

<b>DKRW Wind Holdings, LLC v LS Power Dev., LLC</b>
2018 NY Slip Op 32326(U)
September 17, 2018
Supreme Court, New York County
Docket Number: 653173/2018
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**DKRW WIND HOLDINGS, LLC,**

**Plaintiff,**

**-against-**

**LS POWER DEVELOPMENT, LLC and  
HELIX GENERATION, LLC,**

**Defendants.**

----- X  
**O. PETER SHERWOOD, J.:**

Under motion sequence 002, defendants LS Power Development, LLC, and Helix Generation, LLC, seek an order staying all proceedings in this action pursuant to CPLR 2201. For the following reasons, the motion to stay shall be granted.

**I. BACKGROUND**

This action arises out of the alleged breach of a Project Fee Agreement (“PFA”) related to a wind power project in Maine. The original agreement was between plaintiff, DKRW Wind Holdings (“DKRW”), and TransCanada Energy, Ltd. (“TCE”) for the purpose of jointly developing the project (NYSCEF Doc No. 18, exhibit 1 to Walker affirmation [*DKRW v TCE* complaint] at ¶¶ 5-6). Plaintiff DKRW is a Delaware LLC engaged in developing various wind power projects. Defendants LS Power Development (“LS Power”) and Helix Generation (“Helix”) are also Delaware LLCs (NYSCEF Doc No. 2, complaint ¶¶ 1-3). Plaintiff alleges that TCE assigned its interest in the PFA to defendants LS Power and/ or its affiliate, Helix (*id.* ¶ 15). In this action, DKRW seeks to recover for LS Power and Helix’s failure to pay certain amounts, based on a dispute over proper calculation of an “operations fee” pursuant to the terms of the PFA (*id.* ¶ 17).

DKRW originally sued TCE on a variety of claims, including breach of the PFA<sup>1</sup> (*DKRW v TCE* complaint ¶ 4). On TCE’s motion for summary judgment, this court issued an order granting TCE’s motion in full and dismissing all of DKRW’s claims (NYSCEF Doc. No. 19, exhibit 2 to Walker affirmation [Sherwood order]). On appeal of that order, the First Department affirmed in part and reversed with respect to the first cause of action (for breach of contract), and

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<sup>1</sup> *DKRW Wind Holdings, LLC v TransCanada Energy, Ltd.*, Index No. 654146/2013 (Sherwood, J.)

the third cause of action (for a declaratory judgment related to the “operations fee” provision in the PFA) (NYSCEF Doc No. 20., exhibit 3 to Walker affirmation [First Department Order]). That action was then remanded for a non-jury trial on those two claims (*id.*) and is already on the trial calendar (Walker affirmation ¶¶ 6, 10). Plaintiff also brought the instant action, making nearly identical allegations, against the purported successors to the agreement, defendants LS Power and Helix.

Defendants bring this motion to stay by order to show cause pursuant to CPLR 2201, pending resolution of the prior action. Defendants argue that the stay should be granted for reasons of judicial economy, observing that resolution of the claims in the prior action may avoid duplicative discovery or even dispose of the need to continue the present action. Defendants cite CPLR 2201 and CPLR 3211(a)(4) with *Britt v. International Bus Services, Inc.* (255 AD2d 143 [1st Dept 1998]), for the proposition that even though the defendant parties are different in each case, the court should in its discretion grant a stay because (1) although the defendant parties are different in name, “they are the alleged successors in interest to TCE” and (2) the claims are identical to those in the first action. (Walker affirmation ¶ 11)

Plaintiff does not oppose the stay but request that defendants respond to their document requests of September 5, 2018 before the proceedings are stayed (Coheley affirmation ¶ 13). Plaintiff provides background regarding the document requests. Following summary judgment motions and appeal of the first action, plaintiff discovered that a transaction related to the PFA had occurred between TCE and LS Power-Helix, and requested documents related to the transaction from TCE (NYSCEF Doc No. 28, exhibit A to Coheley affirmation [document request letters to TCE]). TCE refused to provide such documents (NYSCEF Doc No. 29, exhibit B to Coheley affirmation [response letter]). Plaintiff subsequently received payment from LS Power, instead of TCE, for amounts due under the PFA, and then sought documents regarding the transaction referenced above from LS Power (NYSCEF Doc No. 30, exhibit C to Coheley affirmation [document request letters to LS Power]). LS Power did not respond to the document requests, but based on knowledge of the above transaction, plaintiff brought the current action against LS Power and Helix. Defendants in their answer contend that there was no assignment as plaintiff alleges, but rather that the payment in question was made because Helix acquired TransCanada Maine Wind Development, Inc., which was at the time of acquisition the counterparty to the PFA (NYSCEF Doc No. 7 [answer] ¶ 15). Plaintiff issued the first Request

for the Production of Documents in this action on September 5, 2018. The time to respond has not expired.

## II. DISCUSSION

A stay is defined as “a direction of the court, usually embodied in an order, ‘freezing’ an action or proceeding before it at whatever point it has reached and precluding it from going any further” (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2201:1, at 7). CPLR § 2201 states that “[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.” The broad language of CPLR § 2201, however, has been limited by case law (*Hope's Windows v Albro Metal Products Corp.*, 93 AD2d 711, 712, 460 NYS2d 580 [1<sup>st</sup> Dept 1983]; *660 Riverside Drive Also Assocs., L.L.C. v Marte*, 178 Misc2d 784, 786, 681 NYS2d 436 [Civil Ct., New York County 1998]). Thus, “to impose a stay in one action pending the resolution of a related action, there must be a complete identity of parties, claims and reliefs sought in the two action” (*Green Tree Fin. Servicing Corp. v Lewis*, 280 AD2d 642, 643 [2d Dept 2001]; *see also Rael Automatic Sprinkler Co. v Solow Dev. Corp.*, 58 AD2d 600, 395 NYS2d 485, 486 [2d Dept 1977]).

In some narrow circumstances, where a pending proceeding “may well dispose of or limit the issues to be determined,” the court may grant a stay of proceedings even where the identity of the parties is not completely identical. The court may consider factors such as whether there are overlapping factual allegations, whether the two proceedings seek the same damages, risk of incompatible outcomes, duplication of proof, and potential waste of judicial resources (*Oxbow Calcining USA Inc. v American Indus. Partners*, 96 A.D.3d 646, 652 [1st Dept 2012]; *Belopsky v Renew Data Corp.*, 41 A.D.3d 322, 322 [1st Dept 2007]; *Goodridge v Fernandez*, 121 A.D.2d 942, 945 [1st Dept 1986]).

In the two actions at issue, the parties is not identical. In the first action, DKRW brings breach of contract claims against TCE, with whom it initially contracted. In the instant action, DKRW alleges breach of contract against LS Power and Helix, who, it is alleged, entered into a transaction with TCE either to acquire TCE Maine, a party to the contract in question (answer ¶ 15), or to take on directly the rights and obligations of the contract by assignment from TCE (complaint ¶ 15). Except for the substitution of new party names, the allegations and damages

sought in both complaints are substantially similar. For example, the first cause of action in *DKRW v TCE* alleges that:

In violation of the Project Fee Agreement, **TCE** has removed the value of the environmental attributes of the electricity sold from the Operations Fee payment calculation by excluding revenue from [Renewable Energy Certificates] in calculating “gross electricity sales revenue”

(*DKRW v TCE* complaint ¶ 33). The complaint in this case, *DKRW v LS Power, et al.* alleges:

In violation of the Project Fee Agreement, **LS Power and Helix** have removed the value of the environmental attributes of the electricity sold from the Operations Fee payment calculation by excluding revenue from [Renewable Energy Certificates] in calculating “gross electricity sales revenue”

(complaint ¶ 30). As shown, plaintiff has simply substituted the names of the new defendants for that of TCE. The substance of the claims remains unchanged.

With regard to damages, plaintiff has actually decreased the amount of damages sought with respect to LS Power and Helix. The first complaint against TCE seeks \$3,700,000 in damages, and the more recent case against LS Power and Helix seeks \$2,500,000 (*compare DKRW v TCE* complaint ¶ 37 with complaint ¶ 34). It does not appear that there are any additional damages or relief sought through the second action that could not be recovered through the first action.

Finally, plaintiff seeks to obtain responses to the document requests it issued on September 5, 2018 in the present action in advance of a stay the proceeding. However, beyond explaining that requests were made and ignored in both this and the prior action, plaintiff fails to advance any legal arguments as to why the discovery responses should be required as a condition for the stay (*see* Coheley affirmation). Given that plaintiff does not oppose the reasons for staying this action, it appears to the court that there is no need for discovery now as opposed to later, if or when this action resumes. The request for discovery is denied without prejudice to reward if the stay is lifted.

It is hereby,

**ORDERED** that the motion to stay this case is GRANTED; and it is further

**ORDERED** that either party may make an application by order to show cause to vacate or modify this stay upon resolution of the prior action; and it is further

**ORDERED** that movant is directed to serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within ten (10) days from entry and the Clerk shall mark the action stayed as provided herein; and it is further

**ORDERED** that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the court.

**DATED: September 17, 2018**

**ENTER,**  
  
**O. PETER SHERWOOD J.S.C.**