[Cite as *Occidental Chemical Corp. v. Maxus Energy Corp.*, 2004-Ohio-6700.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

OCCIDENTAL CHEMICAL CORPORATION,	:	**O P I N I O N**
Plaintiff- Appellee,	:	**CASE NO. 2002-A-0012**
- vs -	:	
MAXUS ENERGY CORPORATION,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 97 CV 811.

Judgment: Affirmed in part, reversed in part, and remanded.

Carl F. Muller, 134 West 46th Street, P.O. Box 2300, Ashtabula, OH 44004, and *Joseph D. Lonardo*, P.O. Box 1008, Columbus, OH 43126 (For Plaintiff-Appellee).

David A. Schaefer, 1800 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115, *Paul M. Bohannon*, 1001 Woodloch Forest, Suite 200, The Woodlands, TX 77380, and *Thomas E. Starnes*, 1701 Pennsylvania Avenue, N.W., Suite 300, Washington, DC 20006 (For Defendant-Appellant).

WILLIAM M. O'NEILL, J.

{¶1} This appeal arises from the Ashtabula County Court of Common Pleas, wherein appellee, Occidental Chemical Corporation, ("Occidental"), prevailed on a motion for summary judgment against appellant, Maxus Energy Corporation ("Maxus").

{¶2} Pursuant to a stock purchase agreement ("Agreement"), dated September 4, 1986, Occidental paid over $411 million dollars to acquire Diamond Shamrock Corporation ("DSCC") from its parent company, Maxus.

{¶3} Upon acquiring DSCC, Occidental acquired and continued to operate some of the chemical plants that DSCC had operated, but not all of them. The Agreement refers to the plants that Occidental purchased and continued to operate as "active sites." In contrast, the Agreement refers to "inactive sites" as those chemical plants "which were previously, but which, as of the Closing Date, are not, owned, leased, operated or used in connection with the business or operations of any Diamond Company."

{¶4} There are two key provisions of the agreement that are at issue in this case. Both provisions deal primarily with how environmental liabilities and costs would be distributed between the parties. First, Article IX of the Agreement focuses on those matters for which Maxus would be contractually obligated to indemnify Occidental for one hundred percent of specified environmental liabilities, including those associated with federal Superfund sites, as defined in Article IX. The parties agreed that the Superfund sites referred to within the Agreement are those listed on Schedule 2.07(g) of the Agreement.

{¶5} Secondly, Article X relates to which environmental costs would be equally shared by both parties, including costs associated with remediation at active sites and equipment installation to maintain environmental compliance at active sites, including actions necessary because of changes in the law after the closing.

{¶6} A dispute arose as to the interpretation of key provisions in both Article IX and X. Occidental subsequently filed this declaratory judgment action in the Ashtabula County Court of Common Pleas in October 1997. Occidental sought a declaration of its rights and obligations regarding the interpretation of the Agreement.

{¶7} Specifically, in Count I, Occidental asked the trial court to declare that, pursuant to Article IX of the Agreement, Maxus had an obligation to pay one hundred percent of the liabilities of DSCC for the Fields Brook Superfund Site, located in Ashtabula, Ohio. In Count III, Occidental sought to have the trial court declare that Maxus had an obligation under Article X of the Agreement, to pay fifty percent of the costs to bring "Active Chemical Plant Sites" into compliance with "Environmental Laws" (as those terms are defined in the agreement), including costs due to changes in the laws after the date of the Agreement.

{¶8} Occidental filed a motion for summary judgment on September 30, 1998, requesting the trial court to declare that the relevant provisions of Article IX and Article X were unambiguous and clear on their face, and to declare that Maxus was obligated to pay Occidental one hundred percent of the Fields Brook Superfund Site liabilities and fifty percent of the environmental costs to bring active sites into compliance with environmental laws.

{¶9} Maxus opposed Occidental's summary judgment motion and filed a cross-motion for summary judgment on November 20, 1998, arguing that Occidental's claims were barred by res judicata because Occidental did not assert these claims in a prior declaratory judgment action filed in Texas in 1995. Maxus also contended that, even if Occidental's claims were not barred by res judicata, genuine issues of fact existed,

which precluded summary judgment in Occidental's favor on Counts I and III of the complaint.

{¶10} On January 25, 2002, the trial court granted Occidental's motion for summary judgment and denied Maxus's cross-motion. The judgment entry only addressed the declaratory judgment claims of Counts I and III, with Counts II and IV for breach of contract remaining. Thus, both parties jointly moved to amend the judgment entry pursuant to Civ.R. 54(B) to authorize an immediate appeal. An amended judgment entry was issued on February 11, 2002, including a finding pursuant to Civ.R. 54(B). Maxus subsequently filed this appeal, citing two assignments of error.

{¶11} Maxus's first assignment of error is:

{¶12} "The trial court erred in denying Maxus's motion for summary judgment based on *res judicata*."

{¶13} In its first assignment of error, Maxus contends that, due to a previous declaratory judgment action filed by Occidental seeking a declaration of Occidental's rights under provisions in the Agreement, the doctrine of res judicata operates to preclude Occidental from prevailing in this action.

{¶14} Pursuant to Civ.R. 56(C), summary judgment is properly entered where no genuine issues of fact remain, the moving party is entitled to judgment as a matter of law, and it appears that reasonable minds can come to but one conclusion which is adverse to the nonmoving party.[1] A party seeking to obtain a declaratory judgment may move for summary judgment with or without supporting affidavits.[2]

1. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293.
2. *See* Civ.R. 56(A).

{¶15} The Supreme Court of Ohio has recognized that the Full Faith and Credit Clause of the United States Constitution requires Ohio courts to recognize the validity of prior judgments rendered by courts of competent jurisdiction in other states.[3] In the case at bar, the effect of the prior judgment rendered in Texas state court must be determined under Texas law, where it was rendered, and the judgment must be given the same effect in this court.[4]

{¶16} In Texas, the doctrine of res judicata holds that, "a final judgment in an action bars the parties and their privies from bringing a second suit '"not only on matters actually litigated, but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit."'"[5] Texas applies a transactional approach in determining which claims could have been brought in an earlier suit.[6] Under the transactional approach, a claim is barred if it "arises out of the same subject matter of a previous suit and which through the exercise of diligence, could have been litigated in [the] prior suit."[7]

{¶17} On November 7, 1995, Occidental filed a petition for declaratory judgment, pursuant to the Texas Uniform Declaratory Judgment Act, in Texas state court. Occidental filed that action seeking a declaration of its rights regarding notice in a fifty percent cost-sharing provision in Article X of the Agreement.

3. *Holzemer v. Urbanski* (1999), 86 Ohio St.3d 129, 132, citing *Wyatt v. Wyatt* (1992), 65 Ohio St.3d 268, 269.
4. *Holzemer*, at 132.
5. (Citations omitted.) *Compania Financiara Libano, S.A. v. Simmons* (Tex.2001), 53 S.W.3d 365, 367.
6. *Barr v. Resolution Trust Corp.* (Tex.1992), 837 S.W.2d 627, 630.
7. Id. at 631.

{¶18} Specifically, Occidental sought a declaration from the trial court that it was sufficient that Maxus receive timely notice of the "conditions, events or circumstances" that might give rise to environmental costs within ten years from the closing of the Agreement, even if the costs were not actually "paid or incurred" until after the ten-year period had expired.

{¶19} In contrast, Maxus argued in the Texas action that the environmental costs had to have been "paid or incurred" by Occidental within the ten-year period prescribed by §10.01(d) of Article X to be eligible for cost-sharing under Article X.

{¶20} On April 17, 1996, the Texas trial court entered judgment in favor of Occidental, and Maxus was ordered to pay the costs under the Agreement. Maxus appealed that decision to the Texas Court of Appeals.[8] As the appeal was pending, and at Occidental's request, Maxus was required by court order to post a supersedeas bond, so that Occidental could be made whole if the appeal was unsuccessful. Thus, Maxus posted a bond, in the form of a letter of credit in Occidental's favor. Maxus was required to obtain an amended letter of credit for every six months that the appeal was pending. At the conclusion of the appeal, Maxus established a letter of credit totaling approximately $14.5 million dollars.

{¶21} On May 28, 1998, the Texas Fifth District Court of Appeals affirmed the trial court, holding that, "[t]he plain meaning of the language used requires Occidental to give notice of conditions, events, and circumstances within the ten years following the closing date and not, as Maxus contends, notice of environmental costs paid or incurred."[9] The court then ordered that Occidental "recover their costs of this appeal

8. *Maxus Energy Corp. v. Occidental Chem. Corp.* (Tex.App.1998), 1998 Tex. App. LEXIS 3242.
9. Id. at *16.

from [Maxus] and the full amount of the trial court's judgment and the costs of this appeal, to the extent that they exceed the liability of Aetna Casualty & Surety Company as surety on [Maxus's] cost bond, from [Maxus] and from Societe Generale as surety on [Maxus's] supersedeas agreement."

{¶22} The thrust of Maxus's argument on this appeal is that res judicata acts as a bar to this litigation in Ohio for two reasons. First, because Occidental sought and recovered "coercive money judgment" in the Texas action, the action was not a true declaratory judgment action and any exceptions to res judicata on declaratory judgment grounds cannot stand. Second, Maxus asserts that the two disputes at issue in this case existed prior to the filing of the petition for declaratory judgment in Texas and could have been litigated at that time, thus barring this current litigation under res judicata principles.

{¶23} In response, Occidental argues first that Texas res judicata theory allows for a declaratory judgment exception, meaning that a declaratory judgment action will preclude the relitigation of only those issues declared in the prior action, not issues that could have been litigated in the prior action. Occidental does not dispute that the current issues, which are the subject of this Ohio cause of action, existed at the time the Texas suit was filed. Occidental maintains that the prior Texas suit was purely declaratory and the exception to res judicata applies.

{¶24} Applying the Texas theory of res judicata, it is clear that the claim in this Ohio suit arises out of the same subject matter of the previous suit in Texas; namely, the stock purchase agreement, and, more specifically, Article X of the Agreement and

its application to each party's environmental cost liabilities. This current suit also includes issues regarding Article IX of the Agreement.

{¶25} Maxus asserts, and Occidental does not dispute, that both parties were aware of the disputes at issue in the Ohio suit years before the Texas suit was filed. This fact goes to the heart of the Texas res judicata doctrine: through the exercise of due diligence, the current issues could have been litigated in the Texas declaratory judgment action, rather than a separate Ohio action.

{¶26} An exception exists to the res judicata doctrine for declaratory judgment actions. The exception reads:

{¶27} "'A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.'"[10]

{¶28} In *Martin v. Martin, Martin & Richards, Inc.*, the Supreme Court of Texas recognized the declaratory judgment exception to res judicata pronounced in the Restatement. In *Martin*, the court held, "as a general matter, a judgment dismissing with prejudice a claim for a declaration that a contract is valid does not amount to a declaration that the contract is invalid and does not preclude an action for subsequent breaches."[11]

10. *Martin v. Martin, Martin & Richards, Inc.* (Tex.1998), 989 S.W.2d 357, 359, quoting Section 33, Restatement (2d) of Judgments.
11. *Martin*, at 359.

{¶29} Thus, in Texas, the declaratory judgment exception to res judicata states that where a party receives a judgment in a declaratory action, that party is barred from bringing that issue in a subsequent action, as it relates to the specific matters declared. Moreover, regardless of the outcome of the first declaratory action, either party can pursue other declaratory or coercive relief in a subsequent action.

{¶30} Thus, in the instant case, Occidental prevailed in its declaratory judgment action in the Texas appellate court concerning the interpretation of Article X of the contract at issue, concerning notice of environmental costs paid or incurred. That judgment did not, however, relate to the issue brought before the Ohio court; that is, the declaratory judgment sought in Counts I and III. In Count I, Occidental contended Maxus had an obligation to pay all liabilities of DSCC for the Fields Brook Superfund Site, and, in Count III, Occidental asserted Maxus had to pay half the costs to bring the "Active Chemical Plant Sites" into compliance with environmental laws.

{¶31} Neither of these discrete issues was litigated in the prior declaratory judgment action in Texas. Although the broad issue of environmental cost liabilities is a similar theme in both cases, a different provision of the contract, that also relates to environmental cost-sharing, is implicated in the Ohio case than in the previous Texas action. Therefore, in applying the declaratory judgment exception to the res judicata doctrine set forth in Section 33, Restatement (2d) of Judgments and the Supreme Court of Texas holding in *Martin*, we conclude Occidental's claims, relating to Counts I and III of the complaint, are not barred by the doctrine of res judicata as the discrete matter declared in the Texas action is not raised in this action.

{¶32} Maxus asserts that, even if the declaratory judgment exception has been adopted in Texas, Occidental received "coercive relief" in the Texas suit, which precludes it from falling into the exception as it is not a "pure" declaratory judgment action. However, we find that argument to be without merit. The "relief" obtained by Occidental in the Texas action was in the form of a supersedeas bond posted by Maxus to ensure that Maxus would be able to indemnify Occidental for its environmental liability, should the Texas court declare such. We find that Texas has adopted the declaratory judgment exception to res judicata and, thus, need not address whether the Texas action was a "pure" declaratory judgment action.

{¶33} Thus, we find that this current action is not barred by the doctrine of res judicata.

{¶34} Maxus's first assignment of error is without merit.

{¶35} Maxus's second assignment of error is:

{¶36} "The trial court erred in granting Occidental's motion for summary judgment."

{¶37} In its second assignment of error, Maxus contends that the trial court erred in granting Occidental's motion for summary judgment, as genuine issues of fact remain.

{¶38} According to the terms of the contract, the Agreement shall be governed by the laws of the state of Delaware. Thus, we shall consider the contract at issue employing Delaware contract law.

{¶39} When contract provisions currently in controversy are "fairly susceptible of different interpretations or may have two or more different meanings, there is

ambiguity."[12] Thus, the interpreting court must look beyond the language of the contract and determine the intent of the parties.[13] Therefore, where, as here, there is ambiguity, the reviewing court must consider extrinsic evidence to arrive at the correct interpretation of the contractual terms.[14] Thus, the meaning of the contract terms cannot be resolved as a matter of law.[15]

{¶40} In the instant case, the trial court stated, "[t]he Court does not consider Article IX, Section 9.03 to be ambiguous and will not consider the affidavit of William C. Hutton." Thus, the court determined the contractual terms were not ambiguous and consideration of extrinsic evidence was not required. We disagree.

{¶41} The Agreement provided for three, separate categories of liability: (1) Superfund Sites; (2) Federal Superfund Litigation; and (3) active plant sites. Schedule 2.07(g) of the agreement is a listing of fifteen sites on the National Priority List of Superfund Sites and the Fields Brook Site is on that list.

{¶42} Article IX of the agreement provides for full indemnification on the part of Maxus to Occidental for any Superfund Site. Maxus contends that the language "but excluding matters expressly covered by Article X hereof" at the end of the provision providing full indemnification creates an ambiguity. Maxus contends that, although Fields Brook is listed as a Superfund Site, it is subject to the cost-sharing provisions of Article X, rather than full indemnification, because Fields Brook encompasses and receives pollution from an active site that Occidental continued to operate after the close of the agreement and Section 9.03(a)(iii) expressly excludes Superfund Sites from

12. *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.* (Del.1997), 702 A.2d 1228, 1232.
13. *Pellaton v. Bank of New York* (Del. 1991), 592 A.2d 473.
14. *Pellaton*, at 478.
15. *Eagle Indus., Inc.,* at 1233.

full indemnity coverage under Article IX if they are also covered by the active site provisions in Article X.

{¶43} We find this term, as to whether the Fields Brook Site is to be deemed purely a Superfund Site under Article IX, requiring full indemnification, or whether it is subject to the active site cost-sharing provision in Article X, to be ambiguous. Thus, the issue cannot be settled as a matter of law and disposed of via summary judgment. Therefore, the trial court was required to consider extrinsic evidence provided in determining the intent of the parties.

{¶44} Therefore, based on the foregoing, the trial court erred in entering summary judgment in favor of Occidental. Maxus's second assignment of error is with merit.

{¶45} Thus, Maxus's first assignment of error is without merit and the second assignment is with merit. The judgment of the trial court is affirmed in part and reversed in part, and the cause is remanded for further proceedings consistent with this opinion. Any pending motions are hereby overruled as moot.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.