Glencore Ltd. v Freepoint Commodities LLC
2020 NY Slip Op 30964(U)
April 15, 2020
Supreme Court, New York County
Docket Number: 653431/2019
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN, *Justice* — PART IAS MOTION 3EFM

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GLENCORE LTD.

Plaintiff,

- v -

FREEPOINT COMMODITIES LLC,

Defendant.

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INDEX NO. 653431/2019

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32

were read on this motion to DISMISS.

This is a contract dispute over the quality of certain low sulphur fuel oil ("LSFO") purchased by Plaintiff Glencore Ltd. ("Glencore") from Defendant Freepoint Commodities LLC ("Freepoint"). Glencore alleges that Freepoint breached their contract by delivering off-specification LSFO in Houston, then failed to fix the problem after reloading in the U.S. Virgin Islands, and ultimately caused Glencore's buyer in Argentina to reject the product as unusable. This troubled transaction was documented by at least two different contracts, and left a trail of certificates of analysis vouching for the quality of the fuel oil along the way. Now, Glencore is suing Freepoint for breach of contract and contractual indemnification, based on Freepoint's delivery of defective LSFO to Glencore and Glencore's attempted sale of the LSFO to the end buyer. Freepoint moves to dismiss Glencore's claims, arguing in part that irrefutable documentary evidence defeats those claims.

For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND

A. The Contract

On June 26, 2018, Glencore entered into a contract to purchase approximately 250,000 barrels of LSFO from Freepoint for delivery on FOB terms in Houston, Texas between June 27 and June 29 (the "Contract"). Complaint ("Compl.") ¶7. "FOB terms" meant, among other things, that the "risk of loss of or damage to the [LSFO] passes when the [LSFO is] on board the vessel, and the buyer bears all costs from that moment onwards." Contract at §12 (incorporating "[t]he definition of FOB as applicable in Incoterms 2010," available at https://iccwbo.org/resources-for-business/incotermsrules/incoterms-rules-2010/).

Under Section 7 of the Contract, Freepoint agreed to sell LSFO that met defined quality specifications, including certain maximum levels of water and sediment, sediment, and sulphur content. Compl. ¶9; Contract at §7. The Contract instructed that "Quality [is] to be based on the mutually agreed independent inspector's analysis of shore tank(s) volumetric composite sample taken prior to loading," and that if "the shore tank is active, then quality [is] to be based on barge or ship composite after loading." Contract at §8.

The Contract also incorporated a set of guidelines called the BP Global Oil Americas General Terms and Conditions for the Purchases and Sales of Crude Oil, Refined Petroleum and Related Products (2015 Edition), as amended by Freepoint (the "BP General Terms"). Compl. ¶8; *see id.* Ex. 2. Under the BP General Terms, Freepoint agreed that "in no circumstance shall the [fuel oil] contain any deleterious substances or concentrations of any contaminants that may make the [fuel oil] either commercially unacceptable in general industry application or, where relevant, render it a lower grade." *Id.* ¶10; BP General Terms §3.1. The BP General Terms also included a warranty disclaimer:

> EXCEPT AS MAY BE ESPRESSLY PROVIDED IN [sic] ELSEWHERE IN THE AGREEMENT, THERE ARE NO REPRESENTATIONS, GUARANTEES OR WARRANTIES, EXPRESS OR IMPLIED, OF MERCHANTABILITY, FITNESS, OR SUITABILITY OF THE GOODS FOR ANY PARTICULAR PURPOSE, OR OTHERWISE, WHICH EXTEND BEYOND THE FOREGOING.

BP General Terms §3.1.2 (capitalization in original).

In addition, Freepoint agreed to indemnify Glencore for any claims, demands, and causes of action that might be asserted against Glencore for loss or damage to property resulting from Freepoint's negligent acts or omissions:

> EACH PARTY TO THE AGREEMENT SHALL INDEMNIFY, DEFEND, AND HOLD THE OTHER HARMLESS FROM CLAIMS, DEMANDS, AND CAUSES OF ACTION ASSERTED AGAINST THE OTHER BY ANY OTHER PERSON (INCLUDING EMPLOYEES OF EITHER PARTY) FOR PERSONAL INJURY, FOR LOSS OF OR DAMAGE TO PROPERTY, OR FOR VIOLATIONS OF LAW RESULTING FROM THE WILLFUL MISCONDUCT OR NEGLIGENT ACTS OR OMISSIONS OF THE INDEMNIFYING PARTY.

Compl. ¶11; BP General Terms §3.1 (capitalization in original).

Finally, the parties agreed that any dispute or claim arising out of or in connection with the Contract would be governed by the laws of the State of New York. Compl. ¶12; BP General Terms §26.

B. The Delivery in Houston and Diversion to Limetree Bay

Around June 30, 2018, Freepoint delivered the LSFO to Glencore at the Houston Fuel Oil Terminal, where the fuel oil was to be loaded aboard the *M/T SCF Provider* (the "Vessel") by July 2. Compl. ¶¶1, 13-14. Glencore alleges that the LSFO delivered in Houston "contained volumes of water and sediment, sediment, and sulphur that exceeded the warranted specifications set forth in the Contract." *Id.* ¶15.

Freepoint "treats the factual allegations in paragraph 15 of the Complaint as true," while at the same time "disput[ing] any allegation that the LSFO it delivered to Glencore at the Houston Fuel Oil Terminal exceeded the specifications set forth in the Contract." Def. Br. at 4

n.5. According to Freepoint, the trouble in Houston arose from alleged discrepancies between a pre-load certificate of analysis provided by a mutually agreed inspector and a certificate of analysis later obtained by Glencore after loading. *Id.* at 3-4. What is undisputed, however, is that the Vessel was soon diverted from Houston to the Limetree Bay Terminal in St. Croix, U.S. Virgin Islands ("Limetree Bay") to load and blend additional fuel products – either to bring the LSFO within the contractual quality specifications (in Glencore's telling), Compl. ¶16, or to "ensure . . . that the LSFO *was* within the contractual quality specifications" (in Freepoint's telling), Def. Br. at 4 (emphasis added).

On July 9, the Vessel arrived at Limetree Bay. Over the next few days, the Vessel discharged approximately 25,000 barrels of LSFO, and took on an equivalent amount of "No. 6 fuel oil," to blend the respective fuel oils within the Vessel's tank. Compl. ¶17; Affidavit of Andrew McNamara ("McNamara Aff.") ¶4. This blending operation was reflected in a new contract, issued by Freepoint on July 10 and accepted with modifications by Glencore on July 23 (the "Limetree Bay Contract"). *See* McNamara Aff. Ex. A. Under "Part I" of the Limetree Bay Contract, Glencore sold the 25,000 barrels of discharged LSFO to Freepoint. *Id.* And under "Part II," Glencore would buy the same volume of No. 6 fuel oil from Freepoint. *Id.* The "[q]uality" of the new fuel oil picked up in Part II was "to be based on the mutually agreed independent inspector's analysis of shore tank(s) volumetric composite sample taken prior to loading," or "[i]f the shore tank is active, then quality to be based on barge or ship composite after loading." *Id.*

The mutually agreed independent inspector – a firm called Inspectorate America Corporation ("Inspectorate") – tested a composite sample of the *blended* LSFO aboard the

Vessel.[1] Inspectorate then issued a draft certificate of analysis dated July 11, 2018, and a final certificate of analysis dated July 17, 2018 (collectively, the "Certificate of Analysis"). *See* Affirmation of Francis C. Healy ("Healy Aff."), Ex. A. The Certificate of Analysis showed that the LSFO was within the minimum and maximum levels of each required specification. Based on this apparent confirmation, Glencore accepted the LSFO, paid Freepoint in full, and departed Limetree Bay.

C. Glencore's Customer Rejects the LSFO and Glencore Files this Action

The Vessel traveled on to Argentina, where the LSFO was to be delivered to Glencore's customer there. *Id.* ¶18. But the customer rejected the delivery, citing fuel oil samples that indicated excessive levels of sediment as well as water and sediment. *Id.* ¶19. Glencore was then forced to transport the LSFO back to Limetree Bay, where the oil was resold to Freepoint at a loss of $1,667,350.00 against the original purchase price Glencore had paid. *Id.* ¶20. In addition, Glencore claims incidental losses totaling at least $2 million. *Id.* ¶21.

Meanwhile, on August 2, 2018, Inspectorate issued a revised and corrected final certificate of analysis for the same sample it previously tested in Limetree Bay. This *final* "final" certificate of analysis demonstrated that the blended LSFO failed to meet contractual specifications. McNamara Aff. ¶8, Ex. B. These revised findings accorded with the conclusions of the independent inspector who tested the LSFO in Argentina. *See* Compl. ¶19.

On September 14, Glencore provided notice to Freepoint of its quality claim along with supporting documentation. *Id.* ¶22. In addition, on September 26, Glencore submitted a supplemental notice of claim, informing Freepoint that Glencore's purchaser was demanding payment to cover costs associated with the harmful effects of the allegedly corrupted LSFO. The

[1] That is, the quality was "based on . . . ship composite after loading," because "the shore tank [was] active." *Id.*

purchaser complained that the LSFO had caused the delamination and stripping of the coatings of the Vessel's tanks, which would cost approximately $600,000 to repair, along with an additional $380,000 in lost hire during that time. *Id.* ¶¶24-25. On or about November 12, Freepoint purported to reject Glencore's claims. *Id.* ¶¶20-22, 26.

Glencore instituted this action on June 12, 2019, by filing a Summons and Complaint. *See* NYSCEF Doc. Nos. 1-2. The Complaint asserts three causes of action against Freepoint: (1) breach of the June 26, 2018 Contract as a result of delivering off-specification LSFO; (2) breach of the same contract's indemnity provision, due to Freepoint's refusal to indemnify Glencore against the purchaser; and (3) declaratory relief, which has been withdrawn in the course of briefing this motion. Compl. ¶¶27-40; *see* Pl. Opp. Br. at 3.

DISCUSSION

A. Breach of Contract – Quality Specifications (First Cause of Action)

1. The Documentary Evidence Does Not Conclusively Refute Glencore's Claim Under CPLR 3211(a)(1)

The documentary evidence marshaled by Freepoint – the Certificate of Analysis together with the Contract – fails to conclusively refute Glencore's breach of contract claim under CPLR 3211(a)(1). *See* Def. Br. at 8; CPLR 3211(a)(1) ("A party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that . . . a defense is founded upon documentary evidence."). "A paper will qualify as 'documentary evidence' only if . . . (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable.'" *VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC*, 171 A.D.3d 189, 193 (1st Dep't 2019). Dismissal under CPLR 3211(a)(1) "is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994); *VXI Lux Holdco S.A.R.L.*, 171 A.D.3d at 193 ("A court may

not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence or a defense is conclusively established.").

Not only does the documentary evidence dodge the key factual allegation underlying Glencore's claim, Freepoint treats that allegation as true here. Glencore alleges that Freepoint breached the Contract by delivering LSFO in Houston containing prohibited levels of water and sediment, sediment, and sulphur content, as well as prohibited deleterious substances or contaminants. *See* Compl. ¶¶15, 30. The Certificate of Analysis relied on by Freepoint was issued in connection with the subsequent Limetree Bay reloading operation, not the Houston delivery. Freepoint acknowledges that certificates of analysis were issued in connection with the delivery in Houston, but those certificates are not the basis for Freepoint's motion. As a matter of fact, Freepoint accepts as true, for purposes of this motion, the allegation that "the LSFO it delivered to Glencore at the Houston Fuel Oil Terminal exceeded the specifications set forth in the Contract." Def. Br. at 4 n.5. Nor does Freepoint dispute Glencore's allegation about the presence of deleterious substances or contaminants in the LSFO, which also must be accepted as true. *See* Compl. ¶23.[2]

Given those allegations, the question is whether the later-issued Certificate of Analysis, on its face, conclusively establishes that Freepoint nonetheless satisfied its obligations under the Contract. It does not. The Certificate of Analysis purports only to verify the composition of the blended LSFO following the reload at Limetree Bay. The document says nothing about how the

[2] Simultaneously, Freepoint "disputes any allegation that the LSFO it delivered to Glencore at the Houston Fuel Oil Terminal exceeded the specifications set forth in the Contract, and expressly reserves all its rights to assert otherwise, including, but not limited to, in answering or otherwise responding to the Complaint[.]" Def. Br. at 4 n.5. To the extent the condition of the LSFO in Houston is a factual issue still to be litigated, dismissing Glencore's claim now based on the later-issued Certificate of Analysis is inappropriate. *VXI Lux Holdco S.A.R.L.*, 171 A.D.3d at 193.

reload operation fits with Freepoint's obligations under the Contract, and the Contract says nothing at all about a reload operation. Arguably, the testing at Limetree Bay was performed under the separate Limetree Bay Contract, which called for "[q]uality to be based on the mutually agreed independent inspector's analysis of shore tank(s) . . . after loading." Limetree Bay Contract at Part II, §8. According to Glencore's head of operations in the oil department, this testing sought to "mitigate Freepoint's breach of the Contract" by "bring[ing] the blended product into compliance with the specifications of the Contract" using the methodologies set forth in that Contract. McNamara Aff. ¶¶4, 6, 10.

Freepoint contends that the Certificate of Analysis was indisputably "contemplated [and] required by the Contract" and *not* "issued under the separate Limetree Bay Contract," because the latter "related solely to the 25,000 replacement barrels of fuel oil" and did not include any quality specifications or testing methods apart from that of the original Contract. Def. Reply Br. at 5-6. While Freepoint's interpretation may be plausible, it is not the only plausible interpretation permitted by the terms of the Limetree Bay Contract. The quality of the 25,000 replacement barrels of No. 6 fuel oil under the Limetree Bay Contract could be determined "based on barge or ship composite after loading." And the Certificate of Analysis purports to do exactly that – it tested the "Product," identified as "# 6 Fuel Oil," "After Load." Healy Aff. Ex. A. The parameters for that testing followed the parameters set out in the original Contract, consistent with Glencore's stated desire to "mitigate[ ] Freepoint's breach of the Contract and br[ing] the product into compliance for sale[.]" McNamara Aff. ¶6. The Certificate of Analysis thus lends credence to Glencore's view that the reload operation at Limetree Bay came under the auspices of the Limetree Bay Contract, following Freepoint's prior breach of the original Contract.

Freepoint's reliance on the First Department decision in *Sempra Energy Trading Corp. v. BP Prods. N. Am., Inc.*, 52 A.D.3d 350 (1st Dep't 2008) ("*Sempra*"), is misplaced in this particular context. *Sempra* and other similar cases, including this Court's decision in *Curacao Oil N.V. v Trafigura Pte. Ltd.*, No. 651746/2019, 2020 WL 532519 (N.Y. Sup. Ct. Feb. 03, 2020) ("*Curoil*"), analyzed undisputed contractual language to determine whether a "final and binding" independent inspection report cuts off future claims challenging product quality. By contrast, here the parties disagree about which contract governed the independent inspector's conclusions at Limetree Bay, and whether Freepoint was already in breach of the Contract by then. So, while *Sempra* and *Curoil* posed legal questions that could be resolved on a motion to dismiss, this case poses fact questions that require discovery, not dismissal.

Therefore, at this stage, neither the Certificate of Analysis nor the Contract establish a defense to Glencore's claim as a matter of law.

2. **Glencore's Claim Cannot be Dismissed for Failure to State a Cause of Action Under CPLR 3211(a)(7)**

Freepoint's arguments under CPLR 3211(a)(7) also fail. *First*, the warranty disclaimer in the Contract does not bar Glencore's claim. The relevant clause disclaims representations, guarantees or warranties "EXCEPT AS MAY BE ESPRESSLY PROVIDED IN [sic] ELSEWHERE IN THE AGREEMENT," BP General Terms § 3.1.2, and Glencore's claim is based on specifications and warranties in the Contract itself. *See* Contract at §7 (specifying permissible levels of water and sediment, sediment, and sulphur); Compl. ¶10 (expressly warranting that "in no circumstances shall the [LSFO] contain any deleterious substances or concentrations of any contaminants that may make the [LSFO] . . . commercially unacceptable in general industry application").

Second, the "FOB" delivery term in the Contract does not immunize Freepoint from liability for defects in the LSFO arising prior to delivery. The FOB provision, incorporated from Incoterms, marks when title passes from the seller to the buyer. Delivery FOB allows the seller to hand off risk to the buyer once it deposits the product with a carrier, so the risk of misfortune from that point onwards falls on the buyer. *Rosenberg Bros. & Co. v. F.S. Buffum Co.*, 234 N.Y. 338, 343 (1922); *Chase Manhattan Bank v. Nissho Pacific Corp.*, 22 A.D.2d 215, 221 (1st Dep't 1964). But this is not a case about fuel oil going bad on the way to its destination; Glencore is alleging that Freepoint delivered bad fuel oil. Under those circumstances, "the FOB term will not shield [Freepoint] from liability." *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co.*, No. 06 CIV. 3972 LTS JCF, 2011 WL 4494602, at *4 (S.D.N.Y. Sept. 28, 2011) (applying Incoterms FOB provision to contract dispute regarding delivery of allegedly defective product).

Freepoint also asserts that Glencore cannot premise its breach of contract claim on the initial delivery in Houston because Freepoint had a statutory right under U.C.C. §2-508(2) to cure any alleged non-conformity in the LSFO by substituting a conforming delivery. To begin with, this argument "is not properly before [the Court] since it was raised for the first time in [Freepoint's] reply brief." *Erdey v. City of New York*, 129 A.D.3d 546, 546 (1st Dep't 2015). Even considered on its merits, however, the argument still falls short. U.C.C. §2-508(2) provides that "[w]here the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender." "On its face . . . for the statute to apply (1) a buyer must have rejected a nonconforming tender, (2) the seller must have had reasonable grounds to believe this tender would be acceptable (with or without money allowance), and (3) the seller must have 'seasonably' notified the buyer of the intention to

substitute a conforming tender within a reasonable time." *T.W. Oil, Inc. v. Consol. Edison Co. of New York*, 57 N.Y.2d 574, 583 (1982). Whether the seller acted "seasonably" is "[e]ssentially a factual matter," and "[a]t least equally factual in character, a 'reasonable time' is left to depend on the 'nature, purposes and circumstances' of any action which is to be taken." *Id.* at 583 n.7 (deciding issue after trial). Freepoint does not submit factual evidence to demonstrate that this U.C.C. provision applies, much less that it defeats Glencore's claim as a matter of law.

Therefore, the branch of Freepoint's motion seeking to dismiss Glencore's first cause of action is DENIED.

B. Breach of Contract – Indemnity (Second Cause of Action)

On the other hand, Glencore's second cause of action, alleging that Freepoint breached a separate provision in the Contract by failing to indemnify Glencore against the ultimate purchaser of the LSFO, fails as a matter of law. The Contract's indemnity provision only covers claims "resulting from the willful misconduct or negligent acts or omissions of the indemnifying party." Compl. ¶11; BP General Terms §9.2. And contractual indemnification provisions like these are strictly construed under New York law, so that "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." *Suazo v. Maple Ridge Assocs., L.L.C.*, 85 A.D.3d 459, 460 (1st Dep't 2011) (dismissing third-party claim alleging indemnification). To allege "negligent acts" that fall within the scope of the indemnity provision, it is "a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 389 (1987) (affirming dismissal of claims for negligence and gross negligence); *Wilk v. Columbia Univ.*, 150 A.D.3d 502, 504 (1st Dep't 2017) (affirming summary judgment dismissing claim for contractual indemnity, "which require[d] a finding of

negligence," because there was no evidence of negligence and "claims based on negligent or grossly negligent performance of a contract are not cognizable").

To satisfy the predicate for indemnification here, Glencore tries to convert an alleged breach of contract into a tort simply by using the word "negligent" to describe the same conduct underlying its first cause of action. *Compare* Compl. ¶30 ("Freepoint breached the Contract by delivering LSFO that contained elevated levels of water and sediment, sediment, and sulphur content in excess of the warranted specifications, as well as prohibited deleterious substances or contaminants"), *with id.* ¶34 ("Freepoint was negligent in delivering to Glencore LSFO that was off-specification and that contained deleterious substances and other contaminants."). Restating the claim this way, of course, is not enough to allege the existence (let alone the breach) of a legal duty independent of the Contract.

Therefore, the branch of Freepoint's motion seeking to dismiss Glencore's second cause of action is GRANTED.

C. Declaratory Relief (Third Cause of Action)

In its opposition to Freepoint's motion to dismiss, Glencore withdrew its third cause of action. *See* Pl. Opp. Br. at 3 (NYSCEF Doc. No. 19).

* * * *

Accordingly, it is

ORDERED that Freepoint's motion to dismiss is Granted with respect to Glencore's second cause of action (breach of contract – indemnity) and third cause of action (declaratory relief), but is Denied with respect to Glencore's first cause of action (breach of contract – quality specifications); and it is further

ORDERED that the parties are directed to contact the Court at sfc-part3@nycourts.gov thirty days following the date of this Decision and Order to seek a date for a preliminary conference.

This constitutes the Decision and Order of the Court.

4/15/2020
DATE

JOEL M. COHEN, J.S.C.

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