NATCO Power, Ltd. v Megawatt Power Indus., Inc.
2014 NY Slip Op 32178(U)
August 11, 2014
Sup Ct, NY County
Docket Number: 652136/14
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

NATCO POWER, LTD., Plaintiff, -against- MEGAWATT POWER INDUSTRIES, INC., Defendant.	Index No. 652136/14 DECISION AND ORDER Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

This is the court's decision with respect to plaintiff NATCO Power, Ltd.'s (NATCO) motion for a preliminary injunction seeking to prevent defendant Megawatt Power Industries, Inc. (MPI) from selling six self-contained mobile power generator units (MPUs).

Background

In December 2012, Public Electric Corporation of Aden (PEC) invited bids for an electric power project in Yemen using Heavy Fuel Oil (HFO) and/or diesel (Project). Complaint, ¶ 10. Three companies, MegaWatt Power Holdings Limited (Megawatt), Dome Trading & Contracting Co. Ltd. (Dome), and NATCO, submitted a joint bid. NATCO agreed to provide financing, Dome agreed to handle civil works and maintenance, and Megawatt agreed to provide the HFO technology. Megawatt was the exclusive distributor and controlling shareholder of PowerTeam Energy Systems LLC (PowerTeam), a manufacturer of power generator units based in Mulberry, Florida, and it assured NATCO and Dome that PowerTeam had the ability to manufacture MPUs that can run on both diesel and HFO. *Id.*, ¶¶ 11-13.

Because Megawatt, Dome and NATCO were the only companies that offered to use HFO-fueled MPUs, PEC selected their bid for the Project. On April 29, 2013, Dome signed the

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Energy Purchase Agreement with PEC (the PEC Agreement). *Id.*, ¶ 14. Then, on May 6, 2013, Dome assigned all of its interests and obligations to NATCO. On June 18, 2013, NATCO and PowerTeam entered into an Equipment Purchase Agreement (EPA), which defines the equipment specifications and sets forth a delivery schedule. *Id.*, ¶ 17.

Pursuant to the EPA, PowerTeam had to deliver forty MPUs to NATCO, though only eighteen MPUs have been delivered to date. The EPA also specifies that payment for each set of MPUs would be made in four installments. With respect to delivery, Mazen Aman, NATCO's business development manager for the Project, testified regarding the parties' established practice under the EPA, which has been used for the delivery of the eighteen MPUs. Namely, he testified that the first two installment payments went toward the purchase of the units' engines and alternators. The remaining two installment payments were made once an MPU set was tested and packaged for shipment. Tr., 72-73. The delivery of the set occurred only after all four installments were paid in full. Tr., 57: 16-20.

From the outset, PowerTeam encountered cash-flow problems that caused significant delays in the delivery of the MPUs. Indeed, none of the units have been delivered in accordance with the EPA's delivery schedule. On December 30, 2013, Megawatt converted PowerTeam into MPI in an attempt to make the company more efficient. *Id.*, ¶ 26. According to NATCO, MPI and its parent Megawatt gave numerous assurances that MPI was overcoming its financial difficulties, and that the Project would be successfully completed. *Id.*, ¶ 28.

Notwithstanding the assurances that NATCO received, the delivered MPUs failed to generate continuous power. Even after the MPUs' hydraulic motors were replaced with electric ones, the units continued to exhibit significant failures if operated for more than a few days. *Id.*, ¶ 20. The cause of these MPU malfunctions is the subject of a disagreement. MPI claims the

fault lies in the fuel supplied by NATCO, and not the units themselves. NATCO claims that MPI simply failed to deliver functioning units.

The remaining six MPUs, which are the subject of the present motion, are currently in MPI's warehouses in Mulberry, Florida. Even though NATCO does not expect these units to perform any better than the eighteen MPUs already delivered, NATCO claims it needs these units to salvage the Project because it has reached an oral understanding with the PEC to temporarily run all the MPUs on diesel until a solution can be found with respect to their HFO components. *Id.*, ¶ 32. Given the myriad of problems that NATCO has encountered with the MPUs already delivered by MPI, NATCO does not believe it has to pay for the remaining six. MPI disagrees, and claims that if NATCO does not pay in full for these units, it will have to sell them to another party to avoid insolvency. Indeed, MPI is currently negotiating with two prospective buyers, and NATCO seeks to enjoin MPI from selling the six units pursuant to CPLR 6301 and 7109. On July 31, 2014, the court conducted a hearing, and the parties were afforded an opportunity to submit oral arguments and testimony.

Discussion

"The decision to grant a preliminary injunction is committed to the sound discretion of the court, as the remedy is considered to be a drastic one." *Gas 110, LLC v Fwevents Corp.*, 44 Misc 3d 1215(A) (NY Sup Ct 2014) (*citing Bergen-Fine v Oil Heat Institute, Inc.*, 280 AD2d 504 [2d Dept 2011]). To prevail, the petitioner has to show a likelihood of success on the merits, danger of irreparable harm absent the injunction, and a balance of the equities in its favor. *Aetna v Capasso*, 75 NYS2d 860, 862 (1990). While "CPLR 7109 authorizes a court to grant a preliminary injunction where the chattel is unique . . . , plaintiff still must meet the requirements

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for a preliminary injunction . . . ." *Danae Art Intl. Inc. v Stallone*, 163 AD2d 81, 82 (1st Dept 1990).

NATCO contends it is likely to prevail on its breach of contract, replevin and/or unjust enrichment causes of action, because, to date, it has advanced approximately $47 million to MPI, and in return it has received only eighteen allegedly non-functioning MPUs. As a result, NATCO believes it is excused from making any further payments to MPI, including for the remaining six MPUs. NATCO further claims it will suffer irreparable harm absent the injunction because the six MPUs are unique chattels not readily available in the market, and because without the remaining six MPUs it will be unable to salvage the Project and avoid significant reputational harm.

MPI contends that NATCO must pay for the units in full before they are delivered, as was the case with the previous eighteen units. It is uncontested that NATCO has not made the last two installment payments for the remaining six units in the amount of $3,516,334. Tr., 79: 17. Moreover, MPI claims the remaining six MPUs are not at all unique since "[a]ll of the HFO components of the six MPUs have been removed." Instead, "[t]hey are [now] diesel fuel [MPUs] of a kind readily available in the market from companies such as Caterpillar, Stewart and Stevenson, and Aaron Equipment." Defendant's Memorandum at 4, 6.

Based on Mr. Aman's testimony, the accounting of the $47 million paid by NATCO to MPI to date is as follows: $22 million was paid in installments for the eighteen MPUs already delivered, approximately $9 million was paid for the purchase of plant auxiliaries and spare parts, $10 million went toward the purchase of alternators and engines for MPUs that have not yet been assembled, and $5 million went toward the purchase of alternators and engines used for the six remaining MPUs. The last figure represents the sum of the first two installments made

toward the six MPUs at issue here. Tr., 51-56. Mr Aman further testified that NATCO currently finds itself "in a catastrophic situation with PEC" with respect to the Project. Tr., 58: 19. Nevertheless, NATCO's management has taken a position that "[w]e have reached a stage where we are not going to pay a single penny more after all the millions. . . . And that's the end of story for us. . . ." Tr., 118: 2-4. Clearly, NATCO does not intend to pay the two outstanding installments, even if MPI ultimately delivers the remaining six MPUs.

