

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

| | | |
|-----------------------------|---|--------------------------------|
| RIVERSIDE FUND V, L.P., and |) | |
| RIVERSIDE AMCAD BLOCKER |) | |
| CORP., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | C.A. No.: N14C-10-038 EMD CCLD |
| |) | |
| VISAGAR SHYAMSUNDAR, |) | |
| JUPITER TECHNOLOGY |) | |
| HOLDINGS, LLC, RONALD F. |) | |
| CORNELISON, and EDWARD |) | |
| BERKOWITZ, |) | |
| |) | |
| Defendants. |) | |

Submitted: May 4, 2015
Decided: August 17, 2015

*Upon Consideration of the
Plaintiffs' Motion to Dismiss the Amended Counterclaims of Defendant Ronald F. Cornelison*
GRANTED

Philip Trainer, Jr., Esquire, Marie M. Degnan, Esquire, Ashby & Geddes, P.A., Wilmington, Delaware, and Mark D. Cahill, Esquire, Jean-Paul Jaillet, Esquire, Choate Hall & Stewart LLP, Boston, Massachusetts, *Attorneys for the Plaintiffs and Counterclaim Defendants Riverside Fund V, L.P. and Riverside AmCad Blocker Corp.*

Neal J. Levitsky, Esquire, Seth A. Niederman, Esquire, Fox Rothschild LLP, Wilmington, Delaware, Kenneth G. Menendez, Esquire, Ellis Funk, P.C., Atlanta, Georgia, *Attorneys for Defendant and Counterclaim Plaintiff Ronald F. Cornelison.*

DAVIS, J.

INTRODUCTION

This is a civil action assigned to the Complex Commercial Litigation Division of the Court. The action concerns the purchase of a majority interest in American Cadastre LLC (“AmCad”) by Plaintiffs Riverside Fund V, L.P. and Riverside AmCad Blocker Corp.

(collectively, “Riverside”). On September 16, 2013, Defendants Jupiter Technology Holdings, LLC (“Jupiter”), Visagar Shyamsundar, and Ronald Cornelison sold their majority interest in AmCad to Riverside. The transaction was governed by an Equity Purchase Agreement (“EPA”) which was signed by several parties. At the time of the transaction, Mr. Shyamsundar was AmCad’s Chief Executive Officer and Mr. Berkowitz was AmCad’s Chief Financial Officer.

On October 3, 2014, Riverside filed this lawsuit. In the Complaint, Riverside alleges the following claims: (i) Fraud (against Jupiter and Mr. Shyamsundar); (ii) Aiding and Abetting Fraud (against Mr. Berkowitz); (iii) Civil Conspiracy (against Jupiter, Mr. Shyamsundar, and Mr. Berkowitz); and (iv) Breach of Contract – Indemnification (against Jupiter, Mr. Shyamsundar, and Mr. Cornelison).

Mr. Cornelison first answered the Complaint and asserted counterclaims on November 19, 2014. On January 28, 2015, Mr. Cornelison filed his Answer, Amended Counterclaim and Amended Cross-claim of Defendant Ronald F. Cornelison (the “Answer”). Mr. Cornelison asserts two counterclaims in the Answer against Riverside: (i) Breach of an Implied Covenant of Good Faith and Fair Dealing (the “Implied Covenant Counterclaim”); and, (ii) Indemnification (the “Indemnification Counterclaim”).

In the Implied Covenant Counterclaim, Mr. Cornelison alleges that Riverside breached the implied covenant of good faith and fair dealing that applies to the EPA. Mr. Cornelison asserts that Section 8 of the EPA contains post-closing covenants. Mr. Cornelison then contends that the EPA, as a matter of Delaware law, includes an implied covenant of good faith and fair dealing, and that implied in Section 8 of the EPA is a post-closing duty for Riverside to operate AmCad in a fashion so as to protect the interests of the shareholders of AmCad. Jupiter is one such shareholder. Mr. Cornelison contends that Riverside breached this implied covenant by

mismanaging the operations of AmCad resulting in the closing of AmCad's justice practice and ultimately leading to bankruptcy. As to the Indemnification Counterclaim, Mr. Cornelison seeks indemnification from Riverside under Section 9.3 of the EPA.

Riverside filed Plaintiffs' Motion to Dismiss the Amended Counterclaims of Defendant Ronald F. Cornelison (the "Motion") on February 11, 2015. In response, Mr. Cornelison filed Defendant Ronald F. Cornelison's Answering Brief in Opposition to Plaintiffs' Motion to Dismiss the Amended Counterclaims of Defendant Ronald F. Cornelison (the "Response"). Finally, Riverside submitted Plaintiffs' Reply Brief in Support of Their Motion to Dismiss and Amended Counterclaims of Defendant Ronald F. Cornelison (the "Reply"). The Court held a hearing on the Motion, the Response and the Reply on May 4, 2015. After hearing arguments from the parties, the Court took the matter under advisement.

RELEVANT FACTS¹

As detailed in the EPA, Riverside paid \$32 million to purchase AmCad. Of that amount, Mr. Cornelison received approximately \$5.8 million. A portion of the purchase price for AmCad included Rollover Equity in AmCad. Jupiter received 8,000,000 Series A Preferred Units of AmCad. Mr. Cornelison has a 26.57% interest in Jupiter, and Mr. Shyamsundar has the remaining 73.06% interest. Defendant Edward Berkowitz, was and is the CFO of Jupiter. Mr. Cornelison signed the EPA as one of two "Member Beneficiaries."

AmCad declared bankruptcy several months after the sale under the EPA. In June 2014, AmCad discontinued its court management systems division.

¹ Unless otherwise indicated, the following are the Relevant Facts of this action as the facts were alleged in the Answer. For purposes of the Motion, the Court must view the Answer's alleged facts in a light most favorable to Mr. Cornelison. *See, e.g., Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Acad., LLC*, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010).

The EPA has the following provisions:

Preface

This Purchase Agreement (the “*Agreement*”) is entered into as of September 16, 2013, by and among ... (iii) Jupiter Technology Holdings, LLC, a Virginia limited liability company (the “*Member*”), (iv) the Member Beneficiaries (as defined on Exhibit A) ...

...

Exhibit A – Definitions

...

“Member(s)” has the meaning set forth in the preface.

“Member Beneficiary” means each of Visagar Shyamsundar and Ronald F. Cornelison.

...

Section 9.3 Indemnification Provisions for Benefit of the Member. Subject to the other terms of this Article 9, each Buyer, severally and not jointly, shall indemnify and hold harmless the Member and its successors and assigns (each a “*Member Indemnified Party*” and together, the “*Member Indemnified Parties*”) from and against any and all Damages arising out of or resulting from (a) breach of any of the representations and warranties made by the Buyer in Article 4, or (b) the breach by the Buyer of any of its covenants under this Agreement.

...

Section 9.9 Exclusive Remedy Provision. Each Party acknowledges and agrees that the indemnification provisions of this Article 9 shall be the sole and exclusive remedies for breaches of representations and warranties contained in this Agreement, the failure or non-performance of any covenants or agreements contained in this Agreement, or any other claim in connection with the transactions contemplated by this Agreement, except for (a) the remedies arising from Fraud Claims and (b) the right to seek injunctive or equitable relief. Each Party acknowledges and agrees that the remedies available in this Article 9 and the items excepted in the first sentence of this Section 9.9 supersede any other remedies available at law or in equity. Each Party covenants not to sue, assert any arbitration claim or otherwise threaten any claims other than those expressly provided for under this Article 9, Article 10 or pursuant to the items accepted in the first sentence of this Section 9.9.

The post-closing covenants of the EPA are contained in Article 8. There are three subsections to Article 8: (i) 8.1 (General); (ii) 8.2 (Litigation Support); and (iii) 8.3 (General Release). Subsection 8.1 requires the parties to the EPA, after the “Closing,” to take such further

action as any party may reasonably request that is necessary or desirable to carry out the purposes of the EPA. Subsection 8.2 provides that the parties must reasonably cooperate if a party is actively contesting or defending an action that relates to a pre-Closing event. Finally, subsection 8.3 provides for a general release regarding certain pre-Closing claims.

LEGAL STANDARD

Upon a motion to dismiss, the Court (i) accepts all well-pled factual allegations as true, (ii) accepts even vague allegations as well-pled if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) will only dismiss a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.² However, the court must “ignore conclusory allegations that lack specific supporting factual allegations.”³

DISCUSSION

In the Motion, Riverside contends the Implied Covenant Counterclaim should be dismissed because the implied covenant claim is barred by the EPA’s “Exclusive Remedy” Provision, because the EPA did not create any implied covenant concerning Riverside’s management of AmCad, and because the allegations of mismanagement were vague. Riverside contends that the Indemnification Counterclaim should be dismissed because the provisions of the EPA do not create any obligation of indemnification by Riverside towards Mr. Cornelison.

THE IMPLIED COVENANT COUNTERCLAIM

In Delaware, the implied covenant attaches to every contract by operation of law.⁴ It requires contracting parties “to refrain from arbitrary or unreasonable conduct which has the

² *Cent. Mortg. Co.*, 27 A.3d at 536; *Cedars Acad., LLC*, 2010 WL 5825343, at *3.

³ *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

⁴ *Metro. Life Ins. Co. v. Tremont Grp. Holdings, Inc.*, No. CIV.A. 7092-VCP, 2012 WL 6632681, at *15 (Del. Ch. Dec. 20, 2012).

effect of preventing the other party to the contract from receiving the fruits of the bargain.⁵ The implied covenant is applied to honor the parties' reasonable expectations under an agreement.⁶ To state a claim for breach of the implied covenant, a litigant must allege: (1) a specific obligation implied in the contract; (2) a breach of that obligation; and (3) resulting damages.⁷

Mr. Cornelison states that as a minority member of Jupiter, the 8,000,000 in Series A Preferred Units of AmCad were held in part for his benefit, and that Riverside's alleged mismanagement of AmCad deprived Mr. Cornelison of the value of the Units. Mr. Cornelison contends that Riverside had an implied covenant to use its majority equity position in AmCad's operations to manage AmCad well.

Mr. Cornelison fails to allege sufficient facts to show that such an implied covenant existed in the EPA in connection with Article 8. Mr. Cornelison has not provided facts to show that such an obligation, on the part of Riverside, was implied in the EPA under Article 8. In the Answer, Mr. Cornelison asserts that Article 8 implies a covenant on the part of Riverside to properly manage AmCad. However, Article 8 does not contain any provision as to the ongoing business operations of AmCad and a duty to run AmCad in a proper manner. Instead, the three subsections of Article 8 create three express covenants relating to (i) a general obligation to cooperate and take certain actions after the Closing, that are necessary and desirable to carry out the purposes of the EPA; (ii) provide litigation support in certain circumstances; and (iii) a general release. As the Delaware Supreme Court has recently held, Delaware courts should be

⁵ *Id.*

⁶ *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005).

⁷ *Metro. Life Ins. Co.*, 2012 WL 6632681, at *15.

careful of implying contractual obligations in a contract, when such an obligation is not clearly supported by the terms of the contract.⁸

THE INDEMNIFICATION COUNTERCLAIM

“Under Delaware law, the proper interpretation of language in a contract is a question of law.”⁹ Absent any ambiguity, the Court should interpret a contract in accordance with the plain meaning of language in the document.¹⁰ The Court finds that the plain language of the EPA does not provide Mr. Cornelison with a right of indemnification from Riverside.

Under the terms of the EPA, Mr. Cornelison is identified only as a “Member Beneficiary” and not as a “Member.” The EPA does not contain a clause providing for indemnification of a “Member Beneficiary.” The EPA provides for rights of indemnification in Article 9. Subsection 9.3 provides who Riverside has contractually agreed to indemnify and in what circumstances. Under subsection 9.3, Riverside “shall indemnify and hold harmless the Member and its successor and assigns.” Mr. Cornelison has not pled facts which indicate that he is a successor or assign of Jupiter. As such, Mr. Cornelison has no indemnification rights under the EPA.

CONCLUSION

For the foregoing reasons the Plaintiffs’ Motion to Dismiss the Amended Counterclaims of Defendant Ronald F. Cornelison is **GRANTED**.

IT IS SO ORDERED.

/s/ Eric M. Davis

Eric M. Davis, Judge

⁸ See *gen. Nationwide Em. Managers, LLC v. Northpointe Holdings, LLC*, No. 441,2014 2015 WL 1317705 (Del. March 18, 2015).

⁹ *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 581 (Del. Ch. 2006).

¹⁰ See, e.g., *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997), *State, Dep't of Transp. v. Figg Bridge Engineers, Inc.*, 2013 WL 5365384, *7 (Del. Super. 2013), *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 581 (Del. Ch. 2006).