IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ACF LEASING, LLC; ACF SERVICES, LLC; and GENERATION CLEAN FUELS, LLC,	)	
Plaintiffs,	)	
v.	)	Case No. 2014 L 2768
GREEN BAY RENEWABLE ENERGY, LLC; ONEIDA SEVEN GENERATIONS CORPORATION; and THE ONEIDA TRIBE OF INDIANS OF WISCONSIN,	)	
Defendants.	)	

GREEN BAY RENEWABLE ENERGY'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS COUNTS I, III, & V OF PLAINTIFFS' COMPLAINT

INTRODUCTION

Green Bay Renewable Energy, LLC ("GBRE") worked diligently and in good faith to secure funding for and finalize contracts with Plaintiffs, under which GBRE would have leased from Plaintiffs certain machinery for use in planned waste-to-energy facilities in Monona, Wisconsin and Cheboygan, Michigan (the "Project"). Those efforts, however, proved unsuccessful after the contingent financing commitments GBRE obtained for the Project fell through, and, rather than work with GBRE to secure replacement financing to enable the Project to go forward as intended, Plaintiffs rushed to court to file suit. In doing so, Plaintiffs obstructed the Project and the very contracts they are now trying to enforce. But as discussed below, Plaintiffs cannot enforce agreements or obligations that, by their own terms (and as a result of Plaintiffs' own conduct), never

became effective. Plaintiffs have failed to state any claim upon which relief may be granted, and their Complaint against GBRE must be dismissed as a result.

For these reasons, as discussed more specifically below, this Court should dismiss the claims alleged against GBRE in Counts I, III, and V of the Complaint.

FACTS

GBRE disagrees with many of the allegations, factual mischaracterizations and material omissions made by Plaintiffs in their Complaint, but recognizes that, for purposes of this motion to dismiss, the allegations are assumed true.

GBRE is an indirect subsidiary[1] of Defendant Oneida Seven Generations Corporation ("Seven Generations"), and was created with the goal of conducting energy-related business for Seven Generations and Defendant the Oneida Tribe of Indians of Wisconsin (the "Tribe"). (Compl. ¶¶ 12-13.) Seven Generations is a tribal corporation chartered under the laws of the Tribe, and was formed for purposes of diversifying the Tribe's nongaming income and business activities. (*Id.* ¶¶ 11, 13.)

In May 2013, GBRE approached ACF Leasing seeking to lease certain machinery and equipment for use at facilities dedicated to the conversion of solid waste into energy (the "Project"). (*Id.* ¶ 16, Ex. A.) GBRE and ACF Leasing negotiated the terms of the prospective Lease, contingent on the ability of GBRE to secure and finalize financing for the Project. (*Id.*) In December 2013, GBRE obtained a loan commitment for the Project from the Wisconsin Bank and Trust ("WBT"), contingent on WBT obtaining a guarantee from the U.S. Bureau of Indian Affairs ("BIA") and Seven Generations. (*Id.* ¶ 38.) WBT

[1] As noted in Plaintiffs' Complaint, GBRE is a wholly-owned subsidiary of Oneida Energy Blocker Corporation, which itself is a wholly-owned subsidiary of Oneida Energy, Inc., a wholly-owned subsidiary of Seven Generations. (Compl. ¶¶ 9-11.)

applied to BIA for a guarantee of the loan it intended to make to GBRE to finance the Project. (*Id.* ¶ 39.) Shortly thereafter, however, amidst (and as a result of) significant public scrutiny of the Project and its economic and technological viability, the Tribe voted to dissolve Seven Generations. (*Id.* ¶ 40.) As a result, WBT withdrew its application for a loan guarantee from BIA, as well as its contingent commitment to finance the Project. (*Id.* ¶ 41.)

Immediately, Plaintiffs cried foul and threatened to file suit, claiming that the dissolution of Seven Generations and BIA's subsequent withdrawal of its financing commitment amounted to a breach of contract by GBRE, despite the fact that by their own terms, the agreements—or at the very least, GBRE's obligations—were only effective once a final, noncontingent financing commitment was obtained. Rather than afford GBRE the opportunity to salvage the Project and obtain substitute financing, Plaintiffs opted instead to immediately file suit.

As discussed below, under these facts, none of Plaintiffs' claims against GBRE can survive. Plaintiffs cannot enforce agreements against GBRE that by their own terms are unenforceable.

SUMMARY OF ARGUMENT

All of the counts against GBRE in Plaintiffs' Complaint should be dismissed. Count I (Breach of Contract) fails to state a claim upon which relief may be granted because Plaintiffs have failed to plead any facts to show that the condition precedent to the contract between Plaintiffs and GBRE—the execution of financing arrangements between GBRE and WBT—was fulfilled. Count III (Promissory Estoppel) likewise fails to state a claim because promissory estoppel is inapplicable to claims arising from

contract and further because Plaintiffs do not plead sufficient facts to establish justifiable reliance in light of the unfulfilled condition precedent. Finally, Count V (Unjust Enrichment) fails to state a claim upon which relief may be granted because the parties' relationship is governed by contract and further because Plaintiffs have failed to plead sufficient specific facts to support any benefit unjustly retained by GBRE as a result of oral or written presentations the Plaintiffs may have made.

ARGUMENT

Plaintiffs' allegations against GBRE are conclusory and completely lacking in factual support. The threadbare claims against GBRE in the Complaint are insufficient under Illinois pleading standards; however, even accepting the sparse factual claims as true, the language of the alleged contracts itself demonstrates that GBRE had no enforceable obligations to Plaintiffs.

Pursuant to section 2-615 of the Illinois Code of Civil Procedure, a motion with respect to pleadings may request that an action or claim be dismissed for failure to state a cause of action. 735 Ill. Comp. Stat. 5/2-615. "Illinois is . . . a fact-pleading jurisdiction, and a plaintiff must allege facts sufficient to bring his or her claim within the cause of action asserted." *Jackson v. S. Holland Dodge, Inc.*, 197 Ill. 2d 39, 52, 755 N.E.2d 462 (2001). The plaintiff "must allege sufficient facts to state all of the elements of the asserted cause of action." *Purmal v. Robert N. Wadington & Assocs.*, 354 Ill. App. 3d 715, 720, 820 N.E.2d 86 (1st Dist. 2004). "In determining the sufficiency of any claim or defense, the court will disregard any conclusions of fact or law that are not supported by allegations of specific fact." *Richco Plastic Co. v. IMS Co.*, 288 Ill. App. 3d 782, 784-85, 681 N.E.2d 56 (1st Dist. 1997).

> It is fundamental that facts and not conclusions are to be pleaded. If, without considering the conclusions that are pleaded, there are not sufficient allegations of fact to state a cause of action, a motion to dismiss will properly be granted, no matter how many conclusions may have been stated and regardless of whether they inform the defendant in a general way of the nature of the claim against him.

Adkins v. Sarah Bush Lincoln Health Ctr., 129 Ill. 2d 497, 519-20, 544 N.E.2d 733 (1989).

I. PLAINTIFFS HAVE FAILED TO ALLEGE SUFFICIENT FACTS TO ASSERT A BREACH OF CONTRACT CLAIM AGAINST GBRE.

"[T]o establish a claim for common law breach of contract in Illinois, a plaintiff must allege and prove the following elements: '(1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff.'" *Catania v. Local 4250/5050*, 359 Ill. App. 3d 718, 724, 834 N.E.2d 966 (2005) (quoting *Henderson-Smith & Assocs., Inc. v. Nahamani Family Serv. Ctr., Inc.*, 323 Ill. App. 3d 15, 27, 752 N.E.2d 33 (1st Dist. 2001)).

A "condition precedent" is one that must be met before a contract becomes effective. *Carollo v. Irwin*, 2011 IL App (1st) 102765, 959 N.E.2d 77. A "condition precedent to the formation of a contract" will be found where "the intent to create such a condition is apparent from the face of the agreement." *Catholic Charities of Archdiocese of Chicago v. Thorpe*, 318 Ill. App. 3d 304, 309, 741 N.E.2d 651 (2000). Even where the existence of the condition does not prevent the formation of a valid contract, an express condition precedent still must be met before the contract is enforceable. *Carollo*, 959 N.E.2d at 84-85. "[W]here a contract contains a condition precedent, the contract is neither enforceable nor effective until the condition is performed or the contingency occurs." *Id.* (citation omitted) (internal quotation marks omitted).

The financing contingency described in paragraph 1 of the Master Lease clearly shows an intent to create a condition precedent to the effectiveness of the contract: "[n]otwithstanding the foregoing, the Agreement **shall not become effective** until such time as Lessee has notified Lessor, in writing, that Lessee has entered into financing arrangements." (*See* Compl., Ex. A, ¶ 1) (emphasis added). Because Plaintiffs have failed to plead sufficient facts to show that the financing contingency was fulfilled, Plaintiffs have not established the first element of a breach of contract claim: The existence of a valid and enforceable contract between Plaintiffs and GBRE. Plaintiffs may argue that their obligation to plead the fulfillment of conditions precedent is met with the conclusory statement at paragraph 45 of the Complaint that "[a]ll conditions precedent to the Master Lease and Maintenance Agreement were met by [Plaintiffs]. (*See* Compl. ¶ 45, Count I.) Plaintiffs' allegations are incomplete, however, since the financing contingency is a condition that cannot be met by the Plaintiffs, but rather by the third-party WBT. Further, as Plaintiffs allege, the financing was *not* agreed to by WBT, "as a direct result of the . . . . vote to dissolve OSGC." (*See* Compl. ¶ 41.) Even if the financing contingency was not a condition precedent to the formation of the Master Lease, it is a condition precedent to GBRE's obligation to perform under the lease. Without the execution of the financing agreement with WBT, the Master Lease did not become effective, and GBRE had no obligation it could have breached to Plaintiffs.

Any obligations of GBRE under the Maintenance Agreement are likewise contingent on the effectiveness of the Master Lease. Paragraph 1 of the Maintenance Agreement describes the term of the Maintenance Agreement as commencing on the "Lease Commencement Date," as that term is defined in Schedule 1 to the Master Lease.

(*See* Compl., Ex. B ¶ 1.) The Lease Commencement Date is defined in Schedule 1 as "[t]he later of the date of this Schedule or the date of the receipt by the Lessee of the proceeds of a loan from Lessee's Lender in the amount of approximately $21,777,777." (Compl., Ex. A, Schedule 1.) As Plaintiffs' complaint acknowledges (*see* Compl., ¶ 41), those loan proceeds were never disbursed, and thus the Master Lease never commenced such as to trigger the commencement of the Maintenance Agreement.

Finally, to the extent Plaintiffs suggest in paragraph 47 of Count I that GBRE violated a duty of good faith and fair dealing, such a claim is also insufficiently pled under Illinois law. "The term 'good faith' refers to 'an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting.'" *Capital Options Invs., Inc. v. Goldberg Bros. Commodities, Inc.*, 958 F.2d 186, 189 (7th Cir. 1992) (citation omitted). "In order to plead a breach of the covenant of good faith and fair dealing, a plaintiff must plead existence of contractual discretion . . . [a] party who does not properly exercise contractual discretion breaches the implied covenant of good faith and fair dealing that is in every contract." *See Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 352 Ill. App. 3d 160, 165, 815 N.E.2d 911 (2004). The covenant is breached where a party exercises contractual discretion "arbitrarily or capriciously." *Vincent v. Doebert*, 183 Ill. App. 3d 1081, 539 N.E.2d 856 (1989).

