

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA  
Justice

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KERNS MANUFACTURING CORP.,

Plaintiff, Index No.: 19788/03

- against -

VERIDIUM CORPORATION and  
KBF POLLUTION MANAGEMENT, INC.,

Defendants.

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The following papers numbered 1 to 67 on this motion:

Papers	<u>Numbered</u>
Plaintiff's Notice of Motion	1-22
Defendants' Affirmation in Opposition and Notice of Cross-Motion	23-48
Plaintiff's Reply Affirmation	49-67

Plaintiff, by notice of motion, seeks an order of the court granting summary judgment pursuant to CPLR § 3212 based on its claims for specific performance, breach of contract and indemnification, and dismissing defendants' counterclaim for fraud and fraud in the inducement and for tortious interference. Defendants respond in opposition to plaintiff's motion for summary judgment and seek, by notice of cross-motion, an order pursuant to CPLR § 3212 for partial summary judgment on plaintiff's indemnification, fraud in the inducement and fraud claims. Plaintiff replies in support of its motion and in opposition to defendants' cross-motion.

Plaintiff commenced this action for specific performance and money damages in August 2003 by filing its summons and complaint, which was subsequently amended in June 2005. The causes of action for specific performance, breach of contract, fraudulent inducement, fraud and indemnification all arise out of an agreement plaintiff entered into with defendants for an exchange

of stock which included the acquisition of two incinerators. The complaint alleges that defendants exploited plaintiff by entering into the agreement and closing in order to bolster their balance sheet, at plaintiff's expense, in order to obtain additional financing to fund other transactions. See Plaintiff's Amended Complaint ¶ 34. Issue was joined shortly thereafter when defendants served a verified answer and counterclaim against plaintiff for fraud, fraud in the inducement and tortious interference.

The underlying causes of action in this case arise out of an agreement between plaintiff Kerns Manufacturing Corporation and defendants Veridium Corporation and KBF Pollution Management, entered into on or about December 30, 2002 when the parties entered into a written Stock Purchase/Sale Agreement for the transfer of 15% of outstanding Veridium stock in exchange for all outstanding stock in one of plaintiff's subsidiaries, Vulcan Waste Systems, and certain assets as set forth in the agreement. Such assets included two mobile hazardous waste incinerator systems, which were to be sufficient to provide collateral for a loan to be obtained by defendant Veridium to consummate an independent agreement to acquire another company, R.M. Jones & Co., Inc. Sometime in December 2002 or January 2003, plaintiff provided defendants an opportunity to inspect the two incinerators, around which time defendants requested information from plaintiff regarding the cost and purchase price of the incinerators, which was purportedly a sum of approximately \$5,029,000.

On or about January 20, 2003, the parties executed an Addendum to the agreement, whereby the parties agreed that plaintiff would accept KBF stock instead of Veridium stock and whereby defendants agreed jointly and severally to indemnify plaintiff and hold it harmless from and against any claim or liability that may arise as a result of now accepting KBF stock as opposed to Veridium stock. Then on or about January 22, 2003, the parties closed on the agreement, at which time plaintiff delivered Vulcan stock to defendant in accordance with the agreement in exchange for a stock certificate which, according to the defendants, represented 15% of the issued and outstanding stock of KBF. However, the KBF stock bore a restrictive legend which plaintiff allegedly only accepted at the closing based on verbal assurances by defendants that it was required because the stock was not issued pursuant to a registration statement under the Securities Act of 1933.

After the closing of the agreement between the parties, several disputes arose as to the details of the agreement. Plaintiff contends that despite repeated assurances made by defendants that the KBF stock would be registered pursuant to a

statement to be filed with the SEC, no such registration statement was ever filed. Further, plaintiff argues that defendants failed to exchange the KBF stock for the requisite number of shares of common stock in Veridium after the KBF-Veridium merger. Defendants, on the other hand, contend that the incinerators were insufficient collateral and that despite continuing representations by plaintiff that it would provide replacement assets or, alternatively assist defendants with obtaining alternative financing based on the revenue generated by customers using the incinerators, plaintiff failed to do so.

The New York Supreme Court, Appellate Division, Second Department, has held that “[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form.” Santanastasio v. Doe, 301 A.D.2d 511 (2d Dept. 2003). Where a question of fact exists as a result of conflicting evidence, summary judgment must be denied. Messena v. Manhattan & Bronx Surface Transit Operating Auth., 249 A.D.2d 280 (2d Dept. 1998); see also Skiadas v. Barsalis, 292 A.D.2d 593 (2d Dept. 2002).

Plaintiff argues that, as a matter of law, it is entitled to summary judgment on its claim for specific performance against defendants. To establish a cause of action for specific performance of a contract, the plaintiff must establish that it “substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law.” Smith v. Tenshore Realty, 801 N.Y.S.2d 781 (N.Y. Sup. Ct. Kings County 2005); see also Backer v. Bouza Falco Co., 814 N.Y.S.2d 188 (2d Dept. 2006). Plaintiff contends that there is a binding and enforceable contract between the parties that requires defendants to provide plaintiff with a number of shares of outstanding Veridium stock equal to 15%. Further, plaintiff argues that it fully performed its obligations under the agreement and remains ready, willing and able to perform any remaining obligations, and that it has no adequate remedy at law. Defendants, however, argue that plaintiff cannot obtain summary judgment because there remains outstanding the issue of whether plaintiff did indeed satisfy its own obligations under the agreement. Defendants contend, through the deposition testimony of Kevin Kreisler, president of Veridium and KBF, that the incinerators provided by plaintiff were insufficient collateral. The Second Department has held that where a party succeeds in raising questions of fact, summary judgment will be denied. Del Pozo v. Impressive Homes, Inc., 814 N.Y.S.2d 734 (2d Dept. 2006); Cider Mill Friends v. Cider Mill Development, 23 A.D.3d 600 (2d Dept. 2005). Moreover, defendants maintain that

the testimony of the principal of Kerns, Simon Srybnik, reveals that plaintiff misrepresented material facts regarding the value of the incinerators. Defendants also contend that plaintiff failed to provide "other equipment" to defendants as required under the agreement. Because triable issues of fact exist as to whether plaintiff actually performed its duties under the contract, plaintiff's motion for summary judgment on its claim for specific performance against defendants is denied.

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Plaintiff argues that summary judgment should be granted in its favor on its claim for breach of contract and damages against defendants. As plaintiff correctly relies upon in its papers, "[t]he elements of a breach of contract claim are (1) the making of an agreement; (2) performance of the agreement by one party; (3) breach by the other party; and (4) damages." J&L American Enterprises, Ltd. v. DSA Direct, LLC, 2006 WL 216680 (Sup. Ct. N.Y. County 2006)(citing Furia v. Furia, 116 A.D.2d 694 (2d Dept. 1986)). Plaintiff contends that while it fully performed its obligations under the agreement, defendants breached the agreement by failing to provide plaintiff with 15% of the issued and outstanding shares of Veridium and by preventing dilution of plaintiff's shares after defendants entered into various other financing and merger deals, resulting in damage of \$6 million to plaintiff. The Second Department has held that in an action to recover damages for a breach of contract claim, a motion for summary judgment will be dismissed where a question of fact exists. Prescott v. Turner, 15 A.D.3d 557 (2d Dept. 2005). While plaintiff argues that defendants breached the agreement, defendants raise a question of fact as to the amount of damages actually incurred by plaintiff. Defendants argue that plaintiff has provided "vague, inconsistent and speculative" explanations for the \$6 million damages claim and therefore has failed to satisfy the element of damages in its breach of contract claim. See Defendants' Memorandum of Law in Opposition p. 14. To support its argument, defendants provide evidence of unsubstantiated deposition testimony of Simon Srybnik. When confronted with the issue of providing an explanation for plaintiff's \$6 million damages claim, Srybnik gave three unsubstantiated bases for the calculation. Plaintiff's inability to provide a basis to determine the amount of damages defendants must pay for breach of contract leaves open a question of fact that must be decided by a jury. Plaintiff's motion for summary judgment on its claim for breach of contract and damages against defendants is therefore denied.

Because plaintiff has purportedly satisfied its obligations under the agreement, plaintiff further contends that it is entitled to summary judgment on defendants' counterclaim for breach of contract. However, consistent with the reasoning presented above, this motion is denied because a question of fact

that must be resolved by a trier of fact still exists. In response to plaintiff's motion, defendants argue that plaintiff is not entitled to summary judgment because it misrepresented material facts regarding the value of the incinerators. Raising a question of fact as to plaintiff's assertion that it fully performed under the agreement, defendants argue that the incinerators were insufficient collateral as provided by plaintiff. Defendants bring forth evidence that while plaintiff maintained that the incinerators were purchased for \$5,029,000 (as testified to at the deposition of Simon Srybnik), documents subsequently produced by plaintiff on March 6, 2006 reflect that the incinerators were purchased for a purported price of approximately \$3.6 million. Such discrepancy raises a material issue of fact that remains to be resolved by the trier of fact. Further, there is evidence that plaintiff failed to provide "other equipment" to defendants as required under the agreement. Defendants present more deposition testimony of Simon Srybnik to support their claim, including Srybnik's statement that he did not believe at the time of the agreement that Vulcan Waste owned any assets other than the two incinerators. Again, the Second Department has held that when there is a question of fact as to whether a party has materially breached the contract, summary judgment will be denied. Germain v. Staten Island Boat Sales, Inc., 248 A.D.2d 507 (2d Dept. 1998). In the case at hand, defendant has provided sufficient evidence to warrant review by a trier of fact concerning breach of contract. Accordingly, plaintiff's motion for summary judgment on defendants' counterclaim for breach of contract is denied.

Plaintiff also argues that summary judgment should be granted as to its claim that it is entitled to indemnification by defendant for all damages it has suffered resulting from its agreement to accept the KBF stock. According to plaintiff, as per the Addendum to the agreement, defendants were to defend plaintiff against all claims and indemnify and hold plaintiff harmless for any claim "which may arise as a direct or indirect result of its agreement to accept the KBF stock in lieu of Veridium stock." Further, plaintiff argues that in a letter dated January 13, 2003, defendants also agreed to indemnify plaintiff "against any claim or liability that may arise from [the] proposed letter valuing the subject incinerators." The First Department has affirmed the notion that "an indemnification agreement is a promise by which one party, the indemnitor... promises another party to the contract, the indemnitee..., that the indemnitor will pay specified damages arising out of certain accidents or activities." Robinson v. City of New York, 801 N.Y.S.2d 781 (Sup. Ct. Bronx County 2005), *aff'd* by 22 A.D.3d 293 (1st Dept. 2005). In the case at hand, according to defendants, the alleged damages claimed by plaintiff are not relevant to any claims or liabilities arising out of plaintiff's decision to

accept KBF stock in lieu of Veridium Stock. In other words, the damages purportedly experienced by plaintiff do not fall within the scope of those "accidents or activities." Further, defendants argue that plaintiff cannot rely upon the January 13, 2003 letter as proof of indemnification since the agreement, which includes the indemnification clause, does not encompass this letter in any way. Defendants support their contention that this letter is meaningless by submitting evidence that plaintiff's amended complaint is devoid of a single reference to the January 13 letter and that plaintiff cites only to the agreement as the basis for its cause of action for indemnification. In this regard, an issue of fact as to the relevance and interpretation of the indemnification agreement exists, and, where a question of fact exists as to the scope of an indemnification clause in an agreement, summary judgment is denied. Murphy v. Longview Owners, Inc., 13 A.D.3d 346 (2d Dept. 2004). As to plaintiff's contractual indemnification claim, defendants also argue that they, and not plaintiff, are entitled to summary judgment. In either motion, however, a question of fact still remains. Accordingly, the Court addresses both plaintiff's motion and defendants' cross-motion for summary judgment by dismissing both claims since an issue of fact remains to be decided upon by a trier of fact.

Plaintiff also contends that it is entitled to summary judgment on defendant's counterclaim for fraud and fraud in the inducement. The Second Department has held that to prevail on a cause of action alleging fraud, a plaintiff must prove "(1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations." Leno v. DePascuale, 18 A.D.3d 514 (2d Dept. 2005). According to defendants, they were induced to execute and close on the agreement based upon plaintiff's misrepresented material facts regarding the value of the incinerators and plaintiff's agreement to provide equipment beyond assets owned by Vulcan Waste as of the date of the agreement. Plaintiff argues, however, that defendants' fraud claims must be dismissed as a matter of law because defendants have not put forth any evidence that plaintiff has made any false representations, let alone evidence that any such representations were known to be false by plaintiff at the time. The Second Department has held, however, that "[w]here it does not conclusively appear that a [party] had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of facts." Thompson v. Whitestone Savings & Loan Assoc., 131 A.D.2d 749 (2d Dept. 1987). In the case at hand, plaintiff

argues that it had no reason to believe, based upon its knowledge and equipment appraisal, that the incinerators would be insufficient to satisfy defendants' financing needs. Plaintiff presents deposition testimony of its principal, Simon Srybnik, that it was his actual understanding that the incinerators did provide sufficient collateral. However, defendants correctly raise the notion that the record contains significant disputed material questions of fact as to this issue, including inconsistencies with Srybnik's deposition testimony. Because such a question of fact exists, plaintiff's motions for summary judgment on defendants' counterclaim for fraud and fraud in the inducement are denied.

Defendants argue that as a matter of law, they are entitled to partial summary judgment dismissing plaintiff's claim of fraud in the inducement. Again, as reasoned above, the Second Department has held that to sustain a cause of action based on fraud, the plaintiff has to establish "(1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations." Brannigan v. Board of Education, 18 A.D.3d 787 (2d Dept. 2005). According to plaintiff, defendants' representations regarding the 15% of stock that was to be delivered to plaintiff were false and were known by defendants to be false when they were made. Plaintiff also argues that defendants knew the plaintiff was relying on these representations when it entered into the agreement, and plaintiff was damaged as a result of these misrepresentations. Defendants contend, however, that plaintiff's principal and sole witness for this claim, Simon Srybnik, knows of no facts that support plaintiff's fraud in the inducement claim. While defendants argue that the plaintiff's fraud claims must be dismissed as a matter of law because plaintiff has not put forth evidence that defendants have made any false representations, defendants have failed to establish a prima facie showing of entitlement to judgment as a matter of law. Accordingly, partial summary judgment dismissing plaintiff's claim of fraud in the inducement is denied.

Defendants also argue that summary judgment should be granted in their favor dismissing plaintiff's claim of fraud. Defendants first argue that they have no liability to plaintiff for fraud based on the notion that a party cannot maintain claims for breach of contract and fraud where both claims are based on the same set of facts. However, the Second Department has held that where "[a] present intent to deceive" is alleged, a claim of fraud may be pled. WIT Holding Corp. V. Klein, 282 A.D.2d 527 (2d

Dept. 2001). Therefore, plaintiff can retain its claim for fraud. As for defendants' motion for partial summary judgment dismissing this claim, such motion is denied since a material issue of fact still remains to be determined by a trier of fact. In Port Refinery Co. v. Firman, a case where the parties disagreed on basic facts relating to the nature of the transaction, the Second Department held that such existence of questions of fact precludes summary judgment on a fraud cause of action. 123 A.D.2d 752 (2d Dept. 1986). Similarly, in the case at hand, the parties also disagree on the basic facts relating to the nature of the agreement, specifically over the issue of whether the defendants exploited plaintiff through the agreement to temporarily acquire the incinerators, without any cash outlay, so that they could present a higher asset portfolio to their proposed lenders. Accordingly, defendants motion for partial summary judgment dismissing plaintiff's claim of fraud is denied.

Plaintiff also argues that it is entitled to summary judgment dismissing defendants' counterclaim for tortious interference. "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." Lama Holding Company v. Smith Barney, Inc., 88 N.Y.2d 413 (1996). Plaintiff, however, fails to provide sufficient evidence to establish a prima facie case, and therefore summary judgment is denied.

Accordingly, upon all of the foregoing, it is hereby

ORDERED, that all foregoing motions for summary judgment are denied.

Dated: June 28, 2006  
Jamaica, NY

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JOSEPH P. DORSA, J.S.C.

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