

Motion Ex. 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BP AMOCO CHEMICAL COMPANY,

Plaintiff/Counter-Defendant,

v.

FLINT HILLS RESOURCES LLC,

Defendant/Counter-Plaintiff.

Consolidated Case No. 05 C 5661

Judge James B. Moran

FLINT HILLS RESOURCES LLC,

Third-Party Plaintiff,

v.

BP CORPORATION NORTH AMERICA INC.,

Defendant.

PARTIAL SUMMARY JUDGMENT: “PRODUCTION CAPACITY” CLAIMS

BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC.’S MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO FLINT HILLS RESOURCES, LLC’S “PRODUCTION CAPACITY” CLAIMS

Flint Hills Resources, LLC (“FHR”) alleges that BP Amoco Chemical Company (“BP Amoco”) committed fraud and breached the parties’ written Asset Purchase and Sale Agreement (“PSA”), which set forth the terms of BP Amoco’s sale to FHR of a chemical plant in Joliet, Illinois, and other assets. FHR’s largest single claim in this litigation alleges that the capacity of certain chemical production units at the Joliet Plant is less than what BP Amoco represented in the PSA. The express language of the PSA, however, rebuts this claim. Indeed, FHR’s production capacity claim depends upon rewriting the PSA by deleting some words from the contract while adding others. Because the undisputed evidence demonstrates that BP Amoco has

fully complied with this representation, BP Amoco and BP Corporation North America (“BPCNA”)¹ move for summary judgment on FHR’s production capacity claim.

In further support of their Motion, BP Amoco and BPCNA refer to their accompanying Memorandum of Law, Statement of Undisputed Material Facts (“SOF”), and Appendix of Exhibits, and state as follows:

1. This litigation centers on BP Amoco’s sale to FHR of a chemical plant in Joliet, Illinois (the “Joliet Plant”). The Joliet Plant produces three chemicals: purified isophthalic acid; (ii) trimellitic anhydride (“TMA”); and (iii) maleic anhydride (“MAN”). Purified isophthalic acid is made in a two-step process where feedstock is fed into an isophthalic acid (“IPA”) production unit, and then the IPA is fed into a separate production unit to make purified isophthalic acid. The Joliet Plant’s products are used in the consumer products, electronics, appliances, packaging and automotive industries. (SOF ¶¶ 5-6)

2. In March 2003, BP Amoco announced its intention to sell the Joliet Plant and related assets. As part of this process, potential buyers were provided with a Confidential Information Memorandum (“CIM”) containing information about the Joliet Plant, including figures for a measure of capacity referred to as “effective capacity.” The CIM explicitly stated that BP Amoco was not making any representation or warranty of, nor would it be liable for, any of the information in the CIM. (SOF ¶¶ 9, 13-15)

3. BP Amoco also provided prospective buyers with a data room containing volumes of detailed information about the Joliet Plant. Among other materials, the data room included documents explaining the different ways of discussing and evaluating capacity that BP Amoco historically used and describing some of the testing BP Amoco had done to establish the production rates of some of the units. The data room also contained actual production data. BP Amoco allowed FHR access to all of this information in the data room, and at FHR’s request sent the entire data room to FHR in November 2003. (SOF ¶¶ 17-18)

¹ FHR’s third-party claim against BPCNA arises out of a Performance Guarantee that BPCNA executed with FHR in connection with BP Amoco’s sale of the Joliet Plant. FHR alleges that BPCNA has failed to guarantee the alleged obligations of BP Amoco. If BP Amoco did not breach the PSA, then, as a matter of law, BPCNA did not breach the Performance Guarantee and cannot be liable to FHR. *See, e.g., DAG Petroleum Suppliers L.L.C. v. BP P.L.C.*, 452 F.Supp.2d 641, 650 (E.D. Va. 2006) (holding that where summary judgment was granted for subsidiary, summary judgment must also be granted for affiliate company whose alleged liability was derivative of subsidiary’s), *aff’d*, 268 Fed.Appx. 236 (4th Cir. Jan 23, 2008).

4. During the course of their extensive and protracted negotiations, BP Amoco and FHR negotiated the specific and unambiguous terms of the production capacity representation in the PSA. FHR originally asked BP Amoco to warrant the effective capacity figures from the CIM, but BP Amoco would not agree to do so. (SOF ¶¶ 23-24) Instead, the parties negotiated the following representation:

The annualized maximum demonstrated sustainable production of the TMA, purified isophthalic acid and MAN production units at the Joliet Plant are 71,000 metric tons, 170,000 metric tons, and 51,000 metric tons, respectively, with the product produced meeting Seller's standard specifications therefor, recognizing that such demonstrated capacity does not take into account planned or unplanned downtime.

(SOF ¶ 26) The PSA does not contain any other statements regarding production capacity.

5. As part of its extensive due diligence, FHR constructed a financial model to evaluate the economics of acquiring the Joliet Plant and the related assets. This model used the effective capacity figures from the CIM, not the amounts represented in the PSA. (SOF ¶¶ 20-21)

6. In the PSA, FHR and BP Amoco also agreed to a series of limitations on each party's representations and warranties. For example, the parties agreed that, except for certain representations explicitly stated in the PSA, all other express or implied representations were excluded and that the Joliet Plant was being sold "as is, where is." The parties further agreed that neither had made any representations not contained in the PSA, and that BP Amoco would not be liable for FHR's use of information outside the PSA, such as information in the CIM. The parties also agreed that BP Amoco disclaimed all implied warranties, including any representation or warranty as to value. (SOF ¶¶ 31-33)

7. The sale closed, and FHR assumed ownership of the Joliet Plant, on May 28, 2004. (SOF ¶ 25) In this litigation, FHR is asserting over 50 individual post-closing claims against BP Amoco, including breach-of-contract and fraud claims arising out of the production capacity representation. (SOF ¶ 38)

8. FHR's production capacity claims are barred by the plain terms of the PSA and the undisputed evidence. First, FHR's breach of contract claims fails because it is not based upon the actual contract terms to which the parties agreed, and thus depends upon this Court rewriting the parties' contract. The production capacity representation must be interpreted according to its plain meaning. The undisputed evidence establishes that BP Amoco had

empirical and reasonable bases supporting its determination of the AMDSP amounts for each of the production units. (SOF ¶¶ 34-37)

9. By contrast, FHR's production capacity claim depends upon adding or subtracting words to the text of the representation. For example, FHR's experts contend that the AMDSP rates should have been based on production over at least a full month, even though nothing in the PSA requires that the production rates be demonstrated over a particular time period. (SOF ¶¶ 26, 30) FHR also contends that BP Amoco warranted the simultaneous production of all three chemicals, but phrases such as "simultaneous" or "at the same time" do not appear anywhere in the production capacity representation. (SOF ¶ 29) Nor did BP Amoco warrant the average daily production capacity of the production units over a one-year period. The PSA expressly represents "annualized" production, meaning that a period of time that is less than one year is being extrapolated or interpolated to be equivalent to a full year. (SOF ¶ 26) Indeed, FHR's interpretation of the capacity representation deletes the words "maximum" and "annualized" from the parties' contract. FHR also seeks to delete the limitation of the capacity representation to "production units" and thus to expand the warranty to support facilities, the IPA unit, and items included in working capital, none of which is covered by the plain language of the PSA.

10. FHR's second claim for fraud fails because FHR cannot introduce sufficient admissible evidence for a jury to find that FHR has proven the elements of fraud by clear and convincing evidence. Because the AMDSP amounts in the PSA are well supported, FHR cannot prove by clear and convincing evidence that the represented production amounts were false, and thus there can be no false representation. In addition, FHR cannot prove reliance on the AMDSP amounts because the financial model it used to evaluate the value of Joliet Plant and related assets used a different set of capacity figures -- figures that BP Amoco refused to warrant in the PSA. (SOF ¶¶ 20-21) And FHR cannot prove justifiable reliance because FHR's post-sale interpretation of the capacity representation is refuted by the information BP Amoco made available to FHR before the sale of the Joliet Plant. (SOF ¶ 18) Nor can FHR prove that BP Amoco intended to misrepresent the production capacity given the evidentiary support for the AMDSP amounts in the PSA and how BP Amoco provided various information to FHR concerning the production units months before the sale. (SOF ¶¶ 18, 34-37)

For these reasons and those stated in their Supporting Memorandum, BP Amoco and BPCNA request that they be awarded summary judgment on FHR's breach-of-contract and fraud claims arising out of the production capacity representation in Section 7.1(d)(ii) of the PSA.

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Respectfully submitted,

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