Lancer & Loader Group, LLC v American Tack & Hardware Co., Inc.
2019 NY Slip Op 30659(U)
March 13, 2019
Supreme Court, New York County
Docket Number: 651594/2017
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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LANCER & LOADER GROUP, LLC,

Plaintiff,

- v -

AMERICAN TACK & HARDWARE CO., INC.,

Defendant.

INDEX NO. 651594/2017

MOTION DATE 03/12/2019

MOTION SEQ. NO. 006

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 76, 77, 78, 79, 84, 85, 88, 89, 90, 91, 95
were read on this motion to/for JUDGMENT - SUMMARY.

HON. BARRY R. OSTRAGER:

Plaintiff Lancer & Loader Group, LLC ("Lancer") commenced the instant action against Defendant American Tack & Hardware Co., Inc. ("Amertac") alleging, *inter alia*, breach of the parties' Asset Purchase Agreement ("APA"). On March 12, 2019, following oral argument, Plaintiff's motion for summary judgment was granted in its favor on liability for breach of the APA. The Court reserved decision as to the portion of Plaintiff's summary judgment motion seeking dismissal of Defendant's counterclaims. For the reasons stated herein, the motion for summary judgment dismissing Defendant's counterclaims is granted.

Background

On June 27, 2013, Lancer and Amertac executed the APA. Pursuant to the APA, Amertac agreed to purchase certain rights, properties, and assets of Lancer's lighting business. In exchange, Amertac agreed to pay Lancer $550,000 on the Closing Date. Additionally, Amertac agreed to make quarterly earnout payments to Lancer based on Amertac's sales of the products of the business Amertac was purchasing from Lancer. Under the APA, the earnout payments

would be paid quarterly during an "Earnout Period" which was defined as "the period beginning on the Closing Date and ending on the fourth anniversary of the end of the first full calendar quarter immediately following the Closing Date." (APA, Rinehart Aff. Ex. G [NYSCEF Doc. No. 79]).

Lancer alleges that Amertac ceased making quarterly earnout payments after Q3 2016 when Amertac was obligated to make payments through Q4 2017. Thus, Lancer commenced this action alleging that Amertac breached the APA by failing to make five quarterly earnout payments to Lancer.

Amertac filed an answer with counterclaims alleging that Amertac properly withheld earnout payments from Lancer because those earnout payments were entirely offset by Lancer's breach of an Independent Contractor Agreement ("ICA") entered into by Amertac and Lancer's principal, non-party Jonathan Levine ("Levine"). Thus, Amertac asserts that Levine's breach of the ICA entitled Amertac to offset earnout payments it owed to Lancer under the APA.

Amertac also filed a third-party complaint against Levine alleging that Levine failed to perform certain services for Amertac in breach of the ICA. This Court previously dismissed the third-party complaint, without prejudice to the action being initiated in an appropriate forum, because the ICA contains an unambiguous New Jersey forum selection clause.

Discussion

On a motion for summary judgment, the movant bears the initial burden to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

"Under New York law, written agreements are construed in accordance with the parties' intent and the best evidence of what parties to a written agreement intend is what they say in their writing." *Schron v. Troutman Sanders LLP*, 20 N.Y.3d 430, 436 (2013) (internal quotations and citations omitted). "The question whether a writing is ambiguous is one of law to be resolved by the courts." *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548 (1995). However, "[u]nless the court finds ambiguity, the rules governing the interpretation of ambiguous contracts do not come into play." *R/S Associates v. New York Job Development Authority*, 98 N.Y.2d 29, 33 (2002).

Here, Amertac contends that the APA and ICA are integrated contracts, and thus, that a breach of the ICA constitutes a breach of the APA, thereby triggering Lancer's indemnification obligations under the APA and Amertac's right to offset earnout payments by the amount of Lancer's indemnification obligations. Amertac contends that Levine—a non-party to this action and a party only to the ICA (and not the APA)—failed to perform certain services under the ICA. Amertac argues that Levine's breach of the ICA enables Amertac to offset earnout payments it owes to Lancer by the amount for which Amertac should be indemnified based on a breach of the ICA.

Amertac's counterclaims fail as a matter of law.

Although the APA and ICA were negotiated during the same time period and are related to the same overall business transaction, the two agreements are entirely separate contracts between different parties.[1]

The APA is explicitly between Lancer, as seller, and Amertac, as purchaser. Levine is not a party to the APA and Levine signed the APA only in his capacity as principal for Lancer.

[1] This is further evidenced by the fact that the APA has a New York forum selection provision and the ICA has a New Jersey forum selection provision.

The ICA, on the other hand, is explicitly between Levine and Amertac. Under the ICA, Levine was obligated to provide consulting services to Amertac in exchange for payment. Amertac's payment obligations to Levine are detailed entirely within Schedule A of the ICA.

The Court acknowledges that the ICA and APA are not wholly unrelated in the context of the overall business transaction. Section 3.2(a)(vii) of the APA provides that an executed copy of the ICA was provided to Amertac as consideration for Amertac to enter the APA. The circumstances indicate that Amertac sought to purchase the assets and property of Lancer in exchange for earnout payments to Lancer. Contemporaneously, the parties agreed under the ICA that Levine—Lancer's principal—would work for Amertac as a consultant and Amertac would pay Levine directly for that consulting work in accordance with the ICA's payment schedule.

The fact that the APA acknowledges that execution of the ICA was consideration for Amertac to enter the APA does not necessarily mean that the agreements were fully integrated for all purposes. *See Guerini Stone Co. v. P.J. Carlin Const. Co.*, 240 U.S. 264, 277 (1916) (holding that "a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement *only for the purpose specified*" (emphasis added)). The ICA relates to the APA only to the extent that the ICA was part of the consideration provided to Amertac to enter the APA. Therefore, in all substantive respects, the two agreements are wholly separate.

The Court also acknowledges that it is entirely possible that Levine failed to perform his obligations under the ICA, as Amertac alleges.

However, Amertac's obligation to provide earnout payments to Lancer under the APA is entirely distinct from Levine's consulting obligations to Amertac under the ICA. Further,

Amertac cannot, as a matter of law, claim that Levine's breach of the ICA entitles Amertac to withhold earnout payments to Lancer under the APA.

Amertac's purported right to withhold earnout payments based on Levine's alleged breach of the ICA is grounded in the indemnification provisions of Article X of the APA.

Section 10.1 of the APA provides:

> Seller shall indemnify, defend and hold Purchaser and its affiliates and each of their respective direct and indirect owners, directors, managers, officers, employees and agents (each a "Purchaser Party" and collectively, the "Purchaser Parties"), harmless from any and all losses, liabilities, obligations, claims, contingencies, damages, costs, and expenses (including all court costs and reasonable attorneys' fees) (collectively "Damages") that any Purchaser Party may suffer or incur in connection with: *(i) the breach or inaccuracy of any representation or warranty made by Seller herein, (ii) the breach of any covenant or agreement made by Seller herein, (iii) any act or transaction that occurred prior to the Closing or any facts or circumstances that existed at or prior to the Closing related to Seller, any of the Assets or operation of the Business, (iv) any liability or claim against Seller not related to the operation of the Business or not expressly assumed by Purchaser hereunder....* (emphasis added).

Section 10.1 thus provides for Seller—a defined term that only includes Lancer—to indemnify Amertac as Purchaser only under the four specific scenarios described therein.

Section 10.5 of the APA explicitly provides a procedure whereby indemnification amounts Lancer owes to Amertac would first be deducted from the earnout payments Amertac was obligated to pay Lancer on a quarterly basis.

Section 10.5, entitled "Right to Setoff", provides:

> Any amounts owed to a Purchaser Party under this Article 10 will first be set off and deducted from any future payments due to Seller under this Agreement. Purchaser shall notify Seller, in writing, no less than ten (10) days prior to the date that any offset of payment due to Seller shall be effectuated pursuant to the terms hereof.

Thus, the APA unambiguously provides that Lancer, and not Levine, shall indemnify Amertac for any of the four scenarios outlined in Section 10.1 of the APA, and that those indemnification amounts will be deducted from Amertac's earnout payments to Lancer.

Critically, *none* of the four indemnification scenarios are present in this case or are even alleged by Amertac. It is not alleged that Lancer breached any warranty, representation, or covenant. Amertac does not allege that it suffered any loss related to "any act or transaction that occurred prior to the Closing or any facts or circumstances that existed at or prior to the Closing related to Seller, any of the Assets or operation of the Business." Amertac does not allege that Lancer is liable or subject to a claim asserted by a third party. Simply put, none of the scenarios that would trigger an indemnification obligation are present or even alleged.

All Amertac alleges is that Levine—not Lancer—failed to perform consulting work under the ICA. However, Levine's purported failure to perform his obligations under the ICA is not a breach subject to indemnification under the explicit terms of Section 10.1. This is particularly true given that contractual indemnity obligations are to be construed narrowly. *See Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989) ("When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed."). Ultimately, because Levine's alleged breaches are not subject to indemnification under Section 10.1, Amertac had no right to set off and deduct those purported losses from earnout payments in accordance with Section 10.5 of the APA.

This holding is entirely without prejudice to Amertac's right commence an action against Levine for breach of the ICA in a proper forum. The Court's decision does not reflect the merits of Amertac's potential claims against Levine. This Court simply finds that, as a matter of law, Levine's purported breaches do not give rise to an indemnification obligation under Section 10.1 of the APA, and therefore, Amertac had no right to deduct those purported losses from earnout

payments to Lancer. Thus, Amertac's counterclaims for breach of contract and setoff are dismissed.

Further, Amertac's two counterclaims alleging unjust enrichment are precluded entirely by the existence of written contracts governing the subject matter of the claims. *See Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388 (1987) ("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.").

Finally, Amertac's counterclaim seeking attorneys' fees is dismissed because Amertac is not the prevailing party in this litigation.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment dismissing Defendant's affirmative defenses and counterclaims is granted based on the decision granting Plaintiff's summary judgment motion on liability and as supplemented by this decision regarding counterclaims; and it is further

ORDERED that the parties appear for an inquest on Plaintiff's damages on April 3, 2019 at 9:30 a.m., unless the parties stipulate to the amount of damages.

BARRY R. OSTRAGER
JSC

3/13/2019
DATE

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
APPLICATION:	[X] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER	
	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE	