

**Bristol Investment Fund, Ltd. v Eternal
Technologies Group, Inc.**

2007 NY Slip Op 34210(U)

December 20, 2007

Supreme Court, New York County

Docket Number: 0601290/2006

Judge: Jane S. Solomon

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

PRESENT: **JANE S. SOLOMON**

PART 55

Justice

Index Number : 601290/2006

BRISTOL INVESTMENT FUND

VS.

ETERNAL TECHNOLOGIES GROUP

SEQUENCE NUMBER : # 002

SUMMARY JUDGMENT

INDEX NO. 601290-06

MOTION DATE 10/24/07

MOTION SEQ. NO. #002

MOTION CAL. NO. _____

re read on this motion to/for _____

PAPERS NUMBERED

1-3

4-5

6

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 enclosed memorandum decision and order.*

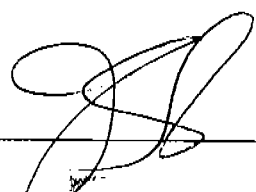
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

FILED

DEC 24 2007

NEW YORK COUNTY CLERK

Dated: 12/20/07



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: IAS PART 55

-----X
BRISTOL INVESTMENT FUND, LTD.,

DECISION AND ORDER

Plaintiff,

-against-

INDEX NO. 601290/06

ETERNAL TECHNOLOGIES GROUP, INC.,

FILED

DEC 24 2007

Defendant.

-----X

JANE S. SOLOMON, J.

Plaintiff Bristol Investment Fund, Ltd. (Bristol) moves for summary judgment in this breach of contract action to enforce a subscription agreement made in connection with a purchase of shares in defendant Eternal Technologies Group, Inc. (Eternal). Bristol further requests that its claim to recover attorney's fees it incurred in this litigation be severed and an inquest directed on that issue.

In September 2003, Bristol executed an agreement to acquire 285,715 shares of Eternal stock (Agreement), and a Warrant to purchase 142,858 additional shares of stock, paying an aggregate purchase price of \$250,000. Bristol was one of 24 purchasers who entered into similar agreements. Under section 11.4 of the Agreement, Eternal was obligated to file a registration statement with the United States Securities and Exchange Commission (SEC). The registration statement was

required to be effective on or before January 24, 2004, and Eternal was required to make such filings necessary to keep the registration statement in effect for a period of two years (Agreement, section 11.2[b]). If Eternal failed to register the shares with the SEC, Eternal was required to pay Bristol liquidated damages in the amount of 1% of the purchase price for the first 30 days after the January 2004 deadline, and 2% for each 30 day period thereafter. Eternal had not filed a registration statement by January 14, 2005, when Bristol sold the last of its shares.

Neither Bristol nor Eternal are located in New York, and Bristol is not authorized to do business in New York. The Agreement provides that it is governed by New York law, and that any action concerning the transaction is to be brought only in the state courts of New York, or a federal court located in New York. In other words, both parties consented to jurisdiction here.

Bristol interprets section 11.4 to mean that Eternal is liable for \$2,500 (i.e., 1% of the purchase price) for the 30 period immediately following January 24, 2004, and an additional \$5,000 for each 30 day period thereafter until January 14, 2005. Eternal does not challenge how Bristol calculated the liquidated

damages, which total \$55,666.67, including \$3,1666.67 for the period from December 26, 2004 through January 14, 2005.

Eternal never filed a registration statement with the SEC. In May 2005, Eternal offered all 24 Warrant holders additional shares in payment of the penalty. All but Bristol accepted the offer. Eternal alleges that Bristol "tentatively" accepted the offer at first, but subsequently rejected it (Aff. of Hank Vanderkam, paragraphs 11-13).

Eternal raises several issues, both legal and factual. In part, Eternal argues that summary judgment should be denied because Bristol failed to remedy certain defects in its pleading that were identified in orders deciding Bristol's motion for default judgment made in an earlier lawsuit (New York County index number [604144/04]) seeking to recover on the same claim. Eternal never appeared in that lawsuit, which was dismissed without prejudice by an order dated February 24, 2006. Among the deficiencies in Bristol's pleading noted in the decisions dismissing the prior action was the fact that Bristol was not qualified to do business in New York, as required under Business Corporation Law § 1312 (BCL § 1312).

Eternal now argues that Bristol's motion for summary judgment should be denied under BCL § 1312. That statute provides that a foreign corporation doing business in New York

State may not maintain an action unless it is authorized to do business through the Secretary of State, and pay to the state the appropriate fees and taxes. The burden of showing that a party lacks capacity to bring an action under BCL § 1312 is on the party relying on the statute (Uribe v Merchants Bank of New York, 266 AD2d 21 [1st Dept 1999]). Although Bristol is a foreign corporation, there is no evidence that it is doing business in New York within the contemplation of BCL § 1312 (id.), so this aspect of Eternal's opposition lacks merit.

Eternal further argues that under SEC Rule 144 (17 CFR section 230.144), Bristol was entitled to sell its unregistered shares freely one year after the date of the Agreement, and therefore its calculation of damages should be capped as of September 23, 2004. Bristol persuasively maintains that while it would have been possible to sell the shares after one year, there are regulatory obstacles that would impose on Bristol additional cost and effort, and that under the Agreement, Eternal had accepted responsibility for these regulatory issues, and agreed to take such steps as necessary to keep the registration statement in effect for two years. Also, the consequences to Eternal for its breach are clearly set forth, and the Agreement does not provide for a set-off to Eternal if Bristol failed to take the initiative and tackle the regulatory issues itself.

Eternal next argues that the it "surpassed all of its legal obligations to plaintiff" when it offered to modify the Agreement in May 2005, and that Bristol "tentatively" accepted the offer to settle the dispute by offering additional shares. However, it is undisputed that Eternal presented a written offer to Bristol that was rejected. The Agreement provides that it may be amended only by a writing executed by both parties (section 13[c]), and this did not occur.

Finally, Eternal contends that Bristol seeks pre-judgment interest on liquidated damages, which is not permitted under New York law. The only authority proffered for this contention is a footnote, in an unpublished decision from the United States District Court, stating that liquidated damages are a penalty imposed by the Court, not damages actually incurred by a plaintiff (Ave Lew Aff., paragraph 10). The decision addresses liquidated damages imposed by statute, and it is not clear that the court's footnote has any relevance to this lawsuit.

The Court of Appeals has written:

In effect, a liquidated damage provision is an estimate by the parties at the time they enter into the agreement, of the extent of the injury that would be sustained as a result of a breach of the agreement . . . Parties to a contract have the right to agree to such clauses, provided that the clause is neither unconscionable nor contrary to public policy

(Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc., 41 NY2d 420, 424 [1977], citing, 5 Williston, Contracts [3d Ed.] § 776).

There being no showing that the liquidated damages provision in the Agreement is unconscionable or contrary to public policy, it will be enforced. Eternal does not dispute this, but argues that pre-judgment interest does not apply because liquidated damages, as a matter of law, do not serve to compensate a party for a breach of contract claim within the meaning of CPLR 5001(a). Viewing the subject liquidated damages provision in accordance with the Court of Appeals' discussion in Truck Rent-A-Center, Inc., and in light of plaintiff's contention that there is a cost incurred as a result of Eternal's failure to register that is difficult to quantify, there appears to be no reason to deny plaintiff interest on that claim. However, the liquidated damage provision in this case accounts for added cost incurred over time from the date of breach to when Bristol sold the last of its shares.

Finally, Bristol's request that its claim for attorney's fees incurred in this lawsuit be severed for a separate inquest is denied because attorney's fees generally are not recoverable under the American legal system absent an explicit contractual or statutory basis. No contractual or statutory basis for recovering attorney's fees is alleged, to that claim is dismissed upon searching the record (CPLR 3212[b]).

Accordingly, it hereby is

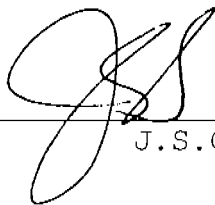
ORDERED that the motion by Bristol for summary judgment is granted to the extent that Bristol is entitled to judgment in the amount of \$55,666.67 plus interest from January 14, 2005, together with costs and disbursements as taxed; and it further is

ORDERED that Bristol's claim for attorney's fees is dismissed; and it further is

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: December 20, 2007

ENTER:



J.S.C

JANE S. SOLOMON

FILED
DEC 24 2007
NEW YORK
COUNTY CLERK'S OFFICE