

**BPPC, LLC v Druker Co. Ltd.**

2022 NY Slip Op 31521(U)

April 27, 2022

Supreme Court, Kings County

Docket Number: Index No. 524438/2019

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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BPPC, LLC d/b/a GREAT EASTERN ENERGY,

Plaintiff, Decision and order

- against -

Index No. 524438/2019

THE DRUKER COMPANY LTD.,

Defendant, April 27, 2022

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §3212 seeking summary judgement on the grounds they owe no money to the plaintiff and that consequently the complaint should be dismissed as a matter of law. The plaintiff opposes the motion arguing there are significant questions of fact which foreclose a summary determination at this time. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On March 31, 2016 the plaintiff BPPC (also known as GEE) entered into a contract with defendant Druker Company Ltd., whereby GEE would supply electricity service to Druker's ten entities through a local distribution company named Eversource. The contract contained a fixed price per kilowatt hour from December 2016 through November 2017. Pursuant to the contract Eversource sent Druker monthly bills and Druker timely paid each bill. On June 21, 2017 Druker entered into contracts with an entity called Spark Energy essentially replacing GEE with Spark Energy commencing November 2017. Eversource was never made aware

of the change and Spark Energy never enrolled with Eversource. Thus GEE was never un-enrolled as the energy supplier and continued to supply energy past November 2017 to twenty out of twenty-one accounts of Druker. In this lawsuit GEE seeks \$372,581.03 that it claims it is owed for variable rates of service as opposed to the fixed rate. Further, GEE seeks \$264,524.24, representing sales tax which is owed to the Commonwealth of Massachusetts for the electricity GEE sold to Druker. Druker insists no money is owed and has now moved seeking summary judgement dismissing the lawsuit. GEE opposes the motion noting there are factual issues which foreclose a summary determination at this time.

#### Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

Essentially, Druker asserts it does not have to pay additional invoices sent by GEE which contain bills for

electricity at the higher variable rate for the (between two and five) billing cycles following November 2017. Druker notes that pursuant to the contract Druker is only obligated to pay invoices sent by Eversource and that all such invoices were paid. Druker argues there is no mechanism whereby GEE has the ability to submit any such invoices and consequently there are no questions of fact such invoices need not be paid. Thus, Druker insists that "no provision in the Contract obligates Druker to pay anything other than the single monthly invoice issued by Eversource" (see, Defendant's Second Memorandum of Law in Support, page 2). However, an examination of the contract indicates otherwise. Paragraph 3 of the contract states that "GEE will invoice Customer monthly for electricity delivered under this Agreement, as measured by the LDC [local distribution company -Eversource- in this case] and customer will pay each invoice" (id). The contract does state that the "customer may receive a single bill of both commodity and delivery costs from the LDC or each of the LDC and GEE may invoice Customer separately. GEE may assign and sell Customer accounts receivable to LDC" (id) and that "where available, Customer will be provided with complete billing under which Customer will receive a single bill from the LDC for Distribution Service and Supplier Service provided by GEE" (id). Thus, while GEE has the right to permit the LDC to submit invoices, the contract clearly permits GEE to

send its own invoices to Druker as well. Moreover, on July 26, 2017 GEE sent a notice to Druker informing them that the contract entered into between the parties was soon expiring and that if no action was taken then any fixed rate plan would be converted to a variable rate plan. Indeed, the funds sought concern the difference between the fixed and variable rates for electricity following the expiration of the contract and the failure to enroll Spark instead of Eversource. Thus, while the plaintiff has not produced any specific invoices for the amounts sought and is relying on a spreadsheet it produced, there are surely questions of fact whether the plaintiff had the right to send invoices and whether Druker in fact owes the money sought by Drucker.

Likewise, there are similar questions of fact whether the fees sought to pay the taxes owed to the Commonwealth of Massachusetts are proper. Paragraph 9 of the agreement states that the "customer will be liable for and pay all taxes, assignments or surcharges, which are imposed with respect to the electricity provided hereunder. If Customer is exempt from such taxes Customer is responsible for identifying and requesting any exception from the collection of the taxes by filing appropriate documentation with GEE. GEE will indemnify and hold the Customer harmless from all taxes, royalties, fees or other charges incurred before title passes with respect to the electricity

provided hereunder" (id). Thus, it is Druker's obligation to pay any taxes. Druker argues that "GEE has no claim against Druker for the sales tax it owes MassDOR unless and until GEE pays MassDOR" (see, Memorandum of Law in Reply, page 3). However, there is no basis for that assertion and surely in any event there are questions of fact whether Druker has any reason to withhold the payment of taxes. This is particularly true since there are questions whether the bill sent to Druker for variable electricity payment is valid. If valid then likewise the taxes owed are equally valid. Therefore, based on the foregoing, the motion seeking summary judgement is denied.

Turning to the plaintiff's motion seeking to amend the complaint, it is well settled that a request to amend a pleading shall be freely given unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit (Adduci v. 1829 Park Place LLC, 176 AD3d 658, 107 NYS3d 690 [2d Dept., 2019]). The decision whether to grant such leave is within the court's sound discretion and such determination will not lightly be set aside (Ravnikar v. Skyline Credit-Ride Inc., 79 AD3d 1118, 913 NYS2d 339 [2d Dept., 2010]). Therefore, when exercising that discretion the court should consider whether the party seeking the amendment was aware of the facts upon which the request is based and whether a reasonable excuse for any delay has been

presented and whether any prejudice will result (Cohen v. Ho, 38 AD3d 705, 833 NYS2d 542 [2d Dept., 2007]).


The claim for a breach of contract was clearly contemplated by the plaintiff and the defendant. The entire thrust of the lawsuit concerns the agreement between the parties which is repeatedly referenced throughout the original complaint and indeed throughout the entire lawsuit. The defendant can hardly claim any surprise or prejudice at all. Nor should the amendment demand anything other than minimal, if any, discovery since this cause of action has been the underlying basis of the lawsuit since it has started.

Therefore, the motion seeking to amend the complaint is granted.

So ordered.

ENTER:

DATED: April 27, 2022  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC