

**Resolute FP US Inc. v New-Indy Catawba LLC**

2020 NY Slip Op 31334(U)

April 28, 2020

Supreme Court, New York County

Docket Number: 652961/2019

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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RESOLUTE FP US INC.

Plaintiff,

- v -

NEW-INDY CATAWBA LLC,

Defendant.

INDEX NO. 652961/2019

MOTION DATE 11/13/2019

MOTION SEQ. NO. 005

**DECISION + ORDER ON  
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to DISMISS.

This case involves the purchase and sale of a pulp and paper mill in South Carolina. In the Asset Purchase Agreement (“APA”), the parties agreed to a pre-closing process in which the purchaser (Defendant New-Indy Catawba LLC, “New Indy”) was permitted to negotiate with South Carolina authorities with respect to certain environmental remediation obligations that New-Indy might incur after the transaction. Subject to certain conditions, the seller (Plaintiff Resolute FP US Inc., “Resolute”) agreed to pay up to 50% of the costs of the agreed-upon remediation. The parties dispute whether the conditions for Resolute’s obligation to pay its share of remediation obligations – to which New-Indy and South Carolina regulators agreed in a Voluntary Cleanup Contract (“VCOC”) – have been met. At stake is whether Resolute is entitled to the return of \$5 million that was held in escrow upon closing of the transaction to cover remediation costs, as defined in the APA.

In its Amended Complaint (“FAC”), Resolute seeks: (i) a declaratory judgment that it is not obligated to share the costs of environmental remediation because New-Indy did not meet the

contractual conditions for cost-sharing (First Cause of Action); a declaratory judgment that it is not obligated to share the costs of remediation because New-Indy prevented Resolute from participating in negotiations with South Carolina regulators (Second Cause of Action); (iii) damages for New-Indy's breach of the escrow provisions of the APA (Third Cause of Action); and (iv) damages for breach of the implied covenant of good faith and fair dealing (Fourth Cause of Action).

New-Indy moves to dismiss on the grounds that Resolute's allegations, taken as true, establish that: (i) the conditions precedent to trigger Resolute's cost-sharing obligations have been met; (ii) Resolute has waived its rights to enforce the alleged breach on which its claim is based; and (iii) there is an adequate remedy at law that precludes a claim for declaratory relief. Separately, New-Indy asserts that Resolute's claim for breach of the implied covenant of good faith and fair dealing should be dismissed as duplicative of its claim for breach of contract.

For the reasons set forth below, New-Indy's motion is granted in part and denied in part.

### Analysis

"When deciding a ... motion to dismiss, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court determines only whether the facts as alleged fit within any cognizable legal theory" (*Grassi & Co. v Honka*, 180 AD3d 564 [1st Dept 2020]). The Court need not credit allegations that "constitute legal conclusions or are inherently incredible or [are] unequivocally contradicted by documentary evidence" (*Landmark Ventures, Inc. v InSightsec, Ltd.*, 179 AD3d 493 [1st Dept 2020]; see also *Franklin v Winard*, 199 AD2d 220, 220 [1st Dept 1993]). The question "is whether [the plaintiff] has a cause of

action, not whether [it] has *stated* one” (*Maddicks v Big City Props., LLC*, 34 NY3d 116, 123 [2019] [emphasis in original; citations omitted]).

Moreover, a motion under C.P.L.R. 3211(a)(1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] [dismissal appropriate only if documentary evidence “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim”] [citation and quotation omitted]). Where the document in question is a contract between the parties, dismissal under Rule 3211(a)(1) is warranted only where the agreement “unambiguously contradicts the allegations supporting a litigant’s cause of action” (*150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]).

A core question that cuts across each of the claims at issue here is whether New-Indy has established, as a matter of law, that Resolute is required under the APA to fund a portion of remediation costs to which New-Indy agreed in the VCOC. The Court finds that the APA reasonably can be read to limit Resolute’s financial obligations to remediation expenses that are required *under a formal* Voluntary Cleanup Contract (“VCC”). While New-Indy may be able to establish that its VCOC with South Carolina is the equivalent of a non-responsible party VCC for purposes of the APA, or that the act of *applying* for a VCC is sufficient under the APA to entitle it to retain the escrow amount, Resolute’s factual allegations (taken as true for purposes of the instant motion) are sufficient to raise mixed questions of fact and law that cannot be resolved on a motion to dismiss. In particular, Resolute’s allegations raise a legitimate question – at the

pleading stage – whether the scope of the future remediation obligations to which New-Indy agreed in its VCOC goes beyond what Resolute agreed to share when it sold its paper mills.

That does not mean that *all* of Resolute’s Causes of Action necessarily state viable claims for relief, but it does resolve a core question that applies to each of them. Each one will be addressed in turn.

#### **First Cause of Action (Declaratory Judgment)**

New-Indy’s motion to dismiss the First Cause of Action is premised on the contention that Resolute is required, as a matter of law, to contribute toward the remediation expenses to which New-Indy agreed in the VCOC. For the reasons discussed above, the branch of the motion to dismiss addressed to that cause of action is denied.

