Vertical Computer Systems, Inc. v Ross Systems, Inc.

2006 NY Slip Op 30486(U)

November 30, 2006

Supreme Court, New York County

Docket Number: 600644/03

Judge: Richard B. Lowe

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SCANNED ON 12/13/2006

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III, Justice

PART 56

Vertical Computers Systems

- v -

Ross Systems Inc.

INDEX NO. 600644/03

MOTION DATE 7/24/06

MOTION SEQ. NO. 007

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 08 2006
NEW YORK
COUNTY CLERK'S OFFICE

NYS SUPREME COURT
REVIEWED
DEC 13 2006
E-FILING DEPT.

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/30/06

HON. RICHARD B. LOWE, III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
---X
VERTICAL COMPUTER SYSTEMS, INC., a member of NOW SOLUTIONS, LLC, suing in the Right of NOW SOLUTIONS, LLC, and VERTICAL COMPUTER SYSTEMS, INC., suing in its own Right,

Index No. 600644/03

Plaintiff,

-against-

ROSS SYSTEMS, INC., J. PATRICK TINLEY, GARY GYSELEN, and ARGLEN ACQUISITIONS, LLC,

Defendants.
---X

FILED
DEC 08 2006
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Richard B. Lowe, III:

Plaintiff Vertical Computer Systems, Inc. (Vertical) moves for summary judgment in motion sequence #007. Defendant Ross Systems, Inc. (Ross) moves for summary judgment in motion sequence #008. These motions are consolidated for disposition.

Background

As in the companion case of *Ross Systems, Inc. v NOW Solutions, LLC*, Index no. 600679/04, this action arises out of the February 28, 2001 sale of certain of Ross's business assets to Vertical's predecessor-in-interest, NOW Solutions LLC (NOW), and Ross's claim that Vertical defaulted on a promissory note which was executed contemporaneously with the sale of assets.

Vertical seeks summary judgment against Ross on the second cause of action, for breach of the Asset Purchase Agreement (APA) Article 2.4 (iii), the fifth cause of action, based on setoff, the sixth cause of action, for indemnification, and the seventh cause of action, for

attorneys' fees. These claims were reinstated by the Appellate Division in a decision and order entered on October 26, 2004, after having been dismissed by this court for failure to state a cause of action.

Vertical also seeks summary judgment with respect to Ross's 13 affirmative defenses.

Vertical alleges that Ross entered into several confidential agreements which should have been disclosed to NOW before the sale closed. In the first agreement, Vertical alleges that Ross promised the business broker, Arglen Acquisitions LLC (Arglen), a "cash success fee" for the timely closing of the sale (the November letter agreement).

The second agreement (the February 2001 agreement) between NOW, Arglen and Gary Gyselen (Gyselen), a principal in Arglen, promised Arglen a finder's fee.

The final, undisclosed agreement promised 175,000 options and warrants for the purchase of Ross stock as an additional closing bonus to Arglen.

Vertical alleges that it was entitled to a post-closing adjustment in the amount of $3.7 million, pursuant to Article 2.4 (iii) of the Asset Purchase Agreement (APA). This credit was calculated based on maintenance fees that had allegedly been pre-paid to Ross before the closing. With this post-closing adjustment, and others, Vertical alleges that it has a credit balance with Ross of approximately $3.6 million.

Vertical claims that prior to commencement of this suit, it attempted to obtain Arglen's approval of this litigation in order to satisfy a 75% supermajority voting requirement. Arglen allegedly refused to approve the commencement of suit against Ross, in violation of the terms of NOW's Operating Agreement and in violation of the business judgment rule.

With respect to the claim for breach of the APA, the relevant language of APA § 2.4

states:

> Purchase Price. Subject to the terms and conditions of this Agreement, in full consideration for the Assets and in addition to Purchaser's assumption of the Assumed Liabilities, the Purchaser shall pay to Seller the amount of Six Million One Hundred Thousand Dollars ($6,100,000) less all ... *(iii) maintenance fees received prior to the Closing Date which relate to maintenance contract renewals extending beyond December 31, 2000.*[1] (Emphasis added).

Vertical argues that this language entitles it to all maintenance payments received by Ross for software maintenance contracts that started before the closing date but extended beyond that date. Ross claims that Vertical was only entitled to payments made to Ross for software maintenance periods commencing after the anticipated closing date.

Discussion

A movant's burden on a motion for summary judgment is to establish that there are no material issues of fact. *Zuckerman v City of New York,* 49 NY2d 557 (1980). Once a movant has met this burden, the party opposing the motion must come forward with proof of the existence of a triable issue. *Indig v Finkelstein*, 23 NY2d 728 (1968).

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[1] After the APA was executed, this date was extended to February 28, 2001.

Where the intent of the parties to a contract is clear, and can be determined from the face of the agreement, the interpretation of the contract is a matter of law, and the court may grant summary judgment to one of the parties. *American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275 (1st Dept 1990). If the parties' intent is discernable from the plain meaning of the language of the contract, there is no need to look beyond the face of the contract to discern its intended meaning. *Evans v Famous Music Corporation*, 1 NY3d 452 (2004). Where a contract is subject to more than one reasonable interpretation, the parties' intent is may be said to be ambiguous. *Id.*

Marianne Franklin (Franklin), a former Ross employee and current president and CEO of NOW, avers that Vertical was entitled to adjustments to the purchase price totaling approximately $4.1 million, relying on a report prepared for Vertical by David Braun (Braun), who examined Ross's books and records.

Braun's affidavit states that he was an accountant and controller for NOW from January 2, 2006 to March 31, 2006, and that he was assigned to determine the amounts collected by Ross prior to February 28, 2001 for maintenance contracts in effect on February 28, 2001.

Neither Franklin nor Braun's affidavits shed light on the intention of the parties or the meaning of APA Article 2.4 (iii) at the time that the APA was entered into.

Ross's former Chairman and CEO, J. Patrick Tinley, states that, when negotiating the terms of the APA, he and Gyselen agreed that Ross would keep payments received for software maintenance periods that had commenced on renewal dates on or before the anticipated closing date. NOW (Vertical), however, would remain liable for the remaining months of maintenance support on then-existing contracts, even though Ross would be keeping the corresponding

maintenance payments. Tinley claims that a December 1, 2000 Letter of Intent memorializes this understanding.

Ross's consultant, and former senior executive, Robert B. Webster, concedes that the language in APA Article 2.4 (iii) was "seemingly irreconcilable," and could have been drafted with greater precision. Affidavit of Robert B. Webster dated June 27, 2006, ¶ 26.

The court finds that the disputed language is subject to two different interpretations and is ambiguous. Plaintiff has therefore failed to sustain its burden of proving entitlement to judgment as a matter of law with respect to the second cause of action.

The Appellate Division found that the fifth, sixth, and seventh causes of action seek relief that is collateral to the second cause of action, for breach of the APA. Since the outcome of these claims, for offset, adjustment credits, indemnity and attorneys' fees, turns on the outcome of the second cause of action, plaintiff's motion for summary judgment is denied with respect to these causes of action, as well.

With respect to that branch of plaintiff's motion which seeks dismissal of Ross's 13 affirmative defenses, Ross objects only to the dismissal of the third affirmative defense, based on estoppel, the fifth affirmative defense, based on waiver, and the sixth affirmative defense, based on plaintiff's alleged failure to comply with Delaware law regarding commencement of derivative actions.

Plaintiff's burden, on a motion for summary judgment on affirmative defenses, is identical to a similar motion on the main claims. Plaintiff must prove that it is entitled to judgment as a matter of law, and the absence of any triable issues of fact. *Tifft v Benson,* 109 AD2d 1006 (3d Dept 1985).

Plaintiff claims that defendant will be unable to establish the defense of waiver at trial since its proof will consist of oral modifications to the APA, and both the express language of APA Article 13, and General Obligations Law (GOL) § 15-301, prohibit oral modifications to a written contract.

APA Article 13 contains a merger clause, and states that waivers of any term of the agreement must be in writing.

GOL § 15-301, the statute of frauds, states that a written agreement may not be modified or terminated by an executory agreement unless the executory agreement is in writing.

The defendant's claims of waiver and estoppel rest on proof of a conversation allegedly held between Ross's former Chief Financial Officer, Verome Johnston (Johnston), and NOW's Chief Financial Officer, Steven Gunn (Gunn), after the February 2001 closing of the asset sale. Johnston and Gunn allegedly reached a final understanding about the credits and debits due to each party to the sale, resulting in an agreement that NOW could forego its $250,000 Promissory Note payment to settle their accounts. Ross claims that it relied on this agreement in making the financial disclosure statements required of a public company, and that this fully executed agreement constitutes a waiver of, and estoppel against plaintiff's present claims. Citing *Rose v Spa Realty Assoc.* (42 NY2d 338 [1977]), defendant claims that the parties' oral modification of the APA was fully executed, and therefore enforceable against plaintiff.

Plaintiff has succeeded in establishing a prima facie case of entitlement to summary judgment on the affirmative defenses of waiver and estoppel through proof of the terms of APA Article 13, and GOL § 15-301. Defendant, however, has come forward with some evidence of a fully executed oral agreement to settle accounts, which raises a triable issue with respect to these

affirmative defenses.

Plaintiff's motion to dismiss the affirmative defenses of waiver and estoppel is, therefore, denied.

Plaintiff's motion to dismiss the sixth affirmative defense, and defendant's motion for summary judgment based on Delaware law will be considered concurrently.

Defendant's sixth affirmative defense alleges that Vertical does not have standing to sue since NOW failed to commence a derivative action in accordance with the requirements of the NOW Operating Agreement, or the relevant provisions of Delaware law.

Ross claims that, under NOW's limited liability company agreement, Vertical and Arglen were vested with the authority to approve or disapprove of the commencement of litigation on behalf of NOW. Ross claims further that, under Delaware law, Vertical had to choose to either forgo seeking approval of its voting members, where a demand would have been futile, or seek their approval and be bound by the voting members' decision to proceed, or not.

Ross claims that Delaware substantive law applies to this case since NOW was a Delaware limited liability company at the time this action was filed, citing *Vertical Computer Systems, Inc. v Ross Systems, Inc.* (11 AD3d 375 [1st Dept 2004]). Arglen's vote not to sue Ross is an issue of limited liability company governance, a matter of substantive law, claims Ross.

Under Delaware law, Vertical will be unable to overcome the strong legal presumption that NOW's decision not to litigate was a valid exercise of "business judgment." Vertical will also be unable to prove that Arglen's decision to vote down any legal action against Ross was wrongful, requiring a judgment in Ross's favor against Vertical based on Vertical's lack of standing to bring this suit.

Both Delaware law and the Operating Agreement vested management decisions, such as the commencement of any lawsuits, in the hands of the members of NOW, rather than in its Executive Committee, claims Ross. Therefore, the Executive Committee decision to proceed with this litigation after NOW's members failed to approve of litigation by a supermajority, constitutes an act outside of the scope of the Executive Committee's authority, depriving Vertical of standing to proceed with this litigation, as a matter of law, claims Ross.

Vertical responds that the Appellate Division has considered this issue, and that the appellate court's holding that the amended complaint adequately pleaded facts which support Vertical's standing to commence this suit constitutes the law of this case, which may not be re-litigated by Ross on this motion for summary judgment, citing *Vertical Computer Systems, Inc. v Ross Systems, Inc.* (11AD3d 375, *supra*).

Although the Appellate Division upheld the sufficiency of the complaint, for purposes of a motion pursuant to CPLR 3211 (a) (7), that holding does not preclude the factfinder from considering all of the evidence regarding the manner in which Vertical obtained authority to bring this suit, and the issue of Vertical's standing.

> Delaware Code §18-1001 states, in relevant part:
>
> A member ... may bring an action in the Court of Chancery in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed.

6 Del Code § 18-1001.

The issue of whether Vertical complied with NOW's Operating Agreement, and the

provisions of Delaware law governing demand on managers before bringing suit, raise issues of fact which preclude summary judgment.

Conclusion

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted to the limited extent that the first, second, fourth, and seventh through thirteenth affirmative defenses are dismissed, and the motion is denied in all other respects; and it is further

ORDERED that defendant's motion for summary judgment is denied.

Dated: November 30, 2006

ENTER:

HON. RICHARD B. LOWE, III
J.S.C.

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