IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RHI HOLDINGS, INC., et al,	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 04-486
HLAC, INC., et al.	:	

MEMORANDUM

Baylson, J. **July 15, 2005**

I. Introduction

Presently before this Court is Plaintiffs' Motion for Partial Summary Judgment, pursuant to Federal Rule of Civil Procedure 56.

II. Jurisdiction and Venue

This court has jurisdiction pursuant to 28 U.S.C. § 1332, as the parties are citizens of different states and the amount in controversy exceeds $75,000.[1] The requirement of complete diversity among the parties is satisfied and thus, this court has diversity jurisdiction.[2] See Strawbridge v. Curtiss, 7 U.S. 267 (1806) (requiring complete diversity). This case originated in

[1] 28 U.S.C. § 1332 states, in pertinent part:

> § 1332. Diversity of citizenship; amount in controversy; costs
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between--
> (1) Citizens of different States.

[2] According to the Complaint, Plaintiffs are Delaware corporations having their principal place of business in Dulles, Virginia. (Complaint at ¶1). Defendants HLAC, Inc. ("HLAC") and Solid Waste Services, Inc. (d/b/a J.P. Mascaro & Sons) are Pennsylvania corporations with their principal place of business in Harleysville, Pennsylvania. Id. at ¶2. Plaintiffs seek damages in the amount of at least $1,000,000, plus interest, attorneys' fees and costs. Id. at 12.

the Eastern District of Virginia where the district court transferred venue to this district pursuant to 28 U.S.C. § 1404(a).[3]

III. Procedural Background

Plaintiffs RHI Holdings, Inc. and Banner Capital Ventures, Inc. (collectively "Plaintiffs") filed the complaint in this case in the United States District Court for the Eastern District of Virginia on November 7, 2003, against HLAC, Inc. ("HLAC") and Solid Waste Services, Inc. (d/b/a J.P. Mascaro & Sons, Inc. ("Mascaro")), alleging three causes of action: breach of contract, fraud, and a request for declaratory relief.

On November 22, 2004, Plaintiffs filed a Motion for Partial Summary Judgment on the issue of liability as to breach of contract, including a request for attorneys fees, and an award of $933,333.33, plus interest, on Count I of the Complaint for breach of contract. Plaintiffs also seek a declaratory judgment on Count III of the Complaint, providing that Defendants are obligated to pay a minimum of $3,566,666.67 more in bi-monthly installments through July 20, 2012. Plaintiffs are not seeking summary judgment on Count II, which alleges fraud against the

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[3] 28 U.S.C. § 1404(a) states:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The district court judge gave the following reasons for transferring the case:

- This case involves two Defendants who are both Pennsylvania corporations with limited contacts in Virginia.
- This case concerns the acquisition of a proposed landfill and rail station in Pennsylvania.
- The Defendants represent that all their witnesses are in Pennsylvania and that they intend to subpoena several members of the Pennsylvania Department of Environmental Protection to testify.

See Order dated January 27, 2004.

Defendants.

IV. Factual Background

Plaintiffs' claims against Defendants arise out of Defendants' alleged nonperformance of, and fraudulent misrepresentation relating to, a Royalty Agreement and accompanying Guaranty entered into by the parties. The Royalty Agreement and Guaranty were part of a larger set of agreements designed to allow Defendants to purchase both the real estate and permits necessary to own and operate a landfill in Jefferson County, Pennsylvania (the "Happy Landing Landfill"). (Pl's Brief in Opposition to Def's Motion to Dismiss at 2).

Count I of the Complaint alleges that Defendants breached a contract to make minimum royalty payments over ten years, beginning September 20, 2002, and asks for an award in the amount past due. Count III asks for a declaratory judgment with respect to future payments that will become due.

A brief summary of the pertinent facts follows.

A. Summary of Undisputed Facts

1. Plaintiffs are Delaware corporations having their principal place of business in Virginia. (Complaint and Answer at ¶1).

2. Defendants are Pennsylvania corporations having their principal place of business in Pennsylvania. (Complaint and Answer at ¶2).

3. The parties agree that the contracts at issue should be construed in accordance with Pennsylvania law.

4. Before July 31, 2001, RHI owned one hundred percent of Recycling Investments, Inc. ("Recycling"). Jacques Khodara owned one hundred percent of Khodara Environmental Inc. ("KE"). Recycling and KE were partners of Eagle Environmental, L.P. ("Eagle").

5. On July 31, 2001, RHI closed sale of its stock in Recycling to Defendant

HLAC. Khodara also closed sale of his stock in KE to HLAC.

6. The sale was pursuant to four related agreements dated May 21, 1996:

   a. Stock Purchase Agreement in which Mascaro agreed to pay Khodara and RHI $1,650,000 for stock (See Stock Purchase Agreement, Exhibit A to Complaint);

   b. Real Estate Purchase and Sale Agreement in which Mascaro agreed to purchase the Happy Landing Real Estate for $850,000, payable to Banner Capital Ventures, Inc. (See Real Estate Purchase and Sale Agreement, Exhibit B to Complaint);

   c. A consulting and cooperation agreement whereby RHI and Khodara agreed to provide Mascaro with services in consideration for payment of $2 million (See Consulting and Cooperation Agreement, Exhibit 3 to Pl's Motion for Partial Summary Judgment);

   d. Royalty Agreement in which Mascaro agreed to pay royalties to Khodara and RHI (See Royalty Agreement, Exhibit C to Complaint).

7. Defendant Mascaro also guaranteed HLAC's performance through a Guaranty Agreement executed by Mascaro on July 31, 2001. (See Guaranty, Exhibit F to Complaint).

8. The Royalty Agreement includes a provision permitting a one-time deferment of payments of up to one year if there occurs "a material modification of existing laws or regulations or a new legislation or regulatory enactment ('Change of Law')" preventing Happy Landing Landfill from disposal of any waste. This provision requires interest payments during the period of deferment. (Pl's Ex. C to Complaint, at ¶1(d)).

9. The permit for Happy Landing Landfill was issued by the Commonwealth of Pennsylvania Department of Environmental Protection ("DEP") on February 9, 1996 with an expiration date of February 9, 2006. (Def's Ex. C - Affidavit of Attorney Fox and Exhibit A attached thereto). The permit contained the following clause:

   34. The approval of the plans and authority granted in this permit, if

not specifically extended by the Department in writing, shall terminate and be thereafter void if no municipal waste is disposed at the facility within five (5) years of the date of issuance of this permit pursuant to the requirements of 25 PA Code § 271.211(e).

10. By letter dated February 12, 2001, the DEP declared the Happy Landing Landfill permit void "because no municipal waste has been disposed at this facility within 5 years of permit issuance." (Def's Ex. C - Affidavit of Attorney Fox and Exhibit D attached thereto).

11. At the closing on July 31, 2001, Mascaro paid $4.5 million.

12. On September 23, 2002, Attorney William F. Fox, for HLAC, sent a letter to Khodara indicating that HLAC would invoke the change of law provision of the Royalty Agreement (see above) and defer for one year the bi-monthly royalty payments, but would pay interest monthly at the rate of 10% per annum. Attorney Fox enclosed a check in the amount of $3,333.33. (See Exhibit 5, Pl's Motion).

13. Mascaro sent nine additional checks in the same amount, dated October 30, 2002; November 27, 2002; December 30, 2002; January 31, 2002; February 27, 2003; March 27, 2003; April 30, 2003; May 30, 2003; and June 26, 2003. (See Ex. 7, Pl's Motion).

14. Defendants have not made any payment since June 26, 2003.

15. The Happy Landing Landfill never opened or operated.

B. <u>Disputed Facts</u>

1. Plaintiffs argue that any conditions precedent required under the contracts were waived by the Defendants when they closed. Defendants claim that they did not waive any conditions under the Royalty Agreement or the requirement that Plaintiff extend the land permit. (Def's Brief at 5).

2. Whether Paragraph 1(d) of the Royalty Agreement was properly invoked. Plaintiffs argue that there was no "Change of Law" entitling Defendants to defer payments for one year. Defendants contend that there was a change in law entitling them to the deferment: 1) the status of their permit; and 2)

the passage of federal legislation that sought to prevent the siting and construction of the landfill. (Def's Brief at 16).

