DKRW Wind Holdings, LLC v Transcanada Energy Ltd.
2016 NY Slip Op 30379(U)
March 1, 2016
Supreme Court, New York County
Docket Number: 654146/2013
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
---X
DKRW WIND HOLDINGS, LLC,

Plaintiff,

-against-

TRANSCANADA ENERGY LTD.,

Defendant.
---X

DECISION AND ORDER

Index No.: 654146/2013
Motion Seq. Nos.: 002 -and -003

O. PETER SHERWOOD. J.

This follows from a decision announced from the Bench at the end of oral argument on motion sequence numbers 002 and 003. These opposing motions for summary judgment reflect each other. The facts are taken largely from the undisputed facts in the parties' 19-a statements except as indicated.

The parties entered into a contract to develop a wind-power electrical generating facility. They disagree on three points:

(1) Whether the royalties due plaintiff should be calculated based only on electrical power sold, or should also include income from sale of Renewable Energy Credits derived from the generation of power from a renewable energy source;

(2) Whether defendant breached the contract when it built the facility with a different type of turbine than discussed when the parties entered into the contract; and

(3) Whether an unrealized plan to build another facility falls under the contract.

I. FACTS

Plaintiff DKRW Wind Holdings, LLC (DKRW) is in the business of developing wind power-generation projects (Complaint at ¶¶ 1-2). In 2004, GE Wind Energy, LLC (GE Wind) had the rights to develop a wind energy facility near Kibby Mountain in Franklin County, Maine (the "Kibby Project"). DKRW entered into an option agreement with GE Wind to take over the right to develop the facility. DKRW offered to partner with defendant Transcanada Energy (TCE) to develop the project.

DKRW and TCE entered into the Development Services Agreement (DSA) in October 2004. TCE subsequently decided it wanted to develop the Kibby Project without DKRW. The parties agreed to restructure their agreement and entered into a Project Fee Agreement dated August 26, 2005, (PFA, attached as Exhibit 10 to Walker Aff, NYSCEF Doc. No. 33). The PFA provides that the DSA is terminated and replaced by the new agreement. The PFA includes provisions that there is no drafting presumption, that the PFA supercedes any prior agreements or understandings, and that it includes the parties' entire agreement. DKRW's option with GE Wind was then terminated, and TCE made its own option agreement with GE Wind.

Pursuant to the PFA, TCE is required to pay DKRW various fees. It is undisputed that TCE paid the proper Purchase Fee and Development Completion Fee, pursuant to PFA sections 4.1(a) and (b). The parties dispute whether the amount paid as the Operations Fee was correct. Section 4.1(c) of the PFA provides:

> "If TCE, in its sole discretion, proceeds to construct the Project, TCE will pay to DKRW an annual fee for the first 10 Contract Years, ("Operations Fee"). The Operations Fee will be equal to the greater of (i) the Royalty Rate (as defined below) multiplied by the gross electricity sales revenues for the Contract Year from the Project up to a maximum of 200 MW as originally contemplated in the Option Agreement, and (ii) $260,000. The Royalty Rate shall be determined each Contract Year as follows:
>
> (1) if the Capacity Factor is greater than or equal to 0.4, then the Royalty Rate is equal to 0.04; or
> (2) if the Capacity Factor is less than 0.4, then the Royalty Rate is equal to 0.04 - (0.4 - CF)/2, provided, however, that the Royalty Rate shall never be less than 0.02;
>
> where the Capacity Factor, or CF, is equal to:
>
> $$\frac{\text{electrical energy sold from the Project in the Contract Year (kWh)}}{\text{installed capacity at Project (kW) x 8760."}}$$

In 2009, TCE began exploring another wind farm project to be built two miles West of the Kibby Project, on the Sisk Mountain ridgeline (the Sisk Project or the Kibby Expansion Project). The parties dispute whether this is a separate project, or an expansion of the Kibby Project. DKRW maintains that it is part of the Kibby Project, and therefore energy production from the Sisk Project

should be considered in calculating the Operations Fee under the PFA. It is undisputed, however, that the Sisk Project was never developed, is inactive, and cannot move forward now, due to the lapse of permits and land rights. No revenue has ever been received from the Sisk Project.

Because the Kibby Project generates and sells power from wind, it also creates, and sells, Renewable Energy Credits (or Certificates)(RECs). TCE did not include revenue received from RECs when it calculated the Operations Fee owed DKRW. Instead, TCE calculated it solely on the basis of electricity sold.

In this case, DKRW asserts claims for breach of contract and declaratory judgment grounded on TCE's alleged failure to pay the contractual Operations Fee (First and Third Causes of Action), breach of contract and declaratory judgment on grounds that TCE's selection of different turbines resulted in an improper Royalty Rate (Second and Fourth Causes of Action), and declaratory judgment, breach of contract and unjust enrichment related to the Sisk Project (Fifth, Sixth, and Seventh Causes of Action).

II. STANDARD FOR SUMMARY JUDGMENT

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver,* 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference

(*see Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "'[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

III. ARGUMENTS AND DISCUSSION

A. Whether Gross Electricity Sales Revenues Include Profits from Sale of RECs

The parties dispute whether the PFA should be interpreted to calculate the Operations Fee based only on the revenue from the sale of electrical power, or whether revenue from the sale of RECs should be included. "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

The parties agree that the PFA is unambiguous, but disagree on how it should be interpreted. Plaintiff DKRW argues that since RECs are part of "gross electricity sales" as specified in section 4.1(c) of the PFA, revenue from the sale of RECs should be included in calculating the amount of Operations Fee due to DKRW. DKRW claims the PFA does not explicitly carve out RECs, so should be interpreted to bundle them with the power. DKRW notes that New York law applies to

the PFA, and that New York law at the time of contracting prohibited separating the power from the RECs (or other attributes of power generation)(002 Opp at 7-9). DKRW relies on a September 2004 State of New York Public Service Commission Order Regarding Retail Renewable Portfolio Standard by the (Case 03-E-0188, Order Regarding Retail Renewable Portfolio Standard, dated September 24, 2004, attached as Exhibit Z to Coheley Aff, NYSCEF Doc. No. 118).

In that Order, the Public Service Commission adopted a policy of awarding financial incentives for the generation of electricity from renewable resources. In the program contemplated, revenues would be raised from fees paid by utility customers, and incentives paid to those generating power from renewable resources (*id.* at 11). The commission acknowledged the merits of a system for transferring RECs, and noted that while "[i]t is not necessary to establish a [REC] tracking and trading system for purposes of the central procurement model we are adopting . . . , it is our vision that the mechanism used to track the success of the . . . program should be designed in such a way that it can co-exist with and eventually be replaced by a more market-based approach" (*id.* at 57). The commission also announced that it planned to consider options for such a system in the 2009 system review (*id.*). The sale of RECs was not prohibited. There was merely no system for it in New York State. Such a system existed in New England, where the Kibby Project was planned (*id.*).

DKRW also claims that the RECs are inseparable from the electricity itself under Maine law, absent specific language to the contrary. It relies on a September 2002 Notice of Investigation issued by the Maine Public Utilities Commission (002 Opp at 13, citing Docket No. 2002-506, 2002 Me. PUC LEXIS 331 at). The Maine commission considered whether certain power generating facilities that have power purchasing agreements with utilities which predate the creation of the New England Power Pool Generation Information System (and thus the ability to separately sell RECs) should be required to transfer the RECs to the utilities along with the power, once the system was implemented (*id.* at *1-2). The Notice merely seeks comments on a policy then being considered. The Notice tentatively stated the idea that the RECs should be transferred to the utilities, as electricity had been contracted for as a bundled product, and the ability to unbundle should not deprive the utilities of part of their bargain (*id.* at *4-5). Because the PFA post-dated the New England Power Pool, that rationale does not apply here.

DKRW also points to cases from New Jersey and Pennsylvania. In *ARIPPA v Pennsylvania Public Utility Commission* (966 A2d 1204 [PA Commw Ct 2009]), that court considered whether "the non-utility generation facility or the electric distribution company . . . owns alternative energy credits where the power purchase agreement executed by the two entities is silent on the issue" (*id.* at 1206). In *ARIPPA*, as in the Maine Order, the power purchase agreement at issue predated creation of "alternative energy credits." The New Jersey Superior Court considered "[t]he issue of initial ownership of Renewable Energy Certificates for existing [electricity] contracts that did not anticipate [the] creation [of those credits]" and determined that "as applied to existing contracts for the sale of power to utilities by renewable energy producers, the certificates are the property of the purchasing utility rather than the producer" (*In re Ownership of Renewable Energy Certificates*, 389 NJ Super 481, 485 [NJ Super Ct App Div 2007]). As above, this case is distinguishable.

The terms of the PFA were arrived at during a period when there were markets for both the Kibby Project's electrical power and RECs. The PFA provides that the Operations Fee is to be based on the "gross electricity sales revenues." The sale of electricity is distinct from the sale of the RECs. Accordingly, revenue from the sale of RECs should not be taken into account when calculating the Operations Fee. TCE has not breached the PFA by making this distinction. Summary judgment will be granted to the defendant on the First (breach of contract) and Third (declaratory judgment) Causes of Action.

B. Whether Installation of a Different Turbine Constitutes a Breach of Contract

In the Complaint, DKRW states claims for breach of contract and declaratory judgment related to the Royalty Rate used to calculate the Operations Fee. Section 4.1(c) of the PFA provides that the Royalty Rate is determined as follows:

(1) if the Capacity Factor is greater than or equal to 0.4, then the Royalty Rate is equal to 0.04; or
(2) if the Capacity Factor is less than 0.4, then the Royalty Rate is equal to 0.04 - (0.4 - CF)/2, provided, however, that the Royalty Rate shall never be less than 0.02;

where the Capacity Factor, or CF, is equal to:

$$\frac{\text{electrical energy sold from the Project in the Contract Year (kWh)}}{\text{installed capacity at Project (kW)} \times 8760.}$$

This issue relates to the installed capacity at the Kibby Project. It is undisputed that TCE originally planned to use GE Wind 1.5 MW turbines, but eventually used Vestas V90 3.0 MW turbines. Plaintiff claims that the GE turbines would have a presumptive 40% capacity, resulting in a 4% Royalty Rate, but the capacity of the installed Vestas turbines is under 35% and yields only a 2% Royalty Rate. Plaintiff argues that the use of the Vestas turbines therefore constitutes a breach of contract. It also seeks a declaratory judgment that the capacity factor of the GE turbines should be used to calculate the Royalty Rate.

Defendant points out that the PFA does not specify any particular turbine (002 Memo at 16-17, citing Ramm Dep, attached as Exhibit 1 to Walker Aff, at 73:14-19 [testimony of a DKRW employee involved in the negotiations over the PFA, admitting there is no turbine specification in the PFA]). Defendant also observes that the merger clause in the PFA provides that the PFA is the entire agreement and "supersedes any previous agreements or understandings" (PFA § 6.4).

While the parties may have planned the project using the GE turbine, the PFA states no such requirement. Use of a different turbine does not violate the PFA and the actual capacity of the Kibby Project is properly used to calculate the Royalty Rate. Summary judgment shall be granted to defendant TCE on the Second (breach of contract) and Fourth (declaratory judgment) Causes of Action.

C. The Sisk Project

Plaintiff also seeks (1) a declaratory judgment that it would be owed Operations Fee payments flowing from the Sisk Project (Fifth Cause of Action), (2) a finding of breach of the confidentiality clause of the PFA base on TCE's alleged use of DKRW's confidential information in the Sisk Project (Sixth Cause of Action), and (3) unjust enrichment based on TCE's alleged benefit from DKRW's work and information which TCE used in the Sisk Project (Seventh Cause of Action). DKRW moves for summary judgment as to the Fifth Cause of Action for a declaratory judgement. TCE moves for summary judgment on all three Sisk Project- related claims.

1) Fifth Cause of Action- declaratory judgment

In the Fifth Cause of Action, DKRW asserts that the Sisk Project is part of the Kibby Project and that revenues from Sisk Project should be used to calculate the Operations Fee. The

"Project" is defined in the PFA as "an estimated 200 MW wind power project to be situated near Kibby Mountain, Maine" (PFA at 1).

DKRW claims that the Sisk Project would leverage the Kibby Project's infrastructure and was presented to regulatory entities, including the Maine Land Use Regulatory Commission, as an expansion of the Kibby Project (003 Memo at 23- 24). DKRW acknowledges that the Sisk Project has not yet come to fruition, but argues that is of no moment, as the PFA continues through November 2020, and potential revenues during that period create a sufficient present controversy to support the claims.

TCE argues, however, that all three Sisk Project claims fail as a matter of law on the ground that there are no damages because the Sisk Project was never built and has generated no revenue (002 Memo at 19). TCE also states that the Sisk Project "cannot be developed because the permits for the wind farm and the easements . . . have lapsed or expired," making any issue regarding future revenues or damages moot (002 Reply at 15). $5 million was lost on the project (*id.* at 14-15).

As the Sisk Project will never be built, claims based on its future potential revenues are moot. Accordingly, an action seeking a declaratory judgment must fail (*see* Civil Practice Law and Rules 3001). Summary judgment shall be granted to defendant TCE on the Fifth Cause of Action for a declaratory judgment.

2) Sixth Cause of Action- breach of contract (confidentiality and non-use)

In this claim, DKRW alleges that TCE used "DKRW's Confidential Information in designing, developing, and constructing" the Sisk Project, and that, if the Sisk Project is not found to be part of the Kibby Project, that use of DKRW's information was a breach of the PFA (Complaint, ¶¶ 80-81). DKRW seeks damages based on all "revenue, income, and/or profits received by TCE as a result of the" Sisk Project" (*id.* at ¶ 82). The confidentiality clause of the PFA provides that:

> "[d]uring the term of this Agreement and for a period of two (2) years thereafter, neither of the Parties, without the consent of the other Party, will divulge or communicate to any person or entity or exploit for any purpose whatsoever, other than for the purposes set out herein, any Confidential Information disclosed to it by the other Party or any Confidential Information obtained or produced in relation to this Agreement or the Project. "Confidential Information" means all information, written or oral, furnished by a Party, directly or indirectly, to the receiving Party, including but not limited to all contracts, financial information,

> engineering reports, environmental reports, technical and economic data, marketing terms and arrangements, knowledge, know-how and related information such as plans, maps, drawings, field notes, sketches, photographs, computer records or software, specifications, models, or other information which is or may be either applicable to or related in any way to the assets, business or affairs of the disclosing Party or the Project"

(PFA, ¶ 6.7).

TCE argues that this claim must fail because (1) DKRW cannot show any damages, as the Sisk Project never made any money; and (2) there is no evidence that DKRW ever provided TCE with confidential information (002 Memo at 19-20). DKRW does not argue this point in its opposition to TCE's motion. Nor does the plaintiff address this claim in its motion for summary judgment. Without opposition, and as it is undisputed that the Sisk Project never came to fruition or made any money, summary judgment shall be granted to the defendant for failure to show that DKRW will suffer any damages.

2) Seventh Cause of Action-Unjust Enrichment

In its Seventh Cause of Action, DKRW alleges that, if the Sisk Project is not part of the Kibby Project, TCE was unjustly enriched by DKRW's development work which contributed to the Sisk Project (Complaint, ¶¶ 83-103). "Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

As with the Sixth Claim, TCE argues that TCE has not been enriched because the Sisk Project has not been completed, let alone brought in any revenue. DKRW makes no opposition. Accordingly, summary judgment on this claim shall be granted to TCE, as no damages have been shown. This claim is dismissed.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of plaintiff, DKRW against defendant, TCE as to the First through Fifth Causes of Action is DENIED; and it is further

ORDERED that the motion for summary judgment of defendant, TCE against the plaintiff, DKRW to dismiss the complaint in its entirety is GRANTED and the Clerk of the Court is directed to enter judgment accordingly dismissing the complaint together with costs and disbursements upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: March 1, 2016

E N T E R,

O. PETER SHERWOOD
J.S.C.