AZE Group, LLC v Active MA, Inc.
2024 NY Slip Op 35254(U)
July 2, 2024
Supreme Court, Westchester County
Docket Number: Index No. 72610/2023
Judge: Paul I. Marx
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
HON. PAUL I. MARX, J.S.C.
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AZE GROUP, LLC f/k/a EZA HEALTHCARE MANAGEMENT LLC,

Plaintiff,

-against-

ACTIVE MA, INC. and JP MORGAN CHASE BANK, N.A.,[1]

Defendants.
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

DECISION AND ORDER

Index No. 72610/2023

Motion Date: March 13, 2024
Motion Sequence No. 1

The papers filed electronically on NYSCEF numbered 7 to 19 were read on Defendant Active MA, Inc.'s ("Defendant") motion to dismiss the complaint pursuant to CPLR § 3211(a)(1).

Upon reading the foregoing papers, it is ORDERED that Defendant's motion is granted for the reasons which follow.

<u>BACKGROUND</u>:

On or around July 26, 2016, Plaintiff entered into an Asset Purchase Agreement (the "APA") with Defendant, pursuant to which Plaintiff agreed to sell its adult day care health services business (the "Business") to Defendant.

The APA provides, *inter alia*, that at the closing, Defendant is to deposit $740,000.00 (the "Escrow Amount") with Defendant JPMorgan Chase Bank, N.A. (the "Escrow Agent"), to be held "subject to and in accordance with the provisions of this Agreement and the Escrow Agreement as defined in Section 2.3(b)" (APA, § 1.5[b]). The APA also provides that at the closing, Plaintiff is to deliver to Defendant the Escrow Agreement by and among Plaintiff, Defendant and the Escrow Agent (the "Escrow Agreement") "substantially in the form of Exhibit B attached hereto", executed by Plaintiff (APA, § 2.3[b]).

The APA includes provisions related to Plaintiff's retained liabilities (APA, § 1.3[a]),

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1 On February 9, 2024, Plaintiff filed a notice of discontinuance, without prejudice, as to Defendant JP Morgan Chase Bank, N.A.

covenants (APA, § 3.3[a]), representations (APA, §§ 4.7, 4.8, 4.9, 4.10, 4.23), indemnification (APA, § 6.2), indemnification procedures (APA, § 6.3), Defendant's right to set off Plaintiff's indemnification obligations against the Escrow Amount (APA, § 6.4), and amendment of the APA (APA, § 8.1).

The APA provides that: "This Agreement (including the documents and agreements referred to herein) constitutes the entire agreement among the Parties . . ." (APA, § 8.6).

Finally, the APA provides that:

> This Agreement will be governed by and construed in accordance with the laws of the State of Delaware, without regard to the principles of conflicts of law thereof. Any judicial proceeding brought with respect to this Agreement must be brought in any court of competent jurisdiction in the State of Delaware, and, by execution and delivery of this Agreement, each Party (a) accepts, generally and unconditionally, the exclusive jurisdiction of such courts and any related appellate court, and irrevocably agrees to be bound by any judgment rendered thereby in connection with this Agreement, and (b) irrevocably waives any objection it may now or hereafter have as to the venue of any such suit, action or proceeding brought in such court or that such court is an inconvenient forum (APA, § 8.7).

On or around October 11, 2016, Plaintiff, Defendant, and the Escrow Agent entered into the Escrow Agreement.

The Escrow Agreement provides that Defendant is to deposit the Escrow Amount with the Escrow Agent (Escrow Agreement, § 2[a]). The Escrow Agreement sets forth the procedures by which the Escrow Agent is to hold and distribute the Escrow Amount and the interests and earnings thereon (the "Escrow funds").

The Escrow Agreement provides that if Defendant believes that it is entitled to indemnification, then prior to the twelve month anniversary of the date of the Escrow Agreement, Defendant may deliver a written certification to the Escrow Agent, asserting that it is entitled to receive a portion of the Escrow funds to satisfy amounts owed to it pursuant to Section 6.2 of the APA, and that if Plaintiff does not, in a written notice delivered to the Escrow Agent within 20 calendar days after the Escrow Agent's receipt of Defendant's claim certificate, dispute all or any of the amounts set forth therein, then the Escrow Agent will on the 21st calendar day following its receipt of the claim certificate distribute to Defendant, an amount equal to the portion of the Escrow funds claimed in the claim certificate (Escrow Agreement, § 3[c]).

The Escrow Agreement provides that if Plaintiff timely objects, the Escrow Agent will not distribute and will hold that portion of the Escrow funds requested in any claim certificate, or the disputed portion thereof, pending receipt of either (i) joint payment instructions or (ii) a court order (Escrow Agreement, § 3[d]).

The Escrow Agreement also provides that on the twelve month anniversary of the date of the Escrow Agreement, the Escrow Agent is to automatically distribute to Plaintiff 100% of the then-remaining Escrow funds less the portion of the Escrow funds requested in any claim certificate or the disputed portion thereof, if any, plus any amounts asserted in a claim certificate received by the Escrow Agent and for which the applicable objection period has not yet expired (Escrow Agreement, § 3[e]).

Finally, the Escrow Agreement provides that:

> This Agreement shall be governed by and construed under the laws of the State of Delaware. . . Each Party and Escrow Agent irrevocably waives any objection on the grounds of venue, forum non-conveniens or any similar grounds and irrevocably consents to service of process by mail or in any other manner permitted by applicable law and consents to the jurisdiction of the courts located in the State of New York (Escrow Agreement, § 10).

On December 26, 2023, Plaintiff commenced this action by filing a summons and complaint. The complaint alleges one cause of action for declaratory judgment. Plaintiff seeks a judgment declaring, *inter alia*, that it is entitled to payment of the Escrow funds.

The complaint alleges that Plaintiff entered into the APA with Defendant on or around July 26, 2016. Plaintiff alleges that the closing occurred on October 11, 2016, at which time Plaintiff[2] deposited the Escrow Amount with the Escrow Agent, pursuant to the terms of the Escrow Agreement.

The complaint alleges that on or around October 26, 2016, Defendant served a notice of claim for indemnification for costs associated with an investigation of the Business by Mass Health initiated after the closing (the "First Claim"). Plaintiff alleges that it timely objected to the First Claim. Plaintiff also alleges that the Mass Health investigation has not resulted in any charges, fines, penalties or other costs for Defendant. Plaintiff alleges that the statute of limitations for a claim by Mass Health has expired, and as such, there can no longer be any claim by Mass Health

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[2] The APA and the Escrow Agreement indicate that Defendant is to deposit this amount (APA, § 1.5[b]; Escrow Agreement, § 2[a]).

against Defendant. Plaintiff alleges that Defendant has not pursued the First Claim against Plaintiff other than sending a notice more than six years ago. As such, Plaintiff alleges that the First Claim is time-barred.

The complaint alleges that on or around June 21, 2017, Defendant served a notice of claim for indemnification, asserting that Plaintiff had failed to disclose that compensation for certain employees increased by a total of $89,284.00 between the signing of the APA and the closing (the "Second Claim"). Plaintiff alleges that it timely objected and provided, *inter alia*, detailed calculations of the ordinary course wage and salary changes that occurred during the pre-closing period demonstrating the normal fluctuations in the workforce consistent with past practice, and provided evidence that Defendant was provided with notice of the changes in employment compensation prior to the closing. Plaintiff alleges that Defendant has not pursued the Second Claim against Plaintiff other than sending a notice more than six years ago. As such, Plaintiff alleges that the Second Claim has no merit and is time-barred.

The complaint alleges that in order to enforce its claims, Defendant would have had to file a lawsuit in Delaware, in accordance with Section 8.7 of the APA. Plaintiff alleges that as of the date of commencement of this action, Defendant has not commenced a lawsuit in Delaware or served Plaintiff with a civil summons from a court in Delaware.

The complaint alleges that because Defendant served notices of claim for indemnification, the Escrow funds can only be released pursuant to a joint instruction notice signed by Plaintiff and Defendant or a court order, pursuant to Section 3(d) of the Escrow Agreement. Plaintiff alleges that Defendant has refused to sign a joint instruction to have the Escrow funds released to Plaintiff. Plaintiff also alleges that Defendant has not acted upon its notices of claim for indemnification, and as such, Plaintiff is entitled to an order from this Court directing the Escrow Agent to release the Escrow funds to Plaintiff.

The complaint alleges that venue is proper in the New York pursuant to Section 10 of the Escrow Agreement.

On February 5, 2024, Defendant filed the instant motion.

DISCUSSION:

Defendant moves to dismiss the complaint pursuant to CPLR § 3211(a)(1), arguing that Delaware is the proper forum to resolve this matter, pursuant to the forum selection clause set forth in the APA. Defendant argues that the APA is the main and controlling agreement between the parties. Defendant argues that the parties executed the Escrow Agreement in connection with the acquisition of the Business, and as required by the APA. Defendant argues that both the APA and the Escrow Agreement make clear that the Escrow Agreement was intended to be made a part of the APA. Defendant argues that pursuant to Sections 2.3(b) and 8.6 of the APA, the Escrow Agreement was incorporated by reference into the APA. As such, Defendant argues that the two agreements must be read together, as they were executed for the same purpose and in the course of the same transaction. Defendant argues that reading the agreements together, it is clear that the APA's forum selection clause supersedes the Escrow Agreement's forum selection clause.

Defendant also argues that Plaintiff's claims over the Escrow funds arise from or relate to the APA and require an interpretation of the APA, because the indemnification claims arise from Plaintiff's breaches of its representations and warranties in the APA. Defendant argues that both indemnification claims remain unresolved.

In opposition, Plaintiff argues that the two agreements should not be read together, because a third party, the Escrow Agent, was added to the Escrow Agreement; the Escrow Agreement became effective after the APA; and the two forum selection clauses were not executed simultaneously. As such, Plaintiff argues that the APA's forum selection clause does not supersede the Escrow Agreement's forum selection clause.

Plaintiff also argues that the APA is largely irrelevant, because the sale of the Business has closed and the parties' obligations under that agreement have been discharged. Plaintiff argues that after the closing, its financial obligation was limited to the Escrow funds. As such, Plaintiff argues that the Escrow Agreement supersedes the APA with respect to handling of the Escrow funds.

Plaintiff argues that to the extent that the APA and the Escrow Agreement are determined to be part of a single transaction, the parties modified the APA's forum selection clause pursuant to Section 8.1 of the APA by designating New York as the forum for any claims arising out of the Escrow Agreement.

Plaintiff further argues that this action seeks a release of the Escrow funds, and as such, its claims arise from Section 3(e) of the Escrow Agreement. Plaintiff argues that although Defendant served two notices of claim for indemnification, those claims arise out of the APA, and Defendant has the burden to pursue and prove those claims. Plaintiff argues that since Defendant has not done so, and there is no possibility of recovery under those claims, there is no basis to maintain the

Escrow funds, which was intended only as relief for a potential indemnity claim by Defendant. Plaintiff argues that since Defendant has not enforced its right to seek indemnity by filing an action in Delaware and there is no judgment from a court in Delaware which can be levied against the Escrow funds, it is entitled to an order from this Court directing the release of the Escrow funds.

Finally, Plaintiff argues that Defendant expressly waived any objection on the grounds of venue, forum non-conveniens or other similar grounds, and consented to jurisdiction of the courts in New York in the Escrow Agreement.

In reply, Defendant argues that Plaintiff's arguments that the Escrow Agreement modified and/or superseded the APA are without merit and would render the APA meaningless. Defendant argues that reading the APA and the Escrow Agreement together compels the finding that the APA is the main agreement and its Delaware forum selection clause controls.

Defendant also argues that whether the indemnification claims have merit and/or are time-barred are questions that may only be resolved by interpreting the terms of the indemnification clauses of the APA.

CPLR § 3211(a) provides that: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded upon documentary evidence".

A document qualifies as "documentary evidence" for purposes of CPLR § 3211(a)(1) if it is: (1) unambiguous, (2) of undisputed authenticity, and (3) its contents are essentially undeniable. *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]; *Mehrhof v Monroe-Woodbury Cent. Sch. Dist.*, 168 AD3d 713, 715 [2nd Dept 2019]. Documents such as judicial records, mortgages, deeds, contracts, and other papers, the contents of which are essentially undeniable, have been found to qualify as documentary evidence. *Mehrhof* at 715; *Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1159 [2nd Dept 2019].

"A court may not dismiss a complaint based on documentary evidence unless 'the factual allegations are definitively contradicted by the evidence or a defense is conclusively established'". *VXI Lux Holdco S.A.R.L.* at 193; *Mehrhof* at 715. "In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences. However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence". *Dixon v*

105 West 75th Street, LLC, 148 AD3d 623, 626-627 [1st Dept 2017]. "[A] contractual forum selection clause is documentary evidence that may provide a proper basis for dismissal pursuant to CPLR 3211(a)(1)". *Air-Sea Packing Group, Inc. v Applied Underwriters, Inc.*, 211 NYS3d 87, 93 [2nd Dept 2024] [internal quotation marks omitted].

"[T]he enforceability of a forum selection clause involves a procedural rather than a substantive issue, [and as such,] New York law applies". *Id.* at 93; *Amazing Home Care Services, LLC v Applied Underwriters Captive Risk Assurance Company, Inc.*, 191 AD3d 516, 518 [1st Dept 2021]. "New York courts . . . apply contractual choice of law clauses only to substantive issues". *Nielsen Co. (U.S.), LLC v Hudson River Group, Inc.*, 117 AD3d 696, 697 [2nd Dept 2014]; *Frankel v Citicorp Ins. Services, Inc.*, 80 AD3d 280, 286 [2nd Dept 2010].

Here, the Court is not tasked with enforcing a forum selection clause or determining the validity of a clause, but with determining which agreement is the controlling document for forum selection purposes for the claims at issue. As such, the Court must apply the laws of the State of Delaware in making this determination, in accordance with the choice-of-law provisions of the APA and the Escrow Agreement.

The courts in Delaware, as in New York, hold that: "When interpreting a contract, the role of a court is to effectuate the parties' intent." *Lorillard Tobacco Co. v American Legacy Foundation*, 903 AD2d 728, 739 [Del. 2006]; *Tomhannock, LLC v Roustabout Resources, LLC*, 33 NY3d 1080, 1082 [2019]; *131 Heartland Blvd. Corp. v C.J. Jon Corp.*, 82 AD3d 1188, 1189 [2nd Dept 2011]. "We will read the contract as a whole and enforce the plain meaning of clear and unambiguous language. In doing so, we endeavor to give each provision and term effect and not render any terms meaningless or illusory." *Weinberg v Waystar, Inc.*, 294 AD3d 1039, 1044 [Del. 2023] [internal quotation marks omitted]; *CNR Healthcare Network, Inc. v 86 Lefferts Corp.*, 59 AD3d 486, 489 [2nd Dept 2009]. "Clear and unambiguous language . . . should be given its ordinary and usual meaning . . ." *Lorillard Tobacco Co.* at 739. "A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. Ambiguity does not exist where a court can determine the meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends . . . The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant". *Id.* "The determination of ambiguity lies within the sole province of the court". *Weinberg* at 1044.

"[A]s a general rule, contemporaneous contracts between the same parties concerning the same subject matter should be read together as one contract". *Florida Chemical Company, LLC v Flotek Industries, Inc.*, 262 AD3d 1066, 1081 [Ch. Del. 2021] [internal quotation marks omitted]; *Nau v Vulcan Rail & Constr. Co.*, 286 NY 188, 197 [1941].

Here, it is clear that the APA and the Escrow Agreement are part of one transaction and must be read together as one agreement. The agreements were executed for the purpose of effectuating the sale of Plaintiff's Business. The APA conditions the sale on, *inter alia*, Defendant depositing the Escrow Amount at the closing, to be held in accordance with the APA and the Escrow Agreement (APA, § 1.5[b]), and on Plaintiff's delivery of the Escrow Agreement, executed by Plaintiff, to Defendant at the closing (APA, § 2.3[b]). The APA also includes as Exhibit B a form template of the Escrow Agreement. Finally, the APA includes an integration clause, which confirms that the two agreements should be read together. Section 8.6 of the APA provides that: "This Agreement (including the documents and agreements referred to herein) constitutes the entire agreement among the Parties . . ." The Escrow Agreement is specifically referred to in the APA, and as such, it is clear that the Escrow Agreement was incorporated into the APA. *See, i.e., Florida Chemical Company, LLC* at 1081-1082.

Although the APA and the Escrow Agreement are part of one transaction and must be read together, each agreement has its own forum selection clause. As such, the Court must determine whether Plaintiff's claims fall within the scope of the APA or the Escrow Agreement. In its complaint, Plaintiff alleges that it is entitled to the disbursement of the Escrow funds being held by the Escrow Agent in accordance with the Escrow Agreement, because Defendant does not have any meritorious claims to the Escrow funds. Plaintiff alleges that Defendant is not entitled to the Escrow funds, because Defendant's indemnification claims are without merit and are time-barred. Thus, in order to determine whether Plaintiff is entitled to the Escrow funds, it is necessary to first determine the merits of Defendant's indemnification claims.

Defendant's indemnification claims are based on Plaintiff's alleged breaches of the APA. In the First Claim, Defendant alleges that Plaintiff violated its retained liabilities under Sections 1.3(a)(i), (vi), and (ix) of the APA and breached its representations and warranties made under Sections 4.7, 4.8, 4.9, 4.10 and 4.23 of the APA (Defendant's Exhibit 4). In the Second Claim, Defendant alleges that Plaintiff breached Sections 3.3(a) and 4.23 of the APA (Defendant's Exhibit 5). Under both claims, Defendant seeks indemnification pursuant to Section 6.2(b) of the APA.[3] Clearly, Defendant's claims arise out of the terms and obligations set forth in the APA and an interpretation of the APA is required. As such, the APA is the controlling document and the APA's forum selection clause applies. The plain language of the forum selection clause in the APA states that any proceeding "with respect to this Agreement" must be brought in Delaware (APA, § 8.7). Consequently, Delaware is the proper forum in which to litigate this action.

Accordingly, Defendant's motion to dismiss the complaint pursuant to CPLR § 3211(a)(1) is granted.

All other arguments not specifically addressed herein have been considered and have been found to be without merit.

It is hereby

ORDERED that Defendant's motion to dismiss the complaint pursuant to CPLR § 3211(a)(1) is granted.

The foregoing constitutes the Decision and Order of the Court.

Dated: July 2, 2024
White Plains, New York

ENTER

HON. PAUL I. MARX, J.S.C.

[3] Section 6.2(b) of the APA provides, in relevant part, that: "[Plaintiff] . . . agree that they will indemnify . . . [Defendant], . . . from, against and in respect of any Losses arising out of, resulting from or in connection with: (i) any breach of any representation or warranty made by [Plaintiff] . . . contained in this Agreement . . . (iii) any Retained Liabilities . . ."