SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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AEGEAN MARINE PETROLEUM NETWORK INC., AEGEAN BUNKERING (USA) LLC

Plaintiffs,

-against-

HESS CORPORATION,

Defendant.

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DECISION/ORDER

Index No. 653887/2014
Motion Seq. No. 002

HON. SALIANN SCARPULLA, J.:

In this action for fraud and breach of contract, defendant moves to dismiss plaintiff's fraud claim for failure to state a cause of action, pursuant to CPLR § 3211(a)(7), and moves to dismiss portions of plaintiff's breach of contract claim.

Background

Plaintiffs Aegean Marine Petroleum Network, Inc. and Aegean Bunkering (USA), LLC (collectively, "Aegean") are part of a large marine fuel reselling business. Marine fuel is also referred to as bunker oil. Aegean purchases bunker oil from third-party suppliers and then resells it "in port" to customers such as container ships, cruise ships, and ferries. Aegean had not operated a bunker oil business in the United States prior to its entering into the agreement at issue with defendant Hess Corporation ("Hess").

In 2013, Hess, a vertically integrated oil and gas company, had a wholesale supply business, as well as a bunker oil reselling business. As part of its bunker oil operations, Hess purchased bunker oil in-house, and then resold it to retail customers. Hess's bunker oil business was one of a group of retail businesses organized under Hess's Supply, Trading & Transportation division ("ST&T").

On May 22, 2013, Hess, seeking to sell its bunker oil contracts, approached Aegean. By that time, Hess had established a team that was responsible for the sale of the bunker oil business. The team was comprised of: (1) Larry Orenstein, senior vice-president of marketing, refining and financial controls, who reported directly to Hess's CEO, John Hess; (2) Darius Sweet, senior vice-president of refining, terminals, and supply; (3) John Fitzgerald, vice-president of supply, trading, and transportation; (4) Stuart Steigerwald, vice-president of marketing, refining, and financial controls; and (5) Brian McGrath, director of marketing and refining planning and analysis ("Deal Team").

On June 4, 2013, Aegean was provided with access to an online data room which contained due diligence materials relating to Hess's bunker oil business. The Deal Team was responsible for generating and posting the materials and documents placed in the online data room. In July 2013, Hess created, and posted to the data room, a set of financial disclosure statements for its bunker oil business, which showed the revenues, costs, and profits of the business for 2010, 2011, and 2012. On November 12, 2013, after a diligence period, Aegean and Hess executed a Purchase and Sale Agreement ("PSA") for Aegean's purchase of Hess's bunker oil sales contracts for certain ports. As part of the transaction, Aegean also purchased Hess's current bunker oil inventory for $97 million. The PSA also included a final set of financial disclosures that were later annexed as Schedule 8 to the PSA.

In paragraph 4.9 of the PSA, Hess represented that "Schedule 8 is consistent with the financial books and records of Seller from which it is derived and presents fairly in all material respects the sales and margins of the Bunker Oil Business for the periods covered thereby." Schedule 8 indicated that Hess's pretax profit for its bunker oil business was $15 million from 2010 to 2012.

In paragraph 4.11 of the PSA, entitled "Exclusivity of Representations", the parties agreed, in relevant part, that:

> Except for any representations and warranties set forth in Article IV, the Purchased Assets are sold "AS IS, WHERE IS" and Seller expressly disclaims any other representations or warranties of any kind or nature, express or implied, as to Liabilities, operations of facilities, the title, condition, value or quality of assets the Seller or the prospects (financial or otherwise), risks and other incidents of Seller as they relate to the Purchased Assets . . . No material or information provided by or communications made by Seller or any of its Affiliates, or by any advisor thereof, whether by use of a "data room," or in any information memorandum, or otherwise, or by any broker or investment banker, will cause or create any warranty, express or implied, as to or in respect of the Seller or the title, condition, value or quality of the Purchased Assets and Assumed Liabilities. Purchaser agrees that, except in the case of fraud, neither Seller nor any other Person will have or be subject to any Liability to Purchaser or any other Person resulting from the distribution to Purchaser, or Purchaser's use of, any information regarding Seller or its assets and Liabilities, including any offering memorandum prepared, as supplemented or amended, and any information, document, or material made available to Purchaser or its Affiliates in expectation of the transaction contemplated by this Agreement.

After suffering a loss of approximately $10 million in its operation of the bunker oil business in 2014, on December 18, 2014, Aegean commenced this action, alleging that Hess had breached paragraph 4.9 of the PSA. Then, after significant discovery, on December 15, 2015, on consent, Aegean amended its complaint to add a cause of action for fraud.

In the first cause of action for fraud Aegean alleges primarily that information posted to the data room in 2013, during the due diligence process, fraudulently understated Hess's costs of operating its bunker oil business. Specifically, Aegean alleges that despite assurances that Hess purchased its bunker oil for resale at "market prices," the costs quoted in the data room, and in Schedule 8 of the PSA, were based on internal transfer pricing at below market prices.

Aegean claims that throughout the diligence process, it asked Hess to clarify the rates it was using for purposes of calculating the bunker oil business production costs. In the Deal Team's responses, posted directly to the data room, Hess represented that its bunker oil business acquired

bunker oil for resale at market prices. However, Aegean never requested Hess to verify that representation.

Aegean also alleges that the data posted to the data room concealed significant operating costs, labeled "Excess Logistics" and "Other/Timing Impacts," that are colloquially referred to as "black hole" costs. Per Aegean, while some of these black hole costs were incurred by the bunker oil business, they were charged to the ST&T division generally, rather than being allocated specifically to the bunker oil business within the ST&T division. Thus, Aegean claims, Hess overstated the profitability of its bunker oil business. Aegean alleges that these costs include costs for inspection and measurement, custom duties and fees, barge charter costs, port charges, commission expenses, brokerage expenses and government required industry funding. Aegean alleges that the Deal Team knew that substantial portions of these costs were not being allocated to the bunker oil business. Aegean claims that Hess did not disclose that these black hole costs existed, or that they should be attributed to the bunker oil business.

As proof of the alleged fraud, Aegean notes that in an email dated August 27, 2013, Brian McGrath told his manager Stuart Steigerwald that Hess's internal "Allocated Costs" were "significantly higher than what's in the data room ($5.2 [million] vs $3.9 [million]". In the same email, McGrath also noted that the bunker oil business costs did not include the salaries of two Hess employees, and stated, "$ will be skewed".

Aegean alleges that the disclosures provided by Hess represented that the average annual overhead cost of the bunker oil business was $12.2 million, however, the actual cost, including the acquisition of oil at market prices, black hole costs, and other costs, was $25.4 million per year. Aegean contends that, had it learned that the actual costs incurred by Hess's bunker oil business were double what Hess disclosed in the data room and in Schedule 8, it would not have proceeded with the transaction, and would not have lost $10 million in 2014.

Aegean also alleges that it was told by the Deal Team that the financial disclosures posted to the data room were audit quality, when they were not, and that Hess falsely represented that the sale of the bunker oil business included the Port Reading facility, when, in fact, the Port Reading facility was sold to another buyer. Aegean notes that the disclosures posted to the data room and on Schedule 8 of the PSA included the costs, revenues, and pretax profits of the Port Reading facility, and that it did not know that the Port Reading facility was not included in the sale.

Aegean alleges that Hess knew of all these misrepresentations, but did not correct them. Aegean notes that McGrath informed Fitzgerald in an email that there may be inconsistencies in the 2012 figures between different documents in the data room, to which Fitzgerald responded, "[if] we have differences between the sum of the 4 quarters in 2012 and the financials [sic] for 2012, I guess we will just need a good story there to explain why."

Aegean claims that, in reliance on these fraudulent misrepresentations, it overpaid for Hess's bunker oil business and incurred $10 million in losses in 2014. Aegean concludes that Hess's fraud has caused it $97 million in damages.

In the second cause of action Aegean alleges that Hess breached paragraph 4.9 of the PSA by stating that Schedule 8 of the PSA was a fair representation of the costs and margins of Hess's bunker oil business. As damages, Aegean seeks the return of the $30 million purchase price for the bunker oil business.

Hess now moves to dismiss Aegean's fraud claim and portions of its breach of contract claim. Hess argues that in paragraph 4.11 of the PSA, the parties agreed that Hess disclaimed all representations other than those expressly set forth in the PSA. Hess argues that all the alleged misrepresentations are extra-contractual representations, on which Aegean could not justifiably rely. Hess then argues that even if paragraph 4.11 does not apply to plaintiff's fraud claim, Aegean

fails sufficiently to allege fraud and that in any event, Aegean's fraud claim is duplicative of its breach of contract claim.

Discussion

In considering a CPLR § 3211(a)(7) pre-answer motion to dismiss a complaint for failure to state a cause of action, a "court must accept all of the allegations in the complaint as true, and, drawing all inferences from those allegations in the light most favorable to the plaintiff, determine whether a cognizable cause of action can be discerned therein, not whether one has been properly stated" *MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 A.D.3d 836, 839 (1st Dep't 2011) (citations omitted). However, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 A.D.2d 233, 233-234 (1st Dep't 1994). Moreover, fraud claims must be alleged with particularity. *See* CPLR § 3016 (b); *Credit Suisse Fin. Corp. v Reskakis*, 139 A.D.3d 509 (1st Dep't 2016).

I. Fraud

A. Interpretation of Paragraph 4.11 of the PSA

The first portion of paragraph 4.11 disclaims any representation other than those expressly made in the PSA. The last sentence of paragraph 4.11, however, states that "except in the case of fraud," Hess would have no liability for *any* information, documentation, or materials that Hess made available to Aegean. Hess argues that this fraud exception only applies to Hess's liability; it does not permit Aegean to justifiably rely on any extra-contractual representations that were expressly disclaimed earlier in the same paragraph.

The first portion of paragraph 4.11 plainly disclaims all extra-contractual representations. Contrary to Aegean's argument, the last sentence does not carve out an exception to the disclaimer. Rather, the parties agreed that, in addition to a breach of warranty claim (with its concomitant

breach of contract damages) Hess was permitted to assert a fraud claim (with its concomitant, and broader, damages) based on an intentional, relied upon misrepresentation in the PSA. This interpretation is consistent with New York law, which provides that "a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim [on the same warranties]" *Wyle Inc. v ITT Corp.*, 130 A.D.3d 438, 441 (1st Dep't 2015) (citation omitted).

Aegean's interpretation of paragraph 4.11 would render the disclaimer of representations therein meaningless, which is to be avoided under the well-settled rules of contract interpretation. *See RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 A.D.3d 272, 274 (1st Dep't 2007); *Helmsley–Spear, Inc. v New York Blood Center, Inc.*, 257 A.D.2d 64, 68-69 (1st Dep't 1999). If, as Aegean argues, the last sentence in Paragraph 4.11 creates a broad, extra-contractual fraud exception, then the preceding language disclaiming extra-contractual representations would have no meaning or effect.

Accordingly, I find that paragraph 4.11 precludes Aegean from relying on alleged fraudulent misrepresentations outside the PSA, but Hess may be held liable for fraudulent misrepresentation claims based on the PSA itself. I therefore dismiss Aegean's fraud claim to the extent that the cause of action is premised on disclaimed extra-contractual representations, including, but not necessarily limited to the allegations that: 1) product costs are based on "market prices"[1], and 2) Hess's financials are "audit quality."

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[1] In any event, Aegean is cannot establish reasonable reliance regarding the allegation that product costs are based on "market prices" because Aegean, as a sophisticated entity, admittedly did not ask Hess to verify this representation. *See Glob. Minerals and Metals Corp. v Holme*, 35 A.D.3d 93, 100 (1st Dep't 2006) ("New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations made during business acquisitions by investigating the details of the transactions and the business they are acquiring.").

B. Sufficiency of Aegean's Fraud Claim

Fraud requires a misrepresentation of a material fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance, and damages. *Lama Holding Co. v Smith Barney*, 88 N.Y.2d 413, 421 (1996); *Connaughton v Chipotle Mexican Grill, Inc.*, 135 A.D.3d 535, 537 (1st Dep't 2016). A claim rooted in fraud must be plead with the requisite particularity under CPLR § 3016 (b). "Although under section 3016(b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud." *Pludeman v Northern Leasing Sys. Inc.*, 10 N.Y.3d 486, 492 (2008). "Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct." *Pludeman*, 10 N.Y.3d at 492.

In its complaint, Aegean alleges that Hess made several representations that it knew to be false, upon which Aegean relied, and was damaged. Only two of those alleged misrepresentations are set forth in the PSA – 1) that the financial disclosures, including Schedule 8, were accurate; and 2) that Port Reading was included in the sale. Aegean alleges that it relied upon these misrepresentations, which underestimated costs and overestimated profits.[2] Aegean contends that, had it known the truth about the costs associated with the bunker oil business, it would not have

[2] Specifically, Aegean alleges that "black hole" costs, which were incurred by the bunker business but not allocated to that business, were intentionally not included as part of the costs depicted in the documents posted to the data room and Schedule 8. Aegean further alleges that Hess knew that it understated and/or omitted costs from Schedule 8 that were material to Aegean's decision to enter into the PSA.

Aegean also alleges that, because Hess never intended to include Port Reading in the sale, Hess overstated its revenue by $2.1 million by fraudulently including Port Reading in its Schedule 8 disclosures. Although Hess argues that Aegean knew it was not purchasing Port Reading because Port Reading was not enumerated in the "Purchased Assets" portion of the PSA, Schedule 8 does include Port Reading as part of Hess's bunker oil business. Accordingly, Hess has not established, as a matter of law, that Aegean knew it was not purchasing Port Reading.

purchased the business, and would not have lost $10 million in 2014. Based on these allegations, Aegean has sufficiently set forth a claim of fraud against Hess.

C. Fraud Claim Duplicative of Breach of Contract Claim

Under New York law, a plaintiff may plead a fraud claim, as well as a contract claim, if it alleges "a misrepresentation of present fact, unlike a misrepresentation of future intent to perform under the contract . . .." *GoSmile, Inc. v Levine*, 81 A.D.3d 77, 81 (1st Dep't 2010). Hess argues that Aegean's fraud claim must be dismissed as duplicative of its breach of contract claim because the alleged misrepresentation is a breach of an express representation in the PSA between the parties. Aegean opposes, arguing that, in understating costs and overstating revenues in Schedule 8, Aegean's express representation was false and misleading, and under New York law, that alleged misrepresentation may form the basis of a separate fraud claim.

Recently, in *Wyle Inc. v ITT Corp.*, 130 A.D.3d 438 (1st Dep't 2015), the First Department held that a plaintiff may assert a fraudulent inducement claim and a breach of contract claim, even where "a fraud claim [is] based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim." *Wyle Inc.*, 130 A.D.3d at 440. In reaching this conclusion, the court cited *First Bank of Americas v Motor Car Funding, Inc.*, 257 A.D.2d 287, 292 (1st Dep't 1999), in which "plaintiff[] claim[ed] [] that defendant[] intentionally misrepresented material facts about various [present facts] so that they would appear to satisfy these warranties." *Wyle Inc. v ITT Corp.*, 130 A.D.3d 438, 441 (1st Dep't 2015) (citing *First Bank of Americas*, 257 A.D.2d at 292).

Similarly, here, Aegean alleges that in Schedule 8, Hess made several fraudulent representations about its business, *i.e.*, omitting certain costs and/or including Port Reading in Schedule 8. These alleged misrepresentations may form both a claim for breach of the warranties in the PSA, and fraud in the inducement.

II. Breach of Contract

Hess argues that I should dismiss those portions of Aegean's breach of contract claim that relate to Port Reading and the omission of certain costs. As noted above Aegean's fraud claim based these allegation stands, thus I do not dismiss Aegean's breach of contract claim which are also based upon these allegations.

Accordingly, it is

ORDERED that defendant Hess Corporation's motion to dismiss is denied except to the limited extent set forth above; and it is further

ORDERED that defendant Hess Corporation is directed to serve an amended answer to the amended complaint within thirty days of the date of this order; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 208, 60 Centre Street on July 19, 2017, at 2:15 p.m.

DATE 5/31/17

SALIANN SCARPULLA J.S.C.