

**Hartree Partners, LP v Vaquero Permian Processing
LLC**

2023 NY Slip Op 31204(U)

April 10, 2023

Supreme Court, New York County

Docket Number: Index No. 651999/2021

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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| HARTREE PARTNERS, LP | INDEX NO. <u>651999/2021</u> |
| Plaintiff, | MOTION DATE <u>N/A</u> |
| - v - | MOTION SEQ. NO. <u>006</u> |
| VAQUERO PERMIAN PROCESSING LLC, | |
| Defendant. | DECISION + ORDER ON MOTION |
| -----X | |

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 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, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Hartree Partners LP’s (**Hartree**) motion for summary judgment must be granted. Simply put, Storm Uri (hereinafter defined) could not be a basis for force majeure under the Buy Back Agreement (hereinafter defined) or Vaquero Permian Processing LLC (**Vaquero**)’s other actions because they entered into the Buy Back Agreement specifically with Storm Uri in mind. This was a known risk and the known risk occurred (*Victoria’s Secret Stores, LLC v Herald Square Owner LLC*, 70 Misc3d 1206[A], at * 1 [Sup Ct, NY County 2021], citing *General Electric Co. v Metals Resources Group Ltd.*, 293 AD2d 417 [1st Dept 2022]). Under those circumstances, Vaquero’s attempt to read additional terms or delivery requirements into what was a supplemental agreement created to deal with the precise contingency which occurred is unavailing absent express language in Vaquero’s favor. The timing and purpose of the Buy Back Agreement places Vaquero under a high burden of proof that has in no way been met.

More specifically, reference is made to this Court's Decision and Order (the **Prior Decision**; NYSCEF Doc. No. 30), dated January 10, 2022, pursuant to which this Court expressed substantial concern that Vaquero's motion to dismiss was entirely frivolous and that under the best reading of the facts, issues of fact exist as to whether Hartree was entitled to summary judgment based on Vaquero's position that physical delivery of the gas was required under the Buy Back Agreement. Now, on the fully developed record, it is clear that Vaquero's position is entirely without merit. To wit, Vaquero's employees testified at their depositions that Vaquero's practice was never to deliver the amounts of gas subject to a buy back.

Sanctions are however not called for because it does not appear that Vaquero's position has dramatically slowed down the proceedings. It has simply made an unavailing argument. This without more is insufficient to support an award of sanctions.

The Relevant Facts and Circumstances

Reference is made to (i) a Base Contract for Sale and Purchase of Natural Gas, dated July 11, 2019, which incorporated by reference the General Terms and Conditions for Sale and Purchase of Natural Gas published by the North American Energy Standards Board (the **NAESB Agreement**; NYSCEF Doc. No. 73), dated as of July 11, 2019, by and between Hartree and Vaquero, (ii) a Physical Natural Gas Contract (the **October 2019 Agreement**; NYSCEF Doc. No. 74), dated October 23, 2019, by and between Hartree as Buyer and Vaquero as Seller, subject to the terms of the NAESB Agreement, pursuant to which Vaquero agreed to sell to Hartree 50,000 MMBtu per day for the period from April 1, 2020 to March 31, 2021, (iii) a series of ICE Chats (the **ICE Chats**; NYSCEF Doc. No. 75) dated February 12, 2021, between

Rafael Martinez, a natural gas trader for Hartree, and Cassondra Wynn, Vaquero's Vice President of Marketing, pursuant to which the parties agreed that Vaquero would buy back 15,000 MMBtu per day each day from February 13, 2021 through February 16, 2021 at the then-current market price, (iv) a Physical Natural Gas Contract (the **Buy Back Agreement**; NYSCEF Doc. No. 76) dated February 16, 2021 confirming the agreement reached in the ICE Chats on February 12, 2021 that Vaquero would buy from Hartree 15,000 MMBtu of gas per day from February 13, 2021 to February 16, 2021 at the Index Price: NG-Waha-GDM + USD 1.25 per MMBtu, (v) a notice of Force Majeure dated February 14, 2021 (the **February 14 Force Majeure Notice**; NYSCEF Doc. No. 79) sent by Ms. Wynn to Mr. Martinez pursuant to which Vaquero declared a Force Majeure event for February 14, 2021 per the NAESB Agreement and requested that all markets reduce by 50% for the day; (vi) a notice of Force Majeure dated February 15, 2021 (the **February 15 Force Majeure Notice**; NYSCEF Doc. No. 80) sent by Ms. Wynn to Mr. Martinez pursuant to which Vaquero declared a Force Majeure event for February 15, 2021 per the NAESB Agreement and requested that all markets reduce by 100% for the day; (vii) a notice of Force Majeure dated February 16, 2021 (the **February 16 Force Majeure Notice**; NYSCEF Doc. No. 81, and, together with the February 14 Force Majeure Notice and the February 15 Force Majeure Notice, hereinafter, collectively, the **Force Majeure Notices**) sent by Ms. Wynn to Mr. Martinez pursuant to which Vaquero declared a Force Majeure event for February 16, 2021 per the NAESB Agreement and requested that all Markets reduce by 100% for the day.

Pursuant to the NAESB Agreement, transactions between the parties were to be effectuated either through telephone calls or electronic data interchange, *i.e.*, email, IM, or other electronic

message platform, with the terms of the transaction set forth in a subsequent Transaction Confirmation (NYSCEF Doc. No. 73, §§ 1.2, 2.32). The NAESB Agreement also excused performance (except a party's obligation to make certain payments) in the event a force majeure:

11.1. Except with regard to a party's obligation to make payment(s) due under Section 7, Section 10.4, and Imbalance Charges under Section 4, neither party shall be liable to the other for failure to perform a Firm obligation, to the extent such failure was caused by Force Majeure. The term "Force Majeure" as employed herein means any cause not reasonably within the control of the party claiming suspension, as further defined in Section 11.2.

11.2. Force Majeure shall include, but not be limited to, the following: (i) physical events such as acts of God, landslides, lightning, earthquakes, fires, storms or storm warnings, such as hurricanes, which result in evacuation of the affected area, floods, washouts, explosions, breakage or accident or necessity of repairs to machinery or equipment or lines of pipe; (ii) weather related events affecting an entire geographic region, such as low temperatures which cause freezing or failure of wells or lines of pipe; (iii) interruption and/or curtailment of Firm transportation and/or storage by Transporters; (iv) acts of others such as strikes, lockouts or other industrial disturbances, riots, sabotage, insurrections or wars, or acts of terror; and (v) governmental actions such as necessity for compliance with any court order, law, statute, ordinance, regulation, or policy having the effect of law promulgated by a governmental authority having jurisdiction. Seller and Buyer shall make reasonable efforts to avoid the adverse impacts of a Force Majeure and to resolve the event or occurrence once it has occurred in order to resume performance

(*id.*, §§ 11.1-11.2).

After entering into the October 2019 Agreement, the parties entered into approximately 20 buy back agreements pursuant to which Vaquero bought back certain volumes of natural gas from Hartree (NYSCEF Doc. No. 70, ex. 1). Ms. Wynn testified at her deposition that the purpose of the buy back agreements was to reduce the volume of natural gas that a seller was obligated to physically deliver to a buyer (tr at 18-19, lines 16-4 [NYSCEF Doc. No. 68]). Paula Cheater, a scheduler and trader at Vaquero, testified at her deposition that one of the reasons a seller may enter into a buy back agreement is because the seller does not have sufficient gas to deliver to the

buyer on a specific day (tr at 26, lines 1-7 [NYSCEF Doc. No. 67]). She also testified that the amount of gas that a seller buys back under a buyback agreement is netted against the volume of the sale and that there is no flow of gas back and forth (*id.*, at 28, lines 3-19). Significantly, Ms. Wynn also testified at her deposition that when Vaquero entered into buy back agreements, it did not deliver the volume of gas subject to the buy back agreement to the buyer and the buyer did not deliver that volume back to Vaquero (tr at 23, lines 3-9). Ms. Cheater testified that the way the buy back is settled is not through the delivery of gas but financially through price adjustments (tr at 47, lines 15-22).

On February 12, 2021, in anticipation of a winter storm in Texas that would become known as Winter Storm Uri (**Storm Uri**), Ms. Wynn contacted Mr. Martinez through the ICE Chats to request another buy back agreement of gas that was to be delivered each day from February 13, 2021 through February 16, 2021. In the ICE Chats, Ms. Wynn wrote that she expected a lot of “freeze offs” during those days. At her deposition, she testified that when she wrote “freeze offs”, she meant that there would be reductions in the gas available to Vaquero (tr at 74, lines 10-13). She also testified that the purpose of the buy back was to minimize Vaquero’s exposure caused by the anticipated reduction in gas (*id.*, at 72, lines 10-13). The parties agreed to a buy back of 15,000 MMBtu of natural gas per day each day from February 13, 2021 through February 16, 2021 at the then-current market price, as reflected in the Buy Back Agreement.

Subsequently, in a text message to Mr. Martinez and Ms. Cheater, and after issuing the Force Majeure Notices, Ms. Wynn wrote that the Buy Back Agreement was not valid under a Force Majeure event (NYSCEF Doc. No. 78, at 5). On February 22, 2021, Vaquero sent a copy of the

Buy Back Agreement to Hartree with handwritten notations that the agreement was only for February 13, 2021, that the total buy back amount was 15,000 MMBtu, and noting “FM [Force Majeure] on 2/14-2/16” (NYSCEF Doc. No. 82). This copy was signed and dated by Ms. Wynn. In response, Mark Lester, Head of Credit at Hartree, rejected the position that the Buy Back Agreement was not valid in the event of a Force Majeure Event and wrote an email to Scott Maurer at Vaquero requesting \$6,400,000 in collateral as security for amounts due Hartree in support of its net gas position for February 2021 (NYSCEF Doc. No. 83).

On March 5, 2021, Vaquero issued an invoice to Hartree for February 2021 (NYSCEF Doc. No. 84). Vaquero’s invoice reflected on February 13, 2021 that Vaquero charged Hartree \$123,000 for 50,000 MMBtu of gas and agreed to pay Hartree \$2,322,975 for the 15,000 MMBtu of gas that it bought back under the Buy Back Agreement. Vaquero’s invoice did not reflect any buy back for February 14, 2021 through February 16, 2021 and instead charged Hartree \$505,655.48 for the month. On March 10, 2021, Hartree issued its own invoice to Vaquero, reflecting the buy back amount for each of the four days from February 13, 2021 through February 16, 2021 (NYSCEF Doc. No. 85). In total, Hartree charged Vaquero \$6,352,569.96 for the month of February 2021. Ms. Wynn rejected Hartree’s invoice on behalf of Vaquero on March 15, 2021 (NYSCEF Doc. No. 86) and on March 25 she emailed Hartree that Vaquero received payment of \$444,155.04, leaving an unpaid amount of \$61,500.44 (NYSCEF Doc. No. 87). The amount paid reflected the amount owed by Hartree for the month of February 2021 excepting February 14, 2021 through February 16, 2021.

Hartree sued by summons and complaint dated March 25, 2021 (NYSCEF Doc. Nos. 1-2) asserting a single cause of action for breach of contract, alleging that Vaquero breached the Buy Back Agreement. Hartree now moves for summary judgment, arguing that Vaquero failed to perform under the Buy Back Agreement and that their performance was not excused by Force Majeure. They also argue that Vaquero should be sanctioned for frivolous litigation conduct in connection with the position taken that the Buy Back Agreement required physical delivery of the gas to Hartree such that their performance under the Buy Back Agreement was excused. Vaquero argues that the Force Majeure applied to the Buy Back Agreement under the express terms of the NAESB Agreement such that their performance was excused and that material issues of fact remain that preclude summary judgment. Vaquero also argues that the request for sanctions should be denied because their position on the motion to dismiss was a legal argument addressing the sufficiency of Hartree's allegations.

Discussion

On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once such a showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish the existence of any material issue of fact requiring trial (*id.*).

The elements of a cause of action for breach of contract and (i) the existence of a contract, (ii) the plaintiff's performance thereunder, (iii) the defendant's breach thereof, and (iv) resulting damages (*Lebedev v Blavatnik*, 193 AD3d 175, 182 [1st Dept 2021]).

Summary judgment is appropriately granted on the facts of this case. As discussed above, the Buy Back Agreement was a valid contract that was entered into precisely with Storm Uri in mind. Storm Uri did not excuse performance under the Buy Back Agreement which were purely financial because the agreement contemplated a known risk and the known risk occurred. Therefore, Vaquero's attempt to read additional terms or delivery requirements into what was a supplemental agreement created to deal with the precise contingency which occurred fails and summary judgment must be granted.

Vaquero's opposition papers fail to raise a triable issue of fact. Their own witnesses have testified that delivery was not a requirement under buy-back agreements. For completeness, Bob Broxson's report is also not helpful to their position. Mr. Broxson testified at his deposition that he has no experience whatsoever in working with buy-back agreements and that everything he knows about buy back agreements has been from what he has read or been told by other people who he simply would not identify (tr at 8, lines 13-21 [NYSCEF Doc. No. 113]); (Broxson Aff., ¶ 6 [NYSCEF Doc. No. 108]); (tr at 27-28, lines 23-25). An expert witness may base their opinion on personal knowledge or on facts that are in the record (*Admiral Ins. Co. v Joy Contractors, Inc.*, 19 NY3d 448, 457 [2012]). Mr. Broxson's testimony is based on neither. It is based solely on undisclosed sources and unsupported by any published standard or evidence

(*Warshak v City of New York*, 200 AD3d 548, 548 [1st Dept 2021]). Thus, his opinion is not admissible and does not create an issue of fact precluding the award of summary judgment.

Vaquero's affirmative defenses are ripe for dismissal. The affirmative defense for unjust enrichment must be dismissed because the issue is addressed by the Buy Back Agreement. Thus, there can therefore be no claim for unjust enrichment (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012]). The frustration of purpose defense also does not apply because the event that allegedly frustrated the purpose, *i.e.*, Storm Uri, was the exact event that precipitated the Buy Back Agreement, and therefore it was foreseeable (*Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009]; *Victoria's Secret Stores, LLC*, 70 Misc3d 1206[A] at * 1). Finally, the defense of failure of consideration, which was not pled in Vaquero's answer and is therefore waived, also fails on the merits. Vaquero entered into the Buy Back Agreement to minimize its exposure in the event the gas supply was reduced. It does not matter that subsequently they delivered a Force Majeure notice. The bargained for benefit had already been received.

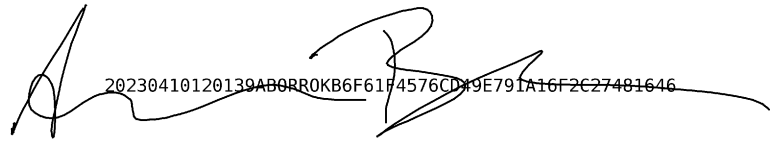
The branch of the motion seeking sanctions is however denied. Frivolous litigation conduct can be defined as (i) conduct without legal merit, (ii) conduct undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another, or (iii) conduct asserting material factual statements that are false (*Levy v Carol Management Corp.*, 260 AD2d 27, 34 [1st Dept 1999]). In determining whether to award sanctions for frivolous litigation conduct, the Court should consider whether the conduct was continued when it became apparent or should have been apparent that it was frivolous or when it was brought to the attention of the parties or to counsel (*Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 11 [1st Dept 2017]). As discussed above,

Vaquero’s position does not appear to have dramatically slowed down the proceedings. It simply made an unavailing argument. This without more is insufficient to support an award of sanctions.

It is hereby ORDERED that Hartree’s motion for summary judgment is granted except to the extent that it seeks sanctions against Vaquero; and it is further

ORDERED that Vaquero’s affirmative defenses are dismissed; and it is further

ORDERED that Hartree is directed to enter judgment on notice.



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4/10/2023
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