Castor Petroleum Ltd. v Petroterminal De Panama, S.A.
2012 NY Slip Op 33533(U)
September 27, 2012
Supreme Court, New York County
Docket Number: 600243/2008
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS PART 53
Justice

Index Number : 600243/2008
CASTOR PETROLEUM LTD.
vs.
PETROTERMINAL DE PANAMA,
SEQUENCE NUMBER : 012
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with accompanying Memorandum Decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/27/12

_____, J.S.C.
CHARLES E. RAMOS

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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CASTOR PETROLEUM LTD.,

Plaintiff,

Index No.
600243/08

-against-

PETROTERMINAL DE PANAMA, S.A.,

Defendant.

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Charles Edward Ramos, J.S.C.:

In motion sequence 012, defendant Petroterminal de Panama, S.A. (PTP) moves for summary judgment.

In motion sequence 013, plaintiff Castor Petroleum Ltd. (Castor) moves for partial summary judgement as to liability on its first cause of action, and for an order directing the parties to complete damages discovery.

Motion sequence numbers 012 and 013 are consolidated for disposition.

Background

Castor, a Swiss corporation, trades, stores and ships crude oil. PTP, a Panamanian government-owned corporation, owns and operates an oil pipeline and storage facility on the Atlantic and Pacific coasts of the Panama Canal. It receives oil from clients such as Castor and stores it at its facility. In December 2005, the Transportation and Storage Agreement (TSA) was assigned to Castor from a non-party predecessor under which Castor leased PTP's facilities for storage of its crude oil and related

shipping operations. The TSA governs the parties' rights and obligations.

On February 4, 2007, a valve rupture occurred in a PTP facility causing an onshore oil spill of approximately 5,000 barrels. Normal operations resumed within several days. Approximately four months later, in a lawsuit instituted in Panama against Castor, PTP and others arising out of the oil spill, a Panamanian court attached Castor's oil, which was being stored in PTP's facility, in order to obtain personal jurisdiction over it.[1] As a result, although PTP's facility remained open and operational, Castor was prevented by court order from accessing its oil, which, in turn, caused severe disruption to its business operations including lost profits and cancelled transactions.

While both parties sought to have the attachment lifted in Panamanian courts, PTP declared an Event of Force Majeure under Article 12 of the TSA (Exhibit V, annexed to the Jacobson Aff.). Castor, reserving its rights, rejected the declaration, and sent PTP notice that it was seeking indemnification under section 18.2

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[1] As set forth by the judge who issued it, the attachment was issued in order to obtain jurisdiction over Castor, which was not registered in Panama as a foreign company, and required the plaintiffs to post only a minimal bond of $1,000 (PTP's Rule 19-A Statement, ¶¶ 45-46). Had Panamanian plaintiffs not been seeking to obtain jurisdiction over Castor (i.e. had Castor been registered to do business in Panama), the plaintiffs would have been required to post a bond of between twenty to thirty percent of the amount sought to be attached (*Id.*).

of the TSA for any damages that it suffered as a result of the oil spill litigation or otherwise relating to the oil spill (Exhibits N, W annexed to the Jarashow Aff.).

The attachment lasted from June 8, 2007 until July 16, 2007, when it was ultimately suspended by a Justice of the Supreme Court of Panama, who ruled that it was excessive, arbitrary and contrary to law (Exhibit Y, annexed to the Jacobson Aff.). This ruling was affirmed by the full panel of the Supreme Court of Panama in April 2011.

In January 2008, Castor commenced this action against PTP, and amended its complaint in February 2012 (*see Castor Petroleum, Ltd. v Petroterminal de Panama, S.A.*, 90 AD3d 424 [1st Dept 2011]). Castor asserts claims for contractual indemnification and breach of contract, seeking recovery for the vessel delay damages that stem from the unavailability of PTP's facility during the period of the attachment.

Discussion

Castor moves for partial summary judgment as to liability under section 18.2 of the TSA, which it argues obligates PTP to fully indemnify Castor against any and all damages resulting from or relating to the operation of PTP's system. Castor contends that its losses flow from the oil spill litigation brought by Panamanian claimants and the attachment entered in that action which rendered PTP's facility unavailable. According to Castro,

its business interruption losses that it suffered is a triggering event of PTP's indemnification obligation under section 18.2 of the TSA.

In opposition and in support of its own motion for summary judgment, PTP asserts that the claims for indemnification and breach of contract must be dismissed because Castor's losses all stem from the attachment, which plainly constitutes a Force Majeure Event, as defined by the TSA, the effect of which was to entirely suspend PTP's contractual obligations.

I. Force Majeure

The TSA defines a "Force Majeure Event":

> Any act of God or of a ... **government embargo or intervention or other similar or dissimilar event or circumstances**, in any such foregoing case is beyond the control of the affected Party and which could not have been prevented or overcome by the exercise of the affected Party's due diligence (emphasis added).

Article XII, section 12.1 of the TSA, entitled "Force Majeure" provides:

> **If, solely as a direct result of a Force Majeure Event, PTP** or Shipper [Castor] **fails or omits to carry out or observe any of the terms**, provisions or conditions of this Agreement, **such failure or omission shall not be deemed a breach of this Agreement**, and the **affected Party's obligations hereunder shall be suspended** insofar as performance of such obligations is rendered impracticable (emphasis added).

Under well-established law, the primary purpose of a force majeure clause is to relieve a party from its contractual duties when its performance has been prevented by a force beyond its

control (*Phillips Puerto Rico Corp., Inc. v Tradax Petroleum Ltd.*, 782 F2d 314, 319 [1985]). To this extent, force majeure clauses are aimed at events that neither party could have foreseen or guarded against in the agreement (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 901-02 [1987]; *Reade v Stoneybrook Realty, LLC*, 63 AD3d 433, 433 [1st Dept 2009]).

Force majeure clauses are narrowly construed, and thus a party's performance will be excused only if the clause specifically includes the event that actually prevents performance (*Id.*). The party claiming that a force majeure event of a governmental restraint excuses its performance must demonstrate its bona fide efforts to dissolve the restraint that prevents performance of its contractual duties (*Phillips Puerto Rico Core, Inc.*, 782 F2d at 319; *Dezsofi v Jacobi*, 178 Misc 851, 853 [Sup Ct, NY County 1942]).

With these principles in mind, the Court is persuaded that the attachment, issued by a Panamanian court and which completely prohibited Castro from accessing its oil that was being stored in PTP's facility, clearly constitutes a "government embargo or intervention" within the meaning of the TSA. The attachment was an event included in the contractual definition of a force majeure event, and its effect was to render PTP's performance of its obligations under the TSA impracticable, insofar as it had

covenanted to make its facility available for Castor's use.[2]

The First Department similarly determined that a temporary restraining order issued by a justice of the New York Supreme Court, which prevented a landlord from proceeding with construction necessary to deliver possession of subject premises to a tenant, was a "governmental prohibition" within the meaning of the force majeure clause contained in the lease, insofar as it prevented the landlord from performing (*Reade v Stoneybrook Realty, LLC*, 63 AD3d 433; *compare Macalloy Corp. v Metallurg, Inc.*, 284 AD2d 227 [1st Dept 2001]).

In contrast, in *Macalloy Corp.* (*Id.*), the First Department determined that a government decision to enforce environmental regulations was not within the "plant shutdown" language contained in an agreement's force majeure clause. There, the court reasoned that because the plant itself continued to be operational, the plaintiff's voluntary election to close it due to the financial hardship caused by enforcement of the regulations, and plaintiff's prior knowledge that the regulations would likely be enforced, did not frustrate the purpose of the contract beyond the control of the parties.

Here, the effect of the attachment was frustrate the entire

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[2] The attachment was issued solely against Castor's oil, and not against PTP or any of portion of PTP's facility, which remained open and operational within several days of the oil spill and throughout the period of the attachment.

purpose of the TSA by preventing PTP from fulfilling its contractual obligation to Castor to make its oil storage facility available for Castor's use, while complying with "any and all Applicable Laws"(TSA, §§ 1.7, 2.1, 16.1), beyond the control of the parties.[3]

Further, the Court rejects Castor's assertion that PTP is obligated to indemnify it under section 18.2, irrespective of whether the attachment constitutes a force majeure event.

II. Indemnification

Section 18.2 of the TSA states:

> **PTP shall indemnify**, defend, reimburse and hold harmless **Shipper [Castor]** and Shipper's Representatives **from any and all Damages** (other than loss of Crude Oil unless by reason of negligence or fault of PTP) **resulting from or relating to the operation of the PTP System, regardless of the cause,** and including without limitation, any Damages of an environmental nature"[4] (emphasis added).

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[3] PTP covenanted to operate and make its facility available for Castor's use (TSA, § 2.1). In addition, the TSA defines "Applicable Laws" to mean "all laws, ordinances, rules, regulations, orders, writs, injunctions, decrees, rulings, determinations, awards or standards of any governmental authority, all governmental authorizations" (TSA, § 1.7).

[4] The TSA also contains mutual indemnification provisions for negligence or breach of contract.

Section 18.1 states:

> Each Party to this Agreement shall indemnify, defend, reimburse and hold harmless the other Party ... from and against any and all liabilities, losses, damages, claims, demands, and causes of action (collectively, "Damages") resulting from or relating to (I) the ... negligent acts ... of the indemnifying Party or (ii) any breach or default by

According to Castor, the provision requires PTP to indemnify it from any and all claims, so long as they "result from or relate to the operation of the PTP system," even if caused by a force majeure event.

The Court rejects this narrow reading of section 18.2 as illogical, as it effectively writes the force majeure provisions out of the TSA, and renders them superfluous (*see W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, [1990] [contracts should be "read as a whole to determine its purpose and intent"]; *Bruckman, Rosser, Sherril & Co. v Marsh USA, Inc.*, 87 AD3d 65, 70-71 [1st Dept 2011] ["Courts are obliged to interpret a contract so as to give meaning to all of its terms"]).

It is evident that the attachment constituted a force majeure event, and "solely as a direct result of" the attachment (TSA, § 12.1), PTP was prevented from performing its contractual duty to provide Castor with access to its oil being stored at PTP's facility. Under the TSA, if a party fails to perform any of its obligations as a direct result of a force majeure event, such failure or omission will not be considered a breach of the agreement, and its obligations thereunder are suspended (TSA, §

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the indemnifying Party of any of its obligations, representations, warranties or covenants set forth in this Agreement or applying under Applicable Laws" (emphasis added).

12.1), including, necessarily, the duty to indemnify.

In any event, even assuming arguendo that Castor's interpretation of section 18.2 is correct, Castor does not demonstrate that the attachment, and the business interruption losses that it suffered as a result, is a triggering event of PTP's indemnification obligation.

First, a claim for indemnification under section 18.2 is limited by language contained in section 18.3 to "third party claims."[5] It is doubtful whether losses stemming from an attachment, which was later suspended as contrary to law, qualifies as a "third party claim."

Further, PTP successfully raises the issue that the attachment resulted from or related to Castor' failure to register to do business in Panama, rather than as a result of a "third party claim" resulting from or relating to the "operation of the PTP system."[6]

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[5] Section 18.3 of the TSA defines the claims subject to indemnification under Article XVIII (18):

> "[I]n accordance with this Article XVIII, promptly after receipt by a Party of a notice of the commencement of any action or the representation or other assertion of any claim or demand by a third party (a "Third Party Claim") which could result in a claim for indemnification of damages hereunder ..."

[6] The attachment order clearly states, "so that this Court might be assigned jurisdiction over the foreign companies it order the attachment of a total of FIVE MILLION FOUR HUNDRED THOUSAND BARRELS OF CRUDE OIL that CASTOR AMERICAS INC. (CASTOR PETROLEUM) has stored or deposited at PETROTERMINAL DE PANAMA,

PTP asserts, without meaningful dispute from Castor, that had Castor been registered to do business in Panama, the plaintiffs in the underlying action would have been required to post a bond of between twenty to thirty percent of the amount sought to be attached, an amount in excess of $100 million, an amount so high as to render it unlikely an attachment would have been sought (Castor's Response to PTP's Rule 19-A Statement, ¶¶ 45-47).

Castor correctly points out that it had no obligation under the TSA, or Panamanian law, to register to do business in Panama, although it concedes that registering to do business in Panama would have ensured that no attachment could be issued against it (Castor's Response to PTP's Rule- 19A Statement, ¶ 51). Moreover, Castor does not meaningfully contest that access to its oil returned to normal within days of the oil spill which occurred in February 2007, and PTP continued to perform its obligations to Castor under the TSA largely without interruption until issuance of the attachment, on June 8, 2007 (PTP's Rule 19-A Statement, 48).[7]

S.A. in its tanks at the terminals of ..." PTP (Exhibit R, annexed to the Jacobson Aff.).

[7] Castor did not make a claim for vessel delay damages that it incurred as a result of the oil, and only sent an indemnification notice for damages that it allegedly incurred after the attachment was issued, on June 18 2007 (Castor's Response to PTP's Rule 19-A Statement, 31-34).

That Castor's failure to register to do business in Panama was the immediate basis for the issuance of the attachment, coupled with the ultimate suspension of the attachment as contrary to law, suggests that the attachment itself, rather then the relatively minor oil spill which led to the Panamanian litigation, was the source of Castor's business losses.[8]

Consequently, it is evident that the attachment was an unanticipated event that PTP could not have foreseen or guarded against in the TSA (*see Kel Kim Corp.*, 70 NY2d at 901-02). Otherwise, Castor fails to demonstrate that it was a foreseeable consequence of the oil spill.

Finally, PTP demonstrates, without meaningful opposition from Castor, that it acted with due diligence to have the

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[8] Castor generally disputes PTP's assertion that the oil spill was "relatively minor" and caused only minimal disruption to its operations. Castor claims in a conclusory manner that "it is not correct to say that Castor had full access to its oil ... [and] PTP's operations during that time [between the oil spill and the attachment] were far from 'normal'" (Castor's Response to PTP's Rule 19-A Statement, ¶¶36-38). Further, although it claims to have incurred approximately $800,000 in alleged costs directly arising from the oil spill, Castor has not made a claim to recoup these damages, because it was concerned with maintaining its commercial relationship with PTP (Castor's Response to PTP's Rule 19-A Statement, ¶ 31).

Castor's Rule 19-A Statement is bereft as to citations to the record of instances where it did, in fact, lose access to its oil following the oil spill and prior to the attachment. In this regard, Castor fails to raise a triable issue regarding access to its oil and the operation of PTP's facility following the oil spill and prior to the issuance of the attachment (*EBC I, Inc. v Goldman Sachs & Co.*, 91 AD3d 211, 220-21 [1st Dept 2011]).

attachment lifted, including making at least eight filings in the Panamanian courts and appealing the issuance of the attachment (Castor's Response to PTP's Rule 19-A Statement, ¶¶ 72-76). To this point, PTP submits an e-mail authored by a Castor representative sent to PTP ten days after the issuance of the oil spill, in which he states "[w]e do, however, appreciate the efforts and cooperation of PTP ... to date with respect to getting the lien related to PTP's Oil Spill Litigation removed, and we look forward to continuing to work with you in the same spirit" (Exhibit, RR, annexed to the Jacobson Aff.).

Accordingly, it is

ORDERED that motion sequence 012 is granted in its entirety, and the complaint is dismissed; and it is further

ORDERED that motion sequence 013 is denied in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendant Petroterminal de Panama, S.A.

Dated: September 27, 2012

ENTER:

J.S.C.

CHARLES E. RAMOS