

IN THE SUPERIOR COURT OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DINESH SHETH, in his individual capacity))
and as Member Representative and))
SHETH LIMITED PARTNERSHIP, by and))
through Dinesh Sheth, its General Partner,))
))
Plaintiffs,) C.A. No. N14C-01-222 WCC CCLD
))
v.))
))
HARLAND FINANCIAL SOLUTIONS,))
INC.,))
))
Defendant.))

Submitted: May 12, 2014
Decided: August 28, 2014

**On Defendant’s Motion to Dismiss – GRANTED in part, DENIED in part
On Plaintiffs’ Motion for Partial Summary Judgment – GRANTED**

OPINION

Richard L. Horwitz, Esquire, Brian C. Ralston, Esquire, and Michael B. Rush, Esquire, Potter Anderson & Corroon, LLP, 1313 North Market Street, Wilmington, DE 19801. Thomas R. Dyer, Esquire and Mark Vorder-Bruegge, Jr., Esquire, Wyatt, Tarrant & Combs, LLP, The Renaissance Center, 1715 Aaron Brenner Drive, Suite 800, Memphis, TN 38120. Attorneys for Plaintiffs.

Joel Friedlander, Esquire, Jeffrey M. Gorris, Esquire, Friedlander & Gorris, P.A., 222 Delaware Avenue, Suite 1400, Wilmington, DE 19801. Attorneys for Defendant.

CARPENTER, J.

Before this Court is Harland Financial Solution Inc.’s (“Defendant”) Motion to Dismiss and Dinesh Sheth’s and Sheth Limited Partnerships’s (“Plaintiffs”) Motion for Partial Summary Judgment (on Count IV). In addressing these Motions together, the Court is asked to answer three questions: (1) whether Plaintiffs’ claims are subject to the contractual obligation that disputes relating to the Earn-Out provisions be resolved by an Independent Accountant; (2) whether Plaintiffs’ claim for breach of the implied covenant of good faith and fair dealing is actionable; and (3) whether Plaintiff, Dinesh Sheth (“Sheth”), has established a cognizable claim for termination fees. The Court finds that, under the plain language of the unambiguous contract, the Independent Accountant Provision does not apply to the claims at issue and, thus, Plaintiffs are entitled to the declaratory judgment requested in Count IV. However, Plaintiffs’ claim for breach of the implied covenant of good faith and fair dealing is not appropriate given the detailed, comprehensive, bargained-for, 78-page, single-spaced agreement. Therefore, that Count will be dismissed. Finally, at this juncture, Plaintiffs’ remaining claims are sufficient to withstand Defendant’s Motion to Dismiss. Accordingly, Defendant’s Motion to Dismiss is **GRANTED** in part, as to Count III, the implied covenant claim, but otherwise **DENIED** and Plaintiffs’ Motion for Partial Summary Judgment is **GRANTED**.

A. FACTUAL BACKGROUND

This action arises out of a Purchase and Sale Agreement entered into by the parties on December 6, 2010, whereby Defendant agreed to purchase Plaintiffs' entire ownership interest in Parsam Technologies, LLC, for over \$32 million (the "Agreement"). The Agreement provided for the potential payment to Plaintiffs of an additional \$25 million depending upon the company's performance during the two years following closing (the "Earn-Out Payments"). The Earn-Out Payments were only payable if certain revenue thresholds were met during the specified benchmark periods. The contract provided that disputes relating to the Earn-Out Payments were subject to review by an Independent Accountant, whose decision would be final and binding on the parties. Also, within the same section, the Agreement contained restrictions on Defendant's termination of Sheth, who stayed on as a Senior Vice President after closing (the "Termination Without Cause Payment").

Plaintiffs were never paid any Earn-Out Payments for either 2011 or 2012. Both parties agree that the revenue thresholds were not met to trigger such payments and that, mathematically, no payments were due. Plaintiffs acknowledged this, via letter to Defendants on April 2, 2013, stating that the calculations were correct and there were no Earn-Out Payments due under such

reported revenues. However, Plaintiffs allege that during the Earn-Out period, Defendant operated in a manner which suppressed the company's revenue and Defendant purposefully underperformed to avoid making the Earn-Out Payments. Further, Plaintiffs allege that Defendant avoided revenue-generating opportunities and failed to give due accord to the advice of Sheth.

In addition, Plaintiffs allege that Defendant began to strip Sheth of his role within the company in February, 2011, until such authority was fully removed in June, 2011. This prompted Sheth to offer to terminate his employment that month and again in early 2012. Such offers were declined and instead, Plaintiffs allege he was assigned no responsibilities and given no meaningful tasks. Thereafter, on June 12, 2013, Defendant terminated Sheth, without cause, and the Termination Without Cause Payment was never tendered to Plaintiffs.

After making a demand upon Defendant, which was rejected, Plaintiffs sued Defendant in Florida state court seeking the full Earn-Out Payments and Termination Without Cause Payment. However, the Florida court found that the Agreement was governed by Delaware law and contained an enforceable provision agreeing to litigate disputes in Delaware.¹ Accordingly, the Florida action was dismissed and Plaintiffs, thereafter, filed a Complaint in this Court on January 24,

¹ See Compl. Ex. A at § 7.06.

2014. Therein, Plaintiffs assert five claims for relief: (i) breach of contract (for Defendant's alleged failure to conduct the business in a productive manner to allow for Earn-Out Payments); (ii) breach of contract (for Defendant's alleged failure to pay Sheth the Termination Without Cause Payment); (iii) breach of the implied covenant of good faith and fair dealing (for Defendant's alleged dereliction of duties to conduct the business productively after closing); (iv) declaratory judgment (that the Agreement does not require the above claims to first go to an Independent Accountant); and (v) contractual indemnification (for the fees and cost expended by Plaintiffs in bringing suit for the above allegations of wrongdoing). Plaintiffs have now moved for partial summary judgment as to Count IV and Defendants have moved to dismiss the Complaint in its entirety.

B. STANDARD OF REVIEW

In reviewing a motion for summary judgment pursuant to Rule 56, the Court must determine whether any genuine issues of material fact exist.² Specifically, the moving party bears the burden of showing that there are no genuine issues of material fact so that he is entitled to judgment as a matter of law.³ Further, the Court must view all factual inferences in a light most favorable to the non-moving party.⁴ Therefore, summary judgment will not be granted if it appears that there is

² Super. Ct. Civ. R. 56(c); *Wilm. Trust Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).

³ *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

⁴ *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).

a material fact in dispute or that further inquiry into the facts would be appropriate.⁵ When addressing a motion for summary judgment on the interpretation of a contract, the threshold question is whether the contract is ambiguous.⁶ A contract is ambiguous if the provisions at issue “are fairly susceptible of different interpretations or may have two or more different meanings.”⁷ “[S]ummary judgment may not be awarded if the language is ambiguous and the moving party has failed to offer uncontested evidence as to the proper interpretation.”⁸ Conversely, “[s]ummary judgment is an appropriate process for the enforcement of unambiguous contracts because there is no material dispute of fact for the court to resolve.”⁹

Under Delaware Superior Court Civil Rule 12(b)(6), the Court may dismiss a plaintiff's claim for “failure to state a claim upon which relief can be granted.”¹⁰ When analyzing a motion to dismiss under Rule 12(b)(6), the Court must proceed without the benefit of a factual record and assume as true the well-pleaded allegations in the complaint.¹¹ A complaint is “well-pleaded” if it puts the

⁵ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).

⁶ *See, e.g., Premcor Ref. Grp. Inc. v. Matrix Serv. Indus. Contractors, Inc.*, 2008 WL 2232641, at *6 (Del. Super. May 7, 2008); *Klair v. Reese*, 531 A.2d 219, 222 (Del. 1987).

⁷ *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

⁸ *GMG Capital Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 784 (Del. 2012).

⁹ *Comet Sys., Inc. S'holders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1030 (Del. Ch. 2008).

¹⁰ Super. Ct. Civ. R. 12(b)(6).

¹¹ *See Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38-39 (Del. 1996).

opposing party on notice of the claim being brought against it.¹² Therefore, the Court may dismiss a complaint under Rule 12(b)(6) only where the Court determines with “reasonable certainty” that no set of facts can be inferred from the pleadings upon which the plaintiff could prevail.¹³ Additionally, although the Court need not blindly accept as true all allegations nor draw all inferences in the plaintiff’s favor, “it is appropriate . . . to give the pleader the benefit of all reasonable inferences that can be drawn from its pleading.”¹⁴

C. DISCUSSION

As mentioned before, the parties’ motions can be simplified into three issues involving: (1) the Earn-Out Payments; (2) the implied covenant of good faith and fair dealing; and (3) the Termination Without Cause Payment. Each will be addressed in turn.

