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Transaction ID 36185534
Case No. 4601-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CORKSCREW MINING VENTURES, LTD.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 4601-VCP
PREFERRED REAL ESTATE INVESTMENTS, INC. F/K/A PREFERRED UNLIMITED, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: November 10, 2010
Decided: February 28, 2011

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PARSONS, Vice Chancellor.

This matter involves Plaintiff's request in the form of a motion for summary judgment for the enforcement of a financing agreement to purchase securities in a Delaware limited liability company. Plaintiff asserts that the parties entered into a valid financing agreement and Defendant has refused to perform its obligations under that agreement. Defendant contends that the financing agreement is void and unenforceable because it is the product of fraud in the inducement based on alleged misrepresentations Plaintiff made in a related agreement. In this Memorandum Opinion, I grant Plaintiff's motion for summary judgment because Defendant's affirmative defense lacks merit.

I. BACKGROUND

A. The Parties

Plaintiff, Corkscrew Mining Ventures, Ltd. ("Corkscrew"), is a Florida Limited Partnership.[1] Until early September 2007, Corkscrew owned a mining quarry in Florida.[2] Defendant, Preferred Real Estate Investments, Inc. ("PREI"), is a Pennsylvania corporation, formerly known as Preferred Unlimited, Inc., which entered into a transaction with Corkscrew to acquire the mining quarry.[3]

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1 Pl.'s Second Am. Verified Compl. (the "Complaint.") 1.

2 Aff. of Jason Dempsey ("Dempsey Aff.") ¶ 3.

3 Preferred Unlimited, Inc. changed its name to PREI on December 11, 2008. Compl. 1. To avoid confusion, I refer to Preferred Unlimited, Inc. as PREI, even though this case involves actions taken before the name change.

B. Facts

In May 2007, the parties entered into an agreement for the purchase of Corkscrew's mine (the "Real Estate Agreement").[4] In addition to providing the terms for the purchase of the property, the Real Estate Agreement established Preferred Unlimited of Corkscrew Holding Company, L.L.C. (the "Holding Company"), a Delaware limited liability company.[5] The parties created the Holding Company to own and operate the mine. Pursuant to the Agreement, Corkscrew would own 100% of the Holding Company upon its creation and would transfer its interest in the mine to the Holding Company.[6] The parties also agreed that PREI would buy Corkscrew's interest in the Holding Company.[7] On September 17, 2007, the parties closed on the Real Estate Agreement, and PREI purchased approximately 88% of Corkscrew's interest in the Holding Company.[8] PREI was unable, however, to purchase all of Corkscrew's interest at the closing, so on September 19, 2007 the parties entered into another agreement in which PREI agreed to purchase Corkscrew's remaining 12% interest in the Holding Company (the "Securities") by March 18, 2009 (the "Financing Agreement").[9]

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4 Dempsey Aff. ¶ 3; *see* Def.'s Opp'n. Ex. A.

5 Compl. 1; Dempsey Aff. ¶ 4.

6 Dempsey Aff. ¶ 4.

7 *Id.* ¶ 5.

8 *Id.* ¶ 6.

9 Compl. ¶ 11; Dempsey Aff. ¶ 7.

The opening clause of the Financing Agreement states:

> [T]he parties hereto desire that the Seller [*i.e.*, Corkscrew] agree to sell, transfer, convey and assign to the Buyer [*i.e.*, PREI] under certain circumstances, and that the Buyer be given an option and, in certain circumstances, have an obligation, to purchase and acquire from the Seller, the Securities and any and all rights and benefits incident to the ownership thereof.[10]

The Financing Agreement provides two ways in which the Securities could be transferred. The first provision gives PREI an option to purchase the Securities, while the second mandates that PREI purchase them. Specifically, Section 1.1 of the Financing Agreement pertains to the option to purchase and states:

> The Seller hereby grants to the Buyer the option to purchase the Securities, which right shall be exercisable by the Buyer at any time, at the Purchase Price (as defined [in Section 1.3]). The Buyer shall exercise such option by providing written notice to the Seller of its exercise of such option. The closing of the purchase and sale for the Securities pursuant to this option shall occur no later than ten (10) business days following receipt by the Seller of the Buyer's notice of exercise.[11]

Section 1.2 mandates purchase of the Securities. It states:

> In the event that the Buyer has not exercised its option to purchase the Securities pursuant to the provisions of Section 1.1 above on or before March 16, 2009, the Buyer shall purchase the Securities on March 18, 2009 at the Purchase Price (as defined [in Section 1.3]).[12]

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[10] Compl. Ex. A, Financing Agreement, at 1.

[11] *Id.* § 1.1.

[12] *Id.* § 1.2.

PREI admits that it did not purchase the Securities on or before March 16, 2009[13] and did not close on the purchase of the Securities on or before March 19, 2009.[14] On April 20, 2009, Corkscrew sent a demand letter to PREI requesting that it confirm its intention to buy the Securities and arrange for a closing date.[15] PREI responded by denying that it was required to purchase the Securities under the Financing Agreement. Ultimately, PREI never purchased the Securities, and Corkscrew brought this action seeking to specifically enforce PREI's obligations under the Financing Agreement.

C. Procedural History

Corkscrew filed this action against PREI on May 15, 2009 seeking specific performance of the Financing Agreement or, in the alternative, damages for breach of contract. Corkscrew amended its complaint to add Preferred Real Estate Investments, Inc., f/k/a Preferred Unlimited, Inc., as a defendant.[16] On July 24, 2009, PREI removed this action to the United States District Court for the District of Delaware on diversity grounds.[17] A month later, on August 24, Corkscrew moved to remand on the ground that there was no basis for diversity jurisdiction. In response, on January 13, 2010, the parties stipulated to a remand to this Court and to the dismissal of Preferred Unlimited,

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13 Answer to Second Am. Verified Compl. ¶ 17.

14 *Id.* ¶ 18.

15 Compl. Ex. B.

16 Pl.'s First Am. Verified Compl. ¶ 3.

17 Docket Item ("D.I.") 10.

Inc. as a party, which the District Court granted on January 19, 2010.[18] After the pleadings closed, Corkscrew moved for summary judgment on April 27, 2010. This Memorandum Opinion constitutes my ruling on Corkscrew's motion.

D. Parties' Contentions

Corkscrew requests specific performance of the Financing Agreement or, in the alternative, damages for breach of that Agreement. According to Corkscrew, the Financing Agreement is unambiguous and should be given its plain meaning. Moreover, because PREI admits that it did not fulfill the terms of the Financing Agreement, Corkscrew asserts that the existence of a breach is undisputed, and, as such, it is entitled to judgment as a matter of law.[19]

PREI opposes the motion for summary judgment, arguing that the Financing Agreement is unenforceable due to certain misrepresentations and omissions Corkscrew made in connection with the related Real Estate Agreement.[20] PREI contends that the Real Estate Agreement contains a warranty as to the environmental conditions of the property that is applicable to the Financing Agreement. Specifically, PREI relies on two sections of the Real Estate Agreement. Section 5.1(r)(C) states in relevant part:

> All Hazardous Substances generated by the Seller [*i.e.*, Corkscrew] or any other Person at or in connection with the Real Property have been transported and otherwise handled, treated, and disposed of in compliance with all applicable

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18 D.I. 13.

19 Pl.'s Rep. Br. ("PRB") 12.

20 Def.'s Opp'n 2-3.

> Environmental Laws, Seller will deliver to purchaser the draft and final Phase I report . . . disclosing any Hazardous Substances located at, on or under the Property as described in Section 3.8 hereof, and . . . [there] are, to Seller's knowledge, no Hazardous Substances located at, on or under the Property.[21]

Section 5.1(r)(D) states in relevant part: "[Corkscrew has not] taken any action that will result in any encumbrance, liability or obligation arising out of environmental conditions on, under or about the Real Property."[22]

PREI asserts that, after the closing, it learned of hazardous substances on the property and further claims that the above quoted warranties to the contrary contained in the Real Estate Agreement fraudulently induced it to enter the Financing Agreement.[23] PREI also avers that this matter is not ripe for summary judgment because the parties have not conducted discovery and asks the Court, "at a minimum, [to] allow Defendant ample time to conduct discovery on Defendant's affirmative defenses."[24]

II. ANALYSIS

A. Standard for Summary Judgment

A court grants summary judgment if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file show there are no genuine issues of

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21 Def.'s Opp'n Ex. A, Real Estate Agreement, § 5.1(r)(C).

22 Real Estate Agreement, § 5.1(r)(D); Dempsey Aff. ¶ 12.

23 Def.'s Opp'n 3.

24 *Id.* at 8.

material fact and that the moving party is entitled to a judgment as a matter of law.[25] When considering a motion for summary judgment, the court views the evidence and the inferences drawn therefrom in the light most favorable to the nonmoving party.[26] The court "maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application."[27] Moreover, where "the dispute centers on the proper interpretation of an unambiguous contract, summary judgment is appropriate because such interpretation is a question of law."[28]

In responding to a motion for summary judgment, the nonmoving party may "not rest upon the mere allegations or denials of the adverse party's pleading, but the [nonmoving] party's response, by affidavits or as otherwise provided in [Rule 56], must set forth *specific facts* showing that there is a genuine issue for trial."[29] Thus, it is not

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25 *Twin Bridges Ltd. P'rship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

26 *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

27 *Tunnell v. Stokley*, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006) (quoting *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. May 24, 2000)).

28 *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *2 (Del. Ch. Nov. 8, 2007) (citing *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007)); *see also AHS N.M. Hldgs., Inc. v. Healthsource, Inc.*, 2007 WL 431051, at *3 (Del. Ch. Feb. 2, 2007).

29 Ct. Ch. R. 56(e) (emphasis added).

enough to rely on conclusory allegations; PREI must come forward with specific facts supporting its affirmative defense.[30]

In addition, a party opposing summary judgment may, pursuant to Court of Chancery Rule 56(f), request limited discovery if it cannot present facts essential to oppose the summary judgment motion.[31] Normally, Rule 56(f) comes into play when the party opposing summary judgment cannot state certain facts essential to justify its position because those facts are within the exclusive knowledge of the moving party.[32] To invoke Rule 56(f), the opposing party must submit an affidavit requesting discovery and stating its scope.[33]

B. Does PREI Have a Valid Defense to Enforcement of the Financing Agreement?

Preliminarily, I emphasize that this case is before me on a motion for summary judgment, not a motion to dismiss. Moreover, this case now has been pending for over a year. There has never been a stay of discovery which means the parties have been free to pursue appropriate discovery as they saw fit. As discussed above, to avoid summary

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30 In its reply brief, Corkscrew suggested that PREI had to adduce evidence in support of its fraud in the inducement defense sufficient to meet the particularity requirements of Ct. Ch. R. 9(b). Rule 9(b) applies to pleadings, such as a complaint or answer. The parties have not addressed the applicability of Rule 9(b) in the context of briefing on a motion for summary judgment. Accordingly, I have not relied on that Rule for purposes of this Memorandum Opinion.

31 *von Opel v. Youbet.com, Inc*., 2000 WL 130625, at *1 (Del. Ch. Jan. 6, 2000).

32 *See Scharf v. Edgcomb Corp.*, 2000 WL 1234650, at *2 (Del. Ch. Aug. 21, 2000).

33 *von Opel*, 2000 WL 130625, at *1.

judgment, PREI, as the party opposing the motion, must come forward with sufficient allegations to create a material issue of fact.

Turning to the merits, I note that under Delaware law, a court will enforce a valid contract unless there are defenses to enforcement.[34] Delaware courts interpret contracts using the "objective theory," meaning contracts are given the interpretation that an objective, reasonable third party would assign to the contract.[35] When contract terms are unambiguous, they are given their plain meaning.[36]

Here, apart from the fraud in the inducement defense discussed *infra*, PREI does not dispute the validity of the Financing Agreement. Nor does PREI argue that the contract is ambiguous or deny that it is in breach of it. The only defense PREI offers is fraud in the inducement. To establish that affirmative defense, PREI has the burden to show that (1) Corkscrew made a false statement or representation; (2) Corkscrew had knowledge that the statement was false, or made the statement with a reckless indifference as to the truth of the statement; (3) Corkscrew intended to induce PREI into action; (4) PREI justifiably relied on the representation; and (5) PREI suffered resulting injury.[37] The absence of any one of those elements defeats PREI's defense.

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34 *Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

35 *NBC Universal, Inc. v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005).

36 *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

37 *See Walker v. Res. Dev. Co.*, 791 A.2d 799, 814 (Del. Ch. 2000).

1. Did Corkscrew make a false statement?

PREI first must prove that Corkscrew made a false statement or misrepresentation. The only evidence PREI offers to establish its affirmative defense is an affidavit of Jason Dempsey (the "Dempsey Affidavit"), Vice President of PREI. In substance, Dempsey asserts that Corkscrew misrepresented the environmental conditions of the underlying mining property, thereby violating a warranty contained in the Real Estate Agreement.[38] PREI avers that the parties executed the Real Estate Agreement and the Financing Agreement contemporaneously, and, thus, any fraudulent statements contained in the Real Estate Agreement were intended to, and in fact did, induce PREI to enter into both that Agreement and the Financing Agreement. It is well settled under Delaware law that courts can construe contracts executed at the same time and relating to the same transaction as a single document.[39] PREI argues that the Financing Agreement only came into being because the parties were not able to fully implement the Real Estate Agreement on the closing date. The parties executed the Financing Agreement within days of closing on the Real Estate Agreement, and both Agreements deal with closely related subject matter, including the Holding Company established by the Real Estate

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[38] Dempsey Aff. ¶¶ 10, 15.

[39] *See, e.g.*, *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *9 n.33 (Del. Ch. Oct. 19, 2000); *Crown Books Corp. v. Bookstop, Inc.*, 1990 WL 26166, at *1 (Del. Ch. Feb. 28, 1990); *Ashall Homes Ltd. v. ROK Entm't. Gp. Inc.*, 992 A.2d 1239, 1250 (Del. Ch. 2010).

Agreement. Based on these facts and drawing all inferences in PREI's favor, I find that PREI has a plausible argument that the documents are related.

Corkscrew counters by emphasizing that neither document references the other and both Agreements contain express provisions stating that each document stands alone.[40] Furthermore, it argues that because the Financing Agreement never mentions the underlying property, the condition of the property should have no bearing on the sale of the remaining securities. Corkscrew also asserts that because the laws of two different states govern the two Agreements, it would be unreasonable to infer that the parties intended the agreements to rely on one another.[41]

Both sides present colorable arguments to support their respective positions, but given the procedural context of this case, I must construe all inferences in favor of PREI, the nonmoving party. Therefore, for purposes of this Memorandum Opinion, I assume the Agreements are sufficiently contemporaneous, and that any misrepresentations made in connection with the Real Estate Agreement could support a claim that Corkscrew fraudulently induced PREI to enter into the Financing Agreement. Assuming the Agreements are related, I turn next to the elements of the defense of fraudulent inducement.

In his affidavit, Dempsey identifies two statements from the Real Estate Agreement as misrepresentations. First, Dempsey cites § 5.1(r)(C), which states:

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[40] *See* Real Estate Agreement § 11.5; Financing Agreement § 10.

[41] *See* Real Estate Agreement § 11.11; Financing Agreement § 14.

> All Hazardous Substances generated by [Corkscrew] or any other Person at or in connection with the Real Property have been transported and otherwise handled, treated, and disposed of in compliance with all applicable Environmental Laws, [Corkscrew] will deliver to Purchaser the draft and final Phase I Report (collectively, the "Phase I Report") that has been certified to [PREI], disclosing any Hazardous Substances located at, on or under the Property as described in Section 3.8[42] hereof, and other than those Hazardous Substances disclosed in the Phase I Report, there are, to [Corkscrew's] knowledge, no Hazardous Substances located at, on or under the property.[43]

Second, Dempsey relies on § 5.1(r)(D), which states: "[Corkscrew has not] taken any action that will result in any encumbrance, liability or obligation arising out of environmental conditions on, under or about the Real Property."[44] Dempsey suggests that these statements are false, but PREI has not presented evidence of facts regarding any specific environmental conditions that allegedly make these warranties false. Instead, PREI conclusorily alleges only that it found "various hazardous substances" on the property.[45] In Paragraph 15 of his affidavit, Dempsey avers that PREI learned that Corkscrew misrepresented the environmental conditions after executing the Real Estate Agreement, but, again, does not identify any environmental conditions that potentially would violate the Real Estate Agreement. As Vice President of the PREI, Dempsey

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42 Section 3.8 allows for termination of the Real Estate Agreement based on inspection of the Phase I Report. Neither party made a copy of the Phase I Report a part of the record.

43 Real Estate Agreement, Def.'s Opp'n Ex. A § 5.1(r)(C).

44 *Id*. § 5.1(r)(D); Dempsey Aff. ¶ 12.

45 Dempsey Aff. ¶ 15.

presumably would have access to information regarding the types of substances PREI discovered on the property, when the Company discovered those substances, and whether those substances differed from any that Corkscrew disclosed before the closing in the Phase I Report. Yet, he did not identify a single hazardous substance that PREI found after the closing, let alone indicate whether that substance was mentioned in the Phase I Report, or provide any other relevant details. Thus, PREI has failed to set forth specific facts sufficient to show that Corkscrew made a false statement or misrepresentation.

2. Did Corkscrew have knowledge of a false statement or reckless indifference for the truth?

Even if PREI alleged facts sufficient to support a finding that the statements contained in the Real Estate Agreement were false, it further fails to offer any evidence that Corkscrew *knew* those statements were false or acted with *reckless indifference* as to the truth of a challenged statement. The Dempsey Affidavit contains no allegations regarding Corkscrew's knowledge or recklessness. PREI simply alleges, in a conclusory fashion, that the statement in § 5.1(r)(C), "to [Corkscrew's] knowledge there are no hazardous substances located at, on or under the property," is false.[46] This allegation suffers from the same shortcomings discussed above. To fulfill this element, PREI needed to submit facts showing that Corkscrew had knowledge of the hazardous substances—such as documents disclosing or acknowledging the presence of such substances—or, at the very least, that Corkscrew should have known about the existence

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[46] *Id.* ¶ 11.

of such substances on the property. PREI presumably knows the identity of the substance or substances involved. With the benefit of that knowledge and PREI's majority ownership interest in the property since September 2007, it is reasonable to require PREI to meet its burden of alleging specific facts sufficient to support a claim that Corkscrew knew the representations it made in § 5.1(r) were false, or that it made those representations in reckless disregard of whether they were true.

Even if evidence of Corkscrew's state of mind was outside of PREI's knowledge, Rule 56 required PREI to do more than it did here to respond to the pending motion for summary judgment. As discussed *supra*, Court of Chancery Rule 56(f) authorizes a party opposing summary judgment to file an affidavit requesting limited discovery if the facts it needs to oppose the motion successfully are outside of its control. PREI did not make a proper Rule 56(f) request. The Dempsey Affidavit is not such a request. It recites only cursory factual allegations, makes no request for limited discovery, and offers no explanation as to why Rule 56(f) should apply in this case. As discussed previously, this case has been pending for over a year and discovery has never been stayed. Hence, PREI has had ample time to engage in any discovery it might have needed to enable it to set forth specific facts showing that there is a genuine issue for trial as to its defense of fraud in the inducement. Therefore, I deny PREI's request for additional time for discovery, and hold that Corkscrew has shown that there is no genuine issue of material fact and that

it is entitled to judgment as a matter of law on its claim that PREI breached the Financing Agreement.[47]

C. Specific Performance

The court will order specific performance of a contract when the agreement is clear and definite and the court need not supply any missing terms.[48] A party seeking specific performance must show by clear and convincing evidence that: (1) a valid contract exists; (2) the party is ready, willing, and able to perform; and (3) the balance of the equities tips in favor of the party seeking performance.[49]

Corkscrew has satisfied each of these elements. As discussed *supra*, there is no dispute as to the validity of the Financing Agreement. Moreover, Corkscrew declared its readiness to perform the Agreement in its April 20, 2009 demand letter to PREI, which requested that the sale close promptly and notified PREI that if it did not, Corkscrew would seek other remedies.[50] Finally, the balance of the equities favors specific performance because the Securities represent a minority interest in a privately held limited liability company, and the restriction on their transfer precludes Corkscrew from selling the Securities in any other market. Furthermore, ordering PREI to purchase the

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47 Based on PREI's failure to present sufficient evidence to support either of the first two elements of its fraud in the inducement defense, I need not address any of the other elements.

48 *Ramone v. Lang*, 2006 WL 905347, at *10 (Del. Ch. Apr. 3, 2006).

49 *Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

50 Compl. Ex. B.

remaining Securities will not hinder PREI's ability to pursue any claim it may have for breach of the Real Estate Agreement or other wrongs related to the alleged environmental problems. PREI ultimately may have a claim for breach of the Real Estate Agreement's representations and warranties regarding the environmental conditions on the property. That question, however, is not before me, and I offer no opinion on the merits of such a claim. Rather, I hold only that PREI has failed to present specific facts to support any defense to Corkscrew's claims for enforcement of the Financing Agreement, including the purported defense of fraud in the inducement. Thus, having satisfied all three requirements, Corkscrew is entitled to summary judgment on its claim for specific performance.

III. CONCLUSION

For the foregoing reasons, I grant Corkscrew's motion for summary judgment in all respects and order specific performance of the Financing Agreement. Counsel for Corkscrew shall submit a proposed form of judgment or order reflecting this ruling to opposing counsel for comment, and file the proposed judgment or order within ten (10) days of this Memorandum Opinion.