STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1663

Outland Renewable Energy, LLC,
Appellant,

vs.

Siemens Energy, Inc.
f/k/a Siemens Power Generation, Inc.,
Respondent.

Filed June 27, 2011
Affirmed
Hudson, Judge

Redwood County District Court
File No. 64-CV-08-853

Wallace G. Hilke, Michael Olafson, Nicole M. Siemens, Lindquist & Vennum, PLLP, Minneapolis, Minnesota (for appellant)

Michael T. Nilan, Teresa J. Kimker, Paula D. Osborn, Nilan Johnson Lewis PA, Minneapolis, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

In this breach-of-contract dispute, appellant, a wind-farm developer, challenges the district court's entry of summary judgment in favor of respondent, a wind-turbine manufacturer. The district court concluded that the term sheet signed by the parties in

relation to the sale and installation of wind turbines was a valid and enforceable contract, which entitled respondent to retain a $15.2 million reservation fee paid by appellant. Because we conclude that the term sheet formed a valid contract, which was supported by consideration of appellant's payment of the reservation fee, and which provided that the reservation fee would convert to a cancellation fee if the parties failed to reach agreement on additional contracts within a stated negotiation period, we affirm.

FACTS

Appellant Outland Renewable Energy, LLC (Outland), is a Minnesota-based company that develops, owns, and maintains wind farms. Respondent Siemens Energy, Inc., f/k/a Siemens Power Generation, Inc. (Siemens), a Delaware corporation headquartered in Florida, sells wind turbines. Siemens is owned by Siemens Corporation, a United States holding company that is owned, in turn, by Siemens AG of Germany.

In 2007, Outland sought to purchase wind-turbine generators (WTG) for several wind farms that it was developing. Outland contacted several different WTG manufacturers; at least two of these manufacturers required an up-front reservation fee. Outland was also introduced to Summit Wind Power, LLC (Summit), a company that assisted in procuring Siemens WTGs for the development of wind farms. Outland attempted to negotiate with Siemens directly, but a Siemens representative notified Outland that it preferred to work through Summit. Outland agreed that Summit would facilitate negotiations with Siemens, and Outland conducted all negotiations for the purchase of WTGs with Summit.

In November 2007, representatives of Outland and Siemens executed a document titled "Turbine Supply and Installation Term Sheet," which related to the purchase and installation of 87 WTGs. The WTGs were to be manufactured by Siemens at its overseas production facilities and installed at prospective wind farms to be developed by Outland.

The 14-page term sheet signed by Outland and Siemens provides that it "set[s] forth the principal terms on which [the parties] have agreed . . . for the design, supply, transport, erection, commissioning, warranty and service of . . . WTGs." The term sheet includes provisions relating to project-site construction by Siemens; specifications for Siemens-supplied equipment and services; and statements relating to warranties, quality control, and pricing. The term sheet relates to an expected total purchase price of $321.9 million, and it provides for the shipment of WTGs beginning late in the first quarter of 2010.

The term sheet also provides that the parties agree to negotiate "in good faith until the earlier of the execution of [a] definitive Supply Agreement and Service and Maintenance Agreement" or the designated end of the negotiation period, October 1, 2008. It requires Outland to pay a reservation fee of $15.2 million to Siemens. It further states:

> In the event that [Outland] and Siemens do not execute the Supply Agreement or the Service and Maintenance Agreement for the specific WTGs after good faith efforts to negotiate and execute such agreements by end of the Negotiation Period for such WTGs, this Term Sheet shall automatically terminate and the Reservation Fee shall become a nonrefundable Cancellation Fee.

The term sheet indicates that it "reflect[s] the Parties' agreement in principle concerning key provisions but [is] not intended to reflect final contractual language or to address every provision which shall be included in the final definitive contract agreements." The term sheet also, however, contains an integration clause and a provision allowing for its assignment in certain circumstances. It specifies that New York law governs the agreement.

Pursuant to the term sheet, Outland paid the reservation fee to Siemens, but Outland was unable to secure financing for the purchase of the WTGs by October 1, 2008, due to the absence of a power-purchase agreement from a utility and deteriorating economic conditions. Outland then filed a complaint in district court seeking declaratory relief, alleging that the term sheet was not enforceable because it lacked mutuality; that it was the product of mutual or unilateral mistake; and that the reservation/cancellation fee amounted to an unenforceable penalty. Outland also alleged that performance of the term sheet had become commercially impracticable and that Siemens had been unjustly enriched by retaining the reservation/cancellation fee. In the alternative, Outland asserted that Siemens had breached the contract, resulting in damages. Siemens filed an answer seeking dismissal of Outland's claims and alleging that the term sheet was a binding contract, which Outland had breached. The answer did not assert a counterclaim for damages.

Siemens moved for summary judgment and for judgment on the pleadings relating to Outland's claims of unilateral and mutual mistake, unjust enrichment, and breach of contract. The district court granted the motion for judgment on the pleadings as it related

to unilateral and mutual mistake and Siemens's alleged breach, but denied the motion as it related to unjust enrichment. Outland moved for summary judgment on its remaining claims.

Outland also moved for a preliminary injunction to prevent Siemens from terminating the contract and converting the reservation fee to a cancellation fee. The district court granted the injunction, concluding that Outland had made a sufficient showing of the likelihood of success on the merits of its claim that the cancellation fee was an unenforceable penalty. Based on the district court's order, Siemens moved to amend its answer to add a counterclaim for damages arising from Outland's breach. The district court denied leave to amend, concluding that allowing the amendment would be prejudicial to Outland because it would necessitate additional discovery, the parties had already engaged in significant discovery, and trial was imminent.

Siemens renewed its motion for summary judgment. After a hearing, the district court granted Siemens's motion for summary judgment and denied Outland's motion for summary judgment. The district court concluded that the term sheet was supported by consideration and constituted an enforceable contract. The district court further determined that the reservation/cancellation fee constituted either (1) an alternative contract or (2) a valid liquidated-damages clause. And the district court granted summary judgment on the unjust-enrichment claim based on its determination that the term sheet was a valid contract.

This appeal follows.

D E C I S I O N

In reviewing the district court's grant of summary judgment, this court examines whether any genuine issues of material fact exist and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This court views the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But the nonmoving party must present evidence that is "sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). We "review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

The parties have agreed that New York law applies to their agreement. This court reviews the district court's interpretation of state law de novo. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231, 111 S. Ct. 1217, 1221 (1991).

Outland argues that the district court erred by granting summary judgment in favor of Siemens because the term sheet is not an enforceable contract for the sale of WTGs, but is instead a preliminary agreement to negotiate, which cannot support an award of damages for breach. Outland maintains that the term sheet expressed no mutuality of obligation because it imposed no obligations on Siemens, and the district court erred by considering it to be an enforceable alternative-performance contract. Finally, Outland

argues that Siemens would be unjustly enriched by retaining the benefit of the reservation/cancellation fee.

In a contract case, when a court determines a question of intent "by written agreements, the question is one of the law, appropriately decided . . . on a motion for summary judgment." *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 73 (2d Cir. 1989) (quotation omitted). The court focuses primarily on the terms of the agreement but also considers other factors, such as the context of the negotiations. *Id.* at 72 (citing *Teachers Ins. & Annuity Ass'n. of Am. v. Tribune Co.*, 670 F. Supp. 491, 499–503 (S.D.N.Y. 1987)).

Outland maintains that, because the term sheet contemplated the execution of additional contracts, it was only a preliminary agreement, which, at most, bound the parties to continue negotiating in good faith for the purchase of WTGs. Outland argues that, therefore, Siemens's only remedy for a breach of Outland's good-faith duty to negotiate under the agreement would be the recovery of out-of-pocket damages. *See Goodstein Constr. Corp. v. City of New York*, 604 N.E.2d 1356, 1360–61 (N.Y. 1992) (holding that, when asserting breach of an agreement to negotiate in good faith, a party may not recover expectancy damages based on the anticipated performance of obligations under a future contract, which had not yet been executed).

Under New York law, parties may negotiate a binding preliminary agreement, which "does not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith in an attempt to reach the alternate objective within the agreed framework." *Tribune Co.*, 670 F. Supp. at 498.

Such an agreement does not guarantee that a final contract will be reached, but it bars one party from renouncing the agreement, abandoning negotiations, or attempting to impose conditions that do not conform to the agreement. *Id*. In deciding whether a preliminary agreement is enforceable, the court examines "whether the agreement contemplated the negotiation of later agreements and if the consummation of those agreements was a precondition to a party's performance." *IDT Corp. v. Tyco Grp., S.A.R.I.*, 918 N.E.2d 913, 915 n.2 (N.Y. 2009).

We agree with Outland that the term sheet contemplated the negotiation of additional contracts—the Supply and Service and Maintenance Agreements—which would be required to put the parties' complete agreement for the purchase and installation of WTGs in its final form. And the consummation of these additional contracts was required as a condition to Siemens's obligation to deliver and maintain WTGs and Outland's obligation to pay additional sums for that performance. *See id*.

But the district court did not conclude that the term sheet amounted to a valid contract for the purchase of WTGs. Rather, the district court concluded that the provision of the term sheet relating to the reservation/cancellation fee was valid and enforceable on its own terms, based on the language of the term sheet and the parties' negotiations in entering the agreement. We agree with the district court.

Here, both parties signed the term sheet, the language of which requires Outland to pay a reservation fee of $15.2 million for the opportunity to negotiate with Siemens and for Siemens's promise to reserve space in its "load plan" for WTGs for Outland. In this respect, Outland's payment of the reservation fee acts similarly to consideration paid

pursuant to an option contract, which reserves an optionee's right to hold open the terms of an express offer for a designated period of time. *See, e.g.*, *Kaplan v. Lippman*, 552 N.E.2d 151, 153 (N.Y. 1990) (defining option contract as "an agreement to hold an offer open that confers upon the optionee, for consideration paid, the right to purchase at a later date"). Outland's payment of the fee therefore essentially acted as a deposit, which guaranteed its right to reserve WTGs from Siemens's production capacity during the first quarter of 2010. *See Zahner v. Uram*, 605 N.Y.S.2d 611, 611 (App. Div. 4th Dept. 1993) (concluding that allowing purchaser to occupy home prior to closing acted as consideration for purchaser's nonrefundable deposit); *see also Lowe v. Mass. Mut. Life Ins. Co.*, 127 Cal. Rptr. 23, 28 (Ct. App. 1st Dist. 1976) (concluding that stand-by deposit with insurance company under terms of loan-commitment agreement was option, which irrevocably committed insurance company to issue loan if applicant met stated conditions).

To determine the parties' intent, in addition to the written agreement, we also examine the context of the negotiations. *See Tribune Co.*, 670 F. Supp. at 500–02 (concluding that binding preliminary agreement existed to negotiate additional terms of loan in good faith, based in part on context of negotiations). In this regard, we consider "the objective manifestations of the intent of the parties as gathered by their expressed words and deeds." *Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp.*, 361 N.E.2d 999, 1001 (N.Y. 1977). This analysis is based on the totality of the circumstances, the parties' situations, and their objectives. *Id.*

Here, the context of the parties' negotiations shows that Outland's reservation of production capability with Siemens had value to Outland, based on Outland's efforts to expand in the wind-farm development industry. The record shows that Outland actively sought to negotiate with Siemens, that Outland chose Siemens over other manufacturers of WTGs, and that Outland marketed its own capacity to develop wind farms by referring to its contract with Siemens. Outland's reservation of Siemens's production capacity was reserved by payment of the reservation/cancellation fee. Therefore, the record does not show the existence of a genuine issue of material fact as to the parties' intent to be bound by the term sheet as it relates to the payment and retention of the reservation/cancellation fee, and the district court did not err in concluding that the reservation/cancellation-fee provision was valid and enforceable.

Outland maintains that the term sheet lacks mutuality of obligation because it imposed no coextensive obligation on Siemens. Outland points out that the term sheet provides that, in the event of Siemens's breach, return of the reservation fee would be Outland's sole remedy. But, "while coextensive promises may constitute consideration for each other, 'mutuality', in the sense of requiring such reciprocity, is not necessary when a promisor receives other valid consideration." *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 444 (N.Y. 1982). Consideration may be either a benefit to the promisor or a detriment to the promisee, and as long as the consideration is acceptable to the promisee, its value need not be measurable. *Id.* at 444–45. Here, Outland paid the reservation fee in consideration for the benefit of Siemens's promise to reserve manufacturing capability

for Outland's needs. The lack of identical remedies for breach does not make that promise illusory.

Outland also argues that its payment of the reservation fee cannot act as consideration because the term sheet provided that, if the additional contracts were successfully concluded, the fee could be applied to the purchase price of the WTGs. We disagree. *Cf. Lowe*, 127 Cal. Rptr. at 27 (stating that "[t]he fact that the deposit would be returned if the loan were made did not prevent the arrangement from being an option").

Similarly, we reject Outland's suggestion that, if the agreement had imposed a duty on Siemens to negotiate in good faith, the district court would have properly recognized that Siemens breached that duty, because Siemens waived and extended term sheets for other companies that went beyond their defined negotiation period. Outland did, in fact, sue Siemens for breach; the district court dismissed that claim, based on its determination that any breach by Siemens was caused by Outland's own breach when it failed to provide the required financing. Outland did not appeal that dismissal, and the issue of breach is not before this court.

Outland maintains that the district court erred by concluding that, based on the term sheet, Outland could sue Siemens for breach. But any error in this determination was harmless because the district court upheld the parties' agreement as to the reservation fee, which does not require a determination of breach. *See* Minn. R. Civ. P. 61 (stating that harmless error is to be ignored); *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 357, 237 N.W.2d 76, 79 (1975) (stating that, to prevail on appeal, the appellant must show both error and prejudice resulting from the error).

A court must enforce an unambiguous contract according to its terms. *Breed v. Ins. Co. of N. Am.*, 385 N.E.2d 1280, 1282 (N.Y. 1978). The term sheet specifically provides that, if the additional contemplated contracts are not executed by the end of the negotiation period after good-faith efforts to do so, the contract "shall automatically terminate and the Reservation Fee shall become a nonrefundable Cancellation Fee." Therefore, on October 1, 2008, when the stated negotiation period expired without execution of the additional contracts, Outland's specified option to reserve production capacity with Siemens in its 2010 load plan expired of its own accord. By the contract's express terms, the reservation fee automatically converted to a cancellation fee, and Outland forfeited the fee.

We therefore affirm the district court's summary judgment concluding, as a matter of law, that Siemens was entitled to retain the $15.2 million as a cancellation fee, based on the parties' negotiated provisions relating to that fee. We base our decision on the law of binding preliminary agreements and consideration, rather than on an analysis of alternative contracts or liquidated damages. Although we note that the district court concluded that the term sheet was an enforceable alternative contract, we disagree with that analysis. An alternative contract, under New York law, allows a party to elect one of at least two distinct options for performance. *See Cahn v. Squires*, 824 N.Y.S.2d 729, 729 (App. Div. 2d Dept. 2006) (concluding that contract, which provided party "with two distinct options," either purchasing other party's interest in former marital home or selling property and dividing it equally, constituted an alternative-performance contract); *see also* 14 Samuel Williston & Richard A. Lord, *Williston on Contracts* § 42:10 at 414

(4th ed. 2000) (stating that "[a] contract is a true alternative contract when the parties have agreed that either of two or more alternative performances is to be given by the promisor as the agreed exchange for the promisee's performance" (quotation omitted)).

Here, the term sheet provided that, should the parties fail to reach agreement on additional specified contracts by October 1, 2008, it would automatically terminate, and the reservation fee would become a cancellation fee. We cannot characterize this provision as presenting a choice of "two distinct options" to Outland because, if both parties were to do nothing more to negotiate the additional contracts, the fee would still convert to a cancellation fee.

Nor do we believe that the reservation/cancellation fee is properly analyzed as a liquidated-damages clause. Liquidated damages relate to the parties' obligations after breach. *See Wirth & Hamid Fair Booking v. Wirth*, 192 N.E. 297, 301 (N.Y. 1934) (stating that "[l]iquidated damages constitute the compensation which the parties have agreed must be paid in satisfaction of the loss or injury which will follow from a breach of contract"). Here, there has been no determination of breach, and the reservation/cancellation fee, which amounted to consideration under the term sheet, does not act as liquidated damages. *See, e.g.*, *Lowe*, 127 Cal. Rptr. at 31 (concluding that amount deposited to keep option open was not subject to rules governing liquidated damages).

Finally, because we conclude that the parties' obligations with respect to the reservation/cancellation fee were properly determined under the enforceable term sheet, we reject Outland's argument that Siemens was unjustly enriched by retaining the

reservation/cancellation fee. *See IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 907 N.E.2d 268, 274 (N.Y. 2009) (stating that if the parties have executed a valid and enforceable agreement covering a certain subject matter, recovery under an unjust-enrichment theory is generally precluded).

Affirmed.