NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *Robert Eisiminger, Seller's Representative v. Perspecta, Inc.*
Case No. CL-2021-3525

Dear Counsel:

BACKGROUND

This dispute arose from an equity purchase agreement where Defendant, Perspecta Inc. ("Perspecta") agreed to purchase the membership interests of Knight Point Systems, LLC from multiple sellers ("Sellers"). As part of the equity purchase agreement ("the Agreement"), both parties agreed that Perspecta would take a tax election under Section 338(h)(10) of the Internal Revenue Code ("Section 338"), resulting in a multi-million dollar benefit for Perspecta and a large income tax liability for the Sellers.

To compensate the Sellers, the Agreement provided for a purchase price increase equal to the total increased liability resulting from the election (the "Final Incremental Section 338 Liability"). Given that all financial inputs were not available at the time of closing to determine

the Sellers' increased liability, Perspecta paid an initial sum of $4,276,704 to the Sellers one day after closing. This payment constituted an estimate of Sellers' tax liability ("Incremental Section 338 Liability"). If the Final Incremental Section 338 Liability was greater than the Incremental Section 338 Liability, Perspecta would further compensate the Sellers by paying them the difference. Per the Agreement, both the Incremental Section 338 Liability and the Final Incremental Section 338 Liability would be calculated using the "'methodologies and principles'" contained in Exhibit G of the Agreement.

Sellers subsequently calculated a difference of $3,046,632 based on "exact financial inputs and applying the Exhibit G methodologies," but Perspecta refused to pay the additional amount. (Compl. ¶ 11). As the designated representative of the Sellers for this transaction, Plaintiff, Robert Eisiminger ("Mr. Eisiminger") filed this claim alleging breach of contract, claiming the $3,046,632 difference plus interest, costs, expenses, and fees. (Compl. ¶ 20). In the current matter, Perspecta demurs to Mr. Eisiminger's breach of contract claim and requests that this Court dismiss the case. Specifically, defendant alleges that the cause of action fails because the plaintiff has not alleged the satisfaction of a condition precedent, *viz.*, actual payment of the tax liability.

STANDARD

Rather than deciding the merits of allegations in a complaint, the Court's only duty in a demurrer is to "determine whether the factual allegations pled and the reasonable inferences drawn therefrom are sufficient to state a cause of action…" upon which relief may be granted. Va. Code Ann. § 8.01–273(A); *Friends of the Rappahannock v. Caroline County Bd. Of Sup'rs*, 286 Va. 38, 44, 743 S.E.2d 132, 135 (2013) (citing *Riverview Farm Assocs. Va. Gen. P'ship v. Bd. Of Supervisors of Charles County*, 259 Va. 419, 427, 528 S.E.2d 99, 103 (2000)). "A demurrer admits the truth of all properly pleaded material facts. 'All reasonable factual inferences fairly and justly drawn from the facts alleged must be considered in aid of the pleading.'" *Ward's Equipment, Inc. v. New Holland N. America, Inc.*, 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997) (quoting *Fox v. Custis*, 236 Va. 69, 71, 372 S.E.2d 373, 374 (1988)). A demurrer does not speak to the strength of proof of the facts alleged. *E.g., Phillip Abi-Najm, et al. v. Concord Condominium, LLC.*, 280 Va. 350, 357, 699 S.E.2d 483, 486 (2010).

ANALYSIS

I. Breach of Contract

A party properly pleads a breach of contract action when three elements are satisfied: "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Filak v. George*, 267 Va. 612, 619, 594 S.E.2d 610, 614 (2004) (citing *Brown v. Harms*, 251 Va. 201, 306, 467 S.E.2d 805, 807 (1996); *Fried v. Smith*, 244 Va. 355, 358, 421 S.E.2d 437, 439 (1992); *Westminster Investing Corp. v. Lamps Unlimited, Inc.*, 237 Va. 543, 546, 379 S.E.2d 316, 317 (1989)). As part of establishing a legally enforceable obligation, the Plaintiff must assert the satisfaction of all conditions precedent to a contract. *Light v. Beaver Creek Dev. Partners*, 125

F.3d 848, 1997 WL 600059, *4 (4th Cir. 1997) (citing *Morotock Ins. Co. v. Fostoria Novelty Glass Co.*, 94 Va. 361, 364-65, 26 S.E. 850, 851 (1897). Such a provision has a particular effect on a contract:

> A condition precedent calls for the performance of some act or the happening of some event after the terms of the contract have been agreed upon, before the contract shall take effect; that is to say, the contract is made in form, but does not become operative as a contract until some future specified act is performed, or some subsequent event occurs.

Morotock Ins. Co. v. Fostoria Novelty Glass Co., 94 Va. 361, 365, 26 S.E. 850, 851–52 (1897). In short, if the condition precedent is not satisfied, the contract does not become effective. Virginia law interprets conditions precedent through the "plain meaning of the language the parties used in the documents." *Primov v. Serco, Inc.*, 96 Va. Cir. 121, 2017 WL 9887365, at *5 (2017) (Judge White), aff'd, 296 Va. 59, 817 S.E.2d 811 (2018) (citing *Musselman v. Glass Works, L.L.C.*, 260 Va. 342, 366, 533 S.E.2d 919 (2000)).

