

**Azimut-Benetti S.p.A. v Magnum Marine Corp.**

2007 NY Slip Op 32109(U)

July 6, 2007

Supreme Court, New York County

Docket Number: 0602920/2005

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03  
Justice

F B E M

AZIMUT-BENETTI S.p.A.,

Plaintiff,

-against-

MAGNUM MARINE CORPORATION and KATRIN THEODOLI,

Defendants.

INDEX NO. 602920/2005 E

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is

**ORDERED** that this motion is decided in accordance with the accompanying Decision and Order .

Dated: July 06 2007

PAPERS NUMBERED  
**FILED**  
JUL 11 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

KARLA MOSKOWITZ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 3

-----x  
AZIMUT-BENETTI S.p.A.,

Index No. 602920/2005 E

Plaintiff,

-against-

MAGNUM MARINE CORPORATION and KATRIN  
THEODOLI,

**DECISION and ORDER**

Defendants

-----x  
KARLA MOSKOWITZ, J:

**FILED**  
JUL 11 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

The court consolidates motion numbers 002 and 003 for disposition.

In this breach of contract action, defendants Magnum Marine Corporation ("Magnum") and Katrin Theodoli ("Theodoli"), Magnum's president and chief executive officer (collectively "defendants"), move for summary judgment dismissing the complaint (motion 003).

In motion 002, plaintiff Azimut-Benetti S.p.A. ("Azimut" or "plaintiff") moves to compel disclosure.

**FACTS**

Azimut and Magnum are both companies that build high performance motor yachts. In 2002, Theodoli and Paolo Vitelli, Azimut's chairman, discussed the possibility of Theodoli selling Magnum to Azimut. Vitelli and Theodoli did not reach an agreement, and, in June 2003, several other companies (the "suitors") expressed an interest in acquiring Magnum's stock. In connection with that 2003 transaction, Vitelli and the other suitors engaged in due diligence, and, in connection with the due diligence, they signed a Confidentiality Agreement that states, in relevant part:

It is agreed that unless a definitive written acquisition

agreement has been executed and delivered, neither

you [Azimut], the Stockholder [Theodoli], the company [Magnum] nor their respective affiliates and representatives shall be under any legal or other obligation of any kind except regarding matters specifically agreed to in this [confidentiality] letter agreement and that any party hereto may cease negotiations with respect to the Transaction<sup>1</sup> at any time; provided that the cessation of such negotiations shall not affect your obligations under this [confidentiality] letter agreement.

(1/19/07 Skolnik Aff. Ex. 1, para. 13).

By letter dated August 7, 2003, Magnum informed Azimut that the bid Azimut submitted for Magnum was too low and that Azimut had not been selected to proceed to the next round of bidding. Magnum asked Azimut to destroy and/or return all the confidential materials it received in connection with the due diligence. (8/30/05 Theodoli Aff., Ex. C). It appears that, ultimately, Theodoli chose not to sell Magnum to any of the other suitors.

Thereafter, in December 2003, in an effort to recommence negotiations, Vitelli wrote to Theodoli about “developing a business together.” (8/30/05 Theodoli Aff, Ex. D). In that letter, Vitelli stated, “[w]e are opened [sic] to various options: from the purchase of the trademark and some moulds [sic], to a royalty agreement for building and selling Magnum boats in Europe.” Theodoli and Vitelli continued their discussions in a somewhat sporadic manner throughout 2004 until November 12, 2004, when they met in New York and negotiated the terms of a document entitled “Contratto Preliminare” [Preliminary Contract].<sup>2</sup> (Skulnik Aff., Ex.2). It

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<sup>1</sup> In the preamble, the Confidentiality Agreement defines the “Transaction” as the possibility of acquiring the Company.

<sup>2</sup> Vitelli prepared the Preliminary Contract in Italian and left blanks for certain terms that the parties apparently discussed at the November 12 meeting. The parties agree that the English translation is accurate.

appears from the handwritten notations on the original Italian draft of the document that, during the November 12 meeting, Theodoli and Vitelli agreed on the price Azimut would pay to purchase “the full and free property of the Magnum Marine brand,” the broad terms of Theodoli’s continued participation in the business and the royalties Azimut would pay Theodoli for her agreement not to compete with Azimut.

Paragraph 11 of the Preliminary Contract states:

The parties bind themselves to sign a final contract and to execute the sale within 90 days from today binding themselves to create any ulterior contract, declaration and writing necessary or useful to produce the effect foreseen by the present preliminary.

Theodoli initialed the document but handwrote the following notation above her signature, “agreed in principal subject to approval by my attorney.” Azimut did not sign the document.

Azimut alleges in the complaint that, in reliance on its understanding that the defendants had agreed to the terms of the sale, Azimut engaged in certain activities to effectuate the purchase of Magnum’s assets, including “preparing and organizing to cease production at one of its shipyards to make available the necessary physical resources to design and manufacture at this shipyard products formerly produced by Magnum, . . .” Azimut also claims that it made workers available at that shipyard to engage in the design and to manufacture products that Magnum formerly produced. (Braden Aff., Ex. A, para. 12).

Thereafter, although Theodoli retained a new attorney to handle the transaction, she and Vitelli continued to communicate by email. On December 14, 2004, Vitelli emailed Theodoli asking her to please instruct her attorney, “to work together with Azimut-Benetti lawyers to transform the preliminary contract dated 03.11.04 in [sic] a final contract covering as well those

legal issues you might find important to protect my interests.” (Theodoli Aff., Ex. G). On that same day, Theodoli responded, stating, “[m]y attorney has instructions to proceed with drafting of the final agreement; he also has a list of questions from me which need to be clarified or resolved.” On December 21, 2004, Theodoli emailed Vitelli to express her dismay regarding her attorney’s delay in preparing a final contract, stating, “I would like to have the matter settled as quickly as possible, . . . , but I clearly must rely on my attorney for the definite version of the agreement. His approval of all matters is essential for such an important project.” (Theodoli Aff., Ex. H).

It appears that Azimut’s and Magnum’s attorneys exchanged draft agreements but that they were unable to agree on a final contract. On March 14, 2005, Vitelli emailed Theodoli to express his frustration that “the commitments of the Contratto Preliminare (not Letter of Intent) and all the following agreements have not been respected” (Theodoli Aff., Ex. J), and, on March 17, 2004, Vitelli demanded that Theodoli agree to abide by the Preliminary Contract. Theodoli responded by stating that her attorney had “practical objections” and felt that “changes were necessary.” She told Vitelli that “[d]iscussing these changes is essential if we are to come to an agreement.” In response, Vitelli instructed his attorneys to file this lawsuit. (Theodoli Aff., Exs. L, M and N).

The complaint states four causes of action: 1) breach of contract; 2) breach of duty to negotiate in good faith; 3) breach of implied contract; and 4) promissory estoppel.

Contemporaneously with filing the complaint, plaintiff moved for a preliminary injunction to prevent the defendants from selling Magnum or its assets to any other company. The court denied the injunction because there did not appear to be a likelihood that plaintiff would succeed on the merits. (*See* transcript of 9/7/05 hearing, p. 27)

Thereafter, at a January 11, 2007 compliance conference, the court granted defendants permission to move for summary judgment on the ground that the Preliminary Contract is unenforceable as a matter of law because the contract is not a “definitive written acquisition agreement.” Defendants reserved the right to move for summary judgment on other issues, if necessary, after the parties complete discovery.

### **ARGUMENTS**

In support of the motion for summary judgment, defendants argue that the Preliminary Contract is unenforceable because, in Paragraph 11, they expressly reserved their right not to be bound until they executed and delivered a definitive agreement. They claim that the contract lacks many of the essential terms typical in these agreements, such as the guaranteed minimum royalties, the collateral Azimut would provide to secure the royalty payments and a statement of Theodoli’s duties as president of the new organization.

They also argue that, because the Preliminary Contract is not binding and enforceable, they did not have a duty to bargain in good faith. Defendants further assert that promissory estoppel will not lie because plaintiff cannot prove that it reasonably relied on the document or alleged oral promises when the parties expressly agreed not to be bound without an executed final agreement.

In opposition to summary judgment, Azimut argues that the Preliminary Contract is binding because it contained all of the essential contractual terms and that, by signing the agreement, defendants intended the terms to be binding. Moreover, Azimut contends that it initiated efforts to perform the contract. Azimut argues that the Confidentiality Agreement permitted Magnum to enter into a binding agreement with Azimut, and, alternatively, Azimut

argues that the Confidentiality Agreement is inapplicable to the asset purchase transaction (and the Preliminary Contract) because Azimut signed the Confidentiality Agreement in connection with a stock purchase agreement that was unrelated to this transaction.

Plaintiff also argues that material questions of fact exist as to whether defendants intended to be bound, whether they obtained attorney approval for the contract or whether defendants, in bad faith, instructed their attorney to withhold consent.

Finally, plaintiff argues that, pursuant to CPLR 3212(f), facts essential to justify opposition to the motion may exist but cannot be stated because Azimut has not had an opportunity to conduct defendants' depositions and seeks evidence that defendants' attorneys approved the terms of the Preliminary Contract or that they withheld approval in bad faith.

## **DISCUSSION**

### **A. Summary Judgment**

“The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact.” (*Alvarez v Prospect Hospital*, 68 N.Y.2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require trial of any issue of fact. (CPLR 3212[b]). Thus, when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for the failure to do so. (*Vermette v Kenworth Truck Co.*, 68 N.Y.2d 714 [1986]; *Zuckerman v City of New York*, *supra* at 560). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient. (*Alvord and*

*Swift v Steward M. Muller Constr. Co.*, 46 N.Y.2d 276 [1978]; *Fried v. Bower & Gardner*, 46 N.Y.2d 765 [1978]).

A grant of summary judgment is a drastic remedy. (*Glick & Dolleck v Tri-Pac Exprot Corp.*, 22 N.Y.2d 439 [1968]). Therefore, a court views evidence a party submits on summary judgment in the light most favorable to the non-movant. (*Robinson v Strong Memorial Hospital*, 98 A.D.2d 976 [4th Dept. 1983]). The role of the court is to discover if any disputed issues of fact exist but not to resolve those issues. (*Sillman v Twentieth Century Fox*, 3 N.Y.2d 395 [1957]).

A. The Confidentiality Agreement

As a preliminary matter, the court holds that the Confidentiality Agreement is inapplicable to the present dispute because the key documents in this case show beyond dispute that the defendants drafted the Confidentiality Agreement in June 2003 when they attempted to sell Theodoli's stock in Magnum.<sup>3</sup> Azimut submitted a bid with respect to that transaction and Magnum rejected that bid telling Azimut that it should return or destroy the confidential documents in its possession. Azimut's participation in the June 2003 solicitation ended in August 2003 when it received the rejection letter from Magnum.

The transaction at issue here -- a Preliminary Contract for Azimut to purchase Magnum's assets-- is entirely separate from the unsuccessful "stock acquisition" transaction. The Preliminary Contract does not refer to the Confidentiality Agreement, and the Preliminary

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<sup>3</sup> The first sentence of the preamble to the Confidentiality Agreement states, "You have expressed an interest in discussing with Magnum Marine. . . and its stockholder. . .the possibility of your acquiring the Company (the "Transaction")." The "non-binding language" in Paragraph 13 relates to the Transaction, as defined in the preamble. (Skulnik Aff., Ex. 1).

Contract does not involve the purchase of shares of Magnum's stock. Moreover, it does not appear that there was a further document exchange between the parties that would have required Azimut to renew its obligations under a confidentiality agreement. Accordingly, the court will not consider the language of the Confidentiality Agreement in determining whether the Preliminary Contract binds the defendants because that agreement is irrelevant to the Preliminary Contract.

B. The Preliminary Contract

Ordinarily, where the parties contemplate further negotiation and the execution of a formal instrument, a preliminary agreement does not create a binding contract. (*Prospect St. Ventures, LLC v Eclipsys Solutions Corp.*, 23 A.D.3d 213 [1st Dept. 2005] [the letter agreement was a mere agreement to agree as it was expressly conditioned on the execution of a definitive agreement satisfactory in form and substance to both sides]). In some circumstances, however, preliminary agreements can create binding obligations. (*See Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 A.D.2d 288, 298 [1st Dept. 2003] *citing Teachers Insurance & Annuity Association v Tribune Co.*, 670 F.Supp. 491, 498 [S.D.N.Y. 1987]; *see also Held v Kaufman*, 91 N.Y.2d 425, 432 [1998]; *Cornfeld v Urfirer*, 5 A.D. 3d 178,180 [1st Dept. 2004]). If, however, the court finds that the parties did not intend the preliminary writing to be binding, the writing is a mere proposal and neither party is obligated to negotiate further. (*See Brause v Goldman*, 10 A.D.2d 328 [1st Dept 1960], *aff'd* 9 N.Y.2d 620 [1961]).

The key to determining whether a preliminary agreement is binding is the intent of the parties – that is, whether the parties intended to bind themselves and, if so, to what extent. (*Trade & Industry Corp. (USA), Inc. v Euro Brokers, Inv. Corp.*, 222 A.D.2d 364, 368-369 [1st Dept 1995] [dismissing breach of contract action based on preliminary agreement that the parties did

not intend to be binding]). The question of contractual intent is factual in nature. (*Weinstein v Barnett*, 219 A.D.2d 77, 80-81 [1st Dept. 1996] [“The question of contractual intent is essentially factual in nature . . . .”]; *Four Seasons Hotel v Vinick*, 127 A.D.2d 310, 318 [1st Dept 1987]).

Other than assessing the intent of the parties, New York State courts have not adopted any specific factors. However, federal courts interpreting New York law have developed four factors to consider in determining whether the parties to a preliminary agreement, that calls for execution of a formal instrument, intended to bind themselves in the absence of an executed document. These factors are: 1) whether the parties expressly reserved the right not to be bound in the absence of a writing; 2) whether either or both of the parties have partially performed the contract; 3) whether the parties agreed to all of the terms of the alleged contract; and 4) whether the agreement at issue is the type of contract that is usually committed to writing. (*Teachers Insurance & Annuity Assoc., supra*; *Arcadian Phosphates, Inc. v Arcadian Corp.*, 884 F.2d 69 [2d Cir. 1989]; *Adjustrite Systems, Inc. v GAB Business Services, Inc.*, 145 F.3d at 549). Plaintiff urges this court to adopt the factors from *Teacher’s Insurance*, but as no appellate court in this state has expressly utilized and adopted these factors, this court declines to do so. Moreover, adoption of the specific approach in *Teacher’s Insurance* is not necessary to rule in plaintiff’s favor on this motion.

Here, the Preliminary Contract does not expressly state whether it is binding in the absence of a “final contract.” Rather, Paragraph 11 obliquely refers to the parties’ obligation to enter into additional agreements to “produce the effect foreseen by the present preliminary.” But, Paragraph 11 does bind the parties to sign a final contract and execute the sale within 90

days, and it does bind the parties “to create any ulterior contract,<sup>4</sup> declaration and writing necessary or useful to produce the effect foreseen by the present preliminary.” Thus it appears that, in the Preliminary Contract, the parties agreed to sign a final contract for the sale of Magnum’s assets within 90 days without specifying that the terms of the preliminary contract bound the parties. Thus, it is not possible to determine from the language of the document itself, the extent to which the parties intended to bind themselves.

In favor of finding a binding agreement, plaintiff points out that it took action based on the understanding that the parties had reached a binding agreement. Vitelli states that Azimut “began preparing and organizing to cease production at one of its shipyards” and to make resources and personnel available to manufacture Magnum’s products. However, whether, in fact, Azimut actually ceased production or made material and personnel available to work on the new projects or took any other affirmative steps in reliance on the Preliminary Contract remains unknown at this time. Thus, there is a question of fact regarding whether Azimut took any steps to perform the contract.

However, the parties left certain provisions open. This militates in favor of finding that the Preliminary Contract is not a binding agreement. Here, Azimut was spending \$10,000,000 to purchase not only Magnum’s design and molds but also the name recognition and selling power of Magnum’s chairperson, Theodoli. (5/13/05 Vitelli Aff., Ex. 7 [3/05 Fortune Mag. Article]). Thus, Azimut’s agreement to hire Theodoli as president of the newly formed Magnum Marine was not a fiction. Consequently, from an objective point of view, it was critical that a contract spell out, in detail, Theodoli’s rights and responsibilities. The contract did not include these

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<sup>4</sup> The parties do not define the term “ulterior contract.” However, the Merriam-Webster On-Line dictionary defines ulterior to mean “further.” Accordingly, the court presumes that the phrase, in this context, means “further or additional” contract, declaration or writing.

terms, and it did not include specific terms regarding the rights and liabilities of each of the parties. Magnum also points out that the Preliminary Contract did not include terms regarding royalties. Further, given the size of the transaction, the nature of the assets Azimut was purchasing and the length of Theodoli's contemplated employment, the Preliminary Contract is of the type that the parties would finalize in a formal contract, including representations and warranties and the other standard provisions that are in standard asset purchase agreements.

In sum, there are questions of fact as to whether the parties intended the Preliminary Contract to be a binding preliminary agreement or whether the document was merely a proposal and no further duty attached. The agreement itself is ambiguous and resolution of this ambiguity depends on extrinsic evidence not currently before the court. (*Id.*; see also *SNC Ltd. v Kamine Engineering and Mechanical Contracting Co., Inc.*, 238 A.D.2d 146 [1st Dept. 1997]). In addition, plaintiff may have commenced performance. Accordingly, because defendants have failed to establish that they are entitled to judgment as a matter of law, the court denies the motion for summary judgment dismissing the complaint.

#### B. Motion to Compel

In motion 002, plaintiff requests: 1) production of certain documents that defendants denominated as privileged; 2) an order permitting plaintiff, during depositions of defendants and their corporate attorneys, to make reasonable inquiries to determine whether defendants' corporate attorneys approved or disapproved the November 2004 Preliminary Contract; and 3) an order extending the deadline to January 31, 2007 to take the parties' depositions.

##### 1. Document Production

The court conducted an in camera review of documents in the privilege log numbered 9-20, 24, 26-27 and 30-41 and finds as follows:

- a.. Defendants are directed to produce documents 9-11, 16-18, 24, 32 and 35-37, as they do not involve attorney work product or attorney-client privilege.
- b. Documents 12-15, 19-20, 25, the cover email to document 30 and document 33 are in Italian, and the parties have not provided the court with English translations. Accordingly, the court cannot determine the status of these documents but notes that defendant reserved the right, pending these motions, to provide the court with translations.
- c. Documents 26-27, 31, 34 and 38-41 are privileged, and defendants need not produce those documents.

## 2. Inquiries Regarding Approval of the Preliminary Agreement

Here, plaintiff seeks to invade the attorney-client privilege to discover whether or not defendants' corporate attorneys approved the Preliminary Contract and, if not, whether the attorneys withheld their approval in bad faith.

As to attorney approval, Azimut does not deny that defendants' attorneys did not approve the contract but appears to base its request for discovery on the fact that the attorneys never explicitly disapproved the contract. However, because the Preliminary Contract required attorney approval and it is undisputed that defendants' attorneys did not approve the Preliminary Contract, the court denies Azimut's request for discovery regarding "attorney approval."

The court also denies Azimut's request to invade the attorney-client privilege based on its allegation that defendants' attorneys withheld their approval in bad faith. "A party cannot, through its own allegations of fraud or bad faith, waive its adversary's privilege." (*Oxyn Telecom., Inc. v Onse Telecom.*, 2003 WL 660848 at \*6 [S.D.N.Y. 2003]); *see also, Bank of New York v. River Terrace Associates, LLC*, 23 AD3d 308, 311 [1<sup>st</sup> Dep't 2005). However, the court grants plaintiff's request to extend the date to take party depositions to the extent necessary to ensure that party depositions occur if they have not already.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that plaintiff's motion to compel discovery is granted to the extent that defendants are directed to produce Privilege Log documents numbered 9-11, 16-18, 24, 32 and 35-37 and to take party depositions, if still necessary, and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to provide translations of documents 12, 15, 19, 20 and 25 within 60 days of the date of this decision and order with notice of entry for further *in camera* inspection.

This decision constitutes the order and judgment of the court.

Dated: July 03 2007

ENTER

  
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J.S.C.

**FILED**  
JUL 11 2007  
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