

SUPERIOR COURT
OF THE
STATE OF DELAWARE

PATRICIA A. WINSTON
JUDGE

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VIA FILE&SERVEXPRESS

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Re: *Fedelta Partners, LLC v. Aware360 Ltd., et al.,*
C.A. N25C-03-253 PAW CCLD

Dear Counsel:

This letter opinion addresses Plaintiff's motion for partial summary judgment. In writing for the parties, I assume the readers' familiarity with the background of the case. For the following reasons, the motion is denied.

In this action, Plaintiff contends that Defendants made an unequivocal, positive, and unconditional statement about their intent not to make Payment 3 when it refused to make an escrow payment for the undisputed portion of Payment 3—

\$1,618,771—both parties accepted during the pre-litigation negotiations.¹ Because Location Based Holdings Corp. d/b/a AlertGPS (LBH) historically used accrual accounting, under which debt was treated as an operating expense rather than a reduction in revenue, and because LBH historically recorded a bad debt expense only after confirming a debt was uncollectable, Plaintiff also contends that income from Sutter and other Disputed Slow Pay Customers must be included in the Payment 3 calculation because LBH would have counted its income as revenue.²

Defendants contend their statements that they would not pay “at that time” cannot be read as unequivocal, positive, and unconditional, because they confirmed they would make a contractually contemplated payment, with interest, if applicable.³ Defendants also argue that three of the Disputed Slow Pay Customers, including Sutter, cannot be included in the Payment 3 calculation because their contracts were entered into after closing.⁴

Summary judgment is appropriate “when the [record] show[s] [] there is no genuine issue as to any material fact, and [] the moving party is entitled to a judgment

¹ D.I. 23, Op. Br. in Supp. of Pl.’s Mot. Summary J. (hereinafter “Op. Br.”) at 20-24.

² *Id.* at 17.

³ D.I. 33, Defs.’ Opp’n to Pl.’s Mot. Summary J. (hereinafter “Ans. Br.”) at 6-8.

⁴ *Id.* at 9.

as a matter of law.”⁵ The moving party bears the burden of demonstrating the undisputed facts entitle it to judgment as a matter of law.⁶ “When the moving party sustains the initial burden of showing the nonexistence of any material issues of fact, the burden shifts to the non-moving party to substantiate its adverse claim by showing that there are material issues of fact in dispute.”⁷ “If the facts permit reasonable persons to draw from them but one inference, the question is ripe for summary judgment.”⁸ Summary judgment will not be granted, however, “if, upon an examination of all the facts, it seems desirable to inquire thoroughly into them in order to clarify the application of the law to the circumstances.”⁹

A. THE ANTICIPATORY REPUDIATION CLAIM RESTS ON AN IMPLIED ESCROW OBLIGATION THAT THE CONTRACT DOES NOT CONTAIN.

“Under Delaware law, repudiation is an outright refusal by a party to perform a contract or its conditions entitling ‘the other contracting party to treat the contract as rescinded.’”¹⁰ To prove anticipatory repudiation, a claimant must point to a

⁵ Super. Ct. Civ. R. 56(c).

⁶ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

⁷ *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) (citing *Moore*, 405 A.2d 679, 680).

⁸ *Id.* at 1364 (citing *Wootten v. Kiger*, 226 A.2d 238 (Del. Super. 1967)).

⁹ *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

¹⁰ *CitiSteel, USA, Inc. v. Connell Limited Partnership*, 758 A.2d 928, 931 (Del. Aug. 11, 2000) (quoting *Sheehan v. Hepburn*, 138 A.2d 810, 812 (Del. Ch. Feb. 20, 1958)).

promisor’s “unequivocal statement” that is “positive and unconditional” about its intent to not perform its contractual obligation.¹¹

Plaintiff has failed to establish that the alleged statement—Defendants would not be in a position to make Payment 3 at that time, but intend to make Payment 3, including any applicable interest—is an unequivocal, positive, and unconditional statement of Defendants intent not to pay. Setting aside the intent of Defendants’ statement, Plaintiff’s basis for its anticipatory repudiation claim is Defendants’ refusal to place the lowest agreed-upon amount into escrow,¹² yet Plaintiff failed to support this contention. In fact, the SPA sets out a process for resolving disputes over Deferred Payments Calculations: Defendants submit a Calculation Statement; Plaintiff reviews and either accepts or objects to it; if Plaintiff objects, the parties enter a good-faith negotiation period; and if they cannot agree on a finalized

¹¹ *Carteret Bancorp, Inc. v. Home Grp., Inc.*, 1988 WL 3010, at *5-6 (Del. Ch. Jan. 13, 1988).

¹² See Compl. ¶¶ 64-72 (alleging that Defendant did not deposit the undisputed payment floor amount into escrow); Op. Br. at 10-11 (“After an unsuccessful negotiation period, the deadline under the SPA for the parties to agree upon a Deferred Payment Calculation for Payment 3 expired. [Plaintiff] requested that [Defendant] place in escrow the lowest amount agreed upon by the parties, \$1,618,771, while the parties negotiated their dispute regarding the additional \$347,452.52 . . . [Plaintiff] requested that [Defendant] pay the Undisputed Payment Floor . . . into escrow within ten (10) days from [Plaintiff’s] request . . . [Defendant] did not comply.”); See Op. Br. Ex. F (notifying Defendant of Plaintiff’s demands, which Defendant refused to comply).

calculation during that period, they submit the dispute to an accounting firm.¹³ No provision requires Defendants to place any amount in escrow, even if the parties agree a floor amount is owed.¹⁴

Plaintiff relies on the general Payment 3 provision, which broadly provides that Defendants shall remit Payment 3 to an escrow agent once calculated.¹⁵ Plaintiff's reading assumes there is no dispute as to what Payment 3 is, or any dispute has been resolved. "Where sophisticated parties addressed a certain contractual issue, the Court will not imply terms that parties failed to include but which could have been drafted."¹⁶ Plaintiff is not only asking the Court to imply such a term here, but it is also moving for summary judgment on its anticipatory repudiation claim on the grounds that Defendants breached that implied term.

B. A FULLER FACTUAL RECORD IS NECESSARY TO RESOLVE THE CUSTOMER-RELATED DISPUTE.

There is no genuine dispute of material fact regarding the Disputed HHS Customers. While Plaintiff submits its contentions concerning the Disputed HHS Customers in detail, along with its basis for summary judgment, Defendants do not

¹³ See generally SPA Ex. A (hereinafter "Deferred Payments Agreement") § 2.

¹⁴ *Id.*

¹⁵ See generally Op. Br. at 10-12; Deferred Payments Agreement § 1(c)(ii)(2)(b).

¹⁶ *AG Mobile Holdings, L.P. v. H.I.G. Mobile, L.P.*, 2025 WL 501088, at *12 (Del. Ch. Feb. 13, 2025) (internal quotations omitted).

address these arguments and do not discuss any Disputed HHS Customer in their opposition.¹⁷ Failure to respond to an argument raised in a motion constitutes waiver.¹⁸

As previously stated, Plaintiff contends that income from Sutter and other Disputed Slow Pay Customers must be included in the Payment 3 calculation because LBH's use of accrual accounting would have counted their income as revenue, and because LBH historically recorded a bad debt expense only after confirming a debt was uncollectable. Defendants counter that Sutter and two of the Disputed Slow Pay Customers cannot be included in the Payment 3 calculation because their contracts were entered into after closing. Defendants also raise various other arguments that they say preclude summary judgment as to other Disputed Slow Pay Customers, including that Plaintiff seeks to include amounts invoiced to Franciscan Alliance even though that company went out of business before Plaintiff invoiced it.¹⁹

Beyond the Disputed HHS Customers and the Disputed Slow Pay Customers, there is a third category of customers in dispute: the "miscellaneous customers." Plaintiff did not move for summary judgment as to these customers, yet they make

¹⁷ *See generally* Ans. Br.

¹⁸ *See Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999).

¹⁹ Ans. Br. at 10-11.

up the majority of the 26 total Disputed Customers.²⁰ Accordingly, “it seems desirable to inquire thoroughly” into these factual issues that Defendants raise.²¹ Furthermore, Defendants note that at this juncture, “[Plaintiff] has yet to produce any documents” in discovery at all, let alone documents about how LBH historically would’ve treated income.²² The question of whether LBH would have historically treated an item of income as revenue is central to the SPA’s definition of “Revenue.” Allowing the parties to engage in more discovery on LBH’s historical treatment of income would be helpful to the Court. Accordingly, Plaintiff’s motion for partial summary judgment is denied.

Very truly yours,

/s/ Patricia A. Winston

Patricia A. Winston, Judge

²⁰ See Op. Br. at 13, 18-20 (establishing that Sutter and the Slow Pay Customers represent six, Disputed HHS Customers represent six, and miscellaneous customers represent fourteen of the total Disputed Customers, respectively).

²¹ *Ebersole*, 180 A.2d 467, 468 (Del. 1962).

²² Ans. Br. at 11.