

**Triad Holding Co., LLC v Triad Consulting Engrs.
Holdings, Inc.**

2023 NY Slip Op 31231(U)

April 18, 2023

Supreme Court, New York County

Docket Number: Index No. 650897/2022

Judge: Andrew Borrok

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

-----X

TRIAD HOLDING CO., LLC, RONALD R. REGAN,

INDEX NO. 650897/2022

Plaintiff,

MOTION DATE 04/01/2022

- v -

MOTION SEQ. NO. 001

TRIAD CONSULTING ENGINEERS HOLDINGS,
INC., AMA CONSULTING ENGINEERS, P.C., DOING
BUSINESS AS AMA GROUP, DC CAPITAL PARTNERS
FUND II, L.P.

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion to dismiss the tortious interference with contract claim (fourth cause of action) must be granted without prejudice because (i) the defendants had an interest in the SPA (hereinafter defined) and (ii) the plaintiffs fails to adequately allege fraud, malice or illegality to fall within the exception to the economic interest privilege (*Felson v. Sol Café Mfg. Corp.*, 301 N.Y.2d 682, 687 [1969]). At most, the conduct alleged constituted bad faith to which the Seller (hereinafter defined) could still object requiring resolution by independent auditors.

The Relevant Facts and Circumstances

Reference is made to a certain Stock Purchase Agreement (the **SPA**), dated August 6, 2020, by and between Triad Consulting Engineers Holdings, Inc. (the **Buyer**), Triad Holding Co., LLC (the **Seller**) and Ronald R. Regan pursuant to which the Seller agreed to sell its interests in

certain companies to the Buyer for \$9,500,000. Pursuant to Section 3.1(a) of the SPA, the parties agreed that the Seller could receive up to two additional “earnout” payments of \$1,500,000 each if certain performance benchmarks were met. The Seller would earn the first “earnout” payment if its FY 2020 EBITDA was greater than or equal to \$2,850,000 (the **Target Amount**).

The Buyer is a wholly owned subsidiary of AMA Consulting Engineers, P.C. (**AMA**), which, in turn, is a portfolio company of the private equity fund DC Capital Partners Fund II, L.P. (**DCCP**) (NYSCEF Doc. No. 1 ¶10).

Pursuant to Section 3(b)(i) of the SPA, the Buyer was required to send its FY 2020 EBITDA calculation to the Sellers within thirty days of auditing the Buyer’s financial statements:

Within 30 calendar days after the delivery of the audit of Buyer’s (or its applicable Subsidiary’s) financial statements by its accountants with respect to the applicable EBITDA Calculation Period, Buyer will prepare and deliver a written statement (in each case, “**Earnout Calculation Statement**”) setting forth reasonable detail, its determination and calculation of (1) Adjusted EBITDA during such EBITDA Calculation Period, and (2) the applicable Earnout Payment with respect to such EBITDA Calculation Period, together with copies of supporting documentation relating to such determinations and calculations

(NYSCEF Doc. No. 26, § 3[b][i]).

Pursuant to Section 3(b)(ii) of the SPA, the Seller was given thirty days to review and object to Earnout Calculation Statement:

Seller shall have thirty days after receipt of the Earnout Calculation Statement (the “**Earnout Review Period**”) to review and object to such Earnout Calculation Statement. Prior to the expiration of the Earnout Review Period, Seller may object to the applicable Earnout Calculation Statement by delivering a written notice of objection (the “**Earnout Calculation Objection Notice**”) to Buyer

(*id.*, § 3[b][ii]).

Also pursuant to Section 3(b)(ii) of the SPA, the Seller and the Buyer were required to negotiate any disputed items:

If Seller timely delivers an Earnout Calculation Objection Notice, then Buyer and Seller shall attempt in good faith to resolve the disputed items and agree upon the resulting amount of the applicable Earnout Payment for the applicable EBITDA Calculation Period

(*id.*).

Pursuant to Section 3(b)(iv) of the SPA, if the Seller and the Buyer failed to reach agreement with respect to an Earnout Calculation Statement, any disputed amounts (including the LSIS Reserve [hereinafter defined] amount at issue in this case), would be submitted to an independent accountant for resolution:

If the Seller and Buyer fail to reach an agreement with respect to the Earnout Calculation Statement within thirty days after such Earnout Calculation Objection Notice has been delivered, then any amounts remaining in dispute (the “**Earnout Disputed Amounts**”) shall be submitted for resolution to the Independent Accountants who, acting as experts and not arbitrators, shall resolve the Earnout Disputed Amounts only and make any adjustments to the Earnout Calculation Statement required by such resolutions

(*id.*, § 3[b][iv]).

On May 31, 2021, in accordance with Section 3.1(b)(i) of the SPA, the Buyer sent an Earnout Calculation Statement to Mr. Regan detailing the FY 2020 EBITDA and noting that it was short of the Target Amount (NYSCEF Doc. No. 1, ¶ 15). The Earnout Calculation Statement included

a note which said, “Net income includes a 50% reserve on the year-end 2020 LS Electric America Inc. (LSIS) accounting receivable balance” (the **LSIS Reserve**) (*id.*).

On July 14, 2021, in accordance with Section 3.1(b)(ii) of the SPA, the Seller sent an Earnout Calculation Objection Notice to the Buyer (*id.*, ¶ 20). In the Earnout Calculation Objection Notice, the Seller listed seven objections (the **Disputed Items**) to the Buyer’s FY 2020 EBITDA calculations (*id.*). The Seller did not object to the 50% LSIS Reserve (*id.*).

On August 13, one day before the thirty-day deadline to resolve the Disputed Items, AMA sent Mr. Regan a letter (the **Concession Letter**) in which the Buyer conceded, in whole or in part, five of the Disputed Items (*id.*, ¶ 25). After the concessions, the FY 2020 EBITDA would have exceeded the Target Amount (*id.*). However, in the Concession Letter, the Buyer changed the LSIS Reserve from 50% to 100% of the LSIS account receivable (*id.*, ¶ 28). This change kept the FY 2020 EBITDA below the Target Amount (*id.*). The Seller alleges that (i) changing the LSIS Reserve constituted a breach of the SPA by the Seller and (ii) AMA and DCCP intentionally procured said breach (*id.*, ¶ 56).

The Seller and Mr. Reagan sued by summons and complaint dated February 25, 2022 (NYSCEF Doc. No. 1) asserting causes of action for (i) breach of contract (first cause of action), (ii) breach of the covenant of good faith and fair dealing (second cause of action), (iii) a declaratory judgment that increasing the LSIS Reserve from 50% to 100% of the LSIS account receivable was a breach of the SPA and that the FY 2020 EBITDA exceeded the Target Amount (third cause of action), and (iv) tortious interference with contract (fourth cause of action).

Discussion

On a motion to dismiss, the pleading is to be afforded a liberal construction, and the court is to accept the facts as alleged as true, accord the non-moving party the benefit of every favorable inference, and determine only whether the facts alleged fit any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

To plead tortious interference of contract, a plaintiff must allege (i) the existence of a valid contract between plaintiff and a third party, (ii) the defendant's knowledge of that contract, (iii) the defendant's intentional procuring of the breach, and (iv) damages (*Foster v. Churchill*, 87 N.Y.2d 744, 750 [1996]). Where a plaintiff alleges interference with contract, a defendant may raise an economic interest defense, *i.e.*, that it acted to protect its own legal or financial stake in the breaching party's business (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY2d 422, 426 [2007]).

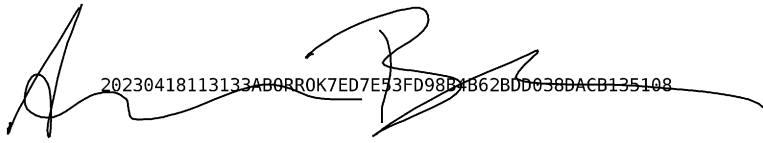
New York courts have held that the economic interest privilege applies to a stockholder alleged to have interfered with a contract entered into by any subsidiary, affiliate, or company in which that stockholder had a financial stake (*Karmely v. Wertheimer*, 2012 WL 3583141, at * 13 [SD NY 2012]). Inasmuch as the Buyer is a wholly owned subsidiary of AMA which in turn, is a portfolio company of DCCP (NYSCEF Doc. No. 1, ¶ 10, the economic interest privilege appears to apply.

However, the economic interest privilege is not without exception. In order to come within the exception, a plaintiff must plead specific facts showing that the defendants engaged in malicious, illegal or fraudulent behavior (*Audax Credit Opportunities Offshore Ltd. v TMK Hawk Parent, Corp.*, NY Slip Op 50794(U) at * 15 [Sup Ct, NY County 2021]). Even a showing of bad faith, without more, does not satisfy the malice requirement (*id.*). As discussed above, the Buyer alleges that the defendants changed the LSIS Reserve from 50% to 100% just one day before the deadline to resolve the Disputed Items to avoid paying the earnout. Although perhaps bad faith, this does not constitute malicious, illegal or fraudulent conduct. Among other things, as discussed above, the Seller could still object and the issue would be resolved by independent accountants as provided for in the SPA. For the avoidance of doubt, discovery may reveal that there was appropriate reason for the change in position and, in any event, the Seller was on notice from the outset that the LSIS Reserve was being heavily discounted.

It is hereby ORDERED that the motion to dismiss the fourth cause of action is granted without prejudice and it is further

ORDERED that the Seller shall have 45 days to file an amended complaint, otherwise the motion will be granted with prejudice.

4/18/2023
DATE



20230418113133A00RROK7ED7E53FD98B4862BD030DACB135108

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED

CASE DISPOSED
GRANTED

DENIED

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER

OTHER