SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

JOHN DOE I, et al., Plaintiffs, Vs. UNOCAL CORP., et al., Defendants; and JOHN ROE III, et al., Plaintiffs, Vs. UNOCAL CORP., et al., Defendants.	Case Nos: BC 237 980 and BC 237 679 RULING ON PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION

Hearing date: 6/3/02

Ruling date: 6/7/02

After considering the moving, opposing and reply papers and the arguments of counsel at the hearing, the court now rules as follows:

Plaintiffs' Motion for Summary Adjudication is DENIED.

Plaintiffs move for summary adjudication on Defendants' First Affirmative Defense pursuant to Code Civ. Proc., § 437c, subd. (f)(1). The First Affirmative Defense states:

"Unocal is not a proper party to this action. Unocal is not a party to any relevant contract involved in this action, nor is it even a direct investor in the corporate entity that is responsible for constructing the pipeline involved in this action--i.e., the gas pipeline in the Tenasserim region of Burma. The entity involved in constructing the pipeline, Moattama Gas Transportation Company Limited, is a corporation, some of the shares of which are owned by a subsidiary of Unocal. Accordingly, Unocal should not have been named as a party to this action."

A party may move for summary adjudication as to one or more affirmative defenses if that party contends that there is no merit to an affirmative defense as to any cause of action. (Code Civ. Proc., § 437c, subd. (f).) A motion for summary adjudication shall be granted only if it completely disposes of an affirmative defense. (Ibid.) A plaintiff moving for summary adjudication bears the initial burden "of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgement on that cause of action." (Union Bank v. Superior Court (1995) 31 Cal.App.4th 573, 583.) Once this burden is met, the burden shifts to the defendant to show that a triable issue of material fact exists to the defense, supported by evidence of specific facts. (Code Civ. Proc., § 437c. subd. (o)(1); Aguilar v. Atlantic Richfield Co. (2000) 25 Cal.4th 826, 849-851.) In determining the existence of a triable issue of material fact, the moving party's evidence is strictly construed, while the responding party's evidence is liberally construed. (D'Amico v. Board of Medical Examiners (1974) 11 Cal.2d 1, 21.)

I. Application of Burmese law

Defendants contend that because the Production Sharing Contract (PSC) contains a choice of law provision specifying Myanmar law, that with respect to issues requiring an

evaluation of the intent of the parties, that choice of law provision governs. (Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal.4th 459, 470 [valid choice of law provision "encompasses all causes of action arising from or related to that agreement"].) However, Plaintiffs were not parties to the PSC, nor are their causes of action based on the PSC. To further complicate the application of Burmese law, the only sources of Burmese law offered to the court are competing declarations from the parties' experts. For these reasons, the court will apply California law to this summary adjudication motion.

II. Plaintiff's "Joint Venture" Theory

Plaintiffs' first theory is that there exists a "Yadana Project Joint Venture" that encompasses both gas field development and gas transportation activities. The existence of a joint venture depends on the intent of the parties. (Stilwell v. Trutanich (1960) 178 Cal.App.2d 614, 618.) Intent is revealed in their agreement, conduct and surrounding circumstances. (Holmes v. Lerner (1999) 74 Cal.App.4th 442, 454.) Plaintiff contends that this joint venture came into being when the Myanmar Oil and Gas Enterprise (MOGE) and Total executed the Memorandum of Understanding (MOU) and the PSC in July 1992, and Unocal joined the venture through an assignment from Total to Unocal Myanmat Offshore Company (UMOC). This theory is based on plaintiffs evidence that the MOU describes the entire Yadana project including both production and transportation of gas (Peters Decl., Exh. A, pp. 2439, 2436-2437); exploitation of the Yadana gas field presumes transportation of the gas through a pipeline (Peters Decl., Exh. A, pp. 2439, 2441); and evidence that significant pipeline-related activities began before the incorporation of Moattama Gas Transportation Company (MGTC) on December 20, 1994. (Peters Decl., Exh. H, p. 399.) Plaintiffs evidence of pre-incorporation pipeline activity includes a discussion between Unocal's vice president and Total Myanmar Explotation & Production's (TMEP) project manager regarding pipeline planning (Exh. F, pp. 81-84); site studies prepared by TMEP and presented to Unocal (Exh. 1073); discussions between the joint venture parties regarding the pipeline route ((Exh. 1003);

discussions regarding pipeline sizing, construction and the pipeline route (Exhs. 1004-1007); liabilities incurred for the pipeline by the parties (Exh. G, pp. 78-79); the securing of the pipeline route by the Burmese military by March 1994 (Exh. 1010, p. 4572.) and an environmental ground study showing that the joint venture undertook pipeline-related work before the creation of MGTC (Chomsky Decl., Exh. A).

