

**Coast to Coast Energy, Inc. v Gasarch**

2013 NY Slip Op 31623(U)

July 15, 2013

Sup Ct, New York County

Docket Number: 602044/2009

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY  
PRESENT: Hon. Eileen Bransten, Justice PART 3

-----X  
COAST TO COAST ENERGY, INC. and COAST TO  
COAST AMERICAN DRILLING I LP,

Plaintiffs,

-against-

Index No.: 602044/2009  
Motion Date: 05/29/13  
Motion Seq. No.: 037

MARK GASARCH, CONTINENTAL DRILLING  
CORP. and GASMARK CORP.,

Defendants.

-----X  
The following papers, numbered 1 to 3, were read on this motion to Strike.


- Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s) 1
- Answering Affidavits - Exhibits No(s) 2
- Replying Affidavits No(s) 3

Cross-Motion:  Yes  No

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

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM  
DECISION.

*July*  
Dated: ~~June~~ 15 2013

  
\_\_\_\_\_, J.S.C.  
Hon. Eileen Bransten

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

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
  - 2. CHECK AS APPROPRIATE: Motion Is:  GRANTED  DENIED  GRANTED IN PART  OTHER
  - 3. CHECK AS APPROPRIATE: Cross- Motion Is:  GRANTED  DENIED  GRANTED IN PART  OTHER
  - 4. 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: IAS PART THREE

-----X  
COAST TO COAST ENERGY, INC. and  
COAST TO COAST AMERICAN  
DRILLING I LP,

Plaintiffs,

-against-

Index No. 602044/2009  
Motion Date: 5/29/13  
Motion Seq. No.: 037, 038

MARK GASARCH, CONTINENTAL  
DRILLING CORP., and  
GASMARK CORP.,

Defendants.

-----X

BRANSTEN, J.:

Motion sequence numbers 037 and 038 are consolidated herein for disposition.

In Motion sequence number 36, the Court granted partial summary judgment in favor of Defendants, but permitted Plaintiffs to move for leave to amend the complaint.

Plaintiffs did not move for leave to amend, but instead filed the Proposed Second Amended Complaint. In Motion sequence number 37, Defendant Mark Gasarch, Defendant Continental Drilling Corp. ("Continental"), and Defendant Gasmark Corp. ("Gasmarck," collectively "Defendants") move to strike Plaintiff Coast to Coast Energy, Inc.'s ("Coast to Coast") and Plaintiff Coast to Coast American Drilling I LP's ("American Drilling," collectively "Plaintiffs") Proposed Second Amended Complaint.

In Motion sequence number 38, Plaintiffs oppose the motion to strike and cross-move for leave to amend the complaint.

### **Background**<sup>1</sup>

In 2005, non-parties Lawrence Doherty and Mark Gonsalves became principals in Plaintiff Coast to Coast, a company that was formed by Defendant Gasarch to serve as the general partner for various oil drilling projects. *See* First Amended Complaint (“FAC”) ¶ 19. One such project, American Drilling, was created in 2008 in order to “recomplete”<sup>2</sup> a Texas oil well. *See* FAC ¶ 2. In order to attract investors to American Drilling, Gasarch prepared a Private Placement Memorandum (“PPM”) that laid out the project’s material terms. *See* FAC ¶ 6.

The PPM stated that American Drilling would pay Continental, the drilling contractor of which Gasarch was an officer, \$900,000 to “recomplete” the Texas oil well. *See* FAC ¶ 29. Cost overruns were to be borne by Continental. *See* Proposed Second Amended Complaint, Ex. A at 10. Further, the PPM stated that all working interests in the Texas oil well would be assigned to Coast to Coast, and that Continental would perform the tasks necessary to “recomplete” the well and place it into production. *See* FAC ¶ 29.

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<sup>1</sup> Facts in this section are undisputed, unless otherwise noted.

<sup>2</sup> The Environmental Protection Agency defines the “recompletion” of an oil well as the “remedial operations required to maintain production” of an oil well. “Representative Completion and Recompletion Emissions,” Subsection of *Oil and Natural Gas Sector: Standards of Performance for Crude Oil and Natural Gas Production, Transmission, and Distribution*, United States Environmental Protection Agency (July 2011), <http://www.epa.gov/airquality/oilandgas/pdfs/20110728tsd.pdf>.

Although the PPM stated that the parties would execute a “Turnkey Agreement”<sup>3</sup> that would serve as their contract, and despite numerous requests from Gonsalves and Doherty, no “Turnkey Agreement” was ever executed. *See* First Amended Complaint ¶ 28. Nevertheless, the parties acknowledge that there is an enforceable agreement and that the PPM contains language of some agreed upon terms. *See* Statement of Material Facts in Support of Defendants’ Motion for Summary Judgment ¶ 5 (“In early 2008, American Drilling and Continental entered into an agreement...in which American Drilling agreed to pay Continental a total of \$900,000 and Continental agreed, on a “turnkey” basis, to recomplete the Well”); Plaintiffs’ Counter Statement of Uncontested Material Facts (indicating Defendants’ statement of material fact ¶ 5 is “Admitted”). In the Proposed Second Amended Complaint, Plaintiffs now allege that they never received any working interests in the well, that Defendants did not “recomplete” the well and place it into production, and that Defendants wrongly requested more than \$900,000 for the project.

Plaintiffs brought this action alleging fraud, misappropriation, breach of fiduciary duty, and unjust enrichment. By order dated February 20, 2013, this Court granted Defendants’ motion for summary judgment, but also granted leave for Plaintiffs’ to move within thirty days to amend the complaint to allege breach of contract. Plaintiffs filed the

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<sup>3</sup> A “turnkey agreement,” also known as a turnkey drilling contract, is a “drilling contract under which the drilling contractor promises to perform specified functions for an agreed price. The lease operator has little or no discretion to control the drilling contractor, and so assumes little or no liability for damages the drilling may cause.” *Black's Law Dictionary* (9th ed. 2009).

Proposed Second Amended Complaint on March 13, 2013 without moving for leave to file, contrary to the Court's direction. Defendants now move to strike the Proposed Second Amended Complaint and Plaintiffs cross-move for leave to amend.

### Discussion

Pursuant to CPLR 3025(b), leave to amend should be freely given. However, leave to amend can be denied if there is either "prejudice or surprise resulting directly from the delay," or if the proposed amendment "is palpably improper or insufficient as a matter of law." *McGhee v. Odell*, 96 A.D.3d 449, 450 (1st Dep't 2012) (internal citations omitted). The opposing party "must overcome a heavy presumption of validity in favor of [permitting amendment]." *McGhee*, 96 A.D.3d at 450 (quoting *Otis Elevator Co. v. 1166 Ave. of Ams. Condo.*, 166 A.D.2d 307, 307 (1st Dep't 1990)).

#### A. *Timeliness and Prejudice*

Defendants argue that their motion to strike should be granted because allowing the proposed amendment would cause them prejudice due to the expense of future motion practice. However, "[p]rejudice does not occur simply because a defendant is exposed to greater liability." *Jacobson v. McNeil Consumer & Specialty Pharm.*, 68 A.D.3d 652, 654 (1st Dep't 2009) (quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981)). Nor does prejudice occur because a defendant has to expend additional time

preparing its case. *Jacobson*, 68 A.D.3d at 654 (citing *Rutz v. Kellum*, 144 A.D.2d 1017, 1018 (4th Dep't 1988)) (finding no prejudice to defendant where exposure to greater liability did not alter defense strategy).

Courts typically find prejudice when the opposing party "has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." *Jacobson*, 68 A.D.3d at 655 (quoting *Loomis*, 54 N.Y.2d at 23 (1993)). Here, Defendants have not been hindered in preparing their case. Defendants cannot claim to be prejudiced by this amendment because the existence of an enforceable agreement was the basis of their motion for summary judgment on Plaintiffs' original complaint. See Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 19.

Defendants also argue that the cross-motion to allow the Proposed Second Amended Complaint should be denied as untimely. Although the cross-motion to amend was filed by Plaintiffs on April 25, 2013, outside of the thirty-day time window, the Second Proposed Amended Complaint itself was filed within the thirty days. The First Department has stated that "[m]ere lateness is not a barrier...[i]t must be lateness coupled with significant prejudice to the other side." *Bishop v. Maurer*, 83 A.D.3d 483, 484 (1st Dep't 2011) (quoting *Edenwald Contr. Co. v City of New York*, 60 N.Y.2d 957, 959 (1983)). Defendants can claim no surprise resulting from the delay of the amendment

because this Court granted the opportunity for Plaintiffs to move for leave to amend. Due to the lack of significant prejudice to Defendants, the motion to strike is denied.<sup>4</sup>

B. *Sufficiency of Proposed Second Amendment*

The Proposed Second Amended Complaint is not palpably improper or insufficient as a matter of law because Plaintiffs have properly alleged breach of contract. “[T]he essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages.” *U.S. Bank Nat’l Assoc. v. Lieberman*, 98 A.D.3d 422, 423 (1st Dep’t 2012) (quoting *JP Morgan Chase v. J.H. Elec. of New York, Inc.*, 69 A.D.3d 802, 803 (2d Dep’t 2010)). Both parties acknowledge that there was an enforceable agreement between them regarding the recompletion of the oil well. See Statement of Material Facts in Support of Defendants’ Motion for Summary Judgment ¶ 5 (“In early 2008, American Drilling and Continental entered into an agreement...in which American Drilling agreed to pay Continental a total of \$900,000 and Continental agreed, on a “turnkey” basis, to recomplete the Well”); Proposed Second Amended Complaint ¶ 45 (“there was an enforceable agreement between all parties for the recompletion of the

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<sup>4</sup> Defendants also argue that the CPLR provides this Court with discretion to grant “final judgment” due to Plaintiffs’ failure to comply with the February 20, 2013 Order to move for leave to amend within thirty days. See CPLR § 3126 (allowing Court to strike pleadings as a penalty for failure to comply with discovery orders). However, Defendants do not cite any authority that mandates action and this Court declines to so penalize Plaintiffs.

well”). It is also uncontested that Plaintiffs performed under the agreement by paying Continental \$900,000 for the recompletion of the oil well. *See* Answer ¶ 6.

Defendants argue, however, that Plaintiffs have failed to properly allege breach of contract because Plaintiffs do not specify the terms of any agreement, nor which contractual provisions were breached. While Plaintiffs admit that the Turnkey Agreement, which was intended to serve as the parties’ contract, was never executed, Plaintiffs specify at least three Private Placement Memorandum (“PPM”) provisions that served as the basis of the agreement and that were allegedly breached. The first provision allegedly breached obligated Defendants to “place the Well into production.” Plaintiffs argue that “plac[ing] the Well into production” required Defendants to ensure that “production revenue checks would be forthcoming that could be distributed to investors,” and Plaintiffs allege no checks were distributed. *See* Proposed Second Amended Complaint ¶ 35.

The second provision allegedly breached required Plaintiffs to receive all working interests in the well that were assigned to Coast to Coast. *See* Proposed Second Amended Complaint, Ex. A at 11. Plaintiffs allege that they did not receive any working interests. The third provision allegedly breached required Defendants to pay any extra costs over the \$900,000 Plaintiffs already paid to Continental for the recompletion of the oil well. *See* Proposed Second Amended Complaint, Ex. A at 13. Plaintiffs allege that Defendants

requested \$235,000 in additional funding. Finally, Plaintiffs allege they lost their \$900,000 investment due to Defendants' breach.

Defendants further contend that the facts alleged in the Proposed Second Amended Complaint are repetitive of the original complaint and are merely an attempt to reinsert the previously dismissed fraud allegations. Although there are a few instances where Plaintiffs use the terms "Ponzi scheme" and "fraudulent," Plaintiffs included this information for factual background purposes and there is no cause of action alleging fraud.

The Proposed Second Amended Complaint, which included the Private Placement Memorandum, supports the Plaintiffs' cause of action. *See McGhee*, 96 A.D.3d at 450 (holding that the complaint, along with supporting documents, laid the foundation for breach of contract claim). Plaintiffs have alleged all the elements of the breach of contract, and therefore the proposed amendment is not palpably insufficient as a matter of law.

*(Order of the Court follows on next page.)*

**Conclusion**

For the reasons set forth above, it is hereby

ORDERED that Plaintiffs Coast to Coast's and Plaintiffs American Drilling's cross-motion for leave to amend the Second Amended Complaint is herein granted, and the amended complaint in the form e-filed on March 18, 2013, as document number 466, shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that Defendants motion to strike the Second Amended Complaint is denied; and it is further

ORDERED that the defendants shall answer the Second Amended Complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel is directed to appear for a status conference in Room 442, 60 Centre Street, on August 20, 2013, at 10 a.m.

Dated: New York, New York  
July 15, 2013

ENTER:



Hon. Eileen Bransten, J.S.C.