#### **Second Cause of Action (Declaration Judgment)**

New-Indy’s principal challenge to the Second Cause of Action is that Resolute waived its right to assert that it was improperly excluded from New-Indy’s discussions with South Carolina regulators. That argument is supported by express provisions contained in the APA.

Section 7.3 of the APA provides that Resolute had no obligation to complete the transaction if any of the conditions enumerated in Section 7.3 remained unsatisfied. One of those conditions was that New-Indy shall not have “failed to perform or comply with, in any material respect, any covenant or agreement to be performed or complied with by it prior to or on the Closing Date” (APA § 7.3.2). New-Indy’s “Environmental Covenants”— including all of its obligations with respect to negotiating a contract with DHEC and keeping Resolute apprised of those negotiations—are contained in Section 5 of the APA, entitled “COVENANTS AND AGREEMENTS.”

Under Section 7.4 of the APA, “[i]f the Closing occurs, each of the conditions set forth in this Section 7 that has not been fully satisfied as of the Closing shall be deemed to have been fully *waived* by the party that is the beneficiary of such condition” (emphasis added). Similarly, Section 8.1.4 of the APA gave Resolute the right to terminate the APA prior to Closing if it believed that New-Indy had “breach[ed] in any material respect any of its [] covenants or other agreements in th[e APA] in a manner that would give rise to the failure of a condition set forth in Section 7 . . . .” It is undisputed that Resolute did not exercise that termination right and chose to proceed with closing on the APA (and receive the purchase price) on December 31, 2018.

Such waiver provisions are enforceable (*see, e.g., Hadden v Consol. Edison Co. of N.Y.*, 45 NY2d 466, 469 [1978]) [“Generally and excepting instances where there would be transgressions of public policy, all rights and privileges to which one is legally entitled, ex contractu or ex debito justitiae, may be waived. . . . A waiver, the intentional relinquishment of a known right . . . may be accomplished by express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage”] [citations omitted]).

Resolute’s generic assertions that waivers should not be lightly presumed and must involve knowing, voluntary and intentional abandonment of rights, while true, are not persuasive. No presumption is required here – the waiver is clear on the face of the APA. And while Resolute complained about New-Indy’s failure to include it in discussions and presented the VCOC essentially as a *fait accompli*, it is undisputed that Resolute nevertheless proceeded with closing and accepted payment of the purchase price, rather than exercising its contractual right not to do so until conditions to closing had been satisfied.

Under the plain language of the APA, Resolute cannot both retain the benefits of closing the transaction and retain the right to sue Indy-New for an alleged breach that was apparent at the

time of closing (*accord N.Y. Tel. Co. v Jamestown Tel. Corp.*, 282 NY 365, 372 [1940]

[“Acceptance of benefit under the contract with knowledge of the wrong constitutes a waiver of the wrong”]). Moreover, Resolute’s purported unilateral “reservation of rights” at the time of closing cannot overcome the express language of the APA.

Accordingly, the Second Cause of Action is dismissed.<sup>1</sup>

### **Third Cause of Action (Breach of Contract)**

New-Indy’s challenge to the Third Cause of Action is that Resolute is required, as a matter of law, to contribute toward the remediation expenses to which New-Indy agreed in the VCOC. For the reasons discussed above, the branch of the motion to dismiss addressed to the Third Cause of Action is denied.

### **Fourth Cause of Action (Breach of the Implied Covenant)**

Finally, Resolute’s cause of action for breach of the implied covenant of good faith and fair dealing is duplicative of its claim for breach of contract. A claim for breach of “the implied covenant of good faith and fair dealing [is] properly dismissed as duplicative of the breach-of-contract claim” where, as here, “both claims arise from the same facts [] and seek the identical damages for each alleged breach” (*Amcan Holdings, Inc. v. Canadian Imperial Bank of Comm.*, 70 AD3d 423, 426 [1st Dept 2010] [citations omitted]).

Accordingly, the Fourth Cause of Action is dismissed.

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<sup>1</sup> The Court has considered New-Indy’s alternative arguments for dismissal (namely, that a declaratory judgment remedy should not be permitted because Resolute can pursue a claim for damages and that breach of the participation provisions do not warrant granting declaratory relief) and finds them to be without merit. Such arguments would not, on their own, warrant dismissal at this early stage of the litigation.

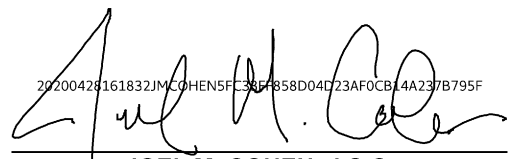
**Conclusion**

For the foregoing reasons, it is

**ORDERED** that Defendant’s motion to dismiss the Amended Complaint is **granted** with respect to Plaintiff’s Second and Fourth Causes of Action and **denied** with respect to Plaintiff’s First and Third Causes of Action.

This constitutes the decision and order of the Court.

4/28/2020  
DATE

  
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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE