

Resolute FP US Inc. v New-Indy Catawba LLC

2021 NY Slip Op 30456(U)

February 17, 2021

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.	INDEX NO.	<u>652961/2019</u>
Plaintiff,	MOTION DATE	<u>09/25/2020</u>
- v -	MOTION SEQ. NO.	<u>006</u>
NEW-INDY CATAWBA LLC,		
Defendant.	DECISION + ORDER ON MOTION	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion to DISMISS COUNTERCLAIMS.

This case involves various disputes arising out of the sale of a pulp and paper mill and a chip mill located in South Carolina. Plaintiff Resolute FP US Inc. (“Resolute”) was the seller, and Defendant New-Indy Catawba (“New-Indy”) was the buyer.

In the present motion, Resolute seeks to dismiss New-Indy’s Third and Fourth Counterclaims. In those counterclaims, New-Indy asserts that Resolute remains on the hook legally for asbestos tort lawsuits filed against Resolute with respect to the mills after the closing of the transaction (“Asbestos Lawsuits”). Resolute argues that documentary evidence – including the Asset Purchase Agreement (“APA”) governing the transaction – demonstrates conclusively that the Asbestos Lawsuits are “Assumed Obligations” (the buyer’s problem) rather than “Retained Obligations” (the seller’s problem), as those terms are defined in the APA.

For the reasons described below, Resolute’s motion to dismiss New-Indy’s Third and Fourth Counterclaims is denied. The documentary evidence – including the text of the APA, the

agreed-upon Schedule of “Legal Proceedings” attached to the APA, and post-contractual actions with respect to the Asbestos Lawsuits – does not conclusively refute New-Indy’s claims that the Asbestos Lawsuits are Retained Obligations.

Factual Background

The Transaction

New-Indy is a paper manufacturer. Resolute is a manufacturer of forest products, including those involving pulp, tissue, wood products and papers. Pursuant to the APA (NYSCEF 80 at 5), New-Indy acquired from Resolute the assets and certain liabilities of a pulp and paper mill complex in Catawba and Jonesville, South Carolina.

Since the closing of the APA on December 31, 2018, several individuals have sued Resolute seeking damages related to alleged exposure to asbestos at the Catawba mill. Initially, New-Indy undertook the defense of those lawsuits. New-Indy later reversed course and took (and still takes) the position that those lawsuits were Retained Obligations that, under the terms of the APA, were the responsibility of Resolute.

Allocation of Post-Closing Liabilities Under the APA

As is common in asset acquisitions, in which liabilities do not automatically shift to the buyer (as they would in a stock purchase), the parties set forth in detail which liabilities would be retained by the seller and which would be assumed by the buyer.

Sections 1.4 and 1.5 of the APA define “Assumed Obligations” and “Retained Obligations,” respectively. Section 1.4 sets forth ten categories of “Liabilities” that were, subject to other terms and conditions in the APA (including Section 1.5), assumed by New-Indy upon closing of the transaction (“Assumed Obligations”). Section 1.5, in turn, provides that anything

that is not an Assumed Obligation is a “Retained Obligation.” Section 1.5 goes on to list sixteen categories of Liabilities deemed to be Retained Obligations.

For purposes of this motion, the main provisions of interest are Sections 1.4.6(a), 1.4.6(c), and 1.4.7, as well as Schedule 3.6.1 (“Legal Proceedings”).

Under Section 1.4.6(a), Assumed Obligations include any liabilities “arising out of the purchased assets . . . by any Person whether before, on, or after the Closing in any way: (a) arising under or pursuant to any past, present, or future Environmental Law” (NYSCEF 80 § 1.4.6[a]). “Environmental Laws” are defined by the APA as relating to “any and all Laws relating to . . . human health or safety (as it relates to exposure to Hazardous Substance), including those relating to emissions, discharges or releases of Hazardous Substance into the environment” (*id.* at §10.1). “Laws,” in turn, are “any federal, state, local or foreign law (including common law)” (*id.*). “Hazardous Substance” includes “asbestos or asbestos-containing materials” (*id.*).

Under Section 1.4.6(c), Assumed Obligations also include all liabilities arising out of or relating to “any Release or other contamination or pollution of the environment.” “Release” is defined as any “release, spill, emission, leaking, seepage, pumping, pouring, dumping, emptying, injection, deposit, disposal, or discharge” (NYSCEF 80 § 10.1).

Finally, under Section 1.4.7, Assumed Obligations include “all Liabilities related to the Actions listed on Schedule 3.6.1 (except as otherwise noted on such schedule) . . .” Schedule 3.6.1, which is part of the APA, contains a list of pending “Legal Proceedings,” several of which were asbestos lawsuits. As to each lawsuit, the Schedule states: “This Action is a Retained Obligation” (NYSCEF 96). New-Indy asserts that the Schedule confirms that the parties intended that *all* asbestos liability claims, whether pending at the time of the transaction or

asserted thereafter, be considered Retained Obligations. Resolute responds that only those pending lawsuits listed in Schedule 3.6.1 were deemed to be Retained Obligations (“except as otherwise noted,” for purposes of Section 1.4.7), but any *future* asbestos lawsuits are covered by the definition of Assumed Obligations in Section 1.4.6.

The Asbestos Lawsuits

In its motion papers, Resolute asserts that between the time the transaction closed on December 31, 2018 and the time New-Indy filed its Amended Counterclaims on August 5, 2020, Resolute had been named as a defendant in five third-party actions alleging injuries arising out of asbestos exposure at the Catawba Mill Business. Three of those claims were filed in 2019, and two more were filed in 2020.

Resolute submits as exhibits to its motion five “confirmations” in which New-Indy stated that it would indemnify New-Indy in connection with the five cases and would assume the defense of the actions, several of which have been resolved. New-Indy further stated in the confirmations that “[t]he terms in the Purchase Agreement continue to speak for themselves and nothing in this instrument amends or modifies the Purchase Agreement.”

In response, New-Indy asserts that it “erroneously followed Resolute’s lead and signed the ‘confirmation’ notices,” but that each confirmation “reiterates that they are not amendments to, or waivers of rights under, the APA” (NYSCEF 94 at 5). New-Indy states that “[b]y August 4, 2020, recognizing its error, New-Indy notified Resolute that the Asbestos Claims were not in fact Assumed Obligations” (*id.*). New-Indy disclaimed indemnification of a sixth asbestos case that was filed after its Counterclaims were filed.

New-Indy's Counterclaims

New-Indy's Third Counterclaim seeks a declaration that liabilities arising from asbestos personal injury lawsuits are Retained Obligations for which Resolute is responsible under the APA. New-Indy's Fourth Counterclaim asserts that Resolute breached the terms of the APA by repudiating its obligation to indemnify New-Indy for liabilities arising from asbestos personal injury lawsuits and by improperly tendering to New-Indy the defense and responsibility for such lawsuits. Resolute seeks to dismiss both claims.

Legal Analysis

Under C.P.L.R. 3211(a)(1), a motion "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]).

Where the documentary evidence at issue is a contract between the parties, dismissal under Rule 3211(a)(1) is warranted only when the agreement "unambiguously contradicts the allegations supporting a litigant's cause of action" (*150 Broadway N.Y. Assocs., L.P. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]). An agreement is unambiguous if "the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference in opinion" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 [2002][quotations omitted]). Where the parties have set down their agreement in a clear, complete document, their writing should be enforced as to its unambiguous terms (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]).

An agreement does not become ambiguous "simply because the parties to the litigation argue different interpretations" (*Riverside S. Planning v CRP/Extell Riverside, L.P.*, 60 AD3d 61,

67 [1st Dept 2008], *aff'd* 13 NY3d 398 [2009]). “To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation. The existence of ambiguity must be determined by examining the entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed, with the wording considered in the light of the obligation as a whole and the intention of the parties as manifested thereby” (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017]). Whether an agreement is ambiguous is a matter of law for the Court to decide (*Taussig v Clipper Grp., L.P.*, 787 NYS2d 10, 11 [1st Dept 2004]).

As described below, the documentary evidence does not conclusively refute New-Indy’s allegation that the Asbestos Lawsuits are Retained Obligations.

1. Section 1.4.6 Suggests the Asbestos Lawsuits are Assumed Obligations.

The language of Section 1.4.6(a) of the APA, standing alone, supports Resolute’s position that the Asbestos Lawsuits are Assumed Obligations. Although New-Indy relies on portions of that paragraph to suggest that “Environmental Laws” are limited to statutes or regulations, the definition of “Laws” expressly includes “common law.” In addition, the definition incorporates liabilities arising out of exposure to Hazardous Substances, which specifically includes asbestos. Thus, absent contrary language elsewhere in the APA, it would be difficult to sustain New-Indy’s allegation that the Asbestos Lawsuits (which contain common law claims based on exposure to asbestos) are Retained Allegations.¹ But that provision does not stand alone.

¹ Whether the Asbestos Lawsuits also come within the plain meaning of Section 1.4.6(c) is a closer question. That Section provides that liabilities arising out of or relating to “any Release or other contamination or pollution of the environment.” Under the APA, “Release” is defined as

2. Schedule 3.6.1 Suggests the Asbestos Lawsuits are Retained Obligations.

As noted above, Section 1.4.7 of the APA, Assumed Obligations include “all Liabilities related to the Actions listed on Schedule 3.6.1 (*except as otherwise noted on such schedule*) ...” (NYSCEF 80 § 1.4.7 [emphasis added]). Schedule 3.6.1, in turn, listed several pending asbestos lawsuits and stated (for each one): “This Action is a Retained Obligation” (NYSCEF 96).

The statement that each pending asbestos lawsuit “is” a Retained Obligation could mean different things. It could mean, as Resolute suggests, that the specific pending lawsuits are deemed by agreement to be Retained Obligations even though they otherwise would be Assumed Obligations under Section 1.4.6. Or it could mean, as New-Indy suggests, that the parties agreed that asbestos lawsuits categorically *are* Retained Obligations (despite what Section 1.4.6 might suggest), in which case that designation would apply to future lawsuits as well as those listed in the Schedule. Because both interpretations are commercially reasonable, and the parties’ intent might be illuminated by extrinsic evidence, New-Indy’s counterclaims cannot be dismissed as a matter of law.

3. The Confirmations Do Not Mandate Dismissal.

Finally, even assuming New-Indy’s initial “confirmations” of indemnification of five Asbestos Lawsuits constitute cognizable “documentary evidence” under CPLR 3211[a][1], they do not conclusively refute New-Indy’s claim that those lawsuits are Retained Obligations under

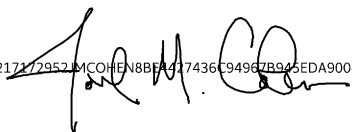
any “release, spill, emission, leaking, seepage, pumping, pouring, dumping, emptying, injection, deposit, disposal, or discharge” (NYSCEF 80 § 10.1). Whether exposure to asbestos constitutes a “Release” is a debatable point. New-Indy argues that “Release” is a term of art as it is understood in the context of environmental law, and does not include close-contact exposure to asbestos. In view of the Court’s conclusions with respect to the ambiguities created by Schedule 3.6.1, *infra*, there is no need to reach a definitive conclusion at this stage as to the interpretation of Section 1.4.6(c).

the terms of the APA. To be sure, New-Indy’s conduct may be relevant to interpreting the APA and may give rise to defenses such as waiver or estoppel, but it is premature to rule on the merits of such arguments or defenses at this stage of the case. While Resolute scoffs at New-Indy’s assertion that it made a mistake when it “followed Resolute’s lead” in confirming that it would provide indemnification for the first five Asbestos Lawsuits (NYSCEF 100 at 14 [“This is nonsense”]), and that New-Indy’s conduct “provide[s] a further indication ... that the APA is not ambiguous” (*id.* at 12), those are questions that cannot be resolved on a motion to dismiss.

Accordingly, it is

ORDERED that Plaintiff’s motion to dismiss Defendant’s Third and Fourth Counterclaims is denied.

This constitutes the decision and order of the Court.


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JOEL M. COHEN, J.S.C.

2/17/2021
DATE

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APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
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