Exposoft Solutions USA Ltd. v. Coca-Cola Co.

Superior Court of Delaware, New Castle
May 3, 2011, Submitted; June 9, 2011, Decided
C.A. No. N10C-06-162-JRJ CCLD

Reporter: 2011 Del. Super. LEXIS 259; 2011 WL 2685956

Exposoft Solutions USA LTD., A Delaware company, Plaintiff, v. The Coca-Cola Company, a Delaware corporation, Defendant.

Disposition: [*1] Upon The Coca-Cola Company's Motion for Summary Judgment: GRANTED.

Case Summary

Procedural Posture
Plaintiff filed a breach of contract action against defendant, alleging defendant repudiated their agreement. Defendant filed a motion for summary judgment, arguing plaintiff lacked standing because it was not a party to the alleged contract.

Overview
Defendant entered into discussions with a vendor regarding the provision of certain services. Defendant and the vendor executed a non-disclosure agreement (NDA). Thereafter, the vendor filed for bankruptcy and plaintiff was formed. Defendant inquired whether there had been any change in ownership of the vendor. Defendant alleged the response by plaintiff's CEO was at best, misleading, at worst, a completely false statement. Defendant alleged plaintiff failed to make full disclosure regarding the vendor and intentionally misled defendant in the course of the negotiations, which amounted to a ″bait and switch.″ At the time the vendor and defendant executed the NDA, plaintiff did not even exist. There were no facts in the record to show that plaintiff and defendant signed an NDA or that the vendor assigned or was permitted to assign its rights under the NDA to plaintiff. There were no signed agreements between plaintiff and defendant. Consequently, plaintiff lacked standing to bring a claim for breach of contract, and defendant was entitled to judgment as a matter of law.

Outcome
The motion was granted.

Counsel: David L. Finger, Esquire, Finger, Slanina, Liebesman, LLC, Wilmington, Delaware, for plaintiff.

Gregory B. Williams, Esquire, Fox Rothschild, LLP, Wilmington, Delaware, Samuel S. Woodhouse, The Woodhouse Law Firm, Atlanta, Georgia, (pro hac vice), for defendant.

Judges: Jan R. Jurden, Judge.

Opinion by: Jan R. Jurden

Opinion

Jurden, J.

INTRODUCTION

Before the Court is the Coca-Cola Company's (″Coca-Cola″) Motion to Dismiss which has been converted into a Motion for Summary Judgment. [1] Coca-Cola argues this it is entitled to judgment as a matter of law because: (1) plaintiff Exposoft Solutions USA Ltd. (″Exposoft″) lacks standing to bring this breach of contract action because it was not a party to the alleged contract upon which this action is based; [2] (2) Exposoft Solutions, Inc. (″ESI″) filed for bankruptcy and ESI's bankruptcy filing voided the Non-Disclosure Agreement (″NDA″) signed by Coca-Cola and ESI; and (3) Exposoft failed to allege the existence of a mutually binding contractual obligation between Exposoft and Coca-Cola. For the reasons that follow, the Court finds that Exposoft lacks standing to bring this action and Coca-Cola is entitled [*2] to judgment as a matter of law. [3]

FACTS

In July 2008, ESI began discussions with Coca-Cola to provide services in connection with Coca-Cola's sponsorship of the 2010 Vancouver Olympic Games and the

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[1] *See* Order dated January 7, 2011 (Trans. ID. 35259708).

[2] At the October 26, 2010 Hearing on Coca-Cola's Motion to Dismiss, the Court requested briefing on this standing issue. *See* Transcript of October 26, 2010 Hearing on Defendant's Motion to Dismiss (″Hr'g. Tran.″) (Trans. ID. 35843622).

[3] Because the Court finds Exposoft has no standing to bring this suit, it need not address the other arguments for dismissal asserted by Coca-Cola.

2010 FIFA World Cup. [4] In October 2008, ESI and Coca-Cola entered into the NDA to enable ESI to prepare a proposal. In January, 2009, ESI ″underwent a restructuring,″ pursuant to which ESI filed for bankruptcy and dissolved, and Exposoft was formed. [5] Exposoft avers that it (not ESI) and Coca-Cola ″commenced negotiations for commercial relations with respect to the 2010 Olympics and the 2012 FIFA World Cup.″ [6] Coca-Cola required event registration services for the events, in addition to complex customized software to manage various aspects of the event registration [*3] processes. [7] On January 20, 2009, Bassel Annab (″Annab″), the President and CEO of Exposoft, sent an email to Veda Burns (″Burns″), Coca-Cola's Marketing Services Procurement Manager, which attached documents identifying Exposoft as the contracting party, not ESI. [8] In response, Burns sent an email to Annab on January 28, 2009 in which she asked:

> I would...like to inquire as to whether there has been any change in ownership for Exposoft. I notice per your draft of the MSA that Exposoft is now a Delaware corporation rather than Ontario and you mentioned that you had moved and changed telephone numbers. Please provide an ownership update and your new contact information.

Annab responded to Burns' inquiry by email the same day:

> We are [*4] still based in Ontario. We have just moved our operations address as our previous lease had expired. We have since our previous engagement with Coca-Cola set up a Delaware LLC to expedite business in the U.S. as most of our customers are American based. [9]

According to Exposoft, Coca-Cola expressed a ″keen sense of urgency″ with respect to the negotiations. [10] During the negotiations, which continued into early February 2009, ″all of the commercial terms of the relationship were mutually agreed upon, including but not limited to contract terms; pricing; licensing fees; payment schedule; deliver schedule, etc.″ [11] As of early February 2009, ″the only matters left to be determined were the specific language of the legal agreements.″ [12]

In March, 2009, Annab and Burns met in person. Exposoft alleges that during this meeting Annab explained ″the overall restructuring of the overall organization including the bankruptcy of the Canadian entity [ESI] and that the Delaware entity [Exposoft] would be the contracting party....there was no objection, and Exposoft moved forward providing services as contemplated.″ [13] As part of Coca-Cola's due diligence, [*5] Exposoft was required to: (1) complete, *inter alia*, an IT audit and insurance review; (2) customize the application to meet Coca-Cola's needs; (3) configure the application to Coca-Cola's specifications; (4) launch the application; (5) have approved personnel support the program; and (6) complete extensive legal documentation related to the same. [14] Exposoft alleges that it and Coca-Cola reached ″a concluded agreement″ on March 26, 2009. [15] Exposoft executed Statements of Work (″SOW's″), the Master Services Agreement (″MSA″), (collectively with the SOW's, the ″Agreement″), and couriered them to Coca-Cola. [16] Subsequent to this, a ″minor issue″ arose with respect to additional insurance indemnity provisions requested by Exposoft. Exposoft alleges that ″[a]n

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[4] Amended Complaint at ¶ 3 (Trans. ID. 34160358).

[5] *Id.* at ¶ 4.

[6] *Id.* at ¶ 5. There appears to be an error in paragraph 5 of the Amended Complaint. According to Statement of Work No. SOW 04, the FIFA World Cup at issue is 2010, not 2012. *See* Schedule A Statement of Work No. SOW 04 FIFA World Cup 2010 Sports Core Services, attached as Exhibit A to Exposoft's Memorandum in Response to Coca-Cola Company's Motion to Dismiss (Trans. ID 33852350).

[7] *Id.* at ¶ 4.

[8] *Id.* at ¶ 9.

[9] *Id.*

[10] *Id.* at ¶ 6.

[11] *Id.* at ¶¶ 6, 7.

[12] *Id.* at ¶ 8.

[13] *Id.* at ¶ 10.

[14] *Id.* at ¶ 11.

[15] *Id.* at ¶ 12.

[16] *Id.*

'Addendum' to the MSA was negotiated and mutually prepared by the parties, being that the MSA had already been executed by Exposoft and accepted by Coca-Cola." [17]

On April 2, 2009, a representative of Coca-Cola (a marketing paralegal) stated in an email to Annab and Exposoft's attorney, "we are glad to wrap this up," and instructed Exposoft to:

> [P]rint and sign 2 copies of [*6] the clean version and return them to me at the below address for further handling. To expedite this matter you may also fax me a signed copy of the Addendum...and then we can follow up with the originals. [18]

According to Exposoft, at all material times, Coca-Cola "conducted itself in a manner consistent with the intention that the main commercial and legal terms of the Agreement had been mutually agreed upon and that performance of same had commenced." [19] Further, according to Exposoft, "there was a meeting of the minds between Exposoft and Coca-Cola as to all material terms of the [A]greement." [20]

On March 30, 2009, Coca-Cola issued a Purchase Order ("P.O.") denoting a "delivery date" of March 12, 2009. The P.O. identified the vendor as "Exposoft Solutions Ltd." Exposoft avers that "[a]lthough the word 'USA' was inadvertently omitted from the title, the intent that the vendor be Exposoft is made clear by the fact that the address listed in the P.O. is that of Exposoft's American office." [21] The P.O. stated that "SERVICE HAS BEEN RENDERED." [22]

In mid-April, Coca-Cola "purportedly repudiated the contract after a trades magazine [*7] article came to its attention, which described that ESI was involved in bankruptcy proceedings." [23] Coca-Cola alleges that Exposoft failed to make full disclosure regarding ESI and "intentionally misled" Coca-Cola in the course of the parties' negotiations. [24] Coca-Cola also claims that it issued the P.O. in error. [25]

Coca-Cola accuses Exposoft of deliberately and clandestinely substituting Exposoft for ESI in the negotiations and on the drafts of the SOW's and MSA provided to Coca-Cola. [26] Coca-Cola says this amounted to a "bait and switch." [27] Coca-Cola points out that ESI created Exposoft on December 24, 2008, without disclosing to Coca-Cola that this new entity had been created, and that ESI filed for bankruptcy on January 21, 2009, without disclosing this fact to Coca-Cola. [28] According to Coca-Cola, once Coca-Cola noticed the "slight variation in the Exposoft name" on the SOW's and MSA, it specifically asked Annab, Exposoft's CEO, about the name change. Coca-Cola alleges that Annab's response was "at best, misleading, at worst, a completely false statement." [29] Coca-Cola points out that Annab's January 28, 2009 email fails to mention anything about [*8] ESI's bankruptcy, yet ESI filed bankruptcy the very next day. [30] Coca-Cola also points out that Coca-Cola signed an NDA with ESI, not Exposoft, and there is no averment in the Amended Complaint that ESI assigned its rights under the NDA to Exposoft. [31] Thus, argues Coca-Cola, Exposoft has failed to state a claim for breach of contract and its Amended Complaint should be dismissed.

DISCUSSION

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[17] *Id.* at ¶ 14.

[18] *Id.* at ¶ 15.

[19] *Id.* at ¶ 16.

[20] *Id.* at ¶ 24.

[21] *Id.* at ¶ 17.

[22] *Id.*

[23] *Id.* at ¶ 20.

[24] *Id.*

[25] *Id.* at ¶ 21.

[26] *See* The Coca-Cola Company's Response to the Supplemental Memorandum of Exposoft Solutions USA LTD. in Response to The Coca-Cola Company's Motion to Dismiss ("Coca-Cola's Resp.") at p. 4 (Trans. ID. 34485997).

[27] *Id.* at p. 7.

[28] *Id.* at p. 4.

[29] *Id.*

[30] *Id.* at p. 5.

[31] *Id.* at p. 6.

HN1 Summary judgment is appropriate ″if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.″ [32] ***HN2*** In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party [33] and the moving party bears the initial burden of establishing that material facts are not in dispute. ***HN3*** [34] Summary judgment will not be granted if, after [*9] viewing the evidence in the light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate. [35] If, however, there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law, summary judgment will be granted. [36]

At the outset, the Court is troubled by the fact that the plaintiff's original complaint contained an untrue allegation. Plaintiff initially alleged that ″the parties had negotiated similar agreements in the past....″ [37] When specifically questioned at oral argument about this material averment, it became clear that Exposoft had never negotiated an agreement (much less a similar agreement) with Coca-Cola in the past. The following exchange occurred between the Court and counsel on that issue:

> The Court: ...it's troubling [*10] to the Court that there is a statement in your complaint that says, ″Being that the parties had negotiated similar agreements in the past, it was mutually decided to base the agreements on those previous versions.″ That averment which I need to accept as true at this stage is untrue, and it's troubling to me because that's a very important component of a contract claim, and you would agree with that, would you not —
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> Exposoft's Counsel: I would.
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> The Court: — ...I'm troubled by the fact that there is an untrue statement in a complaint filed with this Court that's pretty material to what we're here about.
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> Exposoft's Counsel: Your Honor, I'm going to walk back one step with this statement. It appears from the argument that counsel has made that that is untrue because of the recentness of the incorporation or formation of the USA limited. I need an opportunity to confer with my client to confirm that it is, in fact, untrue. It appears on its surface to be, and that is why I would tend to agree. However, I cannot represent from my client that it's untrue before I have a chance to confirm it. This was the information that they gave me, Your Honor, that they've made an argument which needs to [*11] be explored, and I agree, and I'm certainly going to explore it, and we will certainly report back to the Court as to whether that is untrue and needs to be changed or what. Because as I stated, I don't want to put my client in that position as I stand before you without having a further opportunity to confirm it with them.
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> The Court: All right, I would like an answer on that very shortly.
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> Exposoft's Counsel: Yes, Your Honor.
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> The Court: I want to get to the bottom of the standing issue. You claim that you are sandbagged or surprised by the arguments made here, but standing was asserted in the moving papers. But, I will allow opportunity for submissions on the standing argument. I'm not sure what discovery you would need, ...but I'm going to open up the record to allow Coca-Cola to provide what they have to show they thought they were dealing with a completely different company, and then all of a sudden the Delaware company appears. If discovery is necessary for the standing issue, I'm willing to listen to exactly what that discovery will be, but at this point I'm not sure you need discovery. I do need to hear additional - I'm going to open up the record for the purposes of getting to [*12] the bottom of this. [38]

The Court ordered Exposoft to correct this aver-

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

[33] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

[34] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[35] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879-80 (Del. Super. 2005).

[36] *Id.* at 879; *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973); *Ebersole v. Lowengrub*, 54 Del. 463, 180 A.2d 467, 470, 4 Storey 463 (Del. 1962).

[37] Complaint at ¶ 6 (Trans. ID. 31669764).

[38] *See* Hr'g. Tran. at 30-33.

ment if it was untrue. [39] In its Amended Complaint, Exposoft amended this averment to read, ″representatives of the parties had negotiated similar agreements in the past.″ [40] It appears that this amended allegation is, at best, misleading, at worst, untrue. To say ″representatives of the parties″ suggests that representatives of Exposoft, acting on Exposoft's behalf, negotiated similar agreements with Coca-Cola. This is untrue. Representatives of ESI and Coca-Cola had negotiated similar agreements in the past. [41] It is against this backdrop (which Coca-Cola characterizes as ″subterfuge″ [42]) that the Court considers whether Coca-Cola is entitled to judgment as a matter of law.

It is undisputed that ESI and Coca-Cola signed the NDA in October, 2008, not **Exposoft** and Coca-Cola. [43] In fact, at the time ESI and Coca-Cola executed the NDA, Exposoft did not even exist. [44] ESI underwent a restructuring in January 2009 [*13] which resulted in ESI filing for bankruptcy protection. [45] When Coca-Cola questioned Annab about the substitution of Exposoft for ESI in the SOW's and MSA, Annab did not tell Coca-Cola that ESI had filed bankruptcy and stated instead: ″[w]e are still based in Ontario we have just moved our operations address as our previous lease had expired. We have since our previous engagement with Coca-Cola set up a Delaware LLC to expedite business in the U.S. as most of our customers are American based.″ [46] Nothing in Annab's Affidavit changes the analysis. [47] There are no facts in the record to show that Exposoft and Coca-Cola signed an NDA or that ESI assigned (or was permitted to assign) its rights under the NDA to Exposoft. [48] There are no signed agreements between Coca-Cola and with Exposoft. [49] Consequently, Exposoft lacks standing to bring a claim for breach of contract, and Coca-Cola is entitled to judgment as a matter of law.

IT IS SO ORDERED.

Jan R. Jurden, Judge

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[39] It is worth noting that this Judge has never before had to issue such an order.

[40] Amended Complaint at ¶ 8.

[41] Coca-Cola's Resp. at p. 7.

[42] *Id.*

[43] Amended Complaint at ¶ 3.

[44] ESI was not created until December 28, 2008. *See* Coca-Cola's Response at p. 2-3.

[45] *Id.* at ¶ 4.

[46] *Id.* at ¶ 9.

[47] Affidavit of Bassel Annab (Trans. ID. 36923701). *See* Coca-Cola's April 8, 2011 letter filed in response to Annab's Affidavit (Trans. **[*14]** ID. 36944831) (″Despite the submission of the Affidavit of Bassel Annab...the record remains clear that the Coca-Cola Company never entered into a contract with Exposoft USA and Exposoft USA does not have standing to assert the breach of contract claim asserted in this action.″). Coca-Cola argues that Annab's Affidavit contains several ″slick inconsistencies″ and ″falsities.″ Suffice it to say the Court agrees with Coca-Cola that there are troubling inconsistencies and that Exposoft's averment in the Amended Complaint that ″representatives of the parties had negotiated similar agreements in the past″ is inaccurate and misleading. Annab's credibility is also undercut by his failure to advise Coca-Cola of ESI's bankruptcy filing. But whether the Court finds Annab credible or not, the undisputed fact remains that ESI and Coca-Cola were the parties to the contract, not Exposoft and Coca-Cola.

[48] The Court notes that, in its original Complaint, Exposoft alleged that it and ESI were ″completely unrelated legal entities.″ *See* Complaint at ¶ 22.

[49] Exposoft highlights the Purchase Order, arguing that it illustrates Coca-Cola's intent to contract with Exposoft not ESI. However, not only does the **[*15]** Court find the erroneous issuance of the Purchase Order by Coca-Cola not material, but the Purchase Order states that Exposoft Solutions Ltd. is the contracting party not Exposoft USA. *See* Hr'g Tran. at p. 20-21 (″The Court: [The Purchase Order] says Exposoft Solutions Ltd. It does not say USA on the P.O. [Exposoft's Counsel] I agree, it doesn't say USA on the P.O.″).