Tromer v PEAK6 Insurtech Holdings LLC
2026 NY Slip Op 32096(U)
July 2, 2026
Supreme Court, New York County
Docket Number: Index No. 653530/2023
Judge: Andrew Borrok

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

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KEVIN M. TROMER, AS SELLERS' REPRESENTATIVE FOR THE SELLERS OF TEAM FOCUS INSURANCE GROUP, LLC,	INDEX NO.	653530/2023
Plaintiff,	MOTION DATE	04/03/2026
- v -	MOTION SEQ. NO.	008
PEAK6 INSURTECH HOLDINGS LLC,DOUGLAS W. BULLINGTON, THE DOUGLAS WARREN BULLINGTON 2020 IRREVOCABLE TRUST, DATED DECEMBER 28, 2020, THE KEVIN M. TROMER REVOCABLE TRUST AGREEMENT, DATED DECEMBER 5, 2013, THE KEVIN M. TROMER 2020 IRREVOCABLE TRUST, DATED DECEMBER 21, 2020,	**DECISION + ORDER ON MOTION**	
Defendant.		

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 280, 281, 282, 283, 284, 285, 286, 287, 288, 289

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

Upon the foregoing documents, Kevin M. Tromer (the **Plaintiff**)'s renewed motion for partial summary judgment against PEAK6 Insurtech Holdings LLC (the **Defendant**) is GRANTED.

THE RELEVANT FACTS AND CIRCUMSTANCES

Pursuant to an Amended and Restated Unit Purchase Agreement (the **UPA**; NYSCEF Doc. No. 149), dated October 31, 2021 (the **Closing Date**), the Plaintiff and the other co-owners of Team Focus Insurance Group, LLC (collectively, the **Sellers**) agreed to sell Team Focus and its subsidiaries, including Capacity Insurance Company, to the Defendant. The transaction included a fixed cash purchase price, and an "Earnout Amount." Section 2.5(b) of the UPA provides the following formula for calculating the Earnout Amount, which begins at $5,750,000, and can increase or decrease depending on Capacity's performance between the Closing Date and December 31, 2022 (the **Earnout Period**), but could not be less than zero dollars:

> (b) "Earnout Amount" shall mean (i) $5,750,000, *minus* (ii) if the Reference Closing Capital and Surplus is greater than or equal to the Earnout Capital and Surplus, an amount equal to (x) the Reference Closing Capital and Surplus *minus* (y) the Earnout Capital and Surplus, *plus* (iii) if the Earnout Capital and Surplus is greater than the Reference Closing Capital and Surplus, an amount equal to (A) (x) the Earnout Capital and Surplus *minus* (y) the Reference Closing Capital and Surplus *multiplied by* (B) fifty percent (50%); ***provided, that in no event shall the Earnout Amount be less than zero dollars ($0)***, *plus or minus, as applicable*, (iv) fifty percent (50%) of the Capital and Surplus Adjustment, if any, *minus* (v) the Reserve Adjustment Earnout Component, if any.

(NYSCEF Doc. No. 149 § 2.5[b] [emphasis added]).

Each of the Defendant's own term sheets negotiated for the deal uniformly stated that there would be a base earnout for Capacity, which could be "increased" or "reduced, but ***not to a negative amount***" (NYSCEF Doc. No. 122 at 3 [emphasis added]; *see also* NYSCEF Doc. Nos. 117-121). The term sheets never reflected, and (as discussed below) the Defendant never indicated, that the Earnout Amount could fall below zero or become a payment obligation owed by the Sellers to the Defendant.

On July 21, 2023, the Plaintiff commenced this action alleging, among other things, that the Defendant breached the UPA by (i) causing Capacity to cease writing new policies and wind down its business during the Earnout Period, and (ii) substantially altering Capacity's longstanding claims administration practices (NYSCEF Doc. No. 1 ¶¶ 36-50, 56-61). On August 30, 2023, the Defendant filed its Answer asserting three counterclaims and crossclaims against the Plaintiff and the Sellers for (i) a declaratory judgment pursuant to CPLR § 3001 providing that the Earnout Amount is $3,114,363 due to the Defendant (First Counterclaim; NYSCEF Doc.

No. 27 ¶¶ 42-55), (ii) breach of contract alleging the Plaintiff and the Sellers breached the UPA by failing to remit the purported negative Earnout Amount (Second Counterclaim; *id.* ¶¶ 56-63), and (iii) breach of contract alleging that the Plaintiff and the Sellers breached the UPA by failing to make the remaining Reserve Adjustment payment (Third Counterclaim; *id.* ¶¶ 64-71).

On March 31, 2025, and without taking relevant discovery as to the meaning of the Not-Less-Than-Zero Clause (hereinafter defined), both parties moved for summary judgment (NYSCEF Doc. Nos. 102, 160). Pursuant to a prior Decision and Order (NYSCEF Doc. No. 272), dated November 14, 2025, the Court denied both motions. In fact, during oral argument, the Court explained that although it would be "a lot cleaner if" the language "provided, that in no event shall the Earnout Amount be less than zero dollars ($0)" (the **Not-Less-Than-Zero Clause**) appeared at the end of Section 2.5(b), "the fact that it does refer to the entire [E]arnout [A]mount is prima facie evidence that the deal was that it could never go below [zero]" (*id.* at 20:5-12). The Court then permitted the parties to supplement the record with limited discovery of the transaction counsel who drafted the UPA and granted leave to renew their summary judgment motions (NYSCEF Doc. No. 281 at 36:4-37:8). This now supplemented record confirms that this is the proper meaning of the Not-Less-Than-Zero Clause and that there are no issues of fact warranting further proceeding as to this issue of contract interpretation.

On January 6, 2026, the parties filed affirmations from their respective transaction counsel: Michael Halsband for the Plaintiff (NYSCEF Doc. No. 278) and Chad Vance for the Defendant (NYSCEF Doc. No. 279). Both were deposed thereafter (NYSCEF Doc. Nos. 282-283).

Mr. Halsband, who led the negotiation and drafting of the UPA for the Plaintiff, confirmed that he added the Not-Less-Than-Zero Clause to Section 2.5(b) of the UPA on or about March 28, 2021, to reflect the parties' shared understanding that the Earnout Amount could never go below zero (NYSCEF Doc. No. 278 ¶¶ 6-7). He explained that this was consistent with the Defendant's own term sheets (*id.* ¶ 9), and that prongs (iv) and (v) were added later in haste and "as a matter of expediency" during the push toward closing and were placed after the clause without any intention to alter the business deal that the Earnout could become an obligation:

> 10. My recollection is also consistent with the drafts of the original UPA. As noted above, we added the not-less-than-zero clause on or about March 28, 2021, and that clause remained in all drafts of the UPA from there on out. ***As a matter of expediency***, prongs (iv) and (v) were later inserted following the "not-less-than-zero" clause (compare DX-30 § 2.5(b) with PX-37 § 2.5(b)), as additional components of the total Earnout Amount calculation. With the addition of prongs (iv) and (v), we understood that it was the intent of the parties that the "Earnout Amount," as defined in Section 2.5(b), is to be calculated pursuant to prongs (i)-(v), and if the result of that calculation is a negative number, the Earnout Amount is deemed to be $0 and PEAK6 would not pay Mr. Tromer an earnout. Again, the guiding principal I recall always being that the Earnout Amount would have a floor of $0. Neither PEAK6 nor its counsel, Sidley, took the position that the addition and placement of prongs (iv) and (v) was intentionally intended to change the meaning or effect of the "not-less-than-zero" clause nor the floor of $0.

(*id.* ¶ 10 [emphasis added]; *see also* NYSCEF Doc. No. 283 at 70:20-71:4).

According to Mr. Halsband, it "was never in doubt" during negotiations that the Earnout Amount could become an obligation or "go negative," which he described as a "guiding principle" and "fundamental tenet" of the deal (NYSCEF Doc. No. 278 ¶ 11; NYSCEF Doc. No. 283 at 71:12-21). He confirmed that the Defendant never suggested otherwise and never claimed that the placement of prongs (iv) and (v) allowed for a negative earnout (NYSCEF Doc. No. 278 ¶¶ 11-12). Finally, based on decades of M&A experience, he testified that he had never seen a transaction in which a seller paid an earnout to a buyer (*id.* ¶ 13).

Mr. Vance, who was involved in drafting and negotiating the UPA for the Defendant (NYSCEF Doc. No. 279 ¶ 1), submitted an affirmation advancing the Defendant's position (*id.* ¶ 6; NYSCEF Doc. No. 282 at 83:24-84:20 [confirming that clauses (iv) and (v) were add-ons by the Sellers to the UPA but conceding that "PEAK6's intent" was never communicated to the Plaintiff or his lawyer that the Not-Less-Than-Zero Clause only applied to prongs (i) through (iii) even though the clause refers to the defined term Earnout Amount which the UPA says can not be less than zero]). In fact, on cross-examination, he also conceded he could not cite a single email, draft, call, or meeting in which the Defendant or its counsel ever communicated to the Plaintiff or his counsel that the Earnout Amount could go negative or that the placement of prongs (iv) and (v) had that effect:

> Q: Thank you. Mr. Vance, you do not cite a single document where you or anyone else at Sidley or Peak6 discussed with McDermott or sellers that as a result of the addition of prongs 4 and 5 the earnout amount could go negative, do you?
>
> A: I don't think that's correct.
>
> Q: Looking back at your affirmation, you don't identify a single document where an email, you don't reference a single phone conversation, you don't reference a single text message, anything in which someone from Peak6 said that the earnout amount could go negative, do you? Do you need clarification?
>
> …
>
> A: I don't cite a single email from Peak6 where Peak6 says the earnout can go negative.
>
> Q: And that's because those documents don't exist, correct?
>
> A: I don't know what documents exist.
>
> Q: Okay. Fair enough. I can represent to you that there's no document in this case that's been produced that says that. And you don't cite any phone calls or meetings where the parties or their counsel discussed that prongs 4 and 5 could allow the earnout amount to go negative, do you?

A: I do not cite those in my affirmation, no.

…

Q: Let me ask you this straight up. You don't cite any phone calls or meetings in your affirmation where the parties or their counsel discussed that prongs 4, and this is between the Peak6 and their representatives and Team Focus and their representatives or Capacity and their representatives, you don't cite any phone calls or meetings where the parties and their counsel discussed that prongs 4 and 5 could allow the earnout amount to go negative, do you? That's not cited in your affirmation, correct?

A: Correct, that is not cited in my affirmation.

…

Q: Now I want to go back to what we discussed before. At no point did you call anybody from -- you realize in the earnout there are two prongs that were added, prong 4 and 5, I'm just asking, you're aware that those were added, correct?

A: When you say earnout, you mean the definition of earnout amount?

Q: Yes.

A: I'm aware clauses 4 and 5 were added.

Q: At no point did you call anybody from -- at McDermott, your counterpart on the transaction, and say hey, you realize by adding point four or point five, this earnout can now go negative, you never had that conversation with anybody from McDermott, did you?

A: I never had any reason to have that conversation.

Q: That's not my question. The factual question, not the reasoning behind it or not behind it, that conversation never happened, correct?

A: I do not recall any conversation with McDermott where we had that conversation.

(NYSCEF Doc. No. 282 at 75:14-77:17, 83:24-84:20).[1]

[1] Ultimately, Mr. Vance conceded that others drafted portions of his affirmation and he could not identify who wrote them (NYSCEF Doc. No. 282 at 29:13-30:10).

Although Mr. Vance stated that his recollection was that the addition of prongs (iv) and (v) was to provide the Defendant with "full downside protection" (NYSCEF Doc. No. 279 ¶ 16), he additionally conceded in his deposition that he could not point to a single document to substantiate it:

> Q: Do you ever recall Mr. Tromer ever saying anything like I understand that with the additions of prong 4 and 5 to the earnout this could go negative, do you recall him ever saying I assent to that? Yes or no?
>
> A: No, I don't recall that.
>
> Q: Can you point to me -- me to a single document or communication from Mr. Tromer or his counsel where he agreed to give Peak6 full downside protection as you define it, using those words, can you point to anything?
>
> A: No.

(NYSCEF Doc. No. 282 at 91:21-92:6).

In fact, the record before the Court establishes beyond doubt that the Defendant's position is a litigation position.

On April 3, 2026, the Plaintiff filed its renewed motion for partial summary judgment, seeking dismissal of the Defendant's First and Second Counterclaims (NYSCEF Doc. No. 280).

DISCUSSION

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 issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish the existence of material issues of fact requiring trial (*id.*).

I. The Plaintiff's Summary Judgment Motion to Dismiss the Defendant's First Counterclaim for a Declaratory Judgment is Granted

A cause of action for a declaratory judgment pursuant to CPLR § 3001 requires a bona fide, justiciable controversy between the parties (*Zwarycz v Marnia Const., Inc.*, 102 AD3d 774, 776 [2d Dept 2013]). A justiciable controversy must involve a present, rather than hypothetical, contingent or remote prejudice to the plaintiff, and the dispute must be real, definite, substantial, and sufficiently mature so as to be ripe for judicial determination (*id.*).

As discussed above, the Court previously denied summary judgment on the issue of whether the Earnout Amount could be negative and permitted the parties to conduct relevant discovery as to the meaning of the Not-Less-Than-Zero Clause and to renew their motions if appropriate following the completion of discovery. Now, in support of its motion, the Plaintiff adduces testimony from Mr. Halsband establishing that the clause was inserted in that location simply because prongs (iv) and (v) were added later "as a matter of expediency" during the parties' push toward closing, and that it "was never in doubt" during negotiations that the Earnout Amount could not go below zero, which he described as a "guiding principle" and "fundamental tenet" of the deal (NYSCEF Doc. No. 283 at 70:20-71:21).

This interpretation of Section 2.5(b) is fully consistent with the undisputed contemporaneous documentary record before the Court – *i.e.*, the UPA, every term sheet exchanged, and the drafting history – which uniformly reflect that the parties agreed the Earnout Amount could *never* be negative. No contemporaneous document suggests otherwise. As such, the Plaintiff establishes a prima facie showing that he is entitled to judgment as a matter of law (*Alvarez*, 68 NY2d at 324).

In its opposition papers, the Defendant relies on Mr. Vance's after-the-fact assertion that the zero-floor applies only to prongs (i) through (iii), and that prongs (iv) and (v) may drive the Earnout Amount below zero. However, as discussed above, Mr. Vance concedes that he could not identify a single document, draft, markup, email, or conversation contemporaneously expressing such an understanding, nor any instance in which it was communicated to Plaintiff or his counsel (*see Brown Bros. Elec. Contractors, Inc. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977] [providing that courts do not look to the "subjective intent of" the parties, but "rather, to the objective manifestations of intent of the parties as gathered by their expressed words and deeds"]). Mr. Vance also could not point to any document or evidence to substantiate his assertion that the purpose of adding prongs (iv) and (v) were to provide the Defendant with full downside protection.[2]

To the extent the Defendant argues that the Plaintiff's renewed motion is premature because the UPA contains a specific dispute-resolution mechanism for any Earnout objections, the argument fails. The issue of whether the UPA permits a negative Earnout Amount is a pure question of contractual interpretation for the Court, not an objection to the preparation of the Earnout calculation (*Dreisinger v Teglasi*, 130 AD3d 524, 527 [1st Dept 2015]). As such, the Defendant

[2] In fact, one would think if the Defendant were truly concerned, there would have been a holdback of a certain portion of the consideration rather than a so-called downside reconciliation in respect of the Earnout Amount. As discussed previously, the Not-Less-Than-Zero Clause refers to the defined term Earnout Amount and not merely clauses (i) through (iii) and the UPA provides that the Earnout could not be less than zero.

fails to raise a triable issue of fact, and the Plaintiff is entitled to summary judgment dismissing the Defendant's first counterclaim for a declaratory judgment (*Alvarez*, 68 NY2d at 324).

II. The Plaintiff's Summary Judgment Motion to Dismiss the Defendant's Second Counterclaim for Breach of Contract is Granted

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]).

As discussed above, the Plaintiff has adduced sufficient evidence demonstrating that the Earnout Amount can not be negative. Consequently, the Plaintiff could not have breached the UPA by failing to pay the Defendant a negative Earnout Amount. As such, the Plaintiff is entitled to summary judgment dismissing the Defendant's second counterclaim for breach of contract (*Alvarez*, 68 NY2d at 324).

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

Accordingly, it is hereby ORDERED that the Plaintiff's renewed motion for partial summary judgment against the Defendant is GRANTED.

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7/2/2026
DATE

ANDREW BORROK, J.S.C.

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