

Hartree Partners, LP v Vaquero Permian Processing LLC
2022 NY Slip Op 30067(U)
January 10, 2022
Supreme Court, New York County
Docket Number: Index No. 651999/2021
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART 53

Justice

-----X

HARTREE PARTNERS, LP

Plaintiff,

- v -

VAQUERO PERMIAN PROCESSING LLC,

Defendant.

-----X

INDEX NO. 651999/2021

MOTION DATE 04/26/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and for the reasons set forth on the record (1.10.21), Vaquero Permian Processing LLC's (Vaquero) motion to dismiss, pursuant to CPLR 3211(a)(1) and (7) must be denied because Hartree Partners LP (Hartree) has sufficiently pled a claim of breach of the buy back contract and Vaquero's documentary evidence does not disprove Hartree's allegations that buy back contracts create a transaction fiction as a mere financial netting agreement rather than requiring Vaquero to first deliver 50,000 MMBtu of gas for Hartree and for Hartree to deliver back 15,000 MMBtu of those 50,000 MMBtus to Vaquero. At best, there are issues of fact which preclude granting the motion. Among other things, it is undisputed that on the first of four days of the alleged buy back agreement, Vaquero delivered 35,000 MMBtus (i.e., the net amount of the 50,000 MMBtus under the contract less the 15,000 MMBtu alleged buy back amount) which suggests acceptance by performance (NYSCEF Doc. No. 22, at 6; see also NYSCEF Doc. Nos. 26-28). At worst, the motion is entirely frivolous.

The Physical Natural Gas Contract (**Transaction Confirmation**; NYSCEF Doc. No. 9) at issue refers to and incorporates the Base Contract for Sale and Purchase of Natural Gas and the General Terms and Conditions Base Contract for Sale and Purchase of Natural Gas (hereinafter, collectively, the **NAESB Agreement**; NYSCEF Doc. No. 7), dated July 2019, by and between Hartree and Vaquero, for the sale of natural gas and the agreement the parties worked out by chat (**Chat Agreement**; NYSCEF Doc. No. 24). In the Chat Agreement, Vaquero requested and Hartree agreed to permit Vaquero to buy back “15K” of the 50,000 MMBtu of natural that Vaquero was obligated to deliver to Hartree for each of four days – i.e., February 13, 2021 through February 16, 2021. This agreement was memorialized subsequently in a Transaction Confirmation (NYSCEF Doc. No. 9).

Vaquero contends that physical delivery is required based on the incorporation by reference of the NAESB Agreement into the Transaction Confirmation. The argument fails. The buy back agreement as pled is merely a financial convention – *i.e.*, the purchaser under the NAESB Agreement merely receives a reduced quantity in the amount that the seller is “buying back” (NYSCEF Doc. No. 2, ¶ 9). Stated differently, taking the allegations as true as Court must on a motion to dismiss (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the purchaser receives the net amount of the seller’s contracted for delivery amount and the amount the seller and purchaser agree that the seller buys back. The CPLR 3211(a)(1) evidence does not refute this understanding. Indeed, as alleged, on the first of the four days of this alleged buy back arrangement, Vaquero acted in accordance with this understanding.

As discussed above, Hartree alleges that Vaquero was obligated to deliver 50,000 MMBtu of natural gas and asked Hartree to buy back 15,000 MMBtu to which Hartree agreed. On February 13, 2021, Vaquero delivered 35,000 MMBtu (*i.e.*, the net amount of the 50,000 MMBtu contracted for the 15,000 MMBtu which Vaquero and Hartree agreed that Vaquero could buy back) of natural gas to Hartree, Hartree paid \$123,000 and Vaquero paid \$2,322,975 (NYSCEF Doc. No. 28). Vaquero's delivery of 35,000 MMBtu appears to constitute acceptance by performance of the February 13, 2021 buy-back arrangement as a net delivery obligation (NYSCEF Doc. No. 22, at 6; *see also* NYSCEF Doc. Nos. 26-28). On February 22, 2021, Vaquero declared a force majeure event for February 14-16, 2022, the remaining days of the parties buy back agreement, and refused to buy back (*i.e.*, pay for) the 15,000 MMBtu from Hartree and claims that Hartree failed to perform because it did not deliver the 15,000 MMBtus.

For the avoidance of doubt, Vaquero's argument that the court should not look to anything other than the NAESB Agreement itself fails. The Trade Confirmation's indication that the NAESB Agreement applies does not under the circumstances preclude the Court's review of the parties conduct as it relates to the acceptance of a modification (*i.e.* the buy-back agreement) or where the contract may be ambiguous (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]; *Last Time Beverage Corp., v F & V Distribution Co., LLC*, 98 AD3d 947 [2d Dept 2012]). Thus, Vaquero's motion to dismiss must be denied.

The court has considered Vaquero's remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that Vaquero Permian Processing LLC's motion to dismiss is denied; and it is further

ORDERED that Vaquero Permian Processing LLC is ordered to serve an answer within 30 days of this decision; and it is further

ORDERED that the parties shall serve document demands on or before January 27, 2022; and it is further

ORDERED that the parties shall respond to document demands and provide an ESI protocol on or before February 28, 2022; and it is further

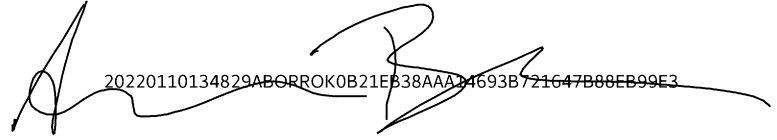
ORDERED that document production shall be completed on or before April 15, 2022; and it is further

ORDERED that parties to complete depositions on or before May 31, 2022; and it is further

ORDERED that fact discovery to be completed on or before June 30, 2022; and it is further

ORDERED that parties to complete expert discovery on or before September 15, 2022; and it is further

ORDERED that NOI to be filed October 3, 2022, with dispositive motions to be filed within 30 days of filing of the NOI.



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1/10/2022
DATE

ANDREW BORROK, 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