

Houlihan Lokey Capital, Inc. v Charah Solutions, Inc.
2025 NY Slip Op 30902(U)
March 14, 2025
Supreme Court, New York County
Docket Number: Index No. 655057/2023
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

-----X
 HOULIHAN LOKEY CAPITAL, INC.,

Plaintiff,

- v -

CHARAH SOLUTIONS, INC., SER CAPITAL PARTNERS,
 LLC

Defendant.
 -----X

INDEX NO. 655057/2023

MOTION DATE 10/15/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
 MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Houlihan Lokey Capital, Inc. (**Houlihan**)'s motion for summary judgment as (I) to its breach of contract claim (first cause of action) levelled against Charah Solutions, Inc. (**Charah**) and (II) its tortious interference with contract claim (second cause of action) to the extent set forth below as against SER Capital Partners, LLC (**SER**) is **GRANTED**.

THE RELEVANT FACTS AND CIRCUMSTANCES

Reference is made to a certain unambiguous letter agreement (the **Agreement**; NYSCEF Doc. No. 6), dated as of November 12, 2019, by and between Charah and Houlihan pursuant to which Charah retained Houlihan as its exclusive financial advisor for various potential transactions (NYSCEF Doc. No. 5 ¶ 1). Terms used but not otherwise defined herein shall have the meaning ascribed thereto in the Agreement.

As relevant, pursuant to Section 2(d) of the Agreement, the parties agreed that Houlihan would receive a cash Sale Fee in connection with any Sale Transaction equal to 1.6% of the total transaction value for share prices up to and including \$3.50 plus 4.0% of the total incremental value transaction value for a price per shares greater than \$3.50.¹

The Agreement defines a Sale Transaction as:

the possible merger, consolidation, joint venture, partnership, spin-off, split-off, business combination, tender or exchange offer, acquisition, sale, distribution, transfer or other disposition of assets or equity interests, or similar transaction, involving more than 50% of the business, assets or equity interests of the Company and/or any of its subsidiaries or affiliates, or any right or option to acquire any of the foregoing, in one or more transactions (other than an Allied Transaction)

(NYCEF Doc. No. 6 § 1). Separate from the Sale Fee, pursuant to Section 2(b) of the Agreement, the parties agreed that Charah would pay Houlihan (i) an additional cash fee of \$500,000 for delivering an Allied Opinion (*i.e.*, a fairness opinion as to the sale of Charah's subsidiary) and (ii) an additional cash fee of \$1,000,000 for delivering a Sale Opinion (*i.e.*, a fairness opinion as to the sale of Charah; *id.* §2(b)).

Additionally, and pursuant to Section 2(f) and (g) of the Agreement, the parties agreed that if Charah pursues either a Financing Transaction or a Restructuring Transaction, Houlihan would be paid a Financing Fee or Restructuring Fee, as applicable, in addition to any other fees due under the agreement.

A Financing Transaction is defined as:

¹ The parties agree that because of Charah stock splits, \$3.50 was adjusted to \$35 per share (NYSCEF Doc. No. 39 ¶ 13).

the possible private placement of equity, equity-linked or debt securities (including, without limitation, any convertible securities, preferred stock, unsecured, non-senior or subordinated debt securities, and/or senior notes or bank debt) (any or all of which being "Financings") to provide financing to the Company and/or any of its subsidiaries or affiliates, or any entity formed by or at the direction of the Company, in one or more transactions

(*id.* at 1). A Restructuring Transaction is defined as:

the possible repurchase or restructuring of the Company's and/or any of its subsidiary's or affiliate's equity or debt securities or indebtedness or any amendments or modifications to the Company's and/or any of its subsidiary's or affiliate's debt securities or indentures whether or not in connection therewith, involving, by or on behalf of the Company or any of its subsidiaries or affiliates, an offer to purchase or exchange for cash, property, securities, indebtedness or other consideration, or a solicitation of consents, waivers of authorizations with respect thereto, in one or more transactions

(*id.*). The Agreement provides that "an Allied Transaction, Sale Transaction, Financing Transaction, Restructuring Transaction are each referred to herein as a 'Transaction'" (*id.* at 2).

However, and significant to the dispute, the parties did agree to some limits as to the overlap of some fees. To wit, pursuant to Section 2(g), the parties provided that where they could not agree on the classification of a particular Transaction as either a Financing or Restructuring Transaction *with only one third party*, in such case, only one fee was due:

In the event the Company and Houlihan Lokey are unable to agree in good faith upon the classification of any single Transaction as a Financing Transaction or Restructuring Transaction, or if a single Transaction *with only one third party* shall consist of two, or more, of the foregoing types of Transactions, or elements thereof, Houlihan Lokey shall receive only one Transaction Fee in respect of such Transaction, which shall be the greatest such Transaction Fee payable to Houlihan Lokey as calculated in accordance with the terms of this Agreement.

(*Id.* § 2[g] [emphasis added]). Significantly, however, the parties did not provide for a credit to Charah for any increase in value of Charah or any further offset against a Sale Transaction based

on other transactions consummated or other fees payable to Houlihan in connection with other transactions done with other parties.

Pursuant to Section 4 and Schedule A of the Agreement, the parties agreed that Charah would indemnify and reimburse Houlihan for all reasonable out-of-pocket expenses, including reasonable fees and attorneys' fees incurred in connection with any lawsuit brought to enforce this Agreement (*id.* § 4 and at 16).

In March 2022, the Charah Board directed Houlihan to solicit interest in a potential acquisition of Charah (NYSCEF Doc. No. 5 ¶ 22). Ultimately, Charah and Acquisition Parent 0423 Inc., an affiliate of SER, successfully consummated a merger transaction. In connection with the merger, Houlihan delivered a Sale Opinion on or about April 16, 2023 (NYSCEF Doc No. 5 ¶¶ 38-42; NYSCEF Doc No. 39 ¶¶ 26). The merger closed on July 13, 2023, with a total Transaction Value of approximately \$279 million (NYSCEF Doc. No. 5 ¶ 45; NYSCEF Doc. No. 39 ¶ 29).

On May 10, 2023, Houlihan issued an invoice for the Sale Opinion Fee plus legal fees and out of pocket expenses, totaling \$1,026,844.70 (NYSCEF Doc. No. 26). This fee was not paid upon the closing of the merger on July 13, 2023 (NYSCEF Doc. No. 34 ¶¶ 10-11).

By Invoice # 4 (NYSCEF Doc. No. 42), dated July 11, 2023, Houlihan issued an invoice for the Sale Fee in the amount of \$4,464,501, plus legal fees, out of pocket expenses, and amounts outstanding from prior invoices.²

² Invoice #4 includes a \$1,000,000 credit for a Sale Opinion Fee although the parties agree that this was not paid until October 6, 2023 (NYSCEF Doc. No. 34 ¶ 13; NYSCEF Doc. No. 39 ¶ 31).
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Motion No. 001

By letter, dated September 1, 2023 (NYSCEF Doc. No. 24 at 3), from Charah to Houlihan, Charah refused to pay the invoice taking the untenable position that fees paid in connection certain transactions which occurred years earlier should be credited against the fees due to Houlihan in connection with 2023 merger transaction:

In particular, Charah has already paid fees for the following components of the Transaction Value:

Date	Transaction	Value	Fee Paid
2/27/20	Series A Preferred Stock	\$39,803,755	\$1,000,000
8/24/21	Senior Notes	\$135,000,000	\$2,420,000
11/11/21	ABL Credit Transaction Fee	\$7,736,087	\$300,000

(*id.*). The problem however is that the unambiguous Agreement does not provide for a credit for dated transactions to more than a single third party.

In response, Houlihan issued a revised invoice, dated September 18, 2023 (NYSCEF Doc. No. 28) for \$4,500,787.65 in respect of the Sale Fee, legal fees and out of pocket expenses, plus the outstanding balances due from a certain May 2022 invoice and January 2023 invoice. The revised invoice did not include the credit that Charah demanded.

By letter (NYSCEF Doc. No. 25), dated September 29, 2023, Charah agreed to remit payment of \$1,027,150.31 to satisfy the amount owed set forth in the July 2023 Invoice (the Sale Opinion Fee, legal fees and out of pocket expenses; *id.* at 2) but otherwise disputed the amount of the Sale Fee taking the incorrect position that they were still entitled to a credit for the Sale Opinion Fee as against the Sale Transaction Fee even though they paid the Sale Opinion Fee six months late.³

³ Charah paid the Sale Opinion Fee on or about October 6, 2023 (NYSCEF Doc. No. 34 ¶ 13).
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Charah has also failed to pay Houlihan's previous expenses. On May 19, 2022, Houlihan issued Charah an invoice for \$9,780.22 for reimbursable expenses incurred by Houlihan (NYSCEF Doc. No. 29). On January 19, 2023, Houlihan issued an invoice for \$17,056.79 for reimbursable expenses (NYSCEF Doc. No. 30). As part of the September 18, 2023 revised invoice, Houlihan invoiced an additional charge of \$1,532.64 for reimbursable expenses (NYSCEF Doc. No. 28). Charah has failed to reimburse Houlihan for these expenses (NYSCEF Doc. No. 34 ¶ 20).

Houlihan alleges that SER knew the terms of the Agreement and intentionally procured Charah's breach of the Agreement by directing and causing Charah to fail and refuse to pay Houlihan for the Sale Fee, associated fees, and expenses (NYSCEF Doc. No. 5 ¶¶ 81-82).

Houlihan then brought this lawsuit alleging breach of contract as against Charah and tortious interference with contract as against SER. Now, Houlihan moves for summary judgment as to its cause of action sounding in breach of contract (first cause of action) and partial summary judgment as to its cause of action sounding in tortious interference of contract (second cause of action).

DISUCSSION

On a motion for summary judgment, the movant "must 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 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opposing party

must then “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” that its claim rests upon (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

I. Summary Judgment is granted as to the breach of contract claim

To prevail upon a cause of action for breach of contract, a plaintiff must prove that: (i) a contract exists; (ii) plaintiff performed in accordance with the contract; (iii) the defendant breached its contractual obligations; and (iv) the defendant's breach resulted in damages (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022]).

The parties do not dispute the existence of the contract, that Houlihan performed under the contract or that some money is owed to Houlihan and that as a result Houlihan has been damaged. The dispute surrounds solely the amount due Houlihan.

According to Houlihan, approximately \$4.5 million is due and owing. In support of their position, they adduce (i) the Agreement, (ii) a United States Securities and Exchange Commission Schedule 14A Proxy Statement (NYSCEF Doc. No. 23), (iii) letters from Charah to Houlihan in which Charah disputes the monies owed to Houlihan pursuant to the Agreement (NYSCEF Doc. Nos. 24 and 25), (iv) invoices issued by Houlihan to Charah for payment pursuant to the Agreement (NYSCEF Doc. Nos. 26-30), and (v) a certain Affirmation of Jordan L. Mendel in Support of Plaintiff's Motion for Summary Judgment and Partial Summary Judgment (NYSCEF Doc. No. 34).

In their opposition papers, and as discussed above, Charah argues that it should be entitled to a credit as to money (which Charah concedes is due Houlihan) based on certain prior transactions which they do not assert involved the same third party. As discussed above, the position is irreconcilably at odds with the negotiated agreement between the parties. As such, Charah fails to raise a material issue of fact warranting further proceeding and Houlihan can submit judgment.

As discussed above, Charah is also entitled reasonable attorneys' fees and expenses (*Moelis & Co. LLC v Ocwen Fin. Corp.*, 203 AD3d 469 [1st Dept 2022]).

II. Summary Judgment is granted as to the breach of contract elements of the tortious interference claim

To state a cause of action for tortious interference with contract, the plaintiff must prove "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B.*, 293 AD2d 314, 315 [1st Dept 2002] citing *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 424, 646 N.Y.S.2d 76, 668 N.E.2d 1370). However, one can not tortuously interfere with their own contract (*see Ashby v ALM Media, LLC*, 110 AD3d 459 [1st Dept 2013]).

According to Houlihan an affiliate of SER merged into Charah earlier this year (NYSCEF Doc. No. 5 ¶ 2). As discussed above, this is the transaction which forms the predicate for the fees due.

Houlihan moves for partial summary judgment as to only two elements of their tortious interference claim: (i) that there was a valid contract between Houlihan and Charah and (ii) that there was a breach of that contract. As discussed above, this is established and Houlihan's motion is granted solely to this extent as to its tortious interference with contract claim.

The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that Houlihan's motion for summary judgment as against Charah as to its claim sounding in breach of contract is granted and its motion for partial summary judgment as to its claim sounding in tortious interference of contract is granted solely to the extent set forth above; and it is further

ORDERED that Houlihan may submit judgment; and it is further

ORDERED that a status conference is scheduled forthwith.

3/14/2025
DATE

ANDREW BORROK, J.S.C.

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