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New York Commercial Division Round-Up BLOG
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# New York Commercial Division Round-Up

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## You Failed To Read An Agreement That You Executed? It Will Probably Be Enforceable

*By Mark E. McGrath*

In *Vulcan Power Co. v. Munson*, Index No. 600712/09 (Sup. Ct., NY County, Dec. 3, 2010), the Honorable Richard B. Lowe III granted summary judgment to Plaintiff Vulcan Power Company ("Vulcan") against Defendants Soo Min Fay, Doug Frosh, George Marshall, Cal Mitchell and Tim Shea (collectively, the "Non-Munson Defendants") on a declaratory judgment claim relating to an agreement that the Non-Munson Defendants executed but never reviewed.

Vulcan, a geothermal energy company, was seeking an investment of over $100 million (the "Investment") from institutional investors (the "Investors") in early 2008. Defendant Stephen M. Munson ("Munson") was the President and Chief Executive Officer of Vulcan until his termination in late 2008. Munson was responsible for negotiating with the Investors and, in April of 2008, Munson and certain of the Investors executed a letter agreement containing a term sheet. The term sheet contemplated multiple agreements, three of which were at issue in *Vulcan Power*: a stock purchase agreement, an amended and restated stockholders agreement (the "Stockholders Agreement"), and a stock purchase agreement concerning the sale of stock by Munson (collectively, the "Agreements").

Vulcan was going to use some of the proceeds from the Investment to purchase a drilling rig, which had a closing deadline of July 25, 2008 and was contingent on the closing of the Investment. Negotiations regarding the Investment continued through Spring of 2008 and into late July of 2008. On July 24, 2008, Munson believed that he, Vulcan, and the Investors had reached an agreement on final terms. Munson and the Investors then agreed that once documents reflecting the agreement were presented, Munson would execute and return them.

On July 25, 2008, Munson sent the signature pages for the Agreements to Vulcan via facsimile. Munson claims he did not review the Agreements prior to signing. Munson also contacted the Non-Munson Defendants and told them their signature were needed on the Stockholders Agreement in order to close the Investment. The Non-Munson Defendants admitted that they never reviewed the Stockholders Agreement before signing it. In fact, the Non-Munson Defendants only received their respective signature pages at the time each executed the Stockholders Agreement. The Investment subsequently closed and the drilling rig was purchased by Vulcan.

After Munson was terminated, he and the Non-Munson Defendants challenged the Agreements claiming that they were not binding because they do not reflect a meeting of the minds. Munson and the Non-Munson Defendants alleged that Vulcan fraudulently appended their signature pages to documents containing terms that were not agreed upon. Vulcan filed the action seeking a declaration that the Agreements were enforceable.

In the action, Justice Lowe previously granted a motion to strike Munson's answer for failing to comply with court orders and a default judgment. However, Munson declared bankruptcy before the default judgment was entered. The court subsequently entered an order on October 19, 2010 striking Munson's affidavit in opposition to Vulcan's motion for summary judgment.

In granting summary judgment to Vulcan and against the Non-Munson Defendants, Justice Lowe cited to a number of cases for the proposition that a "party who signs a document without any valid excuse for having failed to read it is conclusively bound by its terms." *Vulcan Power*, at pg. 6 (citing *Sorenson v. Bridge Capital Corp.*, 52 A.D.3d 265 (1st Dep't 2008); *Dale Gale Assocs., Inc. v. Hillcrest Estates, Ltd.*, 283 A.D.2d 386, 387 (2d Dep't 2001)) (internal quotations omitted) (further citations omitted). However, the Court noted that there are exceptions to this general rule, such an when the person executing the agreement is illiterate, blind, or "ignorant of the alien language of the writing, and the contents thereof are misread or misrepresented to him by the other party, or even a stranger," *Vulcan Power*, at pg. 6 (quoting *Cash v. Titan Fin. Servs., Inc.*, 2009 NY Slip Op 00493 (2d Dep't Jan. 27, 2009), and the party executing the agreement is "not otherwise negligent." *Vulcan Power*, at pg. 6. Failing to obtain a document before executing is "at least as negligent as not reading the document." *Vulcan Power*, at pg. 6 (citing *Pimpinello v. Swift & Co.*, 253 N.Y. 159, 162-63 (1930)).

Since the Non-Munson Defendants admitted that they did not read the Stockholders Agreement before executing it, the only issue was whether Vulcan was responsible for the failure of the Non-Munson Defendants for not receiving a copy of the Stockholders Agreement. The Non-Munson Defendants testified at their depositions that they did not request the Stockholders Agreement due to the impeding deadline to close on the purchase of the drilling rig. However, Justice Lowe found that the pressure to close was made by Munson, not Vulcan. The Court also found that three of the Non-Munson Defendants had access to a fax machine on the date the Investment closed and, thus, nothing prevented the Non-Munson Defendants from obtaining the Stockholders Agreement.

*Vulcan Power* is a reminder that parties should be careful to fully review any agreements before executing. As Justice Lowe noted, there are some exceptions to the general rule that agreements are binding, but these exceptions are narrow. Accordingly, a party seeking to avoid enforcement of an agreement under one of the exceptions should ensure that the exceptions apply before seeking to assert such a defense.

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