NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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April 16, 2021

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Re: FVCBank v. Transform Holdco LLC
Case No. CL-2020-3285

Dear Counsel:

This case came before the Court on March 12, 2021, for a hearing on Defendant Transform Holdco's Motion for Summary Judgment. Having taken the Motion under advisement and after reviewing the memoranda of law and arguments submitted by Counsel, the Court issues the following opinion granting Defendant's Motion for Summary Judgment.

BACKGROUND

On February 26, 2020, Plaintiff FVCBank filed a Complaint against Defendant Transform Holdco. The Complaint alleges that on May 19, 2017, Plaintiff provided Dominion with an $8 million line of credit loan facility to be used in construction activities. Further, on May 25, 2017, Plaintiff filed a UCC Financing Statement with the "Virginia State Corporation Agreement" reflecting Plaintiff's blanket security interest in Dominion's assets, including all of its accounts receivable. On February 15, 2019, Plaintiff provided Dominion with an additional $1.5 million term loan to refinance a portion of the outstanding principal balance of the line of credit. The Complaint further alleges Dominion and the Guarantors are in default of these loans and are indebted to the Plaintiff. Consequently, Plaintiff demanded from Defendant all sums due and owing to Dominion by Defendant, and the Plaintiff alleges Defendant failed to comply with the Demand.

Defendant was formed in September 2018 and has several subsidiaries. Some of Defendant's subsidiaries contracted with Dominion on April 8, 2019, and the contract expired on April 7, 2020. However, no evidence has been presented to suggest Defendant itself ever entered into a contract with Dominion.

On October 15, 2018, Sears Holding Corporation ("Sears") filed for Chapter 11 bankruptcy. On February 11, 2019, Defendant and its subsidiaries acquired substantially all of Sears' assets out of the bankruptcy proceedings. During the bankruptcy proceedings, the United States Bankruptcy Court for the Southern District of New York held Defendant does not assume successor or other derivative liability from Sears' contracts with Dominion.

The Complaint brings one count for Collection and Enforcement by Secured Party Under Va. Code § 8.9A-607. The Plaintiff is specifically seeking $179,712.74 from Defendant and claims it is undisputed that Dominion's books and records show Defendant is indebted to Dominion in that amount.

Shortly after being served with the Complaint, Defendant filed a Demurrer which was subsequently overruled. On January 21, 2021, Defendant filed a Motion for Summary Judgment, arguing Plaintiff failed to produce any evidence indicating Defendant had a legal obligation to pay Dominion the amount listed in Dominion's invoices. Plaintiff responded by arguing the invoices from Dominion are addressed to Transform HoldCo, and further argues Defendant failed to produce any evidence showing the invoices had been paid. After oral arguments on the matter, both parties were instructed to submit supplemental briefs to the Court.

ANALYSIS

I. Summary Judgment Standard

Summary judgment is intended to allow courts to "bring litigation to an end at an early stage, when it clearly appears that one of the parties is entitled to judgment within the framework of the case." *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 5 (1954). Nevertheless, the Supreme Court of Virginia has indicated repeatedly that summary judgment is considered a drastic remedy and is strongly disfavored. *Smith v. Smith*, 254 Va. 99, 103 (1997). Accordingly, a trial court considering a motion for summary judgment must "accept as true 'those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason.'" *Klaiber v. Freemason Assocs.*, 266 Va. 478, 484 (2003) (internal citations omitted). However, when there is no material fact genuinely in dispute, and when the moving party is entitled to judgment as a matter of law, the court shall enter judgment in that party's favor. Va. Sup. Ct. R. 3:20. Furthermore, not merely "if evidence is conflicting on material point" but "if reasonable persons may draw different conclusions from the evidence, summary judgment is not appropriate." *Doris Knight Fultz v. Delhaize America, Inc.*, 278 Va. 84, 88 (2009).

Pursuant to Virginia Supreme Court Rule 3:20,

> Any party may make a motion for summary judgment at any time after the parties are at issue . . .. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, that the moving party is entitled to judgment, the court shall grant the motion. Summary judgment . . . may be entered as to the undisputed portion of a contested claim or on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment may not be entered if any material fact is genuinely in dispute.

Additionally, in actions where the only parties to the action are business entities and the amount in controversy is more than $50,000, depositions and affidavits may be used to support or oppose a motion for summary judgment. Consequently, this Court can consider such documents in this case. Finally, a court need not wait until discovery has closed before ruling on a motion for summary judgment. *See* Va. R. Sup. Ct. 3:20.

II. Legal Obligation of Defendant

The Complaint brings forth the following claim: Collection and Enforcement by Secured Party Under Va. Code § 8.9A-607. Such statute provides the mechanisms for secured parties to collect and enforce their security. Va. Code Ann. § 8.9A-607. Specifically, this statute provides a secured party

> may enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral.

Id. Put another way, a secured party may "contact an account debtor in the event of default, take any proceeds to which the secured party is entitled, and enforce the obligations of the account debtor." *Best Medical Intern., Inc. v. Wells Fargo Bank, N.A.*, 937 F.Supp.2d 685, 705 (E.D.Va. 2013). Nevertheless, there must be an obligation on behalf of the account debtor; the debtor must have some legal right for the secured party to collect on.

Here, Plaintiff is the secured party because they filed a security interest in Dominion's accounts receivable. Dominion is the debtor of Plaintiff who is in default, and Defendant is the account debtor. Consequently, an obligation between Defendant and Dominion must exist for Plaintiff to capitalize on that obligation. If Dominion would have no legal ground to collect any money from Defendant, surely Plaintiff cannot collect simply by way of being a secured party. One standing in another's stead can be cloaked only in the rights of the original obligee. No more, no less.

Plaintiff argues Defendant's failure to respond or object to Plaintiff's Demand constitutes an account stated. The Court finds this argument unpersuasive. The "Demand" sent by Plaintiff to Defendant simply instructs Defendant to pay to Plaintiff "any sums that are due and owing" to Dominion. The Demand does not specify which invoice or what sums specifically Defendant owes to Dominion, if any. Plaintiff issued this "Demand" on January 8, 2020 and filed this lawsuit against Defendant less than two months later. Further, Plaintiff cannot recover sums based on invoices from Dominion if they cannot indicate Defendant had an obligation to pay Dominion any sums. *See* Va. Code Ann. § 8.9A-607.

A. Contract with Defendant HoldCo

Plaintiff provided hundreds of pages of invoices from Dominion listing "Transform Holdco, LLC" as the customer. Plaintiff also provides an Invoice Aging Report generated on January 6, 2020, showing the total due from Defendant. Those invoices and the aging report appear to be the only thing Plaintiff can produce suggesting Defendant owes money to Dominion. No contract between Dominion and Defendant has been produced. In contrast, Defendant supplied a Declaration of Todd Lemmert, the Divisional Vice President for Transform SR Holding Management, a subsidiary of Defendant, affirming Defendant has not entered into any contract with Dominion and has not transacted any business with Dominion. (Lemmert Decl., ¶ 4). Moreover, many of the invoices addressed to Defendant are dated before Defendant was formed as an entity. Thus, while Plaintiff argues Defendant owes money to Dominion, Plaintiff has presented no evidence nor pled any existence of a legal obligation between Defendant and Dominion.

When specifically asked in an interrogatory what facts Plaintiff has to support its claim, Plaintiff was only able to point to Dominion's books and records and invoices. (Pl.'s Obj. and Answers to Def.'s First Interrog. No. 2.) Moreover, when this Court asked Plaintiff what Defendant's legal obligation was to Dominion, Plaintiff was unable to identify anything besides the invoices. These invoices were submitted without any corroborating declaration or affidavit. Plaintiff presented no declaration from a Dominion employee who could identify the legal obligation giving rise to the invoices. Conversely, Defendant submitted a declaration from a Transform Subsidiary Vice President averring Defendant never contracted with Dominion and never transacted business with Dominion.

Without a legal obligation between Defendant and Dominion, Plaintiff is not entitled to collect any sums from Defendant. Even when accepting as true "those inferences from the facts that are most favorable to [Plaintiff]", there is no material fact in dispute. *Klaiber*, 266 Va. at 484. Furthermore, even when assuming, *arguendo*, all the invoices remain unpaid, there is no evidence, shown, proffered, or pled of a legal obligation between Defendant and Dominion.

B. Contract with Defendant's Subsidiaries

Both parties seem to agree Dominion entered into a contract with Defendant's subsidiaries on April 8, 2019. However, this contract cannot form the legal obligation of Plaintiff's claim in this case. When asked to identify all facts and documents that support

Plaintiff's contention that any subsidiary of Defendant owes money to Dominion, Plaintiff answered by stating "FVCBank does not make any such contention at this time." (Pl.'s Obj. and Answers to Def.'s First Interrog. No. 3.) Further, when asked to identify any other entity or person who owes money to Dominion for which Defendant is responsible, Plaintiff answered by stating they make no such contention. (*Id.* at No. 4.) Consequently, it can be presumed Plaintiff does not contend any money is owed to Dominion on the basis of the April 8, 2019 contract between Dominion and Defendant's subsidiaries. Because it is undisputed that Defendant's subsidiaries do not owe money to Dominion, the April 2019 contract does not create a legal obligation for Defendant to pay money to Dominion.

C. Contract with Sears

Both parties acknowledge the existence of at least one contract between Sears and Dominion.

a. Invoices Dated Before Defendant's Acquisition of Sears

During the bankruptcy proceedings, the United States Bankruptcy Court for the Southern District of New York held Defendant does not assume successor or other derivative liability from Sears' contracts with Dominion. Specifically, the Bankruptcy Court held "except with respect to any Assumed Liabilities or as otherwise set forth in the Asset Purchase Agreement, Buyer's acquisition of the Acquired Assets from the Debtors shall be free and clear of any "successor liability" claims of any nature whatsoever." *In re Sears Holdings Corporation, et al.*, No.18-23538 (RDD) (Bankr. S.D.N.Y. Feb. 8, 2019). However, during the March 12, 2021 hearing, Plaintiff argued there are certain common law exceptions to the prohibition of successor liability. When making that argument, Plaintiff identified no case law, nor did it specify what common law exception would be applicable in this case. Consequently, this Court will not consider that argument.

In Plaintiff's supplemental brief, counsel points to the Asset Purchase Agreement ("APA") between Defendant and Sears, which provides for at least fifteen categories of liabilities which Defendant assumed after the purchase of Sears. Specifically, Plaintiff argues Defendant is responsible for liabilities arising prior to the closing date relating to the presence of hazardous substances at Defendant's acquired properties. The APA, under the section titled "Assumption of Liabilities" holds that Defendant shall assume "all Liabilities arising prior to, at or after the Closing Date under or pursuant to any Environmental Law relating to the presence of Hazardous Substances at, on, in, under or migrating to or from any Acquired Asset."

The APA does create a legal obligation—between Defendant and Sears. But Plaintiff has put forth no evidence indicating Dominion contracted with Sears to remove hazardous material. The only evidence of this is from Plaintiff's Supplemental Brief wherein it is stated, "Dominion's work at the acquired properties included addressing leaks of refrigerant, which is a hazardous substance and thus would constitute an Assumed Liability." (Pl.'s Supp. Br., 3.) Again, however, no contract has been produced between Defendant and Dominion or Sears and Dominion that would substantiate this claim, and such claim was not addressed in the Complaint.

Even if a contract was produced, the Order Approving the APA entered on February 8, 2019, provides

> The sale and transfer of the Acquired Assets of the Debtors to the Buyer, including the assumption by the Debtors and assignment, transfer and/or sale to the Buyer of the Assigned Agreements, will not subject the Buyer or ESL to any liability (including any successor liability) under any laws, including any bulk-transfer laws, or any theory of successor or transferee liability, antitrust, environmental, product line, de factor merger or substantial continuity or similar theories, with respect to the operation of the Debtor's business prior to the Closing, and for each Assigned Agreement, the applicable Assumption Effective Date, except that, upon the Closing or such other date as specified in the Asset Purchase Agreement, the Buyer shall become liable for the applicable Assumed Liabilities.

In re Sears Holdings Corporation, et al., No.18-23538 (RDD) (Bankr. S.D.N.Y. Feb. 8, 2019).

The language from the Bankruptcy Court clearly indicates Defendant will not be liable on any theory of successor liability. A breach of an alleged contract regarding removal of hazardous materials does not create environmental liability. It creates contractual liability. Thus, the assumed liability concerning environmental law does not apply to this alleged contract, and Defendant cannot be held liable for such alleged contracts.

b. Invoices Dated After Defendant's Acquisition of Sears

Plaintiff avers nearly $60,000 of the invoices relate to services ordered after Defendant purchased certain assets and liabilities of Sears. However, again, Plaintiff has failed to identify any contractual or legal obligation between Defendant and Dominion.

CONCLUSION

Even when viewing all factual inferences in the Plaintiff's favor, the Plaintiff has failed to introduce any evidence demonstrating Defendant has a legal obligation to pay any money to Dominion. Moreover, there is no material fact in dispute concerning this case and consequently, Defendant is entitled to summary judgment. The Court requests Defendant's counsel prepare an order reflecting the Court's ruling.

Sincerely,

[redacted]

Penney S. Azcarate
Fairfax County Circuit Court

PSA/mra