



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: PAE National Security Solutions, LLC v. Constellis, LLC et al.
CL-2021-14632

Dear Counsel:

This case came before the Court for a bench trial on May 23, 2023, on Plaintiff's action for compensatory damages arising out of breach of contract. At the close of evidence, the Court took the matter under advisement and requested the parties submit written closing arguments. The Court made factual determinations as to the evidence presented and weighed the credibility of the witnesses. After reviewing the trial transcript, the evidence, and the arguments submitted by Counsel, the Court issues the following opinion finding for Plaintiff on Count I of breach of contract against Strategic Social, LLC ("S2") in the amount of \$539,408.34 and finding for Defendant Constellis, LLC ("Constellis LLC") on Count II of successor liability.

OPINION LETTER

BACKGROUND

This case arises from a Subcontract entered on January 4, 2013, and involves a complex web of various corporations which the Court will attempt to lay out with some clarity. On January 4, 2013, A-T Solutions, Inc. (“A-TS”) entered a subcontract (“Subcontract”) with S2 in which A-TS agreed to provide services and equipment in support of S2’s prime contract with the Iraqi government for the Basrah Surveillance Camera Project (“Basrah Camera Project”). A-TS later converted from a corporation to a limited liability company and consolidated into Plaintiff PAE National Security Solutions, LLC (“PAE”). Defendant S2 is a limited liability company owned by Strategic Social Holdings, LLC (“S2 Holdings”), which Constellis Group Inc. (“Constellis Inc.”)¹ acquired the equity units of in 2014. Constellis Inc., who is not a party to this case, is held under the umbrella of Constellis Holdings, LLC. Defendant Constellis LLC is a separate legal entity from Constellis Inc. and is also held under the same umbrella of Constellis Holdings, LLC.

Pursuant to the Subcontract entered in 2013, A-TS performed and invoiced S2 for their expenses as required by their agreement. A-TS successfully invoiced S2 nine times but S2 failed to fully pay A-TS’s last two invoices from April and May 2014,² leaving \$539,408.34 outstanding. Compl. Ex. 2. S2 alleged the reason for their failure to pay A-TS was the nonpayment by the Iraqi government. *See, e.g.*, Pl. Ex. 12. Litigation was subsequently initiated to recover the money owed to S2, and by extension PAE, for the services rendered to the Iraqi government under the Subcontract (“Basrah litigation”).

The Subcontract had a variety of provisions regarding payment to A-TS and the potential of nonpayment. The introduction to the Subcontract states “A-TS will be paid within 10 days of customer payment receipt by S2.” Compl. Ex. 1. However, Paragraph 3 made the obligation of S2 to pay A-TS unconditional, providing “S2 is obligated to pay A-TS . . . notwithstanding references herein to payments between S2 and Client.” *Id.* Additionally, Paragraph 24(b) of the Subcontract provides if the client failed to pay, S2 agreed to diligently pursue rights and remedies to recover the payments and take action to mitigate any Subcontractor losses. *Id.* In the event of an action arising out of the Subcontract, the Subcontract set forth a two-year limitations period to bring an action following the date it accrued or the date upon which the party bringing action knew or reasonably should have known of the accrual of the cause of action. *Id.*

Four months prior to the nonpayment of the invoices by S2, on January 24, 2014, Constellis Inc. acquired the equity units of S2 Holdings through the execution of the Agreement from third-party unit owners. Pl. Ex. 1. Section 2.7 of the Agreement provided:

Except as set forth on Schedule 2.7, all accounts, notes and other receivables and amounts owing to the Company and its Subsidiaries (“Receivables”) . . . are free and clear of all Encumbrances other than Permitted Encumbrances, and, to the

¹ Constellis Group Inc. later became Constellis Inc. *See* Defs. Closing Arg. at 6; Defs. Ex. 11.

² Invoice Nos. 600010-10 and 600010-11 remain outstanding.

extent not previously collected or reserved for in the reserve for bad debts set forth on the Interim Financial Statements, are fully collectible and not subject to any valid claims, setoffs, defenses, or counterclaims.

Id.

Following the execution of the Agreement, on July 14, 2015, the Chief Legal Officer of Constellis Inc. sent correspondence to a representative of S2 Holdings, providing notice of its claim for indemnification and asserting S2 Holdings breached its representation all receivables were fully collectible and not subject to any valid claims. Pl. Ex. 2. After receipt of the notice, on August 24, 2015, Constellis Inc. and S2 Holdings entered into an Amendment to address the Basrah litigation. Pl. Ex. 4.

The Amendment adjusted the purchase price by releasing \$15,000 in Escrow Funds to S2 and the remaining funds, totaling \$863,532.13, to Constellis Inc. Constellis Inc. agreed to “continue to manage and fund the Basrah Litigation at its sole cost and expense” through the earlier of its final determination or December 31, 2015. *Id.* The Amendment also provided two named employees were to remain employed to manage the litigation. *Id.* The Amendment provided it was not “an admission of liability or responsibility on the part of either party.” *Id.* Subsequently, the Basrah litigation was initiated to recover the amounts owed for the Basrah Camera Project. S2 continued its involvement in and funding of the Basrah litigation. Trial Tr. 247.

Financial operations for PAE first noted the outstanding receivables due under the invoice in late 2015. Trial Tr. 37:13-20. On May 17, 2016, Associate General Counsel for PAE wrote to S2 requesting prompt payment of the outstanding unpaid invoices. Defs. Ex. 5. After receiving the letter, Counsel for Constellis LLC reached out via email to Associate General Counsel for PAE to confirm receipt of the letter and state their position regarding the payment terms of the Subcontract being pay-when-paid. Pl. Ex. 12. Counsel further stated once S2 received “payment from the customer we will promptly pay AT-Solutions.” *Id.*

Counsel for Constellis LLC and Associate General Counsel for PAE remained in contact from mid-2016 to March 2018. Associate General Counsel for PAE repeatedly reached out to determine the status of the ongoing litigation and Counsel assured PAE that they would inform them when the Iraqi courts acted or new information was available. *Id.* While the Basrah litigation concluded in Iraq on December 13, 2017, PAE was not informed until the summer of 2021. Trial Tr. 130:5-22. PAE sent a demand letter to S2 requesting payment on August 23, 2021, and subsequently filed suit against S2 and Constellis LLC in Fairfax County Circuit Court on October 25, 2021. Pl. Ex. 20.

The matter proceeded to a bench trial on May 23, 2023, and this opinion follows. The Court will address the statute of limitations issue first, followed by the breach of contract by S2 and successor liability of Constellis LLC subsequently.

ANALYSIS

I. Statute of Limitations

Virginia sets a five-year statute of limitations for suits based on written contracts. Va. Code § 8.01-246(2). However, a contract may set forth its own limitations period, which is enforced according to its terms. *See, e.g., Allstate Property v. Ploutis*, 290 Va. 226, 234, 776 S.E.2d 793, 797 (2015).

Basic contract interpretation principles require a contract be construed according to its plain meaning when its terms are clear and unambiguous. *Barver v. VistaRMS, Inc.*, 272 Va. 319, 329, 634 S.E.2d 706, 712 (2001). Words used by the parties are given their usual, ordinary meaning. *Envtl. Staffing Acquisition Corp. v. B & R Constr. Mgmt.*, 283 Va. 787, 793, 725 S.E.2d 500, 554 (2012). No “word or clause in the contract will be treated as meaningless if a reasonable meaning can be given to it” and the court must presume the parties “have not used words needlessly.” *Orthopaedic and Spine Ctr. v. Muller Martini Mfg. Corp.*, 61 Va. App. 482, 491, 737 S.E.2d 544, 548 (2013) (quoting *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 392, 732 S.E.2d 676, 681 (2012)). The court must consider and construe each phrase and clause of the contract together and harmonize seemingly conflicting provisions when it can be reasonably done to effectuate the intentions of the parties. *TravCo Ins. Co. v. Ward*, 284 Va. 547, 552, 736 S.E.2d 321, 325 (2012).

The Subcontract in this case provided no action arising out of the agreement could be brought by either party “no more than two (2) years following the date the cause of action arose or the date upon which the party bringing the action first knew or reasonably should have known of its cause of action, whichever occurs later.” Compl. Ex. 1. The question then becomes both when a cause of action arises after nonpayment under the Subcontract and when Plaintiff first knew or reasonably should have known of the accrual of cause of action.

A. Interpretation of the Limitations Period in the Subcontract

Three seemingly conflicting provisions in the Subcontract relate to when payment is due to A-TS and, by extension, when a cause of action for nonpayment would arise. The introduction to the Subcontract states “A-TS will be paid within 10 days of customer payment receipt by S2 which is anticipated to be within 30-45 days after acceptance of equipment by customer.” Compl. Ex. 1. At the same time, Paragraph 3 of the Subcontract made the obligation of S2 to make payment to A-TS unconditional, providing “S2 is obligated to pay A-TS . . . notwithstanding references herein to payments between S2 and Client.” *Id.* Then, Paragraph 24(b) of the Subcontract details how, in the event of nonpayment by the client, S2 “agrees to diligently pursue any and all rights and remedies available to S2 to recover any and all payments relating to such Subcontractor Services” and take actions “as reasonably necessary to mitigate any Subcontractor losses that are not caused or created by Subcontractor” without prejudice to other provisions of the Subcontract. *Id.*

Defendants contend Plaintiff's claim is expressly barred by the two-year statute of limitations set forth in the Subcontract based on the above-referenced provisions. First, Defendants argue as they have still not been paid, they have no obligation to pay pursuant to the terms in the introduction of the Subcontract, which sets up a pay-when-paid clause. Second, notwithstanding the pay-when-paid clause, Defendants assert Paragraph 3 triggers the duty to pay when the performing party has performed their obligations under the Subcontract, which was when the invoices were tendered to S2 in 2014.