I. The Earn-Out Payments

Count IV of the Complaint requests declaratory judgment that Plaintiffs’ claims are not subject to the Agreement’s requirement that Earn-Out Payment disputes be sent to an Independent Accountant. Plaintiff is seeking partial summary judgment on this count arguing that the claims alleged in the Complaint do not fit within the Independent Accountant Provision. Conversely, Defendant

¹² See *Precision Air v. Standard Chlorine of Del.*, 654 A.2d 403, 406 (Del. 1995).

¹³ *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

¹⁴ *In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991).

argues for dismissal of such count asserting that, under the Agreement, all claims relating to the Earn-Out Payments can only be resolved by an Independent Accountant. The Court finds that the Agreement is unambiguous and the plain language of the Independent Accountant Provision does not include the claims alleged by Plaintiffs.

Generally disputes in this complicated and complex transaction would be resolved under Section 5 of the Agreement. Specifically, Section 5.03(c) states that Article V of the Agreement provides the “sole and exclusive remedy with respect to any and all claims relating to the subject matter of th[e] Agreement.”¹⁵ However, that section also lists a couple of exceptions where disputes arising in a particular unique area would have dispute-resolution procedures set forth in the relevant part of the Agreement. One such exception is that disputes under Section 1.05—the section which sets forth the Earn-Out Payments—shall be “resolved in accordance with Section 1.05(c).”¹⁶

However, to set the stage for this dispute resolution, it is critical to review Sections 1.05(a) and 1.05(b) to determine what is being reviewed. Subsection (a) required Defendant to deliver to Plaintiffs by February 29, 2012, Defendant’s calculation of the 2011 Earn-Out revenue and calculation of the Earn-Out payment,

¹⁵ Compl. Ex. A at § 5.03(c).

¹⁶ *Id.*

if any. Subsection (b) sets forth the rights of Plaintiffs to review the Earn-Out calculations and to “verify the accuracy” of Defendant’s calculations. If Plaintiffs disagree with Defendant’s calculations, they were required to notify Defendant within 30 days of the objections and to specify in a detailed written explanation the reasons for the disagreement as to each specific “item or amount.” The “Notice of Objections” provision would then activate the remedy provision set forth in Subsection (c).

After a required period of reasonable efforts to reach a written agreement on the disputed items and amounts, if a dispute remained, the provisions of Subsection (c) sets forth the resolution procedures:

. . .“If, at the end of such period or any mutually agreed extension thereof, the Member Representative and Purchaser are unable to resolve their disagreements, either party may retain and refer their disagreements to the Independent Accountant (as defined below). The parties shall instruct the Independent Accountant promptly to review this Section 1.05 and to determine solely with respect to the disputed items and amounts so submitted whether and to what extent, if any, the 2011 Earn-Out Revenue and 2011 Earn-Out Payment set forth in the Preliminary 2011 Earn-Out Revenue Statements requires adjustment. The Independent Accountant shall (i) be bound by the terms of this Section 1.05, (ii) restrict its decision only to such items contained in the 2011 Earn-Out Revenue Notice of Objection that remain in dispute and (iii) base its determination solely on submissions by the Member Representative and Purchaser delivered to the Independent

Accountant (with a copy to the other party) and not on an independent review. . . . As promptly as practicable, but in no event later than 30 calendar days after its retention, the Independent Accountant shall deliver to the Member Representative and Purchaser a report which sets forth its resolution of the disputed items and amounts and its calculation of 2011 Earn-Out Revenue; . . . The decision of the Independent Accountant shall be final, conclusive, non-appealable and binding on the parties.

The Court finds that because of the clear language of these provisions and the limitation placed on the review by the Independent Accountant, there is only one reasonable interpretation of these provisions, that is, it would only apply to items included in the Earn-Out statement and the amounts that were contributable to those items. The Independent Accountant was not allowed to look beyond the submissions of the parties and the contract specifically reflected that the accountant was prohibited from conducting an independent review. The Court can find no basis to support Defendant's contention that this would include operational deficient actions that would undermine Defendant's Earn-Out revenue statement. Plaintiffs do not now nor have they ever disputed the calculations or items set forth in the Earn-Out statement. This litigation is a dispute over the alleged conduct of Defendant to purposely avoid making the Earn-Out payments. That dispute is correctly before the Court, not an accountant. Section 1.05(c) does not provide a

remedy for the claims Plaintiffs now make against Defendant as there are no “items or amounts” disputed. Therefore, since 1.05(c) does not provide a procedure for addressing Plaintiffs’ claims, they are properly before this Court in accordance with Section 5.03(b), which requires indemnification by Defendant for breaches of the Agreement. As a result, the declaratory judgment required by Plaintiffs in Count IV of the Complaint will be granted.

II. The Implied Covenant of Good Faith and Fair Dealing

The next question presented to the Court is whether Plaintiffs’ Count III, for breach of the implied covenant of good faith and fair dealing, is actionable or whether it should be dismissed for failure to state a claim. Defendant argues that this claim cannot proceed because the means for recovery set forth in the 78-page, single-spaced Agreement are so precise that there is no “gap” which needs to be filled by the implied covenant. Defendant asks the Court to hold Plaintiffs to the Agreement asserting that Plaintiffs should have negotiated for the protection they now seek as such was an anticipated risk to an Earn-Out structured transaction. Plaintiffs counter arguing that, at this early stage of the litigation, it is reasonably conceivable that Defendant’s alleged failures to act were solely for the purpose of not tendering to Plaintiffs the Earn-Out Payments and, as such, the actions/inactions were made in bad faith, in breach of the implied covenant.

The implied covenant of good faith and fair dealing is implied in every contract and “requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain.”¹⁷ The implied covenant “serves as a gap-filling function by creating obligations only where the parties to the contract did not anticipate some contingency, and had they thought of it, the parties would have agreed at the time of contracting to create that obligation.”¹⁸ Thus, Delaware courts have consistently held that “the implied covenant is not a license to rewrite contractual language just because the plaintiff failed to negotiate for protections that, in hindsight, would have made the contract a better deal.”¹⁹

Here, Plaintiffs have brought suit for breach of contract and indemnification,²⁰ alleging (in relation to the Earn-Out Payments) that Defendant breached Section 1.05(j) which provides, in part, that “[Defendant] shall not take any action or omit to take any action the sole purpose of which is to hinder the Company from earning the 2011 Earn-Out Revenue Thresholds or the Total Earn-Out Revenue Thresholds”²¹ and that Defendant must “consult with Sheth (to the extent he is employed with the Company) and consider his recommendations in

¹⁷ *Winshall v. Viacom Int’l, Inc.*, 55 A.3d 629, 636 (Del. Ch. 2011).

¹⁸ *Am. Capital Acq. P’rs, LLC v. LPL Hldgs.*, 2014 WL 354496, at *5 (Del. Ch. Feb. 3, 2014).

¹⁹ *Id.* (quotation marks omitted) (quoting *Winshall v. Viacom Int’l, Inc.*, 55 A.3d at 637).

²⁰ Compl. Ex. A at § 5.03 (b)

²¹ *Id.* at § 1.05(j).

good faith with respect to actions (or inactions) which would reasonably be expected to materially adversely affect the Company's business or its relationships with customers, suppliers or employees."²² In asserting their claim for good faith and fair dealing, Plaintiffs have asserted that these are the obligations that have not been met.

What is concerning to the Court is that Plaintiffs' good faith and fair dealing claim appears to be an attempt to broaden the contractual language agreed to by these sophisticated parties and is asking the Court to imply additional duties and obligations beyond that contained in the 78 page, single-spaced agreement. The Agreement evidences that the parties negotiated for protections for Plaintiffs in the event Defendant acted with the "**sole purpose**" of preventing the Earn-Out thresholds and for failing to "consult with Sheth and consider his recommendations in "**good faith**."²³ These contractual provisions provide protection to Plaintiffs for the wrongs alleged in this suit and leave no "gap" which can be filled by the implied covenant. To weaken or add additional duties via the implied covenant would be to rewrite a bargained-for and heavily-negotiated instrument between sophisticated and represented parties. The Court is not the proper entity to be doing

²² *Id.*

²³ Compl. Ex. A at § 1.05(j).

such,²⁴ and while these provisions may place difficult burdens to prove on Plaintiffs, these provisions in essence reflect the contractual good faith and fair dealing required and contemplated by the parties in the agreement. Thus, the Court finds that Count III fails to state a claim for which relief may be granted and Defendant's Motion to Dismiss is hereby granted as to that Count.

III. The Termination Without Cause Payment

Finally, the Court is asked to determine whether the Complaint sets forth a cognizable claim for the Termination Without Cause Payment. Section 1.05(m), within the Earn-Out Payments section, states:

In the event [Defendant] terminates Sheth's employment with [Defendant] for any reason other than Cause, a portion of the Earn-Out Payments equal to \$2,500,000 less amounts, if any, due [Defendant] or any other Purchaser Indemnified Party under this Agreement (such portion, the "**Termination Without Cause Payment**") shall immediately vest and shall be payable²⁵

Due to its position within the Earn-Out Payments section of the Agreement and its reference to the Earn-Out Payments, Defendant argues that the Termination Without Cause Payment is only payable to Sheth if he is terminated, without cause, during the Earn-Out period (ending with the year 2012). Plaintiffs counter, pointing out that there is no time limit or "sunset provision" in the above-quoted provision

²⁴ See, e.g., *Am. Capital Acq. P'rs, LLC v. LPL Hldgs.*, 2014 WL 354496, at *5-*7; *Winshall v. Viacom Int'l, Inc.*, 55 A.3d at 636; *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 145-148 (Del. Ch. 2009).

²⁵ Compl. Ex. A at § 1.05(m).

and, as such, argue that Sheth is entitled to payment for his termination without cause on June 12, 2013. Alternatively, Plaintiffs argue that Sheth was constructively terminated during the Earn-Out period because he was stripped of all his duties, prompting him to submit his resignation, which Defendant did not accept, in June 2011 and early 2012. Defendant contends that Plaintiffs' constructive-termination argument fails because Sheth would have needed to quit or otherwise leave his position to make such a claim.

The Court is convinced that the phrase "a portion of the Earn-Out payments, found in Section 1.05(m) and the definition of Earn-Out payments found in 1.05(g) requires that the termination without cause occur within the Earn-Out time period. These provisions reflect an intent on the parties that the services of Sheth would be retained at least during the Earn-Out period (i.e. several years) and if terminated without cause before the period ended, the damages associated with that action. To find this obligation would be indefinite is simply illogical and inconsistent with good business practices. The intent of the parties here is also clear from their conduct. It appears that Sheth was attempting to force the employment issue during the Earn-Out period reflecting his belief that the time frame was critical. Further, if the obligation continued forever, it would make no sense for Defendant not to simply terminate Sheth's services instead of stripping him of responsibility

since they would be obligated to pay anyway. Clearly the provisions of the contract and the actions of the parties only makes sense when placed within the time frame of the Earn-Out provisions. As such, the Court finds that for Plaintiffs to benefit from the termination without cause payment, the termination must have occurred during the Earn-Out period.

That said, the Court is not willing to dismiss the claim of constructive termination at this juncture. If this occurred, it would be improper for the Court to condone such conduct and allow Defendant to reap the benefits of simply waiting out Sheth until the Earn-Out period has terminated. Plaintiffs here have asserted that Defendant stripped them of all responsibilities and duties during the time the Earn-Out period was in effect and at this juncture the Court must assume these allegations to be true.

In support of its Motion to Dismiss, Defendant asserts that to establish constructive termination Sheth must have resigned. The case law provided by the parties is clearly presented in a factual context quite different from what we have here. The issue traditionally arises in the context of civil rights violations, employment discrimination matters or sexual harassment of an employee. In this context, the Court agrees the requirement of resignation has been generally required. Here the assertions in the Complaint suggest that Sheth on several

occasions submitted his resignation or offered to leave but Defendant did not accept them. If true, Defendant cannot now use the lack of an official resignation as a shield to intolerable or demeaning work conditions that allegedly were imposed on Sheth in violation of the terms of the contract. Therefore, the Court finds there are simply too many factual unknowns regarding the employment relationship between these parties to dismiss this claim this early in the litigation. As such, the Court will allow the matter to proceed on constructive termination until further facts are developed.

IV. Indemnification

Defendant's Motion also sought to dismiss Count V of Plaintiffs' Complaint: indemnification. Since the indemnification claim is wholly dependent on Counts I-IV, it survives insofar as the claim on which it relied survived. Stated more succinctly, Count V remains only as it relates to Count I (breaches relating to the Earn-Out Payments) and Count II (breaches relating to the Termination Without Cause Payment). Insofar as Count V seeks relief based off of the alleged breach of the implied covenant of good faith and fair dealing (Count III), it is hereby dismissed.

CONCLUSION

Therefore, Defendant's Motion to Dismiss is hereby **GRANTED** in part and **DENIED** in part and Plaintiffs' Motion for Partial Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.