Volunteers of Americ v. Heinrich, et al Doc. 197

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

VOLUNTEERS OF AMERICA OF WESTERN NEW YORK, INC.,

Plaintiff,

-vs-

ROCHESTER GAS & ELECTRIC CORPORATION, and JOHN DOE INSURANCE COMPANIES,

Defendants.

DECISION AND ORDER
No. 6:99-cv-6238-MAT

I. Introduction

Plaintiff, the Volunteers of America of Western New York ("VOA"), instituted this action pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq. ("CERCLA"), the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. ("RCRA"), and New York State statutory and common law seeking damages for environmental contamination on two parcels of real property located at 214 Lake Avenue, Rochester, New York ("the Site"). VOA claims that petroleum, hazardous waste, and other contaminants have been released by the defendants, previous owners or operators of the Site. On January 12, 2000, this Court granted in part and denied in part the property owners' joint motion to dismiss. Subsequently, VOA settled with all of the defendants save RG&E and its as-yet unidentified insurers.

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Presently pending before the Court are VOA's Motion for Declaratory Judgment [#174][1] and RG&E's Cross-Motion for Declaratory Judgment [#183]. The parties seek a declaration of their contractual rights, responsibilities, and obligations under the Memorandum of Understanding ("MOU") entered into on January 11, 2005, as well as declaration as to whether there exist other enforceable oral or written contracts between the parties and whether RG&E is liable to VOA under a theory of promissory estoppel. Specifically, VOA contends that RG&E is in breach of the MOU because it failed to execute a new MOU and failed to remediate the Site, and that RG&E has reneged upon its promise to pay for the remediation (a Construction Cap Remedy) desired by VOA. RG&E argues that it has not breached the MOU, and did not contract, promise, or otherwise agree to pay for a Construction Cap Remedy ("CCR").

II. Factual Background and Procedural History

A. History of Contamination at the Site

VOA's allegations concerning the use and contamination of the Site are summarized in the Court's January 12, 2000 decision and order [#17], Volunteers of America v. Heinrich, 90 F. Supp.2d 252 (W.D.N.Y. 2000). Briefly, RG&E purchased a portion of the Site in 1918, and the remainder of the Site by 1924, using it for coal storage and land-filling it with street excavation materials. RG&E

[1] Citations to [#] refer to document numbers on the CM/ECF docket sheet for this case.

sold the Site to defendants Jonathan C. Heinrich and David W. Heinrich in 1981, and VOA acquired the Site in November 1997.

VOA, as noted above, filed suit against all the former owners of the Site. The initial stage of this litigation ended in 2000, with VOA entering into settlement agreements with all defendants except RG&E and its insurers. At the Court's urging, RG&E eventually agreed to commence settlement discussions with VOA in 2003.

Meanwhile, in October 2003, the New York State Legislature passed the Brownfield Cleanup Program ("BCP"), to facilitate remediation of contaminated real estate by offering certain clean-up incentives, such as a statutorily binding liability release and tax credits for the remediation and redevelopment of contaminated sites, to "volunteers", i.e., parties who did not contribute to the contamination of the real estate at issue. Because VOA did not cause any of the contamination on the Site, it was eligible for participation in this program; RG&E, as a responsible party, was not.

On January 11, 2005, VOA and RG&E entered into the MOU, the main purposes of which were to limit legal expenses and fund further investigation into the nature and extent of the contamination of the Site. VOA was to pull the laboring oar in negotiating a remediation of the parcel with the New York State Department of Environmental Conservation ("NYSDEC"), while RG&E

remained in the background but had significant input into the process.

VOA applied to the BCP on February 11, 2005, and the DEC accepted VOA as a "volunteer" on April 26, 2005. VOA and the DEC entered into a BCA on June 15, 2005, pursuant to which Plaintiff agreed to limit its future use of the Site to a commercial use.

The parties subsequently entered into three addenda to the MOU ("the Addenda") [#174-19] in 2007, 2010, and 2012. In the Addenda, RG&E agreed, inter alia, to increase its financial contribution to the Site investigation and to fund the next step in the BCP process, the preparation of an Alternatives Analysis Report ("AAR") and a Remedial Action Work Plan ("RAWP").

In August 2006, a Remedial Investigation Work Plan ("RIWP") was prepared, and it was approved by NYSDEC on December 16, 2006. The RIWP was implemented between October 2007 and April 2010. Then, NYSDEC requested additional investigatory work at the Site. A supplemental RIWP ("SRIWP") was approved by NYSDEC on April 16, 2010. The SRIWP field work was completed in September 2011, and the results of the RIWP and SRIWP were compiled in the December 2011 Remedial Investigation Report ("RIR"), revised in May 2012. RG&E reviewed and made comments to the RIR before it was sent to NYSDEC. The RIR attributes the presence of the semi-volatile organic compounds and heavy metals contamination to the contaminated historic fill at the Site, which RG&E placed or arranged to have placed there. The RIR concluded that petroleum contamination was

not present, as evidenced by, e.g., the lack of volatile organic chemical ("VOC") contamination detected in surface soils or subsurface soils.

By this point in time, VOA had new development partners and a planned project ("the Project") to construct a commercial senior day care center and residential apartments on the Site. The Project, intended to be a public-private partnership, would help create an assisted living facility which would be a less expensive alternative to a traditional nursing home. However, VOA found that the Project could only save money if the tax credit benefits afforded by both the BCP and the State's low income housing tax credit programs could be applied since the construction costs on the Site were higher than on a non-contaminated, non-landfill site. VOA in turn asked RG&E if it would fund a contamination remedy that would build the foundation and parking lot for the Project. RG&E verbally agreed VOA could begin discussing with NYSDEC the concept of a permanent construction cap or CCR.

The CCR, which VOA advocated as the preferred remedy, was mentioned in the RIR. The RIR noted that the "planned development" (i.e., VOA's senior day care center), which will "primarily consist of asphalt pavement and building materials, will serve as a cap to prevent exposure to the contaminated fill materials."

In a July 10, 2012 status update to Magistrate Judge Marian W. Payson, VOA's counsel mentioned what VOA characterizes as "verbal agreements" RG&E made to fund the CCR:

> [T]he VOA and RG&E teams ha[ve] been able to collectively agree on a proposed, preferred remedy to clean up the Site for the intended use, and on several remedial alternatives, which would all be analyzed in the RAWP. However, all of the remedies contemplated only involved limited contaminated soil removal and "capping" methodologies. RG&E has conceptually agreed it will fund this type of limited soil removal and capping remedy if agreed upon by NYSDEC, even though no final work plan has been developed and approved at this time.

Letter from Linda Shaw, Esq. to Magistrate Judge Payson dated 07/10/12 [#174-31].

After reviewing the data and the RIR, in December 2012, NYSDEC and the New York State Department of Health ("NYSDOH") indicated that they were inclined to deem the Site a "significant threat" ("ST") site, i.e., a site that poses a significant threat to human health and the environment. If an ST site remains in the BCP, NYSDEC can select whatever remedy it wants to impose on the Site; if the Site owner withdraws from the BCP, such a site can be listed as a "Superfund Site" and NYSDEC may seek indemnification from the responsible parties for the costs of remediation. Both VOA and RG&E, for obvious reasons, wished to avoid an ST designation.

RG&E suggested that the groundwater sampled contained particles of contaminated soil, which may have affected the results in a negative manner. NYSDEC permitted re-testing of the groundwater, paid for by RG&E, the results of which revealed much lower levels on contamination. According to a February 2013 status update from VOA's counsel, NYSDEC and NYSDOH verbally informed VOA's environmental consultants they were refraining from imposing a ST determination on the Site and were "essential adopt[ing] VOA's

proposed capping and hot spot removal remedy." However, NYSDEC apparently has not issued any final written decision on whether a groundwater remedy is or is not required, or whether an ST designation will be imposed.

VOA's environmental consultants began working on the Remedial Alternatives Analysis Report/Remedial Action Work Plan (RAAR/RAWP) and began sharing drafts with RG&E in December 2012. The parties continued to work on drafts through February 2013.

Meanwhile, the RIR was approved by NYSDEC on January 4, 2013, which enabled VOA to submit its application for funding of the Project to the New York State Housing Agency. At that time, VOA anticipated that the RAWP and AAR documents would be approved by Spring 2013, which would allow construction on the Project to proceed.

However, the process came to a halt following RG&E's review of the third draft of the RAAR/RAWP which it sent to VOA on February 12, 2013. RG&E had placed in the draft the following commentary notes in highlighted text:

> Based on the RI Addendum sampling results and DEC comments indicating they are not requesting groundwater cleanup for the site (S. DeMeo's 16 12/2012 email), the objective of a cover for the site has changed from a cover that served dual purpose to minimize the potential for direct human exposure and also strived to eliminate groundwater infiltration, to a cover that simply minimizes the direct human exposure pathway. . .
>
> We suggest that the "cover" should be a separate layer instead of integrating it as part of a building floor, sidewalk, parking lot, etc. as it's currently discussed and described in Alternative 3. Decoupling the "cover" from the building, parking lot & sidewalks will minimize

> VOA's maintenance requirements of those features in an SMP (which VOA has voiced concern about) since regardless of the condition of those building features (such as a crack or settling), one foot of clean material will exist below it.
> The areas of the property that are covered with asphalt, sidewalks, and the building will serve to provide an additional but not required barrier. An appropriate demarcation material below the one foot of clean soil/aggregate and a vapor intrusion barrier below the building floor are warranted, as well as IC and EC's.

RIR Draft with Comments, Plaintiff's Statement of Material Facts ("Pl's SMF"), Exhibit ("Ex.") N [#174-20] at 26-27. In addition, RG&E commented, "We are not disputing the needed [sic] for a cover but don't agree with the proposed design of the cover that you have asked us to pay for." Id. at 35. VOA viewed these comments by RG&E as "reneg[ing] on its commitments in the MOU and subsequent agreements" and "refus[ing] to cleanup the Site to the agreed upon commercial cleanup standards compatible with the planned future commercial use or to the preferred remedy[,]" i.e., the CCR. Thus, the crux of the parties' dispute is whether or not RG&E ever contracted or promised to pay for the CCR (as it was envisioned by VOA).

At a scheduling conference on October 5, 2013, Magistrate Judge Payson suggested that VOA have the Court rule, via a declaratory judgment action, on the issue of whether RG&E breached the MOU or any other purported agreement. The parties agreed to permit that process and entered into a Stipulated Scheduling Order [#170] on November 7, 2013, regarding, inter alia, the filing of declaratory judgment motions.

On December 5, 2013, VOA filed a Motion for Declaratory Judgment [#174] seeking a declaration that (1) RG&E breached the MOU; (2) RG&E breached "subsequent written and/or verbal agreements"; (3) RG&E is liable to Plaintiff for the damages resulting from its breached promises on a theory of promissory estoppel; (4) RG&E is liable for all past, present, and future costs and damages caused by such breaches; and (5) a trial should be held on the issue of damages. According to Plaintiff, under the MOU's terms, "in the event that the supplemental site investigation . . . concluded that remedial activities were required for commercial use of the Site, Plaintiff and RG&E were to negotiate the terms for payment by RG&E for a remediation sufficient to satisfy commercial use soil clean-up objectives . . . under New York law in order for RG&E to avoid continuing litigation for cleanup costs in this matter." Plaintiff's Memorandum of Law in Support of Declaratory Judgment ("Pl's D.J. Mem.") [#174-4] at 2.

RG&E filed a Cross-Motion for Declaratory Judgment seeking a declaration that RG&E "did not breach the MOU by not reaching agreement with VOA on executing a new MOU or remediating the Site, and that it did not contract, promise, or otherwise agree to pay for a Construction Cap Remedy or any other remediation on [VOA]'s property." Declaration of Paul Leclair, Esq. [#181], ¶ 27.

On June 27, 2014, VOA filed a Motion for Supplementation [#194], seeking to supplement its declaratory judgment motion with excerpts from the recent deposition testimony of RG&E's fact

witness, Steven Mullin ("Mullin"). RG&E did not oppose the request but requested permission to respond to the arguments raised by VOA based on Mullin's testimony. On June 30, 2014, the Court granted RG&E's request, and RG&E filed its response [#196] on July 7, 2014.

The declaratory judgment motions are now fully submitted and ready for decision. For the reasons discussed below, VOA's Motion for Declaratory Judgment is denied, and RG&E's Cross-Motion for Declaratory Judgment is granted.

III. Standard of Review

The requirements for declaratory judgment are set forth in 28 U.S.C. § 2201(a): "In a case of actual controversy within its jurisdiction . . . any court in the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether no relief is or could be sought." 28 U.S.C. § 2201(a). Issuance of a declaratory judgment is appropriate "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, or (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to a proceeding." Continental Cas. Co. v. Coastal Savings Bank, 977 F.2d 734, 737 (2d Cir. 1992) (citation omitted). Typically, the court must determine whether or not to entertain an action for declaratory judgment. E.g., Fleisher v. Phoenix Life Ins. Co., 858 F. Supp.2d 290, 300-01 (S.D.N.Y. 2012) (citing Amusement Indus., Inc. v. Stern, 693 F. Supp.2d 301, 311 (S.D.N.Y. 2010); other

citations omitted). Here, as noted above, the filing of the instant motions was done at Magistrate Judge Payson's suggestion.

"In determining a motion for summary judgment that is filed in the context of a declaratory judgment action, the same standard is applied as in any other action." United States v. State of New York, 3 F. Supp.2d 298, 307 (E.D.N.Y. 1998) (citing PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1111 (2d Cir. 1997)), rev'd on other grounds sub nom., Disabled in Action of Metro. N.Y. v. Hammons, 202 F.3d 110 (2d Cir. 2000). Summary judgment may be granted when "there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); see also, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A court reviewing a request for summary judgment is required to resolve all ambiguities and draw all inferences in favor of the non-moving party, and must view any inferences to be drawn from the underlying facts revealed in materials such as affidavits, exhibits, interrogatory answers, and depositions in the light most favorable to the nonmoving party. Nationwide Life Ins. Co. v. Bankers Leasing Ass'n, Inc., 182 F.3d 157, 160 (2d Cir. 1999) (citing Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 202 (2d Cir. 1995); further citations omitted)). Where, as here, the parties have filed cross-motions for dispositive relief, "each party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration." Morales v. Quintel

Entertainment, Inc., 249 F.3d 115, 121 (2d Cir. 2001) (citation omitted).

The mere existence of disputed factual issues is insufficient to defeat a motion for summary judgment. Knight v. United States Fire Ins. Co., 804 F.2d 9, 11–12 (2d Cir. 1986). Rather, the disputed issues of fact must be "material to the outcome of the litigation," Id. at 11, and must be underpinned by evidence that would allow "a rational trier of fact to find for the non-moving party." Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). With respect to materiality, "the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "[M]ere conclusory allegations, speculation or conjecture," will not provide a sufficient basis for a non-moving party to resist summary judgment. Cifarelli v. Village of Babylon, 93 F.3d 47, 51 (2d Cir. 1996); see also Davis v. State of N.Y., 316 F.3d 93, 100 (2d Cir. 2002).

IV. Discussion

A. Overview of VOA's Contract and Promissory Estoppel Claims

VOA asserts that it entered into "multiple contracts" with RG&E in which "substantial consideration was given to [RG&E] in exchange for its promise to pay and otherwise support [VOA] in the

investigation and remediation of the Site." Third Amended Complaint ("TAC") [#184], ¶ 200. Although VOA refers to "multiple contracts", it does not indicate explicitly in the TAC which documents are included in this definition.

With regard to the MOU, VOA states in this document, RG&E agreed to "pay for and otherwise support[ ] the investigation and remediation of the Site to lower, Track 2 commercial clean-up standards, in addition to other related costs including attorney's fees." TAC, ¶ 202. The other documents to which VOA refers are the RIR, see TAC, ¶ 203; and the RAAR/RAWP, see TAC, ¶ 205. VOA states that it and RG&E "entered into subsequent agreements for a preferred remedy consisting of a three-part construction cap [the CCR],[2] which was documented in the approved RIR. . . ." Id., ¶ 203. VOA alleges that RG&E "voluntarily refused to pay for the preferred remedy [the CCR] even though the final RG&E draft of the RAAR/RAWP still includes this remedy." Id., ¶ 205. VOA states that RG&E "has failed to fulfill its obligations and has, therefore, breached said agreements to [VOA]'s damage." Id., ¶ 206. VOA also argues that RG&E is liable under a theory of promissory estoppel based on statements approved of by RG&E in the RIR submitted to DEC. See TAC, ¶¶ 208-212.

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[2] See, e.g., TAC, ¶ 124 (describing the Construction Cap Remedy, or CCR, as "consisting of building materials and the asphalt parking lot" and characterizing it as "the preferred remedy for this Site to cover its contamination and to prevent rainwater from penetrating the Site to cause further off-Site groundwater remediation"); Affidavit of Joanne M. Ryan ("Ryan Aff.") [#174-1], ¶ 5.

B. Analysis of VOA's Arguments

1. Breach of the MOU (Point One)

The MOU expressly provides that it "shall be governed and construed under the laws of the State of New York." MOU, § 22. To state a claim for breach of contract under New York law, a plaintiff must show (1) the existence of an agreement, (2) performance of the contract by the plaintiff, (3) breach by the defendant, and (4) damages. Harsco Corp. v. Segui, 91 F.3d 337, 348 (2d Cir. 1996). The reviewing court's primary objective is to discern and effectuate the parties' intent as revealed by the language used in the contract. Slatt v. Slatt, 64 N.Y.2d 966, 947 (1985). "When the question is a contract's proper construction, summary judgment may be granted when its words convey a definite and precise meaning absent any ambiguity." Seiden Assocs., Inc. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir. 1992) (citations omitted); see also MHR Capital Partners LP v. Presstek, Inc., 12 N.Y.3d 640, 645 (2009) ("'[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms[.]'") (quotation omitted). However, where a contract's language "is susceptible to differing interpretations, each of which may be said to be as reasonable as another, and where there is relevant extrinsic evidence of the parties' actual intent," the meaning of language used in the contract becomes an issue of fact unamenable to resolution by summary judgment. Id. (citations omitted).

VOA alleges that RG&E breached an alleged agreement contained in the introductory section of the MOU ("the Understanding Clause"). The Understanding Clause states, in relevant part, as follows:

> The Parties enter into this Memorandum in order to resolve certain factual issues without further litigation. To that end, the Parties desire that the SSI [Supplemental Site Investigation] be performed with the approval and to the satisfaction of the NYSDEC pursuant to a Brownfield Clean Up Agreement between NYSDEC and VOA ("BCA"). The Parties further understand that, if the SSI Report reveals contamination requiring remediation to achieve concentrations deemed by NYSDEC to be protective of human health and the environment for the commercial use of the former RG&E lot, the Parties *will either have to* amend this Memorandum to cover that remediation *or* negotiate a new memorandum of understanding *to avoid further litigation*.

MOU [#174-17] at 3 (emphases supplied). VOA relies on this language to argue that, although the MOU leaves the specific terms relating to remediation open and dependent on the results of the SSI, "the material terms are clear that the Site shall be remediated to commercial use SCOs." Pl's D.J. Mem. at 6. VOA argues that "RG&E breached the MOU by failing to agree to amend or negotiate a new [MOU] covering remediation of the Site." Id. at 8.

In its memorandum of law, VOA has selectively quoted the Understanding Clause as follows: "the Parties will . . . amend this Memorandum to cover that remediation or negotiate a new memorandum of understanding to avoid further litigation." Pl's D.J. Mem. at 6, 7, 8 (ellipsis added VOA). RG&E contends that the omission of the words "either have to" are crucial because they make clear that what follows are alternative choices the parties may or may not

make, should they wish to avoid litigation. The Court agrees that the words "either have to" emphasize the disjunctive, "or", that occurs later in the sentence. The Court also finds that the phrase "to avoid litigation" is critical to the meaning of this clause in that it clarifies the alternative to amending the MOU or negotiating a new MOU (i.e., further litigation). That is, the Understanding Clause does not mandate that RG&E amend the MOU or negotiate a new MOU to cover remediation at the Site, or address any other subject. Instead, it merely sets forth VOA's and RG&E's understanding of what actions they would have to take "to avoid further litigation", if remediation were required by the DEC following investigation into contamination at the Site.[3] Cf. IDT Corp. v. Tyco Group, S.A.R.L., 13 N.Y.3d 209, 214 (2009) (finding that a preliminary settlement agreement did not bind the parties to their ultimate contractual goal because, based on the written terms of the agreement, it contemplated the negotiation of later agreements, the consummation of which was a precondition to a party's performance) (discussed in NRP Holdings LLC v. City of Buffalo, No. 11-CV-472S, 2012 WL 2873899, at *5 & n.11 (W.D.N.Y. July 12, 2012)).

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[3] It is questionable whether the Understanding Clause can create a right or obligation in addition to those arising from the MOU's operative terms. See Aramony v. United Way of Am., 254 F.3d 403, 413 (2d Cir. 2001) ("Although a statement in a 'whereas' clause may be useful in interpreting an ambiguous operative clause in a contract, 'it cannot create any right beyond those arising from the operative terms of the document.'" Article I of the RBP, captioned 'Purpose of the Plan,' is analogous for these purposes to a contract's 'whereas' clauses.") (internal quotations and citations omitted).

The possibility that the Understanding Clause was a commitment to negotiate or to enter into additional memoranda of understanding evaporates in the face of the following language in the MOU:

> *If* NYSDEC requires VOA to perform under the BCA additional investigation or other remedial program tasks with respect to the RG&E lot, *and RG&E does not offer to amend this Memorandum . . . then VOA and RG&E are in the same legal position* as they were before executing this Agreement and nothing contained in this Memorandum shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the parties' rights, causes of action or defenses.

MOU [#174-17] at 6-7, § 10 (emphases supplied). Section 10 of the MOU makes clear that RG&E had no obligation whatever to "offer to amend" the MOU.

Section 27 of the MOU further provides as follows:

> In the event the Parties agree to VOA preceding under the BCP with any required remediation of the RG&E lot, a new Memorandum of Understanding will be negotiated to cover the terms of proceeding in the BCP if this Memorandum shall not have first been amended to accommodate VOA's continued participation in the BCP prior to NYSDEC's acceptance and approval of the Final Remedial Investigation Report. If this Memorandum terminates prior to any NYSDEC required remediation of the RG&E lot having been completed to NYSDEC's satisfaction for continued commercial use, nothing contained in this Memorandum shall be construed as barring, diminishing, adjudicating or in any way affecting any of the parties' rights, causes of action, or defenses.

MOU [#174-17], § 27. Thus, as RG&E argues, the MOU anticipated the possibility that the parties would fail to agree on a remediation plan and would not negotiate a new MOU.

Lastly, the MOU specifies that it "may not be modified or amended orally, and can be modified or amended only by a writing

subscribed by the counsel for each of the Parties. . . ." MOU, § 18.

After reviewing the MOU, and in particular, the plain, unambiguous language quoted above, the Court is compelled to conclude MOU did not require RG&E to offer to amend the MOU, to amend the MOU, to reach agreement with VOA on the terms of a new MOU, to enter into a new MOU with VOA, or to remediate the Site. Therefore, the Court finds that RG&E did not breach the MOU by failing to amend the MOU, to reach agreement with VOA on the terms of a new MOU, to enter into a new MOU with VOA, or to remediate the Site.

2. Breach of Unilateral Contract Based on Written Communications Between Counsel (Point Two)

VOA argues that RG&E formed a unilateral contract to fund the remediation of the Site and otherwise back VOA's financial interests in exchange for VOA taking the lead in negotiating with NYSDEC and the New York State Department of Health ("NYSDOH").

A unilateral contract consists of an offer or promise to do something in exchange for an act. See Flemington Nat. Bank & Trus Co. v. Domier Leasing Corp., 65 A.D.2d 29, 36-37 (1st Dep't 1978) ("The agreement may consist of a promise for an act . . . As soon as the act . . . takes place, the offer is accepted, and the contract is made, leaving only the promise outstanding. . . .") (quotation omitted; some ellipses in original). Where one party has fully performed at the time the contract arises, it is a unilateral, or one-sided contract, because "it leaves outstanding

an obligation on the part of the other party only[.]" Id. Here, VOA asserts that it performed the act required under the unilateral contract–namely, taking the lead in negotiating the remediation with the State agencies. Thus, VOA argues, all that remains is for RG&E to fulfill its promise, which VOA asserts is contained in several communications from RG&E's counsel. See Pl's D.J. Mem. at 8-10 (citing Pl's SMF Exs. O [#174-21], Q [#174-23], & R [#174-24]). The Court has reviewed these communications and, as discussed further below, must agree with RG&E that none of them constitutes a promise that gave rise to a unilateral contract upon VOA's engaging in negotiations with NYSDEC and NYSDOH regarding the remediation of the Site.

In Exhibit O, a February 12, 2010 letter, RG&E's counsel stated as follows:

> RG&E is willing to advise at this time that *it is inclined to satisfy the requirements of a limited action remedial alternative for the VOA site . . . . This alternative would include . . . a soil cover required by DEC*. . . . RG&E is willing to . . . financially provide for the installation of a soil cover or fund the incremental cost of building construction resulting from the site management plan (i.e., testing and disposal of excavated soil) *assuming the least costly methods are selected to satisfy VOA's obligations under a site management plan. RG&E is not committing to participating or satisfying VOA's obligations in regard to a more expansive plan such as a containment or extensive excavation of the back lot.*

Letter from Paul LeClair, Esq. ("LeClair") to Linda Shaw, Esq. ("Shaw") dated 02/12/10 [#174-21] at 2-3 (emphases supplied). This letter does not contain a promise to pay for the CCR, but instead

proposes the "soil cover" remedy that RG&E subsequently reiterated in its February 2013 comments to the RAAR/RAWP. In addition, the letter emphasizes RG&E's willingness to pay only for the least expensive remedy acceptable to NYSDEC.

In Exhibit Q, sent on September 20, 2011, RG&E's counsel reiterated that RG&E was "not walking away from this project, but it definitely would rather not waste its money. . . ." Email from Leclair to Shaw dated 09/20/10 [#174-23]. This email does not contain a reference to the CCR or a promise by RG&E to fund any particular remedy.

Finally, in Exhibit R, RG&E's counsel noted in an email dated November 16, 2011, that RG&E

> is willing to discuss participating in the clean-up of the hot spot w/VOA and *participating incrementally* in capping the area if DEC is ultimately willing to allow that remedial step. *We should discuss how VOA would like to accomplish that, so we can begin evaluating costs more fully*. We appreciate that DEC will have to approve the type of remediation steps in which VOA would like to engage but we are willing to begin that discussion now.

Email from Leclair to Shaw dated 11/16/11 [#174-24] (emphases supplied). Again, this email does not contain a promise by RG&E to pay for the CCR. The reference to "participating incrementally in capping the area" cannot be interpreted to mean the CCR as defined by VOA,[4] since RG&E's counsel goes on to note that they "should discuss how VOA would like to accomplish that [i.e., capping the

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[4] See Ryan Aff., ¶ 5 [#174-1] (describing the CCR as "a three[-]part construction cap including (i) a concrete building foundation system . . . ; (ii) an asphalt parking lot; and (iii) a 2[-]foot thick cap").

area]". Presumably, if RG&E was referring to the CCR as defined by VOA, there would be no need to discuss how to accomplish that remedial step, since VOA had already determined how it wished to do so.

RG&E points out that there are additional communications, not referenced by VOA in its motion for declaratory judgment, demonstrating that RG&E did not promise to fund the CCR and adhered to its position that it only would pay for the least expensive, acceptable remedy. See, e.g., Email from Leclair to Shaw dated 02/12/13, p. 6 of [#174-26] ("RG&E proposes that it perform the remedial work of removing the black stained soil, installing a cover, and some other agreed upon ground work if any. . . . If we can agree on the work to be done by RG&E which agreement we believe is attainable, we are going to save considerable time as we will not have to negotiate the costs of this phase of the project."); Letter from Leclair to Shaw dated 03/08/13, p. 11 of [#174-26] ("RG&E has authorized me to convey that it will agree to a two foot cover. We will continue to discuss the composition of such a cover, however."); Email from Leclair to Shaw dated 08/21/13, p. 5 of [#174-26] ("[RG&E] remains committed to contributing towards the least expensive, regulatory [sic] compliant remediation of the VOA property site. It continues to advocate for removal of the one area of contaminated soil to 20 feet, excavating and removing the top one foot of soil, and adding a two foot aggregate/soil cover system suitable for construction or landscaping."); Letter from Leclair to

Magistrate Judge Payson, dated 09/06/13, p. 1 of [#174-26] ("The DEC's June 24, 2013 response . . . is perfectly consistent with RG&E's remediation proposal to remove one area of contaminated soil to 20 feet, excavating and removing the top one foot of soil, and adding a two foot aggregate/soil cover system suitable for construction of landscaping."); Letter from Leclair to Shaw dated 11/09/12, at 1, Ex. A to Leclair Decl. ("[W]e are not in a position to negotiate the amount [RG&E] will contribute to a remediation until DEC weighs in definitively. . . .[I]f the building plan calls for 6 inches of concrete for any aspect of it, but a satisfactory cover to satisfy the objectives of the cap . . . can be achieved with something less, then [RG&E] would only be willing to provide for that amount as noted in our February 12, 2010 letter."); Email from Leclair to Shaw dated 02/06/13, Ex B to Leclair Decl. ("[W]e are not going to be in a position yet to comment on the budget you provided. . . . Getting the AAR done first and resolved is going to allow us to negotiate resolution and [RG&E]'s financial commitment to the remediation.")

RG&E also argues that VOA's correspondence to the Court reflects VOA's understanding that RG&E simply was proposing a soil cover. RG&E points to a letter from VOA's counsel to Magistrate Judge Payson dated July 10, 2012 [#174-31], stating,

> In preparation for this NYSDEC meeting, the VOA and RG&E teams had been able to collectively agree on a proposed, preferred remedy to clean up the Site for the intended use, and on several remedial alternatives, which would all be analyzed in the RAWP. However, all of the remedies contemplated only involved limited contaminated soil

> removal and "capping" methodologies. RG&E has conceptually agreed it will fund this type of limited soil removal and capping remedy if agreed upon by NYSDEC, even though no final work plan has been developed and approved at this time.

See Letter from Shaw to Magistrate Judge Payson dated 07/10/12 [#174-31]. Even assuming this could be construed as referring to a "conceptual agreement" to fund the CCR, any such "conceptual agreement" was trumped by the explicit terms of the MOU, discussed elsewhere in this Decision and Order, providing that the parties intended to be bound *only* by a written agreement subscribed to by both counsel. See, e.g., R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 75 (2d Cir. 1984) ("[I]t is not surprising that considerable weight is put on a party's explicit statement that it reserves the right to be bound only when a written agreement is signed. Courts are reluctant to discount such a clear signal, and it does not matter whether the signal is given during the course of bargaining, or at the time of the alleged agreement.")

Furthermore, VOA has acknowledged that RG&E's willingness to fund any remedy at the Site has been tempered by its concerns over cost. See Letter from Shaw to Magistrate Judge Payson, dated 02/06/13 [#174-35] ("RG&E has stated in writing that it is willing to financially provide for the installation of a soil cover or fund the incremental cost of building construction assuming the least costly methods are selected. . . .").

The above-discussed communications between the parties' counsel and from the parties' counsel to the court do not,

considered singly or taken together, support a finding that a valid unilateral contract existed here. No reasonable fact-finder could conclude that RG&E promised, in any of its communications to VOA or the Court, to pay for the CCR desired by VOA.

3. Oral Promises To Pay For The CCR and Promissory Estoppel (Point Three)

VOA asserts that RG&E "made multiple oral and written promises to pay for . . . the Construction Cap Remedy." Pl's SMF, ¶ 69 (citing "Ryan Aff. [#174-1] in general"). However, in its motion for declaratory judgment, VOA does not specifically refer to breach of oral contract and instead asserts an argument based on promissory estoppel. The TAC does assert a claim for promissory estoppel but not a claim of breach of oral contract. In the interest of completeness, the Court will consider both theories.

a. Oral Contract

The elements for establishing a breach of an oral contract are the same as those required for a written contract, but the plaintiff "has a particularly heavy burden to establish objective signs of the parties' intent to be bound." N.F.L. Ins. Ltd. by Lines v. B & B Holdings, Inc., 874 F. Supp. 606, 613 (S.D.N.Y. 1995) (citing Winston v. Mediafare Entertainment Corp., 777 F.2d 78, 80 (2d Cir. 1985)); see also Cleveland Wrecking Co. v. Hercules Const. Corp., 23 F. Supp.2d 287, 293 (E.D.N.Y. 1998) (citing Winston, 777 F.2d at 80). "Before a court will impose a contractual obligation based on an oral contract, the proponent must establish

that a contract was made and that its terms are definite." Muhlstock v. Cole, 245 A.D.2d 55, 58 (1st Dep't 1997) (quoted in Delaney v. Bank of Am. Corp., 908 F. Supp.2d 498, 514 (S.D.N.Y. 2012)). "The doctrine of definiteness . . . means that a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to. . . ." Dreyfuss v. eTelecare Global Solutions-US, Inc., No. 08 Civ. 1115(RJS), 2008 WL 4974864, at *4 (S.D.N.Y. Nov. 19, 2008) (quoting 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 (1991), aff'd sub nom. Dreyfuss v. Etelecare Global Solutions-U.S. Inc., 349 F. App'x 551 (2d Cir. 2009)).

The Second Circuit has "articulated several factors that help determine whether the parties intended to be bound in the absence of a document executed by both sides", namely, "(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing." Winston, 777 F.2d at 80 (citations omitted). Here, the MOU expressly states that an amended or entirely new MOU was required in order for the parties to implement a remediation plan. See MOU at 3 (Understanding Clause) & § 27. The MOU further stated that it only could be modified or amended by a writing signed by counsel for the parties. Id., § 18. Thus, through the

MOU, the parties expressed a clear intent not to be bound until they achieved a fully executed document. Although the Court need look no further than this first factor, see RKG Holdings, Inc. v. Simon, 182 F.3d 901, 901 (2d Cir. 1999) (unpublished opn.) (stating that where "there is a writing between the parties showing that [one party] did not intend to be bound . . . a court 'need look no further than the first factor'") (quoting Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69, 72 (2d Cir. 1989)), the remaining factors also favor RG&E. There has not been partial performance, and the parties have not agreed on all the terms of the alleged contract: Not only has construction of the CCR not begun, the parties have not agreed on the CCR as the final contamination remedy for the Site. Finally, it is beyond dispute that a contract for an expensive and complex remediation-construction project is the type of agreement usually reduced to writing. See, e.g., Adjustrite Sys., Inc. v. GAB Business Servs., Inc., 145 F.3d 543, 551 (2d Cir. 1998) ("In view of the size of the transaction, the nature of the assets being purchased, and the length of the contemplated employment contracts, the Agreement clearly was of the type that ordinarily would be committed not only to a writing but to a formal contract . . . .").

The Court finds it notable that VOA avoids alleging in the TAC that RG&E ever agreed to "fund a remedy that would build the foundation and parking lot" for the Project. Instead, what VOA alleges is that RG&E agreed VOA "could begin discussing with DEC

the concept of a permanent construction cap"—which is not tantamount to alleging that RG&E agreed to fund that particular remedy:

> 123. With a Project in hand, *VOA in turn asked RG&E if it would fund a remedy that would build the foundation and parking lot* for this project and have it serve as the remedy [for the contamination].
> 124. Since RG&E was notably concerned about DEC's reaction to the groundwater results and threat of a ST listing, RG&E *verbally agreed VOA could begin discussing with DEC the concept of a permanent construction cap . . . .*

TAC [#184], ¶¶ 123-124 (emphases supplied). Thus, VOA's assertion that RG&E promised, with definiteness and specificity, to fund the CCR, is belied by the record before the Court.

b. Promissory Estoppel

"A cause of action for promissory estoppel under New York law requires the plaintiff to prove three elements: 1) a clear and unambiguous promise; 2) reasonable and foreseeable reliance on that promise; and 3) injury to the relying party as a result of the reliance." Kaye v. Grossman, 202 F.3d 611, 615 (2d Cir. 2000) (citing Readco, Inc. v. Marine Midland Bank, 81 F.3d 295, 301 (2d Cir. 1996)). "An action for promissory estoppel generally lies when there is no written contract, or the contract cannot be enforced for one reason or another." NCC Sunday Inserts, Inc. v. World Color Press, Inc., 759 F. Supp. 1004, 1011 (S.D.N.Y. 1991).

VOA argues that RG&E made a "clear and unambiguous promise to pay for a remediation of the [S]ite consisting of hot spot removal of the black stained sandy soils down to 20 feet and the

Construction Cap Remedy as provided in the RIR." Pl's D.J. Mem. at 15 (citing Pl's SMF, Exs. O, Q & R). The three exhibits that VOA cites, a letter and two emails from RG&E's counsel, already have been found by this Court not to constitute a "clear and unambiguous promise" to pay for the CCR. Therefore, they cannot establish the first element of a promissory estoppel claim.

VOA also references the MOU and asserts that it "plainly provides" that RG&E "was to negotiate a remediation sufficient to satisfy commercial use soil clean-up objectives . . . under New York law." Pl's D.J. Mem. at 15 (citing Pl's SMF, Ex. L-1 [#174-13] at 3). However, as discussed above, the Court has found that the MOU does not "plainly provide[ ]" that RG&E was required to negotiate a remediation sufficient to satisfy commercial use soil clean-up objectives under New York law. Because the MOU does not contain a "clear and unambiguous promise" on RG&E's part to negotiate a remediation, it cannot establish the first element of a promissory estoppel claim.

Finally, VOA argues that RG&E bound itself to pay for the CCR because it "approved the following language in the final RIR, which DEC then approved, and which document bec[a]me[ ] a legally binding component of VOA's BCA with DEC":

> The planned development (as noted in Section 7.1), which will primarily consist of asphalt pavement and building materials, will serve as a cap to prevent exposure to the contaminated fill materials.

Declaration of Linda Shaw, Esq. ("Shaw Decl.") [#174-2], ¶ 48 (quoting Pl's SMF, Ex. I [#174-14] at 24). RG&E's "approval" of the

December 2011 RIR is immaterial because the RIR did not contain any provision regarding funding of the remedy, much less a statement that RG&E would pay for the CCR. For that matter, the RIR did not bind the VOA to implement the CCR, since both the RIR and the TAC state that VOA would present its "preferred remedy" in a subsequently drafted Remedial Action Work Plan. See RIR, p.2, § 1.2 [#174-14] ("The data provided in this RI report (RIR) is sufficient to develop a Remedial Action Work Plan (RAWP), which will analyze alternative remedies . . . , and select a preferred remedy for the intended ground floor commercial senior day care/upper floor senior residential use."). Furthermore, RG&E was not a party to the BCA, which was between VOA and DEC only. And finally, as noted above, VOA and RG&E, in the MOU, agreed that if the investigation of the Site revealed that remediation is required, they would either have to amend the MOU to cover that remediation or negotiate a new MOU to avoid further litigation. See MOU [#174-17] at 2.

Furthermore, the Court agrees with RG&E that, contrary to VOA's contention, nothing in Mullin's deposition transcript ("Mullin Tr.") [#194-4] suggests that RG&E contracted or promised to pay for the CCR as defined by VOA. The excerpts VOA has quoted from Mullin's testimony demonstrate that while RG&E, conceptually speaking, did not oppose the CCR as a remedy, the parties never reached an agreement on funding it. See, e.g., Mullin Tr. [#194-4] at 73:9-13 ("We never objected to that remedy, the developmental part of the remedial solution. We never agreed on what the cost of

that was going to be.") (quoted in Plaintiff's Memorandum of Law in Support of Motion to Supplement ("Pl's Supp. Mem.") [# 194-5]), at 6)); Mullin Tr. at 79:2-7 ("[W]e did not object to integrating the building with the remedy. . . . [W]e had discussions about what RG&E would contribute and how it would contribute and our approach to that analysis." (quoted in Pl.'s Supp. Mem. at 7)). At most, "what [RG&E's] communications committed to was that [RG&E] would support a cost-effective remedial solution," specifically the "[l]east costly remedy acceptable to [NYS]DEC." Mullin Tr. at 72:2-4, 72:10-11 (quoted in part in Pl.'s Supp Mem. at 6). As RG&E points out, Mullin did not testify that RG&E ever selected the CCR as the "cost-effective remedial solution" or "least costly remedy acceptable to DEC", or that RG&E agreed to pay the entire cost of the CCR, or any other remedy.

RG&E points to testimony by Mullin that RG&E consistently maintained it would financially support the least costly remedy available; VOA has not established that, at any point in time, the CCR was considered the least costly, acceptable remedy. See, e.g., Mullin Tr. at 111:10-19 ("[W]e agreed in concept on how the remedy would-the building would be part of the remedy. What we never agreed on was . . . what incremental cost RG&E would pay for."); Id. at 113:3-17, 114:8-14 ("We never changed our position. We always said that we would be willing to fund and participate in the least costly remedial plan acceptable to [NYS]DEC, something along that line. . . .[In October 2012] we were already talking,

dialoguing on [what] we needed to understand because we didn't feel that we needed to pay for the whole building foundation. We were only committed to doing . . . what's the least costly solution for the site conditions."); Id. at 116:14-23 ("You [VOA] were asking us to fund, as we understood it in these documents, for [sic] the foundation. We felt the foundation was not needed for the remedy.").

Mullin acknowledged that before receiving the results of the groundwater retesting, the documents did "at least reflect the fact that the building and the pavement would be the remedy, would be the cap[.]" Mullin Tr. at 125:11-25. However, Mullin testified, RG&E did not change its position on based solely on the groundwater data but rather, its position "was consistent with what [they] had been communicating about how [they] would fund the remediation." Mullin Tr. at 126:2-6. Indeed, VOA's counsel even acknowledged during Mullin's deposition that RG&E had disagreed with cost estimates for using the CCR to remediate the site, and had maintained it would only contribute to the least costly remedy available. See id. at 131:12-19 (counsel for VOA stated, "I know you [RG&E] disagreed with them [cost spreadsheets that included the CCR]. . . ."). The Court thus agrees with RG&E that Mullin's testimony does not support a finding either that RG&E "made promises to VOA to pay for the CCR" or that RG&E "reneged on its agreement to pay for the CCR." Pl.'s D.J. Mem. at 2.

In short, even if there existed a "clear and unambiguous" promise by RG&E (outside of the four corners of the MOU) to pay for the CCR, the VOA has not established that its reliance on such a promise was reasonable. The MOU stated that the parties would have to execute a new MOU, or amend the existing MOU, if they reached an agreement on remediation. Moreover, the MOU provided that it could not be amended in the absence of a writing signed by counsel for both parties. Because the MOU stated that the parties would have to enter into a new MOU if they agreed upon remediation, and because, under the MOU, the parties contemplated being bound only by written agreements signed by both counsel, it was unreasonable for VOA to rely on promises allegedly made elsewhere. See Starvest Partners II, L.P. v. Emportal, Inc., 101 A.D.3d 610, 613 (1st Dep't 2012) ("Where a term sheet or other preliminary agreement explicitly requires the execution of a further written agreement before any party is contractually bound, it is unreasonable as a matter of law for a party to rely upon the other party's promises to proceed with the transaction in the absence of that further written agreement[.]") (citing, inter alia, Prestige Foods v. Whale Sec. Co., 243 A.D.2d 281, 663 N.Y.S.2d 14 (1st Dep't 1997) (dismissing promissory estoppel, fraud and negligent misrepresentation counts because plaintiffs' claim of reasonable reliance was "flatly contradicted" by the letter agreements stating that neither party had any legal obligations until both had executed an underwriting agreement)).

V. Conclusion

For the reasons discussed above, VOA's Motion for Declaratory Judgment [#174] is denied. Specifically, the Court declares that (1) RG&E did not breach the MOU; (2) RG&E did not breach "subsequent written and/or verbal agreements"; (3) RG&E is not liable to Plaintiff under a theory of promissory estoppel for damages resulting from its alleged breached promises; and (4) RG&E is not liable for past, present, and future costs and damages caused by such alleged breaches. In light of these conclusions, the Court declines to order that a trial be held on the issue of damages.

RG&E's Cross-Motion for Declaratory Judgment [#183] is granted. In particular, the Court declares (1) that RG&E did not breach the MOU by not reaching agreement with VOA on executing a new MOU or remediating the Site, and (2) that RG&E did not contract, promise, or otherwise agree to pay for a Construction Cap Remedy or any other remediation on the Site.

SO ORDERED.

S/Michael A. Telesca

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Honorable Michael A. Telesca
United States District Judge

DATED: July 14, 2014
Rochester, New York