

<b>Graham Packaging Co., L.P. v Owens-Illinois, Inc.</b>
2007 NY Slip Op 33477(U)
October 19, 2007
Supreme Court, New York County
Docket Number: 0603831/2006
Judge: Helen E. Freedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_

PART \_\_\_\_\_

Index Number : 603831/2006

GRAHAM PACKING

vs

OWENS-ILLINOIS

Sequence Number : 004

DISMISS

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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 \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided*

~~IS DECIDED~~

~~IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION~~

~~IN ACCORDANCE WITH~~

*g law*

~~IN ACCORDANCE WITH~~

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

OCT 25 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/19/07

*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

DO NOT POST  DEFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 39

-----X  
GRAHAM PACKAGING COMPANY, L.P.,

Plaintiff,

Index No. 603831/06

-against-

OWENS-ILLINOIS, INC. and OI PLASTIC  
PRODUCTS FTS, INC.,

Defendants.

-----X  
**HELEN E. FREEDMAN, J.**

**FILED**  
OCT 25 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

In this action, plaintiff Graham Packing Company, L.P., ("Graham" or "plaintiff"), sues defendants Owens-Illinois, Inc., and OI Plastic Products FTS, Inc., (collectively "defendants" or "OI"), for, *inter alia*, breach of contract of a Stock Purchase Agreement. Defendants' answer contains a counterclaim seeking rescission of a Settlement Agreement that the parties entered into after the Stock Purchase Agreement was consummated on the ground that plaintiff fraudulently concealed information relative to the valuation of certain non-settled claims. Plaintiff now moves to dismiss defendants' counterclaim pursuant to CPLR 3211(a)(1) and CPLR(a)(7).

For the reasons set forth below, plaintiff's motion is granted and defendants' counterclaim is dismissed.

*Background*

At issue here is the validity of a Settlement Agreement executed subsequent to a Stock Purchase Agreement ("SPA") between OI, a manufacturer of glass bottles and other containers, and Graham, a manufacturer of various types of plastic containers. Before October 2004, OI was

also in the business of manufacturing plastic bottles and containers through its subsidiary Owens-Brockway Plastics; Graham was a competitor of OI's subsidiary. Under the SPA, Graham paid \$1.2 Billion to acquire all of the shares of OI's subsidiary, Owens-Brockway Plastics. The deal closed on October 7, 2004. The SPA provided for certain post-closing purchase price adjustments, allowed certain claims to be asserted by either party, and set forth a mechanism for adjusting the claims.

On January 20, 2005, Graham's CFO, John Hamilton, sent OI a letter claiming that OI had breached the SPA by, among other things, failing to disclose certain material facts pertaining to OI's relationship with two of its clients, Unilever and The Clorox Company ("Clorox"). More specifically, Hamilton stated that (a) prior to the closing OI modified the relationship under which OI sold 300oz laundry detergent bottles to Unilever, and (b) there were several quality issues regarding products that OI sold to Clorox as evidenced in a letter sent by Clorox to OI on September 30, 2004. Hamilton's letter did not provide any information or representation regarding Graham's own valuation of the Unilever and Clorox claims.

In early 2005, the parties resolved their disputes concerning price adjustments and executed a Settlement Agreement dated April 15, 2005, in which OI paid Graham \$38.9 Million in cash, transferred to Graham some equipment, and forgave certain Graham's debt, for a total transfer of value from OI to Graham in excess of \$50 Million. However, the Settlement Agreement specifically excluded the Unilever and Clorox claims as follows:

Limitation on Mutual Waiver and Release. Nothing whatsoever provided or contained in this Section 4 [Waiver and Release] or in any other provision of this Settlement Agreement . . . (y) shall restrict, impinge upon, or nullify any claim, demand, right, and cause of action that [Graham] may have against [OI] or Seller with

respect to any matter arising out of the Stock Purchase Agreement other than the Section 1.3 Claims or the Other Settled Items, including without limitation (A) the matters set forth in the January 20<sup>th</sup> letter . . . all of which claims survive this Settlement Agreement in their entirety (the "Non-Settled Claims"). The determination of the liability of [OI] and Seller, if any, with respect to the Non-Settled Claims will be made in accordance with the relevant provisions of the Stock Purchase Agreement.

(Settlement Agreement ("Stlmt. Agt.") § 4(b)(ii).) The Settlement Agreement also contained a disclaimer clause providing that:

Entire Agreement. This Agreement and the Exhibits hereto contain the entire agreement between the Parties and constitute the complete, final, and exclusive embodiment of their agreement with respect to the subject matter hereof. This Agreement is executed without reliance upon any promise, warranty or representation by any Party or any representative of any Party other than those expressly contained herein and in the Exhibits hereto and each Party expressly disclaims any such reliance.

(Stlmt. Agt. § 14.)

Subsequent to the execution of the Settlement Agreement and by letter dated May 24, 2005, Graham informed OI that it valued the Unilever and Clorox claims at approximately \$50 Million. Graham then commenced this lawsuit against OI on November 6, 2006, alleging breach of contract, fraudulent misrepresentation, negligent misrepresentation, failure to indemnify, and breach of implied covenant of good faith and fair dealing, and seeking damages in excess of \$30 Million. OI interposed a counterclaim for fraudulent concealment, seeking to rescind the Settlement Agreement and to recover damages resulting from the alleged fraud.

In its counterclaim, OI alleges that it agreed to leave the Unilever and Clorox claims out of the Settlement Agreement only because it was under the impression that Graham considered those claims *de minimis*, that is, not worth more than a small fraction of the total settlement

value. OI alleges that at the time the parties executed the Settlement Agreement, Graham fraudulently concealed to OI that it valued its anticipated Unilever and Clorox claims at approximately \$50 Million. According to OI, Graham had exclusive access to the records related to the Unilever and Clorox claims since the date of the SPA closing, and thus had a duty to disclose its valuation of those claims to OI during the settlement discussions.

### *Contentions*

Graham now moves to dismiss OI's counterclaim on two grounds. First, Graham points to the language of the Settlement Agreement which contains an express reservation of the Unilever and Clorox claim. Moreover, the Agreement contains a full integration clause, whereby both parties acknowledge that this is the "Entire Agreement" between the parties and disclaim reliance upon any promise, warranty or representation made by any party and not contained in the Agreement. Graham contends that parole evidence may not be used to challenge an agreement where an express "specific disclaimer" prevents the parties from claiming reliance on alleged fraudulent representations not embodied in the agreement itself. Second, Graham contends that the fraudulent concealment claim fails because Graham had no duty to disclose its valuation of the Unilever and Clorox claims during the settlement discussions.

In opposition, OI contends that OI's counterclaim for fraudulent concealment is valid because the Settlement Agreement contains only a "general disclaimer," which does not specify that the parties disclaimed reliance on representations about the value of the Unilever and Clorox claims. Further, OI contends that Graham had a duty to disclose to OI its valuation of the Unilever and Clorox claims as information which was material to the Settlement Agreement and based on knowledge not readily available to OI after the closing of the SPA. OI asserts that,

based on information available to it during the settlement discussions, OI expected the Unilever and Clorox claims to be valued at approximately \$2 Million. While OI does not contend that Graham made fraudulent representations as to its valuation of these claims, it contends that Graham knew that OI had a mistaken impression regarding the value of the claims and allowed OI to rely on it to induce the Settlement Agreement.

### *Discussion*

In a motion to dismiss pursuant to CPLR 3211(a)(7), the court must determine whether the allegations in a counterclaim set forth a cause of action. In this regard, the court must accept as true the “factual averments of the [counterclaim],” *Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307 (1995), and give the defendant all favorable inferences that can be drawn from the pleadings. *See Guggenheim v. Ginsburg*, 43 N.Y.2d 268 (1977). The criteria is not just whether a claimant has stated a cause of action, but whether in fact he has one. *See Guggenheim v. Ginsburg*, 43 N.Y.2d 268 (1977); *Weiner v. Lazard Freres & Co.*, 241 A.D.2d 114, 672 N.Y.S.2d 8 (1<sup>st</sup> Dep’t 1984). “Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d 83 (1994).

#### I. Dismissal Under CPLR 3211(a)(1)

Parole evidence is not admissible to add, change or modify the terms of a fully integrated contract except where a party alleges that it was induced to enter into a contract in reliance upon false and fraudulent representations made by the other party. *Sabo v. Delman*, 3 N.Y.2d 155 (1957). A general merger clause or disclaimer may not alter the rule. *Id.*; *Bridger v. Goldsmith*, 143 N.Y. 424 (1894); *Angerosa v. White Co.*, 248 A.D. 425 (4<sup>th</sup> Dep’t 1936). However, where,

as here, an agreement contains a disclaimer of reliance on any representations that are not expressly contained in the agreement the rule is different. *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317 (1959); *see also Citibank, N.A. v. Plapinger*, 66 N.Y.2d 90 (1985).

In this case, the Settlement Agreement expressly provides that the Agreement represents the “Entire Agreement” between the parties and was executed “without reliance upon any promise, warranty or representation by any Party . . . other than those expressly contained herein and in the Exhibits hereto and each Party expressly disclaims any such reliance.” (Stmnt. Agt. § 14.) (emphasis supplied) OI contends that the disclaimer at issue in this case does not bar its counterclaim because it does not specifically disclaim reliance on representations as to the Unilever and Clorox claims. OI, however, concedes that the parties identified the Unilever and Clorox claims under a different provision of the Agreement as “matters set forth in the January 20<sup>th</sup> letter . . . all of which claims survive this Settlement Agreement in their entirety (the “Non-Settled Claims”).” (Stmnt. Agt. § 4(b)(ii).) Since the Agreement specifically addresses and excludes these claims from the Agreement’s coverage, OI’s argument that the disclaimer was not specific enough to bar a fraud claim is without merit.

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More importantly, OI has not alleged any fraudulent representations made by Graham regarding the valuation of its anticipated claims. Rather, OI alleges that it relied on its own understanding of how much those claims were worth and admits that it did not ask Graham for its valuation of those claims. In *Danann Realty, supra*, the court held that a party that fails to exercise ordinary intelligence to ascertain information related to a transaction cannot later complain that it was induced to enter into that transaction by misrepresentations. Clearly, OI could have inquired about the valuation of the Unilever and Clorox claims before expressly

reserving those claims.

## II. Dismissal Under CPLR 3211(a)(7)

To make a prima facie claim of fraud, a plaintiff must allege “misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury.” *Dembeck v. 220 Central Park South*, 33 A.D.3d 491, 492 (1<sup>st</sup> Dep’t 2006). If a cause of action for fraud is predicated on acts of concealment, “there must first be proven a duty to disclose material information.” *Id.* When parties engage in an arm’s length business transaction, a duty to disclose may still arise “where one party’s superior knowledge of essential facts renders a transaction without disclosure inherently unfair.” *P.T. Bank Central Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373 (1<sup>st</sup> Dep’t 2003). A party alleging concealment of essential facts must satisfy a two-prong test: (a) that the facts were information peculiarly within the other party’s knowledge, and (b) that the information could not have been ascertained through the exercise of ordinary intelligence. *Jana L. v. West 129<sup>th</sup> Street Realty Corp.*, 22 A.D.3d 274 (1<sup>st</sup> Dep’t 2005) (stating that a “simple inquiry” shows exercise of ordinary intelligence).

Here both parties were represented by sophisticated legal counsel; OI could have requested Graham to address any concerns about the Unilever and Clorox claims or any facts underlying those claims during the settlement discussions, or could have requested that language be inserted in the Agreement to limit OI’s exposure to potential claims. Further, prior to the SPA, Unilever and Clorox were longtime customers of OI; thus OI had knowledge and information about the issues related to these former clients and which were raised in Hamilton’s January 20<sup>th</sup> letter, three months before the settlement took place.

Since OI has failed to demonstrate that it could have justifiably relied on anything outside

the four corners of the Settlement Agreement, Graham's motion is granted and OI's counterclaim is dismissed.


Based on the foregoing, it is hereby

ORDERED that defendants' counterclaim is severed and dismissed and that the action is continued as to the claims stated in plaintiff's complaint; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 10/19/07

ENTER:



\_\_\_\_\_  
Helen E. Freedman, J.S.C.

**FILED**  
OCT 25 2007  
NEW YORK  
COUNTY CLERK'S OFFICE