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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Salaam Scarpulla Justice PART 39

Index Number : 603831/2006
GRAHAM PACKING
vs.
OWENS-ILLINOIS
SEQUENCE NUMBER : 011
PARTIAL SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

decided per the memorandum decision dated 7/11/14
which disposes of motion sequence(s) no. 011 + 012

FILED

JUL 16 2014

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/11/14

Salaam Scarpulla, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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GRAHAM PACKAGING COMPANY, L.P.,

Plaintiff,

- against -

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

Defendants.

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Index No. 603831/06
Motion Seq. No. 011, 012

DECISION AND ORDER

HON. SALIANN SCARPULLA, J.:

In this action, *inter alia*, to recover damages for breach of contract, plaintiff Graham Packaging Company, L.P. ("Graham") moves for partial summary judgment on its claims for breach of contract and fraud as set forth in counts 1, 2, 4 and 6 of its amended complaint (motion sequence no. 011), and defendants Owens-Illinois, Inc. and OI Plastic Products, FTS, Inc. ("Owens") move for summary judgment dismissing the complaint (motion sequence no. 012).

In 2004, Graham and Owens entered into negotiations for Graham to acquire Owens' subsidiary Owens-Brockway Plastic Products ("OBPP"), which was in the plastic bottle manufacturing business. On July 28, 2004, Owens and Graham executed a Stock Purchase Agreement ("SPA") whereby Graham agreed to acquire 100% of the shares of OBPP for $1.2 billion, after a period of due diligence. The deal closed on October 7, 2004.

Graham commenced this action in or about November 2006, alleging claims of breach of contract, fraudulent misrepresentation, negligent misrepresentation, failure to

indemnify, and breach of the implied covenant of good faith and fair dealing in connection with the acquisition. Graham sought damages in excess of $30 million. The claims arise from three alleged breaches: (1) the Unilever breach; (2) the Clorox breach; and (3) the pension breach.

Discussion

Unilever Breach

On February 21, 2000, Owens and Unilever entered into a contract whereby Owens agreed to supply Unilever with 300 ounce laundry detergent bottles. The contract expired on December 31, 2003, however, Owens continued to be Unilever's supplier with the same terms. Shortly thereafter, Unilever demanded a price reduction and in August 2004, Owens agreed to reduce the price charged to Unilever by approximately 23%, retroactively effective as of July 1, 2004.

According to Graham, Owens did not disclose this price reduction during the due diligence period or before Graham's acquisition of OBPP was completed. In the written questions it submitted to Owens during the due diligence period prior to signing the SPA, Graham asked Owens to "discuss the volume trends and general pricing assumptions in projections" specifically with regard to Unilever. In the first draft, Owens wrote "the key business at risk is the 300 oz. If we want to keep, it would be a maximum of $2.5 MM of erosion." However, when Owens sent Graham the final version of the written response in May 2004, that response was deleted, and instead, Owens provided that its pricing projections "reflect continued price pressure on the HDL (Heavy Duty Liquid) business,

particularly the 300-ounce. However, we believe this business to be secure due to switching costs" and that "further price erosion is included in our projections." Then, during a June 7, 2004 due diligence meeting with Graham's advisors, CEO, CFO and COO, Owens advised Graham that it was still negotiating with Unilever, but Owens had not proposed any lower prices.

Graham refers to an internal email from Owens' Director of Sales and Marketing Dave Andrulonis ("Andrulonis") sent on September 1, 2004, which provided that in exchange for the price reduction, Unilever advised that Owens would "retain the business." It was further stated that "reduced prices will be retroactive to July 1, 2004."

Graham also refers to a September 29, 2004 draft letter written by Unilever's Director of Supply Management Kenneth Kearns ("Kearns") to Owens' business manager for the Unilever relationship Andrew Deutschman ("Deutschman") to confirm Unilever's "exclusive award to [Owens] of its continuing requirements for the 300 oz. laundry club-pack, effectively extending through December 31, 2007 the Project Xena supply agreement in force since 21 February 2000." Kearns indicated that the $260 per thousand bottle price reduction was "from October 1, 2004" and stated that Owens would issue a credit to Unilever "in the sum of $1,030,640 equivalent to the unit volume of Xena packs shipped to Unilever" by Owens during the period July 1 - September 30, 2004 "multiplied by a factor of $0.26 per unit ($260/m)." In their depositions, both Kearns and Deutschman confirmed that such letter accurately represented the deal struck by Owens with Unilever for the bottle pricing going forward. Deutschman testified that

as of July 26, as well as on September 29, 2004, Owens had made a commitment to Unilever to reduce the 300 ounce bottle pricing.

In an email sent on October 15, 2004, Andrulonis informed Graham's CFO John Hamilton ("Hamilton") that the 300 ounce bottle price reduction was agreed to on August 28, 2004. Further, in an email sent on March 20, 2005, Deutschman confirmed that "prior to the acquisition, we came to an agreement with Unilever regarding the continuation of supply on the 300 oz. We had been advised not to sign anything because the agreement came so close to the sale."

According to Owens, the price reduction was disclosed on May 21, 2004 as part of a formal diligence disclosure, where Owens informed Graham that Unilever was applying "continued price pressure on the HDL (Heavy Duty Liquid) business, particularly the 300 ounce. However, we believe this business to be secure due to switching cost." Further, at the June 7, 2004 meeting, Owens disclosed that it did "not have a Unilever contract since the North America bid" and "negotiations underway on 300 oz bottles, which could be at risk; Alpha (a European competitor in the plastic bottle business known for its low prices) may be coming after this business."

Further, according to Owens, in April 2004, Graham had developed a plan to take the Unilever 300 ounce bottle business away from Owens by offering to sell Unilever the same bottles at a price 30% less than what Owens had been charging Unilever. However, Graham never disclosed to Owens that it had been bidding on that business. According

to Owens, on or about August 26, 2004, employees of Owens and Unilever met over dinner, where Unilever informed Owens that it would be keeping the 300 ounce bottle business at the reduced price that Owens had offered. However, Unilever and Owens did not enter into a written contract formalizing that new agreement, and the parties did not complete additional negotiations at that time on the additional terms Owens had included in its reduced price proposal that provided cost savings and other benefits to Owens to partially offset the impact of the price reduction. Because there was no formal agreement, after the Owens/Graham closing, Graham and Unilever continued to negotiate pricing of the 300 ounce bottles. Finally, in November 2005, Graham and Unilever signed a written contract for the 300 ounce bottles.

Graham argues that it is entitled to summary judgment on its claim for breach of contract because Owens failed to notify it that it had agreed to reduce the price of the Unilever bottle prior to closing. Specifically, it alleges that Owens breached Sections 2.19(d), 5.18, 2.7(j), (x), and 5.2(a) of the SPA, which required that all of the representations and warranties contained in the SPA – including the representations made in the Pricing Spreadsheet – be accurate as of closing.

The preamble to Article II of the SPA provides that Owens would "represent and warrant to [Graham], in each case, as of the date hereof and as of the Closing Date (or, in each case, if made as of a specific date, as of such date)."

Section 2.19(d) provides,

> Section 2.19(d)(i) of the O-I Disclosure Schedule sets forth a true, complete and correct list of each Significant Agreement that has not been duly executed and delivered by all of the parties thereto (the "Unexecuted Material Agreements"). Section 2.19(d)(i) of the O-I Disclosure Schedule sets forth a summary of all material terms and conditions of business as currently conducted between the Company or a Subsidiary of the Company, as the case may be, and the third party to such Unexecuted Material Agreements (the "Unexecuted Material Agreement Summaries"). The Unexecuted Material Agreement Summaries are true, complete and accurate in all respects.

Graham maintains that Owens represented and warranted that the information contained in Section 2.19(d)(i) of the Disclosure Schedules was true and accurate. The Disclosure Schedule, *inter alia*, describes the products sold to Unilever, the terms of any rebates and price adjustments, and incorporated the information in Section 24 of the Pricing Spreadsheet, which set forth the prices Owens charged Unilever for the various bottles it supplied. Graham argues that the Pricing Spreadsheet and Disclosure Schedule should have been amended to reflect the Unilever price reductions, and the failure to amend and to disclose violated the SPA, which required that the representations and warranties be accurate as of the date of signing, July 28, 2004, as well as the date of closing.

Graham further contends that Section 5.18 of the SPA requires that "from time to time prior to the Closing, [Owens], on the one hand, and [Graham], on the other hand" shall amend and supplement the Owens Disclosure Schedule or Graham Disclosure Schedule "with respect to any matter that, if existing or occurring at or prior to the date of

this Agreement would have been required to be set forth or described in the [Owens] Disclosure Schedule or [Graham] Disclosure Schedule, as the case may be, or that is necessary to correct any information in the [Owens] Disclosure Schedule or [Graham] Disclosure Schedule, as the case may be, that has been rendered inaccurate by an event occurring after the date hereof . . . ." Graham argues that Owens' representations regarding pricing had to be accurate as of the time of signing and closing, and its agreement to reduce Unilever prices rendered the Disclosure Schedule inaccurate.

Owens argues that no breach of Section 2.19 or 5.18 warranties occurred because the Unilever agreement was not written and executed as of the date the SPA was signed or as of the date of closing. Further, the "Summary" of the Owens/Unilever relationship was accurate. Owens further contends that it was not required to update the Pricing Spreadsheet, which contained the heading "7/26/04 Pricing" to reflect the changed Unilever pricing because Section 6.2(a) of the SPA provided that representations that "shall be true and correct . . . as of the date hereof and as of Closing Date as if made at and as of such date . . . (except those representations and warranties that address matters only as of a particular date or only with respect to a specific period of time, which need only be true and correct (or true and correct in all material respects, as applicable) as of such date or with respect to such period [sic]." Therefore, the Pricing Schedule was never inaccurate because the price was noted for 7/26/04 and the prices reflected as of that date were accurate. Owens refers to Graham's president Roger Prevot's ("Prevot")

testimony that the Pricing Spreadsheet was not a representation of what prices would be in the future or on any day other than July 26, 2004; the 300 ounce bottle prices on the Pricing Spreadsheet were accurate as of that date.

Graham next argues that Owens' agreement to reduce the prices charged to Unilever for the 300 ounce bottles violated Sections 5.2(a)(xvi) and Sections 2.7(j) and (x) of the SPA. Section 5.2(a)(xvi) provides that "none of the company or any of its Subsidiaries will amend, terminate, extend, waive, assign or otherwise modify any rights under, or discharge any other party of any of its obligations under, any Company Material Contract . . . except in the ordinary course of business consistent with past practice." Sections 2.7(j) and (x) together requires that no amendments to contracts would be made, and requires disclosure of any modifications that occur. Owens argues that engaging in price negotiations with Unilever, and ultimately agreeing to the price reduction, was in the "ordinary course of business consistent with past practice" because pricing pressure and pricing negotiations were characteristic of the plastic bottle business. Graham contends that it is Owens' burden to prove that its decision to lower prices was in the ordinary course of business. According to Graham, reducing pricing by 23% was not in the ordinary course of its business.

I find that Owens breached the SPA because the Pricing Spreadsheet, which was incorporated into the Disclosure Schedules, listed prices that were not updated prior to the Closing, as required by Section 5.18. Although Owens and Unilever did not enter

into a written contract reflecting the price reduction, the evidence presented establishes that the parties agreed to the price reduction prior to the Owens/Graham closing.

Additionally, Owens' argument that pursuant to Section 6.2(a) of the SPA, "point in time" representations and warranties such as the Pricing Spreadsheet, which was stated to be accurate as of July 26, 2004, are not subject to the requirements of Section 5.18, is without merit. First, even if the Pricing Spreadsheet was only required to be accurate "as of" July 26, 2004, Section 5.18 required that Graham be notified of the change in pricing. Second, Owens' argument is belied by an examination of other representations and warranties in the SPA that are specifically set forth as "point in time" representations, which, when read in context, show that Section 5.18 representations and warranties can not be "point in time" limited.[1] The fact that there was a date on the pricing spreadsheet of July 26, 2004 does not change the fact that there was no "as of" qualification in the actual representation. There was no "as of" date in the SPA sufficient to relieve Owens of its responsibility to advise Graham of changes in pricing prior to closing.[2]

Clorox Breach

Throughout 2002 and 2003, Owens had been experiencing quality issues with its Hidden Valley Ranch PET plastic bottles (the "HVR Bottles") that it supplied to Clorox

[1] *See* SPA Section 2.6, containing representations and warranties as to the accuracy, as of specific dates, of certain financial statements.

[2] Neither Owens nor Graham submitted sufficient evidence that the price negotiations and subsequent reduction were or were not in the "ordinary course of business consistent with past practice," sufficient for me to determine, *prima facie*, whether Owens violated Sections 5.2(a)(xvi) and Sections 2.7(j) and (x) of the SPA.

pursuant to a written memorandum of agreement ("MOA"). The issues allegedly occurred primarily because of Owens' use of one-stage manufacturing as opposed to two-stage manufacturing.

By letter dated April 22, 2004, Clorox informed Owens that it conducted a cost analysis to determine the financial impact of the bottle problem. The results showed that Clorox had experienced losses of approximately $725,000 because of the problem. Clorox stated, "as we move forward two things need to happen and happen quickly. First, Owens needs to permanently eliminate the quality problem. Second, Clorox and Owens need to reach agreement as to how Clorox will be compensated for the $725,000 expense incurred since the beginning of the 'soft bottle' quality issue one year ago. Compensation should also include any additional costs incurred by Clorox between now and that point in the future when the quality problem is finally eliminated."

Owens hired a consultant to try to solve the HVR Bottles problem but on September 30, 2004, Clorox sent a Performance Notice to Owens, indicating that bottles shipping from Owens' plant failed to meet Clorox's Performance Standards "as defined under section 23 of the MOA" ("Clorox Letter"). Clorox expressed its continued frustration with the bottle issues and reserved "its rights under the Clorox MOA, including, but not limited to, the right to exercise its Termination Option or Reimbursement Option." Clorox further provided, "these ongoing performance failures erode the needed confidence in [Owens] as a long-term strategic source. Should we

continue to see this level of performance, we will be forced to begin to take further action to ensure supply of quality bottles . . . we stand ready to work together with [Owens] to permanently improve this situation." In an email, Andrulonis indicated that he interpreted the Clorox Letter as "notice that if not resolved in XXX days, business goes elsewhere." Owens decided, that rather than risk losing Clorox's business, it would commit to Clorox to use the two-stage production to fix the HVR Bottles issue.

Prevot testified at a deposition that he was aware of the HVR Bottles issue, and specifically discussed the potential switch to two-stage production with Paul Young ("Young"), Owens' head of manufacturing. Young testified that there was no direct conversation about how much the switch would cost and no agreement that Graham would pay for the switch, but was "positive" that around the time that the Clorox Letter was sent, Prevot gave him the authority to tell Clorox that there would be a change to the two-step process. Another Graham executive, Booth, testified that he visited the plant where the bottles were being manufactured, and was told that there were major quality issues with the Clorox bottles.

Owens disclosed the Clorox Letter to Graham via email on October 6, 2004, the night before closing, but did not attach the Clorox Letter to the email. The email, from Owens' Mergers and Acquisitions Executive Ellsworth Shriver ("Shriver"), provided that Owens "has received a letter from Clorox concerning quality issues on Hidden Valley Ranch bottles manufactured at the Vandalia Plant. I have investigated this situation and

learned that Paul Young is aware of this quality problem and has designed a solution which includes moving the production of Hidden Valley Ranch bottles to the Iowa City plant. I have also been told that Paul is working with Graham to move idle 2-stage machines owned by Graham to the Iowa City plant to make the Hidden Valley bottles. I would be glad to supply a copy of the Clorox letter, but I believe Paul Young already has a copy." In an email sent on October 7, 2004, Prevot replied, "I am satisfied with what Paul has described to me about the situation and plans to deal with it."

Now, Graham argues that Owens' failure to give notice of the Clorox Letter, to provide a copy of the actual letter with the October 6, 2004 email, and to amend the Disclosure Schedules to reflect the substance of the letter, constitutes a breach of the SPA. Graham maintains that the Clorox Letter elevated the HVR Bottles issue to a "very significant business risk," the severity of which Graham was unaware at the time. According to Graham, the cost of fixing the issue ultimately totaled approximately $12.4 million.

Graham first references Section 2.14 of the SPA, in which Owens represented that "except as set forth in Section 2.14 of the O-I Disclosure Schedule, (a) there are no claims . . . filed complaints . . . actions . . . or to the knowledge of the O-I Parties, investigations pending, or to the knowledge of the O-I Parties, threatened against or affecting . . . the Company [or] any of its Subsidiaries." Graham contends that Clorox's assertion that Owens owed it $725,000 in compensation for the expenses associated with

the quality deficiencies of the HVR Bottles constitutes a "claim" under Section 2.14 of the SPA, and Owens' failure to timely disclose the Clorox Letter itself and include a full description of its contents on the Disclosure Schedules was a material breach of Section 2.14 of the SPA.

Graham next argues that Owens violated Section 2.19(e) of the SPA, which includes a representation and warranty that Owens was not in default or breach of any of its obligations under the Executed Material Confidential Agreements, and had received no notice or claim of default or breach. Owens argues that the Clorox Letter never formally declared a breach of the MOA and therefore, Section 2.19(e) was not violated. Owens further contends that a failure to meet Performance Standards does not constitute a breach of the MOA.

Graham further argues that Owens' failure to disclose the Clorox Letter and the severity of the bottle quality issues also violated Section 2.27 of the SPA, in which Owens warranted that "no customer or supplier has threatened to cancel in whole or in part, or otherwise terminate in whole or in part, its relationship with the Company . . . which threat could reasonably be expected to result in such a termination." Owens argues that Section 2.27 only circumscribes any representation relating to threats by customers or suppliers to threats received within the 90 days prior to signing. Owens argues that it was not required to supplement or amend Section 2.27 of the Disclosure Schedule to include the Clorox Letter or the April 22 letter because the representation

was only made "as of the date hereof" that is, the date of signing, July 28, 2004 and therefore, the letters were not included within the 90 day limitation of the provision. Further, neither letter was a "threat" as defined by the SPA. The Clorox Letter simply acknowledged the existence of the right to terminate or seek reimbursement for costs incurred.

Graham further claims that in Section 5.2(a)(xiv) of the SPA, Owens agreed that it would not "commit to making capital expenditures in excess of those contemplated by the 2004 budget and, if applicable, the 2005 plan," and the commitment to the capital expenditure for the two-stage equipment designed to fix the HVR Bottle problem without specific disclosure as to its cost, was in violation of this representation. Owens argues that there is no evidence that it committed to any Clorox related capital expenditure between signing and closing that bound Owens after the closing and even assuming that there was a commitment, there is no evidence that such an expenditure was in excess of those "contemplated by the 2004 Budget" or "2005 Plan."

Graham also contends that Owens violated its representation in Section 2.12 that all of the equipment was in "sufficiently good operating condition and repair" to permit its use in the continuing operations of the company because Owens was forced to commit to switching to the two-step process.

Section 2.14, which is titled "Legal Proceedings" clearly only refers to filed claims or lawsuits. Neither the April 22 letter nor the September 30 letter constitutes a filed

claim or lawsuit as described in Section 2.14. Further, Graham's claim that Owens violated Section 2.12 is without merit because no evidence was presented to establish that the one-stage equipment was not in good operating condition in repair, rather, just that it was not the appropriate equipment to use to manufacture these specific bottles. In addition, no evidence has been presented to establish, *prima facie*, that Owens violated Section 5.2(a)(xiv) of the SPA.

In the September 30, 2004 Clorox Letter, Clorox notified Owens that it had not met the "Performance Standards" of the Clorox MOA, and reserved its right to either terminate or seek reimbursement. A chain of internal emails sent by and among executives at Owens indicates that they considered the Clorox Letter to be an ultimatum, perceived it as representing a true threat of termination of the Clorox MOA, and genuinely feared losing Clorox as a customer. Graham maintains that while it knew of the problems with the HVR bottles, it was not aware of the severity of the problem, or of Clorox's threat to terminate. I find that the Clorox Letter indicated that Clorox was reserving its right to exercise either its termination option or reimbursement option, but also provided that it was ready to work together with Owens to permanently improve the situation. Even if the Owens' executives viewed the letter as a true threat of termination, Section 2.27 limits the representations contained therein to only the 90 days prior to the signing of the SPA, which was on July 28, 2004. As such, Owens did not violate the SPA because the Clorox Letter was written after July 28, 2004, and the April 22 letter,

which was written prior to the 90 day period, did not contain a threat to terminate.

Finally, I find that Owens did not violate Section 2.19(e) of the SPA. Section 2.19(e) provides, in relevant part, "none of the Company or any of its Subsidiaries is in default or breach, or has received any written notice or claim of default or breach, under any Executed Material Confidential Agreement . . . and . . . each other party thereto has performed all of its material obligations . . . required to be performed by it and is not in default or breach thereunder." I find that the April 22, 2004 letter did not constitute a "written notice or claim of default or breach," rather, it was part of a dialogue between Clorox and Owens in which they were trying to resolve quality problems with the HVR bottles and the issue of compensation for the $725,000 expense incurred by Clorox.

The parties dispute whether the September 30, 2004 performance notice could be considered a "written notice or claim of default or breach" under Section 2.19(e). Under Section 20 of the Clorox MOA, either party may "(a) . . . terminate the agreement if the other party fails to cure any material breach in any representation or warranty or the performance of any covenant or obligation under this Agreement within thirty days after written notice from the other party as provided . . . and (b) buyer may terminate this agreement thirty days following the date of the Performance Notice provided by buyer to seller . . . provided buyer so specifies such termination election in the Performance Notice."

I find that even if the Clorox Letter was a "written notice or claim of default or breach" under Section 2.19(e) of the SPA, Graham admittedly was aware of the HVR bottle problem well before the Clorox Letter was sent, and Owens disclosed the contents of the Clorox Letter to Graham only a few days after Owens received the letter, which happened to be on the eve of closing. In the October 6 email from Owens to Graham, Owens stated "[Young] is working with Graham to move idle 2-stage machines owned by Graham to the Iowa City plant to make the Hidden Valley bottles. I would be glad to supply a copy of the Clorox letter, but I believe Paul Young already has a copy."[3] Owens specifically notified Graham about Clorox's concerns about the quality of the bottles, and of plans to use two-stage machines to make the bottles. Owens offered to provide Graham with the actual Clorox Letter/Performance Notice, but in an email sent the next day, Prevot stated, "I am satisfied with what [Young] has described to me about the situation and plans to deal with it." Because Graham was well aware of the problems with the HVR bottles, was notified of the Clorox Letter shortly after it was received, was told about plans to shift to the use of two-state machines, and declined Owens' offer to provide it with the Clorox Letter, it can not now sustain a claim that Owens breached its Section 2.19(e) obligations under the SPA.

Pension Breach

Throughout 2004, OBPP was a party to two collective bargaining agreements ("CBA") with the Glass, Molders, Pottery, Plastics & Allied Workers International Union

[3] Paul Young, who originally worked for Owens, was making the transition over to his position at

("GMP"): (a) a multi-plant agreement set to expire on April 30, 2005 covering GMP employees in Baltimore, Chicago, Cincinnati, Edison (NJ), Kansas City (MO), and St. Louis (MO); and (b) a single-plant agreement covering GMP-affiliated employees in Florence, Kentucky. The CBAs provided that GMP-affiliated employees would be eligible for pension benefits as set forth in the CBA and in a separate Owens Pension Plan.

The CBA and the Owens Pension Plan set forth certain early retirement benefits. For example, if an employee who turned 55 years old accrued 30 years of service, that employee would be able to retire at that time with full unreduced retirement benefits, rather than having to wait to retire until age 60 or 65. After the Owens/Graham closing, any employees who were employed by Owens, and then became Graham employees, would be subject to the CBA and the Graham Pension Plan. OBPP employees who had a vested pension benefit under the Owens Pension Plan prior to closing and stayed on at Graham after the transaction closed were to receive two retirement payments: Owens would pay the amount based on the benefits the employees had accrued as of the closing, and Graham would pay the remainder of the benefits accrued after closing, pursuant to the CBA and the Graham Pension Plan.

An issue arose as to three employees who had worked at Owens for more than 30 years, and were age 54 at the time of the Owens/Graham closing. A few months later, when Graham shut down the plant where they worked, those now Graham-employees

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Graham during September 2004.

had reached age 55, and they wanted to collect early unreduced retirement benefits. Graham refused to pay them unreduced retirement benefits, maintaining that it was Owens' responsibility to pay any unreduced benefits owed.

Those employees filed grievances against Graham and participated in an arbitration in November 2006, in which the arbitrator found that Graham was responsible for the full amount of the pension liabilities (paying the employees $1,200.00 per month) and could try to seek restitution from Owens on its own. The arbitrator held, "Graham must make up the difference between the pension paid by [Owens] and the unreduced or enhanced early retirement benefits to which the grievants and others similarly situated are entitled under the CBA." The arbitrator made no finding as to whether Owens would be responsible for indemnifying Graham.

Graham now claims that Owens breached the SPA when it declined to indemnify Graham for the cost of the unreduced early retirement benefits Graham paid to those employees. The issue here is the allocation between Graham and Owens, and interaction between and apportionment of liability under (1) the Owens pension plan; (2) the CBA; and (3) the SPA.

First, with regard to Graham's claim for indemnification, Section 8.2 of the SPA provides for indemnification only if (1) Graham set up a substantially similar benefit plan to that maintained by Owens pre-Closing; (2) OI failed to obtain written consent from the GMP permitting GMP-affiliated employees to participate in Graham's new plan; and (3)

Graham complied in all material respects with its pension obligations under the CBA and the SPA. Owens obtained the GMP's consent required for Graham to set up its own benefit plan to cover the employees. Although Owens argues that the benefits Graham provided to these employees were not identical and thus indemnification would fail independently for this reason, the SPA does not require identical benefits but allows for "substantially similar" benefits if provision of the identical benefits was not commercially practicable. The evidence presented demonstrates that Graham did provide substantially similar benefits in the Graham Plan.

In any event, I find that Graham is not entitled to indemnification from Owens. Sections 2.16 and 8.1 of the SPA designate all pension and employee benefit plans as either "Company Plans" or "Parent Plans." Company Plans were to be sponsored and maintained by OBPP (and its purchaser, Graham) and Parent Plans were to be sponsored by Owens. The CBA was designated as a Company Plan and the Owens Pension Plan was designated as a Parent Plan. Designating the CBA as a Company Plan rather than a Parent Plan meant that obligations arising from the CBA would be the responsibility of OBPP and its new owner, Graham, and not the responsibility of Owens.

Section 8.1 of the SPA specifically provides, "Except as otherwise provided herein, from and after the closing date, the company and its subsidiaries shall be solely responsible for all obligations and liabilities under the Company Plans, and from and after the closing date, none of O-I [Owens], Seller or their respective affiliates shall have

any obligations or liabilities under any Company Plan, whether such obligations or liabilities arose before, on or after the Closing Date."

Section 8.4 of the SPA provides, "buyer shall provide . . . each business employee with full service credit for all purposes (other than for purposes of benefit accruals under a defined benefit pension plan, and other than to the extent such credit would result in duplication of benefits)." Further, Section 8.5 states, "[Owens] shall retain and [Graham] shall not assume, all the liabilities and obligations under the Pension Plans, whether such liabilities or obligations arose before, on or after the closing date." As of the date of the Owens/Graham closing, the subject employees were not eligible for the unreduced early retirement benefit. They only became eligible for those benefits after the closing, when they reached age 55, and were Graham employees, no longer subject to the Owens Pension Plan.

Graham argues that because the Owens Pension Plan contains language that incorporates the early retirement provisions of the CBA, the benefits in question fall under the CBA as well as the Owens pension plan (a Parent Plan), and therefore, pursuant to Section 8.5, Owens is responsible for the unreduced benefits. Graham further argues that according to Section 8.4 of the SPA, Graham is not required to give service credit for the purpose of benefit accruals and therefore, would not be responsible for giving credit for service while employed at Owens in calculating the pension benefits that Graham would pay. Graham argues that the time accrued while employed at Owens should be

allocated to Owens, especially in light of the fact that Owens retained all of the assets of its pension plan. Graham contends that just because those employees happened to turn 55 while they were Graham employees, and no longer Owens employees, Graham should not be responsible for paying the unreduced benefits.

Graham also maintains that while the Owens Pension Plan is listed on Disclosure Schedule as a Parent Plan, and the CBAs are listed as Company Plans, an exception is provided that the CBAs "will be deemed Company Plans solely with respect to those benefits which are not otherwise provided under the Employee Plans listed above." Graham contends that because the Owens Pension Plan contains language that incorporates the early retirement provisions of the CBA, the benefits in question are "otherwise provided under" the Owens Pension Plan and therefore, are part of a Parent Plan, for which Owens maintains responsibility.

Owens argues that it is not required to pay the unreduced benefits pursuant to Sections 8.4 and 8.5 because Owens employees who had not become eligible for early unreduced retirement benefits as of the Closing Date effectively had their benefits frozen as of the Closing Date, could no longer become entitled to them under the Owens Plan post-closing, and would have to seek those benefits from another source, such as the CBA or the Graham Pension Plan. Owens argues that because those employees did not yet reach age 55 at the time of closing, Owens was only required to pay the reduced benefits accrued by those employees while they worked at Owens. It argues that Owens

employees who were absorbed by Graham could only receive the portion of their Owens Plan benefits that had accrued pre-Closing from Owens, and all benefits derivative of the CBA, designated as a "Company Plan" by the SPA, should be paid by Graham.

The Court's role in interpreting a contract is "to ascertain the intention of the parties at the time they entered into the contract." *Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004). Further, in interpreting any agreement, it is "important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases." *South Rd. Assocs., LLC v. IBM*, 4 N.Y.3d 272, 277 (2005).

Here, I find that Graham is not entitled to indemnification from Owens for the unreduced benefits. The language of the SPA and the evidence presented of the parties' intentions in negotiating this transaction support this finding. The SPA provides that Graham is responsible for liabilities that emerge from Company Plans, such as the CBAs, which provide for the unreduced pension benefits. The SPA also provides that for employees who had vested while working at Owens, Owens would pay that portion of the pension benefits accrued by those employees prior to the closing, and Graham would pay the portion of the pension benefits accrued by those employees after the closing. The issue here is the responsibility for the difference between the reduced and unreduced benefits, to which the employees were entitled pursuant to the CBAs and the Owens Pension Plan, but which only became an option available to them when they turned 55, after the closing, when they were no longer participants in the Owens Pension Plan.

Section 8.5 indicates that Owens is responsible for its obligations under its Pension Plan toward employees, whether those obligations arose before, on, or after the closing date, meaning, for example, that if an Owens employee who vested while employed at Owens retired before, on or after the closing date, Owens would be responsible for its portion of that employee's pension benefits. Section 8.5 does not, however, indicate that Owens would be responsible for obligations that could have only *accrued* after the closing date. While the Owens Pension Plan contains language similar to that of the CBAs, with reference to unreduced retirement benefits, the Owens Pension Plan is derivative of the CBAs and the Owens Pension Plan ceased to exist as of the date of closing. Therefore, the subject employees' entitlement to unreduced benefits did not arise from the Owens Pension Plan, rather, it arose from the CBAs.

The language of Section 8.4 does not warrant a contrary finding. In fact, Section 8.4, which states "buyer shall provide . . . each business employee with full service credit for all purposes" makes it clear that the parties intended that Graham be responsible for the unreduced benefits at issue here. Although Section 8.4 makes an exception for "purposes of benefit accruals under a defined benefit pension plan," here, the issue is not benefit accruals under the Owens Plan, rather, it is the apportionment of responsibility for benefits that *could have only accrued* after the closing date, at which time the Owens Plan was no longer in existence. Owens is not claiming that it should not be responsible for paying the reduced benefits for employees that vested at Owens, but who ended

participation in the Owens Plan prior to reaching retirement age. Rather, Owens correctly argues that, in accordance with the terms of the SPA, it should only have to pay unreduced benefits, because the trigger that shifted those employees' entitlement from reduced to non-reduced benefits only occurred after they were no longer participants in the Owens Pension Plan and no longer employees of Owens.

Therefore, the SPA, the CBAs and the Owens Pension Plan, read together, indicate that Graham is responsible for the difference between the reduced and unreduced benefits at issue. Because the unreduced benefits accrued under the CBA, which was a Company Plan under the SPA, and thus Graham's responsibility after the Closing Date, Owens is not responsible for indemnifying Graham for the unreduced benefits, eligibility for which was only triggered by Graham's business decision to close several plants post-Closing.

Remaining Claims

Graham argues that it is entitled to summary judgment on its claim for fraudulent misrepresentation because Owens misrepresented the prices it was charging Unilever for the 300 ounce bottles and did not disclose the magnitude and severity of the quality problems with the Clorox bottles. Graham argues that even though the inaccuracies and failures to disclose were misrepresentations also contained within the contract, they can also support a claim for fraud.

Owens argues that the fraudulent misrepresentation and breach of the implied covenant of good faith and fair dealing claims must be dismissed because they are

duplicative of the breach of contract claims. Graham did not cite any evidence showing that Owens made representations outside of the SPA itself that induced Graham to enter into the SPA. In addition, the damages sought in the fraud claim are no different than the damages sought in the breach of contract claim. Owens further maintains that Graham can not prove justifiable reliance because Graham was a sophisticated investor that was on notice of pricing changes in the bottle industry and was aware of the quality issues with the Clorox bottles. Finally, Owens maintains that Graham's negligent misrepresentation claim must be dismissed because Owens owed no special duty derivative of a special relationship with Graham.

I find that the fraudulent misrepresentation claim is duplicative of the breach-of-contract claim, inasmuch as it is based on the same facts that underlie the contract cause of action, is not collateral to the contract, and does not seek damages that would not be recoverable under a contract measure of damages. *See Financial Structures Ltd. v. UBS AG*, 77 A.D.3d 417 (1st Dept. 2010). Further, the claim for breach of the implied covenant of good faith and fair dealing, which arose from the same facts, is duplicative of the contract claim. *See Lavigny Holdings Ltd. v. Coller Intl. Partners V-A, LP*, 113 A.D.3d 424 (1st Dept. 2014); *Havell Capital Enhanced Mun. Income Fund, L.P. v. Citibank, N.A.*, 84 A.D.3d 588 (1st Dept. 2011). A claim for breach of implied duty of good faith and fair dealing cannot be maintained where, as here, "the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract." *Board*

of Mgrs. of Soho N. 267 W. 124th St. Condominium v. NW 12..., 116 A.D.3d 506, 507 (1st Dept. 2014).

Finally, I dismiss Graham's negligent misrepresentation claim. A claim for negligent misrepresentation is not separate from a breach of contract claim where the plaintiff fails to allege a breach of any duty independent from contractual obligations. *Greenman-Pedersen, Inc. v. Levine*, 37 A.D.3d 250 (1st Dept. 2007). Here, Graham fails to allege any legal duty that would give rise to an independent tort cause of action. The negligent misrepresentation claim is duplicative of the breach of contract claim. *Board of Mgrs. of Soho N. 267 W. 124th St. Condominium v. NW 12...*, 116 A.D.3d 506, 507 (1st Dept. 2014).

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Graham Packaging Company, L.P.'s motion for partial summary judgment on its claims for breach of contract and fraud (motion sequence no. 011) is granted only to the extent that summary judgment is granted to Graham on its claim for breach of contract for Owens-Illinois, Inc. and OI Plastic Products, FTS' breach of Section 5.18 of the Stock Purchase Agreement related to the Unilever price reduction, and its motion is otherwise denied; and its further

ORDERED that defendants Owens-Illinois, Inc. and OI Plastic Products, FTS, Inc.'s motion for summary judgment dismissing the complaint (motion sequence no. 012) is granted except with respect to Graham's claim for breach of contract for Owens-

Illinois, Inc. and OI Plastic Products, FTS' breach of Section 5.18 of the Stock Purchase Agreement related to the Unilever price reduction; and it is further

ORDERED that all remaining claims asserted against defendants Owens-Illinois, Inc. and OI Plastic Products, FTS are dismissed; and it is further

ORDERED that the issue of the amount of damages is referred to a Special Referee to hear and report with recommendations, or upon stipulation of the parties, to hear and determine; and it is further

ORDERED that counsel for Graham Packaging Company, L.P. shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Trial Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of the court.

Dated: New York, NY
July 11, 2014

ENTER:

Saliann Scarpulla, J.S.C.