

Motion Ex. 8

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.,
Third-Party Defendant.

PARTIAL SUMMARY JUDGMENT:
"CONDITION OF ASSETS" AND "SPENDING" CLAIMS

BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA
INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO
CONDITION OF ASSETS AND SPENDING 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 sets forth the terms of BP Amoco's sale to FHR of a chemical plant in Joliet, Illinois, and other assets. FHR's contract claims fail as a matter of law because they are contrary to the contract's unambiguous and plain language and would require rewriting the contract's representation about the condition of the Plant's assets in fundamental and opportunistic ways. FHR's fraud claim fails because it is dependent on and derivative of the contract claims, and also because FHR cannot as a matter of law establish the essential elements of its claim.

In further support of their Motion, BP Amoco and BP Corporation North America Inc. (“BPCNA”)¹ refer to their accompanying Memorandum of Law, Statement of Undisputed Material Facts, and Appendix of Exhibits, and state as follows:

1. FHR, a subsidiary of Koch Resources, Inc. (the country’s second largest privately held company), claims that BP Amoco breached a Purchase and Sale Agreement (“PSA” or “contract”), under which FHR agreed to purchase from BP Amoco a 50-year old chemical plant located in Joliet, Illinois. (SOF at ¶ 4.) This massive, complex facility spans over 200 acres and contains thousands of different pieces of machinery and equipment. (SOF at ¶ 6.)

2. Most of the Joliet Plant’s equipment was decades old at the time of sale — a fact well known to FHR. Indeed, the “PSA” accounts for this fact and expressly limits the contract’s representation about the Plant’s condition to one that reflects the plant’s age:

“All of the Joliet Plant process units and buildings are structurally sound, and all tangible Assets have been maintained substantially in accordance with normal industry practice, are in substantially good operating condition and repair for their age (taking account of their nature, normal wear and tear and continued repair and replacement in accordance with Seller’s past practice)....” (PSA § 7.1(d)(ii))

3. FHR’s lawsuit alleges that BP Amoco breached this contract representation *and* fraudulently misrepresented the condition of approximately 40 individual assets or pieces of equipment, which constitute less than 1% of the many thousands of assets and pieces of equipment at the Joliet Plant. FHR seeks to recover over \$123 million in claimed “damages” relating to these 40 individual assets. FHR also asserts that BP Amoco breached the contract’s representation that BP Amoco had not “reduced maintenance activity or sustaining capital spending in anticipation of the [sale].” (PSA § 7.1(d)(v)) FHR’s claims fail as a matter of law.²

¹ FHR’s only claim against BPCNA is a third party claim for alleged breach of a performance guarantee executed as an exhibit to the PSA. FHR alleges that BPCNA has failed to guarantee the alleged obligations of BP Amoco, and thus breached the performance guarantee. If BP Amoco did not breach the PSA, then, as a matter of law, BPCNA did not breach the performance guarantee. *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).

² FHR alleges breach of contract and fraud with respect to four types of claims: that BP Amoco allegedly breached and misrepresented (1) the condition of Plant assets contrary to PSA Section 7.1(d)(ii); (2) the production capacity of the Plant’s three chemical units contrary to PSA Section 7.1(d)(ii); (3) the maintenance and sustaining capital spending representation in PSA Section 7.1(d)(v); and (4) the environmental compliance of various equipment at the Plant. This motion and accompanying brief address only the first (the “condition-of-assets” claim) and third (the “maintenance-and-capital” spending

4. FHR's contract claims depend upon FHR's improper attempt to rewrite the contract's condition-of-assets provision in Section 7.1(d)(ii). *First*, FHR claims that the representation in Section 7.1(d)(ii) about the condition of "all tangible Assets," refers to the condition of each asset individually — that is, to each individual nut, screw, bolt and piece of equipment. Not only does this interpretation depend on rewriting the unambiguous contract terms, but FHR previously admitted, contrary to its current position, that at the time of the sale it understood that "all tangible Assets" meant "[a]ll Joliet Plant assets *as a whole*." (SOF at ¶ 16.) (emphasis added). This plain meaning — describing the Plant collectively, rather than each asset individually — is confirmed by leading dictionaries, numerous courts, and by FHR's own admission. (See Mem. in Support at 4-5.) For this reason alone, summary judgment should be entered in favor of BP Amoco and against FHR on its breach of contract condition-of-assets claims.

