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OF THE
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November 4, 2002

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RE: Kier Construction, Ltd. v. Raytheon Company and Raytheon Engineers & Constructors International, Inc.
Civil Action No. 19526
Date Submitted: September 9, 2002
Date Decided: November 4, 2002

Dear Counsel:

Pending are motions for summary judgment and to stay discovery by the defendants, Raytheon Company ("Raytheon") and Raytheon Engineers & Constructors International, Inc. ("RECI"). The plaintiff, Kier Construction, Ltd. ("Kier"), seeks declaratory relief against the defendants, reimbursement for its attorneys' fees and expenses associated with this action, and other relief that the Court finds proper. For the reasons next discussed, both of the defendants' motions will be denied.

I. FACTS

Kier is a party to the Saltend construction contract, which is the subject of the underlying claim in this case. The other signatory to the contract is Raytheon Engineers & Constructors UK, Ltd. ("REC UK"), a subsidiary of RECI. That subsidiary, REC UK, was performing the construction on the Saltend project. Sometime thereafter, construction on the project was delayed, and as a result, Kier claims that it was damaged to the extent of $11 million.

In July 2000, the defendants sold REC UK to Morisson-Knudsen ("Morisson") under a Stock Purchase Agreement ("SPA"). Because difficulties arose in obtaining certain consents and novations contemplated by the SPA, Raytheon, RECI, REC UK, and Morisson entered into a Project Completion Agreement ("PCA"). Kier claims the effect of the PCA was to transfer the benefits and burdens of the Saltend construction contract to RECI and Raytheon, thereby making Raytheon and RECI parties who were legally obligated under the Saltend construction contract with Kier.

While the sale of REC UK was taking place, Morisson changed its name to "Washington Group International, Inc." ("Washington Group"), and

REC UK became known as "Washington International, LLC."[1] In May 2001, both REC UK and Washington Group filed for bankruptcy.[2] The plaintiff then sued RECI and Raytheon in this Court, seeking a declaratory determination that those defendants had either retained, or had been assigned, the Saltend construction contract by operation of the PCA, and that as a consequence, RECI and Raytheon were legally responsible for the breach of that contract.

II. THE CONTENTIONS AND GOVERNING LAW

The defendants moved for summary judgment under Court of Chancery Rule 56,[3] and filed an opening brief in support of that motion. The plaintiff, however, did not file a responsive brief, claiming that it needed further discovery to file a responsive brief. The defendants disagree, contending that they are entitled to summary judgment on the present record as a matter of law.

To grant a motion for summary judgment, the Court must determine that there are no genuine issues of material fact and that the moving parties

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[1] The parties refer to Raytheon Engineers & Constructors UK as "REC UK" even after the name was changed to Washington International. This Opinion uses the nomenclature chosen by the parties.

[2] The defendants argue that because Kier was an unsecured creditor of Washington Group before Washington Group filed for bankruptcy, Kier received a stake in the company after it was reorganized. The relevance of Kier's claim in the reorganized company to the claims in this action has not been adequately explained.

[3] Ch. Ct. R. 56.

(here the defendants) are entitled to judgment as a matter of law.[4] All inferences must be resolved in favor of the nonmoving party (here, the plaintiff), and those inferences must be drawn from facts, not suppositions.' Under Rule 56(f), the Court may deny the application for surnmary judgment or grant a continuance until discovery is completed, if the party opposing the motion is unable to present by affidavit the facts that are essential to its position!

After the defendants moved for summary judgment, Kier served the defendants with a request for the production of documents. In response, the defendants moved to stay discovery—a motion that Kier opposes. There is no rule that affords a party an automatic right to stay discovery even though a case dispositive motion has been filed.' When the administration of justice and the specific circumstances of the case require that discovery be stayed, the Court may, in its discretion, grant the motion.'

In support of their motion to stay discovery, the defendants argue that their summary judgment motion is grounded upon the unambiguous

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[4] *Williams v. Geier,* 671 A.2d 1368, 1375 (Del. 1996).
[5] *Liboff v. Allen,* 1975 Del. Ch. LEXIS 255, at *14 (Del. Ch. Jan. 14, 1975).
[6] Ch. Ct. R. 56(f).
[7] *Electra Investment Trust PLC* v. *Crews,* 1999 Del. Ch. LEXIS 235, at *5 (Del. Ch. Nov. 30, 1999).
[8] *Darneille v. Santa Fe Industries, Inc.,* 1979 Del. Ch. LEXIS 419, at *6 (Del. Ch. Sept. 14, 1979).

language of the SPA and PCA, and therefore can be resolved as a matter of law without resort to extrinsic evidence. More specifically, the defendants argue that before extrinsic evidence may be considered and discovery can be taken, the Court must first decide whether the SPA and PCA are ambiguous. Because the motion can be decided solely by reference to the SPA and PCA, which unambiguously defeat Kier's claim, any discovery conducted by Kier at this stage would be unnecessary and wasteful.

Kier responds that discovery is not automatically stayed simply because a dispositive motion is pending, and that it requires and is entitled to discovery to formulate an appropriate response to the summary judgment motion. Because the SPA and PCA are ambiguous, extrinsic evidence that can only be obtained through discovery will be required to resolve the motion. Therefore, the plaintiff will be significantly prejudiced if the Court precludes it from conducting discovery.

I conclude, for the reasons that follow, that the defendants' motion to stay discovery must be denied, and that the motion for summary judgment will be held in abeyance until the completion of discovery and briefing.

III. ANALYSIS

It is black letter law that before a motion for summary judgment is decided, the non-movant must be afforded an opportunity to take all

necessary discovery.[9] The precedents that defendants cite for their motion to stay discovery are inapplicable, because in those cases the motion to stay discovery arose in the context of a motion to dismiss.[10] Because a motion to dismiss is decided on the basis of the complaint alone, that procedural setting is distinguishable from a summary judgment motion, which is determined on a factual record.

This Court is empowered to stay discovery in the sound exercise of its discretion where the administration of justice so requires.'[11] In deciding that issue, the factors that the Court has considered include whether the nature of the proceeding requires prompt resolution, whether the discovery is essential, and whether a stay would be prejudicial to any of the parties.[12]

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[9] *Vanderbilt Income and Growth Associates, L.L.C. v. Arvida/JMB Managers, Inc.,* 691 A.2d 609, 613-14 (Del. 1996).

[10] *Greenspan v. Hinrichs,* 1998 Del Ch. LEXIS 17 (Del Ch. Feb. 10, 1998); *Corporate Property Associates 8, L.P. v. Amersig Graphics Inc.,* 1994 Del. Ch. LEXIS *45* (Del. Ch. March 31, 1994); *Hudson* v. *Wesley* College, *Inc.,* 1993 Del. Ch. LEXIS 260 (Del. Ch. Nov. 19, 1993).

[11] *Dameille* at *6.

[12] *Electra* at *5-*6; *Lipson v. Supercuts, Inc.,* 1996 Del. Ch. LEXIS 108, at *4-6 (Del. Ch. Sept. 10, 1996). On some occasions, the Court has applied a loose three-part test when evaluating motions to stay discovery. *See, e.g., In re McCrory Parent Corp.,* 1991 Del. Ch. LEXIS 112 (Del. Ch. July 3, 1991). The *McCrory* case took place in the context of a motion to dismiss and justified a denial a motion to stay of discovery when: (i) the dispositive motion offered a reasonable expectation of avoiding litigation; (ii) the plaintiff requested interim relief; and (iii) the plaintiff would be prejudiced because the information may be unavailable later. *Id.* at *3. This Opinion considers the first-and third factors whereas the second is inapplicable.

Given the language of the SPA and PCA, the Court finds those contracts are ambiguous. The defendants argue that under those contracts, they are merely guarantors, not owners, of the Saltend-construction contract. But, that argument runs contrary to explicit contract language that transfers "the benefit&d burdens of the Project Agreements . . . to [Raytheon and RECI]" and makes "[Raytheon and RECI] the real parties in interest with respect to those agreements for the Saltend Project."[13] While the Court may ultimately rule that the defendants did not retain the Saltend construction contract, at this stage the language of the PCA can be read to support the claim that the contract was assigned to the defendants.

Because ambiguity exists, the Court may consider extrinsic facts to resolve the ambiguity. [14] Moreover, no additional factors have been shown that would justify granting the motion to stay discovery. The case has not been expedited and is at the earliest procedural stage. There is no claim that the discovery is excessively burdensome or expensive. The facts that Kier seeks to explore are relevant to the merits at issue. Without that discovery,

[13] PCA Preface and $2.2.

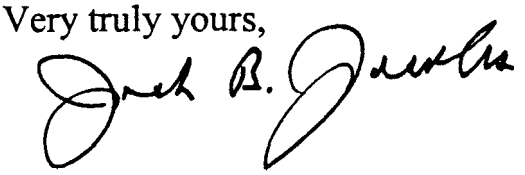
[14] *Citadel Holding* Corp. v. *Roven, 603* A.2d 8 18, 822 (Del. 1992). While the defendants argue that they did not rely on documents apart from the SPA and PCA in arguing their motion for summary judgment, that does not preclude the fact that such documents might be relevant and discoverable.

Kier would be in jeopardy of having its case dismissed without the benefit of what might turn out to be facts essential to its case.

IV. CONCLUSION

For these reasons, the motion to stay discovery is denied. The Court will defer ruling on the summary judgment motion until discovery and briefing are completed. **IT IS SO ORDERED.**

Very truly yours,



CC: Register in Chancery