Without the fulfillment of the financing condition precedent, no effective contract existed. But even if Plaintiffs have pled the existence of a valid and enforceable contract, Plaintiffs have not alleged what contractual discretion was vested in GBRE, how it exercised that discretion "arbitrarily" or "capriciously," or how GBRE possibly took

advantage of the Plaintiffs under a contract that clearly contemplated a financing contingency. Plaintiffs make only the conclusory allegation that GBRE's actions violated "the covenants of good faith and fair dealings embodied within the Master Lease and Maintenance Agreement." (*See* Compl. ¶ 47.) Such a conclusory allegation fails to state a claim for breach of the covenant of good faith and fair dealing.

For the above-stated reasons, Count I of Plaintiffs' complaint fails to state a claim for breach of contract against GBRE and must be dismissed.

II. PLAINTIFFS' PROMISSORY ESTOPPEL CLAIM FAILS AS A MATTER OF LAW.

Plaintiffs' promissory estoppel claim in Count III fails because promissory estoppel is a claim available only in the absence of a contract. *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 906 N.E.2d 520 (2009). The doctrine of promissory estoppel is not intended to merely provide plaintiffs an alternative means of pleading a breach of contract claim; rather, promissory estoppel only applies where a promise not supported by consideration "would be unenforceable under conventional principles of contract law." *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 869 (7th Cir. 1999)

Here, the promises Plaintiffs allegedly relied upon to their detriment are the same "contractual promises" underlying Plaintiffs' breach of contract cause of action. Plaintiffs claim to have relied on "GBRE's contractual promises" (Compl. ¶ 56) and to have "reasonably and justifiably relied on the Agreements." (Compl. ¶ 58.) Thus, it is clear from Plaintiffs' allegations in Count III that their claim for promissory estoppel arises solely from the contracts and is merely duplicative of Plaintiffs' breach of contract claim. That alone defeats their claim for promissory estoppel. *See DeGeer v. Gillis*, 707

F. Supp. 2d 784, 797 (N.D. Ill. 2010) (dismissing promissory estoppel claim because promissory estoppel allegations contained "references to the existence of a contract between the parties"); *The Sharrow Grp. v. Zausa Dev. Corp.*, No. 04C6379, 2004 WL 2806193, at *3 (N.D. Ill. Dec. 6, 2004) ("Nonetheless, while plaintiff may plead breach of contract in one count and unjust enrichment and promissory estoppel in others, it may not include allegations of an express contract, which governs the relationship of the parties, in the counts for unjust enrichment and promissory estoppel.")

But Plaintiffs' promissory estoppel claim fails for another reason as well: Under these facts, Plaintiffs cannot prove that any reliance on GBRE's "contractual promises" was reasonable.

In order to maintain an action for promissory estoppel, a plaintiff must establish: (1) a promise which is unambiguous in its terms; (2) reasonable, foreseeable reliance on the promise; (3) to the party's detriment. *See Levitt Homes, Inc. v. Old Farm Homeowner's Ass'n*, 111 Ill. App. 3d 300, 315, 444 N.E.2d 194 (1982). In other words, a plaintiff claiming promissory estoppel must prove not only that the defendant made and broke a definite, unambiguous promise, but also that the plaintiff's reliance on such a promise was reasonable. *See In re Midway Airlines, Inc.*, 180 B.R. 851, 944 (Bankr. N.D. Ill. 1995) ("A party claiming promissory estoppel must also prove that its reliance on the defendant's promise was reasonable.") A promise that is conditioned on the approval of a third party is not a definite, unambiguous promise sufficient to induce *reasonable* reliance and thereby support a claim for promissory estoppel. *See In re Midway Airlines, Inc.*, 180 B.R. at 945 ("Where the defendant's promise is conditional, the plaintiff's reliance is not reasonable, as 'opinions based on contingent or future events are not the

basis of an action for . . . promissory estoppel.'") (citation omitted); *A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chem. Grp., Inc.*, 873 F.2d 155, 158 (7th Cir. 1989) (agreement conditioned on subsequent board approval cannot be construed as unambiguous promise giving rise to binding obligations).

In the case at hand, the alleged promise giving rise to Plaintiffs' claim for promissory estoppel (the Agreements themselves) was necessarily conditioned on the approval of a third party: the "promise" to finalize and complete the Project was contingent on WBT's willingness to finance the project. Until WBT approved the financing arrangement on terms agreeable to all parties, any promises contained in the Agreements remained contingent on WBT's approval. Any reliance by Plaintiffs on the indefinite, contingent commitments contained in the Agreements (or WBT's preliminary, nonfinal approval of the loan) was unreasonable as a matter of law. Plaintiffs' promissory estoppel claim fails for this reason as well.

III. PLAINTIFFS HAVE FAILED TO ALLEGE SUFFICIENT FACTS TO ASSERT A CLAIM FOR UNJUST ENRICHMENT AGAINST GBRE.

Count V must also be dismissed because Plaintiffs fail to assert a claim for unjust enrichment in light of the contract between the parties and the absence of any factual allegations establishing *any* specific benefit conferred to GBRE and improperly retained.

"To state a cause of action for unjust enrichment, a plaintiff must allege the defendant retained a benefit to the plaintiff's detriment and the defendant's retention violated the fundamental principles of justice, equity, and good conscience." *Galvan v. NW. Mem'l Hosp.*, 382 Ill. App. 3d 259, 888 N.E.2d 529 (2008). "'[W]here there is a specific contract which governs the relationship of the parties, the doctrine of unjust enrichment has no application.'" *People ex rel. Hartigan v E & E Hauling, Inc.*, 153

Ill. 2d 473, 497, 607 N.E.2d 165 (1992) (citing *La Throp v. Bell Fed. Sav. & Loan Asso'n*, 68 Ill. 2d 375, 370 N.E.2d 188 (1977)).

In Count V, Plaintiffs describe the benefit conferred to GBRE only as "technology and specifics" of the project which Plaintiffs considered proprietary and exclusive. (Compl., ¶¶ 65-66.) Plaintiffs' allegation that GBRE was "enriched by learning of and acquiring the technology and specifics of the Project" from Plaintiffs fails to include any specific facts to establish how the information provided by Plaintiffs about the project conveyed any benefit to GBRE or how GBRE's retention of the information provided is unjust enrichment. Plaintiffs fail to plead any facts about the nature of the information—nothing to establish the commercial value or exclusivity of this information—nor the benefit of the information to GBRE. It is not even clear from the Complaint *what* technology Plaintiffs claim as their own. While paragraph 26 describes the plastics to oil project as employing a "pyrolitic process," Plaintiffs do not allege that this process is the proprietary technology to which Count V refers. (*Id.*, ¶ 26.)

The claim further fails because, as Plaintiffs have alleged elsewhere in their Complaint, specific contracts governed the relationship between Plaintiffs and GBRE, and under Illinois law unjust enrichment has no application. Even if the information regarding the Project shared by Plaintiffs with GBRE was proprietary and exclusive to Plaintiffs, and the acquisition of the information conferred some benefit to GBRE, the information Plaintiffs allege was conveyed was presented in preparation for the execution of the Master Lease, which Plaintiffs knew was conditioned on GBRE's finalization of financing with WBT. The exchange of that information is thus governed by contract. Because of the clear financing contingency in the agreement, the parties at least

contemplated that the Project might not move forward even after Plaintiffs shared its "proprietary" information with GBRE. Plaintiffs allege no facts which would establish that GBRE's retention of information under circumstances contemplated in the parties' agreement was somehow inequitable. To find otherwise would be to write additional terms into the agreement.

CONCLUSION

WHEREFORE, defendant GBRE respectfully requests that this Court grant its motion to dismiss Counts I, III, and V of the Complaint in this action because the Counts fail to state claims upon which relief may be granted.

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