SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3057-16T2

PSEG ENERGY RESOURCES & TRADE, LLC,

Plaintiff-Appellant,

v.

ONYX RENEWABLE PARTNERS, LP, and BLACKSTONE ENERGY PARTNERS, LP,

Defendants-Respondents.

Argued January 22, 2018 – Decided February 14, 2018

Before Judges Sabatino, Ostrer and Rose.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-6932-16.

Lawrence S. Lustberg argued the cause for appellant (Gibbons, PC, attorneys; Lawrence S. Lustberg, Thomas R. Valen, and John D. Haggerty, on the briefs).

Daniel M. Perry (Milbank, Tweed, Hadley & McCloy, LLP) of the New York bar, admitted pro hac vice, argued the cause for respondents (Skoloff & Wolfe, PC and Daniel M. Perry, attorneys; Daniel M. Perry, of counsel and on the brief; Katrina Voorhees (Milbank, Tweed, Hadley & McCloy, LLP) of the New York bar,

admitted pro hac vice, Jonathan W. Wolfe and Jane J. Felton, on the brief).

PER CURIAM

This is an interlocutory appeal pursued as of right pursuant to Rule 2:2-3(a)(3) from the trial court's March 6, 2017 order denying plaintiff's motion to compel arbitration in accordance with a contractual arbitration provision. The trial court denied the motion. It did so after determining the parties had not entered into a binding agreement, and that contract documents which had been drafted but were never executed were not enforceable.

On appeal, plaintiff argues that the trial court erred in its legal analysis of the documents and the surrounding circumstances, and that the court should have found that a binding agreement had been consummated. In the alternative, plaintiff contends that the court should not have ruled against plaintiff without first conducting an evidentiary hearing.

Having considered these and plaintiff's other arguments following our de novo review of the record in light of the applicable law, we affirm the trial court's determination. We do so substantially for the sound reasons set forth in Judge Stephanie A. Mitterhoff's detailed twenty-six-page written opinion dated March 6, 2017. We underscore and amplify the judge's analysis,

and address plaintiff's assorted criticisms of her decision, with the following commentary.

I.

We need not repeat here at length the underlying factual chronology detailed in Judge Mitterhoff's opinion. That factual chronology is substantially undisputed. The crux of the dispute on appeal essentially revolves instead around the judge's legal conclusions drawn from those facts.

Briefly stated, the regulatory and business context of this matter is as follows. To promote the generation of solar energy, the State of New Jersey has adopted regulations establishing Renewable Portfolio Standards. See N.J.A.C. 14:8-1 and -2. The regulations require energy suppliers to possess a specified quantity of Solar Renewable Energy Credits ("SRECs"), in order to induce such suppliers to procure a minimum portion of their energy sales from facilities that generate electricity from solar panels.

When a facility generates electricity from solar panels and meets certain other criteria, SRECs are issued to that facility, based upon the amount of solar energy generated. If energy suppliers do not have enough SRECs on hand to meet the specified requirements, they must make a Solar Alternative Compliance

Payment to the State.[1] SRECs are transferable, and the trading of SRECs has created a market in which the price of SRECs fluctuates due to supply and demand.

Plaintiff, PSEG Energy Resources & Trade, LLC ("PSEG"), is a Delaware limited liability company with offices in New Jersey. Plaintiff is the trading arm of PSEG Power LLC, an energy supplier that is subject to New Jersey's SREC requirements. Plaintiff buys and sells SRECs for its affiliated energy suppliers and generators.

Defendant Onyx Renewable Partners, L.P. ("Onyx") is a Delaware limited partnership with offices in New York. Onyx engages in the business of supplying and trading in SRECs. In addition to defendant Onyx, the complaint named as a co-defendant Blackstone Energy Partners, L.P., a Delaware limited partnership. The record indicates that another Blackstone entity, Blackstone Solar HoldCo., L.P., owns an equity interest in Onyx.[2]

Before the present circumstances arose, the parties had no established trading relationship. Through the efforts of a third-party brokerage service, on November 12, 2014, PSEG and Onyx

[1] The compliance payment was $323 per SREC in 2016.

[2] Defendants' brief asserts that Blackstone Solar HoldCo., L.P. should be substituted as the proper co-defendant with Onyx in this case. The trial court did not reach this question of party identification and we have no need to resolve it in deciding this appeal.

assented to a prospective five-year arrangement for Onyx to sell 20,000 New Jersey SRECs annually to PSEG at a price of $171.00 per SREC for Energy Years 2016 to 2020. The total purchase and sale price for the SREC transaction was $17.1 million, which plaintiff's brief describes as one of the "very largest" SREC transactions "in New Jersey's history." The brokered terms of the arrangement further specified that "Delivery to be agreed upon in contracting. Buyer will initiate purchase and sale agreement (PSA). Trade subject to mutual contract and credit terms. This product is Firm LD."[3] (Emphasis added).

In December 2014, PSEG and Onyx began to exchange drafts of a proposed contract. According to Onyx, in March 2015, it made clear to PSEG that neither Blackstone nor any of the Blackstone affiliates would provide a guaranty or credit support. Upon learning this, PSEG requested in April 2015 that Onyx provide a

[3] According to plaintiff's brief on appeal, the term "Firm LD" means that either party would be relieved of its obligations to sell and deliver or purchase and receive SRECs if such performance was prevented by force majeure. Plaintiff further contends that, in the absence of force majeure, the party to whom performance is owed is entitled to receive payment in the amount representing the difference between the contract price and the price of a replacement purchase in an event of a seller failure. We need not focus upon this point, because plaintiff does not contend that the November 12, 2014 brokerage arrangement, absent further negotiation of delivery, credit and other contract terms, comprised a binding and comprehensive contract. Instead, the dispute concerns whether subsequent interactions between the parties, post-dating November 2014, created a binding contract.

$15 million letter of credit for the transaction. Onyx demurred, believing that such a large letter of credit was not sensible financially. In September 2015, PSEG backed off its request to receive a full $15 million letter of credit, but the credit issue remained unresolved.

On December 3, 2015, Onyx's Chief Executive Officer, Matthew Rosenblum, and its chief legal officer, Ryan Marrone, had a telephone conference call with representatives of PSEG. During that conference call, the Onyx representatives proposed that Onyx would provide to PSEG a letter of credit for the contemplated SREC transaction in a much-lower sum of $1.25 million. The Onyx representatives also proposed that PSEG delay the SREC delivery date for Energy Year 2016 from July 2016 to September 2016.

In another telephone conference call the following day, December 4, representatives of PSEG orally informed representatives of Onyx that PSEG was willing to accept Onyx's oral proposals for both a $1.25 million letter of credit and the postponement of the initial delivery date to September 2016. PSEG incorporated these added terms into a drafted Master Power Purchase & Sale Agreement (the "Master Agreement") and a drafted Purchase

and Sale of Solar Renewable Energy Credits Transaction Confirmation Letter (the "Confirmation Letter").[4]

As the trial court aptly recognized, the Confirmation Letter and proposed Master Agreement both contain important language reflecting the parties contemplated the contract documents needed to be executed by duly authorized representatives of both companies in order to consummate the transaction. Among other things, we note in this regard, as did the trial court, that the draft Confirmation Letter recites:

> This Confirmation Letter, together with the General Terms and Conditions, supplements, forms part of, and is subject to, the Master Power Purchase and Sale Agreement entered into by the Parties hereto dated February 1, 2016, as it may be amended from time to time . . . IN WITNESS THEREOF, and intending to be legally bound, the Parties have executed this Agreement by their undersigned duly authorized representative as of the date below to be effective as of the Effective Date hereof.
>
> [(Emphasis added)].

As the trial court also pointed out, Section 10.2(ii) of the draft Master Agreement contains an explicit representation and warranty that "the execution, delivery and performance of this

[4] PSEG asserts that the Master Agreement contains several core terms that are standard within the industry, subject to tailoring and modification to fit the specific needs of the parties. The standardized Master Agreement (version 2.1) apparently was issued in 2000 by the Edison Electric Institute and National Energy Marketers Association.

Master Agreement and each [SREC] Transaction (including any Confirmation accepted in accordance with Section 2.3 [of the Master Agreement]) are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulations, order or like applicable to it." (Emphasis added). In like manner, Section 10.2(iv), also highlighted by the trial court, represents that the Master Agreement, each SREC transaction, and "each other document executed and delivered in accordance with [the] Master Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms; subject to any Equitable Defenses." (Emphasis added).

The trial court also found noteworthy that Section 10.8 of the Master Agreement similarly emphasizes the importance of written execution in instances of amendment or modification. That provision states, "Except to the extent herein provided for, no amendment or modification of this Master Agreement shall be enforceable unless reduced to writing and executed by both Parties." (Emphasis added).

The proposed contract documents also included an Addendum specifically tailored to the proposed PSEG-Onyx transaction. As the trial court noted, the Addendum contained a mandatory

arbitration clause in Section 10.13, requiring the arbitration of disputes that might arise concerning the transaction. Notably, the Addendum also contains language reiterating that the contract "can only be modified or amended through a written and fully executed amendment . . . ." (Emphasis added).

The Addendum further specifies in an additional provision, Section 10.12 ("Authorizations"), that either party to the contract had the right to obtain, among other things, a secretary's "certificate of corporate resolutions authorizing the execution, delivery and performance of the [a]greement" and authorizing the party "to execute, deliver and perform under any guaranty." (Emphasis added). Section 10.12 also provides either party with a right to demand signature specimens for the "respective signatories executing this Agreement and any Guaranty on its behalf." (Emphasis added).

In response to PSEG's transmission of the drafted Confirmation Letter, Master Agreement, and Addendum, Onyx's chief counsel Marrone advised PSEG in a December 17, 2015 email that he had reviewed the drafts, that he still had "one or two" substantive changes, and that he would advise when he had "clearance to release" the documents. Rosenblum, the CEO of Onyx, was copied on that email. A few days later, Onyx sent to PSEG a proposed form for the letter of credit, which PSEG indicated was acceptable.

Another revision concerning a clarifying phrase was discussed and resolved by email on January 25, 2016.

On January 29, 2016, Onyx's counsel Marrone and Luciano Pisano, PSEG's associate general trading counsel, took part in a telephone conference call. Onyx's CEO Rosenblum was not on that call. According to Pisano, during that January 29 call Marrone[5] allegedly acknowledged that the parties were in agreement as to "all terms and conditions for the SREC transaction." PSEG thereafter provided Onyx with a full set of the contract documents for execution.

It is undisputed that the parties never mutually signed the contract documents. It is also undisputed that Onyx did not deliver a letter of credit to PSEG by the contemplated date in February 2016. Consequently, PSEG began buying SRECs from other sources. Further negotiations in 2016 between the parties failed. PSEG took the position that Onyx had bound itself to an enforceable

[5] Marrone disputes Pisano's characterization and recollection of precisely what he said during the call. He specifically denies telling the PSEG representatives on the call that Onyx had agreed to the drafted contract terms. Marrone also certifies that he did not represent to PSEG "at any time" that he had the authority to bind Onyx, and that only Onyx's CEO Rosenblum had such authority. In any event, for the reasons noted by the trial court we discuss infra, that difference of recollection is legally inconsequential to the issues presently on appeal, in light of the legal conclusion that a fully executed set of written agreements was necessary to bind these parties.

agreement, while Onyx asserted that no binding obligations existed because the $17.1 million, five-year contract was never mutually executed.

II.

In October 2016, PSEG filed a seven-count verified complaint and Order to Show Cause against Onyx and Blackstone in the Law Division. Among other things, the complaint asserted that defendants are liable based on alternative theories of breach of contract, breach of the covenant of good faith and fair dealing, promissory estoppel, and fraud and misrepresentation. The complaint also alleged that Blackstone is Onyx's alter ego, and that the corporate veil should be pierced so as to make Blackstone liable to PSEG for Onyx's alleged obligations.

Invoking the arbitration clause within the Addendum, PSEG simultaneously moved in its Order to Show Cause to compel the dispute to be resolved through binding arbitration. PSEG amplified its contentions with various supporting certifications. If the trial court detected any material disputed factual issues, PSEG requested that those issues be considered on a summary basis at an expedited hearing, pursuant to the summary action procedures of Rule 4:67-5.

Onyx responded to the complaint and Order to Show Cause with certifications from Rosenblum and Marrone, along with additional

exhibits and documents. In essence, Onyx maintained, as it had previously, that there was no signed enforceable agreement and thus Onyx had no obligation to perform the alleged contract or to participate in a compelled arbitration. Rosenblum explained in his certification that ultimately he determined that the proposed transaction was not "consistent with market conditions" and was "too economically disadvantageous for Onyx to agree to."

After sifting through these submissions and hearing oral argument, Judge Mitterhoff issued her detailed written decision denying plaintiff's motion to compel arbitration. Fundamentally, the judge concluded that the record, objectively considered, does not support PSEG's claim that the parties entered into a binding agreement, in the absence of fully-executed contract documents for this large and sophisticated business transaction.

Among other things, the judge reasoned that PSEG "viewed both the provision of a letter of credit and an executed contract as essential to cementing an enforceable agreement," and that the letter of credit and executed contract were essential to PSEG to cement the transaction. In addition, the judge ruled "there are otherwise insufficient objective indicia of unambiguous assent to the terms of the agreement for the court to find that a binding agreement was formed in the absence of a signed contract." She noted that there had been no prior dealings between the parties

and the transaction was "fraught from its inception by mutual distrust."

Rejecting PSEG's arguments that the parties achieved a binding agreement in the December 3 and 4, 2015 phone calls or, alternatively, in the January 29, 2016 conference call, the judge particularly noted that: (1) Onyx never delivered a letter of credit, (2) the parties never signed the agreement, and (3) Marrone individually lacked the authority to bind Onyx to the transaction.

The trial judge discerned no need to conduct an evidentiary hearing to reach or confirm its legal conclusions. The judge noted in this regard that the "objective conduct" reflected in the documentary record was not truly in dispute, and that a plenary hearing "would not meaningfully add information that would inform the court's decision."

III.

Now on appeal, PSEG contends that the trial judge mistakenly concluded that mutually signed writings were necessary to bind the parties, and that the oral discussions that took place on December 3 and 4, 2015, and thereafter in the January 29, 2016 conference call adequately substantiated a mutual and binding agreement. We respectfully disagree.

We recognize that, in some instances, parties may be bound by the mutual exchange of oral promises with the intention of

later executing a formal instrument to memorialize their undertaking, assuming that such an oral commitment does not violate the statute of frauds.[6] See, e.g., Pascarella v. Bruck, 190 N.J. Super. 118, 126 (App. Div. 1983). Nevertheless, the absence of a fully executed agreement can be a key consideration in determining whether such a mutual agreement of the parties to be bound actually existed. See, e.g., Leodori v. CIGNA Corp., 175 N.J. 293, 304-05 (2003) (noting that when one party presents a contract for signature to another party, the omission of the latter's signature is "a significant factor in determining whether the two parties mutually have reached an agreement").

Here, the judge soundly determined from the record — including the multiple provisions within the drafted Confirmation Letter, Master Agreement, and Addendum underscoring the important requirement that the contract documents be "executed" by persons having authority within these two enterprises — that the parties each intended that the execution of the contracts was a key precondition to bind them to this five-year, $17.1 million transaction. A fully-executed contract in this setting plainly was not a mere formality.

[6] We need not reach Onyx's alternative claim that an oral agreement of this nature would violate the statute of frauds under New York law.

