

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of October, two thousand fifteen.

PRESENT: DENNY CHIN,
CHRISTOPHER F. DRONEY,
Circuit Judges.
KATHERINE B. FORREST,
*District Judge.**

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CEDAR PETROCHEMICALS, INC.,
Plaintiff-Appellant-Cross-Appellee,

v. 14-2752-cv (Lead)
14-2890-cv (XAP)

DONGBU HANNONG CHEMICAL CO., LTD.,
Defendant-Cross-Claimant-Appellee-Cross-Appellant,

KUMHO P&B CHEMICALS, INC.,
Defendant-Cross-Defendant.

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* The Honorable Katherine B. Forrest, of the United States District Court for the Southern District of New York, sitting by designation.

FOR PLAINTIFF-APPELLANT: JOHN T. LILLIS, Nathan T. Williams, Kennedy Lillis Schmidt & English, New York, New York.

FOR DEFENDANT-APPELLEE: ROBERT A. WEINER, Michael R. Huttenlocher, McDermott Will & Emery LLP, New York, New York.

Appeal from a judgment and order of the United States District Court for the Southern District of New York (Nathan, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment and order of the district court are **AFFIRMED.**

Appellant Cedar Petrochemicals, Inc. ("Cedar") appeals from the district court's entry of judgment, after a four-day bench trial, in favor of Defendant Dongbu Hannong Chemical Co., Ltd. ("Dongbu") and against Cedar, as well as from the district court's order denying Cedar's motion for reconsideration. We assume the parties' familiarity with the underlying facts, procedural history of the case, and issues on appeal.

This suit arises from a May 17, 2005 contract between Cedar and Dongbu for the sale of 2,000 metric tons of phenol, to be delivered F.O.B. Ulsan, Korea. On May 21, 2005, the phenol was loaded on Dongbu's nominated vessel, the Green Pioneer. On May 24, 2005, the Green Pioneer arrived at Ulsan and the phenol was transferred to Cedar's nominated vessel, the Bow Flora. The Bow Flora then set sail for Rotterdam.

On or about July 19, 2005 the Bow Flora arrived in Rotterdam and the quality of the phenol was tested, revealing that the color was off-specification. The test results regarding the damaged phenol were provided to Ertisa, S.A. ("Ertisa"), the ultimate purchaser of the phenol, and Ertisa made a claim for the chemicals through its insurance broker.

Cedar initially brought suit in Korean court against the owners and operators of the Green Pioneer, as well as one of the phenol testing companies. After withdrawing that action, Cedar brought the instant suit against Dongbu on May 24, 2006, alleging that Dongbu had delivered non-conforming liquid phenol. The parties agreed that to demonstrate liability, Cedar had to prove by a preponderance of the evidence that the phenol was damaged before it was transferred to the Bow Flora. Because the damage did not manifest itself -- despite the testing of samples in transit -- until it was offloaded in Rotterdam, Cedar argued what its expert called the "seeding" theory of injury. According to this theory, the phenol was damaged, imperceptibly, while still in Dongbu's control. That initial injury, via a slowly unfurling free radical chain reaction, was finally detected as off-specification phenol in Rotterdam.

The district court was not persuaded by the seeding theory, and by Opinion dated October 21, 2013, following a bench trial, found that Cedar failed to prove by a preponderance of the evidence that Dongbu breached its contract by providing injured phenol.

On appeal, Cedar alleges that the district court (1) abused its discretion by prohibiting Cedar from outlining its seeding theory of phenol injury in its post-trial memorandum and subsequently ruling against the seeding theory without the benefit of the proposed briefing, (2) clearly erred in entering judgment in favor of Dongbu after finding that Cedar failed to show that the phenol was already injured when delivered, and (3) abused its discretion in declining to reach the merits of Cedar's motion for reconsideration. On cross-appeal, Dongbu contends that the district court abused its discretion in declining to sanction Cedar for filing its motion for reconsideration.

1. Post-Trial Memorandum and Motion for Reconsideration

Cedar claims that the district court abused its discretion in prohibiting them from explaining the seeding theory in Cedar's post-trial memorandum. Cedar further contends that the district court abused its discretion in deciding that the seeding theory was contradicted by Cedar's own evidence, Cedar Exhibits 70A-70P (the "Literature").

The district court, however, did not deny Cedar the opportunity to argue its seeding theory. At the conclusion of the bench trial, the district court ordered the parties to submit final proposed findings of fact and conclusions of law, as well as a memorandum of law. Specifically, the district court asked that the proposed findings and conclusions be keyed to the trial record and address the primary question of when and where the phenol was damaged. And Cedar did, in fact, address the seeding

theory in its submissions. Additionally, though Cedar submitted direct testimony in the form of declarations of its experts Martin East and John Minton, neither was able to demonstrate at trial how the Literature supported the seeding theory.

2. The Seeding Theory of Phenol Injury

Cedar argues that the district court clearly erred in holding that Cedar failed to meet its burden in proving that the phenol was already injured upon delivery by Dongbu. "In reviewing a judgment entered after a bench trial, we accept the district court's findings of fact unless they are clearly erroneous." *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 693 (2d Cir. 1994). The factfinder's choice between two permissible views of the evidence cannot be clearly erroneous. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985).

Cedar argues that (1) the parties stipulated that phenol discolors gradually, as opposed to rapidly or instantaneously as the district court found, (2) the Literature supports the seeding theory, (3) the Literature illustrates that the phenol could not have discolored rapidly or instantaneously due to the quantities of contaminants, oxidizing agents, and catalysts, (4) Cedar's expert never actually conceded that the Literature contradicted the seeding theory, (5) testimony on blending supported the seeding theory, and (6) differences in the phenol's storage and carriage conditions and sampling timing limited the ability of the quality-inspection regime to

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