In reply, Defendants contend that there was no all-encompassing joint venture; rather, the agreements show that the Petroleum Production Joint Venture was to be responsible for gas production and that MGTC was responsible for pipeline construction and gas transportation. Defendants supply evidence to support their position. Rather than referring to the Gas project as a joint venture, the MOU states that there would be "2 separate entities (Joint Venture and Company), one for each segment of the Project;" these entities were envisioned as the Petroleum Production Joint Venture and a separate Gas Transportation Company. (Peters Decl., MOU ¶ 2.3, pp. 2440-2441.) The MOU speaks of only two entities, and never mentions a third "Yadana Project" joint venture.

The PSC mentions the project at page 6, describing the project as a *plan* for appraising and developing gas discoveries, not as an *entity*. The PSC states that it "and the MOU describe and constitute together the agreement of the parties in relation to the Project for appraisal, development and production of the two gas discoveries made by MOGE in the Contract Area." (Peters Decl., Exh. A, PSC, p. 2341.) The PSC limits the activities of the Petroleum Production Joint Venture participants to "Petroleum Operations," that is offshore drilling and exploration activities within blocks M5 and M6. (Peters Decl., Exh. A, PSC ¶ 2.2, p. 2341.) The PSC also includes a provision by which MOGE reserved the right to become a participant. (Peters Decl., Exh. A, PSC ¶¶ 19.1, 19.2, p. 2389.)

The MOGE/MGTC Agreement does not mention the Moattama Gas Project. MOGE granted to MGTC the right "to develop, finance, construct, own, operate and maintain the Export Pipeline to transport Natural gas from the YADANA GAS FIELD and more generally

to engage in all aspects of the business of transporting natural gas from the said field and from any other field or fields located in Blocks M5 and M6 offshore Myanmar. (Peters Decl., Exh. D, MOGE/MGTC Agreement, ¶ 2.1, p. 2875.) Again, this agreement provided that MOGE reserved the right to acquire in the future an interest in MGTC. (Peters Decl., Exh. D, MOGE/MGTC Agreement, fourth ¶, p. 2873.) . This contractual language is sufficient to show a triable issue of material fact as to whether a single "Yadana Project Joint Venture" existed.

As defendants have shown that a triable issue of issue of material fact exists as to whether there existed a "Yadana Project Joint Venture" that encompassed both gas production and pipeline construction. Plaintiffs are not entitled to summary adjudication on the First Affirmative Defense on the theory that Unocal was a participant in an alleged "Yadana Project Joint Venture."

III. Whether MGTC is an alter ego of the joint venture

The corporate form may be disregarded where "(1) there is such a unity of interest and ownership between the corporation and the individual or organization controlling it that their separate personalities of no longer exist, and (2) failure to disregard the corporate identity would sanction a fraud or promote injustice." (Webber v. Inland Empire Investments, Inc. (1999) 74 Cal.App.4th 884, 899.) Relevant factors include the use of a corporation for a single venture, control of day-to-day operations, the commingling of funds and other assets, the disregard of legal formalities, treatment by parents of corporate assets as its own, and the sharing of offices and employees. (Associated Vendors, Inc. v. Oakland Meat Co. (1963) 210 Cal.App.2d 825, 838-840.) The essence of the alter ego doctrine is that the parent controls the subsidiary to "such a degree as to render the latter the mere instrumentality of the former.' (Calvert v. Huckins (E.D.Cal. 1995) 875 F.Supp. 674, 678.)

Plaintiffs assert that MGTC is the alter ego of the "Yadana Project Joint Venture." However, as there is a triable issue of material fact as to the very existence of such a joint

venture (see Part II, ante), a finding by this court that MGTC is either an alter ego or an instrumentality of an alleged "Yadana Project Joint Venture" is premature. Summary adjudication is not proper on this ground.

IV. Whether MOGE was a joint venturer with Total and Unocal

Here, Plaintiffs contend that Total and MOGE became joint venturers when they signed the MOU and PSC in July 1992, and Unocal joined this joint venture when Total assigned to a Unocal subsidiary a percentage of total's interest in the gas field. (Exg. G, p. 203; Exh. 126, p. 2453.) "A joint venture exists when there is an agreement between the parties under which they have a community of interest...in a common business undertaking, an understanding as to the sharing of profits and losses and a right of joint control." (Connor v. Great Western Sav. & Loan Assn. (1968) 69 Cal.2d 850, 863.)

The common business undertaking alleged by plaintiffs is the Yadana project. Plaintiffs allege that MOGE's contribution of gas created a community of interest in the Yadana project. (Peters Decl., Exh. A, MOU § 2.1, p. 2438-2439.) Plaintiffs also argue that the PSC gives MOGE a management role in the project. (Peters Decl., Exh. A, PSC §§ 2.1 & 17.1(a), pp. 2348, 2382.) The PSC also shows that MOGE had an "understanding as to the sharing of profits and losses." (Connor, supra, 69 Cal.2d at p. 863.) Under the PSC, MOGE and TMEP were each to profit by taking a share of the gas. (Peters Decl., Exh. A, PSC § 9.7, p. 2363.) Finally, plaintiffs contend that MOGE was required to risk its gas reserves on the venture. While MOGE did not have an obligation to fund some aspects of the project, the fact that the risks undertaken by other joint venturers might be different in kind is irrelevant. (Drdlik v. Ulrich (1962) 203 Cal.App.2d 360, 367.)

Defendants evidence to the contrary is that the language of the MOU and PSC only gave MOGE the right to join the PSC after oil field appraisal led to a declaration of "commercial discovery." (Peters Decl., Exh. A, pp. 2389 (PSC), 2445 (MOU), 2320 (Assignment Agreement).) Before October 1995, when MOGE exercised that right, MOGE

did not participate in the "Contractors'" share of profits and bore none of the risks associated with exploration. (Peters Decl., Exh. A, pp. 2348, 2362, 2384, 2319-34.) The only revenues MOGE received under the PSC before it acquired an equity interest were bonuses and royalties. (Peters Decl., Exh. A, pp. 2362-2367, 2369-2372.) A right to receive royalties does not create a partnership or a joint venture. (Goldberg v. Paramount Oil Co. (1956) 143 Cal.App.2d 215, 220.)

Further, Defendants present evidence that MOGE did not have a right to joint control and management of the joint venture. (Cislaw v. Southland Corp. (1992) 4 Cal.App.4th 1284, 1297.) Defendant cites documents showing that TMEP, rather than MOGE, was the operator (Peters Decl., Exh. A, p. 2444; Exh. F, pp. 2206-2207), and argue that MOGE's lack of control over operations before it became an equity participant precludes a finding that it was a joint venturer during that period.

Defendants have shown evidence that raises triable issue of facts as to whether a community of interest existed, whether there was an understanding as to the sharing of profits and losses, and as to whether MOGE had a right to control the joint venture prior to October 1995 when MOGE became an equity participant in the joint venture.

V. Whether UMOC and Unocal International Pipeline Corporation (UIPC) are alter egos of Unocal Corp. and Union Oil Company (UOC).

As stated above, the corporate form may be disregarded where "(1) there is such a unity of interest and ownership between the corporation and the individual or organization controlling it that their separate personalities of no longer exist, and (2) failure to disregard the corporate identity would sanction a fraud or promote injustice." (Webber v. Inland Empire Investments, Inc., supra, 74 Cal.App.4th 884, 899.) Relevant factors include the use of a corporation for a single venture, control of day-to-day operations, the commingling of funds and other assets, the disregard of legal formalities, treatment by parents of corporate assets as its own, and the sharing of offices and employees. (Associated Vendors, Inc. v. Oakland Meat

Co., supra, 210 Cal.App.2d 825, 838-840.) The essence of the alter ego doctrine is that the parent controls the subsidiary to "such a degree as to render the latter the mere instrumentality of the former.' (Calvert v. Huckins, supra, 875 F.Supp. 674, 678.)

However, "[a]lter ego is an extreme remedy, sparingly used." (Sonora Diamond Corp. v. Superior Court (2000) 83 Cal.App.4th 523, 539.) "The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard." (Ibid.; accord Associated Vendors, Inc. v. Oakland Meat Co., supra, 210 Cal. App. 2d at p. 842.)

While Plaintiffs present evidence regarding UOC's use of the UMOC and UIPC for a single venture, day to day control over the subsidiaries, alleged undercapitalization, and sharing of facilities and employees (Moving Papers, pp. 17-20), Plaintiffs evidentiary showing on the second prong of the test is nonexistent. Plaintiffs simply assert that absent piercing the corporate veil, "UMOC and UIPC are left without the means to satisfy existing and potential creditors." (Moving Papers, p. 20.) "Certainly, it is not sufficient to merely show that a creditor will remain unsatisfied if the corporate veil is not pierced, and thus set up such an unhappy circumstance as proof of an 'inequitable result.' In almost every instance where a plaintiff has attempted to invoke the doctrine he is an unsatisfied creditor." (Associated Vendors, Inc. v. Oakland Meat Co., supra, 210 Cal. App. 2d at p. 842.) Here, Plaintiffs have not "proved each element of the cause of action entitling the party to judgement on that cause of action." (Union Bank v. Superior Court (1995) 31 Cal.App.4th 573, 583.) The motion for summary adjudication is denied.

In sum:

Plaintiffs' Motion for Summary Adjudication is DENIED.

IT IS SO ORDERED.

Dated 6/7/02

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Victoria Gerrard Chaney

Judge