



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ADCHEMY, INC.,)
)
Plaintiff,)
)
v.) C.A. No. N15C-03-096 MMJ CCLD
)
PLATEAU DATA SERVICES,)
LLC, and ZETA INTERACTIVE,)
Formerly known as)
XL MARKETING CORP.,)
)
Defendants.)

FILED UNDER SEAL

Submitted: April 11, 2017
Decided: June 28, 2017

Upon Plaintiff Adchemy, Inc.'s Motion for Summary Judgment
GRANTED IN PART, DENIED IN PART
Upon Defendants Plateau Data Services, LLC's and Zeta Interactive's Motion for
Partial Summary Judgment
GRANTED

OPINION

Kalama M. Lui-Kwan, Esq. (Argued), Mark I. Wraight, Esq., Gregory L. Huber, Esq., Severson & Werson P.C., Michael F. Bonkowski, Esq., Nicholas J. Brannick, Esq., Cole Schotz P.C., Attorneys for Adchemy, Inc.

John Du Wors, Esq. (Argued), Newman Du Wors LLP, Patricia A. Winston, Esq., Morris James LLP, Attorneys for Plateau Data Services LLC, and Zeta Interactive, formerly known as XL Marketing Corp.

JOHNSTON, J.

PROCEDURAL CONTEXT

This case involves a dispute about an Asset Purchase Agreement (“APA”). Plaintiff Adchemy, Inc. (“Adchemy”) filed its first amended complaint against Defendant Plateau Data Services, LLC (“Plateau”) and its parent company, Defendant Zeta Interactive (“Zeta”) (collectively “Purchasers”) on November 10, 2015. The first amended complaint contains four claims: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) contractual indemnification; and (4) declaratory relief.

Purchasers filed an answer and counterclaims on September 15, 2016. Purchasers asserted four claims: (1) breach of contract; (2) contractual indemnification; (3) fraud; and (4) declaratory relief.

Adchemy filed an answer to the counterclaims on August 15, 2016. Discovery concluded on January 15, 2017. Adchemy has moved for summary judgment. Purchasers seek partial summary judgment.

STATEMENT OF FACTS

The parties entered into the APA on October 28, 2013. The APA provided that Adchemy sell certain assets to Purchasers, in exchange for \$6,000,000. The parties agreed to a payment structure that allowed Purchasers to withhold 43% of the consideration (\$2,600,000). The parties agreed that Purchasers would pay the withheld amount to Adchemy over the following 12 months in a series of

payments. These “Deferred Payments” were scheduled to be paid after certain conditions precedent. If a condition precedent was not satisfied, then Purchasers were not required to make the corresponding Deferred Payment. Purchasers have paid \$200,000 of the \$2,600,000 to date. The payment types, deadlines, and amounts are listed in the chart below.

Payment Type	Payment Deadline	Payment Amount
Customer Retention Payment	January 31, 2014	\$100,000 (paid)
Employee Retention Payment	January 31, 2014	\$100,000 (paid)
Customer Retention Payment	April 30, 2014	\$150,000
Employee Retention Payment	April 30, 2014	\$150,000
Lending Tree Payment	May 27, 2014	\$1,000,000
Customer Retention Payment	October 31, 2014	\$250,000
Employee Retention Payment	October 31, 2014	\$250,000
Hold-Back Amount	April 30, 2015	\$600,000
Deferred Payments Unpaid		\$2,400,000

The payment deadlines all have expired. Pursuant to the APA, if the condition precedent corresponding to the Deferred Payment has occurred, Purchasers owe Adchemy the relevant Deferred Payment. If the condition precedent has not occurred, Purchasers do not owe Adchemy the corresponding

Deferred Payment.

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.¹ All facts are viewed in a light most favorable to the non-moving party.² Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.³ When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.⁴ If the non-moving party bears the burden of proof at trial, yet “fails to make a showing sufficient to establish the existence of an element essential to that party’s case,” then summary judgment may be granted against that party.⁵

ANALYSIS

Adchemy’s Breach of Contract Claim

Lending Tree Payment

The APA allowed Purchasers to withhold \$1,000,000 as a security unless Adchemy obtained a “Successful Resolution of the Lending Tree Suit” (“Lending Tree Payment”). The “Lending Tree Suit” is litigation between Lending Tree,

¹ Super. Ct. Civ. R. 56(c).

