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

L&L BROADCASTING LLC,)
Plaintiff,)
V.) C.A. No. N13C-10-028 WCC
TRIAD BROADCASTING COMPANY,)
LLC; MONTEREY LICENSES, LLC;)
MISSISSIPPI MEDIA BROADCASTING,)
JMP RADIO GROUP, LLC; ADVENTURE	
COMMUNICATIONS, LLC; and	
ADVENTURE COMMUNICATIONS, INC	.)
)
Defendants.)

Submitted: December 11, 2013 Decided: April 8, 2014

On Defendants' Motion to Dismiss GRANTED IN PART, DENIED IN PART

MEMORANDUM OPINION

Francis G.X. Pileggi, Esquire and Christopher C. Popper, Esquire, Eckert Seamans Cherin & Mellott, LLC, 222 Delaware Avenue, 7th Floor, Wilmington, DE 19801. Attorneys for Plaintiff.

Richard L. Renck, Esquire, Ashby & Geddes, 500 Delaware Avenue, 8th Floor, Wilmington, DE 19899. Attorney for Defendants.

CARPENTER, J.

Before this Court is Defendants' joint Motion to Dismiss the Complaint.

Defendants' Motion argues that Plaintiff's claims fail as a matter of law because under the plain meaning and reasonable interpretation of the contract, Plaintiff was required to plead additional facts to trigger Defendants' liability under the contract. Defendants also argue that the undisputed facts of the case do not support the conversion and unjust enrichment claims. The Court finds that Plaintiff's proposed interpretation of the contract is against its plain meaning and the facts alleged do not support a breach of contract claim. However, Plaintiff has proffered sufficient factual pretext, on a motion to dismiss, for the remaining claims of conversion and unjust enrichment. Accordingly, the Motion to Dismiss is GRANTED IN PART as to the breach of contract claim, and DENIED IN PART as to the conversion and unjust enrichment claims.

BACKGROUND

Plaintiff's Complaint and Defendants' Motion arise from an Asset Purchase Agreement (the "Agreement") entered into by the parties on October 25, 2012 and the rights and obligations arising from the Agreement. The Agreement provided for Defendants to sell Plaintiff certain assets in exchange for Plaintiff's payment of twenty-one million dollars. The Agreement also obligated Defendants to

provide Plaintiff with net working capital in the amount of thirty-five million dollars (the "Final Net Working Capital").

Pursuant to Section 1.6(b) of the Agreement, the parties were to exchange their calculations of net working capital which, depending on whether it exceeded or fell below the thirty-five million required under the Agreement, would modify the purchase price. The exchange occurred but a dispute arose as to what was to be included in those calculations. Plaintiff wanted Defendants to include money Defendants had obtained for advanced ticket sales and sponsor grants relating to upcoming events scheduled at locations Plaintiff purchased through the Agreement. Importantly, one of Plaintiff's requests was for the inclusion of \$487,006.15 relating to the Gulf Port Music Festival. Defendants remained unwilling to include this amount in the Final Net Working Capital calculation arguing they had specifically excluded this amount as deferred revenue under the Agreement.

As a result, pursuant to Section 1.6(d) of the Agreement, the parties engaged an independent accountant, Bradley J. Preber of Grant Thornton, LLP, to serve as arbitrator (the "Arbitrator"). The Agreement provided that the Arbitrator's decision would be final and binding upon the parties. After receiving information from both parties and fully considering the arguments of each, the Arbitrator, via

letter to the parties on September 20, 2013, found in favor of Defendants on the \$487,006.15 amount and stated that such should be excluded from the Final Net Working Capital. In holding so, the Arbitrator stated that the Agreement was clear and unambiguous and, since the \$487,006.15 amount was in an account entitled "Deferred Revenue," and "Deferred Revenue" was listed on Schedule 1.6(f) of the Agreement as "excluded," the \$487,006.15 should rightfully be excluded. Thus, the Final Net Working Capital Defendants provided to Plaintiff did not include the \$487,006.15 amount. Plaintiff, barred from challenging the Arbitrator's decision "(absent fraud or manifest error by the [Arbitrator])," is pursuing a different mechanism for payment of this amount—indemnification.

The Agreement provides certain liabilities retained by Defendants are subject to indemnification (the "Retained Liabilities").³ For the purposes of this Motion, the Court will consider it undisputed that the \$487,006.15 excluded from the Final Net Working Capital is a Retained Liability under the Agreement. Plaintiff advised Defendants by letter dated May 13, 2013, that Plaintiff would seek contractual indemnification for the \$487,006.15 amount as a Retained Liability. On May 14, 2013, Defendants denied Plaintiff's request for indemnification and stated that the Agreement did not require indemnification of

¹ Compl. Ex. B.

² Compl. Ex. A, Section 1.6(d).

³ See Defs.' Mot. to Dismiss Ex. A at 1.3; 1.6(f).

the Retained Liability absent a loss or liability arising out of such. To date,

Defendants have not indemnified or transferred the Retained Liability to Plaintiff
and it is this failure that Plaintiff alleges is a breach of the Agreement.

Plaintiff also alleges that Defendants converted Plaintiff's funds. On September 26, 2013, Defendants sent a financial spreadsheet to Plaintiff wherein Plaintiff found information indicating Defendants obtained \$33,775.36 of Plaintiff's funds from a "lock box not closed," \$250.00 from an "[a]uto payment received post closing," and \$14,574.25 in accounts receivable that were "supposed to be adjusted at closing. . . ." Plaintiff alleges such funds rightfully belonged to Plaintiff and were unlawfully converted by Defendants. Further, Plaintiff alleges that Defendants received \$48,599.61 in accounts receivable after closing, which rightfully belonged to Plaintiff.

The Complaint, setting forth the above factual pretext, was filed on October 2, 2013. The Complaint alleges three counts: (I) breach of contract for failure to indemnify; (II) conversion for Defendants' possession of the lock box funds, auto payment, and accounts receivable funds which were not adjusted at closing; and (III) unjust enrichment for the accounts receivable funds received after closing.

STANDARD OF REVIEW

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." Under Rule 12(b)(6), "[t]he legal issue to be decided is, whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint." In doing so, the Court "must assume all well-pleaded facts in the complaint to be true" and draw "all reasonable inferences in favor of the non-movant." A well-pleaded complaint "need only give general notice of the claim asserted." The Court should "decline, however, to accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."

DISCUSSION

I. COUNT I - BREACH OF CONTRACT¹⁰

Plaintiff is seeking indemnification of the full \$487,006.15 and the parties disagree as to whether those funds are automatically subject to indemnification or whether a loss or liability arising out of the funds must first be established.

The Agreement's indemnification provision provides:

9.2 <u>Indemnification</u>

⁴ Super. Ct. Civ. R. 12(b)(6).

⁵ Slayton v. Clariant Corp., 10 A.3d 597, 601 (Del. 2010).

⁶ Read v. Carpenter, 1995 WL 945544, at *1 (Del. Super. June 8, 1995).

⁷ Rinaldi v. Iomega Corp., 1999 WL 1442014, at *2 (Del. Super. Sept. 3, 1999).

⁸ Ramunno v. Cawley, 705 A.2d 1029, 1034 (Del. 1998).

⁹ Id. See also Feldman v. Cutaia, 951 A.2d 727, 731 (Del. 2008).

¹⁰ The Court may consider the Agreement in its entirety because it is integral to the underlying Complaint and claims made therein, was incorporated throughout the Complaint, and was attached to the Complaint as an exhibit. *Allen v. Encore Energy Partners*, L.P., 72 A.3d 93, 96 n.2 (Del. 2013).

- (a) From and after Closing, Seller [Defendants] shall indemnify and hold harmless Buyer [Plaintiff] from and against any and all losses, costs, damages, liabilities and expenses, including reasonable attorneys' fees and expenses ("Damages") incurred by Buyer [Plaintiff] arising out of or resulting from:
- (i) any breach by Seller [Defendants] of its representations and warranties under this Agreement;
- (ii) any default by Seller [Defendants] of its covenants and agreements under this Agreement; or
 - (iii) the Retained Liabilities.¹¹

Plaintiff contends that the above-quoted provision mandates Defendants to indemnify Plaintiff for the full amount of the Retained Liabilities without any additional showing or requirement. Defendants, however, argue that the provision requires Plaintiff to first incur damages, as defined in the Agreement, arising out of or resulting from those Retained Liabilities. The Court finds that the latter is the only reasonable interpretation.

"Under Delaware law, the interpretation of contract language is treated as a question of law." Contract interpretation is governed by the parol evidence rule.

The parol evidence rule provides that "[w]hen two parties have made a contract and have expressed it in a writing to which they have both assented as to the complete and accurate integration of that contract, evidence . . . of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." To ensure compliance with the parol evidence rule, the Court first must determine whether the terms of the contract it has been asked to construe clearly state the parties' agreement. In this regard, the Court must be

¹¹ *Id.* at 9.2.

¹² Playtex FP, Inc. v. Columbia Cas. Co., 622 A.2d 1074, 1076 (Del. Super. 1992).

mindful that the contract is not rendered ambiguous simply because the parties disagree as to the meaning of its terms. "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." Upon concluding that the contract clearly and unambiguously reflects the parties' intent, the Court's interpretation of the contract must be confined to the document's "four corners." The Court will interpret the contract's terms according to the meaning that would be ascribed to them by a reasonable third party.¹³

On a motion to dismiss, "[d]ismissal is proper 'only if the defendants' interpretation is the *only* reasonable construction as a matter of law."¹⁴

Looking at the language of the pertinent provision, the Court concludes such is unambiguous and, thus, the plain meaning will be interpreted without any parol evidence. The only reasonable interpretation of the Agreement's plain language is that Plaintiff must first suffer some "losses, costs, damages, liabilities [or] expenses . . . arising out of or resulting from . . . the Retained Liabilities." The loss requirement is a condition precedent to the payment of indemnification and, although Plaintiff asks this Court to ignore that provision, it cannot do so merely to serve Plaintiff's interests. Thus, to further a breach of contract claim, Plaintiff

¹³ Interim Healthcare, Inc. v. Spherion Corp., 884 A.2d 513, 546-47 (Del. Super. 2005) aff'd, 886 A.2d 1278 (Del. 2005) (internal citations omitted).

¹⁴ Deere & Co. v. Exelon Generation Acquisitions, LLC, 2014 WL 904251, at *4 (Del. Super. Mar. 7, 2014) (citing VLIW Tech., LLC v. Hewlett-Packard Co., 840 A.2d 606, 615 (Del. 2003)).

must plead facts which show that Plaintiff suffered some losses, costs, damages, liabilities, or expenses.¹⁵

The only "loss" Plaintiff arguably pleaded is that the Retained Liability was excluded from the Final Net Working Capital and, therefore, Plaintiff had \$487,006.15 less in working capital. However, this is not a loss "arising out of or resulting from" the Retained Liability but rather a "loss" which created the Retained Liability. ¹⁶ If the parties had intended that any amount excluded from Final Net Working Capital be automatically paid to Plaintiff, they could have bargained for and drafted such. The parties are both sophisticated businesses represented by counsel and to add such a gloss to this otherwise unambiguous, all-inclusive, 37-page Agreement would be contrary to the bargain agreed to by the parties.

Plaintiff failed to allege any other loss, cost, damage, liability, or expense arising out of or resulting from the Retained Liabilities. Instead, Plaintiff merely pleaded that Retained Liabilities exist and should be indemnified in full. Such pleading is not sufficient for the contractual indemnification provided in the

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¹⁵ See Certainteed Corp. v. Celotex Corp., 2005 WL 217032, at *4, *6 (Del. Ch. Jan. 24, 2005) (interpreting a nearly-identical contractual indemnification provision as requiring facts which establish both the existence of retained liabilities and losses arising out of such to plead a breach of contract claim for failure to indemnify).

¹⁶ The Agreement provides that any amount excluded from Net Working Capital is a Retained Liability, thus, once the \$487,006.15 was excluded from the Net Working Capital (the alleged "loss") it became a Retained Liability. See Compl. Ex. A Sections 1.6(f) ("any liability listed as excluded from the calculation of Net Working Capital is a Retained Liability and not an Assumed Obligation[.]").

Agreement, which clearly requires pleading facts to establish both that the Retained Liabilities exist *and* that Plaintiff suffered some loss, cost, damage, liability, or expense arising therefrom. Therefore, Plaintiff has failed to plead material facts required for its breach of contract claim, thus, the Motion to Dismiss Count I must be granted.

II. COUNT II – CONVERSION

Defendants' next argument is that Plaintiff does not adequately plead a conversion claim because the Complaint fails to allege facts that Defendants wrongfully exerted dominion over Plaintiff's property. The Complaint alleges that Defendants obtained certain funds from a "lock box not closed," an "[a]uto payment," and accounts receivable. The Complaint alleges that such funds rightfully belonged to Plaintiff and, thus, Defendants' possession of such arose to the level of conversion. Defendants argue that since the money obtained was "credited" to Plaintiff after Defendants' receipt thereof, there was no conversion or such conversion was cured. Plaintiff counters, arguing that Defendants' "crediting" did not cure the prior wrongful exertion of dominion over Plaintiff's funds. Further, Plaintiff contends that Defendants' "crediting" argument is an admission that they did wrongfully possess the funds and, thus, the claims should proceed further on that admission alone.

"Conversion is an act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it." The Complaint alleges, and Defendants concede, that Defendants exerted dominion over funds rightfully belonging to Plaintiff. The Court cannot, at this juncture, say that the Defendants' actions of "crediting" those funds cured any wrongful dominion. On a motion to dismiss, the Court has a limited factual record and, accepting Plaintiff's well-plead allegations of conversion coupled with Defendants' admission of at one time having control of Plaintiff's funds, the Court must find that discovery is necessary to ascertain the extent, if any, of conversion. Thus, at this stage of the case, the Court cannot dismiss Plaintiff's conversion claim.

III. COUNT III – UNJUST ENRICHMENT

Lastly, Defendants argue that Plaintiff's unjust enrichment argument fails because Plaintiff's Complaint does not allege that Defendants unjustly retained a benefit which injured Plaintiff. Similar to Plaintiffs conversion claim, the Complaint alleges that Defendants obtained money in accounts receivable after closing, which rightfully belonged to Plaintiff. Again, Defendants argue that their

¹⁷ Arnold v. Soc'y for Sav. Bancorp, Inc., 678 A.2d 533, 536 (Del. 1996) (internal quotation marks and citations omitted).

¹⁸ Defendants also argue that this claim fails as Plaintiff has failed to allege "the absence of a remedy provided by law." *See Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010). However, the Court finds that Plaintiff's unjust enrichment count is an alternative to the conversion claim and "[t]he Delaware Superior Court Civil Rules expressly permit pleading in the alternative." *Chrysler Corp. (Del.) v. Chaplake Hldgs., Ltd.*, 822 A.2d 1024, 1031 (Del. 2003); Del. Super. Ct. Civ. R. 8(a) ("[r]elief in the alternative or of several different types may be demanded.").

action of "crediting" Plaintiff with the funds cures any unjust enrichment which might have otherwise occurred. Plaintiff counters that, as with the conversion claim, Defendants' "crediting" argument is an admission of its wrongful actions and the "crediting" did not cure the unjust enrichment.

A claim for unjust enrichment requires Plaintiff to allege facts demonstrating "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." Here, Plaintiff alleges that Defendants retained money rightfully belonging to Plaintiff. Defendants concede that the money was due to Plaintiff but argue that it has already been "credited" to Plaintiff. Although such funds may have been "credited" to Plaintiff by Defendants, the Court again cannot, on this limited record, find that there was no unjust enrichment. Therefore, at this stage, the Court will not dismiss the unjust enrichment claim.

CONCLUSION

For the aforementioned reasons, the Court finds that Plaintiff has failed to plead a cognizable claim for indemnification under the Agreement. Thus, Plaintiff's breach of contract claim must be dismissed. However, the Court finds

¹⁹ Nemec v. Shrader, 991 A.2d at 1130.

that Plaintiff pleaded sufficient facts to support the conversion and unjust enrichment claims. Therefore, Defendants' Motion to Dismiss is **GRANTED IN PART** as to Count I and **DENIED IN PART** as to Counts II and III.

IT IS SO ORDERED.

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