



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

AMAYSING TECHNOLOGIES)
CORPORATION,)
)
Plaintiff,)
)
v.) Civil Action No. 19890
)
CYBERAIR COMMUNICATIONS, INC.,)
)
Defendant.)

MEMORANDUM OPINION

Date Submitted: February 11, 2004
Date Decided: May 28, 2004

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PARSONS, Vice Chancellor

Amaysing Technologies Corp. (ATC) brought an action for breach of contract against CyberAir Communications, Inc. (CyberAir) on September 6, 2002, requesting monetary damages and specific performance of a contract. On October 10, 2002, CyberAir moved to dismiss the Complaint for lack of subject matter jurisdiction. On November 25, 2002, after opening and answering briefs on the motion to dismiss were submitted, ATC filed an Amended Complaint. CyberAir then sought to dismiss the Amended Complaint, arguing that ATC had failed to plead a basis for equitable jurisdiction and that monetary damages would provide it complete relief. On January 31, 2003, the Court dismissed the Amended Complaint, but granted ATC leave to amend it further. ATC filed Plaintiff's Second Amended Complaint on March 13, 2003. CyberAir again moved to dismiss for lack of subject matter jurisdiction. On May 21, 2003, ATC moved for summary judgment. By the time briefing on these motions was completed, former Vice Chancellor Jacobs had been elevated to the Supreme Court and this action was reassigned. This Court heard argument on the motion on February 11, 2004.

For the reasons discussed below, both the motion to dismiss and the motion for summary judgment will be denied.

I. BACKGROUND

Plaintiff, ATC, is a Texas corporation with its principal place of business in Austin, Texas. ATC was founded in September 2000 to license and develop technology relating to holographic displays and optical interfaces for computers. Defendant, CyberAir, is a Delaware corporation with its principal place of business in Los Angeles, California.

On August 12, 2001, ATC and CyberAir entered into a Bridge Convertible Loan Agreement (“Bridge Loan Agreement” or “Agreement”). Under the terms of the Agreement, CyberAir would extend to ATC a “bridge” loan of \$1,500,000. ATC would use the loan as “start-up” funding to develop its technology to a level of performance defined in the Agreement as “Successful Qualified Testing.” The Agreement provided that if Successful Qualified Testing was attained, ATC would repay the loan either by issuing ATC common stock to CyberAir (the “conversion option”), or allowing CyberAir to purchase all rights in the technology (the “purchase option”). CyberAir could choose which option it preferred. If the ATC technology failed to reach Successful Qualified Testing, CyberAir could choose either the conversion or purchase option or request repayment of the principal and interest of the loan.¹

At the time they entered into the Agreement, the parties also executed five additional agreements, the “Transaction Documents.” These would come into play if the technology achieved Successful Qualified Testing.

Between August 2001, when the Agreement was signed, and June 2002, ATC and CyberAir executed 13 Addenda to the Agreement granting CyberAir more time to perform. Relying on the Agreement with CyberAir, ATC did not seek additional funding from other sources. To date, CyberAir has paid ATC \$560,000. ATC claims that it has been unable to develop its technology due to the incomplete funding. On August 6, 2002,

¹ Plt.’s Second Am. Compl. ¶¶ 16-21.

ATC demanded payment of the \$940,000 loan balance. When CyberAir did not comply, ATC commenced this action.²

II. CYBERAIR'S MOTION TO DISMISS

A. The Parties' Contentions

ATC maintains that in addition to requesting damages, it seeks to enforce the entire Agreement negotiated with CyberAir. The Agreement first calls for CyberAir to provide sufficient working capital (\$1.5 million) to enable ATC to develop and prove its technology. Once the technology is proven, the Agreement restricts CyberAir to choosing either to accept repayment of the loan in ATC stock or to purchase all rights in the technology and guarantee minimum license fees to ATC. ATC's claim for specific performance also seeks to ensure CyberAir's performance under the Transaction Documents.³ CyberAir has supplied less than half of the agreed loan amount, however, and development of the technology is stalled due to ATC's lack of funds.⁴

CyberAir argues that ATC's only claim is for breach of contract and that ATC is seeking the exact amount in damages that CyberAir owes under the Agreement.⁵ According to CyberAir, since ATC has not yet developed a product, there is no evidence that it is entitled to lost profits; thus, ATC's remedy is the amount that CyberAir still

² *Id.* ¶¶ 23-29.

³ Plt.'s Answering Br. ("PAB") at 8.

⁴ Plt.'s Second Am. Compl. ¶¶ 5, 14.

⁵ Def.'s Opening Br. ("DOB") at 6-7.

owes under the Agreement.⁶ Alternatively, if lost profits are appropriate, CyberAir maintains that experts can determine lost market share and lost opportunity damages for start-up companies.⁷

CyberAir denies that the loan made under the Agreement is unique and that it has any special relationship with ATC. CyberAir acknowledges that it has an option to purchase ATC stock in lieu of repaying the loan, but asserts that the Agreement is a loan contract and not a stock purchase contract.⁸ Therefore, CyberAir contends that ATC has an adequate remedy at law. CyberAir also urges the Court to disregard ATC's request for specific performance as nothing more than a strained attempt to manufacture a basis for equitable jurisdiction.⁹

B. Analysis

“Equitable jurisdiction must be determined from the face of the complaint as of the time of filing, with all material factual allegations viewed as true.”¹⁰ Under 10 *Del. C.* § 341, the Court of Chancery has jurisdiction over all matters and causes in equity. Yet, under 10 *Del. C.* § 342, this Court does not have jurisdiction over any matter for

⁶ Def.'s Reply Br. (“DRB”) at 3.

⁷ DOB at 7, citing *TV58 Ltd. P'ship v. Weigel Broad. Co.*, 1993 Del. Ch. LEXIS 146, at *10-11 (Del. Ch. July 22, 1993) (discounted cash flow analysis appropriate to predict future performance of start-up businesses).

⁸ DRB at 4-5.

⁹ DOB at 4.

¹⁰ *Candlewood Timber Group LLC v. Pan Am. Energy LLC*, 2003 Del. Ch. LEXIS 118, at *6 (Del. Ch. Oct. 22, 2003) (quoting *IBM Corp. v. Comdisco, Inc.*, 602 A.2d 74, 78 (Del. Ch. 1991)).

which there is an adequate remedy at law. The party seeking an equitable remedy has the burden to show that a legal remedy would be inadequate. Moreover, the Court will look beyond the pleadings to determine the true nature of the relief requested. Absent an underlying equitable right,¹¹ equity jurisdiction is inappropriate if a legal remedy offers complete relief.¹²

ATC contends that jurisdiction is appropriate because the parties contractually agreed to exclusive jurisdiction and venue in this Court.¹³ However, “[I]t is settled law that parties may not confer subject matter jurisdiction by consent or agreement.”¹⁴

¹¹ Although ATC seeks the equitable remedy of specific performance, it does not assert any underlying equitable right as a basis for equitable jurisdiction in this case.

¹² *Id.*; see also *Azurix Corp. v. Synagro Tech., Inc.*, 2000 Del. Ch. LEXIS 25, at *6-7 (Del. Ch. Feb. 3, 2000); *Bancroft Co. v. Board of Public Works*, 1980 Del. Ch. LEXIS 638, at *6-7 (Del. Ch. Mar. 11, 1980).

¹³ Plt.’s Second Am. Compl., Ex. A. Section 8.7 of the Bridge Loan Agreement states:

Consent to Jurisdiction and Service of Process. Each party hereto hereby irrevocably submits to the exclusive jurisdiction of the Chancery Court of the State of Delaware in any such action, suit or proceeding, and agrees that any such action [arising out of or relating to the actions of Amaysing or CyberAir pursuant to this Loan Agreement], suit or proceeding shall be brought only in such court (and waives any objection based on forum non conveniens or any other objection to venue therein), provided, however, that such consent to jurisdiction is solely for the purpose referred to in this Section 8.7 and shall not be deemed to be a general submission to the jurisdiction of said courts or in the State of Delaware other than for such purpose.

¹⁴ *El Paso Natural Gas Co. v. Transamerican Natural Gas Corp.*, Del. Ch. LEXIS 64, at *7 (Del. Ch. May 31, 1994) (*citing Timmons v. Cropper*, 172 A.2d 757 (Del. Ch. 1961)). Although not controlling, the fact that the parties’ Agreement contains a provision agreeing to jurisdiction in the Court of Chancery supports the analysis which follows on the availability of specific performance as a remedy and the lack of an adequate remedy at law.

Accordingly, whether equity jurisdiction exists here turns on whether ATC had an adequate remedy at law at the time ATC filed its Second Amended Complaint.

ATC advances two arguments in support of specific performance and equitable jurisdiction over its Second Amended Complaint: (1) ATC relied on the contract with CyberAir for funding and has no alternative means of funding; and (2) any calculation of future profits for ATC is likely to be speculative, which would create a significant risk that ATC would be precluded from receiving legal damages.

1. ATC's Claim for Specific Performance

In its Second Amended Complaint, ATC avers:

35. In reliance on CyberAir's repeated affirmations, ATC did not solicit or pursue alternative means of funding for ATC. Further, during the period that CyberAir was reaffirming its obligations, conditions in the market for venture capital have deteriorated making it virtually impossible for ATC to obtain funding at this time.¹⁵

CyberAir counters that ATC has presented no evidence that it has tried, but failed, to obtain venture capital from another source after CyberAir refused to provide further funding to ATC.¹⁶ ATC alleges, however, that it unsuccessfully approached at least five venture capital firms and several corporate manufacturing entities for alternative funding.¹⁷ For purposes of CyberAir's motion to dismiss, the Court must take ATC's assertion that it has been unable to obtain a substitute loan as true. Based on that assumption, ATC's contention that the Bridge Loan Agreement is unique is persuasive.

¹⁵ Plt.'s Second Am. Compl. at 10.

¹⁶ DRB at 5.

¹⁷ Plt.'s Second Am. Compl. at 8-9, ¶ 29.

ATC also argues that the Agreement creates a unique relationship with CyberAir, and is not merely a traditional loan. In exchange for the opportunity to acquire a novel technology, CyberAir agreed not only to provide funding for ATC to develop its technology, but also to accept stock in lieu of repayment if ATC succeeded. In addition, CyberAir agreed to provide further, long-term funding if the technology was successfully developed. ATC asserts that it seeks not just the balance of the bridge loan, but also CyberAir's performance of the obligations that would be triggered by successful testing of the technology.¹⁸ ATC compares venture capital funding to stock purchase agreements, where the stock is not generally available in the market place, as both the novel technology and the stock have unique value to the purchaser.¹⁹ This Court has ordered specific performance of a stock purchase agreement, when the stock is not generally available in the market place, is unique, or has unique value to the purchaser.²⁰

CyberAir contends that the issuance of stock is only tangential to this case, and that its options to obtain ATC stock are discretionary and not triggered until ATC attains successful qualified testing of its technology.²¹ That may be true, but if successful qualified testing is attained, the Agreement requires CyberAir to accept some form of noncash repayment of the loan.²² Furthermore, ATC relies on more than the fact that the

¹⁸ PAB at 13-14.

¹⁹ PAB at 15.

²⁰ *See Hazen v. Miller*, 1991 Del. Ch. LEXIS 191, at *16 (Del. Ch. Nov. 18, 1991).

²¹ DRB at 4.

²² Plt.'s Second Am. Compl. at 5-6, ¶¶ 17-20.

Agreement involves a transfer of stock. It also contends that an agreement to support development of novel technology involves a unique asset, similar to an agreement to sell stock that is not generally available. When they entered the Agreement, both CyberAir and ATC understood and intended that the initial loan would be used to develop ATC's technology. In exchange, CyberAir obtained the option, and in some cases the obligation, to become an equity partner or otherwise acquire rights in a unique technology. ATC proceeded on this understanding, but did not have the bargained for opportunity to develop its technology because CyberAir withheld the greater part of the loan. The alleged breach by CyberAir also effectively precludes ATC from receiving the additional benefits it would be entitled to under the Bridge Loan Agreement and Transaction Documents, if ATC were to meet the qualified testing requirement. A reasonable inference from the allegations in the Second Amended Complaint is that ATC will be denied a fair opportunity to achieve Successful Qualified Testing, if it does not receive the full amount of the venture capital loan that CyberAir promised to provide.

ATC also analogizes its venture capital agreement to a construction loan.²³ A construction loan is a short-term loan usually made in reliance on a permanent lender who agrees to repay the short-term loan in exchange for a security interest in the completed property. If the permanent lender refuses to repay the construction loan, the

²³ PAB at 16-17.

builder is likely to have difficulty finding substitute funding, and in such circumstances, specific performance has been ordered.²⁴

2. ATC's Claim That it Has no Adequate Remedy at Law

In any case, however, ATC has a strong and independent second argument in support of subject matter jurisdiction. ATC alleges that:

36. [Text omitted.] CyberAir's failure to provide the Bridge Loan proceeds has prevented ATC from completing the development and marketing of the Technology thereby depriving ATC of its expected benefit [marketing and licensing the technology] under the various agreements it executed with CyberAir. Calculation of the potential profits that could have been realized by ATC had it been able to complete development of the Technology would be speculative. Currently, there is no established market for the Technology and as a result, it will be difficult if not impossible to predict the profits that ATC may have achieved had it been able to bring to market its technology in a timely fashion.

37. Alternatively, if ATC is able to secure alternative funding and thereby complete the development of its Technology, the damages that result from CyberAir's breach will be speculative. . . . Changes in related technologies as well as the possibility of new and competing technologies coming on the market in the interim will make calculation of ATC's damages resulting from any such delay difficult if not impossible.²⁵

ATC claims that money damages cannot provide adequate relief because there is no established market for the technology, and so ATC's potential profits cannot be accurately predicted. A remedy at law is not adequate "where damages are impracticable

²⁴ See *First Nat'l State Bank v. Commonwealth Fed. Sav. & Loan*, 610 F.2d 164, 172 (3d Cir. 1979) (acknowledging the "futility of seeking alternative mortgage financing for an obviously failed project"); *Girard Bank v. John Hancock Mut. Life Ins. Co.*, 524 F. Supp. 884, 896 (E.D. Pa. 1981) (awarding specific performance to interim lender because of its special contractual arrangement with long-term lender).

²⁵ Plt.'s Second Am. Compl. at 10.

because it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty.”²⁶

CyberAir contends that experts are able to estimate future profits of start-up businesses in ways that are acceptable to the courts. In support, they cite *TV58*, where this Court used a discounted cash flow analysis in an appraisal action to determine the future performance of a TV station with no earnings history.²⁷ ATC properly distinguishes *TV58* as involving a statutory appraisal action under 8 *Del. C.* § 262.²⁸ In an appraisal action, the court is obligated to determine a fair market value for the stock at issue using “any techniques or methods which are generally considered acceptable in the financial community. . . .”²⁹ In a breach of contract action, however, ATC would have the burden of proving its damages to a reasonable certainty. With its technology still undeveloped, ATC’s ability to prove lost profits damages would be highly doubtful.³⁰

²⁶ *First National*, 610 F.2d at 171 (finding that distinct qualities of shopping mall preclude definitive estimate of its value); *Girard Bank*, 524 F. Supp. at 895-95 (finding award of damages impracticable because market value was based on “pure speculation.”).

²⁷ *TV58 Ltd. Partnership v. Weigel Broad. Co.*, 1993 Del. Ch. LEXIS 146 (Del. Ch. July 22, 1993).

²⁸ *Id.*

²⁹ *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983); 8 *Del. C.* § 262(h) (“After determining the stockholders entitled to an appraisal, the Court *shall* appraise the shares. . . .”) (emphasis added).

³⁰ *See In re Heizer Corp.*, 1990 Del. Ch. LEXIS 71 (Del. Ch. May 25, 1990) (holding that start-up technology company with no commercially competitive product could not prove lost profits); *see also Callahan v. Rafail*, 2001 Del. Super. LEXIS 88 (Del. Super. Mar. 16, 2001) (holding discounted cash flow analysis too speculative to determine lost profits when intervening factors affect performance).

CyberAir also cites *Cheese Shop Int'l, Inc. v. Steele* for the proposition that ATC is not entitled to specific performance, because it has an adequate remedy at law.³¹ In *Cheese Shop*, however, the Delaware Supreme Court reversed the lower court's denial of equity jurisdiction for breach of a trademark licensing agreement. The court held that the subject matter of the contract, a trademark, "is a unique and valuable property interest" which the court will protect because of the "often impossible task of measuring money damages arising therefrom."³² Similarly, ATC is faced with the nearly impossible task of measuring money damages for an unproven technology. Because such damages are likely to be merely speculative, ATC has no adequate remedy at law and is entitled to pursue its equitable remedy in the Court of Chancery.

III. ATC'S MOTION FOR SUMMARY JUDGMENT

On May 21, 2003, ATC moved for summary judgment on grounds that CyberAir agreed to provide ATC with a loan for \$1.5 million dollars subject to two conditions; that CyberAir repeatedly admitted in addenda to the Agreement that the two conditions had been met; and that CyberAir failed to provide the full amount of the loan. The two conditions are: (1) that the "Effective Date," August 13, 2001, shall have passed; and (2) that the provisions of Section 2.1(b) of the Bridge Loan Agreement shall have been satisfied.

³¹ 311 A.2d 870 (Del. 1973).

³² *Id.* at 871.

CyberAir admits that it agreed in each addendum to the Bridge Loan Agreement that ATC had met the conditions precedent to CyberAir's performance. CyberAir argues, however, that the provisions of Section 2.1(b)(iii) of the Agreement have not been satisfied. Under this condition, the representations and warranties made by ATC pursuant to Article 3 of the Agreement must have been true and correct as of the effective date. CyberAir alleges that ATC misrepresented aspects of its technology and misled CyberAir into believing that this condition had been met. Specifically CyberAir asserts that ATC falsely represented that the optical interconnect application was functional and that an optical data signal could be sent through walls and objects to create a wireless LAN.³³

Section 3.7 of the Agreement requires that information provided by ATC not be misleading.³⁴ Therefore, CyberAir maintains that ATC has committed a prior material breach of the Agreement that discharges CyberAir from performance by misrepresenting the capabilities of its technology.³⁵

³³ Affidavit of Carl Erickson at ¶¶ 3, 4; Affidavit of John Caulfield at ¶¶ 2, 3.

³⁴ Section 3.7 states in part that “[n]one of the representations or warranties made by Amaysing herein . . . and none of the statements contained in each exhibit, report, statement, or certificate furnished by or on behalf of Amaysing in connection with any of the Loan Documents, contains any untrue statement of a material fact or omits any material fact required to be stated therein or necessary to make the statements made therein . . . not misleading as of the time when made or delivered.”

³⁵ *See Wagner v. Hendry*, 2000 Del. Ch. LEXIS 33, at *16 (Del Ch. Feb. 23, 2000) (“[A] plaintiff seeking to compel performance must demonstrate freedom from fault with respect to performance of dependent promises, counterpromises or conditions precedent.”).

Based on its review of the briefs, affidavits, and other materials submitted in connection with Plaintiff's motion for summary judgment and the arguments of counsel, the Court finds that material issues of disputed fact remain which preclude a grant of summary judgment.

IV. CONCLUSION

For the foregoing reasons, CyberAir's motion to dismiss is DENIED, and ATC's motion for summary judgment is DENIED. IT IS SO ORDERED.