

Spicer v Gardaworld Consulting (UK) Ltd.
2018 NY Slip Op 33088(U)
November 19, 2018
Supreme Court, New York County
Docket Number: 655352/2017
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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TIMOTHY SIMON SPICER, JEFFREY PAUL ARNOLD DAY,
MARK ANDREW BULLOUGH, DOMINIC EDWARD McCAUSLAND
ARMSTRONG, LORD PETER ANTHONY INGE, JOHN ALLAN
BIRCH and JAMES WILLIAM MARRIOTT ELLERY,

Plaintiffs,

Index No. 655352/2017

-against-

GARDAWORLD CONSULTING (UK) LIMITED,

Defendant.

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GARDAWORLD CONSULTING (UK) LIMITED,

Counterclaim Plaintiff,

-against-

TIMOTHY SIMON SPICER, JEFFREY PAUL ARNOLD DAY,
MARK ANDREW BULLOUGH, DOMINIC EDWARD McCAUSLAND
ARMSTRONG, LORD PETER ANTHONY INGE, JOHN ALLAN
BIRCH and JAMES WILLIAM MARRIOTT ELLERY,

Counterclaim Defendants.

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Hon. C. E. Ramos, J.S.C.:

Plaintiffs/counterclaim defendants Timothy Spicer, Jeffrey Day and Mark Bullough (Hestia parties) move to dismiss the counterclaims of defendant/counterclaim plaintiff Gardaworld Consulting (UK) Limited (Garda) pursuant to CPLR 2201, 3211 (a) (1) and (70), and 3016 (b), or in the alternative, staying prosecution of those counterclaims pending resolution of an upcoming arbitration between the parties.

This action arises out of Garda's acquisition of all

outstanding ordinary shares (the shares) of Hestia B.V. from the Hestia parties, the former controlling shareholders of Hestia. Pursuant to a stock purchase agreement (SPA), Garda paid approximately \$140 million for the shares and agreed to additional consideration post-acquisition if Hestia met certain profit targets specified therein.

As alleged in the counterclaims, Garda agreed to purchase the shares at the purchase price set forth in the SPA in reliance on materially false and misleading statements made by the Hestia parties regarding the full extent of Hestia's liabilities. Garda alleges that these misrepresentations came to its attention for the first time post-acquisition, when Garda obtained access to documents in Hestia's files. These documents reveal that the Hestia parties knowingly provided Garda with due diligence material that understated certain liabilities owed by Hestia's operating subsidiaries both to the US and Afghan governments, thereby inflating Hestia's profits by \$2.5 million. The Hestia parties also allegedly concealed a tax liability of \$1.5 million to the Afghan government.

Discussion

The Hestia parties move to dismiss the counterclaims for fraud and aiding abetting fraud on the ground that Garda fails to allege justifiable reliance because Garda specifically disclaimed reliance on Hestia's financial statements in the SPA.

In opposition, Garda maintains that the counterclaims state a claim for fraud with requisite specificity.

To state a claim for fraud, a plaintiff must allege with specificity the intentional misrepresentation of a material fact, justifiable reliance thereon and damages. With respect to reliance, a buyer's disclaimer of reliance generally precludes its justifiable reliance on the seller's misrepresentations or omissions where the disclaimer is sufficiently specific to the particular type of fact misrepresented or disclosed, and the alleged misrepresentation or omissions did not concern facts peculiarly within the seller's knowledge (*Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014])). Thus, where a written contract contains a specific disclaimer as to a specific matter, a plaintiff is precluded from later claiming fraud on the ground of a prior misrepresentation as to the specific matter (*Id.*).

The Court concludes that the contractual disclaimers of reliance by Garda set forth in the SPA do not come close to satisfying the specificity standard articulated by the Court of Appeals. The disclaimers contained in the SPA do not sufficiently track the particular omissions and representations alleged by Garda.

In this case, Garda alleges that it learned after closing and acquisition of Hestia, that the Hestia parties had

misrepresented the liabilities and revenues of Aegis U.S., one of its operating subsidiaries. Specifically, in July 2011, the US State Department awarded Aegis U.S. a \$423 million contract to provide security services for the US Embassy in Kabul, Afghanistan. That contract required the State Department to partially reimburse Aegis U.S. for certain general and administrative costs. Those costs initially were reimbursed at provisional rates specified in the contract covering the time period for 2012 through 2014 subject to adjustment for the actual rates that were subsequently determined by Aegis U.S. The financial statements that the Hestia parties delivered to Garda between September 2014 and March 2015 prior to closing falsely reported that the provisional and actual rates were equal, indicating that Aegis U.S. had no liability to the State Department. Further, Hestia allegedly concealed the existence of this liability (between the actual and provision rates) by recording it on its balance sheet as a credit to un-billed receivables while overstating the revenue of Aegis U.S. by more than \$2 million.

Garda alleges a second unreported liability which relates to the unpaid withholding of taxes owed by Aegis U.S. to the Afghan government. Garda contends that the unpaid taxes created a liability that should have been, but was not, recorded on Hestia's financial statements. Due to the unrecorded Afghanistan

withholding tax liability, Garda alleges that the liabilities were understated and earnings overstated on the Hestia financial statements for the year ending 2014.

Both the failure to report these liabilities and their concealment in the manner alleged states a claim for fraud.

The disclaimers of reliance and disclosures set forth in the SPA do not preclude, as a matter of law at the pleading stage, a claim for justifiable reliance on the Hestia parties' alleged misrepresentations and omissions. Those provisions do not specifically cover the particular omissions and representations alleged by Garda pertaining to two significant unreported liabilities.

Moreover, even if the disclosures in the SPA had been facially sufficient, the Hestia parties' peculiar knowledge of this secret information was clearly unavailable to Garda until after closing.

Garda also adequately states a claim for aiding and abetting fraud, based upon the Hestia parties' substantial assistance in aiding Hestia's fraud (see generally *Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486 [2008]). Hestia, an alleged a joint tortfeasor, is bound by the false and fraudulent conduct of its officers who were allegedly acting within the scope of their authority.

Finally, the Hestia parties seek a stay of Garda's

counterclaims pending resolution of the parties' arbitration pertaining to calculation of the first earnout amount. Insofar as the parties are not presently arbitrating this issue, the request to stay the counterclaims is denied.

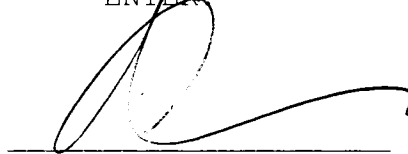
Accordingly, it is

ORDERED that plaintiffs/counterclaim defendants' motion to dismiss the counterclaims is denied; and it is further

ORDERED that plaintiffs/counterclaim defendants are hereby directed to respond to the counterclaims within 30 days of entry of this order.

Dated: November 19, 2018

ENTER:

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a horizontal line and a small flourish.

J.S.C.