Kraton Chem., LLC v Graphic Packaging Intl., LLC
2020 NY Slip Op 30076(U)
January 4, 2020
Supreme Court, New York County
Docket Number: 650250/2019
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREA MASLEY** **PART** **IAS MOTION 48EFM**

Justice

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KRATON CHEMICAL, LLC

Plaintiff,

- v -

GRAPHIC PACKAGING INTERNATIONAL, LLC,

Defendant.

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INDEX NO. 650250/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 57, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 88, 93, 94, 95, 96

were read on this motion to/for DISMISSAL.

In motion sequence number 001, defendant Graphic Packaging International, LLC (GPI) moves to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7), on the grounds that: (1) plaintiff Kraton Chemical, LLC (Kraton) failed to plead performance of the Second Amended and Restated CTO/BLS Supply Agreement[1] (the Agreement); (2) GPI properly terminated the Agreement; (3) Kraton's damages are barred by the Agreement; and (4) Kraton failed to adequately plead that it properly disposed of the chemical Alkaline Brine (Brine) or provided an invoice for its disposal costs.

Kraton alleges that GPI breached the Agreement, an output contract requiring Kraton to purchase two industrial chemicals, Black Liquor Soap (BLS) and Crude Tall Oil (CTO) (together, the Product), both by-products of paper manufacturing produced in paper mills that were owned by IP. Kraton also alleges that GPI failed to dispose of

[1] The Agreement was originally entered into by Kraton and nonparty International Paper Company (IP), GPI's processor-in-interest. IP assigned all of its rights and obligations under the Agreement to GPI after GPI acquired certain paper mills subject to the Agreement in 2018.

Brine from Kraton's Savannah, Georgia facility or pay for its disposal pursuant to Section 4 of the Agreement.

The Complaint

Unless indicated otherwise, the following facts are taken from the complaint (NYSCEF Doc. No. [NYSCEF] 1, 1/14/19 Complaint), and for the purposes of this motion to dismiss, are accepted as true.

Kraton manufactures and markets various pine-derived chemicals and materials for use in adhesives, inks, coatings, road marking, tire and rubber, as well as other uses (*id.*, ¶ 4). On November 17, 2009, Kraton and IP executed the Agreement, whereby IP agreed to sell all the Product produced at various IP paper mills, including IP's mill located in Texarkana, Texas (Texas mill) and IP's mill located in Augusta, Georgia (Georgia mill), to Kraton (*id.*, ¶ 7). The Agreement had an eighteen-year term with a termination date of February 28, 2027 (*id.*).

In early 2018, GPI purchased the Texas mill and the Georgia mill (*id.*, ¶ 2). When GPI learned of the Agreement's "Kraton Friendly" pricing terms, it allegedly devised and executed a multi-step strategy to rid itself of its obligations under the Agreement and terminate the Agreement, likely because GPI was unhappy with these favorable prices (*id.*). Kraton alleges that GPI did this by erecting obstacles to Kraton's ability to pick up BLS that was produced at the Texas mill and processed into CTO at GPI's West Monroe, Louisiana facility (West Monroe) (*id.*).

Specifically, Kraton alleges that, in March 2018, GPI changed the processing location for the Texas mill Product from a facility in Mansfield, Louisiana (Mansfield facility) to West Monroe (*id.*, ¶ 15). In late March 2018, GPI reversed course, informing

Kraton that delivery would return to the Mansfield facility because of logistical problems getting the Product from Texas to West Monroe (*id.*). On April 27, 2018, GPI notified Kraton that it intended to resume delivery at West Monroe (*id.*). In late June 2018, GPI changed its delivery point back to the Mansfield facility without advance notice to Kraton (*id.*). Despite these changes in delivery points, Kraton continued to pick up the Texas Product made available, regardless of where it was delivered (*id.*, ¶ 16).

While Kraton continued to pick up the Texas Product in Mansfield without issues, GPI refused to permit Kraton to pick up from West Monroe by railroad tank car, the default method of pick up under Section 6 the Agreement (*id.*, ¶ 17).[2] Kraton attempted to coordinate delivery by tank truck instead of tank car, but GPI failed to provide Kraton with any specific windows during which the truck loading bays would be open at West Monroe (*id.*, ¶ 18). Kraton alleges that it continued to discuss delivery logistics for pick up at West Monroe throughout the summer of 2018 (*id.*).