In *Primov*, the parties agreed, *inter alia*, to the following:

> *If the dispute* has not been resolved by mediation within 60 days of a written request to mediate made by one of the parties, *then either party* may bring suit in the state or federal courts located in Fairfax County, Virginia. The parties consent to the exclusive jurisdiction of the state and federal courts located in Fairfax County, Virginia. [*emphasis added*]

Id. at *2. The court found that the "plain language of the mandatory mediation provision…clearly states the parties must attempt mediation outside of court…" *Id.* at *6.

In *Lerner v. Gudelsky Co.*, the contract for the sale of a parcel of land included a section entitled "Conditions Precedent to the Obligations of the Purchaser." *Lerner v. Gudelsky Co.*, 230 Va. 124, 128, 334 S.E.2d 579, 582 (1985). Among the provisions included in this section were the following:

> The obligation of the Purchaser to purchase the Sellers' Partnership Interests *shall be subject to* the satisfaction of *129 each of the following conditions (all or any of which may be waived, in whole or in part, by the Purchaser)…[*emphasis added*]

Id. at 128-29.

The court recognized that these provisions were conditions precedent to the purchase of the land, permitting Lerner to recover an earnest-money deposit placed in order to purchase the land.

Contrasting these two cases with *Fluor Federal Solutions, LLC v. BAE Systems Ordnance Systems, Inc.*, the Court considered the following provision of a contract:

> BAE SYSTEMS and CONTRACTOR agree to timely notify each other of any claim, dispute or cause of action arising from or related to this Contract, and to negotiate in good faith to resolve any such claim, dispute or cause of action. To the extent that such negotiations fail, BAE Systems and Contractor agree that any lawsuit or cause of action that arises from or is related to this Contract shall be filed with and litigated only in a court of competent jurisdiction within the state from which this Contract is performed…

Fluor Fed. Sols., LLC v. BAE Sys. Ordnance Sys., Inc., W.D. Va. No. 7:19-CV-00698, 2021 WL 960645, at *3 (W.D. Va. Mar. 15, 2021). Interpreting Virginia law, the Court determined that "in order to discern whether the parties intended a contractual provision to act as a condition precedent or a mere promise, general rules of contract interpretation govern, and '*the plain meaning of the contract controls*." [*emphasis added*] *Id.* at *4. The court additionally noted as follows:

> While no specific words are necessary to create a condition [precedent], words such as "if," "provided that," "when," "after," "as soon as," or "subject to," are words recognized as those that traditionally indicate conditions.

Id. at *4 (quoting *Standefer v. Thompson*, 939 F.2d 161, 164 (4th Cir. 1991)). The Court determined that the dearth of plain language typically associated with a condition precedent was dispositive in determining that no condition precedent existed.

Here, Perspecta avers the Agreement contains a specific condition precedent in § 10.7(b) of the Agreement "that the Sellers incur income taxes after closing that would be reconciled against an amount estimated by the parties in the Agreement." (Dem. at 1). The relevant portion of § 10.7(b) follows:

> Within ten (10) calendar days after the Parties have agreed to the Final Incremental Section 338 Liability (or such amount has been determined in accordance with the procedures outlined below), Buyer shall pay to the Sellers, or the Sellers shall pay to Buyer, as applicable, the difference between (i) the amount of the Incremental Section 338 Liability based upon the final Allocations (the "Final Incremental Section 338 Liability"), and (ii) the estimated amount previously paid to the Sellers by Buyer pursuant to this Section 10.7(b) and Section 1.2(c)(vi)…[*emphasis added*]
>
> (Agreement, § 10.7(b)).

Here, based on a "plain reading" of the language, there is no phrase in this section where an action is dependent upon the satisfaction of an event. It does not, per *Morotock*, "call[] for the performance of some act or the happening of some event…before the contract shall take effect."

Morotock, 94 Va. at 365 (1897). The section merely states that after a period of ten days, either party shall pay the other party the difference between the Final and Incremental Section 338 Liabilities. Neither does the section include any language typical of a condition precedent; this section directs, rather than conditions, the payment of the difference of the Final and Incremental Section 338 Liabilities. Clearly, the contract makes no mention of actually paying the tax liability, only calculating the tax liability.

Compared to the aforementioned cases, this Court does not see the plain language in § 10.7(b) that is consistent with a condition precedent. If Perspecta wanted such a provision, it should have worked with the Sellers to insert the requisite language during negotiations. Additionally, considering the exhaustive detail that is already included in this contract, the absence of the alleged condition precedent in the contract appears to have been intentional.

This Court is not inclined to infer that a condition precedent exists from language that clearly does not specify the existence of such a provision. Additionally, given that the asserted condition precedent is not in the contract, recognizing such a provision through inference would be an inappropriate case of the Court rewriting a contract between parties. Therefore, the demurrer is overruled.

II. Motion to Dismiss

Perspecta also seeks to dismiss this action based on the standing of the parties. Perspecta asserts that Mr. Eisiminger does not have the capacity to represent the Sellers since he has no "property interest" through which he could assert his rights. Perspecta also states that the matter is not ripe before this court given the fact that the Sellers have not been joined in this action; as the Sellers as indispensable parties, the Court must otherwise dismiss the case.

For Mr. Eisiminger to have standing, he must prove that he has a "justiciable interest" in the proceedings. *Chesapeake Bay Foundation, Inc. v. Commonwealth ex rel. Virginia State Water Control Bd.*, 46 Va. App. 104, 118, 616 S.E.2d 39, 46 (2005) (citing *W.S. Carnes, Inc. v. Board of Supervisors*, 252 Va. 377, 478 S.E.2d 295 (1996); *see also Henrico County v. F.W., Inc.*, 222 Va. 218, 223, 278 S.E.2d 859, 862 (1981); *Lynchburg Traffic Bureau v. Norfolk and Western Railway*, 207 Va. 107, 108, 147 S.E.2d 744, 745 (1966)). In other words, if an individual can demonstrate an "actual controversy between [the parties], such that his rights will be affected by the outcome of the case…" either as an individual or as a representative, that individual has a justiciable interest in the matter. *Id.* at 119-20 (citing *W.S. Carnes, Inc. v. Board of Supervisors*, 252 Va. 377, 478 S.E.2d 295 (1996); *see also Cupp v. Board of Supervisors*, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984)). Here, Mr. Eisiminger claims that his rights will be affected since he is one of the Sellers in this transaction. (Eisiminger Brief P. 7). Mr. Eisiminger's individual rights, therefore, would be affected by the outcome of the proceedings and he has a justiciable interest. Additionally, § 11.17(e) of the Agreement states that each seller, inter alia, "understands and acknowledges that he or she is (1) authorizing the Representative to act for the Sellers, collectively or individually, with broad powers…;" such action includes, notably in § 11.17(c)(v), the ability to "contest…any action, claims, or disputes arising out of or related to this Agreement…" Absent any assertion by

Perspecta to the contrary, a plain reading of the entirety of § 11.17 provides Mr. Eisiminger the ability to initiate litigation on behalf of the Sellers. It is clear that Mr. Eisiminger has a justiciable interest in this matter, both as an individual and as a representative; therefore, Mr. Eisiminger has standing in this matter.

Perspecta is correct, however, that the Sellers must be joined in this matter given that they are "necessary parties" to the action. The Virginia Supreme Court ruled that "[a]ll persons interested in the subject matter of a suit and to be affected by its results are necessary parties." *Michael E. Siska Revocable Trust ex rel. Siska v. Milestone Development, LLC*, 282 Va. 169, 175, 715 S.E.2d 21, 23 (2011) (*citing Bonsal v. Camp*, 111 Va. 595, 598, 69 S.E. 978, 979 (1911)). In *Michael E. Siska*, the court found that an LLC must be joined as a party since it would materially benefit from the court's ruling. *Id.* at 181. Similarly here, the Plaintiff represents a party of sellers from an LLC. While it may be true that other states permit a representative to commence legal action on behalf of sellers in a securities matter, there is no identical Virginia precedent. Therefore, the Sellers are necessary parties who must be joined.

Under the Virginia Code, a suit may not be defeated by nonjoinder of parties and new parties may be added as justice requires. Va. Code § 8.01-5.A. Accordingly, Mr. Eisiminger should be granted leave to amend the complaint with respect to Count I in order to join the Sellers as parties in this action.

CONCLUSION

For these reasons, the demurrer is overruled. The motion to dismiss is denied, and parties are granted leave to amend in order to join necessary parties.

An Order is attached.

Sincerely,

[redacted]

Robert J. Smith
Judge, Fairfax County Circuit Court

Enclosure

OPINION LETTER

VIRGINIA :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Robert Eisiminger	)	
	)	
Plaintiff,	)	
v.	)	**Case No: CL-2021-3525**
	)	
Perspecta, Inc.	)	
	)	
Defendant.	)	
	)	

ORDER

IT APPEARING Plaintiff properly pleaded a claim for breach of contract in Count I;

IT APPEARING a condition precedent was not written into the contract in question;

IT FURTHER APPEARING Robert Eisiminger has standing in this matter; and

IT APPEARING necessary parties were excluded from this matter and must be joined;

IT IS ORDERED

Defendant's Demurrer as to Count I (Breach of Contract) is **OVERRULED**;

Defendant's Motion to Dismiss is **DENIED**; and

Plaintiff is granted leave to amend the Complaint to join necessary parties.

ENTERED this 21st day of July 2021.

[redacted]

Judge Robert J. Smith

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.