SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 32

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MACALLOY CORP.,

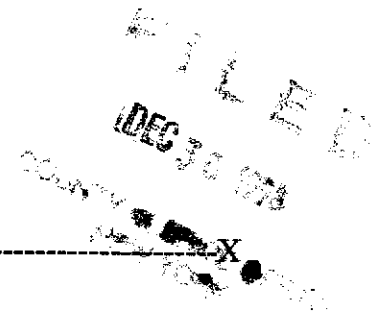
Plaintiff,

-against-

METALLURG, INC.

Defendant.

Index No.
605123-98



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CAROL HUFF, J.:

Plaintiff Macalloy Corp. ("Macalloy") moves for an order pursuant to CPLR 6301 enjoining defendant Metallurg, Inc. ("Metallurg") from drawing against an Irrevocable Standby Letter of Credit ("Letter of Credit"), or entering judgment pursuant to plaintiff's affidavit of confession of judgment, or enforcing remedies under the security agreement between plaintiff and defendant. The order to show cause issued by this court on October 23, 1998 contained a temporary restraining order enjoining all of the above acts pending the hearing of this motion.

Plaintiff is engaged in the production and sale of ferro-alloys. On August 15, 1996, plaintiff and defendant entered into an agreement ("1996 Agreement") under which plaintiff was to purchase certain chrome ore from defendant over a five year period. In February 1998, defendant served a demand for arbitration alleging that plaintiff had breached the agreement. In May 1998, this Court issued an order denying Macalloy's petition for a stay of arbitration. Before the arbitration, the parties entered into a May 1998 Settlement Agreement ("Settlement Agreement") under which a new sales agreement ("1998 Sales Agreement") was to replace the

1996 Agreement. It called for payment of past due amounts and future purchases of chrome ore. Under the Settlement Agreement, plaintiff posted a $150,000 Letter of Credit, and gave defendant an affidavit of confession of judgment, permitting defendant to enter a judgment in the amount of $1,606,000 in the event that plaintiff breached the terms of the Settlement Agreement or 1998 Sales Agreement, and gave defendant a security interest in its inventory.

The 1998 Sales Agreement contained a force majeure clause as follows:

> 7.01 Force Majeure. Neither party hereto shall be liable for any failure to comply with any of the terms or provisions of this Agreement to the extent any such failure is caused directly or indirectly by Acts of God, fire, flood, strike, union or other labor problems, shortages, war...plant shutdown...changes in applicable law...government restrictions imposed subsequent to the date [apparently meaning the date of the contract] without fault on the part of either of them. Upon the occurrence of any of the type [of events] referred to in this section, the party affected thereby shall give prompt written notice thereof to the other party hereto, together with a description of such event and the duration for which such party expects its ability to comply with the provisions of this agreement to be affected thereby. The party affected shall thereafter devote its reasonable efforts to remedy, to the extent possible, the conditions giving rise to such event and to resume performance of its obligations as promptly as possible...

At the time that plaintiff was negotiating the Settlement Agreement, it knew that it was the subject of enforcement proceedings by both the United States Environmental Protection Agency ("EPA") and the South Carolina Department of Health and Environmental Control ("DHEC"). On April 20, 1998, with the concurrence of the South Carolina agency, the EPA issued a Cease and Desist Order which found that Macalloy's practice of managing industrial dust was "unacceptable" and which had the effect of requiring plaintiff to treat certain effluent created by the smelting process as "hazardous waste."

Plaintiff contends that it could not reasonably comply with the Cease and Desist Order and that after efforts to obtain a modification of the Order proved to be unsuccessful, it decided to

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shut down its ferrochrome processing plant. On September 23, 1998, plaintiff advised defendant that it was invoking the force majeure clause and intended to cancel the purchases called for by 1998 Sales Agreement. In response, defendant contended that the force majeure clause did not apply and that plaintiff was now in default under the agreement.

The doctrines of impossibility and force majeure are closely related. Although the defense of impossibility exists, it is construed narrowly. Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance make performance objectively impossible (Kel-Kim Corp. v. Central Markets, Inc., 70 NY2d 900). Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract (Kel-Kim Corp. v. Central Markets, Inc., supra; 407 East 61st Street Garage v. Savoy Fifth Avenue Corp., 23 NY2d 275)[where a hotel agreed to use best efforts to give a garage the opportunity to store the vehicles of hotel guests in exchange for 10 percent of the garage revenues obtained from guests, the fact that the hotel owned decided to shut down by reason of unprofitable operations did not render the contract void by reason of impossibility]). A force majeure clause, excuses performance due to circumstances beyond the control of the parties (Kel-Kim, supra). Normally, only if the force majeure clause specifically includes the event that actually prevents that party's performance will that party be excused (Kel-Kim, supra; United Equities Co. v. First National City Bank, 41 NY2d 1032). The fact that a contract becomes more difficult and expensive to perform because of a law enacted after its execution does not excuse performance (Coastal Power v. New York State Public Service Comm., 153 AD2d 235).

Plaintiff contends that the force majeure clause applies in the event that they decide to shut

down the plant by reason of the action of the regulatory agencies. Plaintiff admittedly knew of the EPA action before it executed the Settlement Agreement and 1998 Sales Agreement, and states that at the time, it expected to be able to convince the EPA to vacate or greatly modify its order, and that it shut down the plant when discussions with EPA did not result in any relief.

There are several reasons why force majeure does not apply. Both the law relating to force majeure clauses and the contract itself provide that performance is excused only upon the occurrence of an event which is beyond the control of the parties, i.e. not the fault of either of the parties. The action of the EPA was taken by reason of violation of environmental regulations, so that plaintiff cannot reasonably claim to be free from fault. Moreover, the doctrine of force majeure is designed to protect a party from the effects of an action which is beyond the contemplation of the parties. Since plaintiff knew of the EPA action before it entered into the relevant agreements, it was certainly forseeable at the time that plaintiff would either have to modify its plant operations or shut down the plant. Shutting down the plant appears to have been a voluntary act and was compelled by governmental action. The fact that it would allegedly be more expensive to operate the plant under the terms of EPA's order than without environmental regulation does not excuse plaintiff from performance under the Settlement Agreement and 1998 Sales Agreement. .

In light of the above, plaintiff has not shown a likelihood of ultimate success in this action. Thus, injunctive relief is not appropriate. Under the agreement, plaintiff would be obligated to take delivery of 58,300 short dry tons of chrome by December 31, 1998 and to pay for 30,000 short dry tons after delivery. Plaintiff maintains that since the time for performance is not yet past, defendant cannot enforce its rights under the letter of credit, confession of judgment or security

agreement. On the contrary, once plaintiff clearly and unequivocally repudiated the agreement, defendant had the right to treat plaintiff's conduct as an anticipatory breach of contract (see Uniform Commercial Code § 2-609).

Accordingly, the motion is denied. Defendant is directed to serve a copy of this order with notice of entry upon plaintiff within 10 days. The temporary restraining order issued by this court on October 23, 1998 is extended until January 15, 1999 and is thereafter vacated.

This constitutes the decision and order of the Court.

Dated: DEC 23 1998

DARYL E. HUFF
J.S.C.

FILED
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NEW YORK