3. Defendants contend that they did not agree to pay any royalties if the landfill was not opened. (Def's Brief at 5). Defendants argue that the Royalty Agreement only kicked in and required royalties if the landfill started operating or if Mascaro's delay prevented the landfill from being built or accepting waste. (Def's Brief at 5).

V. Allegations

A. Count I

Plaintiffs move for partial summary judgment on the issue of liability, including a request for attorneys fees, and an award of $933,333.33, plus interest on Count I of the Complaint for breach of contract on the grounds that there is no genuine issue of material fact that Defendants failed to make payments as required under the Royalty Agreement and therefore breached the contract. (Pl's Motion at 9).

Plaintiffs rely on a declaration of Bradley Lough, Esquire ("Lough Dec."), a declaration of Jacques Khodara ("Khodara Dec."), and various exhibits, including the contracts and portions of depositions of Defendants' representatives. (Pl's Motion at 2).

First, Plaintiffs argue that there was nothing that constituted a "Change of Law" under the Royalty Agreement and therefore Defendants were not entitled to invoke Paragraph 1(d) of the Royalty Agreement deferring payments for one year. Second, Plaintiffs argue that even if Defendants properly invoked the deferment, Defendants have stopped making payments altogether since June 26, 2003, thereby breaching the contract.

Finally, Plaintiffs argue that any conditions precedent (such as obtaining or extending a permit) were waived when Defendants closed. Plaintiffs rely, in part, on a letter dated July 30,

2001, sent to Khodara and RHI by William F. Fox, Jr., Esquire, attorney for HLAC, which stated that Mascaro and HLAC

> hereby waive the conditions precedent provided for in the May 21, 1996 Stock Purchase Agreement and elect to proceed to settlement under that agreement even though one or more of the conditions precedent have not been satisfied or met.

(Pl's Ex. E) (emphasis added).

In Response, Defendants rely on portions of deposition transcripts of Pasquale N. Mascaro, William F. Fox, Jr., Esquire, an affidavit of William F. Fox, Jr., Esquire, and Answer #8 to Plaintiffs' Interrogatories. Defendants contend that even though they waived certain conditions in the Stock Purchase Agreement and in the Real Estate Purchase Agreement, they did not waive any conditions in the Royalty Agreement nor did they waive the existence or extension of a land permit. (Def's Brief at 4-5). Defendants also state that the fact that Mascaro closed does not mean that it waived any conditions or failed to hold Plaintiffs responsible. (Def's Brief at 11).

Defendants also claim that Plaintiffs breached the agreements by failing to take the necessary steps to preserve the land permits. (Def's Brief at 9) (Fox Dep. ay 20-21, 26, 28). Defendants point to Paragraph 5 of the Royalty Agreement, which states:

> Each of the Sellers . . . agrees to comply with all laws applicable to the transactions contemplated in this Agreement and to execute all reasonable documents and take all reasonable steps necessary to complete the transactions contemplated in this Agreement.

(Pl's Ex. C). Defendants also rely on Paragraph 7 of the Royalty Agreement, which states that the parties "agree to execute and deliver such further instruments and take such further actions reasonably required to consummate the transactions contemplated by this Agreement." (Pl's Ex.

C).

Defendants argue that because Plaintiffs failed to notify the DEP and request and extension of the permit, they breached the Royalty Agreement causing the permit to become void. Defendants argue that because Plaintiffs materially breached the contract, Plaintiffs cannot be awarded any damages resulting from Defendants' refusal to perform. See Ott v. Buehler Lumber Co., 542 A.2d 1143, 1145 (1998). Further, Defendants argue that Plaintiffs may not insist on performance of the contract when Plaintiffs themselves are guilty of a material breach. J.W.S. Delavau v. Eastern America Transport, 810 A.2d 672, 686 (2002). Plaintiffs rely on Eagle Environmental, L.P. v. DEP, 833 A.2d 805, 811 (Pa. Commw. 2003) (affirming order of the Pennsylvania Environmental Hearing Board, which upheld a decision voiding a suspended solid waste permit) to support their contentions that the breach was immaterial because the DEP did not have discretion to grant an extension to the permit and filing for an extension would have been futile. Defendants state that if the DEP refused to grant an extension, Plaintiffs were obligated to explore other ways of preserving the permit and/or preventing it from being revoked. (Def's Brief at 14).

Defendants' principal argument appears to be that they did not agree to pay royalties if the landfill was not opened. Id. at 5. Rather, the Royalty Agreement contemplated payments only when the landfill was open and receiving waste. (See Fox Dep., p.56-58). Defendants argue that Mascaro did not agree that it would pay any royalties if the landfill was never opened. (Def's Brief at 5). Defendants contend that even though they did not owe the monthly interest charges, as a gesture of good faith and because Plaintiffs were appealing the revocation of the permit, Mascaro voluntarily started making the monthly interest payments. (Def's Brief at 6,

citing Fox Dep. at 58,62). However, Defendants state that after the monthly interest payments were made and the appeal remained unresolved, Mascaro made and owed no further payments. (Def's Brief at 6).

Defendants cite various language in the Royalty Agreement, which Defendants assert supports their contention that the parties contemplated, as a condition for payments by Defendants, that Plaintiffs own the Happy Landing Permits and that the landfill is open and operating. (See Def's Brief at 8).

Defendants argue that there exist several genuine issues of material fact that would affect the outcome of the suit, including:

1. Whether the Royalty Agreement assumed/required the existence of a valid permit;

2. The reasons why the landfill did not open;

3. Whether the Royalty Agreement required payments if the landfill never opened through no fault of Mascaro;

4. Whether it was Plaintiffs' responsibility to extend the land permit;

5. Whether Plaintiffs' failure to apply for an extension of the permit was a material term of the Agreement.

B. <u>Count III</u>

Plaintiffs also move for summary judgment on Count III on the grounds that there is no genuine issue of material fact that Defendants owe the amount specified in the contract and therefore should be ordered to make the payments as they become due.

Defendants rely on the contentions stated above and assert there are multiple genuine issues of material fact regarding the contracts and whether they are obligated to make any further

payments and are not responsible for interest or attorneys fees.

VI. Discussion

The Court held argument on Plaintiffs' Motion for Partial Summary Judgment on June 9, 2005 and July 14, 2005. Both counsel were well prepared and articulated their position. As decided by the Court at the conclusion of the second argument, the Court believes that many of Plaintiffs' positions have merit, based on the provisions of the contracts and the correspondence between the parties. However, the Court cannot, under the principles of summary judgment law under Rule 56 F. R. Civ. P., grant summary judgment to Plaintiffs in that Defendants have appropriately and sufficiently pointed to evidence in the record supporting their contentions. This evidence consists of certain language in the agreements which could make the agreements ambiguous, particularly as to the need for the contemplated landfill to be built, opened and/or operating, and also certain affidavits and documents presented, which may require the Court to submit the intent of the parties to the jury, and to ask the jury to resolve any ambiguities.

Accordingly, the Court will enter an Order denying Plaintiffs' Motion for Partial Summary Judgment and scheduling the case for trial, beginning on August 1, 2005.

An appropriate Order follows.

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ORDER

AND NOW, this 15th day of July, 2005, it is hereby ORDERED as follows:

1. This case is removed from suspense and restored to the Court's active docket.

2. Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 12) is DENIED.

3. Trial in this case will start on August 1, 2005 at 9:30 a.m. for jury selection and beginning of testimony. Please call chambers at 267.299.7520 for the courtroom location.

4. Plaintiffs' counsel shall submit a list of proposed stipulated facts to be read to the jury, with documentation attached if appropriate, to defense counsel by July 22, 2005. Defense counsel shall communicate with Plaintiffs' counsel promptly, but no later than July 27, 2005 as to Plaintiffs' proposals and/or Defendants' counter-proposals as to each of the stipulated facts, and the parties shall thereafter have discussions, as necessary, and shall file a stipulation of facts as agreed to, by the close of business of July 29, 2005.

5. On August 1, 2005, at the beginning of trial, the parties shall submit a trial brief and points for charge.

6. Any motions in limine shall be filed by July 25, 2005; responses shall be filed by July 29, 2005.

7. The parties shall exchange trial exhibits forthwith, and each party shall provide the Court with a copy of the trial exhibits at the beginning of the trial.

8. The parties shall submit verdict forms, including any requested jury interrogatories by August 2, 2005.

9. The trial will not take place on Friday, August 5, 2005.

BY THE COURT:

/s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.

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