² *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).

³ Super. Ct. Civ. R. 56(c).

⁴ *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

⁵ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

LLC (“LendingTree”) and Adchemy in the United States District Court for the Western District of North Carolina.

Purchasers are required to submit the Lending Tree payment to Adchemy if Adchemy obtained a “Successful Resolution” in the “Lending Tree Suit.” The APA defines “Successful Resolution” as:

(i) a summary judgment ruling in favor of Seller [*i.e.*, Adchemy] dismissing all claims made by LendingTree, LLC against Seller in the Lending Tree Suit, (ii) a resolution of the Lending Tree Suit in favor of Seller at Trial the result of which is either that (1) Seller is determined not to have infringed the patent rights at issue in the manner alleged by LendingTree, LLC, and/or (2) such patent rights are declared invalid, (iii) a settlement of the Lending Tree Suit that provides for the grant by LendingTree, LLC for a license for either a fixed license fee of less than \$1,000,000 or a running royalty payment of 2% or less of the net revenue from products or services incorporating the Intellectual Property at issue (either such fee to be paid by Buyer), or (iv) a settlement of the Lending Tree Suit on terms and conditions otherwise acceptable to Buyer and Seller.

Following a jury trial, on March 31, 2014 the United States District Court for the Western District of North Carolina entered a decision in favor of Adchemy. The Court ruled: (1) that LendingTree had not proven by a preponderance of the evidence that Adchemy infringed on the patent rights; and (2) that Adchemy had proven by clear and convincing evidence that the “816 patent” is invalid because it does not identify the correct inventors.

LendingTree filed an appeal of the judgment to the United States Court of Appeals for the Fourth Circuit. While the appeal was pending, Adchemy and

LendingTree entered into a settlement.

Adchemy asserts that this settlement is a “Successful Resolution” under the terms of the APA. Adchemy argues that only a resolution of the LendingTree suit in favor of Adchemy at trial is needed to comply with the APA. Adchemy also argues that Purchasers received the benefit of the bargain because the settlement did not disturb the District Court judgment.

Purchasers argue the settlement does not constitute a Successful Resolution. Purchasers contend that any settlement must provide for the grant by LendingTree of a license, or be on terms and conditions otherwise acceptable to Purchasers and Adchemy in order for it to constitute a Successful Resolution.

The Lending Tree suit was not terminated by summary judgment. Additionally, “Successful Resolution” cannot reasonably be interpreted as a favorable trial verdict, which is reversed on appeal. Thus, the APA definition of “Successful Resolution” referring to “a resolution . . . at trial” must necessarily incorporate an affirmance upon any appeal.

Adchemy accepted the settlement without seeking the approval of Purchasers. Section 2.2 of the settlement agreement explicitly excluded “XL Marketing Corp., Plateau Data Services, LLC, or any past, present, or future successor to Adchemy’s lead-generation business” from being “released, remised or discharged under this Agreement.” As a matter of law, this settlement could not

be “acceptable” to Purchasers, pursuant to the APA definition of “Successful Resolution.”

The Court finds that neither the verdict at trial nor the settlement satisfied the APA’s definition of a Successful Resolution. Therefore, Purchasers did not improperly withhold the Lending Tree Payment. Summary Judgment is granted in favor of Purchasers and denied as to Adchemy, on this issue.

Hold-Back Amount

Pursuant to Section 2.6(c) of the APA, the parties agreed that Purchasers could temporarily withhold \$600,000 (“Hold-Back Amount”) as security for payment of any claims. Purchasers were allowed to withhold this amount until April 30, 2015. After that date, Purchasers could retain the Hold-Back Amount for pending claims by Adchemy for indemnification of losses actually suffered under Section 7.1 of the APA. However, speculative losses would not trigger the ability to retain the Hold-Back Amount.

Adchemy contends that the losses in question are only potential losses, and thus are speculative. Adchemy argues that Purchasers have presented nothing to show that Purchasers’ losses were non-speculative and indemnifiable.

Purchasers argue that Adchemy acted in bad faith when Adchemy negotiated a settlement of the Lending Tree Suit. Purchasers contend that Adchemy’s actions exposed Purchasers to costly litigation and a possible injunction. Purchasers

further assert that Adchemy exposed Purchasers to millions of dollars in penalties for cybersquatting. Purchasers argue that Purchasers are allowed to retain the Hold-Back Amount under the APA.

The Court finds that that there is a genuine issue of material fact as to whether it was proper for Purchasers to retain the Hold-Back Amount. Summary judgment is denied as to Adchemy on this claim.

January 31, 2014 Customer Retention Payment

This payment has been submitted. This issue is no longer in dispute.

January 31, 2014 Employee Retention Payment

This payment has been submitted. This issue is no longer in dispute.

Purchasers' Contract Counterclaim

Transferrable Permits

Purchasers contend that Adchemy failed to disclose that it held unnamed transferrable permits necessary to conduct business and failed to transfer those unnamed permits.

Adchemy asserts that this claim is inconsistent with the evidence. Adchemy argues that Purchasers have not identified any transferrable permits. Adchemy also argues that the permits could not be transferred because the transaction was an asset sale, not a merger or acquisition. Adchemy further contends that there is no evidence that shows that Purchasers have been damaged by the alleged failure to

transfer the permits.

Purchasers argue that Adchemy represented that its licenses were not transferrable. Purchasers assert that in fact, Adchemy could have transferred permits, or revealed that the permits were transferrable if the transaction were structured in certain ways.

The Court finds that there is a genuine issue of material fact as to whether Adchemy improperly failed to disclose and transfer permits. There has been sufficient evidence presented to create a question of fact for the jury as to the potential presence and improper failure to transfer such permits. Adchemy's motion for summary judgment is denied on this issue.

Domain Names and Intellectual Property Rights

Section 2.1 of the APA mandates that Adchemy convey the assets, including the Subject Domain Names, "free and clear of all Encumbrances."

Purchasers contend that Adchemy transferred 137 domain names to Purchasers that are either fully or partially comprised of services marks, or abbreviations of services marks, of Adchemy's customers. Purchasers assert that the APA requires Adchemy to transfer all intellectual property associated with the business to Purchasers. Purchasers argue that the APA mandates that such intellectual property be free and clear of encumbrance. Purchasers also contend that Adchemy warranted that its use of the transferred intellectual property violated

no Third-Party Intellectual Property Rights. Purchasers argue that Adchemy claimed that it also had clear title to the Intellectual Property Rights.

Section 3.3 of the APA provides:

3.3 Noncontravention. Neither the execution, delivery or performance of this Agreement . . . including delivery of the Acquired Assets . . . will . . . (d) result in the imposition of any Encumbrance (other than Permitted Encumbrances) upon any of the Acquired Assets; or (e) violate any material order, writ, injunction, decree, statute, law, ordinance, rule or regulation applicable to [Adchemy] or any of the Acquired Assets.

The APA excludes “Third-Party Intellectual Property Rights” from its definition of “Encumbrance.” However, the APA does not exclude “Subject Domain Names” from its definition of “Encumbrance.”

Purchasers argue that Adchemy did not purport to transfer any Third Party Intellectual Property Rights. Instead, Purchasers claim that Adchemy purported only to transfer Adchemy’s intellectual property that was free of any Encumbrances. Purchasers assert that the transfer of Subject Domain Names which it could not use resulted in a loss of revenue, potential harm to its reputation, and significant potential legal liability.

Adchemy argues that Purchasers’ assertion is based on the assumption that the Intellectual Property Rights only potentially infringe on other marks. Adchemy contends that this necessarily means that Purchasers cannot show that Purchasers have suffered any actual losses. Adchemy also argues that Purchasers received the

bargained-for value of the Intellectual Property Rights. Adchemy contends that Adchemy disclosed the Intellectual Property Rights to Purchasers prior to the acquisition so Purchasers knew what value Purchasers were receiving. Adchemy further asserts that Purchasers assumed potential liabilities arising from the acquired assets. Adchemy also argues that the APA carved out the domain names that Adchemy sold to Purchasers from the APA's definition of "Intellectual Property Rights" in Section 3.8.

The Court finds that there are no genuine issues of material fact on this issue. The undisputed evidence demonstrates that Adchemy transferred encumbered Subject Domain Names to Purchasers in violation of the APA. The alleged "potential infringement," as opposed to actual infringement, does not excuse the breach. The issue of damages is a question of fact. Summary judgment is granted in favor of Purchasers on this issue, and denied as to Adchemy.

Business Financial Statements

Purchasers contend that Adchemy failed to provide Purchasers with certain Business Financial Statements mandated by the APA. Section 3.4 of the APA provides that Adchemy has provided the Business Financial Statements to Purchasers. Section 3.4 sets forth that the provided Business Financial Statements must present fairly the results of operations of the business by Adchemy during 2012 and the first half of 2013.

Purchasers argue that Adchemy did not provide all financial statements to Purchasers. Purchasers contend that the financial statements produced were inadequate because certain information either was omitted or not viewable. Purchasers assert that there is at least a genuine issue of material fact as to whether Adchemy met its obligations under Section 3.4 of the APA.

Adchemy contends that Purchasers have not identified which Business Financial Statements are at issue. Adchemy also argues that the APA only requires it to deliver or make available the Business Financial Statements to Purchasers. Adchemy maintains that there is no evidence that it did not deliver or make available these statements. Adchemy asserts that, in fact, it did make such statements available to Purchasers. Finally, Adchemy contends that the facts do not show that Purchasers have suffered any damages as a result of any alleged failure by Adchemy to provide Purchasers with any Business Financial Statements.

The Court finds that Purchasers have failed to specifically identify any Business Financial Statement that has not been provided or made available to Purchasers. Purchasers have not presented evidence creating genuine issues of material fact as to: the availability and adequacy of the Business Financial Statements; or any damages resulting from Purchasers' alleged failure to comply with the APA.

Therefore, summary judgment is granted in favor of Adchemy on this issue.

Purchasers' Fraud Counterclaim

Transferrable Permits

To prove fraud, Purchasers must produce evidence demonstrating:

(1) A false representation; (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) as a result, the plaintiff suffered damages.⁶

Purchasers argue that Adchemy committed fraud by failing to disclose and transfer numerous permits critical to the purchased business. Purchasers contend that Adchemy knowingly did not convey certain mortgage licenses held by Adchemy that were necessary to continue business, and that those licenses could have been transferred to Purchasers. Purchasers contend that Adchemy made a false representation in Section 3.8 of the APA when it represented that "[t]here are no transferrable Permits issued to or held by Seller that are required to conduct the Business as presently conducted." Purchasers assert that Adchemy made this statement to induce Purchasers to enter into the APA.

Adchemy claims that there has been no showing as to why this representation is false or misleading. Adchemy also contends that there is no evidence that Adchemy made the alleged assertion with knowledge that it was

⁶ *Prof'l Investigating & Consulting Agency, Inc. v. Hewlett-Packard Co.*, 2014 WL 4627141, at *9 (Del. Super.).

false. Adchemy further contends that no damages stem from any alleged fraud.

The Court finds that Purchasers have failed to produce any evidence that Adchemy engaged in any fraudulent activity as to its alleged failure to issue transferrable permits. Purchasers have not established a *prima facie* case that Adchemy made a false statement, with the requisite intent, upon which Purchasers justifiably relied, resulting in damages to Purchasers. Summary judgment is granted in favor of Adchemy as to this claim.

Intellectual Property Rights

Purchasers argue that Adchemy fraudulently claimed that Adchemy held and could transfer the rights to certain domain names, but that the information actually infringed on third-party intellectual property rights.

Adchemy argues that there is no evidence showing that the representation is false or misleading. Adchemy also contends that there is no evidence that Adchemy made any assertion with knowledge that it was false. Adchemy maintains that it is not feasible for Purchasers to reasonably rely on any such representation by Adchemy without conducting due diligence of its own. Adchemy further asserts that there has been no sufficient showing of damages suffered by Purchasers due to any such representation.

