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Order on Defendants' Motion for Summary Judgment (EZGREEN ASSOCIATES, LLC)

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Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
JUN 18 2010
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

EZGREEN ASSOCIATES, LLC, Plaintiff, v. GEORGIA-PACIFIC CORPORATION, GP CELLULOSE LLC (FORMERLY) KOCH CELLULOSE, LLC), and BLUEYELLOW LLC, Defendants.	)))))))))	Civil Action File No. 2009-CV-168743

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On May 26, 2010, counsel appeared before the Court to present oral argument on Defendants' Motion for Summary Judgment. After hearing the arguments made by counsel, and reviewing the briefs submitted on the motion and the record in the case, the Court finds as follows:

I. Factual Background

Don Moore, founder of Plaintiff EZGreen Associates, LLC ("EZG"), invented a system to grow grass using a cellulose-based fabric, seed, fertilizer, and other additives ("engineered seed system" or "the Product"). On April 30, 2004, EZG and Georgia-Pacific Corporation ("GP") entered into a contract permitting GP to manufacture, market, sell and distribute EZG's engineered seed system until June 30, 2014 ("the Agreement"). The Agreement obligated GP to use "commercially reasonable" efforts to market the Product. On May 12, 2008, GP sent EZG a one-page "termination letter," which EZG signed and returned. The termination letter stated that "[t]he Parties herby

agree to terminate the Agreement and all rights, obligations, and liabilities thereunder." In its Complaint, EZG alleges that Defendants breached the Agreement by failing to produce the Product and failing to use "commercially reasonable" efforts to market the Product during the years before the termination.

Defendants' Motion for Summary Judgment is premised on three arguments. First, Defendants contend that the termination letter is a release which bars any claims based on breach of the Agreement. Second, Defendants argue that the damages EZG seeks were not enumerated in the Agreement, and that even if they were, those damages are too speculative and uncertain to warrant recovery. Finally, Defendants contend that EZG failed to give notice of the alleged breach as required under the Agreement.

II. Summary Judgment Standard

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the nonmovant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

III. Release

A release is governed by the same rules of construction as govern any written contract and, therefore, "is to be construed according to the intent of the parties." U.S. Anchor Mfg., Inc. v. Rule Industries, Inc., 264 Ga. 295, 298 (1994). "Since contracts must be construed according to the intention of the parties at the time of their execution, it will not be presumed that parties intend to contract away their legal rights in regard to

a subject matter not clearly appearing therein." Id. Where no ambiguity exists in the language of a release, the court will interpret that language based on its plain meaning. O.C.G.A. § 13-2-3.

The Court finds that the letter sent from GP to EZG On May 12, 2008, which EZG signed and returned and which stated that "[t]he Parties herby agree to terminate the Agreement and all rights, obligations, and liabilities thereunder" is unambiguously a termination of the parties' obligation to continue to perform the contract and nothing more. Therefore, EZG did not execute a release of any claims arising under the Agreement, and summary judgment on this basis is not warranted.

IV. Damages

Defendants attack the issue of damages on two fronts. First, Defendants argue that the doctrine of *expressio unius est exclusio alterius* precludes recovery of monetary damages because the Agreement did not explicitly provide for them. Second, Defendants argue that EZG cannot recover damages because those alleged damages are too uncertain. Both arguments fail.

In dealing with the doctrine of *expressio unius est exclusio alterius*, great caution should be used. New Amsterdam Cas. Co. v. McFarley, 191 Ga. 334, 345-346 (1940). The maxim is "far from being a rule," and at best, it is a "description, after the fact, of what the court has discovered from context." Black's Law Dictionary (8th ed. 2004). Moreover, O.C.G.A. § 13-6-6 explicitly provides that every injured party in a breach of contract action has a right to damages. In other words, in a breach of contract action, once the plaintiff shows the existence of a legally enforceable contract and presents evidence from which a jury could find that defendant breached that contract, the

defendant is not entitled to summary judgment **even if the plaintiff fails to present any admissible evidence to establish the amount of actual damages flowing from the breach**. O.C.G.A. § 13-6-6; Eastview Healthcare, LLC v. Synertx, Inc., 296 Ga. App. 393, 398-399 (2009); Poe v. Sears, Roebuck & Co., 1 F.Supp.2d 1472, 1477 (1998)(applying Georgia law). Accordingly, the fact that the Agreement fails to list damages as a possible recovery for breach of the Agreement does not foreclose EZG's claims for breach of the Agreement.

Defendants' argument that damages in this case are too uncertain is equally unpersuasive. O.C.G.A. § 13-6-2 provides that "damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from such breach and such as the parties contemplated, when the contract was made, as the probable result of its breach." Moreover, the Court finds that, while requiring proof and explanation, and while subject to the rigors of cross examination and the rules of evidence, the damages EZG seeks could "be proved with reasonable certainty." Graham Bros.' Const. Co., Inc. v. C. W. Matthews Contracting Co., Inc.,159 Ga. App. 546 (1981). Thus, summary judgment based on this argument is also improper.

V. Notice

GP argues that EZG failed to comply with the notice provision of the Agreement, thereby barring a breach of contract claim. Paragraph 7.3(a) of the Agreement provides, in relevant part:

> "[I]f EZGreen believes that GP has not made a commercially reasonable effort..., then EZG by written notice to GP **may** within thirty days...identify the specific performance criteria upon which EZG's notice is based. [If GP has not cured within 90 days], EZG **may** then amend the provisions of this Article..." (emphasis added).

At no point does the Agreement require EZG to give notice. When the language of a contract is unambiguous, the court will enforce the contract's clear terms. Caswell v. Anderson, 241 Ga. App. 703, 704 (2000). The word "may" as used in this Agreement shows that notice under Paragraph 7.3(a) was permissive, not mandatory. Thus, the Agreement gave EZG the option to give GP notice of an alleged breach; it did not require such notice.

Even if the Agreement were construed as requiring EZG to give notice of an alleged breach to GP, EZG did so in the form of a letter dated January 27, 2006, alleging that GP had failed to make "commercially reasonable efforts" to market the Product.

VI. Conclusion

For the foregoing reasons, Defendants' Motion for Summary Judgment is hereby **DENIED**. The stay of discovery ordered on March 31, 2010 is hereby lifted. Discovery in this case shall close on Friday, September 17, 2010.

SO ORDERED this 18th day of June, 2010.

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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