NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

March 25, 2022

Gary H. Nunes
WOMBLE BOND DICKINSON (US) LLP
8350 Broad Street, Suite 1500
Tysons Corner, VA 22102

Matthew J. MacLean
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036-3006

Re: *Vista Technology Services, Inc., et al.* v. *Henry G. Nash*,
CL 2021-8951

Dear Mr. Nunes and Mr. MacLean:

This matter is before the court on Plaintiffs' *Motion to Clarify the Scope of the Court's Ruling Dated October 15, 2021*. The court's October 15, 2021 *Order* sustained Defendant's demurrer to Counts One through Six and Count Eight of the *Complaint* without leave to amend and dismissed those counts with prejudice; Plaintiffs previously sought reconsideration of the court's *Order*, which the court denied on November 24, 2021.

In Plaintiffs' motion to clarify, Plaintiffs request that the court clarify that the court's ruling regarding Defendant's Demurrer to Count 8 of the Complaint:

> does not extend to preclude a defensive plea of statutory recoupment filed pursuant to Va. Code § 8.01-422 in response to a Counterclaim for breach of contract filed by Defendant.

Plaintiffs' *Motion* at 1.

Count 8 sought a declaration that Vista "has the common law and

OPINION LETTER

statutory right to deduct from [the 'Earnout Payments']"[1] (*Complaint* ¶ 117) it had made to Nash any damages Vista was awarded for Nash's alleged breaches of the *SPA*.

ANALYSIS

The Court's Ruling of October 15, 2021

As it related to Count 8, the court's ruling of October 15, 2021 -- as further elucidated by its letter opinion of November 24, 2021 denying Plaintiffs' motion for reconsideration -- was limited to the question before it. That question was whether the claim in Count 8 was barred by the survival clause of the *Stock Purchase Agreement* ("*SPA*") (Section 9.3)[2] because Count 8 was "based on Vista's allegations that Mr. Nash has breached a representation and warranty in the *Stock Purchase Agreement*" and the representation and warranty had expired in view of the four year survival clause in the *SPA*. *Memorandum In Support of Demurrer* at 2.

The court found that Nash's alleged breaches of the *SPA were* barred by the survival clause of the *SPA* as the alleged breaches were of a representation and warranty which did not survive after four years (none of the alleged breaches were of "Fundamental Representations"). Accordingly, there was no basis for the relief requested by Count 8 because no damages could be awarded to Vista, so that there was nothing which could be deducted from the "Earnout Payments."

Plaintiffs' Motion To Clarify

Plaintiffs now request that the court clarify that its ruling of October 15, 2021 "does not extend to preclude a defensive plea of statutory recoupment filed pursuant to Va. Code § 8.01-422 in response to a Counterclaim for breach of contract filed by Defendant." Plaintiff's *Memorandum In Support of Plaintiff's Motion to Clarify the Scope of the Court's Ruling Dated October 15, 2021* at 1.

---

[1] "Earnout Payments" are revenues "above specified thresholds . . . achieved by Vista in connection with certain 'Specified Contracts' after the Closing date of February 10, 2017." *Complaint* ¶¶ 2, 7. Vista alleged that it had paid those "Earnout Payments" to Nash. *Id.* at ¶ 7.

[2] The survival clause of the *SPA* (Section 9.3) states in pertinent part:

> Each representation, warranty, covenant and agreement of the Company, the Stockholder, or any of them, contained in this Agreement . . . shall **survive the Closing for a period of four years thereafter,** except, however, the Fundamental Representations, which shall not have an expiration date. The representations and warranties set forth in Sections 3.1 (Organization and Corporate Power), 3.2 (Authority for Agreement), 3.3 (No Violation to Result) shall, collectively and severally, be referred to as the "Fundamental Representations." (Emphasis added).

In arguing that the court's ruling of October 15, 2021 does not preclude a defensive plea of statutory recoupment filed pursuant to Code § 8.01-422 in response to Nash's *Counterclaim* for breach of contract, Plaintiffs assert that Count 8 was "not a plea for statutory recoupment pursuant to Va. Code § 8.01-422" because Code § 8.01-422 "has special pleading requirements and may only be raised as a defensive pleading." Plaintiff's *Memorandum* at 2.

While it is true that the *Complaint* does not cite Code § 8.01-422, it seems plain that the *Complaint* was referring, in part, to Code § 8.01-422 when it asserted that "Virginia law provides for the common law and statutory right to recoupment" (*Complaint* ¶ 114) and that Vista had "statutory right" to deduct from the "Earnout Payments" it had made to Nash any damages Vista was awarded for Nash's alleged breaches of the *SPA*. *Complaint* ¶ 117. The court thus finds that, while Count 8 sought only a declaration, that declaration related to recoupment pursuant to Code § 8.01-422 and that Vista did, in fact, make a plea for statutory recoupment in the *Complaint*.

Plaintiff further asserts that the court:

> based its ruling entirely on its interpretation of the indemnity notice provision in Article IX of the SPA. In ruling on Vista's Motion for Reconsideration, the Court similarly limited its ruling to the indemnity notice provision. Thus, the only issue on which this Court has ruled is the application of a contractual time bar on the raising of indemnity claims by Vista.

Plaintiffs' *Memorandum* at 4.

Plaintiffs have misstated the court's ruling.

First, the court did not base its ruling "entirely on its interpretation of the indemnity notice provision in Article IX of the SPA" and did not "limit[] its ruling to the indemnity notice provision." Indeed, the court did not base its ruling on the indemnity provision at all. The indemnity notice provision is in Section 9.2 of the *SPA*; the court's ruling dealt with the survival clause of the *SPA* (Section 9.3).

Second, the court's ruling was not limited to "the application of a contractual time bar on the raising of indemnity claims by Vista." As discussed above, the court concluded that the survival clause barred recovery of damages for Nash's alleged breaches of the *SPA* and, as a result, there was no basis for the relief requested by Count 8 because no damages could be awarded to Vista.

Plaintiffs go on to argue that a bar by a contractual survival clause "do[es] not apply, as a matter of law, to a plea for statutory recoupment." Plaintiffs' *Memorandum* at 4. In support of that argument, Plaintiffs cite the holding of *Rosenbloom v. Integrated Security Systems,*

Inc., 73 Va. Cir. 71 (2007) that "a contractual limitation on warranties and representations does not bar a plea of recoupment." *See* Plaintiffs' *Memorandum* at 4.[3]

Rosenbloom does not assist Plaintiff. While *Rosenbloom* did in fact hold that "a contractual limitation on warranties and representations does not bar a plea of recoupment," its reasoning does not support its conclusion. Its reasoning was as follows:

> Prior to the time that the Virginia Supreme Court concluded that a statute of limitations defense is not a bar to a plea of recoupment [citing *Cummings v. Fulghum*, 261 Va. 73 (2001)],[4] the Court held that "a defense of recoupment is not barred by the statute of limitations *so long as the main action out of which the claim arose it [sic] timely.*" [citing *City of Richmond v. Chesapeake & Potomac Tel. Co. of Va.*, 205 Va. 919 (1965)]. That analysis implies that recoupment may be pleaded whenever a plaintiff files any timely complaint, notwithstanding limitations that would apply to an original claim, cross-claim or counterclaim.

73 Va. Cir. 71.

Rosenbloom thus concluded that these cases "impl[y] that recoupment may be pleaded whenever a plaintiff files any timely complaint, notwithstanding limitations that would apply to an original claim, cross-claim or counterclaim." This court agrees -- if, by "timely complaint," *Rosenbloom* was referring to timely within the statute of limitations (both *Cummings* and *City of Richmond* involved statute of limitations). But, as to timeliness within the period of a survival clause, this court finds that *Rosenbloom*'s conclusion does not find support in *City of Richmond* (involving common law recoupment) or *Cummings* (involving statutory recoupment) because a survival clause is fundamentally different than a statute of limitations.

A "statute of limitations is a procedural statute, one which creates

---

[3] In Plaintiffs' *Supplemental Brief*, Plaintiffs state that the *Rosenbloom* decision upon which they rely was the result of the *Rosenbloom* plaintiffs having "sought reconsideration of the Court's [previous] Order . . . ." *Supplemental Brief* at 3. This is untrue; the second *Rosenbloom* decision addressed a new and previously unaddressed issue: whether the court should strike the defendant's plea of statutory and/or common law recoupment as an affirmative defense "on grounds that a limitation period contained in a contract is not a statute of limitations, and hence may bar recoupment." *Rosenbloom v. Integrated Security Systems, Inc.*, 73 Va. Cir. 71 (2007).

[4] Defendant's *Supplemental Memorandum* (at 3) mischaracterizes *Cummings* as having "overturned" *Neely* v. *White*, 177 Va. 358 (1941); rather, *Cummings* found *Neely* to be inapplicable due to the statutory amendments made subsequent to *Neely*. 261 Va. at 80.

a temporal bar to the maintenance of a legal remedy arising out of an accrued cause of action." *School Bd. of the City of Norfolk* v. *U.S. Gypsum*, 234 Va. 32, 36 (1987). The survival clause in the *SPA* is not "procedural." Unlike the statute of limitations for written contracts (Code § 8.01-246 -- "actions founded upon a contract . . . shall be brought within the following number of years next after the cause of action shall have accrued"), the survival clause in the *SPA* does not mention of the filing of any "action" nor is accrual of any significance. Rather, the survival clause in the *SPA* is a substantive extinguishment, by the terms of the *SPA*, of the applicable representation and warranty. It follows that, if the applicable representation and warranty is extinguished, there is nothing from which there could be a recoupment in that recoupment is a defensive pleading to a complaint (or a counterclaim). Thus, a survival clause bars a plea for recoupment.

That being said, the court's ruling was, as noted above, limited to the question of whether Vista was barred from seeking damages (for breach of a warranty or representation) and thus whether there was a basis for the relief requested by Count 8 (a declaration that Vista could deduct from the "Earnout Payments" it had made to Nash any damages Vista was awarded for Nash's alleged breaches of the *SPA*) because no damages could be awarded to Vista. What is at issue with respect to Nash's *Counterclaim* is whether Vista may defensively plead statutory recoupment to Nash's claim for unpaid "Earnout Payments."[5]

Whether the court's ruling applies to a subsequent plea for statutory recoupment by Vista in response to Nash's *Counterclaim* turns on whether the claim made by Nash's *Counterclaim* (for unpaid "Earnout Payments") is, like the claim made by Vista's Complaint (breach of a warranty or representation), barred by the survival clause of the *SPA*. If, like Vista's *Complaint*, Nash's *Counterclaim* is barred by the survival clause of the *SPA*, then this court's ruling applies; if, on the other hand, Nash's *Counterclaim* is not barred by the survival clause of the *SPA*, then this court's ruling does not apply.

The survival clause is limited to a representation or warranty by "the Company [General Scientific Corporation], the Stockholder [Nash], or any of them . . . ." As Nash's *Counterclaim* is not for a breach of a representation or warranty by General Scientific Corporation (or of course by himself), but rather for breach of the "Earnout Payments" requirements of the *SPA*, the survival clause does not bar Nash's *Counterclaim* as it did Vista's claims against Nash. It follows that this court's ruling does not apply to Nash's *Counterclaim*.

---

[5] While Vista's *Plea For Statutory Recoupment* does not articulate any basis for its claim for $1,886,456.52, the court will presume, for purposes of this ruling, that this sum is the amount of "Earnout Payments" that Vista has already paid to Nash.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge