IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DENNIS MEHIEL, as Stockholders' Representative of SF Holdings Group, Inc.,	)	
Plaintiff,	)	
	)	C.A. No. 06C-01-169 DCS
v.	)	
SOLO CUP COMPANY, an Illinois corporation,	)	
Defendant.	)	

Submitted: November 16, 2011
Decided: December 20, 2011

Upon Defendant's Motion for Summary Judgment
Motion ***DENIED***

MEMORANDUM OPINION

Appearances:

Thomas W. Briggs, Jr., Esquire
Morris Nichols Arsht & Tunnell LLP, Wilmington, Delaware
Attorney for Plaintiff Dennis Mehiel

Edward B. Micheletti, Esquire
Skadden Arps Slate Meagher & Flom LLP, Wilmington Delaware
Attorney for Defendant Solo Cup Company

STREETT, J.

Factual and Procedural Background

Defendant Solo Cup Company, ("Solo"), has presented a motion for summary judgment on a claim brought by the shareholders of SF Holdings, Inc., (the "Company"), alleging breach of contractual obligations pursuant to a merger agreement between the parties. Dennis Mehiel, ("Mehiel"), as chairman and CEO of SF Holdings, Inc., brings this claim on behalf of the shareholders. Solo argues that Mehiel has not produced sufficient evidence to support its claim.

This matter arises from Solo's 2004 acquisition of the Company and pertains to a dispute over the calculation of the amount of the Company's working capital which is part of the purchase price. In December 2003, the parties entered into a merger agreement, (the "Agreement"), establishing a purchase price of $670,900,000 with a working capital estimate of $242,897,000.[1] The Agreement provided for adjustments to be made to the amount of working capital prior to settlement in February 2004. However, the parties were unable to come to terms on the amount, and the dispute gave rise to this action for damages in the amount of $5.6 million.

[1] *See Mehiel v. Solo Cup Co*., 2007 WL 901637, *1 (Del. Super. 2007). "Working Capital" is defined in the Agreement as "current assets determined in accordance with GAAP consistently applied (including cash and assets held for sale) less current liabilities determined in accordance with GAAP consistently applied (excluding current maturities of long term debt)." Agreement and Plan of Merger, Section 3.11(b) (December 22, 2003). The term "GAAP" refers to the United States generally accepted accounting principles. Agreement and Plan of Merger, Section 3.8(a).

A neutral auditor resolved most of the issues as to the amount of working capital in Solo Cup's favor. According to the Agreement, the neutral auditor's decision was "final, binding and conclusive."[2] The Court determined in its decision on Solo's motion to dismiss that the proceeding before the neutral auditor was a binding arbitration.[3] The Court further found that four of the five counts brought forth in the complaint were raised and decided at the binding arbitration and, therefore, were *res judicata*.[4] However, one claim remains. And, upon cross motions for summary judgment, the Court found that the remaining breach of contract claim was not previously adjudicated.[5]

In this remaining claim, Mehiel alleges that Solo breached its obligation to prepare the working capital statement in good faith and in conformity with GAAP because it included the Earthshell Reserve in the working capital statement which allegedly reduced the working capital which in turn lowered the purchase price. The Earthshell Reserve consisted of $285,195 in an escrow account created to fund any potential deficiencies for rent, utilities or necessary repairs in connection with a Company facility in St. Thomas, Maryland, that was losing its tenant, Earthshell Corp.[6]

---

[2] Agreement and Plan of Merger, Section 3.9(c).
[3] *Solo Cup Co.*, 2007 WL 901637, at *3.
[4] *Solo Cup Co.*, 2007 WL 901637, at *4-5.
[5] *Mehiel v. Solo Cup Co.*, 2010 WL 4513389 (Del. Super. Oct. 14, 2010).
[6] *See* Agreement and Plan of Merger, Section 3.9(a); Plaintiff's Second Amended and Supplemental Complaint, 20 (September 15, 2006). Earthshell Reserve is distinct from Earthshell Corp.

Mehiel further asserts that, prior to settlement, the Company and Earthshell Corp. executed a letter of intent for the sale of the St. Thomas facility without repairs to Earthshell Corp. because Solo represented that it wished to delay entering into a sale contract. Thus, he contends, reserve monies for deficiencies in the facility were not required, and the $285,195 Earthshell Reserve should not have been included in the working capital statement.

Contentions of the Parties

In its motion for summary judgment, Solo argues that there is no issue of fact in dispute because Mehiel has not produced sufficient evidence to support its claim that Solo breached the Agreement. Specifically, Solo claims that Mehiel has not and cannot sufficiently demonstrate that 1) Earthshell Corp. was prepared to purchase the St. Thomas facility without repairs and 2) Solo acted in bad faith by including the Earthshell Reserve in the working capital statement.

Mehiel presents affidavits indicating that Solo was aware that the inclusion of the Earthshell Reserve was an error that needed to be corrected. Mehiel argues that Solo's failure to correct the error was an attempt to take advantage of Mehiel and, thus, was done in bad faith.

Discussion

A moving party is entitled to summary judgment as a matter of law where there is no genuine issue of material fact.[7] "Summary judgment must also be denied if there is a dispute regarding the inferences which might be drawn from the facts."[8] "Affidavits may be submitted by a party opposing a motion for summary judgment for the purpose of creating a material issue of fact."[9] The affiant must provide facts admissible in evidence and be competent to testify thereto.[10]

A valid breach of contract claim must show the existence of a contract, the breach of a contractual obligation, and damages.[11]

Here, Solo is asserting that Mehiel cannot sustain a claim for breach because no evidence exists either that the intended sale of the St. Thomas facility was to occur without repairs to the facility or that Solo's alleged error was made in bad faith. However, Mehiel is claiming that Solo had knowledge that the inclusion of the Earthshell Reserve was an error that should have been corrected. Thus, the material fact in dispute is whether Solo knew of an oversight regarding the inclusion of the Earthshell Reserve in the working capital statement and purposefully failed to correct it. Mehiel is not obligated to demonstrate that a

[7] Del. Super. Ct. Civ. R. 56(c); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *Snyder v. Baltimore Trust Co.*, 532 A.2d. 624, 625 (Del. Super. 1986).
[8] *Empire of Am. Relocation Services, Inc*, 551 A.2d at 435.
[9] *Collins v. Ashland, Inc.*, 2009 WL 81297, *2 (Del. Super. 2009).
[10] Del. Super. Ct. Civ. R. 56(e) (stating that ". . . affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein"); *Collins*, 2009 WL 81297, at *2.
[11] *VLIW Technology, LLC v. Hewlett-Packard Co*., 840 A.2d 606, 612 (Del. 2003).

pending sale of the St. Thomas facility was a purchase without repairs; Mehiel need only demonstrate an acknowledgment by Solo indicating its awareness that the inclusion was a mistake that Solo would correct. Since Mehiel has produced evidence demonstrating that an issue of fact exists as to whether Solo conceded that an oversight needed correcting but did not do so, the Court finds that Mehiel has presented a claim that should go to the trier of fact.

Mehiel has produced an affidavit of George Castelli, Corporate Controller of the Company who became an employee of Solo after the merger. This affidavit is distinct and different from the affidavit of George Castelli previously submitted by Mehiel with its cross motion for summary judgment. The affidavit particularly describes the effect that the information from Company management had on Mr. Castelli and his intent regarding correction of the oversight under the circumstances. This new affidavit raises an issue of fact as to whether the inclusion of the Earthshell Reserve in the working capital statement was an oversight that would be corrected by Solo.

Also presented is a new affidavit of Dennis Mehiel. It, too, differs from his previous affidavit submitted with Mehiel's cross motion for summary judgment. Similarly, it raises an issue of fact that remains in dispute. Dennis Mehiel's affidavit discusses how information that he received from Solo affected his action regarding the execution of the letter of intent for the sale of the St. Thomas facility.

Mehiel's alleged action in executing a letter of intent instead of a sale contract based on Solo's request raises an issue of fact as to what Solo knew about the need to correct the alleged oversight on the working capital statement.

Thus, a material issue remains as to whether Solo knew of the need to correct the working capital statement, and whether it intentionally failed to do so, thus, taking advantage of Mehiel.

For these reasons, the Court finds that a genuine issue of material fact exists as to whether Solo breached its agreement with Mehiel in bad faith that should be resolved at trial.

ACCORDINGLY, Solo's motion for summary judgment is ***DENIED***.

/s/ Diane Clarke Streett
Diane Clarke Streett
Judge

Original Copy to Prothonotary