

**Northern Stamping, Inc. v Monomoy Capital  
Partners, L.P.**

2014 NY Slip Op 30951(U)

April 8, 2014

Sup Ct, New York County

Docket Number: 652445/11

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK : PART 45

-----X  
 NORTHERN STAMPING, INC.,

Plaintiff,

-against-

MONOMOY CAPITAL PARTNERS, L.P.,  
 MONOMOY CAPITAL MANAGEMENT, L.L.C.,  
 and MONOMOY CAPITAL PARTNERS I,

Defendants.  
 -----X

Index No. 652445/11

DECISION AND ORDER

Motion Sequence No. 004

**MELVIN L. SCHWEITZER, J.:**

This is defendants' motion for summary judgment.

**Facts**

In May 2010, Resilience Capital (Resilience), a Cleveland-based private equity fund, put up for sale one of its portfolio companies, Steel Parts Manufacturing Inc. (Steel Parts).

Resilience hired Quarton Partners (Quarton), a privately held investment banking firm, to assist in the sale.

Northern Stamping Inc. (Northern), an Ohio-based corporation, was interested in acquiring Steel Parts. Northern did not have the financial resources to purchase Steel Parts on its own. From the outset of Northern's interest in Steel Parts, Northern planned to use third-party contributed equity to effect the transaction. In order to purchase Steel Parts, Northern needed an equity investor to supply funds for the purchase.

On July 28, 2010, Northern executed a non-disclosure agreement with Quarton (Quarton NDA). The Quarton NDA required Northern to keep confidential any information relating to Steel Parts. This was defined as "Evaluation Material."

In August 2010, Northern retained Scott Mulcahy (Mr. Mulcahy), an investment banker at XMS Capital (XMS), to assist Northern in locating money (e.g. an equity source) so that Northern could make a bid for Steel Parts. As Northern's advisor, Mr. Mulcahy's role was to help Northern negotiate the acquisition of Steel Parts as well as raise financing to facilitate the acquisition.

In the fall of 2010, Northern approached Quarton with a potential deal involving Caymus Partners (Caymus), a private equity firm. On October 25, 2010, Quarton executed a letter of interest (Quarton LOI) with Northern, containing an exclusivity clause under which Quarton agreed to take Steel Parts off the market and deal solely with Caymus. The exclusivity clause would expire by its terms at the end of the year, December 2010, or if the transaction failed. During the fall of 2010, and in connection with the proposed acquisition of Steel Parts, Northern conducted due diligence on Steel Parts based on the Evaluation Material provided to it by Quarton and pursuant to the Quarton NDA. In early December, Caymus backed out of the deal. In December 2010, Quarton put Steel Parts back on the market and began to talk to other interested parties.

Following the failed transaction with Caymus, Mr. Mulcahy continued to look for funding. Also in late 2010, Northern resumed conversations with Richard Newman (Mr. Newman), an independent deal broker, to assist in locating an equity source for the acquisition of Steel Parts. Mr. Newman had previously assisted Northern with the Caymus deal. Mr. Newman was neither an employee nor an agent of Northern. On January 6, 2011, Mr. Newman contacted Nathan Bard, a vice-president at Monomoy Capital Partners (Monomoy), a New York-based private investment firm, about a potential automotive parts transaction. Mr. Newman sent the original Quarton NDA, with an attached consent letter (Northern NDA) and asked Mr. Bard to

sign it. The Northern NDA was drafted by Mr. Mulcahy's investment banking firm, XMS, and was used by Mr. Mulcahy whenever he spoke to potential financing sources. Indeed, Northern ensured that every party with whom Northern shared information about Steel Parts, namely potential financing sources, including banks, private equity funds, and mezzanine financing signed the same Northern NDA.

The Northern NDA consists of two sections.

The first major heading in the document read "Target Confidential Information" and was followed by two paragraphs of text. This text stated that, the signing party agreed not to do or omit to do anything which would cause Northern to be in breach of its obligations pursuant to the Quarton NDA. It also expressly noted that "[t]erms used in this paragraph shall have the same meaning as in the Quarton NDA unless the context otherwise requires." It further noted that Northern would provide "Confidential Information" to the signing party pursuant to the Quarton NDA. The parties further stated that they understood the agreement to bind the signing party to the terms of the Quarton NDA.

The second major heading of the Northern NDA reads "Northern Stamping Confidential Information" and it preceded the balance of the document. This remaining text neither references the Quarton NDA nor explicitly incorporates it or its terms. This text stipulates that Northern sought to maintain as confidential all internal and non-public information on Northern, as well as the participation in, and competitive position of, Northern in the process. This was as defined as "Northern Stamping Confidential Information." It further provided that the signing party would not disclose any Northern Stamping Confidential Information to anyone other than "Northern Stamping Permitted Recipients," defined as employees who need to see the Confidential Information, and provided that the signing party will not use the Confidential

Information for any purpose other than in respect of [its] defined role on the transaction. Neither the phrase "transaction" nor the phrase "defined role" is defined or described by the Northern NDA.

After Mr. Bard signed the Northern NDA, Mr. Mulcahy began sending Mr. Bard information related to Steel Parts that Northern had received and/or prepared in 2010 when contemplating a deal with Caymus. Over the next three weeks, Northern continued to send Monomoy documents it had prepared or obtained during the fall of 2010, pursuant to the Quarton NDA. On January 28, 2011, Mr. Bard sent Mr. Mulcahy an email attaching a non-binding Letter of Intent (LOI) which, Mr. Bard described in the email, was intended to encapsulate the potential partnership between Monomoy and Northern to pursue a joint acquisition of Steel Parts. The LOI outlined the "terms and conditions under which Monomoy would enter into an agreement with Northern to jointly create a new company (NewCo) into which Northern would contribute its assets and Monomoy would provide the new capital to acquire Steel Parts.

The LOI was expressly conditioned on due diligence to be undertaken by Monomoy of both Northern and Steel Parts. Specifically numbered paragraph 4 of the LOI reads:

Closing of the Transaction is contingent upon our completing confirmatory diligence which shall include but not be limited to customary review of both Northern's and Steel Parts' books, records and legal documents, a discussion with the top customers and suppliers, and an insurance and benefit review by our legal, accounting and other advisors and satisfactory resolution of specific issues that may arise during the course of due diligence.

Paragraph 13 of the LOI provided explicitly that the LOI was non-binding. Northern signed the LOI on February 2, 2011.

On February 3, 2011, Monomoy sent Northern an executed Indication of Interest (IOI).

Like the LOI, the IOI provided explicitly in the opening paragraph that it was non-binding:

[T]his letter outlines our interest in acquiring the operations of [Steel Parts] from its equity holders ("Sellers") through a newly-formed entity ("NewCo") owned by [Monomoy] and the owners of [Northern]. This letter is provided as an indication of interest and is not a binding offer or agreement.

The IOI further noted that the proposal was subject to satisfaction of business, legal and environmental due diligence, and definitive documentation that includes customary representations, warranties, covenants, indemnities and conditions for transactions of this sort.

On February 2, 2011, after finalizing the LOI, Mr. Mulcahy contacted Quarton to inform them that Northern and Monomoy intended to make an offer for Steel Parts. On February 22, 2011, Mr. Bard emailed a draft letter to Quarton. The opening paragraph of the letter read:

On the basis of our partnership with Northern Stamping Inc. ("Northern"), this letter outlines our interest in acquiring the operations of Steel Parts Manufacturing Inc. ("Steel Parts" or the "Company") from Resilience Capital Partners ("Resilience" or "Seller") through a newly-formed entity ("NewCo") owned by Monomoy Capital Partners, L.P. ("Monomoy"). This letter is provided as an indication of interest and does not bind Monomoy to consummate a transaction.

Quarton responded that they did not want Northern to be part of the transaction. Quarton thereafter provided a separate Quarton NDA directly to Monomoy, thereby contractually giving Monomoy direct access to all Evaluation Material. Through its due diligence of Northern, Monomoy began to question whether acquiring Northern made sense. On March 21, 2011, Monomoy informed Northern that it was not going ahead with the Northern transaction. Monomoy offered to pay Northern's out-of-pocket expenses. That same day, Monomoy called Resilience, to let them know of Monomoy's decision to proceed without Northern. Later that Spring, Monomoy acquired Steel Parts from Resilience.

### Discussion

Summary judgment may be granted only when it is clear that no triable issues of fact exist. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept. 1997). Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 (1978).

The elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. *Noise in Attic Productions, Inc. v London Records*, 10 AD3d 303 (1st Dept. 2004).

#### Discussion of the Intent Letters

The first set of claims brought by Northern relate to the letters dated January 28, 2011 and February 3, 2011 (collectively, the intent letters). This court has already ruled that the intent letters were not a comprehensive binding agreement. Decision & Order, June 6, 2012 [Docket No. 20], pp. 8-9 ("Monomoy's January 28, 2011 [LOI] to Northern clearly stated that any offer to participate in the acquisition of Steel was contingent upon the "satisfactory outcome of confirmatory due diligence" and, for the most part, the letter contained nonbinding "statements of present intention adopted to facilitate the negotiation of definitive agreements..."). Now Northern attempts to argue that the intent letters constituted a binding "Type II Preliminary Agreement" that would obligate Monomoy to complete negotiations with Northern in good faith. The February 3<sup>rd</sup> Letter of Interest explicitly declared that it was non-binding. It unambiguously

stated that "This letter is provided as an indication of interest and is not a binding offer or agreement." Likewise, section 13 of the January 28<sup>th</sup> letter stated, "Sections 7(b), 8 and 10 through 15 of this Letter constitute the only binding obligation of the parties under this Letter."

Section 7(b) related to the integrity of Northern as an entity capable of being included in a combination. It does not limit Monomoy's ability to transact with Steel. Section 8, simply stipulates at what point the agreement will be terminated. Section 10 through 15 relate to procedural mechanics. It is sufficiently clear from this, that by its own terms the agreement did not create any binding obligations that were violated by Monomoy. The general duty of good faith cannot be stretched so far as to make terms that were explicitly non-binding into binding obligations.

We need to look no further than the unambiguous terms of these letters. They are not binding obligations. The fact that Type Two agreements can include terms to follow, has no bearing on whether or not explicitly non-binding agreements can form the basis of a claim for breach of contract.

#### Discussion of the Disclosure Agreements

The allegation is that there is a cause of action arising from the January 2011 NDA. The thrust of Northern's argument is that the NDA prohibited Monomoy from using information outside of its "defined role" in the transaction and that Monomoy's acquisition constituted a use of information. Monomoy argues that because the NDA never clarified what Monomoy's "defined role" should be, that the agreement is unenforceable as to this alleged breach.

The term "defined role" is never explicitly defined by the unincorporated NDA agreement. Monomoy is correct that what matters is the situation, "at the time the contract was executed" and not at some subsequent time. *New England Merchants Nat. Bank v Iran Power*

*Generation & Transmission Co.*, 502 F Supp 120, 127 (SDNY 1980). Where the parties' intent can be determined from the face of the contract, "interpretation is a matter of law and the case is ripe for summary judgment." *American Express Bank Ltd. v Uniroyal, Inc.*, 562 NYS2d 613 (1st Dept. 1990).

Northern's argument is essentially that the agreement when taken as a whole should be construed as containing something like a "non-circumvention clause," prohibiting Monomoy from completing the deal without Northern. This argument can be parsed out in steps.

First, the NDA provides that Monomoy "will not use Confidential Information for any purpose other than in respect of [its] defined role in the transaction..."

Second, the NDA requires that Monomoy not cause Northern to breach the Quartron NDA. The Quartron NDA was incorporated by reference and attached to the NDA.

Third, the Quartron NDA only allowed Northern to share confidential information with "representatives." The term "representatives" is defined by the Quartron NDA as, "employees, agents, attorneys, accountants or financing source[s]..." Because Monomoy was not an employee, agent, attorney or accountant of Northern, it must be the case that Monomoy was a "financing source."

Northern's argument concludes in the determination that Monomoy used confidential information outside the scope of its "defined role" as a financing source. Monomoy attempts to deflate this conclusion with the following arguments.

First, Monomoy argues that documents did not set forth any "transaction" in which Monomoy could have a defined role. Reasonable readers of the contract could conclude that Monomoy was a financing source in the context of an acquisition transaction involving Northern. The first sentence of the Quartron agreement, clearly describes Northern's interest in

“an acquisition.” The fact that the transaction was not fully described, does not undermine the possibility of Monomoy’s role being sufficiently definite.

Second, Monomoy tries to build an argument off the claim that Northern “admits” that Monomoy did not cause it to breach the Quartron agreement. Assuming this was admitted, it would not disrupt Northern’s interpretation of the situation. Northern does not claim that it breached the Quartron agreement. Northern claims that the Quartron agreement supplies the context that makes it clear what Monomoy’s defined role was and Northern used confidential information outside of its defined role.

Third, Monomoy asserts that the term “defined role” appears only in the section of the NDA relating to confidential information about Northern. The exact implication of this claim is not entirely clear. But in any case, it is unsupported by the document itself, the document merely states that Monomoy not “use the Confidential Information for any purposes other than...[its] defined role.”

Fourth, Monomoy observes that it did use the information within its “role” in the agreement. Strangely, in making this claim Monomoy implicitly claims that its role was unambiguous and that it amounted to that of a private equity firm considering the purchase of a company. This explanation contrasts with (but may not contradict) Northern’s depiction of Monomoy as a “financing source.” There is no need to conclude which explanation is more compelling, because it is sufficient to note that Monomoy’s explanation is not so compelling as to justify summary judgment. Relatedly, Monomoy also seems to claim that because it did use the information properly (to evaluate Steel), it must not be liable for using the information improperly. It is entirely possible that Monomoy both used the information for proper and improper purposes.

Fifth, Monomoy asserts that the Quartron NDA was only incorporated into the first section of the agreement. If this were true, it would undermine the claim that the Quartron agreement provides the substance necessary to understand Northern's defined role. Monomoy's assertion is not based upon any explicit proclamation. Rather, it seems to be based upon the fact that the sentence incorporating the Quartron NDA is found in a paragraph preceded by the heading, "Target Confidential Information." The first sentence in this paragraph is, "we refer to the confidentiality agreement...a copy of which has been attached." It would not be unreasonable to interpret the document as merely providing this heading as easy reference, rather than as some sort of context limiting tool. The two "halves" of the document are not explicitly made into separate sections or otherwise explicitly disconnected from each other.

Monomoy also points to the phrase at the end of the paragraph labeled "Target Confidential Information" in attempting to confine the scope of the Confidentiality agreement. That sentence stated, "Terms used in this paragraph shall have the same meaning as in the Confidentiality Agreement unless the context otherwise requires." This boilerplate, reemphasizes the applicability of the incorporation to the paragraph, but does nothing to limit the scope of that incorporation to the remaining paragraphs.

Monomoy also attempts to support its claim that the Quartron NDA was only incorporated into the first section of the agreement by claiming that this limited incorporation was admitted by the Plaintiff. The alleged admission occurred when Mr. Mulcahy, the man who drafted the NDA, was answering a deposition question. He admitted that after the first section of the NDA, no other part of the document *stated* that the Quartron NDA was to be incorporated. This admission does not imply that the agreement was not incorporated in section one and to the entirety of the agreement.

Sixth, Monomoy claims that Northern admitted the term “defined role” was not in fact defined. To establish this claim Monomoy references three statements by representatives of Northern. None of these statements are sufficiently dispositive to justify a finding of summary judgment but they do deserve serious attention.

Page 39 of the Northern’s appellate brief to the First Department, attempted to overcome the contention that plaintiffs fiduciary duty claim was redundant to the contract claim. In doing this, Northern wrote:

While the NDA sets forth such confidentiality obligation and, further articulates agreement not to use confidential information for any purpose other than in respect of your defined role on the transaction, it does not specify what Monomoy’s role in fact is. Thus, while, generally the requirement of confidentiality is set forth in the NDA, Monomoy’s defined role in the transaction is not.

It could be that this statement intends the term “NDA” to be used in the narrow sense (i.e. to not include the incorporated documents). But this interpretation is belied within the next few sentences of Northern’s brief:

That role (specifically to “provide new capital to acquire Steel Parts Manufacturing, Inc.”) is set forth in the separate later executed, Letter agreement. Accordingly, the basis of the fiduciary breach claim, specifically, the misuse and misappropriation of the Northern Stamping confidential information, is “connected with and dependent upon the contract [NDA],” but the duty itself “springs from circumstances extraneous to the nondisclosure agreement.”

Taken at face value these statements would be extremely hard for Northern to overcome. However, the status of this admission, in the context of this case is highly questionable for four reasons.

First, Monomoy (who entered this evidence as exhibit 33), only included two pages of a brief containing at least 40 pages. It is certainly within the realm of possibility that in the pages preceding the one quoted, the plaintiff put their statement in some sort of context.

Second, New York courts are historically wary of treating claims made in briefs as formal judicial admissions. *See* Hon. William J. Giacomo, Admissions: What They Are and How They Can Impact Litigation, 32 Pace L. Rev. 436, 443 (2012).

Third, treated with a high level of specificity, it is difficult to construe what the “admission” actually is. At best (for Monomoy), the defendant has shown that the plaintiff’s lawyer offered a legal theory that contradicts the theory they now seek to establish. In other words, what the plaintiff seeks to “contradict” at this point is their own (after the fact) interpretation of where the “defined role” was described. Even treating this admission as “binding” is less troubling than it might seem. The plaintiff’s opinion, at the time of filing this brief, is neither a part of the document’s text nor relevant parole evidence.

Fourth, the appellate division *rejected* the claim made by the plaintiff upon appeal. They found that the fiduciary duty claim was “duplicative of the breach of contract cause of action.” While this conclusion leaves room for debate as to the status of the contract claim, it also lends support to the conclusion that the contract claim is not undermined by the plaintiff’s appellate brief. It would be inequitable, to reject the plaintiff’s duty claim as redundant while treating their argument for the duty claim as an admission that forms the basis of a summary judgment that the contract claim (that made the fiduciary duty claim redundant) has been admitted to fail.

The next statement that the defendant construes as an admission is found in the deposition of the Mr. Friedman, a former attorney, Northern’s CEO, and the person who signed the NDA. He testified that Monomoy’s alleged “role is not defined in this [confidentiality

agreement] to the best of my knowledge.” He further specified that, “at the time that it was signed, their role was clearly understood and discussed based upon conversations.”

This supposed “admission” may simply have meant that the NDA itself, taken in the narrow sense, never defined the term. This leaves open the possibility that the definition may have been manifest in the combination of the NDA and the incorporated documents. The claim that the defined role was “clearly understood... based upon conversations” is not an admission that the definition was not also supplied by the incorporated NDA. Finally, it is noteworthy that these statements were explicitly made only as to the witness’ best knowledge. The witness may simply have not “known” the proper source of the information. The witness testified that there was agreement as to what the term “defined role” meant and while his statements may indicate there was not agreement as to what textual basis there was for that meaning, this is not a dispositive issue in evaluating and interpreting the contract.

The final supposed admission was made by Mr. Mulcahy, who drafted the NDA on Northern’s behalf. He was asked during a deposition if the NDA, “defined what a defined role is” and he responded (over an objection) by simply saying “no.” The line of questioning here was highly specific to the language of the agreement. It is possible that Mr. Mulcahy simply was stating that the term “defined role” was never defined, which would not be troubling since the key dispute in this case relate to determining what Monomoy’s role was, not what the term “defined role” means. Furthermore, the witness’ may have interpreted this question to relate to the unincorporated NDA document and not the broader agreement composed of the NDA and the incorporated Quartron NDA.

Finally, Monomoy argues that this interpretation construes the agreement as containing a “non-circumvention clause” when such clause was plainly not included in the contract. The

hypothetical ability to clarify a contract further, by including a specific clause, does not in any way undermine the plain meaning of the existent text. However, the well-established ability to include such a clause is noteworthy. It means that there is no risk that interpreting the contract precisely, will limit the ability of parties to achieve something like a "non-circumvention clause." Furthermore, the existence of such claims does weigh on the courts attempt to ascertain what exactly the NDA was supposed to do, in the minds of the parties. Mr. Mulcahy, who drafted the NDA for Northern, admitted that he was aware of such clauses.

The question is whether or not the incorporated NDA achieved the results of a non-circumvention clause. Nothing on the face of the contract would indicate that this was the case. The theory put forward by Northern functions, as they intend it to, but only as to the "use" of information. The prohibition placed upon Monomoy had to do with their ability to "use" the information supplied to them by Northern, and therefore any breach would have to do not with Monomoy's decision to go forward with the transaction, but with Monomoy's misuse of information in the process of that decision.

Monomoy used the information to consider a financing that would have involved Northern. In the process of that transaction Quartron stated that it (and Steel) would prefer that the deal not include Northern. Prior to Quartron's suggestion that Monomoy pursue Steel independently, there is no reason to believe that Monomoy was misusing information; Monomoy was working with Northern. The causal chain between obtaining the information and communicating with Steel is not enough to find misbehavior on the part of Monomoy.

Immediately following Quartron's suggestion that Monomoy pursue Steel independently, Quartron delivered directly to Monomoy all the Evaluation Material that had previous been

given to Northern (and then forwarded to Monomoy). Monomoy then conducted due diligence and decided to conduct an acquisition of Steel without Northern.

There are two possible categories of protected information.

The first is referenced in the second paragraph of the NDA and refers to the evaluation materials provided by Quartron. This paragraph stated that, "Pursuant to the Confidentiality Agreement Northern Stamping is authorized to provide you, as a Representative, with copies of the Confidential Information." There can be no question that Monomoy could not have violated this obligation, following the delivery of the same information to it, directly by Quartron.

The second is referenced in the third paragraph of the NDA and includes "analysis, studies, and other confidential information regarding the transaction" developed by Northern. There are several reasons why the existence of this second category of information cannot substantiate a finding of breach of contract by Monomoy.

First, the section Monomoy is alleged to have broken only related to what was called "Confidential Information," whereas the second category of protected information was explicitly labeled "Northern Stamping Confidential Information." There may be some confusion because the second category of protected information did explicitly state that Monomoy can only share the Northern Stamping Confidential Information with recipients entitled to see the "Confidential Information." This did not imply that the terms were interchangeable; it simply specified who the second category of protected information could be shared with, using a term originally created through the first category of protected information.

Second, Northern has not presented any evidence to suggest that Monomoy actually used any of the second categories of protected information in its decision to acquire Northern. Individual people at Monomoy, who had seen the information had likely incorporated it into

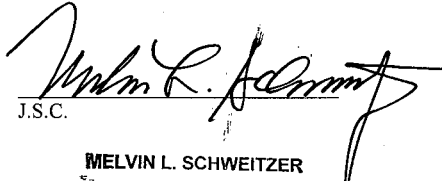
their thinking—but this sort of vague incorporation is not sufficiently definite to ground a finding that Monomoy breached a contract. It is not even clear that such incorporation can be considered “use” of information. There is explicit evidence that Monomoy conducted its own due diligence, and there is no evidence to suggest they used the information created by Northern.

At this point, there was no reason to suppose that Monomoy was misusing any information, and therefore no breach of the NDA can be found.

ORDERED that defendant’s motion for summary judgment is granted.

Dated: April 8, 2014

ENTER:

  
J.S.C.  
**MELVIN L. SCHWEITZER**