NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 29, 2018

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Re. Total Technology Solutions, LLC v. ActioNet, Inc., CL-2017-10745

Dear Counsel:

This matter comes before the Court on ActioNet, Inc.'s Demurrer to Total Technology Solutions, LLC's First Amended Complaint, filed on October 6, 2017.

On October 1, 2014, Total Technology Solutions ("Total Techonology") entered into a Teaming Agreement with ActioNet, Inc. ("ActioNet"). The parties created the Teaming Agreement in response to a solicitation by the United States Department of Labor. The Teaming Agreeent provided that if a contract was awarded to ActioNet, Total Technology and ActioNet would negotiate a Subcontract Agreement to outline the scope of contemplated work.

On May 5, 2015, the parties entered into a Subcontract Agreement. Total Technology agreed to an exclusivity clause in the Subcontract Agreement giving up the right to obtain work from other companies. Total Technology avers that ActioNet failed to abide by both the Teaming Agreement and the Subcontract Agreement when it failed to provide work pursuant to a contract with the Department of Labor.

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On September 7, 2017, Total Technology filed an Amended Complaint, alleging: (I) Breach of Contract (Teaming Agreement); (II) Fraud in the Inducement (Teaming Agreement); (III) Breach of Contract (Subcontract Agreement); (IV) Breach of Contract (Subcontract Agreement); (V) Fraud in the Inducement (Subcontract Agreement); (VI) Quantum Meruit; (VII) Unjust Enrichment; (VIII) and Tortious Interference with Business Expectancy. Total Technology claims a loss of $750,000 in expected profits.

On September 27, 2017, ActioNet demurred, asserting that neither the Subcontract Agreement nor Teaming Agreement constitute a valid, enforceable contract because, *inter alia*, both agreements waive any possibility of recovery. On November 3, 2017, this Court sustained the demurrer to Counts I, II, V, and VIII, finding that only the Subcontract Agreement was an enforceable contract that contained a valid exculpatory clause. The Court reserved its ruling for Count VI for Quantum Meruit and Count VII for Unjust Enrichment and requested supplemental memoranda from the parties.

The issue now before the Court is whether Total Technology may recover under the Subcontract Agreement using a theory of quantum meruit and/or unjust enrichment.

A demurrer "does not test matters of proof and, unlike a motion for summary judgement, does not involve evaluating and deciding the merits of a claim; it tests only the sufficiency of factual allegations to determine whether the pleading states a cause of action." *Welding, Inc. v Bland County Serv Auth*, 261 Va. 218, 227-28 (2001) (citations omitted). When a plaintiff's cause of action "is asserted in mere conclusory language" and supported only by "inferences that are not fairly and justly drawn from the fact[s] alleged," the Court must sustain the demurrer. *Bowman v. Bank of Keysville*, 229 Va. 523, 541 (1985).

It is settled law in Virginia, and elsewhere, that the purpose of equitable causes of action are to prevent one party unjustly benefiting from another's services when a valid contract does not exist. *See, e g, Mongold v Woods*, 278 Va. 196, 204 (2009). Indeed, an obligation *quasi ex contractu* may be brought only in the absence of an express, enforceable contract. *See Kern v. Freed Co.*, 224 Va. 678, 681-81 (1983). A sufficiently alleged cause of action for quantum meruit or unjust enrichment requires not only showing a benefit to the defendant, but also that the defendant promised to pay the plaintiff and accepted such benefit. *See Schmidt v Household Fin Corp, II*, 276 Va. 108, 116 (2008).[1]

In this case, Total Technology failed to sufficiently plead a cause of action for quantum meruit and unjust enrichment. The Subcontract Agreement, as previously held by this Court, is an express, enforceable contract between the parties covering the services for which Total Technology now seeks equitable recovery. The Complaint alleges equitable claims which are based solely on the Subcontract Agreement, and fails to state any obligation outside those provided by the Subcontract Agreement.

[1] In Virginia, the elements necessary to state a cause of action for quantum meruit and unjust enrichment are virtually the same.

Implicit in this Court's finding is that the exculpatory clause does not render the Subcontract Agreement unenforceable, thereby allowing Total Technology to claim equitable remedies. An exculpatory clause unequivocally frees the enforcing party from liability arising out of performance of the contract, or lack thereof. *Kocinec v. Pub. Storage, Inc.*, 489 F. Supp. 2d 555, 561 (E.D. Va. 2007). The self-evident purpose of an exculpatory clause is to limit liability, not render the contract unenforceable. The rationale underlying the enforceability of exculpatory clauses is based upon the doctrine of freedom of contract—allowing parties to provide for the terms and conditions that govern their contractual relationship. Indeed, a basic cannon of contract interpretation commands that a court shall look no further than the "four corners of the instrument under review" when the language of the contract is clear and unambiguous. *Va. Elec. & Power Co v. N Va Reg'l Park* Auth., 270 Va. 309, 316, (2005) (quoting *Utsch v. Utsch*, 266 Va. 124, 129 (2003)).

The Subcontract Agreement provides ActioNet shall have no:

> liability with respect to their obligations hereunder or otherwise for any indirect, special, incidental, punitive or consequential damages, including without limitation damages for loss of use, *lost profits*, lost savings or other financial loss. . . *[t]his limitation applies to all causes of action* in the aggregate, including without limitation, breach of contract, breach of warranty, negligence, misrepresentation, and other torts. Both parties agree that the fees, remedies and limitations herein from an essential or the bargain and represent an equitable allocation of risks between the parties.

Compl. ¶ 1.15 (emphasis added).

Total Technology's asserted claims for lost profits were clearly within the contemplations of the parties at the time they entered into the contract. A simple reading of the contract leads this Court to conclude that the parties intended any and all claims related to lost profits to be unenforceable. There is no plausible interpretation of the provision by which one could find it refers only to causes of action in law and not equity. The Subcontract explicitly states that, "[t]his limitation applies to all causes of action," and "limitations herein form an essential [part] of the bargain and represent an equitable allocation of risks between the parties..." Such clear and unambiguous language demonstrates that the parties' negotiated away any recovery for lost profits pursuant to a perceived breach of contract.

In light of the fact that the Subcontract Agreement constitutes a valid, enforceable contract, Total Technology's claims for equitable relief must fail as a matter of law. Based on the foregoing, the demurer is sustained without leave to amend.

Sincerely,

[redacted]

Judge Robert L. Smith

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