

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[FILED: April 2, 2015]

MANAGEMENT CAPITAL, LLC,
Plaintiff,

v.

F.A.F., INC. and ARTHUR
FIORENZANO,
Defendants.

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C.A. No. PB 08-2364

DECISION

SILVERSTEIN, J. Before the Court for decision is Defendant F.A.F., Inc.’s (F.A.F.) Motion for Summary Judgment pursuant to Super. R. Civ. P. 56 (Rule 56) as to Counts I, II, and V of Plaintiff Management Capital, LLC’s (Management) Complaint. Following a hearing on the Motion, the Court permitted both parties to submit supplemental briefing on the issue of whether F.A.F. had repudiated its obligations under a Common Stock Warrant (Warrant) held by Management. Thereafter, a second hearing was held. In moving for summary judgment, F.A.F. principally argues that it did not repudiate the Warrant because it acted in accordance with the terms set forth therein in refusing to honor Management’s attempted put¹ of the Warrant. Further, F.A.F. argues that even if the Court were to find repudiation, Management is not entitled to relief because repudiation, in fact, would not excuse Management’s required performance—i.e., Management would have had to exercise the Warrant, if at all, by one of two alternative

¹ The term “put” as used throughout this Decision refers to an “option to sell something (esp. securities) at a fixed price even if the market declines,” or “the right to require another to buy.” Black’s Law Dictionary 1268 (10th ed. 2014) (defining “put option”); cf. Lohnes v. Level 3 Commc’ns, Inc., 272 F.3d 49, 53 (1st Cir. 2001) (“A stock warrant is an instrument that grants the warrant holder an option to purchase shares of stock at a fixed price.”). An option to purchase shares additionally may be structured in accordance with a predetermined formula.

methods in order to obligate F.A.F. to perform under the agreement. F.A.F. claims Management's rights under the Warrant have terminated because it never exercised the Warrant. In moving for summary judgment, F.A.F. also requests the Court to decline any invitation by Management to reform the Warrant. Management opposes F.A.F.'s Motion.

I

Facts and Travel

On October 9, 2002, Management Solutions, LLC (Solutions), an affiliate of Management, sent correspondence to Arthur Fiorenzano (Fiorenzano), President of F.A.F.,² confirming F.A.F.'s engagement of Solutions to assist in developing a strategy to resolve a judgment rendered against F.A.F. in an unrelated lawsuit. See Pl.'s Opp. to Summ. J. Ex. 1 at 1. As part of the agreement, upon the settlement of the lawsuit, F.A.F. would grant Solutions a warrant for the purchase of 10% of F.A.F.'s capital stock. See id. The October 9, 2002 letter provided the applicable terms of the warrant (attached as Exhibit A to the letter), which included a provision that the warrant may be exercised in whole or in part any time prior to December 31, 2007, and established the put and call rights to be exercised any time after that same date. See id. Ex. 1 at 3.

On June 20, 2003, Management³ and F.A.F. executed the Warrant, whereby Management, as holder, was entitled to purchase the "Warrant Shares"⁴ at an exercise price of

² F.A.F. is a Rhode Island company originally engaged in the business of manufacturing costume jewelry. See Fiorenzano Dep. 11:9-14, Jan. 26, 2010.

³ Solutions duly assigned its rights to Management.

⁴ As originally contemplated in the October 9, 2002 letter, the "Warrant Shares" were defined in the Warrant to mean "the number of shares of common stock of [F.A.F.] as shall equal Ten (10%) Percent of the capital stock of [F.A.F.] on the date of exercise calculated on a fully diluted basis taking into account all warrants or other rights to acquire stock." (Def.'s Opp. to Summ. J. Ex. 1 at 1).

\$710,000 (termed the “Exercise Price”). (Arthur Fiorenzano Aff. Ex. A, June 2, 2014). In relevant part, the Warrant provided, as follows:

“3.1 This Warrant may be exercised in whole or in part at any time by the registered holder by the surrender of this Warrant at any time after the date hereof and before 5:00 p.m. on: (a) the date which is seventy-five (75) days after receipt by [Management], or any subsequent holder hereof, of the audited financial statements of the Corporation for the year ending *December 31, 2007*; or (b) *October 31, 2007*, whichever is earlier to occur (“Expiration Time”); together with payment to the Corporation of the Exercise Price (or portion thereof) for the shares to be purchased hereunder.” (Def.’s Opp. to Summ. J. Ex. 1 at 1) (emphasis added).

The Warrant also provided in Section 13, entitled “Put and Call Rights”:

“At any time after 5:00 p.m. on (a) the date which is forty-five (45) days after receipt by [Management], or any subsequent holder hereof, of the audited financial statements of the Corporation for the year ending *December 31, 2007*; or (b) *September 30, 2007*, whichever is the earlier to occur, [F.A.F.] shall have a call and [Management] or any subsequent holder hereof shall have a put with respect to the Warrant, or the shares issued pursuant to this Warrant, if applicable. The Closing of the purchase and sale shall take place within 120 days of the date of exercise of the put or call. The purchase price for the Warrant, or the shares issued pursuant to the Warrant, if applicable shall be determined and paid as provided in Section 14 hereof.” (Def.’s Opp. to Summ. J. Ex. 1 at 1) (emphasis added).

As Robert D. Wieck (Wieck), counsel for F.A.F., acknowledged by affidavit, typographical errors occurred at some point during the drafting process of the Warrant. See Wieck Aff. ¶ 18, Apr. 6, 2012. Indeed, in a letter from Management to Fiorenzano dated September 28, 2007, Management brought to the attention of F.A.F. the typographical errors, which Management alleged occurred with respect to the dates of “October 31, 2007” in Section 3.1 and “September 30, 2007” in Section 13. See Fiorenzano Aff. Ex. B. Specifically, Management asserted those dates should have read “October 31, 2008” and “September 30,

2008,” respectively, and requested that the Warrant be amended. See id.; see also Ernest D. Humphreys Aff. ¶ 9, July 31, 2012 (noting typographical error as to the “drop dead” expiration dates for Warrant); accord Armand Almeida Aff. ¶ 2, Feb. 6, 2008 (noting two mistakes in Warrant). Additionally, Management stated in the September 28, 2007 letter that in order to preserve its rights under the Warrant, it “believe[s] that it is necessary for [it] to exercise its put rights as set forth in the Warrant” and “[t]herefore, [it] hereby provides notice of the exercise of its right to put the Warrant.” (Fiorenzano Aff. Ex. B).

Following the September 28, 2007 letter attempting to put the Warrant, Wieck sent a letter to Humphreys of Management, dated October 1, 2007, indicating F.A.F.’s contrary interpretation of the typographical errors. See Supplemental Mem. in Supp. of Pl.’s Obj. to Mot. Summ. J. Ex. 14. In that letter, Wieck conveyed his understanding of the errors, stating he believed the intent of the parties was that the Warrant would expire prior to December 31, 2007.

Id. He further stated:

“My file revealed that this drafting error resulted from your request to create a window for a contemporaneous exercise of the Warrant and the Put. In the 10/9/02 letter agreement and the initial draft Warrant which you prepared, the Put option could only be exercised after the Warrant option was exercised. During our negotiations, you indicated to me that for tax reasons, i.e. to preserve capital gains status you wanted to be able to ‘put’ the Warrant without exercising the Warrant, i.e. put the Warrant vis à vis ‘put’ the shares.” Id.

Wieck also noted F.A.F.’s agreement to that “window” to put the Warrant; however, he pointed out that F.A.F. had mistakenly referred to the 2007 financial statements instead of the 2006 financial statements. See id. In conclusion, the letter stated:

“In sum, it is quite clear to me that the parties always intended that: (a) the Warrant had to be exercised prior to 12/31/07; and (b) the Put could be exercised after 12/31/07. The error occurred when we

drafted the window to permit the exercise of the Put prior to the expiration of the Warrant.” Id.

The errors regarding the dates listed in Sections 3.1 and 13 of the Warrant ultimately led to a dispute among the parties as to when and how Management could exercise its rights. Both parties agree that the Warrant contains mistakes as to the correct dates on which Management could exercise or put the Warrant. Following the September 28, 2007 letter, Management also sent an email dated December 31, 2007, evidencing Management’s intent to put the Warrant, stating Management “hereby exercises its right to purchase shares of FAF under the terms of the Warrant.” (Pl.’s Obj. to Mot. Summ. J. Ex. 6).

F.A.F. filed for summary judgment on June 11, 2014. Management commenced this action on March 21, 2008 setting forth five counts: reformation of the Warrant (Count I), declaratory judgment (Count II), breach of good faith and fair dealing (Count III), breach of fiduciary duty (Count IV); and injunctive relief (Count V). As stated above, two hearings were held on the Motion, with the parties focusing on issues relative to repudiation at the second hearing.

II

Standard of Review

The procedure by which a trial justice reviews a motion seeking summary judgment has been well-documented by our Supreme Court and need not be exhaustively discussed here. See, e.g., Estate of Giuliano v. Giuliano, 949 A.2d 386, 391 (R.I. 2008). “A hearing justice who passes on a motion for summary judgment ‘must review the pleadings, affidavits, admissions, answers to interrogatories, and other appropriate evidence from a perspective most favorable to the party opposing the motion.’” Id. (quoting Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981)). Furthermore, “[t]he hearing justice may grant the motion for summary judgment only if, after

conducting that required analysis, he or she determines that ‘no issues of material fact appear and the moving party is entitled to judgment as a matter of law’” *Id.* (quoting *Steinberg*, 427 A.2d at 340). Importantly, “in passing on a motion for summary judgment, the question for the trial justice is whether there is a genuine issue as to any material fact and not how that issue should be determined.” *O’Connor v. McKanna*, 116 R.I. 627, 633, 359 A.2d 350, 353 (1976).

III

Discussion

A

Parties’ Interpretations of the Typographical Errors

In its original memorandum submitted in support of its Motion, F.A.F. laid out the three possibilities of dates resulting from the various interpretations of the typographical errors. First, according to the provisions of the Warrant, under section 3.1, Management may exercise its rights at any time after the earlier of (a) 75 days after Management’s receipt of the audited financial statements of F.A.F. for the year ending December 31, 2007 or (b) October 31, 2007. F.A.F. claims that the intended financial statement date should be December 31, 2006 (and not 2007, as the Warrant actually stated). The 2006 financial statements were purportedly delivered to Management on May 1, 2007. Therefore, F.A.F. claims that the Warrant under § 3.1 would have expired on July 14, 2007 (75 days after the receipt of the 2006 financial statements), and under § 13, Management’s put commencement date would be June 14, 2007. Second, F.A.F. claims a literal reading of the Warrant means that pursuant to § 3.1, the Warrant was to expire on October 31, 2007 (as that date was the earlier date because Management would not have received the 2007 financial statements until several months later), or Management could have put the Warrant, under § 13, on September 30, 2007. Third and last, F.A.F., pursuant to the theory

adopted by Management, recognizes that if the typographical errors related to the year of the fixed date options (rather than the dates of the financial statements), then under § 3.1, the Warrant should have expired on October 31, 2008 and, under § 13, Management's put commencement date was September 30, 2008. Regardless of which dates are ultimately held to control, F.A.F. maintains that Management had only two possible ways to utilize the Warrant and that it failed to timely exercise either.⁵

On the other hand, Management claims that the above-noted third interpretation of the errors should control, as the dates in section 3.1 and 13 of the Warrant should read 2008 (and not 2007, as actually provided for in the Warrant). Management argued in its original opposition to the Motion that, pursuant to section 3.1, the "drop dead" date should be October 31, 2008 and Management attempted to exercise the Warrant on December 31, 2007 via an email to F.A.F. Furthermore, Management originally argued that its right to put the Warrant never expired because there was no specific expiration date contained in the Warrant. In short, Management

⁵ According to F.A.F., there were only two methods by which Management could exercise its rights under the Warrant: (a) tendering the Exercise Price of \$710,000 to F.A.F. in return for Management's receiving F.A.F. shares equal to 10% of its stock (termed the "Cash Settlement Method") or (b) tendering the Warrant to F.A.F. and in return Management would receive the net value of the Warrant which is calculated as the purchase price less the Exercise price of \$710,000 (termed the "Net Settlement Method"). F.A.F. argues that the return to Management is the same regardless of which method of exercise is used.

F.A.F. asserts Management failed to exercise either method. F.A.F. claims Management did not exercise the Cash Settlement Method which could have been exercised any time during the period from June 20, 2003 to October 31, 2008 (if using Management's interpretation of the error). According to the affidavit of Fiorenzano, Management did not exercise the Warrant under this Method. See Fiorenzano Aff. ¶ 3 ("At no time since the issuance of the Warrant did [Management] ever tender \$710,000 to [F.A.F.] and request 10% of [F.A.F.'s] stock in return for said payment."). F.A.F. argues Management similarly did not exercise its rights under the Net Settlement Method. F.A.F. contends that Management could have exercised its rights pursuant to the Net Settlement Method at any time after the put commencement date until the respective expiration dates occurred. As to this method, F.A.F. claims that Management's attempted exercise of the Warrant through written notice dated September 28, 2007 fell outside any potential window and, thus, (because it was either too early or too late) the rights under the Warrant were not timely exercised.

argued that at the very least, issues of fact existed vis à vis which actual dates were intended by the parties and whether any rights of Management remain in the Warrant. In addition to those arguments, at the September 29, 2014 hearing (and further in its supplemental memorandum), Management asserted that whether or not it complied with any of the three various potential time periods to exercise or put the Warrant was not actually the correct issue.⁶ Rather, Management currently argues that it was excused from any performance required under the Warrant because of F.A.F.'s alleged repudiation via the October 1, 2007 letter.

As a result of the recent arguments advanced by F.A.F. and Management with respect to issues of repudiation, the Court permitted supplemental brief as to those new issues. The Court will now address these issues first and will then discuss remaining issues, if any, including those issues pertaining to Management's requested reformation of the Warrant.

B

Management's Alleged Failure to Plead Repudiation

F.A.F. argues in its supplemental memorandum that Management failed to specifically plead a count for breach and/or anticipatory breach. As a result, F.A.F. argues the Court should reject such arguments even with a liberal reading of the Complaint. Management, however, argues the mere fact that it did not explicitly set forth a count for repudiation should not preclude it from asserting that it was excused from performance. More specifically, Management contends that it should be permitted to assert repudiation because it alleged a count for breach of the duty of good faith and fair dealing—a count which is inherently linked to an action for breach of contract. If Management has effectively asserted a claim for breach of contract, then,

⁶ Management maintains that it did not abandon the arguments raised in its original objection to the Motion when it advanced the theory of repudiation. As this issue will ultimately prove dispositive of F.A.F.'s Motion for Summary Judgment, the Court need not engage in a substantial analysis of those points.

as it argues, it necessarily must follow that it was justified in claiming an excuse of performance regardless of whether the breach was based on the duty of good faith and fair dealing or repudiation. In response to any assertion by Management that this Court should liberally construe its Complaint, F.A.F. contends that an examination of the Complaint here “reveals not a trace of repudiation.” The Court disagrees.

It strikes the Court that the appropriate vehicle for addressing F.A.F.’s arguments here is an amendment of the pleadings brought under Super. R. Civ. P. 15 (Rule 15). Rule 15(a) provides:

“A party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served Otherwise a party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.”

Similarly, section (b) of Rule 15 states: “When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” As set forth in Rule 15, the Court has discretion whether to grant leave and allow a party to amend its pleadings. Our Supreme Court has “consistently interpreted Rule 15(a) to allow trial justices to grant amendments to the pleadings liberally if justice so requires.” Faerber v. Cavanagh, 568 A.2d 326, 328-29 (R.I. 1990). “[The Court’s] liberal interpretation of Rule 15(a) encourages the allowance of amendments in order to facilitate the resolution of disputes on their merits rather than on blind adherence to procedural technicalities.” Wachsberger v. Pepper, 583 A.2d 77, 78 (R.I. 1990). With that in mind, “[t]he question of prejudice to the party opposing the amendment is central to the investigation into whether an amendment should be granted.” Harodite Indus., Inc. v. Warren Elec. Corp., 24 A.3d 514, 531 (R.I. 2011) (quoting Faerber, 568 A.2d at 329).

Moreover, it is generally held that a court may amend the pleadings before or after judgment in order to conform to the evidence. See, e.g., MRI Enters., Inc. v. Comprehensive Med. Care of New York, P.C., 996 N.Y.S.2d 119, 120-21 (N.Y. App. Div. 2014) (“[T]he Supreme Court providently exercised its discretion in, sua sponte, amending the pleadings”), leave to appeal denied, No. 2014-1222, 2015 WL 753885 (N.Y. Feb. 24, 2015); Green v. Hooper, 205 P.3d 134, 139 (Wash. Ct. App. 2009) (“Under [Rule 15(b)], a trial court on its own motion may amend pleadings to conform to the evidence and issues actually litigated before the court in order to avoid the necessity of a new trial and a multiplying of lawsuits.”). In Green, the Washington Court of Appeals recognized that Rule 15(b) permits the Court to amend the pleadings but such an amendment must not “unfairly prejudice a party’s ability to present a defense.” Green, 205 P.3d at 140.

Here, the question is whether a Rule 15(a) or (b) amendment is necessary because of Management’s contention that an argument for repudiation is inherently subsumed in another cause of action (i.e., inferentially alleged in its breach of good faith and fair dealing count). In order to set aside any doubt on this issue, the Court, on its own motion, elects to treat the pleadings as amended in order to reflect Management’s argument that the October 1, 2007 letter constitutes F.A.F.’s repudiation. See id. at 139. While the Green court found the trial court had abused its discretion when it allowed a new cause of action, the requisite finding of prejudice and lack of a fair opportunity to rebut the claim to the defendant does not similarly exist here. See id. at 140. In fact, both parties have substantially briefed the issue of repudiation in their summary judgment papers, including F.A.F.’s second supplemental memorandum. As a result, the Court can find no prejudice to F.A.F. that would bar such an amendment at this time. The Court

therefore rejects F.A.F.'s argument that repudiation cannot be argued by Management because no specific count with respect thereto is expressly alleged in the Complaint.⁷

In recognizing our Supreme Court's liberal construction of Rule 15(a) and the general rule that a Court can amend the pleadings on its own motion under Rule 15(b), the Court finds the pleadings so amended.⁸ Whether those arguments prove persuasive to the Court to warrant a denial of summary judgment based on the existence of a genuine issue of material fact is the ultimate issue that the Court will now address.

C

Alleged Anticipatory Breach of Contract

The arguments regarding repudiation can be grouped into two main issues for the Court to resolve. First, the Court must determine whether the letter sent by F.A.F., dated October 1, 2007—sent in response to Management's September 28, 2007 letter attempting to put the Warrant—amounted to a repudiation of the Warrant. Second, assuming the Court finds repudiation, the Court must then determine what action, if any, was required by Management in response thereto. In other words, if F.A.F. is found to have repudiated, was Management nonetheless still required to attempt to exercise its rights under the Warrant prior to October 31, 2008 or was it excused from performance.⁹

⁷ See *infra* Part III.B for a discussion of whether F.A.F. actually repudiated the Warrant to justify Management's claimed excusal of performance.

⁸ Additionally, in accordance with the provisions of Rule 15(a) and (b), Management is hereby directed to file an amended complaint setting forth a claim of repudiation as discussed herein.

⁹ Using Management's interpretation of the typographical errors in the Warrant, Management would have to exercise the Warrant pursuant to either the Cash Settlement Method or the Net Settlement Method at some point prior to October 31, 2008. Originally, according to Management, there was no express or definite expiration date for its ability to put the Warrant or for F.A.F.'s ability to call the Warrant. See Pl.'s Obj. to Mot. Summ. J. 17. This contention, the so-called "infinity put" argument, was alleged by F.A.F. to contradict the above-referenced negotiated window, *supra*, at 4-5, wherein Management would not have to exercise the Warrant

Setting aside for the moment the underlying dispute as to what dates actually control for purposes of exercising or putting the Warrant, Management's argument in support of repudiation is as follows. Based on F.A.F.'s assertion that the expiration date of the Warrant was July 14, 2007 (the date that is 75 days after Management's receipt of the 2006 financial statements on May 1, 2007), Management argues any attempt to exercise the Warrant after that date would be untimely. That conclusion is due to the fact that F.A.F. stated in the letter its belief that § 3.1 actually intended the expiration of the Warrant to occur when Management received the 2006 financial statements rather than the 2007 financial statements. Therefore, Management argues its receipt of that letter on October 1, 2007 effectively conveyed F.A.F.'s position that July 14, 2007 was F.A.F.'s intended expiration date of the Warrant. Accordingly, Management argues F.A.F. took the position that it was not going to recognize any future attempt to exercise the Warrant because it had already expired. Yet, assuming Management's date interpretations are indeed correct, (that the Warrant would not expire until October 31, 2008), then F.A.F.'s refusal to accept any future exercise after October 1, 2007 amounts to an anticipatory breach of the Warrant.¹⁰

before expiration in order to put the Warrant, *i.e.*, instead of paying \$710,000, that sum would be credited against the exercise price of the Warrant. See Wieck Aff. ¶ 8. In its later filing, however, Management does acknowledge that it had the opportunity to put the Warrant between September 30, 2008 and October 31, 2008. Yet, the parties do not dispute that Management prematurely attempted to put the Warrant prior to the "literal" commencement date of September 28, 2007. See Pl.'s Obj. to Mot. Summ. J. 17. Be that as it may, by virtue of F.A.F.'s alleged repudiation, Management argued any attempt to later exercise the Warrant after the October 1, 2007 letter would have been futile.

¹⁰ Furthermore, Management takes the position that F.A.F. repudiated the Warrant when it failed to produce the 2007 financial statements. According to Management, fiscal year 2007 was intended by the parties to be considered in the evaluation of whether to exercise the Warrant. When F.A.F. failed to produce those financial statements however, Management argued such failure constituted repudiation.

Taking up the first issue—whether, as a matter of law, the October 1, 2007 letter constituted a repudiation of the Warrant—it generally is held in Rhode Island that in order to establish an anticipatory breach of contract, the other party’s refusal to perform must be “positive and unconditional.” Thompson v. Thompson, 495 A.2d 678, 682 (R.I. 1985) (quoting 11 Williston, Contracts § 1322, at 130 (3d ed. Jaeger 1968); see also J.K. Welding Co. v. W.J. Halloran Steel Erection Co., 178 F. Supp. 584, 589 (D.R.I. 1959) (“It is well settled that in order to constitute an anticipatory breach of contract sufficient to give rise to an immediate right of action in favor of a promisee, the intention of the promisor not to perform must be unqualified and unequivocal.”). An anticipatory breach of contract was defined by the United States Supreme Court as “one committed before the time has come when there is a present duty of performance. . . . It is the outcome of words or acts evincing an intention to refuse performance in the future.” New York Life Ins. Co. v. Viglas, 297 U.S. 672, 681 (1936). A central tenet of repudiation—also sometimes referred to as anticipatory breach—is that a party is excused from performing any conditions precedent in the contract, once the other party is found to have anticipatorily repudiated. See In re Best Payphones, Inc., 432 B.R. 46, 54 (S.D.N.Y. 2010) aff’d, 450 F. App’x 8 (2d Cir. 2011); 13 Williston on Contracts § 39:37 (4th ed. 2014).

Applying the foregoing principles to the case at bar, in order for the Court to determine whether the October 1, 2007 letter in fact constituted repudiation, the Court must find that F.A.F. manifested a positive, unconditional, and unequivocal refusal to perform. See Thompson, 495 A.2d at 682; accord Griffin v. Zapata, 570 A.2d 659, 662 (R.I. 1990); see also D’Oliveira v. Rare Hosp. Int’l, Inc., No. P.C. 99-1835, 2003 WL 1223854, at *2 (R.I. Super. Feb. 13, 2003) (Israel, J.) (“[P]laintiff was required to prove that the defendant intended to repudiate its contractual obligation unqualifiedly, unconditionally and unequivocally.”). In making this determination,

the Court cannot ignore the fact that the entirety of Management's repudiation argument hinges on certain assumptions about the typographical errors present in the Warrant; to wit, that the Warrant was not intended to expire until 2008 and any reference to Management's receipt of financial statements referred to the date upon which it received the 2006 financial statements. Of course, if the Court were to adopt F.A.F.'s arguments, *i.e.*, that F.A.F. only conveyed by letter that it was contractually correct when it denied the attempted put of the Warrant (because it came two days before the commencement date of September 30, 2007), and that the Warrant expired on July 14, 2007, then the Court would be unable to find any repudiation on behalf of F.A.F. Again, Management's theory of repudiation hinges on the underlying fact that the "actual" expiration of the Warrant would not occur for another year. This pivotal, threshold dispute mandates a finding that F.A.F.'s Motion for Summary Judgment must fail.

In Dudzik v. Degrenia, our Supreme Court explained, "the question whether facts have been established showing a waiver or repudiation of the contract is a question for the jury." 48 R.I. 430, 138 A. 57, 57 (1927). Furthermore, in O'Shanter Res., Inc. v. Niagara Mohawk Power Corp., 915 F. Supp. 560, 567-68 (W.D.N.Y. 1996), the court, on a motion for summary judgment, found that genuine issues of material fact existed as to whether a letter sent by the defendant to the plaintiff clearly and unequivocally expressed an intent not to perform. In that case, the court stated that reasonable minds could differ as to whether the letter—while not expressly stating the defendant would not perform its contract with plaintiff—nonetheless implied that defendant was unequivocally repudiating the agreement. *See id.* As another federal district court in New York found, "[w]hether a particular communication or act constitutes repudiation of a contract generally presents a question of fact." Best Payphones, 432 B.R. at 55 (citing Palmiero v. Spada Distrib. Co., 217 F.2d 561, 565 (2d Cir. 1954); *see, e.g., O'Connor v.*

Sleasman, 788 N.Y.S.2d 518, 520 (N.Y. App. Div. 2005) (quoting Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp., 705 N.E.2d 656, 659 (N.Y. 1998)) (concluding repudiation is a “factual determination [that] is heavily dependent upon a determination of whether ‘a breaching party’s words or deeds are unequivocal.’”).

Management is correct that the October 1, 2007 letter creates an issue of fact on whether “positive and unconditional” repudiation occurred. On the one hand, the October 1, 2007 letter can be interpreted as a mere response by F.A.F. that, as it then understood the dates in the Warrant, the attempted put by Management was too early. It may also be inferred that F.A.F. elected to take the opportunity to discuss F.A.F.’s position on the typographical errors, setting forth what it interpreted the correct dates to be. As F.A.F. points out to the Court in its Second Supplemental Response, besides implying that the attempted put was ineffective, F.A.F. made no other statement, express or implied, regarding its intent to perform. Cf. 23 Williston on Contracts § 63:46 (4th ed. 2014) (“A party may repudiate a contract expressly or by implication.”). On the other hand, it would not be unreasonable to conclude that F.A.F. would not honor any further attempted exercise of the Warrant by virtue of F.A.F. communicating its belief that the Warrant’s expiration date should have been based on Management’s receipt of the 2006 financial statements. This conclusion is further clouded by the fact that F.A.F. never expressly mentioned the supposed July 14, 2007 expiration date in its letter. Indeed, F.A.F., through counsel, wrote only that “[m]y file clearly indicates that the parties always intended that the expiration date for the exercise of the Warrant would always be prior to 12/31/7.” (Supplemental Mem. in Supp. of Pl.’s Obj. to Mot. Summ. J. Ex. 14).

While the Court recognizes that the burden in establishing anticipatory breach is generally on the party who asserts it, the evidence in the record could lead to different

conclusions as to whether Management was still permitted to perform under the Warrant. See In re Bradlees Stores, Inc., 313 B.R. 565, 574 (S.D.N.Y. 2004) (citing PDM Mech. Contractors, Inc. v. Suffolk Const. Co., 618 N.E.2d 72, 77 (Mass. App. Ct. 1993) (indicating, pursuant to Massachusetts law, “[t]he burden to establish that an anticipatory breach occurred is on the party asserting it.”). The evidentiary record is too conflated for the Court to definitively state what the original intent of the parties was. Specifically, the record is not clear regarding whether Management had the right to review the 2006 or 2007 financial statements in determining whether to exercise its rights under the Warrant. Moreover, and relatedly, it is unclear whether the parties originally intended the Warrant to expire at some point prior to December 31, 2007.

With this finding, the Court need not reach the secondary issue of whether Management was nevertheless required to exercise the Warrant. Indeed, the Court recognizes that if repudiation was clearly found, F.A.F. would be correct in asserting that such a finding presented Management with a series of alternatives in responding to F.A.F.’s repudiation.¹¹ It is only then that the Court would be able to reach arguments as to whether Management was subsequently

¹¹ In support of its contention, F.A.F. cites to the following to describe the three options available to a nonrepudiating party:

“Under the doctrine, as accepted by the courts, the rights of a party to a bilateral contract which has been anticipatorily breached should be:

“1. to rescind the contract altogether, and if any performance has already been rendered by the injured party, to recover its value on principles of quasi contract;

“2. to elect to treat the repudiation as a breach, either by bringing suit promptly, or by making some change of position; or

“3. to await the time for performance of the contract and bring suit after that time has arrived.” Williston on Contracts, supra, at § 63:33.

required to exercise the Warrant, as is repeatedly alleged by F.A.F. throughout its papers.¹² Regardless of whether Management was said to have opted for the right to ignore F.A.F.'s repudiation (but then subsequently failed to exercise the Warrant prior to its expiration), or whether Management opted for the right to properly and promptly bring suit against F.A.F. prior to expiration, those issues are quite simply not for the Court to decide today. As the Court cannot state as a matter of law whether F.A.F.'s letter constituted an anticipatory breach of the Warrant, the Court must deny F.A.F.'s Motion.

D

Reformation

Count I of the Complaint requests this Court reform the Warrant to correct for scrivener's errors.¹³ In Rhode Island, "[t]o warrant reformation it must appear that by reason of a mistake,

¹² As to this issue, even though the Court is not bound by other jurisdictions' decisions, it is worth noting that F.A.F. cites to a New York federal district court case, Hermanowski v. Acton Corp., 580 F. Supp. 140 (E.D.N.Y. 1983) aff'd in part and remanded, 729 F.2d 921 (2d Cir. 1984), among others, for the proposition that, in the specific context of stock options, if the nonrepudiating party ignores repudiation, that party must still attempt to exercise the option. See Def.'s Second Supplemental Resp. 13-15. Moreover, according to F.A.F., that party would not be permitted to seek one remedy for anticipatory breach only to subsequently opt for another remedy. While the Court has made clear it will not pass judgment on what actions Management should have taken once it received notice of F.A.F.'s alleged repudiation via the October 1, 2007 letter, the Court nonetheless notes that in Hermanowski, the occurrence of repudiation was undisputed. See id. at 144 ("Having repudiated its obligation under the terms of the agreement in advance of the time for performance, the defendant made possible one of several responses by the plaintiff."). As stated above, the Court cannot make such similar determinations here—that there was, in fact, repudiation—in order to ultimately reach the issue of Management's alleged failure to nonetheless exercise the Warrant.

¹³ As a threshold matter, our Supreme Court has never expressly addressed scrivener's errors in the context of reformation. However, as one Rhode Island court has found, "[o]ther jurisdictions and commentators have likened scrivener's errors to mutual mistakes of fact" and noted that "[t]he classic case for reformation' is when the mutual mistake can be traced to a typo or transcription error." Berrios v. Jevic Transp., Inc., No. PC 04-2390, 2012 WL 894010, at *4 (R.I. Super. Mar. 12, 2012) (Gibney, P.J.) (quoting OneBeacon Am. Ins. Co. v. Travelers Indem. Co. of Ill., 465 F.3d 38, 41 (1st Cir. 2006)). The Berrios court subsequently found that the characterization of a scrivener's error as a form of mutual mistake was a "sensible approach" and

common to both parties, their agreement fails in some material respect correctly to reflect their prior completed understanding.” Hopkins v. Equitable Life Assur. Soc. of U. S., 107 R.I. 679, 685, 270 A.2d 915, 918 (1970). Stated another way, “[f]or a contract to be subject to judicial reformation, the court must first find a mutual mistake.” Gorman v. Gorman, 883 A.2d 732, 740 (R.I. 2005); see also Yates v. Hill, 761 A.2d 677, 680 (R.I. 2000) (“To permit reformation of a contract, it must appear by reason of mutual mistake that the parties’ agreement fails in some material respect to reflect correctly their prior understanding.”). A party that seeks reformation of an agreement must prove the existence of a mutual mistake by clear and convincing evidence. Merrimack Mut. Fire Ins. Co. v. Dufault, 958 A.2d 620, 624 (R.I. 2008).

A mutual mistake is generally defined by the Rhode Island Supreme Court to mean ““one common to both parties wherein each labors under a misconception respecting the *same terms* of the written agreement sought to be [reformed].”” Yates, 761 A.2d at 680 (brackets in original) (emphasis added) (quoting Dubreuil v. Allstate Ins. Co., 511 A.2d 300, 302 (R.I. 1986)). As the Merrimack court indicated, a party who performs under a mistake not similarly shared by the other party (*i.e.*, a unilateral mistake) will not be afforded relief of reformation. Merrimack, 958 A.2d at 625. The Court elaborated that “[a] mutual mistake is not merely the existence of a common error, but rather involves a shared misconception relating to the parties’ intent.” Id. at 624. Thus, for purposes of analyzing whether this Court is permitted to reform the Warrant, the Court is tasked with first determining whether a mutual mistake arises when there is a split between the parties regarding what exact term in the contract represents the scrivener’s error. Essentially, if one party believes the mistake applies to “date A” and the other party believes the

elected to analyze the scrivener’s error through the lens of mutual mistake. See id. This Court elects to do the same.

mistake applies to “date B,” then the question becomes is the Court presented with a “mutual mistake.”

There is no doubt that typographical errors occurred in the drafting of the Warrant. In order for the Court to reform the Warrant, however, as requested by Management, the Court would have to opine on which series of dates were indeed intended by the parties to constitute the “prior completed understanding.” Hopkins, 107 R.I. at 685, 270 A.2d at 918. In those circumstances, it is permissible to admit extrinsic or parol evidence for purposes of reforming a contract “to mirror the true intent of the parties.” Marr Scaffolding Co. v. Fairground Forms, Inc., 682 A.2d 455, 459 (R.I. 1996). As stated by F.A.F.’s counsel in its October 1, 2007 letter,

“I reviewed the MC Warrant and confirmed that there is definitely an error in §3.1 and §13 of the MC Warrant. With respect to §3.1 either the reference to the December 31, 2007 financial statements is incorrect or the reference to October 31, 2007 is incorrect. Similarly, with respect to §13, either the reference to the December 31, 2007 financial statements is incorrect or the reference to September 30, 2007 is incorrect.” (Supplemental Mem. in Supp. of Pl.’s Obj. to Mot. Summ. J. Ex. 14).

F.A.F.’s counsel then proceeded to discuss his belief that the errors were as to dates that differed from those that Management believed were in error. See id.

While Management is correct in noting that a contract generally may be subjected to judicial reformation in order to reflect the true intent of the parties, as explained above, the Court is unable to conclusively determine what exactly that prior completed understanding was. Based on the conflicting evidence in the record now before the Court, it is evident to the Court that there is a genuine issue of material fact as to the presence of a mutual mistake with respect to the 2006 or 2007 financial statements and the “drop dead” dates of the Warrant. The Court cannot rule as a matter of law that the shared misconception of the parties’ intent applied to a specific date in the Warrant, as the scrivener’s error could have led to three different groups of dates.

Any such determination would require the Court to cross into the realm of fact finding, which is a procedure expressly prohibited to a trial justice in summary judgment proceedings. Accordingly, reformation of the Warrant is not available at this juncture.

IV

Conclusion

In considering all of the evidence before the Court, and noting that Management may properly pursue a theory of repudiation, the Court finds that genuine issues of material fact exist that prevent the Court from finding that F.A.F. repudiated the Warrant as a matter of law. When reviewing the evidence from a perspective most favorable to Management, as the nonmoving party, the Court recognizes that determining whether F.A.F. repudiated by way of letter on October 1, 2007 requires the Court to also determine which parties' interpretation of the typographical errors is factually correct. Because the role of this Court on summary judgment is issue finding, and not issue determination, the Court denies F.A.F.'s Motion for Summary Judgment as to Counts II and V requesting declaratory judgment and injunctive relief, respectively. Similarly, the Court denies F.A.F.'s Motion with respect to Count I requesting the Court to reform the Warrant. Management will thus be required to prove at trial the existence of a mutual mistake by clear and convincing evidence.

Prevailing counsel shall present an order consistent herewith which shall be settled after due notice to counsel of record.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Management Capital, LLC v. F.A.F., Inc. and Arthur Fiorenzano

CASE NO: C.A. No. PB 08-2364

COURT: Providence County Superior Court

DATE DECISION FILED: April 2, 2015

JUSTICE/MAGISTRATE: Silverstein, J.

ATTORNEYS:

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