

**SEMTEK INTERNATIONAL
INCORPORATED
Plaintiff**

v.

**LOCKHEED MARTIN
CORPORATION, et al.
Defendants**

* **IN THE**
* **CIRCUIT COURT**
* **FOR**
* **BALTIMORE CITY, Part 20**
* **Case No.: 97183023/CC3762**
* **[2003 MDBT 8]**

MEMORANDUM AND OPINION

On July 29, 2003 the Court heard argument from counsel on defendant's motion for summary judgment and the plaintiff's opposition thereto. The issues addressed in the papers submitted by counsel for the respective parties were well briefed and supported by numerous affidavits, deposition testimony, reports and extensive documents produced in the course of discovery in this case. Counsel for each side provided the Court with summaries of their clients' positions and answered the Court's questions during the July 29 hearing. The case's tight schedule and time constraints do not permit detailed discussion of the materials considered by the Court in connection with its ruling on the present motion. The Court will provide, however, a brief explanation for its determination on each issue.

1. Statute of Limitations

The complaint in this case was filed on July 2, 1997. Maryland's three year statute of limitations applies to plaintiff's claims. Md. Code Ann., [Cts. & Jud. Proc.] §5-101. The original complaint contained four counts but only two survived the Court's Order of March 26, 2002 and those are Counts I and II, asserting claims for defendant's inducement of a breach of

contract and intentional interference with prospective economic advantage.

Lockheed Martin Corporation (“Lockheed”) takes the position that the undisputed facts establish that any breach of an agreement between Semtek International, Inc. (“Semtek”) and Merkuriy, Ltd. (“Merkuriy”) occurred by December 17, 1993 when Merkuriy contracted all of Semtek’s claimed rights to the Loutch Satellites to Transworld Communications, Inc. (“Transworld”), five months after Semtek’s Letter of Intent with Merkuriy had expired.¹ Placing the “breach” at this date, Lockheed contends that it occurred well before it had knowledge of Semtek and prior to any acts of interference attributed to Lockheed. Even if Semtek was unaware of the agreements dated December 17, 1993, Lockheed contends that the plaintiff was on inquiry notice of Martin Marietta’s (Lockheed’s predecessor) involvement by May or early June of 1994 and knew of Transworld’s and Martin Marietta’s contractual rights concerning the satellites no later than July 1, 1994. This would place Semtek’s complaint outside the applicable statute of limitations.

Semtek objects to Lockheed’s limitations analysis as based on new evidence and arguments presented for the first time in defendant’s reply memorandum and insists that it would be unfair for the Court to consider them because plaintiff has had no opportunity to adduce record evidence placing Lockheed’s factual premise in dispute.

Notwithstanding its objection, plaintiff contends that, although initially alarmed when it learned of Martin Marietta’s involvement in its Loutch satellite venture with Merkuriy,

¹ The Letter of Intent dated May 2, 1993 set an expiration date of July 4, 1993. It was then extended on February 2, 1994 to December 31, 1994.

ultimately Semtek did not treat defendant's involvement as a breach and continued to develop its

business plan under the assumption that Merkuriy had elected to subcontract its satellite modification responsibilities to Transworld and/or Martin Marietta.

Because one of the elements necessary to establish the tort of intentional interference with contractual relations under Massachusetts law is knowledge of the existence of a contractual relationship between the plaintiff and a third party, Semtek contends that no tort was actually committed by Lockheed until July 6, 1994, the date upon which there is first evidence that Lockheed knew of Semtek's claimed satellite rights.² See Abramian v. President & Fellows of Harvard Coll., 432 Mass. 107, 122 (2000).

Upon a review of the record before it, the Court finds that the versions of the facts to be gleaned from the parties' respective affidavits and documents are too disparate to admit of any one set of undisputed material facts and, accordingly, summary judgment on this issue is inappropriate and is **DENIED**.

2. Causation

Lockheed attempts to use Semtek's statute of limitations argument against it, contending that it had no knowledge of Semtek before July 6, 1994 and is, therefore, not liable for any tortious behavior because such post July 6, 1994 behavior could not be a proximate cause of a breach by Merkuriy, which occurred on December 17, 1993, when it contracted Louch

² Knowledge of Semtek and Merkuriy's business relationship is also an essential element of plaintiff's claim for intentional interference with prospective economic advantage. American Private Line Services, Inc. v. Eastern Microwave, Inc., 980 F.2d 33, 36 (1st Cir. 1992), citing United Truck Leasing Corp. v. Geltman, 406 Mass. 811 (1990).

satellite rights to Transworld. Additionally, defendant contends that its conduct was not wrongful.

Semtek, of course, disputes Lockheed's placing of the date of the breach at December 17, 1993, rather placing it at August 8, 1994 when the infamous fax from Pytor Sivirin was received at Semtek. Semtek argues that Massachusetts law requires no more than wrongful motive to support an interference with contract claim³ and points to at least six distinct activities by Transworld and/or Lockheed which it claims caused Merkurii to breach its joint venture agreement with Semtek.

Without detailing all of the bases for Semtek's contentions concerning causation,⁴ it is fair to say that plaintiff's claims rest in large part on its ability to establish a joint venture or partnership relationship between Lockheed and Transworld. Despite the fact that there is in the record no executed written partnership or joint venture agreement between Lockheed and Transworld, the Court finds that there is record evidence⁵ from which a reasonable fact finder could infer that such a working arrangement existed and, therefore, there are material facts in

³ The same standard would apply to plaintiff's claim under Count II. American Private Line Services, Inc. v. Eastern Microwave, Inc., 980 F.2d at 36.

⁴ These arguments are set forth in detail in Semtek's memorandum in opposition to the motion for summary judgment at pgs. 31-38.

⁵ See Exhibits 1-4 filed with Semtek's memorandum in opposition to the motion for

dispute with respect to both this issue and causation which preclude summary judgment treatment and defendant's motion is **DENIED**.

3. Semtek's Claim for Inducing Breach of Contract - Count I

Lockheed asserts that it is entitled to judgment as a matter of law on Count I because Semtek's Business Agreement, Protocol, Letter of Intent and the oral agreements referenced in the affidavit and deposition testimony of Edward Shapiro amount to nothing more than an unenforceable agreement to agree, which cannot support a claim for tortious interference with contract.

Semtek disagrees, relying primarily upon the fact that the Court earlier declined to dismiss Count I. In its Memorandum and Opinion of March 26, 2002 the Court denied summary judgment or dismissal of Count I because it held that, under Maryland law, the Business Agreement, Protocol and Letter of Intent, the agency agreement between Semtek and Mercuriy and the correspondence between those parties gave rise to a material factual dispute as to whether or not Semtek could establish a joint venture agreement. Claiming that Massachusetts law is, if anything, even more favorable to Semtek on this issue, plaintiff argues that there are triable issues of material fact precluding summary judgment.

Semtek's memorandum in opposition to the motion for summary judgment does not meet head-on Lockheed's argument that no enforceable contractual relationship between Semtek and Mercuriy can be established on the basis of the record in this case. Despite references during oral argument by counsel to a "binding Letter of Intent," there is, at the

summary judgment.

conclusion of discovery in this case, not really any material factual dispute as to whether Semtek and Merkuriy entered into a binding contract.

The Court's March 26, 2002 Memorandum and Opinion failed to appreciate fully plaintiff's allegations in Count I to the effect that a binding and enforceable contract to establish a joint venture with Merkuriy is to be found in its Business Agreement, Protocol, agency authorization and Letter of Intent. (Complaint, ¶133). The Court's analysis of Count I at pages 10-12 of the earlier opinion allows for the possibility, under Maryland law, that Semtek could establish an enforceable unwritten joint venture agreement with Merkuriy. In its ruling on the preliminary motion the Court considered Semtek's documents evidence of an enforceable agreement. They are not enough, however, to survive the present motion because it is now clear to the Court that Massachusetts law requires a binding contract as an essential element of proof in an action for unlawful inducement to breach a contract. American Private Line Services, Inc. v. Eastern Microwave, Inc., 980 F.2d at 35. For the reasons stated herein, the Court finds that Semtek's documents standing alone do not constitute an enforceable contract.⁶

The cases cited to the Court indicate that, under Massachusetts law, "A purported contract which is no more than an agreement to agree in the future on essential terms, or one which does not adequately specify essential terms, ordinarily will be unenforceable." Guilliano v. Nations Title, Inc., 1998 U.S. App. LEXIS 1136 (1st Cir. 1998), citing Air Technology Corp. v.

⁶ As discussed infra at pages 7-8, if plaintiff is able to prove a valid unwritten joint venture agreement by use of these documents and other evidence, it may succeed with its claims under Count II.

General Elec. Co., 347 Mass. 613, 626 (1964). Referring to other cases cited therein, the First Circuit panel in Guilliano stated that “The key issue for the Court is ‘whether the parties intend to be bound when they sign the contract and, if so, whether the initial agreement included all the essential terms.’ (Citation omitted) Accordingly, a Letter of Intent may be binding or non-binding, depending on the intentions of the parties. Further, the fact that a further agreement is contemplated does not defeat a finding that the original agreement was a binding contract, so long as the essential terms are agreed upon at the start. The essential terms must be set forth ‘with sufficient definiteness and clarity that a court, by interpretation with the aid of existing and contemplated circumstances, may enforce it’.” (Citation omitted). See also Rosenfeld v. U.S. Trust Co., 290 Mass. 210, 215-17 (1935); American Private Line Svcs., Inc. v. Eastern Microwave, Inc., 980 F.2d at 35-36.

This Court’s review of the Letter of Intent, Protocol and Business Agreement involving Semtek and Mercuriy demonstrates that those documents lack the definiteness, clarity and essential terms necessary to constitute a binding contract.⁷ In the absence of an enforceable contract, Semtek’s claim for inducing breach of contract must fail as a matter of law and, accordingly, partial summary judgment is **GRANTED** as to Count I.

4. Semtek’s Claim for Intentional Interference with Prospective Economic Advantage - Count II

Semtek’s second count alleges the existence of an economic relationship between Semtek and Mercuriy as evidenced by both the documents it contends in Count I constitute a

⁷ The failure of Semtek’s documents to set forth essential terms of its agreement with Mercuriy is described in Lockheed’s memorandum in support of its motion for summary judgment at pages 40-41. The Court agrees with defendant’s assessment.

binding contract and its acts in partial performance of a joint venture agreement, to be later formalized in writing. Under Massachusetts law, plaintiff has the burden of establishing a “reasonable expectancy of financial benefit” arising from this economic relationship. Brown v. Armstrong, 957 F. Supp. 1293, 1305 (D. Mass. 1997). Lockheed contends that this is a burden Semtek cannot meet under the facts of this case⁸ and that it is, therefore, entitled to summary judgment as to Count II.

In opposition, Semtek looks to this Court's March 26, 2002 Memorandum and Opinion for support for its position that there are material factual disputes precluding summary judgment on this count. As noted, *supra*, at page 5, the Court now believes that it failed to make an appropriate distinction in its earlier ruling and confused the legal predicates for Counts I and II. Although analyzing the complaint under Maryland law then, the Court held that the purported contract documents, including correspondence between Semtek and Merkuriy, gave rise to a material factual dispute as to whether or not Semtek could establish a joint venture agreement. Now that discovery is complete, plaintiff has added to the record affidavits and deposition testimony sufficient to survive Lockheed's summary judgment motion on this count because Massachusetts law requires Semtek merely to prove a “probable future business relationship anticipating a reasonable expectancy of financial benefit.” American Private Line Svcs., Inc. v. Eastern Microwave, Inc., 980 F.2d at 36. Thus, Lockheed's motion for partial summary

⁸ Further, Lockheed insists that it has no liability because its knowledge of Semtek occurred after the date of the breach. But, as noted *supra* at pgs. 3-4, that is an issue for the jury to decide.

judgment as to Count II is **DENIED**.

5. Plaintiff's Damage Theory

Lockheed contends that plaintiff's damage theory is so speculative and the facts of this case are so unique that Semtek should be barred as a matter of law from seeking damages, even if it overcomes all the hurdles on its way to liability.

Defendant argues that Semtek never raised any money in support of this venture, never developed an adequate business plan, never modified the satellites, never obtained necessary licenses and waivers, never obtained any customers and never got its venture off the ground. Moreover, as the facts played out, Transworld and Lockheed were unable to succeed with this venture because no additional satellites were ever commercially successful.

Semtek contends that by August 8, 1994 it had spent approximately \$300,000 in partial performance of its obligations under its joint venture agreement with Mercuriy, that it had developed *pro formas*, obtained experienced personnel to manage both the business and technology ends of the deal and that Dr. James R. Stuart's report⁹ sets forth the necessary comparisons, market demand and financial projections which will form a reasonable basis to make his trial testimony admissible and persuasive. Semtek insists that it would have succeeded if its efforts had not been cut off through interference from Transworld and/or Lockheed.

This is not an easy issue for the Court to resolve. Cases cited by both parties contain extensive Massachusetts authorities to support their respective positions. Without citation to each of those cases, the principles that emerge are:

⁹ This report is the basis for Dr. James L. Plummer's expected expert testimony on Semtek's damages.

1. Prospective profits need not be proven with mathematical accuracy.
2. Plaintiff need only show by reasonable proof that it has lost profits.
3. All that is required is a reasonable basis of computation and the best evidence obtainable.
4. There must be a sufficient foundation for a rational conclusion.
5. Expert testimony alone has been explicitly recognized as a method of proving prospective damages.

These principles are gleaned from cases such as Knightsbridge Marketing Svcs., Inc. v. Promociones Y Proyectos, S.A., et al., 728 F.2d 572, 575-76 (1st Cir. 1984) and Lowrie v. Castle, et al., 225 Mass. 37, 51-52 (1916).

In this case, there is a motion *in limine* pending with respect to plaintiff's damage expert testimony and there may be additional motions filed before trial. The Court has yet to resolve those motions and may require a hearing before trial to do so. The Court's review of the qualifications and reports of plaintiff's damage experts, Dr. Plummer and Dr. Stuart, indicates that they appear to have the necessary qualifications and expertise to offer the requisite evidence to place Semtek's damage claim before the jury. But the Court has not had the opportunity to make any credibility determination of their testimony, particularly when challenged by the particular facts of this case. Although dated, the opinion of the Supreme Judicial Court of Massachusetts in Lowrie v. Castle, supra, 225 Mass. at 52 is instructive: "The nature of the business or venture upon which the anticipated profits are claimed must be such as to support an inference of definite profits grounded upon a reasonably sure basis of facts. When the elements, upon which the claim for prospective profits rests, are numerous and shifting contingencies

whose relation to the wrong complained of is problematical, and such profits are not provable with assurance as a trustworthy result of the alleged cause, then there can be no recovery.”

While the Court is not prepared to grant summary judgment on this issue at this time, it continues to harbor concerns, as expressed in its March 26, 2002 Memorandum and Opinion, as to whether a sufficient foundation will be established at trial to submit plaintiff's damage claims to the jury. In the end, this issue will be determined by the quality of the expert testimony presented and the bases upon which the expert opinions are grounded. City Welding and Mfg. Co. v. Gidley-Eschenheimer Corp., 16 Mass.App.Ct. 372, 374-75 (Mass.App.Ct. 1983). On the record before the Court at the present time, Lockheed's motion for summary judgment on plaintiff's damage theory is **DENIED**.

6. Judicial Estoppel

On December 7, 2001 Lockheed filed a motion to dismiss the present action on the grounds, *inter alia*, of judicial estoppel. The issue was extensively briefed and argued before the Court on February 22, 2002. On March 26, 2002 the Court issued an Order and Memorandum and Opinion denying the motion to dismiss and holding that the present action is not barred by the doctrine of judicial estoppel. In the instant motion, a year and a half later, Lockheed has again included judicial estoppel as a ground for its summary judgment motion. To summarize its argument, defendant asserts that Semtek has taken inconsistent positions and made inconsistent representations in the Massachusetts litigation involving Merkuriiy and in the present action before this Court. Lockheed asserts that these representations were made with the intent to mislead this Court.

In response, plaintiff contends that Lockheed's argument on this issue is a mere rehashing of its earlier unsuccessful motion and that Lockheed cannot show that Semtek ever intended to mislead the Massachusetts court¹⁰ or that it was prejudiced in this case by the alleged inconsistent statements.

¹⁰ A further correction to this Court's Memorandum and Opinion of March 26, 2002 may be necessary. Lockheed took exception to the Court's statement that it had conceded no intent on Semtek's part to mislead either the Massachusetts or Maryland courts. If the concession was limited to the Massachusetts litigation, the defendant is free to argue that this Court has been intentionally misled but the argument is weakened by the fact that the Court has been aware throughout these proceedings of the differences in the cases presented to the Massachusetts court and here.

Reviewing the alleged inconsistencies between the positions taken by Semtek in the Massachusetts litigation and in the present case, the Court finds no intent to mislead this Court and no evidence that Lockheed has been prejudiced in its defense of the present action. Accordingly, defendant's motion for summary judgment on the basis of judicial estoppel is **DENIED.**

ALBERT J. MATRICCIANI, JR.
Judge
August 15, 2003

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ORDER

Upon consideration of defendant Lockheed Martin Corporation's motion for summary judgment and plaintiff Semtek International, Inc.'s opposition thereto, arguments of counsel having been heard on July 29, 2003, it is this 15th day of August, 2003, by the Circuit Court for Baltimore City, Part 20, **ORDERED** that partial summary judgment is **GRANTED** as to Count I of plaintiff's complaint and in all other respects the defendant's motion for summary judgment is **DENIED** for the reasons set forth more fully in the accompanying Memorandum and Opinion of this date.

ALBERT J. MATRICCIANI, JR.
Judge

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