Kraton further alleges that, in July 2018, GPI began selling CTO at a higher price to Kraton's competitor, nonparty Georgia-Pacific Chemical (Georgia Pacific), in violation of Section 1.1 of the Agreement (*id.*, ¶ 19). Kraton alleges that it attempted to purchase the CTO that GPI sold to Georgia Pacific by suggesting that GPI employ an accounting method in which GPI would reverse its invoices to Georgia Pacific, and invoice Kraton for the CTO, but GPI was unwilling to do so because it was unprofitable (*id.*, ¶ 20). Kraton contends that, from March 2018 through August 2018, GPI rejected the proposed swap with Georgia Pacific and every Kraton proposal for purchasing the Texas Product (*id.*, ¶ 22).

[2] A tank car is a "railroad car for transporting liquids or gases in bulk" (https://www.merriam-webster.com/dictionary/tank%20car).

On August 14, 2018, GPI issued a notice stating that Kraton failed to pick up and purchase the CTO as required by the Agreement and gave notice of the 45-day cure provision of the Agreement (the August Notice) (*id.*, ¶ 23). On September 14, 2018, GPI agreed to tank car delivery at West Monroe (*id.*, ¶ 28). On September 19, 2018, Kraton provided GPI with the dimensions for the tank cars (*id.*). The next day, GPI confirmed the tank car sizes (*id.*). In response, Kraton suggested sending 3 or 4 tank cars; however, GPI informed Kraton that West Monroe would only be able to fill one tank car every other day or every 72 hours and would not allow its rail to clutter with empty tank cars, requiring Kraton to release two cars (*id.*). As GPI issued specific instructions to Kraton regarding delivery, Kraton contends that GPI led it to believe that delivery issues had been resolved (*id.*).

On September 21, 2018, Kraton released two tank cars to be sent to West Monroe, both of which arrived at the facility on September 30, 2018 at 10:34 a.m. (*id.*, ¶ 30). On September 26, 2018, the parties discussed matters due to occur in October 2018 concerning the Georgia mill (*id.*, ¶ 31). The parties worked toward a resolution of outstanding issues, set up a future meeting on October 3, 2018, and GPI scheduled its performance under the Agreement on dates through December 2018 (*id.*). Kraton contends that GPI led Kraton to believe that the issues in the August Notice had been resolved, and that the parties were engaged in business as usual by continuing and expecting Kraton to continue in the ordinary course of business, thereby waiving any purported default.

Kraton alleges when the tank cars arrived at West Monroe on September 30, 2018 as agreed, GPI refused to load them (*id.*, ¶ 33). On October 1, 2018, GPI

terminated the Agreement via email, claiming Kraton failed to cure its default within the 45-day cure period (*id.*, ¶ 34). Kraton demanded that GPI resume performance (*id.*, ¶ 35).

Kraton contends that GPI did not indicate that it intended to terminate the Agreement if the tank cars did not arrive by the September 28th cure deadline specified in the August Notice. On January 19, 2019, Kraton commenced this action for breach of contract and a declaratory judgment that (1) Kraton did not default on its obligations under the Agreement, (2) the August Notice and October 1, 2018 termination are without legal effect, (3) GPI is estopped from terminating the Agreement due to its own wrongful actions, (4) any alleged default was waived by GPI or fully cured, (5) GPI repudiated its obligations under the Agreement by purporting to unilaterally terminating the Agreement, and (6) Kraton is entitled to legal fees (*id.*, p. 19).

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted]; *see also* CPLR 3211 [a] [1]; *see Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001] [factual allegations or legal conclusions lose the

presumption of truth and benefit of every favorable inference, but only when completely and irrefutably contradicted by documentary evidence]).

To prevail on a CPLR 3211 (a) (1) motion to dismiss, the movant has the "burden of showing that the relied-upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'"(*Fortis Fin. Servs. v Fimat Futures USA,* 290 AD2d 383, 383 [1st Dept 2002] [citation omitted]). "A cause of action may be dismissed under CPLR 3211 (a) (1) 'only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law'" (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted]). "The documents submitted must be explicit and unambiguous" (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623, 626 [1st Dept 2017] [citation omitted]; *see also Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc, Inc.*, 120 AD3d 431, 432 [1st Dept 2014]), and their content "'essentially undeniable'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [citation omitted]). Affidavits submitted by a movant do not constitute documentary evidence (*Art & Fashion Group Corp.*, 120 AD3d at 438 [affidavit raised credibility issues]).

