UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DIRECT ENERGY MARKETING LIMITED, JOHN LAGADIN, and 646885 ALBERTA LTD., Plaintiffs,	:	**3:99cv1942(WWE)**
v.	:	
DUKE/LOUIS DREYFUS LLC, DUKE ENERGY CORPORATION, LOUIS DREYFUS ENERGY CORPORATION, Defendants.	:	

RULING ON DEFENDANTS' RENEWED MOTIONS TO DISMISS, OR IN THE ALTERNATIVE, TO STAY THE ACTION

Plaintiffs Direct Energy Marketing Limited ("DEML"), John Lagadin, and 646885 LTD brought this action against Duke/Louis Dreyfus LLC ("DLD"), Duke Energy Corporation ("DEC"), Louis Dreyfus Energy Corporation ("LDEC") after the failure of a proposed acquisition of DEML by Duke/Louis Dreyfus Canada Ltd.("DLD Canada"), an affiliate of DLD. Plaintiffs allege claims of promissory estoppel(count one), breach of contract(count two), and breach of the implied covenant of good faith and fair dealing (count three).

In its Ruling dated June 20, 2000, this Court denied without prejudice the defendants' motion to dismiss the complaint for failure to join an indispensable party, motion to stay the action pending plaintiffs' action against Duke/Louis Dreyfus Canada previously filed in Canada, and motion to dismiss for lack of personal jurisdiction over DEC. In its ruling, this Court

indicated that DLD Canada was a necessary party. However, the Court stated that if DLD Canada was acting as the agent of DLD, plaintiffs would be entitled to sue DLD, the principal, without joining DLD Canada, the agent. Japan Petroleum Co. LTD v. Ashland Oil, Inc., 456 F. Supp. 831, 836 (D. Del. 1978). Consequently, the Court ordered limited discovery to determine whether an agency relationship existed between DLD and DLD Canada.[1]

The parties have now completed that discovery, and defendants have filed renewed motions to dismiss for failure to name an indispensable party, to stay the action, and to dismiss the complaint against DEC for lack of personal jurisdiction. Plaintiffs do not oppose the motion to dismiss the complaint against DEC for lack of personal jurisdiction.

The disposition of this motion to dismiss for failure to name an indispensable party depends on whether the Court may accord complete relief without the presence of DLD Canada due to the existence of an agency relationship between DLD and DLD Canada, which inquiry requires the Court to determine whether defendant DLD may be held liable for the claims asserted against it. Following the analysis of Japan Petroleum Co. LTD, the Court construes this motion as a motion to dismiss for failure to state

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[1]The Court also ordered discovery to determine whether grounds existed to assert personal jurisdiction over DEC in Connecticut.

a claim under Fed. R. Civ. P. 12(b)(6), which the Court converts into a motion for summary judgment as matters outside the pleading are presented, and the parties have had an opportunity for discovery on the relevant issue.

BACKGROUND

The parties have submitted evidentiary materials including documents and affidavits that are relevant to the Court's consideration of the alleged agency relationship between DLD and DLD Canada. The Court states the following undisputed facts that are reflected in the parties' materials.

DLD contemplated acquisition of DEML prior to creation of DLD Canada. In April, 1996, a team, consisting of employees of Duke Power and LDEC conducted preliminary due diligence of DEML.

On May 1, 1996, DLD Canada was formed as a holding company, with one shareholder holding one share, and four directors.

According to a memo dated May 23, 1996, from John Klarer, Director of DLD's Canadian Operations, DLD decided to create DLD Canada to consummate the purchase of DEML. A memo dated June 18, 1996, from Hal Welkin of DLD's legal department indicates that DLD sought to have the earnings of the newly acquired DEML repatriated by DLD in the United States. Further, a memo by Joe Petrowski, President of Natural Gas at DLD, states that DLD planned to place "a limited number of DLD people to handle risk management, electricity and oversee the direction of DEML."

On September 30, 1996, DLD Canada loaned funds to DEML that it had borrowed from DLD.

On July 22, 2001, a meeting with representatives of DEML and DLD was held at DLD’s offices in Wilton, Connecticut. The evidence demonstrates that DLD stressed that communication should occur between employees or officers of DLD in Connecticut and employees or officers of DEML in Canada.

As reflected by its board resolutions dated September 30, 1996, DLD Canada’s board of directors resolved to enter into an exclusivity letter with the plaintiffs for the purchase of all the shares of DEML.

On October 1, 1996, a meeting of DLD’s board of directors reviewed a summary of the principal terms of the proposed acquisition of DEML and passed a resolution authorizing DLD Canada to provide additional capital to DEML. At an October 25, 1996, telephonic board meeting, DLD’s directors authorized DLD Canada to proceed with the purchase of DEML.

On November 20, 1996, Simon Rich, Managing Director of DLD, informed DLD’s board of directors that negotiations with DEML had encountered difficulties.

In a letter to Lagadin of DEML dated November 18, 1996, Rich indicated that the acquisition of DEML as planned would be terminated, and he proposed terms of disengagement.

DISCUSSION

Defendants move for disposition of this action, arguing that DLD Canada must be joined as the sole entity liable for contractual obligations owed to plaintiffs. Plaintiffs counter that relief can be accorded without the presence of DLD Canada, because DLD Canada was formed as an agent and instrumentality of DLD for the purpose of consummating the acquisition of DEML. Defendants argue that, pursuant to Canadian law, they cannot be held liable for the obligations made by their affiliate, DLD Canada.

A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F. 2d 979, 982 (2d Cir.), cert. denied, 502 U.S. 849 (1991).

The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. American International Group, Inc. v. London American International Corp., 664 F. 2d 348, 351 (2d Cir. 1981). In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). If a nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which

he has the burden of proof, then summary judgment is appropriate. Celotex Corp., 477 U.S. at 323. If the nonmoving party submits evidence which is "merely colorable," legally sufficient opposition to the motion for summary judgment is not met. Anderson, 477 U.S. at 249.

Upon review of the Court's previous ruling of June 20, 2000 and the pending moving papers, this Court finds that DLD Canada is a necessary party to this action.

As indicated previously above, the Court now turns its inquiry to whether DLD may be held liable for contractual obligations owed by DLD Canada to the plaintiffs. If so, the Court may, in equity and good conscience, proceed in DLD Canada's absence. See Global Discount Travel Services, LLC v. Trans World Airlines, 960 F. Supp. 701, 707 (S.D.N.Y. 1997).

DLD urges this Court to apply Canadian law to its inquiry, while plaintiffs argue that Connecticut law is the relevant choice of law. In order to determine the appropriate choice of state law in a diversity action, the Court must apply the conflict of laws principles of the forum state. Klaxon v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941).

The question of whether DLD Canada acted as DLD's agent sounds in contract. Commind v. Sikorsky Aircraft Division of United Technologies Corporation, 116 F.R.D. 397, 401 (D. Conn. 1987). Choice of law for a contract claim should be determined according to the most significant relationship test of the

Restatement (Second) Section 188, which provides that unless another state has an overriding policy-based interest in the application of its law, the law of the state in which the bulk of the contracting transactions took place should be applied. Reichhold Chemicals, Inc. v. Hartford Accident & Indemnity Co., 243 Conn. 401, 414 (1997).

Section 188(2) lists five contacts to be considered: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." The decision to create DLD Canada to consummate the purchase of DEML was made by officers of DLD in Wilton, Connecticut. However, DLD Canada was incorporated in Canada according to Canadian laws; the transaction to be consumated by DLD Canada was to be performed in Canada; and the dispute at issue arises out of the failed acquisition of one Canadian corporation, DEML, by another Canadian corporation, DLD Canada. The bulk of the relevant contacts favor Canada. Furthermore, Canada has an overriding interest in having its law applied relative to recognition of the corporate form established by its statutory law, particularly since the Canadian courts have specifically distinguished the judicial approach of the Canadian courts from that of American courts relative to judicial disregard of the corporate form. See Sun Sudan Oil v. Methanex

Corp. (1992) 5 Alta. L. R. (3d) 292, 308 ("American courts have shown a greater willingness than have the courts in Canada to treat one company as a mere 'instrumentality' of another, and thus, as responsible for the other."). The Court finds no overriding policy interest that mandates application of Connecticut law in this instance. Accordingly, Canadian law applies to the question of agency.

Application of Canadian law is also consistent with the Restatement (Second) Conflict of Laws Section 307, which provides that the local law of the state of incorporation should be applied to determine the existence and extent of a shareholder's liability to its creditors for corporate debts.

As indicated in Sun Sudan Oil, Canadian law requires clear or even overwhelming evidence of agency or fraud in order to hold a parent or related company liable on a contract made with a subsidiary or other company that signed it. In that case, the court found that the subsidiary, which had no profits and no employees of its own, was controlled by the parent. Nevertheless, the Court refused to hold the parent liable for the subsidiary's obligations due, inter alia, to the Court's recognition of the corporate form, the fact that the use of subsidiaries was clearly contemplated by the parties when they formed their agreement, that the parties were sophisticated organizations with access to legal advice, and that the plaintiff could have availed itself of such protection as a parental

guarantee. Significantly, the court held that the subsidiary had been used for legitimate reasons, which could even include shielding the parent from liability for debts of the subsidiary. See also Bank of Montreal v. Canadian Westgrowth Ltd. (1990), 72 Alta. L. R. (2d) 319, 326-27 (where plaintiff was fully aware that subsidiary was party to contract, parent was not held liable for subsidiary's obligations).

Following Sun Sudan Oil, this Court must consider the interests of justice and the context in which the separate existence of DLD Canada is sought to be ignored. In this instance, the plaintiffs, who are sophisticated corporate parties acting with legal advice, knowingly entered into a contract with a Canadian corporation, and made no effort to secure any type of guarantee from DLD. The Court finds no evidence that raises the inference that DLD Canada was formed to perpetrate a fraud upon the plaintiffs or that the corporate veil should be lifted in the interests of justice.

Further, this Court does not find an agency relationship between the defendants and DLD Canada because none of the proffered evidence indicates that DLD Canada had, by virtue of either an express or implied agency agreement, the authority to bind the defendants to any contractual obligation. See Adams v. Cape Industries plc, [1991] 1 All E.R. 929, 1028 (subsidiary that acted as intermediary of parent was not an agent of parent because it had no general authority to bind parent to contractual

obligations).

Without an agency relationship or circumstances meritorious of piercing the corporate veil, DLD cannot be held liable for the obligations entered into by DLD Canada.

Because DLD cannot be held liable for the obligations of DLD Canada, DLD Canada is an indispensable party according to the factors enumerated in Fed. R. Civ. P. 19(b): (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties, (2) the extent to which the prejudice can be lessened through protective provisions in the judgment, (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiffs will have an adequate remedy if the action is dismissed for nonjoinder. As in Japan Petroleum, the third criteria is controlling because no judgment may be obtained that would be adequate in the absence of DLD Canada. Accordingly, DLD Canada is an indispensable party.

Conclusion

For the foregoing reasons, defendants' renewed motion to dismiss [doc. # 43-1] is GRANTED. Defendants' motion to stay the case [doc. #43-2] is DENIED as moot. The clerk is instructed to close the case.

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Warren W. Eginton, Senior U.S. District Judge

Dated at Bridgeport, Connecticut this ___ day of June, 2001.