6-21-2011

Order (EZGREEN ASSOCIATES, LLC)

Alice D. Bonner
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

COPY

FILED IN OFFICE
JUN 21 2011
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

EZGREEN ASSOCIATES, LLC,
Plaintiff,
v.

GEORGIA-PACIFIC CORPORATION, GP CELLULOSE LLC (FORMERLY) KOCH CELLULOSE, LLC), and BLUEYELLOW LLC,
Defendants.

Civil Action File No.
2009-CV-168743

ORDER

On May 16, 2011, counsel appeared before the Court to present oral argument on Defendants' Motion for Summary Judgment, Plaintiff's Motion for Partial Summary Judgment and Defendants' Motion to Exclude the Expert Opinion and Testimony of Dr. Bruce Seaman. After hearing the arguments made by counsel, and reviewing the briefs submitted on the motions and the record in the case, the Court finds as follows:

I. Factual Background

Don Moore, founder of Plaintiff EZGreen Associates, LLC ("EZG"), invented a system to grow grass using a cellulose-based fabric and seed, fertilizer, and other additives ("Engineered Seed System" or the "Product"). On April 30, 2004, EZG and Georgia-Pacific Corporation ("GP") entered into a Restated Engineered Seed System Agreement ("the Agreement") permitting GP to manufacture the Product. GP also agreed to sell the Product in the U.S. retail market, while other entities were responsible for sales of the Product in the golf course, commercial and international markets. EZG agreed to assign the rights in its intellectual property to GP on June 30, 2009, if GP

satisfied its contractual obligation to use "commercially reasonable" efforts to sell the Product in the residential consumer market. The parties anticipated that sales of the Product would generate royalties to EZG of $69 million over a five-year period. EZG alleges in this law suit that the royalties never exceeded $241,493.84, because of the breach of contract of Defendants.

In May 2004, GP sold its pulp operations, the part of its business responsible for producing the Engineered Seed System, to Koch Cellulose, LLC ("Koch"). It is not disputed that EZG was aware of this transaction and agreed to the assignment of the Agreement to Koch. In September of that year, Koch formed a subsidiary, BlueYellow, LLC, to manufacture the Product.

The two major retail outlets for the residential consumer market are Lowe's Companies, Inc. ("Lowe's") and The Home Depot, Inc. ("Home Depot"). BlueYellow, LLC, negotiated with both companies to sell the Product. Home Depot agreed to carry the Product, but only in its landscape supply centers, not in its primary "orange" stores.

Negotiations between BlueYellow, LLC, and Lowe's began in the fall of 2004, but were delayed because Lowe's required the execution of a Master Standard Buying Agreement ("MSBA"). BlueYellow, LLC, objected to two provisions in the MSBA: 1) Lowe's demanded that Koch guarantee all obligations that BlueYellow, LLC, undertook under the MSBA and 2) Lowe's required BlueYellow, LLC and Koch to indemnify Lowe's against any liability, including liability arising from Lowe's own negligence. Koch found those provisions objectionable because it had a long-standing corporate practice against assuming the liabilities of its subsidiaries, and because it contended that

BlueYellow, LLC, should be the entity to bear any risks associated with the production and distribution of the as yet untested Product.

In the fall of 2006 Koch Cellulose acquired the remainder of GP's pulp operations and was renamed GP Cellulose, LLC, after which Lowe's agreed to distribute the Product under the long-standing arrangement it had with GP-related entities. This agreement did not contain the provisions to which Koch had objected. Lowe's agreed to sell the Product in a test market of approximately 140 stores in the fall of 2006 and about 600 stores in the spring of 2007. While in Lowe's stores the Product did not meet selling expectations, although Defendants contend that they put forth their best marketing efforts to sell the Product. After the poor sales performance of the Product in 2007, Lowe's made Defendants aware that it would significantly reduce the number of stores that would carry it, and raised the possibility that it would ultimately discontinue carrying the Product altogether.

On July 19, 2007, BlueYellow, LLC, informed EZG that it would cease production of the Product. Defendants contend that they collectively invested more than $8 million in the Product and lost over $7 million. The record reflects that no golf, retail, or international orders were pending, that no additional orders were expected when BlueYellow, LLC, ceased manufacturing the Product, and that there was more than enough product in existence to satisfy any remaining customer demand. The parties mutually terminated the Agreement on May 12, 2008, and EZG retained its intellectual property.

II. Defendants' Motion for Summary Judgment

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the nonmovant, warrant judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

EZG claims Defendants breached the Agreement in three ways: (1) GP did not use commercially reasonable efforts to sell the Product in the U.S. retail market; (2) GP had no right to cease production in August of 2007; and (3) GP terminated the Agreement early when it ceased production. "The elements for a breach of contract claim in Georgia are the breach, which must be more than de minimis, and the resultant damages to the party having the right to complain about the contract being broken." Techbios, Inc., v. Champagne, et al., 301 Ga. App. 592, 595 (2009).

The commercially reasonable standard applicable in this case has not been addressed by Georgia courts. Courts outside of Georgia have found that commercially reasonable efforts are an "objective standard requiring that a business use the efforts that a reasonable business entity would have made under similar circumstances." Kan. Penn Gaming, LLC v. HV Props. of Kan., LLC, 727 F.Supp.2d 1100, 1111 (D. Kan. 2010); See Valtrol, Inc. v. Gen. Connectors Corp., 884 F.2d 149 (4th Cir. 1989).

Defendants have shown that successful marketing of the Product would have occurred only through contracts with the two major residential and consumer market companies, Lowe's and Home Depot. They have also shown that marketing the Product in Home Depot stores was not possible. It is uncontested that negotiations with

Lowe's stalled for 18 months before a suitable agreement was reached. EZG contends that the delay in reaching a suitable agreement with Lowe's was not reasonable, but they have not controverted the reasonableness of Koch's unwillingness to agree to the onerous requirements of Lowe's initial position in the negotiations, a position which Lowe's ultimately abandoned. The Court finds that EZG has not pointed to any evidence from which a jury could conclude that Defendants' efforts to sell the Product were inconsistent with the efforts a reasonable business entity would have made under similar circumstances. Thus the Court finds that there are no questions of material fact with regard to whether Defendants used commercially reasonable efforts to sell the Product.

EZG argues that GP had no right to cease production of the Product, and that the cessation in July 2007 breached the parties' Agreement. Georgia law has found that a claim for breach of contract cannot survive where a party exercises its bargained-for rights. See Winterchase Townhomes, Inc. v. Koether, 193 Ga. App. 161, 162-63 (1989). Paragraph 7.3(c) of the Agreement states "If [Defendants] during the Payment Period cease...production of Engineered Seed Systems and Erosion Control Products, then [EZG] may terminate this Agreement and the exhibits attached hereto." At the time Defendants ceased production, no pending orders existed and no orders were projected in the foreseeable future. There is no evidence that additional inventory was needed, nor is there any evidence that any orders went unfilled because of the cessation of production. The Court finds that the foregoing provision of the Agreement contemplates that future conditions and circumstances could make continued production untenable, resulting in the decision by BlueYellow, LLC, to cease production, in which case EZG

would be authorized to terminate the Agreement. There would be nothing for EZG to terminate if the cessation of production acted as a termination of the Agreement by Defendants. Georgia law requires courts to reject an interpretation of contracts that would render language in them meaningless. See Horowitz v. Weil, 275 Ga. 467, 468 (2002). The Court therefore finds as a matter of law that Defendants did not terminate the Agreement when they ceased production.

Georgia law does not recognize an "independent cause of action" for breach of the implied duty of good faith "outside a claim for breach of contract." Onbrand Media v. Codex Consulting, Inc., 301 Ga. App. 141, 147 (2009). The Court has found as a matter of law no breach of the Agreement by Defendants, and so EZG's claim for breach of the implied duty of good faith must fail.

As a final matter, EZG seeks its attorney's fees and costs under O.C.G.A. § 13-6-11. However, this statute does not create an independent cause of action for fees and costs, but "permits in certain limited circumstances the recovery of the expenses of litigation incurred as an additional element of damages." Lamb v. Salvage Disposal Co. of Ga., 244 Ga. App. 193, 196 (2000). EZG is unable to show that its underlying claims for breach of the Agreement and the implied duty of good faith are viable, and, therefore, EZG's claim for attorney's fees and costs fails as well.

III. Conclusion

As the Court has found no issues of material fact in this case, and that Defendants are entitled to judgment as a matter of law, the Court hereby **GRANTS** Defendants' Motion for Summary Judgment in its entirety on all of Plaintiff's claims.

Accordingly it is unnecessary for the Court to address Plaintiff's Motion for Partial Summary Judgment and Defendants' Motion to Exclude the Expert Opinion and Testimony of Dr. Bruce Seaman. Plaintiff's Motion for Partial Summary Judgment is **DENIED** and Defendants' Motion to Exclude the Expert Opinion of Dr. Bruce Seaman is **DENIED** as moot.

SO ORDERED this 27 day of June, 2011.

JOHN J. GOGER, JUDGE *for*
ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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