5. *Second*, even if the condition-of-assets representation is applied on an individual-asset basis for the 40 assets at issue, FHR cannot establish a breach of § 7.1(d)(ii) as a matter of law when the "age...nature, normal wear and tear, and continued repair and replacement in accordance with Seller's past practice" are considered. (*Id.*) Moreover, it is undisputed that the assets and Plant equipment over which FHR sues were operational and working on the sale date, and most have remained so through today. (SOF at ¶ 5) Nevertheless, FHR seeks to shift the costs for its own routine maintenance to BP Amoco, years after the fact, even though it now owns and operates the Plant. FHR's attempt to reallocate the parties' risks and responsibilities is contrary to the parties' agreement, and should be denied.

6. *Third*, the undisputed facts establish that there was no breach of the Section 7.1(d)(ii) condition-of-assets representation with respect to various of FHR's individual asset claims — even if FHR is allowed to rewrite the representation. For example, upon taking possession of the Joliet Plant, the equipment now at issue in several claims was inspected by FHR's own inspectors, who later found (*after* closing) that various of the equipment and individual assets were in substantially good operating condition. (See, e.g., SOF at ¶¶ 87, 89, 101-102, 106.)

7. Similarly, for most of its individual asset claims, it is undisputed that FHR has (i) not made the repairs it claims are necessary, or (ii) has not replaced the individual assets, but

claim).

instead has continued to use the assets and equipment since Closing. In addition, FHR has no contemporaneous evidence to establish that an individual asset was not in substantially good operating condition on the date of Closing. No reasonable jury could find that after four-plus years of continued use, the assets were not, at the closing four years earlier, in compliance with the condition-of-assets representation. (*See, e.g.*, SOF at ¶¶ 25, 91, 93-94, 100, 111,)

8. *Fourth*, FHR has no evidence to support its claim that BP Amoco breached a separate provision representing that it had not “reduced maintenance activity or sustaining capital spending in anticipation of the [sale].” (PSA § 7.1(d)(v)) Not a single witness has testified that BP Amoco reduced spending in anticipation of the sale, and no documents say that either. (SOF at ¶¶ 22, 39) Indeed, the undisputed evidence is to the contrary and establishes that BP’s spending leading up to the sale was comparable to — or exceeded — its spending in prior years. (SOF at ¶38). In fact, FHR has conceded that it will not offer proof of any damages on these claims, which alone defeats its maintenance-and-capital spending claims. (*Id.*)

9. *Fifth, and last*, FHR not only alleges that BP Amoco breached the representations in Section 7.1(d)(ii), but did so fraudulently. But FHR cannot prove its fraud claim because it cannot establish that the condition-of-assets representation was breached. Moreover, FHR cannot as a matter of law prove the elements of a fraud claim, specifically: (i) that BP Amoco made any material misrepresentation about the condition of the Plant’s tangible assets; (ii) that FHR actually and justifiably relied upon any alleged misrepresentation; or (iii) that BP Amoco knew the representation was false and intended to defraud FHR. BP Amoco is therefore entitled to summary judgment on FHR’s condition-of-assets fraud claim.

CONCLUSION

For the foregoing reasons, BP Amoco and BPCNA request that the Court grant summary judgment in their favor on FHR’s breach of contract and fraud claims related to the condition of the Joliet Plant Assets and BP Amoco’s pre-sale maintenance and capital spending.

DATED: November 12, 2008

Respectfully submitted,

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