Winston Plywood & Veneer LLC v Dunollie Resources, Inc.
2015 NY Slip Op 31862(U)
October 5, 2015
Supreme Court, New York County
Docket Number: 651851/2014
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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WINSTON PLYWOOD AND VENEER LLC,

Plaintiff,

-against-

DUNOLLIE RESOURCES, INC.

Defendant.

DECISION/ORDER

Index No. 651851/2014
Motion Seq. No. 006

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HON. SALIANN SCARPULLA, J.:

Plaintiff Winston Plywood and Veneer, LLC ("Winston Plywood") brings this action against defendants Dunollie Resources, Inc. (Dunollie) and Natron Wood Products, LLC (Natron), following the destruction of a plywood manufacturing plant in Louisville, Mississippi (the "Facility"). The parties were in the process of redeveloping and re-equipping the Facility when it was destroyed, and their dispute focuses on the related insurance proceeds. The three-count amended complaint asserts causes of action for: (1) declarations that Winston Plywood was the rightful owner of all equipment that was located at the Facility, and that Winston Plywood is entitled to all of the related insurance proceeds; (2) breach of contract; and (3) indemnification.

In defendants' consolidated amended answer, Dunollie and Natron assert separate counterclaims for: (1) declarations that their contracts with Winston Plywood were part

of single transaction, and that the entire transaction is null and void; and (2) rescission. In addition, Dunollie asserts counterclaims for unjust enrichment and conversion.

Defendants now move, pursuant to CPLR 6311, for a preliminary injunction prohibiting Winston Plywood "from engaging in any and all construction activities at the [Facility], either directly or indirectly," and "directing Winston Plywood to immediately return to [d]efendants all property belonging to [d]efendants, including but not limited to, any and all construction equipment and plywood manufacturing equipment."

Background

Natron allegedly sought to expand its plywood manufacturing business and, to that end, formed Dunollie to redevelop and operate the Facility and began negotiations with the City of Louisville ("City") to reopen the Facility. In the spring of 2013, Dunollie and the City entered into a long-term lease for the Facility's site (the "Lease"). Dunollie encountered unexpected setbacks and, in order to continue with its plans, entered into a number of agreements with Winston Plywood.

On March 28, 2014, Dunollie and Winston Plywood entered into An Asset Purchase Agreement ("APA"), an Assignment and Assumption of Lease ("Assignment and Assumption Agreement"), a Construction Contract ("Construction Contract") and a Participation Agreement ("Participation Agreement"). On the same day, Natron and Winston Plywood entered into a Management Services Agreement ("MSA").

Pursuant to the APA, Dunollie transferred to Winston Plywood all of its interest in the Facility, including, among other things, the Lease and "all Equipment and other tangible personal property used primarily in connection with the Facility or located at the

Facility." McDougal aff, exhibit A, § 2.1. However, "certain fixtures and Equipment [were to] be conveyed to [Winston Plywood] after closing pursuant to the Construction Contract upon the completion of the applicable Phase described therein." *Id.* In addition, the APA provided that the consideration for the purchased assets was one million dollars, the assumption of certain liabilities, and "the entering into of the Construction Contract and . . . the Participation Agreement." *Id.*, § 3.1.

The APA contained a severability provision, which stated:

> "If any term or other provision of [the APA] is invalid, illegal, or incapable of being enforced by any law or public policy, all other terms or provision of [the APA] shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to any party. Upon such determination that any term or other provision is invalid, illegal, or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in an acceptable manner in order that the transactions contemplated hereby are consummated as originally contemplated to the greatest extent possible."

Id., § 12.6. In addition, the execution of the Assignment and Assumption Agreement, the Construction Contract, the Participation Agreement and the MSA were included as part of the APA's "Conditions to Closing." *Id.*, art IX.

Pursuant to the Assignment and Assumption Agreement, Dunollie assigned the Lease to Winston Plywood. The City consented to the assignment. The Construction Contract provided that Dunollie would redevelop and re-equip the Facility in six phases, in exchange for $11 million, a portion of which was to be paid upon completion of each phase. The Participation Agreement provided that, based on Dunollie's performance

under the Construction Contract and as part of the consideration for the APA, Dunollie would "participate in the increased enterprise value of [Winston Plywood]" through "certain cash distributions." *Id.*, exhibit C at 1. Pursuant to the MSA, Natron agreed, in exchange for a $135,000 management fee, to assist Winston Plywood with the transition of ownership, to facilitate relationships with local officials and to pursue additional grants and tax benefits. In connection with these agreements, Dunollie designated Winston Plywood as an additional insured and the loss-payee under the policies of insurance that Dunollie maintained with respect to the Facility (the "Policies").

On April 28, 2014, a tornado destroyed the Facility and a substantial portion of the equipment located there. The disaster made the Facility eligible for various state and federal funds and changed the project "from the restoration of an out-of-use plywood plant housed in a 1966 building to the construction of new $45 million state-of-the-art plywood production facility" (the "Project"). Hill aff, ¶ 6.

Following Dunollie's submission of an insurance claim seeking reimbursement under the Policies in the amount of $10 million, a dispute arose between Dunollie and Winston Plywood over entitlement to the insurance proceeds. On June 18, 2014, Winston Plywood commenced this action, claiming that it was the owner of the equipment and property destroyed by the tornado and that, as such, it was entitled to the insurance proceeds under the Policies.

By letter, dated June 27, 2014, Winston Plywood informed defendants that it was terminating the Construction Contract for cause based on Dunollie's alleged assertion that it was entitled to the insurance proceeds and Dunollie's failure to "obtain all of the

necessary permits to perform the work required under the Construction Contract, including a Certificate of Responsibility in accordance with Mississippi Code Section 31-3-15." McDougal aff, exhibit I at 2. The letter also informed Natron that it was in default under the MSA and sought, among other things, defendants' cooperation in terminating the MSA and the Participation Agreement. It is undisputed that Dunollie did not have a certificate of responsibility issued by the Mississippi Board of Construction Contractors and that this omission rendered the Construction Contract null and void pursuant to Mississippi law. *Id*, ¶¶ 28-29; plaintiff's counter-statement of material facts, ¶ 32; *see also* Miss Code Ann § 31-3-15.

On July 24, 2014, shortly after this action was commenced, Natron and Dunollie commenced an action in Oregon state court, entitle *Natron Wood Products, LLC v Winston Plywood and Veneer LLC* (case No. 161414837), seeking to rescind all of the agreements among the parties. By decision dated December 17, 2014, the Oregon court declined to exercise jurisdiction over the parties' claims relating to the APA, due to the APA's forum selection clause. Thereafter, Natron and Dunollie voluntarily discontinued the Oregon action and filed the consolidated amended answer in the instant action, seeking to rescind all of the agreements among the parties and restore them to their pre-contract positions.

Discussion

In support of their request for a preliminary injunction, defendants argue that Winston Plywood's ongoing work on the Facility "will irrevocably commit the Project to a plant layout and machine center installation plan that is different than the one that

Dunollie would utilize if [it] were in charge of this Project," and that if Winston Plywood's implementation of its design for the Facility is not halted during the pendency of this action, "it will be impractical and enormously expensive for Dunollie to pursue its preferred and different design with an entirely different set of machine center locations when the plant has been fully or partially completed according to the Winston Plywood design." McDougal aff, ¶ 31.

"A party seeking a preliminary injunction must clearly demonstrate (1) the likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the injunction is not issued; and (3) a balance of the equities in the movant's favor." *U.S. Re Cos., Inc. v Scheerer*, 41 AD3d 152, 154 (1st Dept 2007). Because a preliminary injunction is a drastic remedy, it "will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers." *Koultukis v Phillips*, 285 AD2d 433, 435 (1st Dept 2001). No irreparable harm exists where money damages are computable and sufficient to make the movant whole. *See U.S. Re Cos., Inc.*, 41 AD3d at 155 (finding that "quantifiable remedy precludes a finding of irreparable harm"); *Metropolitan Med. Group v Eaton*, 154 AD2d 252, 253 (1st Dept 1989) ("plaintiff failed to show it would suffer irreparable injury, absent injunctive relief, since defendant can respond in monetary damages if plaintiff ultimately prevails"). "[W]hen the court balances the equities in deciding upon injunctive relief, it must consider the 'enormous public interests involved.'" *Seitzman v Hudson Riv. Assoc.*, 126 AD2d 211, 214 (1st Dept 1987) (citation omitted); *see also De Pina v Educational Testing Serv.*, 31 AD2d 744, 745 (2d Dept 1969) ("'the courts must weigh the interests of the general

public as well as the interests of the parties to the litigation'" [citation omitted]). Whether to grant or deny a preliminary injunction is within the court's discretion. *Family-Friendly Media, Inc. v Recorded Tel. Network*, 74 AD3d 738, 739 (2d Dept 2010); *see also Rudman v Cowles Communications*, 30 NY2d 1, 13 (1972) (stating that the remedy of rescission, "lying in equity, is a matter of discretion").

Here, the parties dispute defendants' likelihood of success on their rescission counterclaims. Defendants contend that the five agreements at issue were all part of global transaction. In support of their position, defendants point to, among other things, various provisions of the APA which explicitly reference the other agreements. *See* McDougal aff, exhibit A, §§ 2.1, 3.1, 9.1, 9.2. They contend that Dunollie's failure to obtain a certificate of responsibility, rendering the Construction Contract null and void under Mississippi law (Miss Code Ann § 31-3-15), was an innocent mistake. They conclude that, therefore, equity should intervene and prevent Winston Plywood from enjoying a windfall by severing the Construction Contract from the rest of the transaction. Defendants contend that, because the Construction Contract was null and void from inception, so was the rest of the transaction.

Winston Plywood counters that the parties intended to enter into five separate contracts, noting, among other things, the lack of cross-default or cross-contingency provisions among the agreements. Winston Plywood also points to the Construction Contract's silence with respect to any other agreement executed by the parties, particularly in its termination provision.

The parties also dispute which state's law should be applied. Winston Plywood contends that New York law applies, pursuant to the APA's choice of law provision. Defendants argue that the Construction Contract and the MSA require the application of Mississippi law, while the Participation Agreement and the Lease require the application of Delaware and Oregon law, respectively, and that there is no reason to favor the APA's provision over these. Defendants contend that because Mississippi is the center of gravity for the global transaction, the court should apply Mississippi's substantive law to determine whether rescission is appropriate.

Whether the court applies New York or Mississippi law, defendants fail to demonstrate their likelihood of success on the merits. Under New York law, rescission should be denied where damages afford an "adequate remedy at law" and where "it is impracticable to restore the *status quo.*" *Rudman*, 30 NY2d at 13-14; *see also Sokolow, Dunaud, Mercadier & Carreras v Lacher,* 299 AD2d 64, 71 (1st Dept 2002). Here, defendants have readily ascribed quantifiable money damages to their injury. *See* McDougal aff, ¶ 28 ("[i]f Winston Plywood's preferred outcome were to prevail, Dunollie and Natron would forfeit in excess of $60 million"). Moreover, it appears that the "restoration of the status quo ante is made impractical by a substantial change of position" (*Sokolow, Dunaud, Mercadier & Carreras,* 299 AD2d at 71), as the Facility, the subject of the original transaction, has been destroyed and Winston Plywood and the City have moved ahead with the construction of a new, state-of-the-art plywood manufacturing plant.

Defendants fare no better under Mississippi law, which allows a court to set aside a transaction "where an unconscionable advantage has been gained, by mere mistake or misapprehension," and where the parties are capable of being restored to the status quo and "no intervening rights have accrued." *See Ruff v Estate of Ruff*, 989 So 2d 366, 370 (Miss 2009). Here, according to William Hill (Hill), the City's mayor, the City has entered into an amended and restated lease agreement with Winston Plywood, requiring the City to replace the destroyed Facility and its infrastructure by March 31, 2016. Hill states that "federal, state and local dollars totaling approximately $45 million have . . . been actively committed to the project," and that, "[i]f specified timeframes for completion of the Facility and job creation are not met, the City will not be able to take additional draws from these funding sources, and . . . would be subject to legal actions for the recovery of funds already received." Therefore, the status quo may not be restored without interfering with the City's intervening rights, making rescission inappropriate. Accordingly, defendants fail to establish a likelihood of success on their rescission counterclaims.

In addition, defendants fail to demonstrate that they will suffer irreparable harm. They contend that the continued construction will irreparably interfere with their real property interests in the Facility. However, defendants do not object to Winston Plywood and the City constructing a new, state-of-the-art plywood manufacturing plant, as that is defendants' intended purpose for the Facility. Instead, defendants contend that their intended layout for the Facility is different from Winston Plywood's, without explaining what those differences are, why such differences are material, how such differences harm

them or why such harm cannot be calculated and quantified in money damages, assuming they ultimately regain possession and operation of the Facility. Instead, they state only that "it [would] be impractical and enormously expensive for Dunollie to pursue its preferred and different design." McDougal aff, ¶ 31. Such "[c]onclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction." *1234 Broadway LLC v West Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 AD3d 18, 23 (1st Dept 2011).

Defendants also fail to demonstrate that the equities are balanced in their favor. Defendants contend that the grant of a preliminary injunction would merely cause a temporary halt to the construction activities, whereas a denial would result in defendants' loss of "their ability to reclaim their property rights and future business opportunities surrounding the development of the plywood plant." However, as discussed above, defendants do not explain how construction of a new plywood plant will cause them irreparable injury, whereas a halt in construction may cause the City to miss mandated deadlines, rendering it ineligible for additional government funds and liable for repayment of funds already used. Nor would a halting construction merely delay the Project, as defendants contend. Hill states that an injunction will cause the City's contractors, suppliers and vendors to terminate their contracts, requiring the City to restart the bidding process once the injunction is lifted, at which point the City "might not be able to obtain the same favorable pricing on supplies and materials that it has presently secured." Hill aff, ¶ 8. Moreover, according to Hill, the City has been suffering great economic hardship and is "eagerly awaiting the opening of the Facility, which will create

direct employment for hundreds of residents," as well as "a market for standing timber, an increase in logging operations and an increase in purchases of supplies and equipment, which would, in turn, result in increased sales tax that would benefit the City." *Id.*, ¶ 3. Weighing the public interest in the timely completion of the Project against defendants' desire to control the design of the Facility, the balance of the equities favors the "enormous public interests involved." *Seitzman*, 126 AD2d at 214 (internal quotation marks and citation omitted).

Notably, in its reply papers, defendants propose that any hardship to Winston Plywood and the City may be substantially alleviated if the court issues a carefully tailored preliminary injunction, enjoining construction related to the placement and installation of machine centers that differ from defendants' intended design, rather than halting all construction. Even if the court was willing to entertain defendants' request, made for the first time in their reply papers, it is unclear that such an injunction would not have a similar negative impact on the City as discussed above and, in any event, does not alter the analysis with respect to the first two prongs of the preliminary injunction test.

For the foregoing reasons, defendants fail to "establish[] a clear right" to a preliminary injunction ordering Winston Plywood to cease all construction activities at the Facility. *Koultukis*, 285 AD2d at 435.

To the extent that defendants seeks an injunction directing Winston Plywood to immediately return to Dunollie all property that was allegedly not part of the APA, defendants fail to show that they will suffer irreparable harm in the absence of a preliminary injunction. *See U.S. Re Cos., Inc.*, 41 AD3d at 154. Indeed, in its amended

answer, Dunollie calculates that the value of such equipment totals $3.5 million. "This quantifiable remedy precludes a finding of irreparable harm." *Id.* at 155.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendants Dunollie Resources, Inc. and Natron Wood Products, LLC (motion sequence number 006) for a preliminary injunction, and for an order directing plaintiff to immediately return defendants' property, is denied in its entirety; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 208, 60 Centre Street, on December 2, 2015, at 2:15 PM.

This constitutes the decision and order of the Court.

DATE : 10/5/15

SCARPULLA, SALIANN, JSC