

Innophos, LLC v Rohde Asset Holdings, Inc.

2023 NY Slip Op 31674(U)

May 15, 2023

Supreme Court, New York County

Docket Number: Index No. 651980/2021

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. VERNA L. SAUNDERS, JSC</u>	PART	36
	<i>Justice</i>		
	-----X	INDEX NO.	<u>651980/2021</u>
	INNOPHOS, LLC.,	MOTION SEQ. NO.	<u>001</u>
	Plaintiff,		

- v -

ROHDE ASSET HOLDINGS, INC. F/K/A TRIARCO
INDUSTRIES, INC., RODGER R. ROHDE, JR. and
CHRISTOPHER J. ROHDE,
Defendants.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 43, 44, 47

were read on this motion to/for DISMISS.

In this action seeking damages based on breach of contract (first cause of action) and declaratory relief (second cause of action), defendants move the court, pre-answer, to dismiss plaintiff’s amended complaint pursuant to CPLR 3211(a)(7), for failure to state a cause of action and CPLR 3211(a)(1), founded upon the existence of documentary evidence, or, in the alternative, staying all proceedings until work underway to close a permit for two evaporation pools on plaintiff’s property in Green Pond, South Carolina is completed so it may be determined whether plaintiff has been injured by any action by defendants.

This action arises out of a dispute as to the scope of an indemnification clause contained in the Asset Purchase Agreement (“agreement”) entered into between the parties on or about December 31, 2012. Pursuant to said agreement, defendants sold “Green Pond Facilities”, located at 88 Weiss Lane, Green Pond, South Carolina, to plaintiff. (NYSCEF Doc. No. 11, *amended complaint*, ¶ 10). Among the assets defendants transferred to plaintiff are two lined evaporation pools into which wastewater was discharged for aeration and evaporation purposes. Plaintiff is now ceasing operations at the Green Pond Facilities, and the South Carolina Department of Health and Environmental Control (“SCDHEC”) directed that plaintiff submit a closure plan for Pool 1 and Pool 2. SCDHEC approved the closure plans for Pool 1 and Pool 2 on December 18, 2020, and March 9, 2021, respectively. (*id.* at ¶ 13). Plaintiff asserts that defendants discharged unknown substances into both evaporation pools from at least 1981 until and through the closing under the agreement. (*id.* at ¶ 13). The closure includes the preparation, approval, and implementation of closure plans for both pools. Plaintiff asked that defendants pay no less than \$275,000.00 as costs to close both pools pursuant to the agreement’s indemnification provision. (*Id.* at ¶ 14-16). When defendants refused to pay the amount, plaintiff commenced this action, alleging that (1) defendants breached their contractual obligation to indemnify plaintiff pursuant to the agreement; and (2) seeking a declaratory judgment that defendants are responsible for and required to reimburse plaintiffs for costs associated with closing Pool 1 and Pool 2. (*Id.* at ¶ 38-39).

In the instant motion, defendants move, pre-answer, arguing that plaintiff has failed to state a cause of action for contractual indemnification because it fails to allege that, defendants discharged anything into Pool 1 which caused plaintiff to incur an expense and that plaintiff failed to eliminate its own wastewater discharges after the closing. (NYSCEF Doc. No. 29, *Defs' Motion to Dismiss*, pg. 14). Secondly, defendants allege that the documentary evidence provided to the court utterly establishes that the condition of the water, pools, soil, and groundwater did not violate any environmental law immediately prior to plaintiff taking title to the Green Pond property. Current investigation by GEL Engineering ("GEL"), plaintiff's own consultant hired to help close the pools, which commenced testing of the pools in July 2019, do not show that contaminated material would need to be cleaned up or removed from Pool 2, as Pool 2 was not used for any purpose. Defendants further allege that the approved closure plan that GEL Engineering submitted to SCDHEC establishes that the liquid in Pool 1 could be discharged to the grounds without adverse impact, there were no groundwater problems, and that it did not appear that sludge was present in Pool 1. The lack of sludge is consistent with GEL's report that in 1985, Pool 1 was emptied of several feet of dirt and a liner was added. (*id.* at 16). Defendants argue that, without proof that any condition will be found during the closeout of Pools 1 and 2 that would require removal/remediation, their responsibility to indemnify is not triggered. Additionally, defendants further maintain that given that plaintiff discharged its own waste into Pool 1 for almost five years since taking title to the Green Pond property, it will be impossible to determine percentages of wastewater attributed to the parties, should GEL find wastewater that requires remedial treatment. (*id.* at 15). Defendants buttress this point by relying on a September 24, 2012 memo they received from SCDHEC (approximately three months before the agreement closing) affirming that no groundwater contamination issues were found in Pool 1, and that no environmental concerns with Pool 2 is anticipated. (*id.* at 7).

Furthermore, defendants contend that plaintiff has not proffered requested documents, which they believe will show that no adverse environmental conditions which might require cleanup or removal were present when the parties entered the agreement and plaintiff took title to the Green Pond property. (*id.* at 9). Defendants maintain this action should be dismissed if plaintiff destroyed its copies of the environmental reports provided to it by defendants or in the alternative, all proceedings should be stayed until the closure of Pools 1 and 2 is completed and plaintiff has provided defendants with all required documents. (*id.* at 11).

Additionally, defendants posit that plaintiff's failure to provide defendants with proper notice or the requested documents and information pursuant to the agreement has severely prejudiced defendants. Defendants claim plaintiff is voluntarily closing the Green Pond facilities but has yet to reasonably cooperate and assist in determining the calculation of any amounts that could be indemnifiable. (*id.* at 19). Hence, according to defendants, the amended complaint should be dismissed because plaintiff has not complied with the pre-litigation clause pursuant to the agreement.

Defendants also argue that the plaintiff's claims are premature, speculative, and that its cause of action for declaratory judgment must be dismissed because plaintiff has an adequate remedy at law, namely, its cause of action for indemnification. Defendants further maintain that plaintiff claim is speculative and premature since the investigation underway to ascertain the loss incurred in closing the pools has yet to be concluded. (*id.* at 24, 25).

In opposition, plaintiff argues that the amended complaint sufficiently states a cause of action for contractual indemnification because it recites the relevant portion of the agreement's indemnification provision. (NYSCEF Doc. No. 44, *memo in opposition*, pg. 10). In particular, the "Excluded Liabilities" portion of the agreement provides that all cleanup and removal costs "arising out of, relating to or resulting from any environmental law or environmental, health or safety matter or condition" that relate to the pools must be indemnified by the defendants. (*id.*) Secondly, plaintiff argues that the documentary evidence submitted with the motion to dismiss is insufficient to warrant dismissal at this stage in the litigation because it does not utterly refute plaintiff's factual allegations and does not conclusively establish a defense as a matter of law. (*Id.* at pg. 11). The documentary evidence focuses on whether the pools were contaminated or whether there were groundwater problems, but these are not pre-conditions for indemnification obligations to arise as defendants' claim. (*id.*)

Next, plaintiff contends that it has stated a viable declaratory relief and that CPLR 3001 gives the court discretion to render a declaratory judgment. (*id.*). Therefore, plaintiff can state both contractual indemnity and declaratory judgment as alternative causes of action pursuant to CPLR 3014.

Plaintiff further asserts that its claims are not premature or speculative because it has incurred, and will continue to incur, costs to close the pools. (*Id.* at 13). Plaintiff maintains that defendants' argument that its indemnification requirement is not triggered unless there is a remediation is a flawed interpretation of the agreement. (*id.*)

Plaintiff also argues that this proceeding should not be stayed as it has complied with and performed all its obligations under the agreement since it sent defendants a written notice on or about October 15, 2020, of a forthcoming indemnifiable cost, before sending a formal indemnification demand on February 19, 2021. (*id.* at 14). Plaintiff further avers that defendants' pre-litigation requests for information lacked specificity as the requests did not itemize the documents necessary to help determine the validity of the indemnification claim.

In their reply, defendants argue that plaintiff's continual refusal to share with them all the documents given to plaintiff by defendants concerning the environmental condition of the Green Pond facilities at the time plaintiff took title is in breach of the duty to cooperate pursuant to the agreement. (NYSCEF Doc. No. 47, *reply*, pg. 5). Defendants maintain that no evidence of contamination currently exists for which remediation of the pools would be required. The indemnification provisions of the agreement require that an environmental condition exist before indemnification can arise. (*id.* at pg. 6). Therefore, to the extent the documents requested are not provided or have been destroyed in violation of the express terms of the agreement, the amended complaint should be dismissed.

Lastly, defendants contend that the agreement does not have a blanket indemnification, and therefore, plaintiff's actions after purchasing the subject property are relevant to whether defendants should indemnify plaintiff for the cost of cleaning wastewater, if found. (*id.* at pg. 8). Contained in the agreement are various sections which outline what events may give rise to indemnification. Defendants contend that plaintiff having discharged industrial waste to Pool 1 for five years after taking title to the Green Pond property, it would render it nearly impossible to

establish an indemnification claim if the permit closure proves the need for remediation. (*id.* at 7).

When considering a motion to dismiss plaintiff's complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

The right to contractual indemnification depends upon the specific language of the contract. (see *Ging v F.J. Sciame Constr. Co.*, 193 AD3d 415, 418 [1st Dept 2021]; *Trawally v City of New York*, 137 AD3d 492, 493 [1st Dept 2016].) The intent of the parties governs when interpreting a contract and should be construed so as to give full meaning and effect to all of its provisions. (see *American Express Bank, Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990]; *Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 409 [1st Dept 1990].) Here, plaintiff has sufficiently pleaded a claim for contractual indemnification. Plaintiff recites the relevant portions of the agreement's indemnification provision. Specifically, plaintiff cites to sections 2.04, 2.05 and 9.02 that, when read together, allow for a possible inference that defendants are obligated to indemnify plaintiff for costs associated with closing Pool 1 and Pool 2 unless there are hazardous materials generated, transported, disposed, or released by plaintiff since taking title to the Green Pond property. This court notes that GEL Engineering, plaintiff's own consultant hired to help close the pools, commenced testing of the pools in July 2019 and, it is not lost on this court that GEL's investigation may conclusively establish whether plaintiff has generated hazardous material since taking title to the Green Pond property. However, at this juncture, after viewing the pleadings in the light most favorable to the non-moving party and affording plaintiff the benefit of every possible inference, plaintiff has sufficiently pleaded a colorable claim for contractual indemnification. Thus, that branch of the motion seeking dismissal of plaintiff's breach of contract claim, premised on CPLR 3211(a)(7), is denied.

Turning next to CPLR 3211(a)(1), dismissal based on documentary evidence is warranted only where such evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. (see CPLR 3211[a][1]; see *Leon v Martinez*, 84 NY2d 83, 88 [1994].) Dismissal is proper where the documents relied upon definitively disposed of a plaintiff's claim. (see *Bronxville Knolls v Webster Town Ctr. Pshp.*, 634 NYS2d 62, 63 [1995]; *United States Trust Co. v Gill & Duffus, Inc.*, 189 AD2d 655, 655 [1st Dept [1993].) Here, while all the reports about the condition of the pools proffered thus far suggest that the liquid in Pool 1 could be discharged to the ground without adverse impact and that there were no groundwater problems when the Green Pond property was transferred to plaintiff, it does not follow that all the other documents that remain to be shared will confirm said conclusion. Hence, the import from the documents already shared, while probative, is certainly not dispositive and does not utterly establish a defense as a matter of law.

Next, the court finds defendants' contention that plaintiff has failed to "reasonably cooperate and assist" in determining the validity of the indemnification claim and resolving the

matter as contemplated under section 9.06 of the agreement by not providing records and documents pertinent to the claim unavailing. In pertinent part, section 9.06 reads:

“[if] an Indemnified Party asserts a claim for indemnification under this Agreement on account of a Loss which does not result from a Third Party Claim (such a claim, a ‘Direct Claim’), the Indemnified Party shall reasonably cooperate and assist the Indemnifying Party in determining the validity of the Direct Claim and in otherwise resolving such matter. Such assistance shall include (i) providing reasonable access to and copies of information, records and documents relating to such matters so long as the Indemnifying Party complies with the Confidentiality Requirements with respect to such information...”

Plaintiff commenced this action in accordance with section 9.04 of the agreement which provides that a claim may be asserted provided a written notice of such action describing in reasonable details the facts and circumstances with respect to the subject matter of the claim is given to the party not asserting the claim. It is true that defendants requested certain documents from the plaintiff. However, the timeline of this matter establishes that plaintiff has reasonably cooperated and assisted in this indemnification claim action. Plaintiff sent defendants a written notice on or about October 15, 2020, of a forthcoming indemnifiable cost (NYSCEF Doc. No. 13, *Innophos Indemnification Notice*) and thereafter, sent a formal indemnification demand on February 19, 2021 (NYSCEF Doc. No. 15, *Second Demand for Indemnification*). Defendants responded to both of plaintiff’s indemnification claim notices but in return did not request plaintiff share specific documents assessing the validity of the indemnification demand in those responses. (NYSCEF Doc. No. 14, *Rhode attorney response to first demand*; NYSCEF Doc. No. 16, *Rhode attorney response to first demand*). Plaintiff filed the original complaint on March 25, 2021, and the amended complaint on April 23, 2021. (NYSCEF Doc. No. 1, *Notice of Motion*; NYSCEF Doc. No. 6, *Amended Complaint*). It was only on April 7, 2021, that defendants requested “environmental information [that defendants provided to plaintiff during the agreement negotiation], including testing and remediation, any monitoring reports sent to SCDHE during the time it used the evaporation [Pool 1 and Pool 2].” This request was made after this matter commenced and defendants were notified of same. Plaintiff furnished defendants with a document from the SCDHEC on May 13, 2021. (NYSCEF Doc. No. 22, *SCDHEC Construction Permit*). Thus, this chronicle of communication between the parties belies defendants’ allegation that plaintiff has not complied with its obligation to reasonably assist and cooperate to evaluate the validity of the claim.

Moving to whether plaintiff’s claims are premature or speculative, defendants argue that the expenses plaintiff has incurred are simply what any company would pay as required by environmental law to close a wastewater treatment facility permit. Where the nexus between the injury claimed and cause of the injury is too remote and speculative, it cannot support a claim for damages. (see *Howard S. v Lillian S.*, 62 AD3d 187, 193 [1st Dept 2009]; *Megarix Furs v Gimbel Bros.*, 172 AD2d 209, 213 [1st Dept 1991].) Here, the costs incurred are as a result of plaintiff closing Pool 1 and Pool 2 and the amount will be ascertained during discovery. Therefore, the court finds plaintiff’s claims are neither premature nor speculative.

Finally, in the alternative, defendants seek a stay of proceedings so that plaintiff can comply with section 6.01 of the agreement which requires that plaintiff afford defendants reasonable access to books and records that defendants shared with plaintiff relating to periods prior to closing the agreement. The granting of a stay of an action rest within the court's discretion pursuant to CPLR 2201. (see *952 Assoc., LLC v Palmer*, 52 AD3d 236, 236 [1st Dept 2008].) This court denies that defendants' request of a stay of the action for plaintiff to comply with section 6.01 of the agreement insofar as defendants have failed to establish that the documents sought cannot be obtained during discovery.

The court, however, grants that branch of defendants' motion seeking to dismiss plaintiff's declaratory judgment cause of action insofar as it is well-settled that a declaratory judgment does not lie where a breach of contract claim affords the plaintiff an adequate remedy (see *Singer Asset Fin. Co., LLC v Melvin*, 33 AD3d 355, 358 [1st Dept 2006]; *Artech Info. Sys., L.L.C. v Tee*, 280 AD2d 117, 125 [1st Dept 2001].) All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

ORDERED that defendants' motion is granted solely to the extent that plaintiff's second cause of action for declaratory judgment is dismissed, and it is otherwise denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants; and it is further

ORDERED that defendants shall interpose an answer within twenty (20) days after service of this decision and order with notice of entry; and it is further

ORDERED that parties are to appear for a remote preliminary conference on July 26, 2023, details shall be provided no later than July 24, 2023.

May 15, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE