SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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CREDE CG III, LTD.,

Plaintiff,

-against-

TANZANIAN GOLD CORPORATION,

Defendant.

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DECISION AND ORDER
Index No.: 651156/2018

Motion Sequence No.: 003

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion for summary judgment, these facts are taken from the parties' 19a Statements of Undisputed Material Facts (SUMF). Disputed facts are noted.

Plaintiff Crede CG III, Ltd (Crede) is a Bermuda company with its principal place of business in Los Angeles, California. It is in the business of investing in "small cap" emerging companies, providing them with capital to grow.

Defendant Tanzanian Gold Corporation (fka Tanzanian Royalty Exploration Corporation *see* NYSCEF Doc. No. 153) (TGC) is incorporated in Alberta, Canada, and has its principal place of business in Toronto. TGC is a gold and precious metal mining company that exploits resources in the United Republic of Tanzania (Tanzania).

In 2016, Crede agreed to invest $5M in TGC by purchasing common stock, convertible notes, and warrants through a private placement. The transaction is memorialized by a Securities Purchase Agreement (SPA). Pursuant to the SPA, TGC issued Crede two series of warrants, the Series A and Series B which were convertible to TGC common stock.

Crede was to invest in two rounds of financing. The first round, in which Crede invested $1.25 million and received 1.84 million shares of TGC common stock priced at $0.6792 per share and Series A Warrants, which allowed Crede to purchase an additional 1.84 million shares of common stock at $0.8291 per share, closed on September 1, 2016. The second round, in which Crede invested $3.75 million and received $3.75 million worth of convertible notes, with a 2% coupon and a maturity date of September 26, 2046, and Series B Warrants convertible into 4.02 million shares of TGC common stock at $1.10 per share, closed on September 26, 2016. TGC

immediately converted the convertible notes, cancelling them and issuing 5.357 million shares of TGC common stock to Crede. Crede then liquidated that stock.

The warrants contained a "cashless exercise" feature, in case TGC shares were trading below the exercise price. The warrants provided a formula for exercise of the shares as follows (the Cashless Exercise Formula or the Formula):

> Net Number = (AxB)/C
> A= total number of shares being exercised
> B = Black Scholes Value (as defined in section 16)
> C= Closing Bid Price of the Common Stock as of two trading days before the exercise

Section 16(b) of the Warrants defines the Black Scholes Value as:

> "the Black Scholes value of an option for one share of Common Stock at the date of the applicable Cashless Exercise, as such Black Scholes value is determined, calculated using the Black Scholes Option Pricing Model obtained from the "OV" function on Bloomberg utilizing (i) an underlying price per share equal to the Exercise Price, (ii) a risk-free interest rate corresponding to the U.S. Treasury rate, (iii) a strike price equal to the Exercise Price in effect at the time of the applicable Cashless Exercise, (iv) an expected volatility equal to 135%, and (v) a deemed remaining term of the Warrant of five (5) years (regardless of the actual remaining term of the Warrant)"

(*id.*, ¶ 29, quoting Warrants, attached as Exhibits B-C to Peizer aff, NYSCEF Docs. No. 94-95). TGC disputes that it agreed to the Black Scholes Value as defined by section 16 of the warrants. TGC claims they agreed to use, and did use, the Black Sholes [sic] Option Pricing Model, which is different from the model stated in the warrants (SUMF ¶ 27). TGC does not object to the rest of the stated Formula. As stated, the Formula would allow one Warrant to be exchanged for more than one share of common stock. Defendant does not disagree with this interpretation of the document, but disputes it agreed to any such provision (*id.*, ¶ 32).

In a September 1, 2016, email, Duane Morris, Counsel for TGC, included a redline of section 16 of the warrants, and stated that the parties have agreed to this language (*id.*, ¶ 31). Defendant denies having agreed to that language, and claims the referenced agreement was between Crede and a non-party involved in the discussions. Since the closing in September 2016, TGC's balance sheets filed with the SEC have reflected a $4.85 million liability for the Warrants. It has never disavowed this liability.

Since 2017, TGC's stock price has been lower than the exercise price in the Warrants. On four occasions between April 17, 2017 and August 21, 2017, Crede tendered and TGC honored

warrants which Crede then exchanged for shares (*id.*, ¶¶ 47, 49 and 53). On January 3, 2018, Crede tendered 500,000 Series A Warrants seeking to exchange them for 1,393,927 shares of TGC common stock (*id.*, ¶ 55). TGC refused. On January 5, 2018, Crede tendered 800,000 Series A Warrants seeking to exchange them for 1,706,824 shares of TGC common stock (*id.*, ¶ 57). TGC again refused.

An action was filed in this court on January 19, 2018. In that action, TGC represented Crede sought to exchange more Series A Warrants than Crede had (*id.*, ¶ 62). Crede discontinued that action.

On February 27, 2018, Crede sent TGC an Exercise Note seeking to exchange 500,000 Series B Warrants for 1,322,222 shares of TGC common stock (*id.*, ¶ 64). TGC refused.

TGC has significant assets in the form of "mineral properties and deferred exploration" located in Tanzania. While Crede points to various undisputed statements by TGC about how difficult it may be to sue TGC or to enforce a United States court judgment against it, about its financial straits, and that it may not continue as a going concern, TGC contends these statements do not indicate it is insolvent or unable to satisfy a money judgment.

Plaintiff brought this action asserting claims for:

1) Breach of Contract- seeking specific performance and injunctive relief to exchange the Warrants; and
2) Declaratory Judgment- that the SPA and Warrants, including the Formula, are valid.

II. DISCUSSION

A. Breach of Contract

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside L.P.*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a

contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

The arguments made here are largely the same as those made in Motion Sequence 001 for a preliminary injunction. In its November Decision, this court noted: "Crede has shown it has a contractual entitlement to exchange warrants for shares based on the Exchange Formula set forth in the parties' contracts. That the Exchange Formula fails to track the Black Scholes Option Pricing Model does not render the warrants, negotiated by sophisticated well counseled business people, unenforceable (*see DeSilva v Musso*, 53 NY2d 543, 552 [1981]). TGC's defense of "mutual mistake" must be rejected as the parties do not share a substantially similar erroneous belief as to the facts (*see Yurman Design, Inc. v Garden Jewelry Mfg Corp.*, No 99-cv-10507, 2003 WL 22047896*3 [SDNY August 29, 2003]). In fact, TGC does not dispute it exchanged warrants for stock based on the Exchange Formula four times in 2017" (NYSCEF Doc. No. 70 at p. 7).

As far as TGC now argues fraudulent misrepresentation in the negotiation of the Formula, "[t]he elements of fraudulent misrepresentation are (1) the defendant made a material false representation, (2) the defendant intended to defraud the Plaintiffs thereby, (3) the Plaintiffs reasonably relied upon the representation, and (4) the Plaintiffs suffered damage as a result of their reliance" (*J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389, 390 [1st Dept 2005]). TGC cannot show reasonable reliance on a representation about the Formula that stated the Formula was other than it appears in the document TGC signed.

B. TGC's Request for Additional Discovery

As far as TGC argues that the motion should be denied to allow additional discovery to take place, CPLR rule 3212(f) provides that "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." TGC claims it needs discovery regarding its defenses that allege federal securities laws violations by Crede about the negotiations leading to the SPA and Warrants, the placement agent, Jess Mogul, and Crede's disposition of the common stock it acquired (Opp at 3-5). As in the November Decision, these arguments are irrelevant or otherwise unavailable. Additional discovery is not necessary.

C. Specific Performance

The party seeking specific performance of a contract must show that it performed its contractual obligations, that the other party was able to perform its part, and that there is no adequate remedy at law (*see EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004]). Money damages are regarded as an inadequate remedy at law when money cannot provide the benefits that the injured party expected to derive from the contract (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 [2001]). This may occur where "the subject matter of the particular contract is unique and has no established market value" (*id.*, citing *Van Wagner Adv. Corp. v S&M Enters.*, 67 NY2d 186, 193 [1986]; *Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174, 175 [1st Dept 2002]).

Crede claims the remedy at law, money damages, is insufficient, as it is undisputed that TGC's assets are either ephemeral or located in Tanzania, which does not honor United States judgments. "The decision whether or not to award specific performance is one that rests in the sound discretion of the trial court" (*Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174, 175 [1st Dept 2002] quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 [2001]). "In general, specific performance is appropriate when money damages would be inadequate to protect the expectation interest of the injured party and when performance will not impose a disproportionate or inequitable burden on the breaching party" (*Cho*, 300 AD2d at 175, citing Restatement [Second] of Contracts §§ 359, 364[1] [b]). "Traditionally, specific performance has been held to be a proper remedy in actions for breach of contract for the sale of real property or when the uniqueness of the goods in question makes calculation of money damages too difficult or too uncertain. Similarly, agreements to convey shares of stock in a close corporation may be enforced by specific performance, as may an agreement to sell shares in a cooperative real estate corporation" (*Cho*, 300 AD2d at 175 [internal citations omitted]). "[T]he trial court must determine, in the first instance, whether money damages would be an adequate remedy by considering, among other factors, the difficulty of proving damages with reasonable certainty and of procuring a suitable substitute performance with a damages award" (*id.*).

Given the acknowledged ineffectiveness of this court's judgment in obtaining relief in Tanzania, where TGC's assets reside, the remedy at law of a money judgment will be inadequate. Specific performance, ordering TGC to provide the stock demanded pursuant to Crede's exercise of the Warrants, is appropriate.

D. Declaratory Judgment

Crede also seeks a declaratory judgment that the SPA and the Warrants, including the Formula, are valid and binding.

"The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (Civil Practice Law and Rules 3001). "Under the principle that a court may legitimately exercise judicial discretion by declining declaratory relief where the plaintiff has another adequate remedy, courts have held that a declaratory judgment action should normally not be entertained when a full and adequate remedy is already provided through other judicial proceedings, such as . . . an action for breach of contract" (NYJUR DECLJUDS § 13).

As far as Crede seeks a declaratory judgment regarding the Warrants already exercised, the claim will be denied, as Crede had a full remedy in its breach of contract claim. As far as Crede seeks a declaratory judgment regarding the unexercised Warrants, a declaratory judgment is appropriate for the reasons discussed above.

III. CONCLUSION

The motion for summary judgment is granted. Crede shall be granted specific performance of its contract claims and the courts' order shall direct issuance of the shares of stock it demanded pursuant to the Warrants. Crede's claim seeking a declaratory judgment is also granted as to the remaining Warrants.

Crede shall settle order on fourteen (14) days notice.

This constitutes the decision and order of the court.

DATED: June 19, 2019

ENTER,

O. PETER SHERWOOD J.S.C.