IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

HUNTSMAN INTERNATIONAL, LLC, and HUNTSMAN HOLLAND B.V.,	)	
Plaintiffs,	)	
v.	)	C.A. NO.: N17C-11-242 WCC CCLD
DOW CHEMICAL COMPANY, and DOW BENELUX N.V.,	)	
Defendants.	)	

Submitted: May 10, 2018
Decided: October 3, 2018

On Defendants' Motion to Dismiss - DENIED

MEMORANDUM OPINION

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CARPENTER, J.

Before this Court is Defendants' Dow Chemical Company and its Dutch affiliate Dow Benelux N.V.'s (collectively "Dow") Motion to Dismiss Huntsman International LLC and Huntsman Holland B.V.'s (collectively "Huntsman") Complaint.

I. FACTUAL & PROCEDURAL BACKGROUND

The dispute in this case arises from a contract between Dow and Huntsman, under which Dow manufactures industrial chemicals called ethyleneamines and provides them to Huntsman at cost.[1] Their arrangement was a byproduct of Dow's purchase of Union Carbide Corporation in 2001.[2] Prior to the merger, Dow and Union Carbide were the only producers of ethyleneamines in the United States and Canada, and to resolve anti-trust concerns raised by the Federal Trade Commission, Dow entered a consent decree requiring it to sell its pre-merger ethyleneamines business to Huntsman.[3]

As part of the divestment, Dow kept control of the ethyleneamines plant located at its facility in Terneuzen, the Netherlands (the "Terneuzen Plant").[4] At that location, Dow produces ethyleneamines, but it is required under the contract to sell up to half of the Terneuzen Plant's output to Huntsman at the cost of production

[1] Def. Opening Br. in Support of Mot. to Dismiss at 3.
[2] *Id.*
[3] *Id.* at 4.
[4] *Id.*

and receive no profit.[5] The Terneuzen Plant is one of seventeen plants at Dow's Terneuzen facility ("Terneuzen Facility"), Dow's second-largest production site world-wide. The Agreement provides that Dow will send Huntsman an invoice after every quarter for the amount of Product delivered in that quarter. The invoice total is calculated by Dow's cost to operate and maintain the Terneuzen Plant, as well as the cost to produce, store, handle, and deliver the Product and the raw materials used to manufacture the Product.

On January 14, 2014, a barge owned by an unrelated third-party crashed into Dow's jetty at the Terneuzen Facility, causing heavy damage. Dow used that jetty to receive raw materials for the Terneuzen Plant and to deliver ethyleneamine to Huntsman. However, at the time of the accident, the barge was not delivering raw materials for use or otherwise engaged in activities related to the Terneuzen Plant and the production of ethyleneamine. Dow made repairs to the jetty, but did not inform Huntsman of the accident and Huntsman claims it did not otherwise know the accident occurred. On November 30, 2015, Dow sent Huntsman three invoices that purportedly allocated Huntsman its share of the jetty repair costs. The invoices included a summary charge, but did not explain how Dow allocated the charges among its customers and did not provide the total repair cost. Upon receiving the invoices, Huntsman disputed its obligation to pay for the jetty repairs. On

[5] *Id.*

November 3, 2017, Dow sent a notice to Huntsman stating it intended to terminate the Agreement if Huntsman did not pay the November 2015 invoices within fifteen days. On November 17, 2017, Huntsman paid Dow $1,736,095.32 for the jetty repairs ("Repair Payment") under protest and with full reservation of its rights.

On November 22, 2017, Huntsman brought this action seeking a declaration that (1) Huntsman had no contractual obligation to pay for the jetty repairs and (2) Huntsman was entitled to recover the Repair Payment, along with pre- and post-judgment interest and attorneys' fees. On January 29, 2018, Dow filed its Motion to Dismiss and the parties briefed and argued the Motion.

II. STANDARD OF REVIEW

On a motion to dismiss, a court must determine whether the "plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof."[6] "If [the plaintiff] may recover, the motion must be denied."[7] A court may grant the motion if "it appears to a reasonable certainty that under no state of facts which could be proved to support the claim asserted would plaintiff be entitled to relief."[8] When applying this standard, the Court will accept as true all non-

[6] *Holmes v. D'Elia*, 129 A.3d 881 (Del. 2015) (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).
[7] *Deuley v. DynCorp Int'l, Inc.*, 2010 WL 704895, at *3 (Del. Super. Ct. Feb. 26, 2010) (citing *Parlin v. DynCorp Int'l, Inc.*, 2009 WL 3636756, at *1 (Del. Super. Ct. Sept. 30, 2009) (quoting *Spence*, 396 A.2d at 968)), *aff'd*, 8 A.3d 1156 (Del. 2010).
[8] *Fish Eng'g Corp. v. Hutchinson*, 162 A.2d 722, 724 (Del. 1960) (citing *Danby v. Osteopathic Hosp. Ass'n of Del.*, 101 A.2d 308, 315 (Del. Ch. 1953), *aff'd*, 104 A.2d 903 (Del. 1954)); *Nero v. Littleton*, 1998 WL 229526, at *3 (Del. Ch. Apr. 30, 1998).

conclusory, well-pleaded allegations.[9] In addition, "a trial court must draw all reasonable factual inferences in favor of the party opposing the motion."[10] At this preliminary stage, dismissal will be granted only when the Court is able to determine with "reasonable certainty" that plaintiff would not be entitled to relief "under any set of facts that could be proven to support the claims asserted" in the complaint.[11]

III. DISCUSSION

Dow raises two arguments in its Motion to Dismiss. First, Dow contends Huntsman cannot recover the Repair Payment because Huntsman did not allege duress and the payment therefore was voluntary. Second, Dow argues that the terms of the Agreement unambiguously require Huntsman to pay for cost to manufacture the product, which includes delivery of raw materials by way of the jetty. Dow argues that because the jetty services the entire Terneuzen Facility, Huntsman is obligated to pay its portion of the jetty repairs.

In response, Huntsman first argues it may recover the Repair Payment because it properly reserved its rights under 6 *Del. C.* § 1-308. Huntsman argues Section 1-308 allows a party to reserve its rights without alleging duress. Second, Huntsman argues the contractual provisions raised in Dow's arguments do not require

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[9] *Pfeffer v. Redstone*, 965 A.2d 676, 683 (Del. 2009).
[10] *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005) (citing *Ramunno v. Cawley,* 705 A.2d 1029, 1034 (Del. 1998) (citing *Solomon v. Pathe Commc'ns Corp.,* 672 A.2d 35, 38 (Del. 1996)) (other citations omitted)).
[11] *See Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *3–4 (Del. Super. Ct. Apr. 16, 2014).

Huntsman to pay for the jetty repairs because the jetty serviced other plants at Dow's Terneuzen Facility and was unrelated to the Terneuzen Plant.

A. HUNTSMAN MAY SUE UNDER RESERVATION OF RIGHTS AND HAS ADEQUATELY PLEADED DURESS

Dow argues Huntsman cannot recover the Repair Payment because Huntsman did not allege duress and the payment therefore was voluntary. In support of its argument, Dow cites *Western Nat. Gas Co. v. Cities Serv. Gas Co.*,[12] in which the Delaware Supreme Court held "[a] payment under protest is not necessarily involuntary, nor is it made so by unilaterally calling it involuntary at the time of payment[] but where money is paid because of duress, the payment is involuntary."[13] Dow asserts that Huntsman cannot preserve its rights to sue unless it alleges duress. Dow contends the Complaint fails to adequately plead duress because (i) threatening to terminate a contract is not a wrongful act; (ii) Huntsman did not allege the threat was sufficient to break its free will; and (iii) Huntsman could have sought injunctive relief in court within the fifteen days of the ultimatum.

In its answering brief, Huntsman argues 6 *Del. C.* § 1-308 supersedes *Western* by permitting parties to reserve their rights without pleading duress. While the Court believes the Complaint adequately alleges Dow's ultimatum constituted duress, it agrees with Plaintiffs that a duress pleading is no longer a prerequisite to recovery.

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[12] 201 A.2d 164 (Del. 1964).
[13] *Id.* at 169 (citations omitted).

1. Section 1-308 permits parties to reserve their rights without pleading duress.

Dow's involuntary payment argument depends heavily on the Delaware Supreme Court's 1964 decision in *Western*. In *Western*, plaintiff brought suit to recover alleged overpayments for natural gas that it purchased from defendant.[14] The alleged overpayments arose after Kansas enacted a minimum price order that raised the price of natural gas from 8 cents per unit to 11 cents per unit.[15] Plaintiff paid the state-mandated price, but only after sending defendant a "letter of protest."[16] After the United States Supreme Court voided the Kansas order,[17] plaintiff sued to recover payments made under the mandate. The Delaware Supreme Court held that, absent duress or a contract to repay, payments made under protest are not necessarily involuntary.[18]

After the Delaware Supreme Court's decision in *Western*, Delaware adopted a reservation of rights provision as part of the Delaware Uniform Commercial Code in 1966.[19] Title 6, Section 1-308(a) of the Delaware Uniform Commercial Code

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[14] *Id.* at 166.
[15] *Id.* at 166-67.
[16] *Id.* at 166.
[17] *See Pan Am. Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961).
[18] *Western Nat. Gas Co.*, 201 A.2d at 169.
[19] 55 Del. Laws Ch. 349 (1966) (codified at 5A *Del. C.* 1953, § 1-207) (codified as amended at 6 *Del. C.* § 1-308). At oral argument, Dow contended Section 1-308 was codified in 1953 and therefore did not supersede the Supreme Court's decision in *Western*. In support of its argument, Dow pointed to the section's codification citation, 5A *Del. C.* 1953, § 1-207. Under Delaware Uniform Citation Rule 12.1(b), however, all citations to the code between the revisions of 1953 and 1974 would have been cited as follows: [title] Del. C. 1953, § [section]. 1953 therefore does not refer to the year of enactment, but rather to the 1953 revision.

provides "[a] party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest,' or the like are sufficient."[20] Section 1-308(a), therefore, permits parties to reserve their legal rights, regardless of whether the party is under duress.

Comment 1 of Section 1-308 describes the section's purpose, noting:

> This section provides machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute, by adopting the mercantile device of going ahead with delivery, acceptance, or payment "without prejudice," "under protest," "under reserve," "with reservation of all our rights," and the like. All of these phrases completely reserve all rights within the meaning of this section. The section therefore contemplates that limited as well as general reservations and acceptance by a party may be made "subject to satisfaction of our purchaser," "subject to acceptance by our customers," or the like.[21]

Here, Huntsman adequately pleaded that it reserved its right to recover the Repair Payment. The Complaint alleges that Huntsman disputed its obligation to pay for the jetty repair after receiving Dow's November 30, 2015 invoices. The Complaint also alleges that Huntsman only made the Repair Payment after Dow

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[20] 6 *Del. C.* § 1-308(a).
[21] *Id.* cmt. 1.

threatened to terminate the contract and only under protest with "full reservation of rights."[22]

The Complaint sufficiently alleges Huntsman properly reserved it rights under Section 1-308. This section was designed to allow parties to a contract, like Huntsman, to continue performance even while a dispute between the parties remains unresolved. Huntsman therefore may pursue its claim to recover the involuntary Repair Payment.

2. Huntsman adequately alleged duress.

In order to prove economic duress, a party must demonstrate: "(1) a 'wrongful' act, which (2) overcomes the will of the person (3) who has no adequate legal remedy to protect his interest."[23] Here, the Complaint adequately pleaded economic duress.

First, this Court has held that a party's unjustified threat to breach their contract constitutes a "wrongful act."[24] Whether Dow's threat to end its contract with Huntsman was unjustified involves issues of material fact which cannot be resolved on a Motion to Dismiss. Huntsman claims it had no contractual obligation to repair the jetty because the jetty was not involved in manufacturing the Product. At the motion to dismiss stage, this Court must draw all reasonable inferences in

[22] Compl. at ¶ 25.
[23] *Way Road Dev. Co. v. Snavely*, 1992 WL 19969, at *3-4 (Del. Super. Ct. Jan. 31, 1992).
[24] *Id.* at *3-4.

favor of Huntsman even though Dow has asserted that the jetty was critical to its production and servicing of the contract. Clearly a factual dispute exists that cannot be resolved at this stage of the litigation.

Second, the Complaint adequately alleges Dow's ultimatum overcame Huntsman's will. The Complaint alleges the parties' Agreement gave Huntsman the right to purchase up to 30 million pounds of the Product every year. The Product is sold by Huntsman for a broad range of uses, including asphalt additives, bleach activators, chelating agents, corrosion inhibitors, elastomeric fibers, and epoxy curing agents. Additionally, the Agreement had been in place since 2001 and was set to continue until 2026. Because Huntsman relied on the Agreement to supply a significant amount of a widely-used product for approximately sixteen years, it is reasonable to infer that the ultimatum left Huntsman with no choice but to agree to Dow's terms.

Third, Dow's claim that Huntsman could have sought injunctive relief as a legal remedy is unconvincing. A party's ability to litigate a dispute is not determinative of the existence or absence of a legal remedy.[25] The ability to litigate is "capable of supporting more than one inference, and [is] simply [a] factor[] to be weighed and considered in the totality of the circumstances by the trier of fact."[26]

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[25] *See id.* at *5.
[26] *Id.*

At this juncture it is even unclear whether the injunctive remedy would have been sufficient or timely to continued production of Huntsman's product. At best this is legal argument created by creative counsel and not a business decision by the parties. Dow is free to try to convince a jury of the merits of this argument, but it is not one this Court finds convincing. Accordingly, the Court finds the Complaint adequately pleaded economic duress.

B. INTERPRETATION OF THE AGREEMENT INVOLVES MATERIAL ISSUES OF FACT

Dow next argues even if Huntsman is permitted to seek recovery, the Agreement unambiguously requires Huntsman to pay for the jetty repairs. Dow contends the jetty repairs were included in Huntsman's contractual obligation to pay the economic costs of producing and delivering the raw materials used to manufacture the Product. Dow also argues the Agreement does not limit Huntsman's obligations to foreseeable costs and that Dow was not obligated to notify Huntsman of the repair costs before the November 30, 2015 invoices. Dow argues that contract interpretation is a question of law and dismissal therefore is appropriate. Whether the terms of the Agreement are triggered by the damaged jetty, however, involves material issues of fact.

According to the Complaint, the Terneuzen facility is Dow's second-largest production site with seventeen separate plants, including the plant that manufactures the Product for Huntsman. The Complaint alleges that the damaged jetty serviced

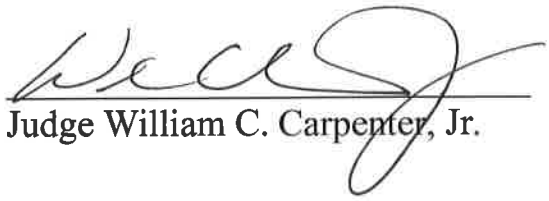
multiple manufacturing plants and other Dow customers at the Terneuzen Facility.[27] The third-party barge that caused the damage to the jetty allegedly was not delivering raw materials used in the manufacturing of the Product and Huntsman claims it was not otherwise aware that the accident ever occurred. From these alleged facts, clearly there is a dispute regarding the obligation Huntsman had to pay to repair the jetty that cannot be resolved by simply reading the Agreement. It is also unclear to the Court that the language of the Contract associated with the normal production and delivery of the Product can be expanded to cover the costs of unrelated general expenses of the Facility. It is extremely doubtful that the parties at the time the Agreement was executed expected this language would be so broad as to pay for a jetty damaged by a third party. At this juncture, it appears Dow is simply attempting to transfer this expense to the users of the facility when it should be litigating against the third party who actually caused the damage. And if that litigation has not occurred, the answer to why it hasn't occurred may provide insight as to the motivation here, which may elevate Dow's action to more than a contract dispute. In any event, this is not a clear and precise contractual dispute that the Court is willing to resolve at this juncture and factual discovery is needed.

[27] Compl. ¶ 17.

IV. CONCLUSION

For the foregoing reasons, the Defendants' Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.



Judge William C. Carpenter, Jr.