VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 20-CV-00653

Hanksville Hemp, LLC v. VT/CBD Labs, LLC

ENTRY REGARDING MOTION

Title: Motion in Limine Regarding Impossibility Defense (Motion: 6)
Filer: James W. Swift
Filed Date: February 22, 2023

This case involves a contract for the processing and sale by Defendant of hemp grown by Plaintiff. Plaintiff alleges, inter alia, that Defendant breached the contract by failing to process or sell the hemp. Defendant proffers the defense of "impossibility/impracticability." Specifically, Defendant argues that it intends to offer "testimony and documentary evidence of its ongoing efforts to find a market for CBD Isolate for Plaintiff and its other farm partners" after a purchaser rescinded its offer to buy the product. Opposition at 2. Defendant suggests it will offer evidence of the "dissolution of their extraction partnership and ongoing state restrictions with its operations that have their impacted their ability to sell the CBD Isolate." Id. Plaintiff seeks to preclude this defense at trial, arguing that changing market conditions alone are not sufficient to establish such a defense.[1]

[1]There is no assertion that supply chain problems or other pandemic-induced conditions were at issue here.

Discussion

"Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." Restatement (Second) of Contracts § 261 (1981). "Events that come within the rule stated in this Section are generally due either to 'acts of God' or to acts of third parties." Id., cmt. d. However, "[a] change in economic conditions does not provide a basis for rescission of a contract." Ruff v. Yuma Cnty. Transp. Co., 690 P.2d 1296, 1298 (Colo. App. 1984). "The continuation of existing market conditions and of the financial situation of the parties are ordinarily not . . . assumptions [underlying a contract], so that mere market shifts or financial inability do not usually" justify nonperformance. Restatement (Second) of Contracts § 261, cmt. b (1981). However, "[a] severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or prevents performance altogether may bring the case within the rule stated in this Section." Id., cmt. d. Likewise, death of a person, destruction of necessary property, or subsequent legal prohibition may be a defense. Id., cmt. a.

"Vermont law recognizes th[e legal impracticability] affirmative defense and looks to the Restatement (Second) of Contracts to determine its parameters." Milnes v. Blue Cross & Blue Shield of Vermont, No. 1:11-CV-00049 JGM, 2013 WL 1314520, at *6 (D. Vt. Mar. 28, 2013), aff'd on other grounds, 566 F. App'x 18 (2d Cir. 2014) (footnote omitted). Our Supreme Court has explained:

> It is a defense to a contract action that a party's performance under the contract is "impracticable" because of a fact of which he has no reason to know and the nonexistence of which is a basic assumption on which the contract was made. Restatement (Second) of Contracts § 166 (1981). "Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved." *Id.* § 261 comment d. Our cases have recognized only a narrow application of this principle. Thus, in *City of Montpelier v. National Surety Co.,* 97 Vt. 111, 119, 122 A. 484, 487 (1923), the Court stated the rule as follows:
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> > To warrant the application of that principle, the impossibility must consist in the nature of the thing to be done and not in the inability of the party to do it. . . . [I]f what is agreed to be done is in nature possible and lawful, it must be done; . . . the promissor takes the risk within the limits of his undertaking of being able to perform.

Agway, Inc. v. Marotti, 149 Vt. 191, 193 (1988). The Court equates impossibility and impracticability, both meaning "extreme and unreasonable difficulty, expense, injury, or loss to one of the parties." Id. (quoting Restatement (Second) of Contracts § 261, cmt. d); *see also* Record v. Kempe, 2007 VT 39, ¶ 20, 182 Vt. 17 ("the term 'impossibility' has been expanded to include the concept of 'impracticability'"). "[I]it is a strict standard that excuses nonperformance only when performance would cause extreme, unreasonable, and unforeseeable hardship due to an unavoidable event or occurrence." Record, 2007 VT 39, ¶ 20 (quotations omitted).

The doctrine does not include the usual risks of doing business, such as fluctuations in market conditions. "The fact that a promisor is unable to control the actions of a third person whose consent or cooperation is needed for performance of an undertaking ordinarily is not regarded as impossibility such as would avoid an obligation or excuse liability, unless the terms or nature of the contract indicate that this risk was not assumed." 30 Williston on Contracts § 77:1 (4th ed.). Defendant points to

nothing in the contract suggesting that it would be excused from performance for such reasons.

"A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover." Restatement (Second) of Contracts § 261, cmt. d (1981). Examples of the proper application of the defense include fire, war, embargos, and the closing of the Suez Canal. Id., Illustrations. The claims Defendant makes here do not appear to reach anything near this level.

However, "[u]sually, there are questions of fact as to whether the nonperforming party's difficulty was sufficiently extreme as to merit a complete discharge of its duty to the other party under the doctrine of commercial impracticability." 30 Williston on Contracts § 77:13 (4th ed.). It is unclear from the brief response Defendant has filed what government restrictions it refers to, or why the loss of its expected buyer could not be remedied by selling to other buyers. Although it seems unlikely that Defendant will be able to meet the test for presenting this defense to the jury, it is possible that it could establish that its planned purchaser was the only buyer in the market. If so, it could potentially meet the test of showing something akin to an "unforeseen shutdown of major sources of supply or the like." Id. at § 77:1. Likewise, "the defense excuses performance where supervening governmental action renders it unlawful." Milnes, 2013 WL 1314520, at *6. It is possible that Defendant could show that the government restrictions it references created an impossibility/impracticability.

Order

The motion is denied. However, Defendant may not present news reports or other hearsay regarding the hemp market unless it can establish some exception to the hearsay rule.

Electronically signed on March 14, 2023 pursuant to V.R.E.F. 9(d).

Helen M. Toor
Superior Court Judge