Cricket Stockholder Rep, LLC v Project Cricket Acquisition, Inc.
2018 NY Slip Op 30911(U)
May 10, 2018
Supreme Court, New York County
Docket Number: 651454/2016
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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CRICKET STOCKHOLDER REP, LLC,

Plaintiff,

- v -

PROJECT CRICKET ACQUISITION, INC., and USES HOLDING CORP.,

Defendants.

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INDEX NO. 651454/2016

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 82, 108, 120, 121, 122, 123, 124, 126, 127, 129, 130, 133

were read on this application to/for SUMMARY JUDGMENT (AFTER JOINDER

HON. SALIANN SCARPULLA:

This action concerns the purchase by defendant Project Cricket Acquisition, Inc. ("Purchaser") of defendant USES Holding Corp. ("Company") (collectively "Defendants") from the Company's former stockholders ("Sellers") pursuant to a stock purchase agreement ("SPA"). This action and a related action, *Project Cricket Acquisition, Inc. v. Florida Capital Partners, Inc., et al*, New York County Index No. 652524/2015 ("First Action") are pending before me.

On behalf of Sellers, plaintiff Cricket Stockholder Rep, LLC ("Sellers Rep") moves for summary judgment against Purchaser and Company for breach of the SPA.

Defendants cross-move to consolidate this action with the First Action and Company separately moves to dismiss the complaint against it for failure to state a cause of action.

Background

Purchaser commenced the First Action in 2015, asserting various indemnification claims against Sellers based on alleged breaches of representations and warranties in the SPA. Purchaser also alleged that it was fraudulently induced to enter into the SPA, and that Sellers and Sellers Rep breached section 2.3 of the SPA after refusing to accept a "corrected" net working capital statement that was previously based on alleged inaccurate statements.[1]

Sellers Rep subsequently brought this action in 2016, alleging a claim for breach of section 9.4 of the SPA against Purchaser and Company. Pursuant to the SPA, Purchaser prepared all tax returns for the Company that were filed after closing but related to the tax period before closing ("Pre-Closing Tax Period"). Section 9.4 (b) addressed how the parties would allocate refunds:

> Any refunds or credits of Taxes of [] Company for any Pre-Closing Tax Period or for the portion of any Straddle Period up to and including the Closing Date (and specifically including the Special Tax Refund, if received), shall be for the benefit of Sellers except to the extent any such refund or credit is reflected in Closing Net Working Capital and any refunds or credits of a [] Company for the portion of any Straddle Period beginning after the Closing Date, or for any Tax Period beginning and ending on or after the Closing Date, shall be for the benefit of Purchaser.

[1] Section 2.3 of the SPA provides the terms of the price adjustment process. Essentially, after closing, Company calculated its Closing Net Working Capital, and the difference between that statement and a prior net working capital statement provided the amount of the purchase price adjustment. Purchaser asserted that because the net working capital statements were allegedly not GAAP-compliant, the parties should redo the price adjustment process.

Section 9.4 (c) further provides that:

> Purchaser shall promptly pay over (or cause the applicable [] Company to pay over) to Sellers all refunds received by Purchaser or its affiliates to which Sellers are entitled under this Section 9.4. and Sellers shall promptly pay or cause to be paid over to Purchaser (or the applicable [] Company) all refunds to which Purchaser (or the applicable [] Company) is entitled under this Section 9.4 (in each case, including interest with respect thereto from the date of receipt of such funds).

Sellers Rep alleges that Purchaser has received thirteen tax refunds totaling $2,773,406.00 for the Pre-Closing Tax Period, which Purchaser has failed to remit. Sellers Rep provides documentary evidence of each tax refund Company received for the Pre-Closing Tax Period.

Further, in a letter dated January 12, 2016, counsel for Defendants admitted that Company received tax refunds relating the Pre-Closing Tax Period totaling $2,773,406.00, but claimed that Defendants had not remitted these tax refunds because of Sellers' refusal to indemnify Purchaser for its losses arising from Company's tax liabilities. Also, in its answer Purchaser admits that it received $2,773,406.00 in tax refunds relating to the Pre-Closing Tax Period.

Sellers Rep now moves for summary judgment on its tax refund cause of action and for attorneys' fees in prosecuting this action,[2] arguing that it is entitled to the tax

[2] Section 8.3 (b) of the SPA provides that "Purchaser agrees to indemnify the Sellers . . . against, and hold . . . harmless from, any and all Losses suffered by any Seller . . . [for] any breach of or failure by Purchaser to perform any covenant or obligation of Purchaser set out in [the SPA]." The SPA defines "Losses" as including "judgment, costs and expenses, including court costs and reasonable attorneys' and consultants' fees and disbursements and costs of litigation . . . ."

refunds as a matter of law under the unambiguous terms of the SPA. In opposition, Defendants argue that I should deny summary judgment and decide the parties claims against each other in one action, and therefore Defendants cross-move to consolidate this action with the First Action. Separately, Company moves to dismiss the complaint as asserted against it.

Discussion

A party moving for summary judgment is required to make a *prima facie* showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Grob v Kings Realty Assoc.*, 4 A.D.3d 394, 395 (2d Dep't 2004). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980). Generally, a grant of summary judgment is appropriate when the interpretation of a contract is dispositive of the issues in the case. *See Gen. Elec. Capital Corp. v Volchyok*, 2 A.D.3d 777, 778–79 (2d Dep't 2003) (citing *Hartford Acc. & Ind. Co. v. Wesolowski,* 33 N.Y.2d 169 (1973)).

Sellers Rep's Motion for Summary Judgment

Section 9.4 (c) plainly states that "Purchaser shall promptly pay over (or cause the applicable [] Company to pay over) to Sellers all refunds received by Purchaser or its affiliates to which Sellers are entitled under this Section 9.4[.]" Under Section 9.4 (b), Sellers are entitled to "[a]ny refunds or credits of Taxes of [] Company for any Pre-Closing Tax Period or for the portion of any Straddle Period up to and including the

Closing Date . . . except to the extent any such refund or credit is reflected in Closing Net Working Capital . . . ."

Purchaser does not dispute that the SPA entitles Seller to tax refunds that Company has received for the Pre-Closing Tax Period, or that Company has received $2,773,406.00 in tax refunds for the Pre-Closing Tax Period, which Purchaser has not remitted to Sellers. Plainly, Purchaser has not complied with Section 9.4 of the SPA by failing to pay over tax refunds for the Pre-Closing Tax Period to Sellers. Purchaser argues, however, that its counterclaims raise material issues of fact precluding summary judgment. I disagree.

As to its fraudulent inducement counterclaim, the Appellate Division, First Department has dismissed the remaining portions of Purchaser's fraudulent inducement claim in the First Action as "duplicative" and "barred by the SPA's disclaimer of reliance[.]" *Project Cricket Acquisition, Inc. v FCP Inv'rs VI, L.P.*, 159 AD3d 600 (1st Dep't Mar. 27, 2018). Thus, to the extent Purchaser relies on its fraudulent inducement counterclaim, incorporated by reference from the First Action into this action, to oppose summary judgment, its reliance is misplaced because that counterclaim is no longer viable.

Purchaser also argues that disputes regarding the calculation of Closing Net Working Capital preclude summary judgment, because Sellers' entitlement to the tax refunds depends on whether "such refund or credit is reflected in Closing Net Working Capital." Here again, Purchaser's price adjustment claim, which alleged that Sellers breached Section 2.3 by failing to accept a "corrected" net working capital statement, has

been dismissed. *See Project Cricket Acquisition, Inc. v FCP Inv'rs VI, L.P.*, 159 AD3d 600. Purchaser's price adjustment claim therefore fails to raise an issue of fact requiring denial of summary judgment on the Sellers Rep's claim for the tax refunds.

Finally, Purchaser's pending indemnification claims for breach of tax and other representations in the First Action do not require denial of summary judgment to Sellers Rep on the tax refunds claim. As "a sophisticated contracting party, [Purchaser] could have bargained for the right to delay payment of the tax refunds pending the resolution of its indemnification or other claims arising out of [the] [a]greement." *FdG Logistics LLC v A&R Logistics Holdings, Inc.*, 131 A.3d 842, 865–66 (Del. Ch. 2016). Instead, the unambiguous terms of the SPA provide that Purchaser "shall promptly pay over . . . to Sellers all refunds received by Purchaser[.]"

Purchaser's assertion that a breaching party may not demand the other party's performance is misplaced, because the plain language of the SPA required Purchasers to promptly pay without condition. *See also United BioSource LLC v Bracket Holding Corp.*, 2017 WL 2256618 at 6 (Del. Ch May 23, 2017) ("The allegedly inflated financial statements might have caused [purchaser] to pay more than it otherwise would have for the Companies, but they have no bearing on [seller's] entitlement to the Tax Refund.").

Purchaser's assertion of setoff and recoupment defenses are also meritless. Section 8.4(b)(i) of the SPA expressly provides that for breaches of certain representations and warranties, Sellers' liability "shall be payable solely out of [and shall not exceed] the Indemnification Escrow Account[.]" Purchaser may not set off or recoup its recovery from the tax refunds when the SPA sets aside an escrow account as the

limited recourse for these claims. *See FdG Logistics LLC v A&R Logistics Holdings, Inc.*, 131 A.3d 842, 866 (Del. Ch. 2016) (stating that delaying payment of tax refunds based on principles of offset would "rewrite the unambiguous terms" of the merger agreement that required prompt payment).[3]

Accordingly, I grant summary judgment in Sellers Rep's favor on its cause of action for breach of Section 9.4 against Purchaser, as it has established *prima facie* entitlement to judgment as a matter of law on its right to the tax refunds, and Purchaser has failed to raise an issue of fact precluding summary judgment.

Defendants' Cross-Motion for Consolidation

CPLR 602(a) provides that I may consolidate "actions involving a common question of law or fact" pending before me "to avoid unnecessary costs or delay." Because I am granting Sellers Rep summary judgment on the complaint and Purchaser has asserted its counterclaims here in its complaint in the First Action, there is no reason to consolidate the two actions. Accordingly, Defendants' cross-motion to consolidate is denied.

Company's Motion to Dismiss

Section 9.4(c) of the SPA provides that "Purchaser shall promptly pay over (or cause the applicable [] Company to pay over) to Sellers all [applicable tax] refunds." Company moves to dismiss the complaint against it for failure to state a claim because

[3] By withholding Sellers' tax refunds, Purchaser is essentially resorting to self-help in contravention of the plain terms of the SPA.

under the terms of the SPA, it has no obligation to pay the tax refunds. Sellers Rep opposes, arguing that Company waived this defense and that Sellers Rep is entitled to injunctive relief and specific performance against Company to enforce the terms of the SPA.

Sellers Rep's waiver argument is unpersuasive because, while Company did not raise failure to state a cause of action in opposition to the summary judgment motion, the defense was raised in Company's answer. Moreover, a motion for failure to state a claim may be made at any time. *See* CPLR 3211(e).

Sellers Rep additionally argues that, pursuant to Section 9.4 (b) and (c), Company covenants to comply with Purchaser's obligation to pay tax refunds for the Pre-Closing Tax Period. Based on this purported covenant, Sellers Rep argues that the SPA permits it to seek equitable relief against the Company.

Contrary to Sellers Rep's interpretation, Section 9.4 (b) and (c) impose no obligation on Company regarding tax refunds for the Pre-Closing Tax Period. Rather, Section 9.4 (b) unambiguously establishes *Sellers*' right to the tax refunds for the Pre-Closing Tax Period while Section 9.4 (c) unambiguously establishes *Purchaser's* obligation to remit such funds.[4] Absent a contractual obligation regarding tax refunds, Sellers Rep is may not obtain equitable relief against the Company. Accordingly, I grant Company's motion to dismiss the complaint against it.

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[4] *Compare* SPA Section 9.4 (b) ("[a]ny refunds or credits of Taxes of a USES Company for any Pre-Closing Tax Period . . . shall be for the benefit of Sellers"), *with* Section 9.4 (c) ("Purchaser shall promptly pay over (or cause the applicable USES Company to pay over) to Sellers all refunds").

In accordance with the foregoing, it is

ORDERED that the motion of defendant USES Holding Corp. to dismiss the complaint as against it is granted, the complaint is dismissed in its entirety as against defendant USES Holding Corp., and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the motion by plaintiff Cricket Stockholder Rep, LLC for summary judgment on the complaint is granted against defendant Project Cricket Acquisition, Inc. for a total of $2,773,406.00 in tax refunds. The parties dispute, however, when the tax refund amounts were paid, thus I refer the issue of when interest began to accrue on each individual tax refund payment to a special referee to hear and report. It is further

ORDERED that in addition to the interest issue, I refer the issue of attorneys' fees that plaintiff Cricket Stockholder Rep, LLC is entitled to recover from defendant Project Cricket Acquisition, Inc. to a Special Referee to hear and report, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine these issues; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M, 60 Centre Street), who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that entry of judgment in favor of plaintiff Cricket Stockholder Rep, LLC as against defendant Project Cricket Acquisition, Inc. is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee.

This constitutes the decision and order of this Court.

5/10/18
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE