Polaris Venture Partners VI, L.P. v Ad-Venture Capital Parnters, L.P.
2019 NY Slip Op 32373(U)
August 7, 2019
Supreme Court, New York County
Docket Number: 650623/2018
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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POLARIS VENTURE PARTNERS VI, L.P., POLARIS VENTURE PARTNERS FOUNDERS' FUND VI, L.P.

Plaintiff,

- v -

AD-VENTURE CAPITAL PARTNERS, L.P., BRIAN ADDY,

Defendant.

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INDEX NO. 650623/2018

MOTION DATE 08/07/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 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, 62, 63

were read on this motion to/for JUDGMENT - SUMMARY.

Polaris Venture Partners, VI, L.P. and Polaris Partners Founders' Fund VI, L.P.'s (together, **Polaris**) motion for summary judgment pursuant to CPLR § 3212 against Ad-Venture Capital Partners, L.P. (**Ad-Venture**) and its principal and guarantor, Brian Addy is granted as to liability solely on the breach of contract causes of action and is otherwise denied.

This action arises from a Stock Transfer Agreement (the **Agreement**), dated October 10, 2012, by and among Polaris, Ad-Venture, and Brian Addy, pursuant to which Polaris agreed to purchase 201 shares of common stock (the **Purchase Shares**) of ISN Software Corporation (**ISN**) from Ad-Venture at the price of $29,783.30 per share (the **Purchase Price**), with an option to purchase 76 additional shares (the **Option Shares**) at the Purchase Price within one year of the initial closing date of the Agreement (NYSCEF Doc. No. 41, ¶¶ 1.1, 1.2). The Agreement contained an unconditional personal Guaranty, pursuant to which Brian Addy

guaranteed all of Ad-Venture's representations and obligations under the Agreement (*id.*, ¶ 5.4). The Agreement also provided that, in order to exercise the purchase option, Polaris was required to provide written notice to Ad-Venture indicating both the number of shares that it intended to purchase and the date of closing (*id.*, ¶ 1.2).

If Polaris or Ad-Venture intended to consummate a Proposed Transfer, the Agreement required that the party seeking the transfer deliver written notice to the other party at least 10 days prior to the date of the proposed transfer (*id.*, ¶ 6.2). Paragraph 6.1 (b) of the Agreement defined "Proposed Transfer," in relevant part, as "[a]ny assignment, sale, offer to sell, pledge, mortgage, hypothecation, encumbrance, disposition of or any other like transfer or encumbering of any Shares (or any interest therein)" (*id.*, ¶ 6.1 [b]).

Polaris closed on its purchase of the Purchase Shares from Ad-Venture on October 10, 2012 for the total price of $5,766,443.30 (Complaint, ¶ 26). Ad-Venture transferred the 201 Purchase Shares of ISN common stock to Polaris, which became the record holder of the Purchase Shares (*id.*). On January 16, 2013, ISN served a Notice of Stockerholder Action on Polaris (*id.*, ¶ 27). The Notice indicated that, on January 9, 2013, ISN had entered into a merger with a newly-formed subsidiary, and that the ISN shares previously held by Polaris had been converted into a right to receive $38,317 per share (the **Merger Consideration**). Included with the Notice of Stockholder Action were checks from ISN totaling $7,701,717 for Polaris's 201 shares at the Merger Consideration price of $38,317 per share (*id.*, ¶ 30).

Polaris believed that the Merger Consideration price was far below the fair value of the ISN shares and demanded an appraisal of its shares on January 31, 2013 (*id.*, ¶ 31; *see* 8 Del. C. § 262). On the same day that Polaris submitted its demand for an appraisal, Ad-Venture voluntarily tendered all of its 544 remaining ISN shares, including the 76 Option Shares, for appraisal by submitting a demand for appraisal to ISN (Complaint, ¶ 33). Ad-Venture did not provide notice to Polaris of its demand for appraisal (Complaint, ¶ 35). On February 15, 2013, Polaris received a letter from ISN's Chairman, Bill Addy, indicating that, although the merger did not give Ad-Venture the express right to cash out its shares, ISN decided to give Ad-Venture the opportunity to sell some or all of its shares back to ISN at $38,317 per share (*id.*, ¶ 36).

After learning of Ad-Venture's transfer of its ISN stock, Polaris sought to exercise its purchase option as provided under paragraph 1.2 of the Agreement. On February 20, 2013, Polaris served a Notice of Option Exercise on Brian Addy, stating its intention to purchase the 76 Option Shares and setting a closing date of March 13, 2013 (*id.*, ¶ 38). Polaris's counsel also sent a letter to Ad-Venture's counsel, dated February 20, 2013, stating Polaris's belief that Ad-Venture's demand for appraisal was "inconsistent with, and a repudiation of, the terms of the [Agreement], including, among other provisions, the notice provisions of the Agreement" with respect to the 76 Option Shares (*id.*, ¶ 39). Ad-Venture did not respond to either letter (*id.*, ¶ 41). In a subsequent letter, dated March 1, 2013, Polaris's counsel requested that Ad-Venture's counsel confirm by March 6, 2013 that Ad-Venture was prepared to deliver the Options Shares at the Purchase price by the closing date (*id.*, ¶ 42). Ad-Venture did not respond to this letter, either (*id.*, ¶ 44). Polaris's counsel again wrote to counsel for Ad-Venture in a letter dated March 7, 2013 requesting confirmation that Ad-Venture was prepared to deliver the Option Shares on

the closing date as required under the Agreement (*id.*, ¶ 45). Polaris did not receive a response (*id.*, ¶ 46).

Ad-Venture filed a Petition for Appraisal of Stock in the Delaware Court of Chancery seeking an appraisal of its 544 shares of ISN stock, including the 76 Option Shares (*id.*, ¶ 47). Polaris sent a letter to Ad-Venture dated March 12, 2013 indicating that Polaris had learned of Ad-Venture's appraisal petition and requesting that Ad-Venture confirm that it did not intend to deliver the Option Shares (*id.*, ¶ 50). Ad-Venture did not respond this letter (*id.*, ¶ 51). Ad-Venture did not deliver the Option Shares on the closing date of March 13, 2013, or at any time thereafter (*id.*, ¶ 53).

Polaris commenced its own Petition for Appraisal of its 201 shares of ISN stock in the Delaware Court of Chancery on April 22, 2013 (*id.*, ¶ 54). Polaris's petition was consolidated with Ad-Venture's petition and, following a 5-day trial, the court found that the fair value of the ISN shares as of January 9, 2013, the date of the ISN merger, was $98,783 per share (*id.*, ¶¶ 54-56). Final judgment was entered on January 13, 2017 in favor of Polaris in the amount of $14,830,383, and in favor of Ad-Venture in the amount of $53,737,952 (*id.*, ¶ 57). ISN appealed and the Delaware Supreme Court affirmed the judgment of the Chancery Court (*id.*, ¶¶ 58-59).

Polaris commenced this action by filing a summons and complaint on February 7, 2018 (NYSCEF Doc. Nos. 1, 2). On April 9, 2018, Ad-Venture and Brain Addy moved to dismiss the complaint pursuant to CPLR § 3211 (a) (7) (NYSCEF Doc. No. 6). In a decision and order dated December 18, 2018, New York State Supreme Court Justice Charles E. Ramos held that Polaris

met its burden in alleging facts sufficient to state its first and second causes of action for breach of contract and that, while they may ultimately be duplicative of the breach of contract causes of action, the third cause of action for unjust enrichment and fourth cause of action for breach of the implied covenant of good faith and fair dealing were sufficiently pled to survive dismissal (NYSCEF Doc. No. 19, at 4-5). Accordingly, the court denied Ad-Venture's motion to dismiss in its entirety (*id.*, at 5). On February 11, 2019, Polaris brought the instant motion for summary judgment pursuant to CPLR § 3212 (NYSCEF Doc. No. 25).

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.,* citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

A motion for summary judgment brought before the completion of discovery may be denied as premature where "it appear[s] from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated" (CPLR § 3212 [f]). Pre-discovery motions for summary judgment may be denied where the opposing party has not yet had an opportunity to depose parties who would have knowledge of issues relevant to the action

(*Guzman v City of New York*, 171 AD3d 653, 653 [1st Dept 2019]), but the opposing party must identify what information is in the exclusive control of the moving party that would raise a material issue of fact (*Erkan v McDonald's Corp.*, 146 AD3d 466, 467 [1st Dept 2017]). "The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion" (*Guerrero v Milla*, 135 AD3d 635, 636 [1st Dept 2016] [internal quotation marks omitted]). Rather, the party opposing a motion for summary judgment as premature based on a claimed need for discovery must offer an "evidentiary basis . . . to suggest that discovery may lead to relevant evidence" (*Steinberg v Schnapp*, 73 AD3d 171, 177 [1st Dept 2010], quoting *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [2000]).

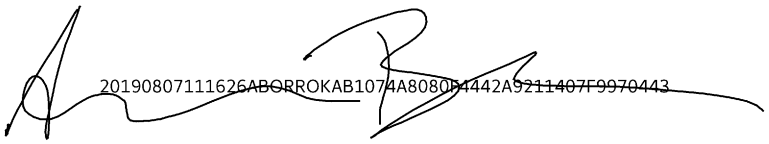
Here, Polaris has established entitlement to judgment as a matter of law with respect to Ad-Venture's liability on the breach of contract cause of action. It is undisputed that Ad-Venture failed to provide written notice of its intention to tender its shares for appraisal as required under paragraph 6.2 of the Agreement. Ad-Venture's failure to comply with the Agreement's notice requirements constitutes a breach of the Agreement. The parties do not dispute that Polaris served written notice of its intention to exercise its Purchase Option, and that Ad-Venture failed to deliver the Option Shares as required under paragraph 1.2 of the Agreement. This, too constitutes a breach of the Agreement. The documentary evidence put forth by Polaris demonstrates that there are no material issues of fact regarding Ad-Venture's breach of the Agreement, and Ad-Venture has failed to identify any information or evidence that would be in the exclusive possession of Polaris that would raise an issue of fact as to liability.

To the extent that Ad-Venture argues that its performance was excused because Polaris did not provide 10-days' written notice of its own intent to submit a written demand for appraisal, this argument is misguided for several reasons. First, paragraph 6.2 of the Agreement expressly provides that the notice requirement is only triggered when a party intends to consummate a Proposed Transfer (NYSCEF Doc. No. 41, ¶ 6.2). Polaris did not intend to consummate any transfer of ISN stock; rather, Polaris's shares were involuntarily converted into the right to receive $38,317 in cash per share as a result of the ISN merger (NYSCEF Doc. No. 42). Not only did Polaris lack the requisite intent needed to trigger the notice requirement, but the merger also made it impossible for Polaris to consummate a Proposed Transfer because, as the Delaware Court of Chancery found, Polaris no longer held any ISN shares as of the date of the merger.

As to the proper quantum of damages, Polaris submits that it is entitled to the difference between the market value of the Option Shares and their purchase price at the time of the breach. Polaris asserts that it is entitled to $5,243,977.20 based on the fair value as of the merger date as determined by the Delaware Court of Chancery and affirmed by the Delaware Supreme Court of $98,783 per share. Polaris argues that it is entitled to summary judgment as to damages because Ad-Venture has failed to raise any issues of material fact demonstrating that the value of the shares on the merger date was different from the value of the shares on the date of the breach, *i.e.*, on Polaris's intended purchase option closing date of March 13, 2013. This argument is unavailing, however, because Polaris has not put forward any evidence as to the value of the ISN shares on March 13, 2013, and instead relies on the appraised value of the shares from more than two months earlier. Accordingly, summary judgment is denied as to damages.

Accordingly, it is

ORDERED that the motion for summary judgment is granted solely with respect to liability for breach of the Agreement but is otherwise denied.



8/7/2019
DATE

ANDREW BORROK, J.S.C.

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