

**Outerlimits Tech., LLC v Electronic Sys. Protection,
Inc.**

2023 NY Slip Op 30690(U)

March 8, 2023

Supreme Court, New York County

Docket Number: Index No. 650585/2022

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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OUTERLIMITS TECHNOLOGIES, LLC, SUCCESSOR IN INTEREST TO NEW FRONTIER ELECTRONICS, INC.,

Plaintiff,

INDEX NO. 650585/2022

MOTION DATE 07/01/2022

MOTION SEQ. NO. 002

- v -

ELECTRONIC SYSTEMS PROTECTION, INC., AMETEK, INC., AMETEK TECHNICAL AND INDUSTRIAL PRODUCTS, INC., ESP HOLDCO INC., and GRIDIRON CAPITAL, LLC, F/K/A GRIDIRON CAPITAL PARTNERS, LLC,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, and 46

were read on this motion to DISMISS.

LOUIS L. NOCK

Upon the foregoing documents, the motion of defendants Electronic Systems Protection, Inc. (“ESP”), ESP Holdco Inc. (“Holdco”), Ametek, Inc. (“Ametek”), and Ametek Technical and Industrial Products, Inc. (“Ametek TIP”), is granted in part to the extent set forth in the following memorandum decision. Plaintiff previously discontinued the action against defendant Gridiron Capital, LLC (“Gridiron”) (NYSCEF Doc. No. 47).

Background

ESP is a subsidiary of Holdco, which was formerly, itself, a subsidiary of Gridiron Capital. On April 11, 2014, ESP, defined specifically as “Buyer,” entered into an Intellectual Property Transfer Agreement (“IPTA”) with plaintiff’s predecessor, New Frontier Electronics, Inc. (“New Frontier”). Pursuant to the IPTA, the purchase price was divided into three components. First, ESP agreed to pay \$250,000 on the closing date (IPTA, NYSCEF Doc. No.

26, § 2.2.1). Second, for each of the “first twelve consecutive three-month period[s] commencing on the first day of the month following the month in which the closing date occurs,” an amount “equal to 10% of the Earn-Out Net Sales of the Buyer during” each such period. Third, if there was a “Change of Control” of ESP, a payment of \$500,000, less the total amount of any prior Earn-Out payments (*id.*, § 2.2.5). “Change in Control” is defined as the sale of, or transfer of, more than 50% of the ownership of ESP to an acquirer (*id.*, Exhibit A). Once a Change in Control occurred, ESP would no longer be obligated to make any remaining Earn-Out payments (*id.*). Further, and with respect to the Earn-Out payments, in the event that any of the products being acquired pursuant to the IPTA were not in compliance with specific regulatory jurisdictions, ESP was entitled, during the year following the closing date, to send a notice setting forth the applicable law or regulation and defining the specific noncompliance of each product, and a “good faith estimate of the costs” of bringing such products into compliance (*id.*, § 2.2.4). ESP could then deduct from the Earn-Out payments the sum of “(i) the actual costs incurred . . . in rectifying the noncompliance . . . and (ii) any fines, penalties or taxes assessed, and any damages or losses suffered by [ESP] . . . in respect of such noncompliance” (*id.*).

Following the transfer to ESP, on October 1, 2014, ESP notified New Frontier that certain products manufactured prior to the effective date of the IPTA were out of compliance (April 2015 notice, NYSCEF Doc. No. 27). Following a response from New Frontier, ESP sent a more detailed notice on April 10, 2015, including a listing of each jurisdiction and why products were out of compliance therein, as well as the estimated compliance costs for each jurisdiction (*id.*). Plaintiff asserts that this notice was insufficient to allow ESP to deduct the associated estimated compliance costs from the Earn-Out payments, which ESP did the following year (first amended complaint, NYSCEF Doc. No. 24, ¶¶ 40-41, 48). Plaintiff also

alleges that none of the defendants had to pay any actual costs for the asserted noncompliance (*id.*, ¶ 42).

On or about February 5, 2016, plaintiff alleges that Ametek announced it had acquired ESP (*id.*, ¶ 43). Gridiron informed plaintiff that the sale did not constitute a Change in Control, because ESP's assets were transferred into Holdco, which was, itself, then purchased by Ametek (*id.*, ¶ 45). Plaintiff asserts that this nevertheless was a Change in Control of ESP as defined under the IPTA. Holdco merged into ESP on September 2021, and ESP then merged into nonparty Powervar, Inc., in December 2021 (*id.*, ¶¶ 53-54). Plaintiff asserts that, notwithstanding the completion of the Earn-Out payments in 2017, each of these events constituted a Change in Control of ESP, requiring the applicable Change in Control payment from defendants.

Standards of Review

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiff the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly

contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

The first amended complaint asserts six causes of action, which unless otherwise stated, are asserted against all defendants: breach of the IPTA (first cause of action); breach of the implied covenant of good faith and fair dealing (second cause of action); tortious interference of contract against Ametek (third cause of action); unjust enrichment (fourth cause of action); money had and received (fifth cause of action); and attorneys’ fees (sixth cause of action).

Breach of the IPTA

As an initial matter, this cause of action must be dismissed against Holdco, Ametek, and Ametek TIP, as ESP is the only defendant which is a party to the IPTA (*Highland Crusader Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd.*, 184 AD3d 116, 121 [1st Dept 2020] [“It is a general principle that only the parties to a contract are bound by its terms”]). Plaintiff’s allegations of alter ego liability are pleaded in conclusory terms and group all of the defendants together without differentiating their alleged actions (*Principia Partners LLC v Swap Fin. Group, LLC*, 194 AD3d 584, 584 [1st Dept 2021] [“The complaint failed to distinguish between the entities and was an improper group pleading”]). Moreover, talismanic recitation of the various elements of alter ego liability is not sufficient to withstand a motion to dismiss (*501 Fifth Ave. Co. LLC v Alvona LLC*, 110 AD3d 494 [1st Dept 2013] [“The allegations of corporate domination are wholly conclusory and consist of no more than a recitation of the elements of the claim”]).

Plaintiff alleges three purported breaches of the IPTA: first, that ESP did not have to pay any actual noncompliance costs and, therefore, improperly withheld the estimated costs from the

Earn-Out payments; second, that ESP failed to provide sufficient documentation for its Earn-Out Payment calculations; and third, that Ametek's acquisition of Holdco, Holdco's merger into ESP, and ESP's merger into Powervar each constituted a Change in Control entitling plaintiff to the applicable payment. With respect to the first purported breach, plaintiff adequately asserts a claim for breach of the IPTA with respect to improper withholding of Earn-Out payments by submitting the IPTA, alleging that plaintiff performed thereunder and ESP breached the contract by withholding estimated costs that it did not have to pay, and that plaintiff has been damaged thereby (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] ["The elements of such a claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages"]). ESP makes no meaningful arguments for dismissal of this claim.

With respect to the second purported breach, plaintiff has failed to state a cause of action as to ESP's purported failure to provide it with documentation regarding the calculation of the Earn-Out Payments. Other than the notice requirement with regard to noncompliance costs, the IPTA does not require ESP to provide plaintiff with any documentation with respect to the Earn-Out payment calculations. "It is well settled that a court may not, under the guise of interpretation, fashion a new contract for the parties by adding or excising terms and conditions which would contradict the clearly expressed language of the contract" (*Republic Natl. Bank of New York v Olshin Woolen Co. Inc.*, 304 AD2d 401, 402 [1st Dept 2003]).

Finally, and with respect to the third purported breach, the plaintiff has also, at this stage of the case, adequately alleged a cause of action for failure to make the Change in Control payment. The 2016 transaction by which Ametek acquired Holdco is the subject of differing factual allegations by the parties. In the absence of documentary evidence of the manner in

which ESP's assets were transferred to Holdco and then acquired by Ametek, the court is left with the allegation in the amended complaint that all of ESP's assets were transferred, which would trigger the Change in Control provision (IPTA, NYSCEF Doc. No. 26, § 2.2.5). Such allegation must be presumed true at this stage (*Leon*, 84 NY2d at 87-88).

Assuming, *arguendo*, however, that such a transaction did not trigger the Change in Control provision, defendants do not dispute that the further mergers which resulted in Powervar being the last company standing would trigger the Change in Control provision. Instead, they argue that because the mergers occurred after the Earn-Out period expired, plaintiff is no longer entitled to a Change in Control. The Change in Control provision itself does not provide an explicit time limit on when it is effective, but the court notes that it is otherwise drafted to operate in conjunction with the Earn-Out period (IPTA, NYSCEF Doc. No. 26, § 2.2.5). "A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties" (*Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [1st Dept 2003] [internal citations omitted]). Here, the language of the Change in Control provision and the absence of an explicit time limitation render the provision ambiguous in this respect, and a commercially reasonable interpretation of the provision requires determinations of factual issues outside of a motion to dismiss (*Williams v Citigroup, Inc.*, 104 AD3d 521, 522 [1st Dept 2013]).

Accordingly, defendants' motion to dismiss the first cause of action is granted as to Holdco, Ametek, and Ametek TIP, and is otherwise denied.

Breach of the Implied Covenant of Good Faith and Fair Dealing

An obligation of good faith and fair dealing is implied in every contract (*Murphy v American Home Products Corp.*, 58 NY2d 293, 304 [1983]). "No obligation can be implied,

however, which would be inconsistent with other terms of the contractual relationship” (*id.*). Put differently, “[a] claim for breach of the implied covenant of good faith and fair dealing cannot substitute for an unsustainable breach of contract claim” (*Skillgames, LLC v Brody*, 1 AD3d 247, 252 [1st Dept 2003]).

Plaintiff alleges as an alternative to its breach of contract claim that if the 2016 acquisition of Holdco by Ametek does not trigger the Change in Control provision, then defendants collectively acted in such a way that, “although not expressly forbidden by any contractual provision, would deprive [plaintiff] of the right to receive the benefits under their agreement” (*id.*). However, the IPTA does not limit or constrain ESP with regard to its manner of dealing with its corporate structure. Rather, the IPTA simply provides that if ESP takes *certain* actions it will be required to make a payment. If ESP’s actions did *not* trigger the Change in Control provision, then plaintiff cannot avail itself of an implied covenant claim where its claim for breach of contract is unsustainable.

Tortious Interference with Contract

“In a contract interference case . . . the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages.” (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). Here, plaintiff alleges in the alternative that Ametek tortiously interfered with the IPTA by orchestrating the transfer to Holdco and subsequent acquisition of Holdco by Ametek in such a way that the Change in Control provision was not triggered. These allegations are inconsistent with the requirements of a tortious interference claim. If the Change in Control provision was not triggered, then ESP did not breach the IPTA by failing to make a

Change in Control payment. Without a breach of the IPTA, there can be no claim for tortious interference.

Unjust Enrichment

“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” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). “A ‘quasi contract’ only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment” (*id.*). Here, plaintiff claims that defendants were enriched at its expense because they did not make the Change in Control payment. However, whether such payment was required is clearly governed by the IPTA. Moreover, plaintiff cannot allege unjust enrichment where it did not pay defendants any money by which they unjustly enriched (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [“IDT does not, and cannot, allege that Morgan Stanley has been unjustly enriched at IDT's expense, because IDT did not pay the alleged fees”]).

Money Had and Received

“To state a cause of action for money had and received, a plaintiff must allege that (1) the defendant received money belonging to the plaintiff, (2) the defendant benefited from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money” (*Pacella v RSA Consultants, Inc.*, 164 AD3d 806 [2d Dept 2018]). “A claim for money had and received lies only in the absence of an agreement” (*Galopy Corp. Intern. N.V. v Deutsche Bank, A.G.*, 150 AD3d 416, 417 [1st Dept 2017]). Here, plaintiff makes the same allegations regarding the Change in Control provision that underlie its other claims.

Whether or not a Change of Control payment was owed is governed by the IPTA, and this cause of action must be dismissed.

Attorneys' Fees

Plaintiff alleges that it is entitled to its attorneys' fees under the IPTA, which provides that plaintiff can recover reasonable attorneys' fees and expenses if it prevails in a litigation arising out of ESP's failure to pay any part of the purchase price (IPTA, NYSCEF Doc. No. 26, § 6.1.2). As the court has sustained the breach of contract claim (subject to proof during the course of this litigation), dismissal of plaintiff's claim for attorneys' fees would be premature.

Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that the first cause of action against defendants ESP Holdco Inc., Ametek, Inc., and Ametek Technical and Industrial Products, Inc., and the second, third, fourth, and fifth causes of action against all defendants, are severed and dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants ESP Holdco Inc., Ametek, Inc., and Ametek Technical and Industrial Products, Inc., dismissing the action against said defendants; and it is further

ORDERED that the caption be amended to reflect the foregoing dismissals and that all future papers filed with the court (except for the judgment to be issued pursuant to the immediately preceding paragraph) bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website)]; and it is further

ORDERED that defendant Electronic Systems Protection, Inc. shall file an answer to the complaint within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that counsel shall appear for a preliminary conference in Room 1166, 111 Centre Street on April 12, 2023, at 2:00 PM.

This constitutes the decision and order of the court.

ENTER:



3/8/2023
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE