

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GEORGE VON OPEL,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 17200
)	
YUBET.COM., INC.,)	
)	
Defendant.)	

Submitted: April 17, 2000

Decided: June 2, 2000

MEMORANDUM OPINION

Gregory P. Williams and Raymond J. DiCamillo of Richards, Layton & Finger, Wilmington, Delaware. OF COUNSEL: Jack McKay, Marc Cohen, Cheryl Covello of Shaw Pittman, Washington, DC. Attorneys for Plaintiff.

Alan J. Stone and Jessica of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware. OF COUNSEL: Eric Landau and Laura D. Castner of Christensen, White, Miller, Fink, Jacobs, Glaser & Shapiro, Los Angeles, California. Attorneys for Defendant.

STEIELE, V.C.

Is a holder of stock and warrants to purchase stock entitled to summary judgment against the issuing company for damages arising from the company's failure to file a registration statement as promised where the stock and warrant holder has signed a document purporting to be a release from liability which refers to "shares" but not to "warrants or shares issuable upon exercise of a warrant?"

I conclude that no party is entitled to summary judgment where the record is unclear about the parties' intent in preparing and signing an ambiguous release susceptible to two distinct and inconsistent meanings.

Summary judgment is only appropriate where the moving party demonstrates that no genuine issues of material fact are in dispute and the moving party is entitled to judgment as a matter of law.¹ In that context, I must view all evidence in the light most favorable to the non-moving party.² With this in mind, I turn to the issues in dispute.

Von Opel, a resident of Switzerland and beneficial owner of Youbet.com³ common stock and warrants to purchase shares of common stock, moves for summary judgment on his complaint alleging that

¹ Ch. Ct. R. 56.

² *Williams v. Geier*, Del. Supr., 671 A.2d 1368, 1388 (1996).

³ Youbet.com is a developer of interactive software providing individual personal computer users with both race handicapping and sports oddsmaking information. The

Youbet.com, a Delaware corporation, failed to file a registration statement with the Securities and Exchange Commission covering common stock issuable on the exercise of warrants according to the terms of a Private Placement Memorandum and Warrant Certificates.

Von Opel, through a private placement offering to non-U.S. investors, agreed to purchase 80 Regulation (“Reg”) S Units.⁴ Each Unit consisted of 10,000 shares of no par value common stock and warrants to purchase 5,000 shares of common stock at a price of \$5.25 per share. Consistent with the agreement, Youbet.com issued 800,000 shares of common stock and Warrant Certificates for 400,000 warrants to Von Opel.

Pursuant to the offering, Youbet.com agreed to file registration statements with the SEC after the completion of the Reg S offering.’

software package (enables users to connect to Youbet.com’s host computer system to place wagers on horseracing and other sports contests.

⁴ A maximum of 200 Reg S Units were offered. Reg S Units receive an exemption from registration with the SEC under the Securities Act of 1933 because they are offshore offerings.

⁵ In its Private Placement Memorandum, Youbet.com agreed to file a registration statement with the SEC “as soon as practicable after the completion of the Regulation S Offering.” In addition, Youbet.com agreed to file a registration statement with the SEC within 10 months of the initial closing to cover the common stock issuable on the exercise of the warrants. The Warrant Certificates issued also reiterate Youbet.com’s obligation to file a registration statement. The Certificates state in relevant part that Youbet.com shall:

Within ten (10) months of the initial issuance of Series S Warrants, file with the Commission a registration statement on an appropriate form, including the Registrable[sic] Securities among the securities being registered pursuant to such registration statements.

Because of its declining financial condition, Youbetcom could not fulfill its obligation. Amid concern of the possibility of a shareholder lawsuit, Youbet.com sought waivers from its investors of all registration rights relating to the Reg S Units. On February 24, 1998, Von Opel received a letter from the Chairman and Chief Operating Officer of Youbet.com, David M. Marshall, regarding the Youbet.com securities which Von Opel had purchased in the Reg S offering.⁶ Youbet.com asked Von Opel to sign and return a copy of the letter acknowledging his agreement to waive the registration requirement of the Private Placement Memorandum and Warrant Certificates. Von Opel, by signing and returning the letter to Youbetcom, arguably also agreed to release Youbet.com, its officers and directors, from any liability because of its failure to file registration statements. Von Opel signed and returned a copy of the letter.

The parties decidedly disagree about the scope of the release contemplated in the February 1998 letter. The letter states in relevant part “in the 199.5 private placement, [Youbetcom] had agreed to file a registration statement with the SEC as soon as practical covering the *resale*

Youbet.com later reduced the exercised price for the 400,000 warrants purchased by Von Opel from \$5.25 per share to \$2.50 per share. Youbet.com amended, signed and delivered a Warrant Certificate to Von Opel incorporating the price reduction and repeating Youbet.com’s obligation to file a registration statement.

⁶ (Letter from David M. Marshall, Chairman & CEO of Youbet.com, Inc. to Georg Von Opel of 2/24/98 at 2.)

of the shares. Because of the financial condition of [Youbetcom], [Youbet.com] was unable to satisfy that obligation.” *emphasis added.* It was from this described obligation that Youbet.com sought a release.

Von Opel disputes the scope of the release arguing it only addresses Youbet.com’s obligation to file a registration statement for the shares issued initially (to be done as soon as “practical”) and not its obligation to register the warrants or the shares issuable upon exercise of the warrants (to be done within 10 months of closing). The letter neither mentions a timeframe of ten months nor does it differentiate between warrants, shares issuable upon exercise of the warrants or shares issued at the time of the private placement. Von Opel argues that Youbet.com breached a valid contract for the purchase of securities when it failed to file a registration statement and that material fact can not be in dispute. Von Opel believes that he is therefore entitled to specific performance of the promise to file and damages that he may have incurred as a result of the failure to file the registration statement promised within 10 months of the closing.

Youbet.com presented the affidavit of Marshall for the purpose of setting forth a material, disputed issue of fact for trial. The Marshall affidavit indicates Youbetcom believed that the release extinguished its obligations concerning all of the securities subject to registration under the

Memorandum and Warrant Certificates. The Marshall affidavit states that Youbet.com intended that the Von Opel release would foreclose the possibility of a shareholder lawsuit for not registering securities issued in the Reg S offering.

Does the fact that the parties disagree about the proper interpretation of the release create an ambiguity? No. Contract terms are not ambiguous simply because the parties disagree on a common meaning.⁷ Rather, ambiguity exists when the provisions in controversy are reasonably susceptible to two or more different meanings.* Under the unique facts of this case, there is ambiguity on the face of the release. There is uncertainty about the scope, meaning, and application of the term shares. Based on the record before me it is fair to say that the term shares is ambiguous and that there is room for interpretation about the intended meaning as proposed in the release.

Youbet.com undertook two arguable obligations to file registration statements. First, the offering Memorandum committed Youbet.com to file a registration statement with the SEC “as soon as practicable after the

⁷ *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co.*, Del. Supr., 616 A.2d 1192, 1196 (1992).

⁸ *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, Del. Supr., 702 A.2d 1228, 1232 (1997) (citing *Rhone-Poulenc Basic Chemical Co. v. American Motorists Ins. Co.*, Del. Supr., 616 A.2d 1192, 1196 (1992)).

completion of the Regulation S offering.” Presumably, this made the offer more attractive to prospective buyers. Second, the Warrant Certificates committed Youbet.com to file with the SEC a registration statement “including the Registrable [sic] Securities” within 10 months of the initial issuance of Series S Warrants. Youbet.com has never filed a registration statement.

Von Opel claims that the filing of the registration statement is necessary for him to be able to sell shares issuable upon exercise of the warrants. Von Opel contends that the promise to register the shares issued at the time of the original offering is distinct from the promise to register the warrants or the shares issuable upon exercise of the warrants.

The Marshall letter stated in part that Youbet.com had “agreed to file a registration statement with the SEC as soon as practicable covering the resale of the shares.” The letter requested that Von Opel release Youbet.com from any liability arising from its “failure to file a registration statement as soon as practicable covering the shares.” Von Opel signed and returned the letter. Von Opel now argues that the letter clearly could be referring only to the shares being sold in the initial offering and not to registration of the warrants or shares issuable upon exercise of the warrants which was promised on a different timetable (within 10 months as opposed

to as soon as practicable) and in both the Memorandum and the Warrant Certificates themselves.

Youbet.com contends that the very same Memorandum upon which Von Opel relies states that “[t]he Company has no present intention of filing a registration statement with respect to the resale of the Reg S Warrants” and that the Certificates confirm this fact by reference to “Registrable [sic] Securities which are further defined as “the Warrant Shares issued or issuable upon the exercise of a Warrant.” Youbet.com contends that Von Opel knowingly and intentionally waived any right to rely upon the promise to register the shares when he signed and returned the release. Youbet.com has raised by affidavit whether, as a matter of fact, Von Opel waived his contract right, either expressly or by his conduct. Youbet.com takes the position that conversations with Marshall before the letter of February 28, 1998, as well as the plain meaning of the term “resale of the shares” establishes that the waiver and release of liability applied to both shares of Common Stock issued through the Memorandum and the warrant shares issued or issuable upon. the exercise of the warrants.

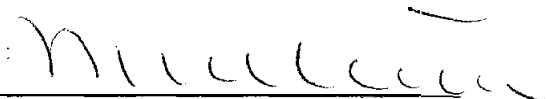
Von Opel has himself done no more than raise a disputed issue of material fact when he contends that the release’s reference to “shares” may have caused a reasonable person to believe that he was only releasing

Youbet.com from liability to file a registration statement on the shares issued initially but not on the warrants or the shares issuable upon the exercise of the warrants. The term in question may relate to both. In any event, a waiver of a known right uniquely involves inferences to be drawn from subjective assessments of the totality of the circumstances surrounding the purported action alleged to constitute a release. Matters of this kind are not generally appropriate for summary judgment.”

In retrospect it appears that I should have granted defendant’s Rule 56(f) request for discovery to explore the facts surrounding Von Opel’s signing of the release. I apologize for any inconvenience that may have caused the parties.

Von Opel’s request for summary judgment is *denied*.

IT IS SO ORDERED.


Vice Chancellor

⁹ See *Allstate Ins. Co. v Luzarczyk*, Del. Super., C.A. No. 96C-05-300, Quillen, J. (Dec. 17, 199 6).