

CPI Aerostructures, Inc. v Air Indus. Group
2020 NY Slip Op 33249(U)
September 23, 2020
Supreme Court, New York County
Docket Number: 653397/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY

PART IAS MOTION 48EFM

Justice

-----X

INDEX NO. 653397/2018

CPI AEROSTRUCTURES, INC.,
Plaintiff,

MOTION DATE _____

MOTION SEQ. NO. 003

- v -

AIR INDUSTRIES GROUP, WELDING METALLURGY,
INC., and COMPAC DEVELOPMENT CORP.,
Defendants.

DECISION + ORDER ON
MOTION

-----X

WJEFM

8

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 136.

were read on this motion to/for ENFORCE

On March 21, 2018, defendant Air Industries Group (Air IG) and plaintiff CPI Aerostructures, Inc. (CPI) entered into a Stock Purchase Agreement (SPA). (NYSCEF Doc. No [NYSCEF] 100, Stock Purchase Agreement at 1.) Pursuant to the SPA, Air IG promised to sell shares of defendant Welding Metallurgy, Inc. (WM) to CPI. (*Id.*) On July 5, 2018, CPI commenced an action in this court alleging that Air IG breached the SPA by failing to provide data and information needed by CPI's accountants to satisfy conditions of the closing as set out in Section 5.02. (NYSCEF 1, Complaint ¶¶ 2-5.) Specifically, in the first cause of action, CPI sought a declaratory judgment that CPI is entitled to specific performance of Section 5.02. (*Id.* ¶ 85.) In the second cause of action, CPI sought damages for at least \$5,000,000. (*Id.* ¶ 91.) The action was commenced with CPI's filing of motion sequence number 001 in which CPI sought a

preliminary injunction enjoining Air IG to produce the data and information required by Section 5.02. (NYSCEF 16, Order to Show Cause.)

Air IG counterclaimed for breach of contract alleging that CPI breached the SPA by performing due diligence in a dilatory manner. (NYSCEF 14, Answer with Counterclaims ¶¶ 30-31.) Air IG also counterclaimed for breach of the implied covenant of good faith and fair dealing. (*Id.* ¶¶ 36-40.) Air IG specifically alleged that CPI "entered into the [SPA] ... to divert resources to negotiating and providing due diligence for the [SPA] that CPI had no intention of closing." (*Id.* ¶¶ 38-39.)

The action was initially assigned to Justice Charles Ramos¹ who met with the parties to resolve motion sequence number 001 and the action. (NYSCEF 99, Palazzolo Affidavit ¶¶ 7-9.) The parties entered into a stipulation and order dated October 2, 2018 in which Air IG promised to provide CPI with certain financials of WM. (NYSCEF 101, First Stipulation.) The parties also created a protocol to resolve other matters. The parties entered into a second stipulation and order that effectively amended the SPA to reflect their resolutions to their disputes. (NYSCEF 102, Second Stipulation.) On December 20, 2018, the parties entered into a stipulation of discontinuance. (NYSCEF 103, Stipulation of Discontinuance.) The stipulation provides that "[a]ll monetary causes of action, claims and counterclaims asserted herein by the parties in this action are discontinued with prejudice." (*Id.*) It further provides that "the Court retains continuing jurisdiction over this case." (*Id.*)

¹ Justice Ramos retired on December 31, 2018. This case was reassigned to Part 48 on October 8, 2019. (See NYSCEF comments).

Because the parties entered the stipulation, Justice Ramos “deemed moot” motion sequence number 001. (NYSCEF 97, Decision and Order.) The action was also marked disposed on NYSCEF and remains disposed to date.

CPI and Air IG closed the acquisition on December 20, 2018. (NYSCEF 99, Palazzolo aff ¶ 6.) Apparently, CPI filed this motion (sequence number 003) because another dispute arose. Specifically, the SPA provides that, at the closing, the initial purchase price shall be adjusted according to certain factors. (NYSCEF 100, SPA § 2.04 [a][i].) This “Post-Closing Adjustment” is defined in the SPA as 50

“an amount equal to the Closing Working Capital minus the Estimated Closing Working Capital (the ‘Post-Closing Adjustment’). If the Post-Closing Adjustment amount is a positive number, such amount will be paid by Buyer to Seller and if the Post-Closing Adjustment Amount is a negative number, the absolute value of such amount will be paid by Seller to Buyer, in each case in accordance with Section 2.04(d).”