To the extent PSEG emphasizes attorney Marrone's role in participating in the parties' negotiations (including the January 29 telephone conference that took place without Onyx's CEO Rosenblum on the line), we concur with the trial court that neither Marrone's actual or apparent authority to bind Onyx is fairly established by the record. See LoBiondo v. O'Callaghan, 357 N.J. Super. 488, 497 (App. Div. 2003) (noting that "a conclusion that a party has acted with apparent authority must rest upon the actions of the principal, not the alleged agent"); Beck v. Edwards & Lewis, Inc., 141 N.J. Eq. 326, 332 (Ch.1948) (instructing that a party dealing with a business enterprise "must inform [itself] of the powers of the officers or of the agent purporting to act for it if [it] hopes to effectuate a binding contract"). In fact, Marrone's email to PSEG following the January 29 conference call sought a "fully executable" set of documents for CEO Rosenblum to sign, a phrasing which is consistent with Onyx's position that the transaction could not be binding until the contract documents were actually signed by both parties. Moreover, even if Rosenblum had provided his personal oral assent to all of the negotiated terms of the proposed transaction, the language of the drafted contract documents — which we have already spotlighted — emphasizing the importance of "execution," defeats PSEG's claim of enforceability.

We reject PSEG's contention that the trial judge unduly focused on the parties' post-January 2016 conduct in finding no binding agreement was present. We recognize that PSEG was entitled, and perhaps even obligated, to reasonably endeavor to mitigate its damages once it became apparent that Onyx was not going to perform. White v. Twp. of North Bergen, 77 N.J. 538, 546 (1978) (regarding mitigation of damages); Quinlan v. Curtiss-Wright Corp., 425 N.J. Super. 335, 359-65 (App. Div. 2012) (regarding mitigation of damages). Further, we appreciate that the post-January 2016 discussions theoretically could be viewed as indicative of efforts at re-negotiating an existing contract. But the more compelling objective evidence in this case indicates that these additional discussions were merely an attempt to salvage a deal that never was consummated.

We defer to the trial court's decision to forego an evidentiary hearing under Rule 4:67-5. For one thing, we have considerable doubts whether the testimony from both sides expounding upon the multiple certifications — with attendant direct and cross-examination by counsel — would have been realistically amenable to a summary trial subject to completion over a day or two. Moreover, as the judge rightly observed, there was no necessity here for an evidentiary hearing, given the

strength of the objective record supporting her findings as to the absence of a binding agreement.

For all of these reasons, we therefore affirm the trial court's interlocutory order denying arbitration and her related decision rejecting PSEG's contract-based contentions. Logically, PSEG's claim of a breach of the covenant of good faith and fair dealing must also fail. See Noye v. Hoffmann-La Roche, Inc., 238 N.J. Super. 430, 434 (App. Div. 1990) (recognizing that, in the absence of a valid contract, there can be no cause of action for breach of the implied covenant of good faith and fair dealing). We assert no views as to whether PSEG's remaining claims of fraud, promissory estoppel, and piercing the corporate veil survive. We defer those unadjudicated questions to the trial court. See Mita v. Chubb Computer Services, Inc., 337 N.J. Super. 517, 529 (App. Div. 2001) (noting the potential non-viability of non-contract claims, where they are "derivative" of an untenable contract claim).[7]

[7] In addressing the discrete issues before us on appeal, we neither endorse nor criticize Onyx's conduct in refusing to execute the drafted documents that PSEG presented to it. We simply uphold the trial court's narrow ruling that the record provides no basis for a claim of contractual breach. Among other things, we presume that on remand the parties and the court will more fully develop proofs concerning Rosenblum's explanation of why Onyx ultimately held back on committing to a contract after the parties' lengthy negotiations. We also presume the remand will explore whether PSEG reasonably relied to its detriment on any "clear and definite"

Affirmed. The matter is remanded to the trial court to adjudicate the open claims. We do not retain jurisdiction.

promises by Onyx (assuming arguendo such promises justifying reliance were made independent of an enforceable contract).