The court finds that NATCO has failed to show clear entitlement to injunctive relief. "To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts. Where the facts are in sharp dispute, a temporary injunction will not be granted." *Related Properties, Inc. v Town Bd. of Town/Vil. of Harrison*, 22 AD3d 587, 590 (2d Dept 2005). The only facts that are undisputed here are that NATCO did not pay in full for the remaining six MPUs, and that more than $3.5 million remains due. In contrast, it is sharply disputed what exactly caused the MPUs to malfunction - the supplied HFO, the units' design, or indeed some other unknown factor. Given the barren record before it, the court cannot conclude that NATCO has "a clear right to relief" here. *Id.*

The court also finds that NATCO has failed to show that it will suffer irreparable harm if the injunction is not issued for two reasons. First, during the course of the hearing, the court heard completely contradicting testimonies from the two sides' witnesses regarding the uniqueness of the remaining six MPUs, and indeed the uniqueness of the eighteen units that have already been delivered. Mr. Aman testified that NATCO searched for other manufacturers that produced dual-fueled MPUs, but could not find any. Tr., 65: 4-8. On the other hand, John Sams, MPI's President and Chief Operating Officer, testified that there are many companies that can

manufacture such items, that the dual-fuel technology has been around for decades, and that there is absolutely nothing unique about the six units at issue here. Tr., 145: 17-20; 147: 16-25; 149: 7-10; 154: 11-15. The burden was on NATCO to introduce evidence that tipped the scales in its favor, but it has failed to do so. NATCO also failed to show that the six MPUs' allegedly unique properties even work, and that their HFO components could be fixed, i.e. that these units could ever be anything other than diesel-fueled units, which both sides agree are not unique and thus not eligible for injunctive relief.

Second, "[a]ny party claiming an injury is under a duty to mitigate its damages. A movant for an extraordinary relief cannot mask an ongoing failure on its part to mitigate its damages as an ongoing instance of irreparable harm." *Lavin Inc. v Colonia, Inc.*, 739 F Supp 182, 193 (SDNY 1990). Here, the ability to avoid the claimed irreparable injury was, and still is, clearly within NATCO's control. All NATCO has to do to acquire these allegedly unique items is to pay the remaining two installments. Given the alleged urgency of NATCO's need, such a course of action would be far simpler, and much more expedient than its current attempt to secure these units through litigation. *See National Football League Player Ass'n v National Football League Properties, Inc.*, 1991 WL 79325 (SDNY 1991) ("a motion for a preliminary injunction is a request for extraordinary and urgent relief, not a casual entry on the list of litigation strategies. . . .").

Therefore, NATCO's failure to help itself undercuts its alleged sense of urgency, and likewise its claim that it will suffer irreparable harm if the injunction is not issued. The court's conclusion is reinforced by NATCO's apparent refusal to post a bond to secure a temporary restraining order to stop any imminent sale of the units to a third party, as well as by the presence of the liquidated damages clause in the EPA, which is more than sufficient to cover the

remaining cost of the six MPUs at issue here. *GFI Securities LLC v Tradition Asiel Securities Inc.*, 21 Misc 3d 1111(A) (NY Sup Ct 2008), order rev'd on other grounds, 59 AD3d 271 (1st Dept 2009); *Long Island Conservatory, Ltd. v Jaisook Jin*, 14 Misc 3d 1219(A) (NY Sup Ct 2007).

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction is denied.

Dated: August 11, 2014

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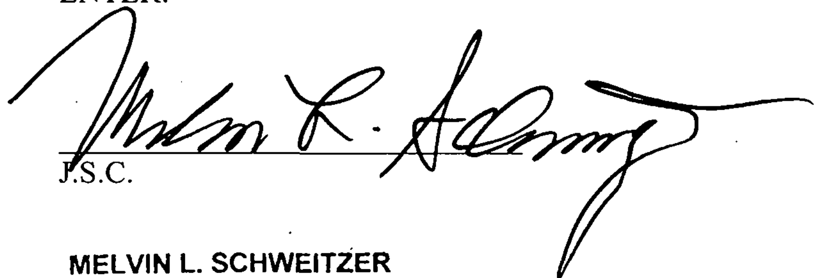

J.S.C.

MELVIN L. SCHWEITZER