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: August 11, 2010
Decided: October 14, 2010

Upon Cross-Motions for Summary Judgment
Plaintiff's Motion for Summary Judgment Denied
Defendant's Motion for Summary Judgment Denied

MEMORANDUM OPINION

Appearances:

Thomas W. Briggs, Jr., Esquire, Wilmington, Delaware
Attorney for Plaintiff Dennis Mehiel

T. Victor Clark, Esquire, Wilmington Delaware
Attorney for Defendant Solo Cup Company

STREETT, J.

The instant matter involves cross motions for summary judgment filed by Plaintiff Dennis Mehiel, as Stockholders' Representative of SF Holdings Group, Inc., ("Mehiel") and Defendant Solo Cup Company ("Solo"). The case involves contractual obligations pursuant to a merger agreement between the parties and an escrow account of approximately $285,195. Mehiel, as chairman and CEO of Sweetheart Cup Company ("Sweetheart" or the "Company"), brings this claim on behalf of the stockholders of SF Holdings Group, Inc., Sweetheart's sole shareholder, and asserts that Solo has conceded to a breach of its contractual obligations to Mehiel. Solo argues that Mehiel's claim of breach is barred by *res judicata* and, alternatively, that Mehiel has not produced any competent evidence to support its breach of contract claim. For the reasons explained below, the cross motions are denied.

Facts

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 was 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] "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[2] consistently applied (excluding current maturities of long term debt).[3]

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 an action for $5.6 million in damages which eventually went to arbitration before a neutral auditor (the "arbitrator") in May 2006.

The arbitrator resolved most of the issues concerning the amount of working capital in Solo's favor. According to the Agreement, the neutral arbitrator's decision was "final, binding and conclusive."[4] Additionally, the Court has already determined (in its decision on Solo's motion to dismiss) that the proceeding before the neutral arbitrator was a binding arbitration.[5] The Court has also determined

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[1] *See Mehiel v. Solo Cup Co*., 2007 WL 901637, *1 (Del. Super. 2007).

[2] The term "GAAP" refers to the United States' generally accepted accounting principles. See Agreement and Plan of Merger, Section 3.8(a).

[3] Agreement and Plan of Merger, Section 3.11(b) (December 22, 2003).

[4] Agreement and Plan of Merger, Section 3.9(c).

[5] *Solo Cup Co.*, 2007 WL 901637, at *3.

that four of the five counts raised in Mehiel's complaint were previously raised and decided at the binding arbitration and, therefore, were *res judicata*.[6]

The Parties' Contentions

The claim that the Court previously found was not adjudicated by the neutral arbitrator is the "Earthshell Claim."[7] Solo contends that all disputes as to the working capital, including the Earthshell Claim, were decided by arbitration and/or the arbitrator's refusal to arbitrate the Earthshell Claim. Solo has provided documentation demonstrating that the parties had submitted argument to the neutral arbitrator concerning whether the Earthshell Claim could be addressed. Solo also asserts that Mehiel cannot sustain its burden of proof as to the breach of contract claim.

Mehiel argues that Solo breached its obligation to prepare the working capital statement in good faith and in conformity with GAAP consistently applied by including the Earthshell Reserve ($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.).[8] The inclusion of the Earthshell Reserve in the working capital

[6] *Solo Cup Co.*, 2007 WL 901637, at *4-5.

[7] *Solo Cup Co.*, 2007 WL 901637, at *4-5.

[8] Plaintiff's Second Amended and Supplemental Complaint, 20 (September 15, 2006).

statement would serve to reduce the working capital which in turn would reduce the purchase price.

Mehiel alleges that the Earthshell Reserve should not have been included in the working capital statement because he received a letter of intent for sale of the facility "as is" prior to settlement and, consequently, monies for deficiencies or repairs were not required.[9] [10] Mehiel has also provided affidavits alleging that Solo personnel had admitted, during the Resolution Period, that the inclusion of the Earthshell Reserve was an oversight that would be corrected.[11]

Standard of Review

A moving party is entitled to summary judgment as a matter of law where there is no genuine issue of material fact in dispute.[12] The moving party bears the burden of establishing that no such genuine issue of material fact exists.[13] "Where

[9] Mehiel Aff. ¶ 10; Aff. of Micheletti, Exh. 9 attaching Letter of Intent from Earthshell, OM., dated February 19, 2004.

[10] Mehiel Aff. ¶ 11.

[11] Mehiel Aff. ¶ 12 ("With regard to the Earthshell reserve, upon disputing the accounting for this reserve, my staff was informed by Solo personnel prior to the conclusion of the Resolution period that this reserve had not been reversed due to an oversight."); Uleau Aff. ¶ 7 ("With regard to the Earthshell reserve, upon disputing the accounting for this reserve I was informed by Solo personnel prior to the conclusion of the resolution period that this reserve was not reversed due to an oversight.").

[12] Del. Super. Ct. Civ. R. 56(c); *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009); *Snyder v. Baltimore Trust Co.*, 532 A.2d. 624, 625 (Del. Super. 1986).

[13] *Hart v. Resort Investigations & Patrol*, 2004 WL 2050511, at *6 (Del. Super. Sept. 9, 2004).

the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[14]

However, "cross–motions for summary judgment are not the procedural equivalent of a stipulation for a decision" where a paper record, such as affidavits, provides each parties' versions of events prior to the closing of a deal pertinent to an agreement for sale.[15] Therefore, when opposing parties present cross-motions for summary judgment, neither motion is granted unless the Court determines that there is no genuine issue of material fact and that one of the parties is entitled to judgment as a matter of law.[16] "Summary judgment must also be denied if there is a dispute regarding the inferences which might be drawn from the facts."[17] Furthermore, "if it seems desirable to inquire more thoroughly into the facts in

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[14] Del. Super. Ct. Civ. R. 56(h).

[15] *Empire of Am. Relocation Services, Inc. v. Commercial Credit Co*., 551 A.2d 433, 435 (Del. 1988).

[16] *Empire of Am. Relocation Services, Inc.*, 551 A.2d at 435.

[17] *Empire of Am. Relocation Services, Inc*, 551 A.2d at 435.

order to clarify the application of the law, summary judgment will not be granted."[18]

In the matter before the Court, the parties have presented cross-motions for summary judgment along with a paper record consisting of affidavits and documentation supporting their versions of the events leading up to the finalized agreement between parties. Therefore, the Court will grant neither motion in this matter unless it determines no genuine issue of fact exists as to the below claims.

Discussion

Based on the parties' contentions, two issues are now before the Court. The first issue is whether the Earthshell Claim is precluded by *res judicata*. The second issue is whether Solo breached the contract.

Res Judicata

The doctrine of r*es judicata* provides a procedural bar to the litigation of issues which were actually decided or should have been raised and decided in a previous suit.[19] The purpose of the doctrine is to prevent needless litigation "by

[18] *84 Lumber Company v. Derr*, 2010 WL 2977949, at *3 (Del. Super. July 29, 2010)(citing *Myers v. Nicholson*, 192 A.2d 448, 451 (Del. 1963)).

[19] *LaPoint v. AmerisourceBergen Corp*., 970 A.2d 185, 191-192 (Del. 2009).

limiting parties to one fair trial of an issue or cause of action."[20] *Res judicata* has preclusive effect where the following parameters are satisfied:

> (1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the appellants in the case at bar; and (5) the decree in the prior action was a final decree.[21]

However, the doctrine of *res judicata* is misapplied if it is used to bar litigation of an issue that had not been decided in a prior action.[22] Moreover, claims triggered and pursued subsequent to those of the prior action are not barred under *res judicata* because any judgment on that prior action does not affect claims not then in existence.[23]

Valid and final arbitration awards are akin to a court's judgment and are given the same treatment as such under *res judicata*.[24] Additionally, the

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[20] *LaPoint*, 970 A.2d at 191-192.

[21] *LaPoint*, 970 A.2d at 192.

[22] *LaPoint*, 970 A.2d at 192.

[23] *LaPoint,* 970 A.2d at 194.

[24] *Solo Cup Co.*, 2007 WL 901637, at *5.

determination of a procedural question, such as whether the raising of an issue for arbitration was timely, is left to the arbitrator.[25]

In this matter, it is without contention that the Earthshell Claim involves the same subject matter and the same parties as the issues litigated in the prior arbitration by the neutral arbitrator. Also, the Court has already determined that the neutral arbitrator's decision was final and binding.[26] However, because the neutral arbitrator merely stated that the merits of the Earthshell Claim would not be addressed,[27] the issues before the Court are whether the neutral arbitrator determined the procedural arbitrability of the Earthshell Claim and, if not, whether the neutral arbitrator's mere refusal to address the claim causes it to be barred.[28] Since the Court had previously found that the neutral arbitrator did not rule that the Earthshell Claim was not arbitrable when it denied Solo's motion to dismiss,[29] this Court will now consider the question in light of the paper record since submitted.

In a September 14, 2005 letter to the parties, the neutral arbitrator stated that both parties led him to believe that there was no disagreement concerning which

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[25] *SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 762 (Del. 1998).

[26] *See Solo Cup Co.*, 2007 WL 901637, at *3.

[27] Aff. of Micheletti, Exh. 14; *Solo Cup Co*., 2007 WL 901637, at *5.

[28] *See Mehiel v. Solo Cup Co.,* 2005 WL 1252348 (Del. Ch. 2005) (stating that the "resolution of procedural questions (*i.e.,* procedural arbitrability)" are for the arbitrator to determine).

[29] *Solo Cup Co*., 2007 WL 901637, at *5.

issues were in dispute and, therefore, he did not require his usual engagement letter specifying the issues to be arbitrated.[30] The neutral arbitrator also indicated that he would rule only on issues discussed by the parties during the Resolution Period provided for in the Agreement.[31] The neutral arbitrator relied on Section 3.9(c) of the Agreement which stated that "[i]f at the conclusion of the Resolution Period there are amounts still remaining in dispute, then all amounts remaining in dispute shall be submitted to" a neutral arbitrator. The Agreement further stated that the neutral arbitrator shall arbitrate "only those items still in dispute."[32]

Thereafter, in his letter to the parties dated November 4, 2005, the neutral arbitrator declared that, "[a]fter due and careful consideration of the language in the agreement and the submissions made by both sides," he would not address the Earthshell Claim.[33] The neutral arbitrator's declination, apparently because the Earthshell Claim was deemed to not be an issue "still remaining in dispute," was not explained.

Solo contends that the Earthshell Claim was not raised by Mehiel during the Agreement's Resolution Period ending on June 25, 2004 and, thus, is barred. Solo

[30] Aff. of Micheletti, Exh. 8 at 2.

[31] Aff. of Micheletti, Exh. 8 at 3.

[32] Agreement and Plan of Merger, Section 3.9(c).

[33] Aff. of Micheletti, Exh. 14.

asserts that Mehiel knew of the need for adjustment of the Earthshell Reserve prior to the end of the Resolution Period (the letter of intent regarding the sale of the facility was dated February 19, 2004), but the Company did not raise the claim. Therefore, Solo contends, Mehiel's inaction during the Resolution Period led the neutral arbitrator to find the Earthshell Claim to be untimely and, thus, waived. Solo further avers that since arbitration was the only forum available for working capital dispute resolution under the Agreement, Mehiel's cause of action here cannot stand.

Mehiel acknowledges that the Company did not raise the Earthshell Claim issue during the Resolution Period because it believed that Solo would sufficiently address the oversight. Mehiel presented affidavits asserting that although the Company had knowledge of the inclusion of the Earthshell Reserve in the working capital statement, it assumed that Solo would correct the oversight thereby eliminating the need to arbitrate the matter.[34] Therefore, Mehiel reasons, the Earthshell Claim was not in dispute at the close of the Resolution Period and, because no dispute per se existed during that period of time over which the arbitrator had authority, the neutral arbitrator lacked authority pursuant to the Agreement to arbitrate the Earthshell Claim. Thus, Mehiel contends that while the Earthshell Reserve might very well be included in the working capital statement

[34] Mehiel Aff. ¶ 8, 12; Uleau Aff. ¶ 6 – 7.

and while Mehiel had reason to have knowledge of such an inclusion during the Resolution Period, this inclusion per se had not ripened into a dispute.

Furthermore, for the same reason, Mehiel argues that knowledge of any necessary adjustment to the working capital statement does not give rise to a dispute where Mehiel was of the belief that said adjustment would be forthcoming without arbitration and accordingly removed the Earthshell Claim from the list of disputed items to be arbitrated based on an assurance that it would be corrected.

Mehiel concludes that since the Earthshell Claim was not arbitrated and no decision on the Earthshell Claim has been evidenced, preclusive effect under *res judicata* does not apply—the issues decided in the neutral arbitrator's arbitration are not the same as the Earthshell Claim. Mehiel reasons that since the Earthshell Claim was not triggered until after the neutral arbitrator's period of time over which it had authority had closed, it cannot be barred.

Although Solo suggests that the 2005 Court of Chancery decision in *Mehiel v. Solo Cup Co*. establishes that the neutral arbitrator ruled that the Earthshell Claim was waived on procedural grounds,[35] the record reflects that two other distinct claims, Somerville and Trigen, were being discussed – not the Earthshell Claim.[36] There, the Court of Chancery found that the neutral arbitrator determined

[35] *See* 2005 WL 3074723 (Del. Ch. 2005).

[36] *Mehiel*, 2005 WL 3074723, at *3.

those two claims to be waived on procedural grounds as to the working capital arbitration.[37] Moreover, the Court of Chancery did not find that the neutral arbitrator's determination of waiver barred those two issues from consideration on the merits in another forum.[38] The Court of Chancery stated that "[i]f the Neutral Arbitrator had made a determination on the merits of the Somerville and Trigen Claims, I would issue an order barring further arbitration of those claims . . . ."[39] However, there was no determination on the merits as to the Somerville and Trigen claims. In fact, the Court of Chancery further stated that the neutral arbitrator's power was limited to items "still in dispute"—those claims that had been negotiated but not resolved—but did not extend to claims raised after negotiations.[40]

Similarly, here, there was no determination on the merits as to the Earthshell Claim and, thus, the claim is not barred as to consideration in this Court. Since the Court finds that the Earthshell claim is not barred under *res judicata*, the Court does not need to address any issue as to the legal theory behind the claim or the type of relief here being sought.

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[37] *Mehiel*, 2005 WL 3074723, at *3-4.

[38] *Mehiel*, 2005 WL 3074723, at *3-4.

[39] *Mehiel*, 2005 WL 3074723, at *3.

[40] *Mehiel*, 2005 WL 3074723, at *3.

Furthermore, Solo argues that the neutral arbitrator made a determination on the merits as to the amount of the Final Closing Working Capital and, as such, a decision by this Court in Mehiel's favor could render the neutral arbitrator's determination to be non-final. However, according to the Agreement, the term "Final Closing Working Capital Statement" refers to the working capital statement determined by the neutral arbitrator in addition to other items.[41] As such, the "Final Closing Working Capital Statement" is not solely determinative on the neutral arbitrator's numbers or definitive in of itself because, while it includes the neutral arbitrator's determinations, it does not exclude other items. Thus, a decision here would not render as non-final the amount of the "Final Closing Working Capital Statement" as such a statement is defined by the Agreement.

In any event, no finding in the matter at bar will either change any decisions on the merits made by the neutral arbitrator as to the negotiated claims that were included in the amount of the closing working capital or render any of those decisions non-final. Moreover, whether a finding by this Court would eventually change what the Agreement defines as the "Final Closing Working Capital

[41] Agreement and Plan of Merger, Section 3.9(c) (December 22, 2003) (stating that "[t]he term "Final Closing Working Capital Statement" as used in this Agreement, shall mean the definitive Closing Working Capital Statement . . . resulting from the determinations made by the Neutral Auditor in accordance with this Section 3.9(c) (in addition to those items theretofore agreed to by Parent and the Stockholders' Representative) . . . .").

Statement" is not only speculative at this point but also has not been proven to be of consequence in this matter.

The Admissibility of Plaintiff's Affidavits

Solo further contends that the affidavits produced by Mehiel, which assert that Mehiel was unaware of the need to raise the Earthshell Claim during the resolution period because the Company was under the impression that the oversight would be corrected, are inadmissible hearsay because they refer to statements allegedly made by unidentified Solo personnel and, as such, cannot sustain Mehiel's assertions. While it is clear that "affidavits may be submitted by a party opposing a motion for summary judgment for the purpose of creating a material issue of fact,"[42] said affidavits must provide facts admissible in evidence and affiants must be competent to testify thereto.[43]

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[44] Upon motion for summary judgment, a court does not consider hearsay contained in an affidavit, but relies on facts therein that are personally

[42] *Collins v. Ashland, Inc.*, 2009 WL 81297, *2 (Del. Super. 2009).

[43] 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.

[44] Del. R. Evid. 801(c).

known to the affiant.[45] "A mere hearsay report from an unidentified informant cannot be regarded as proof" of the facts contained in the report.[46]

Here, the affiants are Dennis Mehiel (the stockholders' representative of the Company), George Castelli (the Corporate Controller of the Company), and Thomas Uleau (Chief Operating Officer of the Company who is now deceased). Dennis Mehiel and Thomas Uleau both claim in their affidavits that they were of the understanding that Solo would correct and reverse the inclusion of the Earthshell Reserve in the working capital statement.[47] Their affidavits contain references to statements allegedly made by unidentified Solo personnel regarding Solo's correction of the oversight.[48]

The affidavit of Dennis Mehiel refers to a conversation that his staff had with unidentified people. Affiant stated, "With regard to the Earthshell reserve, upon disputing the accounting for this reserve, my staff was informed by Solo personnel prior to the conclusion of the Resolution period that this reserve had not been reversed due to an oversight."[49]

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[45] *Wilson v. Pala Mgmt. Corp*., 1988 WL 55310, *2 (Del. Super. 1988) *aff'd,* 553 A.2d 639 (Del. 1988).

[46] *Brown v. Shaffer*, 106 A.2d 700, 701 (D.C. 1954).

[47] *See* Mehiel Aff., *supra* note 11, at ¶ 12; Uleau Aff., *supra* note 11, at ¶ 7.

[48] *See* Mehiel Aff., *supra* note 11, at ¶ 12; Uleau Aff., *supra* note 11, at ¶ 7.

[49] Mehiel Aff. ¶ 12.

Under certain circumstances, courts have accepted an affidavit of a corporate officer who relied on staff reports. In *Royal Indem. Co. v. Ginsberg*, a New York court overruled an objection to the affidavit of a company vice president who relied upon reports from his employees but had no personal knowledge of the information he attested to.[50] In that case, the vice president stated that in addition to reports from his employees, his knowledge also came from the defendant's testimony which was provided in a supplementary proceeding.[51] Furthermore, that court found that enough information regarding the matter testified to existed in the documents accompanying the pleadings and moving papers so as to bring the vice president "within the classification of a person having knowledge of the facts."[52]

While the vice president in *Royal Indem.* was determined to be a person with knowledge of the facts even though he depended on his employees' information instead of his own information, other corroborating testimony existed as to the information being sought to be admitted. Here, there is no corroborating testimony. Although a corporate officer may establish the existence of activity between staff and others (i.e., a conversation),[53] Mehiel's affidavit seeks to also

[50] *Royal Indem. Co. v. Ginsberg*, 284 N.Y.S. 551, 555-56 (N.Y. Mun. Ct. 1935).

[51] 284 N.Y.S. at 555-56.

[52] *Royal Indem.*, 284 N.Y.S. at 555-56.

[53] *See Wilson*, 1988 WL 55310, at *2 (stating that the Court may rely on facts in an affidavit that are within the personal knowledge of an affiant).

establish the content of the conversation – that the conversation concerned the Earthshell Reserve.[54] In view of the fact that the person or persons involved in the actual conversation have neither been identified nor deposed, the affidavit is impermissible hearsay.

The Court will next consider the affidavit of George Castelli. His affidavit indicates that while he was a Solo employee, he participated in a conversation with Company representatives and became aware that the need for any Earthshell Reserve was in question.[55] Affiant stated, "During this review I had discussions with Sweetheart's Representative related to the Earthshell reserve … [and] was made aware that Earthshell O.M. LLC did not require any repairs to the St. Thomas facility, hence there was no need to have any reserve related to the St. Thomas facility."[56] However the referenced representative was not named and was apparently not deposed. Moreover, it is unclear whether the representative or another source created Affiant's awareness. Thus, the contents of the statements in George Castelli's affidavit concerning the Earthshell Reserve are impermissible hearsay.

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[54] *See* Mehiel Aff., *supra* note 11, at ¶ 12.

[55] Castelli Aff. ¶ 11 ("During Sweetheart review of the Closing Working Capital Statement I, as a Solo employee, assisted in Sweetheart's review. During this review I had discussions with Sweetheart's Representative related to the Earthshell reserve. During these discussions I was made aware that Earthshell O.M. LLC did not require any repairs to the St. Thomas facility, hence there was no need to have any reserve related to the St. Thomas facility.").

[56] Castelli Aff. ¶ 11.

Lastly, the affidavit of Thomas Uleau is to be considered. Affiant Thomas Uleau is deceased and thus cannot testify or be cross-examined. His affidavit states that, "With regard to the Earthshell reserve, upon disputing the accounting for this reserve I was informed by Solo personnel prior to the conclusion of the resolution period that this reserve was not reversed due to an oversight."[57]

Again, the informants are unidentified. Furthermore, in order to have the affidavit of a deceased affiant admitted pursuant to the residual exception to the hearsay rule, there must be a guaranty of trustworthiness as to the statement that is "equivalent to the guaranties of trustworthiness recognized and implicit in the other hearsay exceptions"[58] under DRE 807. Factors to consider in determining if a deceased person's affidavit can be admissible include whether such an affidavit is offered to prove a material fact and is highly probative, whether it serves the administration of justice, whether the statements therein can be rebuffed, whether the affiant was named and known, whether the statement was made under oath, whether the affiant was aware of pending litigation at the time of the statement, and whether the affidavit can be corroborated.[59]

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[57] Uleau Aff. ¶ 7.

[58] *Stigliano v. Anchor Packing Co.*, 2006 WL 3026168, *1 (Del. Super. 2006).

[59] *Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 113 (3d Cir. 2001).

Here, the affidavits of George Castelli and Dennis Mehiel, if admissible, could arguably serve to corroborate the statements of Thomas Uleau. However, the affidavits of Dennis Mehiel and George Castelli are inadmissible and the Court finds that the affidavit of Thomas Uleau is inadmissible.

Therefore, the Court finds the affidavits of Dennis Mehiel, George Castelli, and Thomas Uleau to be inadmissible for purposes of determining summary judgment.

Breach of Contract

Mehiel seeks summary judgment for breach of contract based on the aforementioned affidavits of Dennis Mehiel, George Castelli, and Thomas Uleau. Solo counters that Mehiel has failed to produce admissible evidence of the inclusion of the Earthshell Reserve in the working capital statement or breach of an obligation.

A valid breach of contract claim must show the existence of a contract, the breach of a contractual obligation, and damages.[60] Here, the existence of a contract is not challenged. Rather Mehiel contends that Solo admitted to oversight regarding the inclusion of the Earthshell Reserve in the working capital statement and has failed to rectify the oversight. Since Mehiel's evidence, supporting its assertion that it was under the impression that Solo conceded to the need to correct

[60] *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

the oversight but failed to do so, consists of the three impermissible affidavits, the Court will not grant Plaintiff's motion for summary judgment on its breach of contract claim.

Finally, Solo seeks summary judgment based on the assertion that Mehiel cannot sustain its burden of proof as to the breach of contract claim. As the moving party, Solo bears the burden of establishing the nonexistence of issues of material fact as to the claim of breach.[61] Because Solo has failed to meet its burden, the Court will not grant summary judgment.

Conclusion

For these reasons, the Court finds that genuine issues of material fact exist concerning a dispute and whether there is a breach of contract.

[61] *Hart v. Resort Investigations & Patrol*, 2004 WL 2050511, at *6 (Del. Super. Sept. 9, 2004).

Accordingly, Mehiel's motion for summary judgment is ***DENIED,*** and Solo's motion for summary judgment is ***DENIED.***

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Streett, J.