EFiled: Jun 09 2017 12:11PM EDT
Filing ID 60712248
Case Number 47,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELPHI PETROLEUM, INC.,	)	
	)	
Appellant and Cross-Appellee,	)	
	)	
v.	)	No 47,2017
	)	
MAGELLAN TERMINAL HOLDINGS, L.P.,	)	On Appeal From the Superior Court of the State of Delaware
	)	C.A. No. N12C-02-302 FWW
Appellee and Cross-Appellant.	)	

CROSS-APPELLANT'S CORRECTED REPLY BRIEF ON CROSS-APPEAL

Herbert W. Mondros (DE 3308)
MARGOLIS EDELSTEIN
300 Delaware Avenue, Suite 800
Wilmington, Delaware 19801
(302) 888-1112
hmondros@margolisedelstein.com

and

David E. Keglovits, OBA No. 14259
GABLEGOTWALS
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103-4217
(918) 595-4800
dkeglovits@gablelaw.com

Attorneys for Appellee/Cross-Appellant Magellan Terminal Holdings, L.P.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. The May 13, 2011 email from Magellan's attorney to Delphi's attorney was not misleading. It merely stated that Magellan had accepted contract language proposed by Delphi's attorney concerning truck deliveries. Delphi's proposed language was, in fact, incorporated into the final agreement. Magellan's attorney did not "mislead" Delphi or its attorney by failing to explain or construe that language for Delphi or advise Delphi that Magellan did not believe the language would have the legal effect intended by Delphi's attorney. Further, even if, as Delphi alleges, Magellan somehow implied that the language requested by Delphi gave it the contractual rights it sought, Delphi could not have reasonably relied on this "representation" because, as the Superior Court found, the agreement unambiguously ***did not*** give Delphi such a contractual right. Any claimed reliance was objectively unreasonable. The fraud ruling should be reversed.

2. Delphi did not meet its burden of proving that Magellan overcharged Delphi for tank heating in 2005 and 2006. Similarly, its evidence of alleged damages was speculative and did not form a permissible basis for the Superior Court's damages award.

REPLY ARGUMENTS ON CROSS-APPEAL

I. Delphi Did Not Prove That Magellan Committed Fraud.

In its Opening Brief on Cross-Appeal, Magellan showed that Delphi had failed to establish two necessary elements of fraud: a false representation by Magellan and Delphi's reasonable reliance on a false representation. Delphi's Answering Brief on Magellan's Cross-Appeal ("Delphi Ans. Br.") does nothing to undermine these arguments.

1. The Magellan email did not contain a false representation.

Delphi does not—and cannot—dispute that it was required to prove that Magellan made a "false representation" to Delphi. *See Reserves Dev. LLC v. Crystal Props., LLC*, 986 A.2d 362, 368 (Del. 2009); *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990). Remarkably, Delphi's fraud claim is based on a ***true statement***—by Magellan attorney Ronette Beall in an email to Delphi attorney Ron Gumbaz dated May 13, 2011. *See* Delphi Ans. Br. at 7. In that email, Ms. Beall wrote only that Magellan was "in agreement with [Delphi's] two changes dealing with improvement costs and truck receipt language" in the parties' draft contract. A1250. Delphi concedes that its requested changes were, in fact, incorporated into the final agreement. Delphi Ans. Br. at 7. Thus, Ms. Beall's representation that Magellan agreed with Delphi's changes to the language of the contract was unquestionably true and cannot constitute the "***false*** representation" required for fraud.

Because Delphi cannot argue Magellan's statement itself was false, it instead contends the statement was "intentionally deceptive" because Magellan knew the statement "would induce Delphi to believe that Magellan agreed to permit truck deliveries." Delphi Ans. Br. at 12. Delphi relies on the Superior Court's finding that Magellan intended to "'placate Delphi so that Delphi could execute the Agreement.'" *Id.* (quoting Decision at 80). Delphi blurs two separate elements of fraud. To prevail on a fraud claim, the plaintiff must establish ***both*** "a false representation of fact" ***and*** an "intent to induce the plaintiff to act or refrain from acting." *Reserves Dev.*, 986 A.2d at 368. Even if Magellan agreed to Delphi's contract language to induce Delphi to sign the agreement, this in no way establishes that Magellan made a "false representation of fact" to Delphi in the process. Instead, it was a true statement of fact. If it induced Delphi to execute the agreement, there is nothing actionable about that.[1]

Delphi further claims that although Magellan typically would not have had a duty to speak in its arms-length negotiations with Delphi, such a duty arose because "Magellan chose to" state that it agreed to Delphi's language when "Magellan believed that the language did not accomplish Delphi's goal." Delphi Ans. Br. at 12. Under Delphi's reasoning, Magellan could not ***say*** that it agreed to Delphi's

[1] Indeed, contracting parties routinely make truthful representations intended to induce their counterparties to enter into agreements.

language (a fact) without also giving Delphi its own legal interpretation of that language. Delphi cites no authorities supporting the absurd proposition that contracting parties are required to disclose their legal interpretation of contractual terms to counterparties any time they (1) state their agreement to such terms, and (2) have reason to believe their counterparty may have a different legal interpretation of the terms, or else risk liability for fraud. Such a requirement would place unreasonable and wholly unworkable restrictions on parties choosing to contract under Delaware law, as well as impose obligations on their attorneys that squarely conflict with their ethical obligations to their own clients during contractual negotiations.

Magellan did not make a false representation of fact to Delphi. It made a true statement, *i.e.*, that it accepted Delphi's proposed language. Magellan did, in fact, accept that language. Magellan should not be subjected to liability ***for fraud*** merely because it did not disclose to Delphi that Magellan's attorney had a different legal interpretation of the proposed contract language than did Delphi's attorney.

2. Delphi could not reasonably rely on a representation specifically precluded by the unambiguous contract terms.

Delphi contends that Magellan deceived Delphi by causing it to "believe that Magellan agreed to permit truck deliveries" when it accepted Delphi's proposed contract language. Delphi Ans. Br. at 12. But the Superior Court held—in a ruling not appealed by Delphi—that as a matter of law the contract was unambiguous and

did not give Delphi any such right. Delphi argues the trial court's contract ruling has no bearing on Delphi's fraud claim, which is "based on the extra-contractual Beall email, not the language of Section 2.1(a) as written." Delphi Ans. Br. at 14. But the two are inextricably intertwined because Delphi argues that, through the email, Magellan allegedly misrepresented the legal effect of Section 2.1(a) of the parties' agreement.

Delphi contends that fraud can be based on its ***subjective*** interpretation of the parties' negotiations but wants to ignore the plainly obvious and only legally significant portion of those negotiations—the four corners of the written agreement resulting from them. Under Delaware law, Delphi's subjective belief is irrelevant to the reliance inquiry. Instead, "whether the plaintiffs' reliance on the alleged statements and representations resulting from the negotiations was 'reasonable' is judicially determined by using an objective standard.'" *UniSuper Ltd. v. News Corp.*, 2006 WL 375433, at *2 (Del. Ch. Feb. 9, 2006). A reasonable party in Delphi's position would not have relied on Magellan's alleged "misrepresentation" (*e.g.*, the failure to advise Delphi of its legal interpretation of the contract) where, as here, the contract's clear and unambiguous language (drafted by Delphi) precludes Delphi's interpretation of the contract.[2] In other words, even if Magellan allegedly

[2] By definition, an "unambiguous" contract is "'fairly or reasonably susceptible to only one interpretation.'" *In re Viking Pump, Inc.*, 148 A.3d 633, 657

affirmed Delphi's interpretation of the contract by failing to point out it was flawed, no reasonable person would have believed that term granted Delphi the right it claims to have been given—as the trial court found in rejecting Delphi's contract claim. Therefore, any reliance by Delphi on such a contract interpretation would have been unreasonable as a matter of law.

Moreover, as Magellan noted in its Opening Brief on Cross-Appeal and as Delphi ignores in its Answering Brief, Section 4.2 of Schedule A of the 2011 Agreement provides that "[e]xcept as expressly provided in this Agreement, Magellan makes no representations or warranties, express or implied . . . ." A802. In light of this provision expressly disclaiming any representations outside of the four corners of the contract, Delphi could not have reasonably relied on any alleged representations that did not appear in the 2011 Agreement itself. *See Progressive Int'l Corp. v. E.I. Dupont de Nemours & Co.*, 2002 WL 1558382, at *5 (Del. Ch. July 9, 2002) (holding that a plaintiff cannot show reasonable reliance on any statement outside the contract if it has expressly acknowledged that no such representations have been made or relied upon).

For all of these reasons, the Court should reverse the trial court's judgment against Magellan on Delphi's fraud claim.

---

n.101 (Del. 2016) (quoting *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012)).

II. Delphi Did Not Prove That Magellan Overcharged Delphi For Tank Heating In 2005 And 2006.

The trial court found that when Magellan billed Delphi for tank heating in 2005 and 2006, Magellan relied on meters to measure the amount of heating oil that was used, resulting in an overcharge. Ex. A at 56-57. The trial court cited no evidence supporting this finding but instead relied on documents relating to subsequent years. *See* A1158-1216.

Delphi points to no proof that Magellan used meters for billing purposes in 2005 and 2006. Instead, it cites the testimony of Alan Cosby that meters were ***installed*** "a month or two" after September 2005. Delphi Ans. Br. at 15 (citing A301). This does not establish either that Magellan used the meters for billing purposes at that time or that the use of the meters caused Delphi to be overcharged in those years. In fact, Mr. Cosby also testified that he instructed his employees ***not*** to use the meters for billing purposes unless the meters were calibrated and accurate. B106-107. His testimony regarding installation of the meters cannot support a finding that Delphi was overcharged for tank heating in 2005 and 2006.

The only evidence Delphi cites that addresses the use of the meters for billing purposes in 2005 and 2006 is an excerpted portion the deposition testimony of Paul Hafner:

> Q. And in 2006 and 2005 were customers – was Delphi billed by meter as opposed to gauge measurements?

> A. I'd say yes, because when meters were in use, when the sale took place, so we just continued doing it.

AR16 (quoted in part in Delphi Ans. Br. at 16). The transcript itself establishes that Mr. Hafner lacked sufficient personal knowledge to answer this question. Instead of an unequivocal "yes," he ventured to "I'd say yes." His assumption was based on his belief that the meters were in place when Magellan acquired the Terminal in 2005 and that Delphi previously had used the meters for billing purposes. As discussed above, the facts are clearly to the contrary. The meters were not in use when Delphi owned the Terminal, and Magellan installed the meters only ***after*** purchasing the Terminal. At trial, Mr. Hafner confirmed that he lacked a sufficient basis to testify as to when the meters were first used for billing purposes, stating "I can't really tell when they actually started using the meters. I don't believe it was as early as 2005, 2006. I just don't know for sure." B40. His admittedly speculative deposition testimony cannot support a finding of liability on this issue.

Moreover, Magellan objected to Delphi's designation of this deposition testimony on the grounds that it lacked foundation. BR1. The Superior Court did not hold the deposition testimony to be admissible, nor did it cite that testimony in its Decision. The Court should similarly give it no weight here.

Finally, Delphi concedes that the amount of damages must be established with reasonable certainty. Delphi Ans. Br. at 16. Delphi has fallen far short of this standard. Even if the meters were used for billing purposes in 2005 and 2006, Delphi

has offered no evidence that the use of the meters in those years resulted in any overcharges. Thus, it lacks any proof as to the actual amount of any such overcharges. Delphi suggests that Magellan should have produced records from that time period that might answer these questions. Delphi Ans. Br. at 16. Mr. Hafner testified he searched for such records and could not locate them. B38. There was no evidence to refute his testimony, and Delphi did not pursue the argument in the trial court. Thus, the Court should reject Delphi's thinly-veiled request that this Court infer the records would have supported Delphi's speculative damages calculation.

Because there is no evidence supporting the Superior Court's finding that Magellan overcharged Delphi for tank heating in 2005 and 2006 or the amount of the damages awarded on this issue, the Court should reverse the finding, vacate the damages award, and render judgment for Magellan on this claim.

CONCLUSION

For the reasons set forth above, the Court should reverse the Superior Court's rulings imposing liability on Magellan for fraud and for tank heating "overbilling" in 2005 and 2006.

Respectfully submitted,

/s/Herbert W. Mondros

Herbert Mondros (DE 3308)
MARGOLIS EDELSTEIN
300 Delaware Ave., Suite 800
Wilmington, DE 19801
(302) 888-1112

and

David E. Keglovits, OBA No. 14259
GABLEGOTWALS
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103-4217
(918) 595-4800
(918) 595-4990 (facsimile)
(Admitted Pro Hac Vice)

Attorneys for Appellee/Cross-Appellant Magellan Terminal Holdings, L.P.