IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

GREAT WATER CAPITAL PARTNERS, LLC.,	:	APPEAL NOS. C-150015 C-150023
	:	TRIAL NO. A-1300424
Plaintiff-Appellant/Cross-Appellee,	:	*O P I N I O N.*
vs.	:	
DOWN-LITE INTERNATIONAL, INC.,	:	
MARVIN WERTHAISER,	:	
and	:	
LAWRENCE WERTHAISER,	:	
Defendants-Appellees/Cross-Appellants,	:	
vs.	:	
ROBERT WEISMAN,	:	
Third-Party Defendant.	:	

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 18, 2015

J.T. Riker Co., L.P.A., *J. Timothy Riker* and *Katharine Riker*, and *Taft Stettinius & Hollister, LLP*, *Brian G. Dershaw* and *Blake T. Johnson*, for Plaintiff-Appellant/Cross-Appellee,

Katz, Teller, Brant & Hild, *James F. McCarthy III* and *Peter J. O'Shea*, for Defendants-Appellees/Cross-Appellants.

DEWINE, Judge.

{¶1} This appeal arises from a dispute between a company that manufactures bedding materials and an investment bank that was hired to help sell it. No sale happened. The investment bank sued the company alleging that its owners had improperly thwarted any potential sale—thereby depriving it of commissions—by imposing sales conditions that were not disclosed at the time the company contracted with the investment bank. The trial court ultimately found in favor of the bedding company. We affirm the judgment of the trial court.

I. Background

{¶2} Down-lite International, Inc., ("Down-lite") is a Cincinnati corporation that manufactures down- and feather-bedding materials. Great Water Capital Partners, LLC., ("Great Water") is an investment bank that assists middle-market companies with mergers and acquisitions and capital-raising. In 2008, Larry Werthaiser, president of Down-lite, approached Great Water about engaging the bank to find a potential buyer for Down-lite. Marvin Werthaiser, secretary and treasurer of Down-lite, negotiated the agreement on behalf of the company. At the time, Larry Werthaiser, Marvin Werthaiser and Bob Altabaier each owned one-third of Down-lite.

{¶3} On July 23, 2008, Great Water and Down-lite executed an agreement by which Great Water agreed to "assist [Down-lite] as its exclusive financial advisor" in connection with a transaction by another entity to acquire Down-lite. The agreement was later amended to also include assistance with potential investors interested in acquiring less than a majority share of the company.

{¶4} Down-lite agreed to pay Great Water a retainer fee of $25,000. In addition, Down-lite would pay Great Water a percentage of any sale or investment

transaction that was consummated during the term of the agreement or within 12 months of the termination of the agreement ("transaction fee"). Down-lite also agreed to reimburse Great Water for its expenses incurred in connection with the agreement.

{¶5} Under the agreement, Great Water's role was to help identify and analyze potential transactions and to advise Down-lite as to the efficacy of any such deal. Nothing in the agreement limited Down-lite's discretion as to whether to approve any opportunity identified by Great Water. Rather, Great Water was due a transaction fee only "*if* a Transaction is consummated." (Emphasis added.) Great Water's role in helping to facilitate a potential sale was limited to "entities not disapproved by Down-lite." The agreement required Great Water to prepare a confidential information memorandum to be provided to parties interested in acquiring or investing in Down-lite. The memorandum could not be disclosed by Great Water "to any party without the prior consent" of Down-lite.

{¶6} In January 2010, three prospective acquirers submitted proposed letters of intent to acquire Down-lite. According to Great Water, days after the proposed letters of intent were received, the Werthaisers began to disclose requirements upon which any sale of Down-lite would be conditioned. For example, Marvin Werthaiser demanded that he and other family members remain employed at Down-lite following its sale. For his part, Larry Werthaiser required that Down-lite stay based in Cincinnati, that family members maintain or be given the option of employment at Down-lite and that Down-lite continue as a nonunion business.

{¶7} In April 2010, Down-lite executed a letter of intent with a potential buyer. But talks stalled, and in October 2010, Down-lite withdrew from negotiations. Three months later, it terminated its agreement with Great Water.

II. Great Water's Lawsuit Against Down-lite and the Werthaisers

{¶8} Great Water filed a complaint, alleging that Down-lite had breached the contract by erecting impediments to any sale and that the Werthaisers had fraudulently induced Great Water into entering the contract. Upon motion of Down-lite, the trial court dismissed the breach-of-contract claim for failure to state a claim. The fraud-in-the-inducement claim was not dismissed.

{¶9} Great Water filed a motion to amend its complaint to include additional claims for breach of contract under three theories—breach of warranty, excuse of condition and prevention of performance—and claims for unjust enrichment and promissory estoppel. The trial court granted the motion to amend as to the breach-of-warranty claim, but denied it as to the other claims, finding that the addition of those claims would be futile. Down-lite later filed a motion for summary judgment on the fraudulent-inducement claim and the breach-of-warranty claim. The court granted summary judgment as to the breach-of-warranty claim, but denied it as to the fraudulent-inducement claim. Following further discovery, Down-lite again filed a motion for summary judgment on the fraudulent-inducement claim. This time, the court granted the motion. Final judgment in the case was entered in favor of Down-lite on all claims. Great Water filed a notice of appeal. Down-lite filed a cross-appeal essentially arguing that even if we find merit to any of Great Water's assignments of error, the judgment should be affirmed on other grounds.

III. Great Water's Appeal

{¶10} The over-arching theme of Great Water's appeal is that Down-lite never intended to sell itself and concealed that fact from Great Water. According to Great Water, because Down-lite really did not want to be sold, it threw up impediments to any potential sale resulting in a breach of the contract. Additionally, Great Water argued

that the Werthaisers concealed their true intentions and fraudulently induced Great Water into a contract it would not have otherwise entered. We consider each contention in turn.

A. Great Water's Complaint Failed to State a Claim for Breach of Contract

{¶11} In its first assignment of error, Great Water contends that the court erred when it dismissed the breach-of-contract claim pursuant to Civ.R. 12(B)(6). In its complaint, Great Water alleged that the Werthaisers impeded any chance to sell Down-lite, resulting in a breach of the agreement.

{¶12} To survive a motion to dismiss, Great Water needed to plead facts demonstrating that Down-lite breached its obligations under the agreement. Down-lite's duties under the plain terms of the agreement were to: (1) pay Great Water a retainer, (2) pay Great Water a transaction fee if a transaction was consummated with an acquirer or investor and (3) to reimburse Great Water for its expenses. According to the complaint, the retainer was paid. No transaction was consummated, so no transaction fee was due Great Water. And finally, there was no allegation that Down-lite had failed to reimburse Great Water for expenses.

{¶13} Unable to identify any explicit contract term breached by Down-lite, Great Water alleged Down-lite breached its duty of good faith and fair dealing. "The duty of good faith requires the parties to deal reasonably with each other, and it applies where one party has discretionary authority to determine certain terms of the contract." *DavCo. Acquisition Holding, Inc. v. Wendy's Internatl., Inc.*, S.D.Ohio No. 2:07-cv-1064, 2008 U.S. Dist. LEXIS 27108, *17 (Mar. 19, 2008), citing *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 463, 2005-Ohio-4850, 839 N.E.2d 49 (1st Dist.). Great Water contends that Down-Lite had a duty to act reasonably to work toward consummation of a transaction but that it violated the duty when, through the Werthaisers, it "repeatedly

changed material requirements and presented material impediments to the consummation of any acquisition or investment."

{¶14} The problem with Great Water's reasoning is that the duty of good faith and fair dealing does not stand alone from the contract but is a part of it. *Littlejohn* at ¶ 24. It cannot be used to supplant the express terms of an agreement. Thus, "the implied covenant of good faith and fair dealing does not apply where a party to the contract has the absolute and exclusive authority to make the decision at issue." *DavCo*. at *19. By the express terms of the agreement, Down-Lite agreed to pay Great Water a retainer—which it did—and to pay a transaction fee only if a sale or transaction was consummated. Down-lite did not obligate itself to negotiate with prospective acquirers or investors or to consummate a transaction. Implicit in the notion that Down-lite had sole discretion to approve a sale is that Down-lite could consider whatever factors it felt appropriate in assessing the efficacy of a proposed transaction—in other words, that it could impose conditions. It was not a breach of the duty of good faith and fair dealing for Down-lite to exercise the discretion for which it had bargained in determining whether to approve a sale. Great Water has pled no facts that Down-lite breached its obligations under the agreement. The trial court properly dismissed the claim. The first assignment of error is overruled.

B. Motion to Amend to Add Prevention of Performance, Excuse of Condition and Unjust Enrichment

{¶15} Following the dismissal of its breach-of-contract claim, Great Water moved to amend its complaint to add new claims for breach of contract grounded on theories of prevention of performance and excuse of condition. It also sought to add a claim for unjust enrichment. The trial court denied Great Water's motion to amend because it concluded such amendment would be futile. *See* Civ.R. 15(A); *Hensley v.*

Durrani, 1st Dist. Hamilton No. C-130005, 2013-Ohio-4711, ¶ 14. Great Water challenges the court's denial in its second and third assignments of error.

{¶16} As a general rule, a party to a contract can assert the nonoccurrence of a condition as a defense to a breach-of-contract claim. *See Little v. Real Living HER*, 10th Dist. Franklin No. 13AP-924, 2014-Ohio-5664, ¶ 12. But under the theories of prevention of performance and excuse of condition, a party doesn't get the benefit of the defense of nonoccurrence of a condition if it was responsible for the nonoccurrence. 13 *Williston on Contracts*, Section 39:3 (4th Ed.1990). Great Water's allegations with respect to its prevention-of-performance and excuse-of-condition theories were similar. For the prevention-of-performance theory, Great Water proposed to amend its complaint to allege that the Werthaisers put up impediments to the consummation of a sale or investment, which "prevented the performance of the condition precedent in the agreement, i.e. a transaction to acquire Down-lite, or an investment in it, and made impossible the object that the parties intended." Likewise, Great Water proposed to allege an "excuse of condition" in that "Down-lite * * * failed to cooperate, and otherwise hindered the purpose of the contract, thus preventing the transaction, i.e. acquisition of Down-lite, from occurring."

{¶17} The problem with Great Water's argument, though, is that the theories are inapplicable "when the conduct alleged to have prevented performance was permissible under the express or implied terms of the contract." 13 *Williston on Contracts*, Section 39:11 (4th Ed.1990). Under the terms of the agreement, Down-lite's only obligations were to pay Great Water a retainer and to pay a commission *if* a transaction came to fruition. It was under no obligation to negotiate in a certain way or to accept any sale or investment terms. It would have been futile to amend

the contract to include theories of excuse of condition or prevention of performance because the plain terms of the agreement allowed the conduct that prevented the condition—consummation of a transaction—from occurring. The court did not abuse its discretion in denying the motion to amend. *See Wilmington Steel Prod., Inc. v. Cleveland Elec. Illuminating Co.*, 60 Ohio St.3d 120, 122, 573 N.E.2d 622 (1991); *Demmings v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 98958, 2013-Ohio-499, ¶ 9.

{¶18} Likewise, the court did not abuse its discretion when it denied the motion to amend to include a cause of action for unjust enrichment. "It is clearly the law in Ohio that an equitable action in quasi-contract for unjust enrichment will not lie when the subject matter of that claim is covered by an express contract[.]" *Ryan v. Rival Mfg. Co.*, 1st Dist. Hamilton No. C-810032, 1981 Ohio App. LEXIS 14729, *3 (Dec. 16, 1981). There is no question that an agreement existed between the parties. And the subject matter of Great Water's unjust-enrichment claim was covered in the agreement. In the agreement, Great Water undertook to use "commercially reasonable efforts to introduce [Down-lite] to a Prospective Acquirer(s) or Prospective Investors in order to develop and complete a Transaction or Investment." Great Water's proposed amendment alleged that it had performed its contractual duties, and that its performance had added value to Down-lite "even in the absence of an ultimate transaction." This situation was contemplated by the contract, which provided for the payment of the transaction fee if—and only if—a transaction was consummated. The trial court correctly concluded that amendment of the complaint to include an unjust-enrichment claim would be futile. The second and third assignments of error are overruled.

C. Breach of Warranty

{¶19} The trial court did allow Great Water to amend its complaint to include a claim for breach of contract warranty. In its fourth assignment of error, Great Water asserts that the court erred when it subsequently granted summary judgment on the claim in favor of Down-lite.

{¶20} In the agreement, Down-lite warranted that all information that it provided Great Water about itself would be "complete and correct in all material respects and [would] not contain any untrue statement of, or omit to state, a material fact[.]" Great Water insists that Down-lite breached this warranty when it approved representations made in the confidential information memorandum that all owner salaries would cease upon the sale of Down-lite, that the founding management team, which included the Werthaisers, would be replaced by a successor management team, and that certain goals for the "Earnings Before Interest, Taxes, Depreciation and Amortization" would be met at the close of a sales transaction. Great Water alleged that these representations were misleading in light of the then-undisclosed requirements upon which the Werthaisers conditioned any sale.

{¶21} The trial court concluded that there was a question of fact about whether the Werthaisers' failure to disclose their requirements was a breach of warranty, but concluded that summary judgment was appropriate because Great Water had failed to present any evidence of damages. Down-lite points out that the purpose of the warranty was to shield Great Water from liability to third parties to whom it disclosed information provided by Down-lite. It also argues that certain disclaimers within the confidential information memorandum prevent Great Water from pursuing a warranty claim against Down-lite based upon the alleged misstatements and nondisclosures. We need not resolve these questions because we agree with the trial court that Great Water failed to present any evidence of damages

suffered as a result of the alleged misrepresentations. *See Doner v. Snapp*, 98 Ohio App.3d 597, 600-601, 649 N.E.2d 42 (2d Dist.1994). Down-lite was under no obligation to accept a sale, so Great Water was not unconditionally entitled to the transaction fee. Because Great Water could not show that it would have gotten the transaction fee had Down-lite not made the alleged misrepresentations and nondisclosures, it cannot demonstrate that it has been damaged by the alleged breach of warranty. The fourth assignment of error is overruled.

D. Fraudulent Inducement

{¶22} Finally, Great Water challenges the trial court's decision granting summary judgment with respect to the fraudulent-inducement claim. The court concluded that Great Water was acting as a dealer and, thus, under R.C. 1707.14 was required to be licensed. Because Great Water was not licensed, the court reasoned, the contract between Great Water and Down-lite was unenforceable, and Great Water could not claim to have been fraudulently induced to enter it. Great Water insists that it was not a dealer as defined by R.C. 1707.01(E). But we need not determine the issue because we conclude that Great Water's allegation did not demonstrate a claim for fraudulent inducement.

{¶23} Great Water needed to show that the Werthaisers made a material misrepresentation that Great Water justifiably relied on when it decided to enter into the agreement. *See Brannon v. Mueller Realty & Notaries*, 1st Dist. Hamilton No. C-830876, 1984 Ohio App. LEXIS 11140, *8 (Oct. 24, 1984). Great Water contends that it would not have agreed to undertake efforts to find a buyer for Down-lite had it known that the Werthaisers did not really want to sell the company. But "[p]arties may not prove fraud by claiming that the inducement to enter into an agreement was a promise that was within the scope of the integrated agreement but was

ultimately not included in it." *Bollinger, Inc. v. Mayerson*, 116 Ohio App.3d 702, 712, 689 N.E.2d 62 (1st Dist.1996). The contract's scope encompassed the Werthaisers' duties with respect to any potential acquisition. Plainly, a requirement that consent to a sale not be unreasonably withheld or that the owners not place certain conditions on a sale would fall within the scope of the contract. Yet the parties chose not to include such terms. Because Great Water entered into a contract that left approval of a sale at the sole discretion of Down-lite, it cannot complain that it was fraudulently induced to enter that contract when Down-lite exercised that discretion in imposing conditions on a sale. The trial court properly granted summary judgment on the fraudulent-inducement claim. The fifth assignment of error is overruled. And the sixth assignment of error, which asserts that provision of the agreement that was unenforceable due to Great Water being unlicensed should have been severed, is moot in light of our disposition of the fifth assignment of error.

III. Conclusion

{¶24} The trial court properly entered judgment in favor of Down-lite on Great Water's claims. Further, the cross-assignments of error raised by Down-lite to preserve the judgment are moot based on our disposition of Great Water's appeal. We affirm the judgment of the trial court.

Judgment affirmed.

CUNNINGHAM, P.J., and **STAUTBERG, J.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.