(*Id.* § 2.04 [b][ii].) The SPA allows Air IG 30 days from receipt of CPI’s Closing Working Capital Statement to review and object to it by delivering to CPI a written statement setting forth Air IG’s objections (Statement of Objections). (*Id.* § 2.04[c][i],[ii].) The parties promised to subsequently negotiate in good faith to resolve these disputes in the Statement of Objections. (*Id.* § 2.04[c][ii].) Nevertheless, the SPA also provides a protocol for disputes that the parties could not resolve through negotiation. This provision, Section 2.04(c)(iii), provides ;

“If Seller and Buyer fail to reach an agreement with respect to all of the matters set forth in the Statement of Objections before expiration of the Resolution Period, then any amounts remaining in dispute (‘Disputed Amounts’ with any amounts not so disputed, the ‘Undisputed Amounts’) shall be submitted for resolution to EisnerAmper LLP or, if EisnerAmper LLP is unable to serve, Buyer and Seller shall appoint by mutual agreement an impartial nationally

recognized firm of independent certified public accountants other than Seller's Accountants or Buyer's Accountants (the 'Independent Accountant') who, acting as experts and not arbitrators, shall resolve the Disputed Amounts only and make any adjustments to the Post-Closing Adjustment, as the case may be, and the Closing Working Capital Statement. The parties hereto agree that all adjustment shall be made without regard to materiality. The Independent Accountant shall only decide the specific items under dispute by the parties and their decision for each Disputed Amount must be in within the range of values assigned to each such item in the Closing Working Capital Statement and the Statement of Objections, respectively."

(NYSCEF 100, SPA § 2.04 [c][iii].) The scope of the Independent Accountant's authority is set out Section 2.04(c)(v).

"The Independent Accountant shall make a determination as soon as practicable within 30 calendar days (or such other time as the parties hereto shall agree in writing) after their engagement, and their resolution of the Disputed Amounts and their adjustments to the Closing Working Capital Statement and/or the Post-Closing Adjustment shall be conclusive and binding upon the parties hereto."

(*Id.* § 2.04 [c][v].) The fees of the Independent Accountant are calculated and governed by Section 2.04(c)(iv).

"The fees and expenses of the Independent Accountant shall be paid by Seller, on the other one hand, and by Buyer, on the other hand, based upon the percentage that the amount actually contested but not awarded to Seller or Buyer, respectively, bears to the aggregate amount actually contested by Seller and Buyer."

(*Id.* § 2.04 [c][iv].)

Apparently, CPI maintained that the Post-Closing Adjustment amounted to \$4,145,870 (the difference between Air IG's Estimated Closing Working Capital in the amount of \$8,107,172 and CPI's Closing Working Capital in the amount of \$3,961,302). (NYSCEF 99, Palazzolo aff ¶ 18.) Air IG, however, delivered a Statement of Objections

to CPI upon receipt of CPI's Closing Working Capital Statement. (*Id.* ¶¶ 20-22.) The parties could not negotiate a resolution and they submitted their unresolved disputes to an Independent Accountant, not EisnerAmper LLP, but nonparty BDO USA, LLP (BDO) whom the parties jointly retained. (NYSCEF 107, Retainer Agreement.)

BDO issued its Independent Accountant's Report (Report) on September 3, 2019. (NYSCEF 111, Report.) In that report it reiterated the background of this matter, CPI's position, and Air IG's position. (*Id.* at 1-6.) BDO found in favor of CPI and ruled "that no change is required to Closing Working Capital as presented on [CPI's] Closing Working Capital Statement." (*Id.* at 6.) In support of its determination, BDO explained that

"[CPI] has provided detailed and thorough support for its proposed Inventory Value and has furnished emails supporting [CPI's] claims regarding the sampling discrepancies that were discovered. [Air IG's] position appears to be almost entirely predicated on its claim that [CPI's] proposed Inventory Value is not credible in comparison [to] [Air IG's] own Pre-Closing Estimate. [Air IG] has never provided an actual alternative to the Buyer's Inventory Value calculation."

(*Id.* at 6.) BDO further stated that CPI "was awarded 100% of the 'amount actually contested,' therefore, [Air IG] is responsible for 100% of the fees and expenses of the Independent Accountant." (*Id.*)

CPI now alleges that Air IG did not pay the Post-Closing Adjustment amount totaling \$4,145,870 nor BDO's fees totaling \$13,818,50. (NYSCEF 99, Palazzolo aff ¶¶ 40, 60.) Accordingly, in motion sequence number 003, CPI moves for (1) a judgment against AIR IG in those amounts and (2) an order directing Air IG to execute a Joint

Release Instruction providing that the parties' escrow agent release certain escrow funds to CPI.

Air IG cross-moves pursuant to CPLR 7601, 408 and 3102 to vacate BDO's determination and conduct discovery.

Discussion

In the notice of motion for motion sequence number 003, CPI does not articulate a CPLR provision under which it seeks the current relief. Implicit in CPI's papers, however, is CPI's reliance on CPLR 7601. Effectively CPI seeks specific enforcement of the SPA's provision to submit an issue of valuation to an Independent Accountant, BDO. At common law, such provisions were unenforceable, however, CPLR 7601 now authorizes their enforcement. (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 7601.) Air IG is more explicit that CPLR 7601 applies. Nevertheless, the motion and cross motion are procedurally improper and denied.

CPLR 7601 provides that

"A special proceeding may be commenced to specifically enforce an agreement that a question of valuation, appraisal or other issue or controversy be determined by a person named or to be selected. The court may enforce such an agreement as if it were an arbitration agreement, in which case the proceeding be conducted as if brought under article seventy-five of this chapter."

Article 75, specifically CPLR 7502 (a), provides that "[a] special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action." In other words, a plaintiff need not bring a special proceeding when a pending action already exists between the parties.

(*Grosz v Serge Sabarsky, Inc.*, 24 AD3d 264 [1st Dept 1999].)

This action, however, was no longer pending at the time that CPI filed motion sequence number 003 and Air IG cross-moved. An action is no longer pending once the parties enter a stipulation of discontinuance with prejudice. (*Matter of HSBC Bank USA, NA (Makowski)*, 72 AD3d 1515, 1516 [4th Dept 2010]; *Kurtz v Kurtz*, 135 AD2d 615, 616 [2d Dept 1987]; *Greenberg v New York City Planning Commn.*, 48 AD2d 830, 830 [2d Dept 1975].) Here, the parties entered into a stipulation of discontinuance, and it explicitly provides that “[a]ll monetary causes of action, claims and counterclaims asserted herein by the parties in this action are discontinued with prejudice.” (NYSCEF 103, Stipulation of Discontinuance.) Accordingly, CPI’s initial claims for a declaratory judgment that CPI is entitled to specific performance of Section 5.02 and damages of \$5,000,000 along with Air IG’s counterclaims for breach of contract and the implied covenant were no longer pending at the time of this motion and cross motion. (NYSCEF 1, Complaint ¶¶ 85, 91; NYSCEF 14, Answer with Counterclaims ¶¶ 30-40.) In fact, by discontinuing the action with prejudice, “the action is as if it never had been.” (*Matter of HSBC Bank USA, NA (Makowski)*, 72 AD3d at 1516.) Therefore, filing a motion and cross motion in this disposed action is insufficient under CPLR 7601 and 7502 (a).

CPI must commence a special proceeding to obtain the relief it seeks despite the stipulation of discontinuance’s provision that “the Court retains continuing jurisdiction over this case.” (NYSCEF 103, Stipulation of Discontinuance.) Of course, CPLR 103 provides that “[i]f a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form”, but the improper form of this proceeding is not the sole deficiency. The dispute raised in motion sequence number 003 and the cross motion is a new dispute not previously mentioned in the complaint or answer. Whereas the complaint and answer concerned

Air IG's alleged failure to provide information necessary to close the acquisition and CPI's alleged dilatory tactics, this motion and cross motion concern enforcement of the SPA provision to submit disputes to an Independent Accountant. Article 4 entitled Special Proceedings, specifically CPLR 402, states that

"[t]here shall be a petition, which shall comply with the requirements for a complaint in an action, and an answer where there is an adverse party. There shall be a reply to a counterclaim denominated as such and there may be a reply to a new matter in the answer in any case."

Neither CPI nor Air IG complied with these pleading requirements. In fact, there are no pleadings that address these new disputes, just a motion and a cross motion filed in a disposed action. "[T]he net effect of this is that instead of commencing a special proceeding, [the parties have] brought on what in legal effect is nothing more than a mere practice motion." (*Levine v Lending*, 176 Misc 462, 463 [Sup Ct, NY County 1941].) This court in similar circumstances has stated that "[a]ll special proceedings must be litigated on pleadings" and that "pleadings are indispensably required." (*Id.*) Moreover,

"[i]n special proceedings under statutes, and in general, the long-established practice has required petition, answer and reply, and codification thereof is the legislative approval that for the proper adjudication of the rights and status of parties, pleadings and a distinct issue are essential and that there can be no orderly administration of justice without them."

(*Id.*) The parties have not only sought relief through the improper form of civil judicial proceedings, but they have also failed to include pleadings. They are litigating a different dispute with no pleadings. Accordingly, the court cannot invoke CPLR 103 (c) to convert this motion into a special proceeding.

The motion and cross motion are denied without prejudice. The parties must follow the proper procedure for bringing this matter before the court. It bears noting that although Justice Ramos, who sat in Part 53 of this court, retained jurisdiction, that does not necessarily mean that Part 53 of this court must hear this subsequent dispute. In fact, this motion and cross motion were randomly assigned to part 48, and it is likely that subsequent disputes shall be randomly assigned to another Part in this court should the parties follow the proper procedure.

Accordingly, it is

ORDERED that motion sequence number 003 and the cross motion are denied.

9/23/2020
DATE

Esden
HON. ANDREA MASLEY

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE