

GE Oil & Gas, LLC v Turbine Generation Servs., L.L.C.
2018 NY Slip Op 30975(U)
May 4, 2018
Supreme Court, New York County
Docket Number: 652296/2015
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICHPART 54

Justice

Index Number : 652296/2015
 GE OIL & GAS, INC.
 vs.
 TURBINE GENERATION SERVICES,
 SEQUENCE NUMBER : 012
 LEAVE TO AMEND ANSWER

INDEX NO. _____

MOTION DATE 4/25/18

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____

No(s). 392-405

Answering Affidavits — Exhibits _____

No(s). 413-416

Replying Affidavits _____

No(s). 417Upon the foregoing papers, it is ordered that this ~~motion is~~

MOTION IS DECIDED IN ACCORDANCE
 WITH ACCOMPANYING MEMORANDUM
 DECISION AND ORDER.

 MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
 FOR THE FOLLOWING REASON(S):
Dated: 5/4/18
Shirley Werner Kornreich, J.S.C.
SHIRLEY WERNER KORNREICH

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 54

-----X
GE OIL & GAS, LLC,

Index No.: 652296/2015

Plaintiff,

DECISION & ORDER

-against-

TURBINE GENERATION SERVICES, L.L.C., and
MICHAEL B. MORENO,

Defendants.

-----X
TURBINE GENERATION SERVICES, L.L.C.,

Third-Party Plaintiff,

-against-

GENERAL ELECTRIC COMPANY,

Third-Party Defendant.

-----X
SHIRLEY WERNER KORNREICH, J.:

Familiarity with this action is assumed.

On April 3, 2018, Michael Moreno, a former defendant against whom judgment has been entered and affirmed,¹ moved for leave to file a fourth amended answer and counterclaims and a fourth amended third-party complaint. Simply put, he seeks to assert a claim for failure to negotiate in good faith against plaintiff GE Oil & Gas, LLC (GEOG)² and third-party defendant General Electric Company (collectively, the GE Parties). By order dated February 10, 2017, Moreno's prior iteration of such claims were dismissed with prejudice. *See* Dkt. 287 (the

¹ *See GE Oil & Gas, Inc. v Turbine Generation Servs., L.L.C.*, 150 AD3d 586 (1st Dept 2017).

² Following GEOG's conversion to an LLC, the court entered an order on July 31, 2017 amending the caption. *See* Dkt. 342. The court notes that the old caption appears in Moreno's briefs. *See, e.g.*, Dkt 405 at 1. References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

February 2017 Decision).³ However, the dismissal of identical claims asserted by one of Moreno's companies, defendant/third-party plaintiff Turbine Generation Services, L.L.C. (TGS), was without prejudice. *See id.* at 12.

Notwithstanding Moreno's claims having been dismissed with prejudice, *both* Moreno and TGS moved for leave to amend. By order dated July 18, 2017, TGS was granted leave to amend. *See* Dkt. 335. Moreno was not. *See id.* Only TGS, not Moreno, can state a claim for failure to negotiate in good faith. *See* Dkt. 337 (7/18/17 Tr.). Hence, though styled as a motion for leave to amend, Moreno's current motion is effectively one for reargument and, thus, is untimely having been filed well after the 30-day deadline under CPLR 2221(d)(3). Regardless, as set forth in the GE Parties' opposition, Moreno's proposed amendments are devoid of merit. *See McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012) (leave to amend should be denied if proposed amendment "is palpably improper or insufficient as a matter of law.").

As previously discussed, TGS can state a claim against the GE Parties for failure to negotiate in good faith because of the Term Sheet annexed to the Note, which qualifies as an agreement to agree. *See* February 2017 Decision at 3-4. The Term sheet is not a stand-alone agreement, but annexed to the Note. *See* Dkt. 396 at 27. Moreno is not a party to the Note in his personal capacity. Rather, he executed it on behalf of his LLCs, TGS and MOR. *See* Dkt. 396 at 13. The only relevant contract Moreno executed in his personal capacity is the Guaranty, in which he unconditionally personally guaranteed TGS's payment obligations under the Note and in which he expressly waived all defenses based on the GE Parties' breach of the Note. *See* Dkt. 398 at 1-2, 11; *see also* February 2017 Decision at 5. Neither the Note nor the Guaranty provide that Moreno has personal rights under the Term Sheet. While the Note contains 10 references to

³ Capitalized terms not defined herein have the same meaning as in the February 2017 Decision.

its annexed Term Sheet, the Term Sheet is not mentioned in the Guaranty. Since Moreno is not a party to the contract in which the Term Sheet is incorporated, he lacks standing to assert claims arising thereunder.

That said, Moreno makes much of the fact that “Loan Party” is defined in the Note to include him, TGS, and MOR. *See* Dkt. 396 at 23. Yet, as discussed, only TGS and MOR are signatories to the Note. *See id.* at 13. Moreno cites no authority for the proposition that an individual may be considered a party to a contract merely because he is referenced in it. Here, sophisticated parties, represented by counsel, knew how to set forth the counterparties to each contract and delineated them in the opening paragraphs and signature lines of the Note and Guaranty. If they intended Moreno to be a party to the Note or to have personal rights under the Term Sheet, and not only the Guaranty, they would have so provided. Likewise, if Moreno was meant to have personal rights under the Term Sheet (which, again, is only an agreement to agree), the Term Sheet, at the very least, would have been annexed to the Guaranty. It was not. Furthermore, that Moreno has no personal rights under the Term Sheet is apparent on its face, as it expressly contemplates that Moreno’s involvement would be through his LLS, TGS and MOR, but not in an individual capacity. *See* Dkt. 396 at 28.

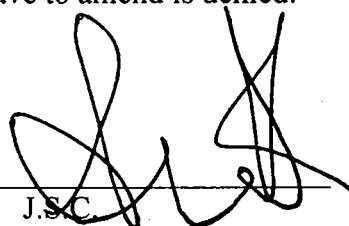
For these reasons, Moreno lacks the requisite personal privity with the GE Parties to sue for claims arising under the Term Sheet. It would be futile, therefore, to permit his proposed amendments. *See Farallon v Mexvalo, S. de R.L. de C.V.*, 146 AD3d 442 (1st Dept 2017) (court “properly declined to grant leave to amend, based on its finding that the proposed amendment would be futile.”), citing *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 (1st Dept 2003)

("Where, as here, the proposed amendments are totally devoid of merit and are legally insufficient, leave to amend should be denied."). Accordingly, it is

ORDERED that the Moreno's motion for leave to amend is denied.

Dated: May 4, 2018

ENTER:

A handwritten signature in black ink, appearing to be "Shirley Werner Kornreich", written over a horizontal line.

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.