, rule, regulation . . . relating to the Assets or the manufacture or sale of the Products or the use of the Asset.”

Wherefore, it is hereby,

ORDERED that Defendants' motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 7/8/13



EILEEN A. RAKOWER, J.S.C.

EILEEN A. RAKOWER