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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-000113 10/30/2018

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

THERMOLIFE INTERNATIONAL L L C GREGORY B COLLINS

v.

MUSCLEPHARM CORPORATION ANDREW S FRIEDMAN

JUDGE BRODMAN

RULING AFTER SUPPLEMENTAL BRIEFING

The Court reviewed both parties' supplemental briefs and responses.

RAJI CONTRACT 9 provides: "A material breach occurs when a party fails to perform a substantial part of the contract or one or more of its essential terms or conditions."

A material breach is a breach that excuses the non-breaching party from continuing performance. Arizona law makes clear that not every departure from the terms of a contract is sufficient to be material. Whether a breach is material depends on the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties. Restatement (Second) of Contracts, § 241 cmts. a & b (1981). *See Hometown Fin. Inc. v. United States*, 60 Fed.Cl. 513, 521 (Fed. Cl. 2004) ("government's failure to establish a single dollar of loss attributable to the plaintiffs' underwriting, appraisal, and internal control practices or any imminent losses is fatal to its material breach claim").

The Court agrees with MusclePharm that the existence or extent of monetary damage caused by a breach of contract is not necessarily dispositive of the question of materiality. *See Famiglietta v. Ivie-Miller Enterprises, Inc.*, 966 P.2d 777, 781-82 (N.M.App. 1998). For

example, a "time is of the essence" provision could be a material term even without monetary damages. But the breach must nevertheless be so central to the parties' agreement that it defeated an essential purpose of the contract.

In *ESPN Inc. v. Office of the Commissioner of Baseball*, 76 F.Supp.2d 416 (S.D.N.Y. 1999), ESPN had a contract with Major League Baseball (Baseball) to broadcast six baseball games on Sunday nights in September 1998 and September 1999. ESPN preempted the six baseball games and broadcast football games instead. ESPN paid Baseball the full amount of the contract, so ESPN alleged that Baseball had no monetary damages. Baseball, in turn, alleged damages arising out of loss of national exposure, loss of promotional opportunities, and loss of prestige resulting in a diminishment of the value of future television packages.

Baseball failed to adequately demonstrate either the fact of damages or the amount of monetary damages. As a result, the court granted ESPN's motion to preclude damages evidence. The court, however, held that Baseball's failure to present evidence of monetary damages did not prevent it from arguing that ESPN had materially breached the contract. The court noted that "materiality does not depend upon the amount of provable money damages, it depends upon whether the nonbreaching party lost the benefit of its bargain." *Id.* at 421. *ESPN* is distinguishable since even without monetary damages there was evidence of harm to Baseball.

In analyzing the instant situation, the Court first notes that MusclePharm had a clumping problem, but it has never claimed that ThermoLife promised to supply a product that would not clump.[1] Evidence indicates that MusclePharm informed ThermoLife of a clumping problem, and that ThermoLife responded by promising to deliver a product with 1% silicon dioxide.[2] MusclePharm's case thus rests on the promise of 1% silicon dioxide.

Yet MusclePharm failed to present evidence indicating that 1% silicon dioxide probably would have prevented its product from clumping.

The Court finds that the "1% solution" was not so central to the parties' agreement that it defeated an essential purpose of the contract. In other words, for 1% silicon dioxide to be a material term of the contract, there must be some significance to the number. Here, there is none.

1. Such a promise would likely run afoul of ThermoLife's disclaimer of any warranties including fitness for a particular purpose.
2. As it regularly points out, ThermoLife denies that it made this promise. However, for the purposes of this motion for summary judgment the Court must assume the promise was made.

MusclePharm's concern was that its product was clumping, not in any particular amount of silicon dioxide. There is no evidence that the precise amount of silicon dioxide was relevant to MusclePharm or that MusclePharm even knew what 1% silicon dioxide meant. Nitrates containing 1% silicon dioxide were not essential to MusclePharm's product. But, as previously noted, 1% silicon dioxide would not have solved MusclePharm's problem. With .05% silicon dioxide, MusclePharm's product clumped. With 0.5% silicon dioxide, MusclePharm's product clumped. With 1% silicon dioxide, MusclePharm's product clumped. While proof of monetary damage is not required to establish a prior material breach, proof of injury/harm (which MusclePharm lacks here) is essential.[3]

ThermoLife's failure to include 1% silicon dioxide was not an essential term and therefore not a material breach of the contract as a matter of law. As a result, MusclePharm had no right to unilaterally suspend performance.

MusclePharm alleges that it reasonably expected ThermoLife to include 1% silicon dioxide, "a promise that was so important to MusclePharm that it appears in numerous contemporaneous emails." Brief at 4:1-2. Of course, if the amount of silicon dioxide was so central to the parties' agreement, one supposes that the promise would have made its way into the contemporaneous lawyer-negotiated written agreement in question. One might have expected MusclePharm to have tested the product for silicon dioxide or at least checked the material data sheets (none of which indicated that silicon dioxide was 1%.) And MusclePharm never rejected the product.

In conclusion, for reasons stated in ThermoLife's brief and responsive brief, ThermoLife's motion for partial summary judgment is granted.

3. Contrast the instant situation to a hypothetical where MusclePharm received FDA approval based on a representation that the product contained 1% silicon dioxide (but the actual product contained only .05%) and, as a result, FDA approval was compromised. In that situation, the 1% promise would have been material.