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Order on Defendants' Motion to Dismiss (GLEN WILLIAM RAGLAND)

Elizabeth E. Long
Superior Court of Fulton County

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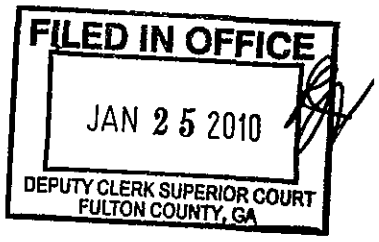
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



GLEN WILLIAM RAGLAND, on his own behalf and as attorney-in-fact for Selling Shareholders,

Plaintiff,

v.

SEVEX NORTH AMERICA, INC. AND SEVEX AG,

Defendants.

CIVIL ACTION
FILE NO. 2008-CV-153555

ORDER ON DEFENDANTS' MOTION TO DISMISS

This matter came to be heard on Defendants' Motion to Dismiss Plaintiff's breach of contract claim and Plaintiff's fraud claim. Based on the briefs and the record in the case, the Court finds as follows:

Plaintiff was the chief executive officer and principal shareholder in ATD Corporation. On February 16, 2006, Plaintiff, on behalf of himself and certain other shareholders, entered into a Stock Purchase Agreement (the "Agreement") in which they agreed to sell all of the ATD shares they controlled to Defendant, Sevex AG.

Plaintiff received a cash payment for his shares and was eligible to receive an additional payment based on Sevex's performance as measured by its EBITDA for the 2006 fiscal year. The Agreement set forth a detailed description of how the EBITDA would be calculated.

In April, 2007, Plaintiff received a letter from Sevex containing its calculation of the EBITDA for fiscal 2006; this calculation showed that no additional payment was due to Plaintiff. Plaintiff notified Sevex that he disagreed with Sevex's computations.

Approximately 15 months later, Plaintiff on behalf of himself, and as "attorney-in-fact" for other selling shareholders, filed this law suit claiming breach of contract and fraud.

I. Breach of Contract

Defendants contend that the breach of contract claim should be dismissed because Plaintiff did not follow the dispute resolution procedures set forth in Section 5.2(a) of the Agreement. Defendants contend that the provisions of Section 5.2(a) concerning the potential purchase price adjustment are mandatory and, since Plaintiff did not follow them, Sevex's EBITDA calculations are final and binding. Specifically, Defendants argue that, since Plaintiff did not submit the EBITDA dispute to his former accounting firm for resolution, the EDITDA calculation of Sevex is final.

Defendants seek to bolster their argument by pointing to Section 5.2(c)(vii), which provides that any disputes concerning the balance sheet, income statement or definition of EBITDA shall be referred to the accountants and settled pursuant to the dispute resolution provisions of Section 5.2(a).

The crux of the problem is one word in Section 5.2(a). After Sevex has delivered its EBITDA calculation, and after Plaintiff has objected to it and after the parties have not agreed on the computations, "then Ragland may retain, at Sellers' expense, Smith & Howard, PC." A dispute resolution mechanism follows involving Smith & Howard and an independent accounting firm. Section 5(a) states that, if Plaintiff does not initially object to the EBITDA calculation, it is final and, if Plaintiff does object and retains Smith & Howard and the procedure involving the accountants is followed, the end calculation result is final. What the Agreement does not say is what happens if Plaintiff objects to Sevex's calculation but does not retain Smith & Howard but instead files a law suit.

Section 5(c)(vii) of the Agreement provides that any disagreement about the balance sheet, income statement or the definition of EBITDA shall be referred to the accountants and settled pursuant to Section 5(a). It does not say that Plaintiff may retain Smith & Howard and then this dispute will follow the 5(a) dispute resolution mechanism. Thus Section 5(c)(vii) is not helpful in deciding the proper interpretation of may retain in Section 5(a).

Defendants do argue that Plaintiff's disagreement with Sevex's EBITDA calculation is really within the definition of EBITDA and therefore pursuant to Section 5(c)(vii) would be referred to the accountants for resolution regardless of whether or not Plaintiff chose to retain Smith & Howard. A reading of the Complaint, which on a Motion to Dismiss must be taken as true, shows that the objections concerning the EBITDA calculations are not definitional.

The Court concludes that the most logical interpretation of the may retain option of Section 5(a) is that there is not a final and binding EBITDA calculation if Plaintiff does not retain Smith & Howard to begin the dispute resolution process, and therefore Plaintiff has the right to pursue his claim in court. The Motion to Dismiss the breach of contract claim is hereby **DENIED.**

II. Fraud

Defendants have moved to dismiss Plaintiff's fraud claim asserting that the reliance alleged in Paragraphs 47 through 51 of the Complaint – Plaintiff relied on Sevex's "obligation to act truthfully and to accurately disclose the performance of the Company in calculating the Purchase Price Adjustment" – is not true. Both Paragraphs 27 and 31 of the Complaint indicate that Plaintiff did not rely on the calculation, and, in fact, within a week he objected to it.

In his brief, Plaintiff argues a slightly different fraud claim. There he argues that Sevex entered into the Agreement without a present intent to perform and that "unusual circumstances" which occurred after the execution of the Agreement show that Sevex did not intend to perform at the time it entered into the Agreement.

If Plaintiff's claim is that the calculation of the Purchase Price Adjustment was false, then there was no reliance and the claim must be dismissed. If Plaintiff's claim is that the Agreement was entered into with no intention to perform then that may be a different matter which has not been set forth with particularity in the Complaint. Plaintiff, of course, has the right to amend his Complaint. Plaintiff's fraud claim as set forth in Paragraphs 47-51 is **DISMISSED** and the Motion to Dismiss is hereby **GRANTED.**

SO ORDERED this 25th day of January, 2010.

ELIZABETH E. LONG, Senior Judge
Fulton County Superior Court – Business Case Division
Atlanta Judicial Circuit

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