IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DEERE & COMPANY, a Delaware corporation,	)	C.A. No. N13C-07-330 JTV CCLD
Plaintiff,	)	
v.	)	
EXELON GENERATION ACQUISITIONS, LLC, a Delaware limited liability company,	)	
Defendant.	)	

Submitted: November 1, 2013
Decided: March 7, 2014

Peter J. Walsh, Jr., Esq., and Matthew F. Davis, Esq., Potter, Anderson & Corroon, Wilmington, Delaware. Attorneys for Plaintiff.

Sean J. Bellew, Esq., Ballard Spahr, Wilmington, Delaware. Attorney for Defendant.

Upon Consideration of Defendant's
Motion to Dismiss
GRANTED IN PART
DENIED IN PART

VAUGHN, President Judge

OPINION

The plaintiff, Deere & Co., has filed this action against Exelon Generation Acquisitions, LLC seeking a declaratory judgment and damages in connection with an August 30, 2010 purchase agreement (the "Purchase Agreement").

Exelon has filed a Motion to Dismiss the Complaint Under Civil Rule 12(b)(6).

FACTS

The allegations in the complaint include the following: Deere had been developing wind generation projects and owned wind generation assets through subsidiaries. Exelon purchased those assets pursuant to the Purchase Agreement. In three projects Deere had obtained power purchase agreements. A power purchase agreement is a contract between a party who generates electricity, in this case Deere's subsidiaries through the wind generation projects, and a party who agrees to purchase the electricity for resale to retail customers. A power purchase agreement is a valuable asset for the party generating the electricity.

Section 2.6(a) of the Purchase Agreement provided for an earn-out to be paid to Deere when each of three identified wind projects under development reached certain milestones. The three wind projects that were subject to earn-outs (defined in the Purchase Agreement as the "Michigan Wind Projects") were the three for which a power purchase agreement had been obtained. There were no earn-out provisions for any other development projects which Exelon was acquiring as part of the transaction. The Michigan Wind Projects were thus treated differently in the Purchase Agreement because they had power purchase agreements.

One of the Michigan Wind Projects was the Blissfield Wind Project, which was described in the Purchase Agreement as "the wind project under development in Lenawee County, Michigan, by Blissfield Wind Energy, LLC, with a nameplate capacity of 81 megawatts."[1] The other two Michigan Wind Projects were identified in the agreement with similar phraseology, that is by county of location, project name, and capacity of megawatts.

Section 2.6(a)(iii) of the Purchase Agreement specifies Exelon's earn-out obligation for the Blissfield Wind Project. It states: "[a]t such time as . . . the Blissfield Wind Project achieves Completion of Development and Commencement of Construction, Buyer shall deliver to Seller an amount equal to $14,000,000."[2]

Furthermore, the Purchase Agreement requires Exelon to use "all reasonable efforts" to develop the Michigan Wind Projects, but also permits Exelon to cease development of and abandon those Projects in certain circumstances. Section 2(b) provided, in pertinent part, as follows:

> In the event Buyer reasonably determines that continuing to proceed with any one or more of the Michigan Wind Projects would not be commercially reasonable and thereafter determines to permanently cease development of and abandon such Michigan Wind Project(s), Buyer shall so inform Seller, including the reason therefor and thereafter Buyer shall have no further obligation to Seller in connection with such development; provided that if

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[1] Purchase Agreement, Section 1.1.

[2] Purchase Agreement, Section 2.6(a).

> within three (3) years thereafter the Completion of Development and Commencement of Construction of a particular Michigan Wind Project (including, for the avoidance of doubt, the direct or indirect sale of such Michigan Wind Project prior to the Commercial Operation Milestone Date (as defined in the applicable Michigan PPA) to a Person engaged in the Business) occurs, then Buyer shall have the payment obligations set forth in this Section 2.6 with respect to such Michigan Wind Project.[3]

After entering into the Purchase Agreement, Exelon continued to develop the Blissfield Wind Project, but encountered difficulties trying to develop the project in Lenawee County. Specifically, the township where the Blissfield Wind Project was located imposed zoning restrictions in July 2011 that precluded development of the project at the Lenawee County location.

By letter dated August 8, 2011, Exelon (through its subsidiary Blissfield, the party to the power purchase agreement) notified Consumers Energy, the purchaser under the power purchase agreement, of a Force Majeure event under the power purchase agreement due to "Seller [Blissfield] . . . being prevented from proceeding with the development of the Blissfield Wind Energy Project (the 'Project') at the designated location."[4] The letter continued, "[t]he Force Majeure event will continue unless and until these new regulations are repealed, the Project has acquired additional land in other townships within Lenawee County or the Project is moved

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[3] Purchase Agreement, Section 2.6(b).

[4] Compl. ¶ 19.

to an alternate location."[5]

In December 2011, Consumers Energy and Blissfield amended the purchase power agreement to allow Blissfield to develop the Blissfield Wind Project in one of two other, alternative counties in Michigan.

By letter dated January 9, 2012, Consumers Energy submitted an application to the Michigan Public Service Commission for approval of the amendment to the purchase power agreement. In its application, Consumers Energy stated that the "45 wind turbines comprising the Blissfield project were expected to be located in portions of Riga, Palmyra, and Ogden Townships, Lenawee County, Michigan."[6] However, "due to significant opposition to wind generation development by the residents of Lenawee County . . . the developer has relocated the development plan to either Ionia County or Gratiot County, Michigan."[7] The application described the amendment to the purchase power agreement as allowing "Blissfield to develop its project in either Ionia County or Gratiot County."[8]

On January 26, 2012, the Michigan Public Service Commission approved the amendment. In its decision, it stated that "[t]he amendment [to the power purchase agreement] moves the location of the wind farm."[9]

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[5] Compl. ¶ 19.

[6] Compl. ¶ 22.

[7] Compl. ¶ 22.

[8] Compl. ¶ 22.

[9] Compl. ¶ 24.

On May 4, 2012, Exelon notified Deere pursuant to Section 2.6(b) of the Purchase Agreement that it had determined that continuing to proceed with the development of the Blissfield Wind Project would not be commercially reasonable and that it was permanently ceasing development of the project. It advised Deere that it would not pay the earn-out for the Blissfield Wind Project.

Exelon's wind project was located in Gratiot County and has achieved Completion of Development and Commencement of Construction.

Deere asserts three claims for relief. Count I of the Complaint alleges that Exelon breached its obligations under the Purchase Agreement by refusing to pay the $14,000,000 earn-out payment upon completion of development and commencement of construction of the Blissfield Wind Project in Gratiot County. Count II alleges that Exelon breached the implied covenant of good faith and fair dealing by failing to compensate Deere for the use of the purchase power agreement. Count III alleges that Exelon was knowingly and unjustly enriched by receiving the benefits of the purchase power agreement without compensating Deere.

STANDARD OF REVIEW

"[T]he governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[10] The court will limit its review of the motion to dismiss to the well-pleaded allegations in the complaint, but will draw all

[10] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs, LLC*, 27 A.3d 531, 537 (Del. 2011).

reasonable factual inferences in favor of the non-moving party.[11] In considering the defendant's motion to dismiss, the court must deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances.[12] This "conceivability" pleading standard asks whether there is any, even a remote, possibility of recovery.[13]

CONTENTIONS

Exelon contends that under the express, unambiguous terms of the Purchase Agreement, Deere is entitled to an earn-out only if the "Blissfield Wind Project" achieved certain milestones; that the Blissfield Wind Project was clearly defined as "the wind project under development in Lenawee County, Michigan;" that it was prevented from constructing the Blissfield Wind Project after encountering zoning obstacles in Lenawee County; that it properly notified Deere that it was ceasing development of and abandoning the Blissfield Wind Project; that nothing in the earn-out provision entitles Deere to an earn-out if, after abandonment of one of the three Michigan Wind Projects, it developed a substitute wind project at a different location; that the earn-out provision does not contain any nexus between use of the power purchase agreement and the earn-out obligation; that Deere's argument that the Blissfield Wind Project and the Gratiot County project are one and the same ignores the plain meaning of the definition of the "Blissfield Wind Project," which was the

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[11] *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

[12] *Cent. Mortg. Co.*, 27 A.3d at 536.

[13] *Id*. at 537.

project "under development in Lenawee County, Michigan;" that the Purchase Agreement has no language obligating it to pay an earn-out if it "relocated" an abandoned project to a different venue; that if the parties desired to require an earn-out payment in the event that one of the Michigan Wind Projects was abandoned and then relocated, they could easily have done so in the Purchase Agreement; that Deere cannot rewrite the terms of the Purchase Agreement it negotiated; that Deere's claim for breach of the implied covenant of good faith and fair dealing fails as a matter of law because the subject matter of the action is expressly covered in detail in the Purchase Agreement; and that the claim for unjust enrichment fails as a matter of law because there is a contract that governs the relationship between the parties that gives rise to the unjust enrichment claim.

Deere contends that the reference to Lenawee County in the definition of the Blissfield Wind Project is descriptive and simply describes where the project was being developed at the time of the transaction; that nothing in the Purchase Agreement prevented Exelon from relocating the Blissfield Wind Project out of Lenawee County, which is what occurred; that correspondence from Exelon and other above-mentioned documentation support the contention that Exelon relocated the project with the express intent of continuing to develop it using the purchase power agreement; that Exelon abandoned only the location of the project, not the project; that, in the alternative, Deere has pled a viable claim for breach of the implied covenant of good faith and fair dealing; that the implied covenant of good faith and fair dealing seeks to enforce the parties' contractual bargain by implying only those

terms the parties would have agreed upon during their original negotiations if they had thought to address them; that Delaware courts have recognized the occasional necessity of implying contract terms to ensure the parties reasonable expectations are fulfilled; that Exelon's obligation to pay the earn-out can be implied in the Purchase Agreement to ensure the parties' reasonable expectations are fulfilled; that Deere expected to be compensated for the use of a purchase power agreement if the project to which it related reached commercial development and commencement of construction; that the parties did not anticipate that the Blissfield Wind Project would not be developed in Lenawee County and did not anticipate that it would be moved; that it is reasonable to infer that had the parties anticipated a relocation of the Blissfield Wind Project, while all other aspects of the project remained the same, they would have agreed to the same earn-out provision; and that, in the alternative, Deere has clearly pled a viable claim for unjust enrichment.

DISCUSSION

Ambiguity exists when a contract provision is reasonably susceptible of different interpretations.[14] Dismissal is proper "only if the defendants' interpretation is the *only* reasonable construction as a matter of law."[15]

I am not persuaded that the only reasonable interpretation of the contract as a matter of law is that the reference to Lenawee County is a defining element of the

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[14] *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

[15] *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003).

Blissfield Wind Project. There is some plausibility in Deere's contention that the reference to Lenawee County was a descriptive term meant to identify the project. Some of the words used in the correspondence and other documents created in the process of obtaining permission to build in Gratiot County support the contention that the project was "relocated" rather than abandoned. And while it is true that the use of the power purchase agreement is not a triggering event for the earn-out, the fact that the same power purchase agreement was used in amended form for the Gratiot County project has some tendency to support Deere's contentions. I find that Deere's interpretation of the contract has sufficient merit to survive a motion to dismiss Count I.

Exelon also moves to dismiss Deere's claim for breach of the implied covenant of good faith and fair dealing claim. It has been stated that in order to state a claim for breach of the implied covenant of good faith and fair dealing, the plaintiff "must allege a specific implied contractual obligation, a breach of the obligation by the defendant, and resulting damage to the plaintiff."[16] "General allegations of bad faith conduct are not sufficient."[17] It has also been stated that "fairly" means a commitment to deal "fairly" in the sense of consistently with the terms of the parties' agreement and its purpose, and that "good faith" does not envision loyalty to the other party, but rather faithfulness to the scope, purpose and terms of the parties contract.[18]

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[16] *Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998).

[17] *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009).

[18] *Gerber v. Enterprise Prod.s Holdings, LLC,* 67 A.3d 400, 419 (Del. 2013).

However, the Delaware Supreme Court has also stated in a case involving a motion to dismiss a complaint under Civil Rule 12(b)(6):

> We will only imply contractual terms when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain the asserting party reasonably expected.[19]

More recently, in another case involving a motion to dismiss, the Supreme Court stated:

> Having so determined, we next analyze whether Gerber has pled facts that, if true, would establish that Enterprise Products GP breached the implied covenant. Applying the implied covenant is a "cautious enterprise" and we will only infer "contractual terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated." Gerber must show that Enterprise Products GP "acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that [Gerber] reasonably expected."[20]

From these authorities I conclude that Deere must plead facts which show that Exelon acted arbitrarily or unreasonably. The complaint, however, does not plead any such facts. From the complaint it appears that Exelon attempted to develop the project in Lenawee County but was unable to do so because of zoning difficulties.

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[19] *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010).

[20] *Gerber*, 67 A.3d at 421 (citing *Nemec*, 991 A.2d at 1125.).

It was only when it met such difficulties that it looked for an alternative location. Since the allegations of the complaint do not aver or create an inference that Exelon acted arbitrarily or unreasonably, Count II must be dismissed.

Finally, Exelon moves to dismiss Deere's claim for unjust enrichment. Exelon contends that Deere's claim for unjust enrichment is barred because the Purchase Agreement governs the parties' relationship and the matter in dispute. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscious."[21] When an express, enforceable contract controls the parties' relationship, a claim for unjust enrichment is not available because the contract itself is the measure of the parties' rights.[22]

Deere relies upon *Boulden v. Albiorix*, which allowed an unjust enrichment claim to survive a motion to dismiss as an alternative to a breach of contract claim.[23] In that case, however, the court recognized that courts generally dismiss an unjust enrichment claim on the pleadings when it is clear from the facts of the complaint that an express contract controls the parties' relationship. In that case, the court allowed the unjust enrichment claim to survive the motion because doubt existed as to whether a contract actually existed. *Boulden* is distinguishable because here the parties' relationship is controlled by their express Purchase Agreement. For this

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[21] *Kuroda*, 971 A.2d at 891.

[22] *Id*.

[23] 2013 WL 396254, at *14 (Del. Ch. Jan. 31, 2013).

reason, Count III will be dismissed.

CONCLUSION

For the foregoing reasons, Exelon's Motion to Dismiss is ***granted*** with respect to Counts II and III and ***denied*** with regard to Count I.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr

cc: Prothonotary
Order Distribution
File