The Court finds that Purchasers have failed to produce evidence indicating any fraudulent representation made by Adchemy relating to intellectual property

rights. The alleged misrepresentation does not constitute fraud. There is no evidence of infringement on third-party rights. Summary judgment is granted in favor of Adchemy on this issue.

Business Financial Statements

Purchasers contend that Adchemy falsely stated that it would provide Purchasers with Business Financial Statements mandated by the APA. Purchasers argue that Adchemy did not produce the mandatory Business Financial Statements even though Adchemy knew or should have known that Adchemy should have done so.

Adchemy contends that Purchasers have not suffered any damages as a result of any alleged fraudulent representation by Adchemy. Adchemy argues that even if Adchemy did not deliver the Business Financial Statements to Purchasers, the evidence does not show whether or how Purchasers were injured.

The Court already has ruled that Purchasers have failed to establish a *prima facie* case that Adchemy failed to provide certain Business Financial Statements. Therefore, there can be no basis for a fraud claim relating to Business Financial Statements. Summary judgment is granted in favor of Adchemy on this issue.

Contractual Indemnification and Declaratory Relief Claims

Pursuant to Section 7.2 of the APA, contractual indemnification is available against damages arising from or connected with:

(i) any inaccuracy in or breach of any representation or warranty of Buyer set forth in this Agreement or any Ancillary Agreement; (ii) any breach of any covenant, agreement or obligation to be performed under this Agreement by Buyer; (iii) any failure to satisfy, perform or discharge any Assumed Liabilities; or (iv) any Liability arising out of the ownership or operation of the Acquired Assets or the Business after the Closing Date.

The Court finds that there is a genuine issue of material fact as to whether the Hold-Back Amount was improperly withheld. Adchemy's Motion for Summary Judgment must be denied on this issue of contractual indemnification and declaratory relief.

CONCLUSION

The Court finds that the Lending Tree settlement was not a "Successful Resolution" under the terms of the APA. The Court finds that Purchasers properly withheld the Lending Tree Payment. **THEREFORE**, summary judgment is hereby **GRANTED** in favor of Purchasers and **DENIED** as to Adchemy.

The Court finds that there is a genuine issue of material fact as to whether it was proper for Purchasers to retain the Hold-Back Amount. **THEREFORE**, Adchemy's Motion for Summary Judgment is hereby **DENIED**.

Purchasers have submitted the January 31, 2014 Customer Retention Payment and the January 31, 2014 Employee Retention Payment to Adchemy. **THEREFORE**, summary judgment on these issues is hereby **DENIED** as moot.

The Court finds that there is a genuine issue of material fact as to whether

Adchemy improperly failed to disclose and transfer permits. There has been sufficient evidence presented to create a question of fact for the jury as to the potential presence and improper failure to transfer such permits. **THEREFORE**, the Court hereby **DENIES** Adchemy's Motion for Summary Judgment.

The Court finds that the undisputed evidence demonstrates that Adchemy transferred encumbered Subject Domain Names to Purchasers in violation of the APA. The alleged limitation to "potential infringement" does not excuse the breach. The issue of damages is a question of fact. **THEREFORE**, summary judgment is hereby **GRANTED** in favor of Purchasers and **DENIED** as to Adchemy.

The Court finds that Purchasers have failed to specifically identify any Business Financial Statement that has not been provided or made available to Purchasers. Purchasers have not presented evidence creating genuine issues of material fact as to: the availability and adequacy of the Business Financial Statements; or any damages resulting from Purchasers' alleged failure to comply with the APA. **THEREFORE**, Adchemy's Motion for Summary Judgment is hereby **GRANTED**.

The Court finds that Purchasers have failed to establish a *prima facie* case in support of Purchasers' fraud counterclaim. **THEREFORE**, Adchemy's Motion for Summary Judgment on the Issue of Fraud is hereby **GRANTED**.

The Court finds that there is a genuine issue of material fact as to whether the Hold-Back Amount was improperly withheld. **THEREFORE**, Adchemy's Motion for Summary Judgment is hereby **DENIED** on the issues of Contractual Indemnification and Declaratory Relief as to the Hold-Back Amount.

IT IS SO ORDERED.



The Honorable Mary M. Johnston