1. **Kraton's Performance**

The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, Kraton sufficiently alleges these four elements.

GPI argues that Kraton cannot plead the element of performance because Kraton failed to purchase of 100% of the Product and failed to make shipping arrangements as required under the Agreement.

The court rejects GPI's argument because the complaint sufficiently alleges that "Kraton fully performed under the Agreement, meeting all its obligations under the Agreement and taking delivery of *all Product made reasonably available to it by GPI*" (NYSCEF Doc. No. 1, ¶ 38 [emphasis added]). Kraton's theory of the case is that GPI hindered and/or prevented its ability to full perform under the contract. A contracting party may not hinder, frustrate or prevent either the occurrence of a condition precedent favoring the other party, or prevent the other party's actual performance of its contractual obligations (*Water Street Dev. Corp. v City of New York*, 220 AD2d 289, 290 [1st Dept 1995] ["it is undisputedly the rule that one who frustrates another's performance cannot hold that party in breach"]; *see Grad v Roberts*, 14 NY2d 70, 75 [1964] ["Persons invoking the aid of contracts are under implied obligation to exercise good faith not to frustrate the contract [and] there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part"]). Thus, at this early pleading stage, it is premature to find as a matter of law that plaintiff did not perform where there are allegations of contractual interference by GPI.

GPI also argues that Kraton improperly attempts to impose affirmative obligations on GPI that are not stated in the Agreement. Even if true, Kraton has sufficiently alleged breaches of stated terms e.g. selling the Product to Georgia Pacific in violation

of §1.1 of the Agreement. Moreover, it is premature to determine whether GPI had implied obligations to cooperate with Kraton's coordination of Product retrievals.

GPI argues that Kraton's request for a declaratory judgment must be dismissed because it is not listed in Section 8.1 entitled "Claims." (*Main Evaluations v State*, 296 AD2d 852, 853 [4th Dept 2002] ["the contracts at issue expressly limit plaintiff's remedy to money damages in the event of a dispute, and 'parties to an agreement may not seek a declaration of their contract rights when their agreement specifies a different, reasonable means for resolving such disputes'" [citation omitted]). Since the Agreement limits remedies to damages and specific performance, the court is compelled to dismiss Kraton's cause of action for a declaratory relief. Moreover, the declaratory judgment claim is effectively duplicative of Kraton's request for specific performance which is authorized under the Agreement and precludes termination of the favorable contract.

2. **Whether GPI Properly Terminated the Agreement**

The court rejects GPI's argument that it rightfully terminated the Agreement because of Kraton's "material" breach for the same reason –GPI's alleged frustration of purpose. In addition, GPI's documentary evidence is not conclusive where such evidence is not "essentially undeniable" (*VXI Lux Holdco S.A.R.L.*, 171 AD3d at 193), and does not utterly refute Kraton's allegations in the complaint that any deficits in Kraton's performance were due to GPI's purposeful delays and failure to cooperate. GPI's Director of Procurement's affidavit also does not definitively refute the allegations contained in the complaint. Indeed, affidavits submitted by a moving defendant "will almost never warrant dismissal under CPLR 3211 unless they 'establish conclusively

that [petitioner] has no [claim or] cause of action'" (*Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008] [citation omitted]). Rather, they raise credibility issues.

GPI also argues that its notice of termination was proper even if it had breached first because Kraton failed to issue a material breach notice as required by § 2 of the Agreement. Whether GPI breached first and whether its breaches were material cannot be determined at this early stage where Kraton has stated a claim that GPI repudiated its obligations by purporting to unilaterally terminate the Agreement – an agreement that was allegedly favorable to Kraton and which Kraton seeks to enforce with this action, not terminate. Otherwise, GPI would succeed in executing the precise scheme that Kraton alleges GPI devised to get out from under the Agreement.

GPI's argument that it was not required to engage in Kraton's proposed accounting swap with Georgia Pacific and whether the swap would have resolved the breach, is not determinative of Kraton's contract claim. (NYSECF Doc. No. 22 at 21, n 1). It applies to only that portion of the Product sold to Georgia Pacific. Moreover, it overlooks the issue of GPI's alleged interference with Kraton's performance. Whether a "swap" of product with Georgia Pacific was possible and would have, as Kraton claims, resulted in Kraton purchasing substantially all of the CTO which GPI claims was not purchased raise factual issue that cannot be resolved on a motion to dismiss.

Accordingly, it is unnecessary to reach the issues of estoppel, or equitable relief, raised by Kraton concerning the cure notice deadline, or whether the total quantity of the Product that Kraton did purchase is a fact issue as to materiality.

3. **Damages**

GPI argues that Kraton has not adequately pleaded damages but pleads forms of damages that are unavailable under the contract. GPI relies on the Agreement § 8, which states that damages "may not exceed the amount of the purchase price thereof" and contends that the purchase price is defined in Section 3 of the Agreement. Consequently, GPI argues, Kraton's demand for past and future damages, calculated as "the difference between the Agreement's pricing for such Product and the market price" or "the additional cost of purchasing Product on the open market" fail (NYSCEF Doc. No. 1, ¶¶ 3, 42).

In opposition, Kraton contends that it seeks monetary damages and specific performance under the Agreement § 8.1, and that it expects to calculate its damages as market damages in accordance with UCC §2-713, which provides for the difference between the market price when the buyer learned of the breach and the contract price. Kraton argues the language in Agreement § 8.1 limits the total damages that may be sought to the total "purchase price" of all "Products" not delivered by GPI. Kraton expects that the total of its contract market damages will fall within this limitation, and not exceed the total price of the Product, because, Kraton asserts, GPI's repudiation of the Agreement means that it will fail to deliver Product for the next seven years. Kraton argues that the Agreement does not entirely bar damages and whether section 8.1 restricts damages is irrelevant to the resolution of this motion as Kraton is entitled to seek specific performance.

Section 8.1 of the Agreement provides that "[a]ny claim made by [Kraton] with respect to Products delivered hereunder, or non-delivery of Products delivered

hereunder, may not exceed the amount of the purchase price thereof, exclusive of delivery costs." That section further provides that Kraton's exclusive remedy for all claims arising out of GPI's performance under the contract, or for non-delivery of products, regardless of the theory of liability, "SHALL BE LIMITED TO" the purchase price of the products that are the subject of the claim, plus transportation costs, if any, paid by Kraton for those products or, for products not delivered under the contract, specific performance.

While, as GPI argues, the Agreement limits damages to the purchase price, which is specified in the Agreement, the complaint merely sets out how Kraton will seek to calculate damages. GPI does not argue that Kraton has no damages under the Agreement, and the complaint does not exclude this possibility. Kraton also seeks specific performance, which is allowed under the Agreement. The Agreement does, however, expressly preclude incidental, consequential or indirect damages, and Kraton's claim for such damages is dismissed. In the absence of "any contract or statutory basis for the claim [for attorneys' fees that claim] must be dismissed" (*Rossetti v Ambulatory Surgery Ctr. of Brooklyn, LLC*, 125 AD3d 548, 549 [1st Dept 2015]).

4. Brine

As to the parties' additional dispute about the Brine, Kraton alleges that even though GPI was informed on multiple occasions of the need to dispose of the Brine under Agreement § 4, GPI failed to pick up and dispose of that Product, or to cover the costs of its disposal from Kraton's Savannah facility. Kraton further alleges that it has had to bear the burden and cost of disposing of the Brine at its Savannah facility, resulting in approximately $800,000 in damages.

Agreement § 4 requires GPI to accept Brine, or if GPI does not do so, requires Kraton to dispose of it as efficiently as possible. GPI's only argument is that Kraton's pleading fails because Kraton did not plead that it disposed of the Brine as efficiently as possible and also has not invoiced GPI for any disposal costs. GPI contends that it only has an obligation to pay for efficient disposal costs and cannot pay for something for which it has not received an invoice. While GPI is correct that the complaint does not state that the Brine was disposed of as efficiently as practicable, thereby mimicking the language of the Agreement, GPI has not demonstrated that the disposal was improperly performed, and also provides no authority stating that, absent an invoice, the claim is not viable. The pleading suffices to give the required notice of the claim (CPLR 3013).

Accordingly, it is

ORDERED that defendant Graphic Packaging International, LLC's motion to dismiss the complaint is granted, in part, to the extent that plaintiff Kraton Chemical, LLC company's claim for declaratory judgment as well as incidental and consequential damages and attorneys' fees is dismissed; and it is further

ORDERED that parties are to appear for a preliminary conference on February 26, 2020 at 9:30AM.

1/4/2020
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION	
		GRANTED	DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE