IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ZANETT LOMBARDIER, LTD.,	)	
	)	
Plaintiff,	)	**C.A. No. 99C-05-083 WCC**
	)	
v.	)	
	)	
WESTERN GEOPHYSICAL, a division of WESTERN ATLAS INTERNATIONAL, INC.,	)	
	)	
Defendant.	)	

Submitted: June 14, 2000
Decided: January 9, 2001

MEMORANDUM OPINION

On Defendant Western Geophysical's Motion for Summary Judgment. Denied.

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CARPENTER, J.

Defendant Western Geophysical, a division of Western Atlas International,

Inc. ("Western"), moved for summary judgment on all claims raised by Plaintiff Zanett Lombardier, Ltd. ("Zanett"). Zanett's complaint asserted claims for common law fraud or negligent misrepresentation and statutory fraud under Section 27.01 of the Texas Business and Commercial Code. A hearing on the motion was held on June 14, 2000. The Court found that Section 27.01 of the Texas Business and Commercial Code did not apply to this transaction and granted Western's motion in that regard but reserved decision as it related to the other assertions. For the reasons set forth below, the Court denies Western's motion regarding the remaining assertions.

FACTS

This action arose as a result of a loan between Zanett and Venture Seismic, Ltd. ("Venture"), a non-party to this litigation. In the latter part of 1998, Venture approached Zanett about securing temporary financing. In considering the loan, Zanett learned that Venture's principal asset was a contract between its wholly owned subsidiary, Continental Holdings Ltd. ("Continental"), and Western.

According to the Continental-Western contract, Continental agreed to perform offshore seismic research services for one year. More specifically, Continental agreed to provide "the vessel *M/V Pacific Titan*, fully crewed, for a

period of twelve (12) months",[1] which "[would] be equipped to acquire 3D seismic data", and the start date would be October 1, 1998.[2] But, because it became obvious in September 1998 that Continental would be unable to begin data acquisition by October 1, 1998, the start date was extended to November 30, 1998. And, on November 30, 1998, the *Pacific Titan* had still not begun acquisition of seismic data.

After understanding the significance of the Continental-Western agreement, Zanett insisted, during the performance of its due diligence review, on speaking with Western before it provided financing to Venture. On December 1, 1998, Zanett representative, Gianluca Cicogna ("Cicogna") spoke to Western's General Manager for Western Hemisphere Marine, Larry Scott ("Scott"). Scott understood that Cicogna was performing a due diligence review for a possible loan with Venture. According to Cicogna, Scott made the following representations:

> **(1) If the market did deteriorate 3-6 months down the road he would certainly be looking to cut back on the third party work such as the contract with [Continental].**
> **(2) [Western] was working in a spirit of cooperation to get the boat to work and that they were as keen as [Continental] to start the**

[1] Continental leased the vessel.

[2] Western Exhibit 3 in Opening Brief. It further stated that the *Pacific Titan* would mobilize from Seattle, Washington, with an initial destination to the Eastern Gulf of Mexico.

contract as it was a good clean site and that the data had been pre-sold.
(3) They were understanding of the delay and needed the boat ...intended to proceed with the contract.
(4) Although it was almost certain that [Continental] would miss the numbers for December, they should be able to get on track in January and not be in breach of contract.
(5) If the [*Pacific Titan*] were not making the numbers for any reason in 2-3 months time he would not hesitate to terminate the contract.
(6) [Western] had every intention of honoring the contract as their reputation was more important than any single contract. [3]

According to Cicogna's deposition, Scott also told him that he saw no reason why Continental would be unable to perform under the contract unless there was an incompetent crew.[4]

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[3] These representations were first handwritten and then typed by Cicogna. According to his deposition, he made handwritten notes while he spoke to Scott, and then after the call, he typed the notes and threw away the handwritten notes. He stated that he typed the notes on the day of the call. (Cicogna Dep. at 51.) But, Cicogna did not confirm any of the above statements in writing. Western notes in its brief that the typed memo is undated and that the contemporaneous handwritten notes were destroyed.

[4] Without identifying himself during the conversation, Claudio Guazzoni, a Zanett representative, sat in on part of the call with Scott. While he could not recall specifics about the conversation, he recalled getting "a warm and fuzzy feeling about the relationship between

During Larry Scott's deposition, when he was questioned about his discussion with Cicogna regarding the *Pacific Titan* contract, he stated:

> **I recall us entering into -- I recall letting him know that, at the time, the *Pacific Titan* was not acquiring data; that it wasn't performing, but that we were working. And I recall also telling him, though, that we were working with Continental to try and get the vessel into acquisition.**
>
> **We discussed the performance clause of the contract. And I recall specifically letting him know that there were provisions for canceling the contract in the event that they didn't meet certain production criteria.**

Venture and Western Geophysical." (Guazzoni Dep. at 34-35.)

I also recall telling him that we were not at a stage where that had been invoked and that our plans were to continue working with them to resolve the problems and getting them into where they would be performing. I don't recall this -- anything specifically, but just in terms of the overall conversation.[5]

[5] (Scott Dep. at 175-76.)

He further recalled telling Cicogna that while they had the option to invoke the performance clause of the contract, at that point, it was not Western's intention to do so and that Western was not "just going by the letter of the contract; that our intent was to work with them in the sense of see why they were not in performance and to see if there was a way to move forward under -- you know, with the contract still in place."[6] He further stated that as of the December 1st conversation, he believed that even if Continental missed the minimum for December that they would be able to get back on track in January. Scott admitted that as of December 1st, he was aware that the revised date of November 30, 1998 for the data acquisition services had been missed and that Continental had not met its contractually mandated minimum production levels.[7] He further testified that he did not express to the Zanett representative the concerns he had about the reliability of information that Continental had been providing Western.

On Friday, December 4, 1998, Cicogna also spoke to James C. White, a Vice-President of Western, regarding the possible loan to Venture.[8] Cicogna

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[6] (Scott Dep. at 179.)

[7] (Scott Dep. at 208.)

[8] During Cicogna's deposition, he stated that Scott instructed him to also speak to James White since he was responsible for managing the contract and selling the information.

recorded the following representations made by White:

> **(1) [Western] was committed to the contract and needed the survey.**
> **(2) [T]he survey for the Pacific Titan work had been partly pre-sold.**

In his deposition, James White stated that he was in Calgary, Alberta, from December 2, 1998 to December 4, 1998. And, while his phone records indicated a communication with Zanett on December 2nd at 1:41 p.m. for 1.2 minutes, he had no recollection of speaking to anyone from Zanett regarding either Continental or the *Pacific Titan*. He also stated that he would never tell anyone that the data had been presold outside of Western.

Based on the cumulation of statements made by Western, Cicogna recommended approval of the loan on December 4, 1998. On Monday, December 7, 1998, which was the next business day, Western sent Continental a letter via fax and courier of notification of non-performance of their agreement, which was signed by Larry Scott. It stated that because the contractual commencement date of October 1, 1998 was missed, as well as the revised date of November 30, 1998, Western wished an immediate and acceptable solution to these shortcomings.[9] Moreover, in a letter dated December 8, 1998, Larry Scott

[9] There is a dispute as to whether Zanett had knowledge of the December 7th letter prior to the loan closing on December 8th. A copy of the notice of non-performance was faxed to Cicogna by Continental on December 7, 1998. Cicogna stated that he did not see the letter on December 7th since he was not in the office on that day or on December 8th. In addition,

wrote to Brian Kozun, the Chief Executive Officer of Continental, stating:

> **Further to our letter of December 7, 1998 and our subsequent telephone conversation on that same day, here is our proposal for moving forward on the lease of the *M/V Pacific Titan*. As previously noted, we believe that we have firm contractual grounds for terminating this agreement at the end of the month unless the *Pacific Titan* is able to meet its stated minimum performance target of 7,200 CMP kilometers of accepted seismic data. We hope that a viable alternative will be made available in order to avoid exercising our right of termination.[10]**

On December 8, 1998,[11] Venture received a loan of $3,000,000 from a group of lenders, which included Zanett. Zanett's portion of the loan was $825,000, which was to be repaid by April 30, 1999.[12]

Cicogna stated that he was not sure if he received the fax before the loan closed, because on December 4th, he had made an oral recommendation to approve the loan after which he was no longer involved. (Cicogna Dep. at 75-80.)

[10] Zanett's Exhibit E in Answering Brief.

[11] There is a dispute of fact as to whether the loan closed on December 8th or 9th. The Loan Agreement was dated December 8, 1998.

[12] Venture also conveyed to Zanett warrants to purchase more than 100,000 shares of Venture common stock.

A few weeks later, under admittedly false pretenses, Western directed Continental to bring the *Pacific Titan* into port at Mobile, Alabama, purportedly for the installation of additional equipment. When the vessel arrived on December 29, 1998, Western had the vessel seized and simultaneously issued a notice of termination of the *Pacific Titan* contract to Continental.[13] Venture and Continental eventually declared bankruptcy and were liquidated.

As a result, Zanett seeks damages against Western for losses that Zanett incurred as a result of the alleged fraudulent or negligent misrepresentations made by Western to Zanett, which Zanett relied upon in ultimately loaning $825,000 to Venture.[14] In this summary judgment motion, Western argues that the elements for fraud nor negligent misrepresentation have been established.

STANDARD OF REVIEW

[13] According to the arbitrators' award, Western was found to have prematurely terminated the *Pacific Titan* agreement and caused a breach thereof.

[14] Zanett argues that it never recovered the $825,000 in principal that it lent to Venture, nor did it receive any of the interest payment due under the financing transaction.

Summary judgment will be granted when, in viewing the record in the light most favorable to the non-moving party, the movant has shown that no genuine issues of material fact exist and that the movant is entitled to judgment as a matter of law.[15] When a motion for summary judgment is supported by a showing that there are no material issues of fact, the burden shifts to a nonmoving party to demonstrate that there are material issues of fact.[16]

DISCUSSION

A. Fraud

The parties have agreed that the Court should use Texas law to examine the issues presented in this motion. Under Texas law, in order to recover for fraud, the plaintiff must establish that:

> **(1) a material representation was made;**
> **(2) it was false when made;**
> **(3) the speaker knew it was false, or made it recklessly without knowledge of its truth and as a positive assertion;**
> **(4) the speaker made it with the intent that it should be acted upon; and**
> **(5) the party acted in reliance and suffered injury as a result.[17]**

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[15] Super. Ct. Civ. R. 56(c).

[16] *Moore v. Sizemore*, Del. Supr., 405 A.2d 679 (1979).

[17] *Clardy Mfg. Co. v. Marine Midland Bus. Loans, Inc*., 5th Cir., 88 F.3d 347, 359

(1996)(*citing Roberts v. United New Mexico Bank at Roswell*, 5th Cir., 14 F.3d 1076, 1078 (1994)).

To be actionable, the misrepresentation must be "one concerning a material fact; a pure expression of opinion will not support an action for fraud."[18] But, an opinion may constitute fraud if the speaker knows that it is false.[19] In addition, "[a]n expression of an opinion as to the happening of a future event may also constitute fraud where the speaker purports to have special knowledge of facts that will occur or exist in the future."[20]

Viewing the record in the light most favorable to Zanett, the Court first finds that there are significant material issues of fact surrounding whether the statements made by Scott were either false or recklessly made and in recognition that they would be relied upon by Zanett. The Court is drawn to this conclusion

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[18] *Clardy Mfg. Co.*, 88 F.3d at 359 (*quoting Transport Ins. Co. v. Faircloth*, Tex. Supr., 898 S. W.2d 269, 276 (1995)).

[19] *Clardy Mfg. Co.*, 88 F.3d at 360 (*citing Sergeant Oil & Gas Co. v. National Maintenance & Repair, Inc.*, S.D. Tex., 861 F.Supp. 1351, 1358 (1994)).

[20] *Clardy Mfg. Co.*, 88 F.3d at 360 (*citing Trenholm v. Ratcliff*, Tex. Supr., 646 S.W.2d 927, 930 (1983)).

as a result of the apparent inconsistencies between the actions taken by Scott before and after the due diligence conversations and the information he provided to Zanett.[21]

Less than a week after his conversation with Cicogna, Scott sent a non-performance letter to Continental. While this document did not constitute a termination of the contract, it raised significant questions about Western's intentions to continue under the contract in contradiction to what was previously represented to Cicogna. Additionally, in Scott's December 8th letter, he essentially threatened Continental with termination of the contract after explaining to Cicogna six days before that Western's intention was to continue to work with Continental to resolve its performance problems. In addition, termination was threatened unless the *Pacific Titan* was able to meet its stated minimum performance target, despite the fact that Scott told Cicogna a few days before that if Continental missed the minimum for December, they would be able to get back on track in January. Moreover, there appears to be no significant event that occurred between December 1st and December 7th to dramatically

[21] While a party's intent is determined at the time the party made the representation, it may be inferred from the party's subsequent acts after the representation is made. *Spoljaric v. Percival Tours, Inc.,* Tex. Supr., 708 S.W.2d 432, 434 (1986).

change Western's alleged desire to be cooperative with Continental. The inconsistencies in what Scott stated to Cicogna and his actions shortly after his conversations raise questions as to the accuracy of the statements made by Scott to Cicogna.

There also appears to be inconsistencies in what Scott said to Cicogna on December 1st and Scott's actions prior to that date. For example, according to the Exhibits provided by Zanett, there was an e-mail dated the day before their conversation, November 30, 1998, from Scott to other Western personnel, Duncan Riley, Major Smith, Joe Chatoor, and Jose Solis, stating that:

> **We need to send a letter to Venture/Continental this week concerning the Pac Titan pointing out the crew performances to date:**
>
> **- Contractual October 1, 1998 start date missed**
>
> **- Verbally extended acquisition start date of November 30, 1998 has been missed**
>
> **- Per the contract, Venture is currently in a status of non-performance, this needs to be rectified immediately**
>
> **- Remind them of the minimum accepted CMP kilometer requirement for the month of December**
>
> **- Also note our concern with respect to HSE, particularly in light of the initial recordable case involving partial amputation of two ringers**[22]

In response to the e-mail of November 30, 1998, Duncan Riley e-mailed on

[22] Zanett's Exhibit G in Answering Brief.

December 1, 1998 that he would draft the letter that day and distribute it for review.[23]

As such, the Court believes that there are significant disputed issues of fact surrounding the statements made by Scott and his knowledge and intentions when the statements were made. Since the determination of this dispute will depend upon the credibility of the witnesses and the weight to be given to their testimony,[24] it should remain an area for the jury to consider.

[23] Zanett's Exhibit G in Answering Brief.

[24] *Spoljaric,* 708 S.W.2d at 434.

Furthermore, the Court finds disputed issues of fact concerning the alleged representations made by White to Cicogna on December 4, 1998. In essence, White has no recollection that the conversation ever took place and denies that he would ever make certain statements, such as whether data had been presold outside of Western.[25] As a result, the Motion for Summary Judgment is denied as it relates to the allegation of fraud.

B. Negligent Misrepresentation

Under Texas law, the elements of a cause of action for negligent misrepresentation are:

> **(1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest;**
> **(2) the defendant supplies "false information" for the guidance of others in their business;**
> **(3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and**
> **(4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.[26]**

A claim for negligent misrepresentation under Texas law contemplates that the "false information" provided by the defendant is a misstatement of existing

[25] The Court finds that it is not necessary to address whether Zanett reasonably relied upon the representations made by Western because the Court finds disputed issues of material fact regarding whether the statements were false. However, this too appears to be an area of dispute that would not lend itself to summary judgment disposition.

[26] *Clardy Mfg. Co.*, 88 F.3d at 357.

fact.[27] "Negligent misrepresentation does not occur when a defendant simply makes a guess as to a future, unknown event."[28]

[27] *Clardy Mfg. Co.*, 88 F.3d at 357 (*citing Airborne Freight Corp. v. C.R. Lee Enterprises, Inc.,* Tex. Ct. App., 847 S.W.2d 289, 294 (1992)).

[28] *Clardy Mfg. Co.*, 88 F.3d at 357 (*citing Sergeant Oil & Gas Co.*, 861 F.Supp. at 1360).

Again, when the Court considers the statements made by Scott and White, there are material factual issues surrounding the accuracy of the information they allegedly provided and whether they exercised reasonable care in communicating that information to Zanett. Both issues relate to the credibility of the witnesses who will testify concerning these conversations and the actions taken by these individuals shortly after or before the statements were made. Clearly, one may not make statements which are likely to guide the decisions of others without exercising reasonable care to insure that the information is accurate. If the jury believes that Scott and White made the alleged statements intending within days to terminate the contract, an action inconsistent with the information provided, and those statements were reasonably relied upon by Zanett, it would support a claim of negligent misrepresentation. Since there remains a dispute as to whether the facts will support this contention, this issue too is not ripe for resolution by summary judgment. As a result, the motion is denied as it relates to negligent misrepresentation.

CONCLUSION

The defendant's Motion for Summary Judgment is denied for the reasons set forth above.

Judge William C. Carpenter, Jr.