The introduction of the Subcontract at first glance seems to set up a straightforward pay-when-paid clause. However, Paragraph 3 imposed a duty on S2 to pay regardless of payment by the client and Paragraph 24(b) required S2 to diligently pursue remedies against the client for nonpayment. There were no payments made to S2, but Paragraph 3 of the Subcontract explicitly provides S2 would still be obligated to pay A-TS for the services rendered under the Subcontract.

The Subcontract does not specify when S2 is required to make payment if there is no payment to S2 by the client, which is when Paragraph 24(b) is triggered. Paragraph 24(b) requires S2 to diligently pursue any remedies available to recover the payments owed. There would be no reason for the parties to have included Paragraph 24(b) in the Subcontract if they had intended the payment be due to A-TS immediately upon nonpayment by the client. If payment was due immediately upon nonpayment of the invoices regardless of payment by the client, Paragraph 24(b) would not exist in the Subcontract as S2 would be incentivized on their own to recover the payments and A-TS would not be involved. When nonpayment of the client is at issue, considering Paragraphs 3 and 24(b), the Subcontract implies the limitations period begins running when S2 stops its pursuit to obtain payment from the client.

Therefore, interpreting all the identified clauses of the Subcontract together and harmonizing the conflicting provisions to give meaning to the entire contract, the Subcontract required, in the event of nonpayment by the client, S2 to diligently pursue all remedies available to recover the payments. Upon the completion of these efforts, the limitations period in the Subcontract required A-TS to bring suit within two years after A-TS knew or reasonably should have known the efforts were halted.

B. When Plaintiff Knew or Reasonably Should Have Known the Cause of Action Accrued

Litigation to recover the payments owed to S2 by the client was initiated in 2016 in the Iraqi court system. Litigation was active and ongoing from 2016 to the final ruling issued on December 13, 2017. Defendants contend this would have required Plaintiff to sue in December 2019 at the latest, but the period of limitations in the Subcontract explicitly states the action must be brought within two years following the date the cause of action arose or "the date upon which the party bringing the action *first knew or reasonably should have known* of its cause of action, whichever occurs later." Compl. Ex. 1. (emphasis added).

While the cause of action arose in December 2017, Plaintiff did not know the cause of action had matured at the time. Between mid-2016 and March 2018, Associate General Counsel for PAE repeatedly reached out to determine the ongoing litigation's status, and Counsel for Constellis LLC assured PAE that they would provide status updates and inform them when the Iraqi courts acted. Pl. Ex. 12. The emails admitted show PAE was actively following up on the status of the ongoing litigation and had been assured they would be given updates on the litigation. *Id.* The final email sent by Constellis LLC during this time explained there was "no guarantee" with the Iraqi courts on the timeline for the case. *Id.* PAE replied a few months later and asked for an update on the litigation, to which there was no response.

The Basrah litigation concluded in Iraq on December 13, 2017, but PAE was not informed until the summer of 2021. Chief Legal Counsel for Constellis LLC testified he never informed PAE the litigation had terminated nor instructed anyone else to do so until he spoke to PAE in the summer of 2021 about an unrelated matter despite their reassurances to PAE of continued updates on the situation. Trial Tr. 129:17-22-130:1-18. Subsequently, PAE sent a demand letter by August 2021 and filed suit on October 25, 2021.

While there was a period between 2018 and 2021 where PAE does not appear to have actively pursued updates, PAE had been told they would be apprised of the situation as it progressed and likely assumed once the litigation terminated, they would be paid accordingly. Defendants' contention Plaintiff's status as a billion-dollar organization active in Basra, Iraq, gave them the responsibility to seek out information from other sources about the litigation is unpersuasive. Plaintiff was reassured by Defendants they would receive updates on the litigation as they became available, and there was no reason for Plaintiff to believe their contacts in Basra could give them information when Constellis LLC had not given Plaintiff the information themselves. PAE had no reason to know the cause of action had matured until the summer of 2021 when they were finally informed of the end of the case in Iraq.

Accordingly, pursuant to the terms of the Subcontract, Plaintiff's action was timely filed. The cause of action arose in December 2017 when the litigation to recover payments from the client ended, and Plaintiff first knew or had reason to know the cause of action had matured in the summer of 2021 when Constellis LLC let them know the litigation had ceased. PAE filed suit soon after in October 2021, rendering the action timely filed.

II. Breach of Contract by S2

Breach of contract occurs when there is a legally enforceable obligation by a defendant to a plaintiff, which the defendant violated, causing injury or damage to the plaintiff. *Filak v. George*, 267 Va. 612, 620, 594 S.E.2d 610, 615 (2004).

Plaintiff sufficiently established at trial S2 is liable for breach of the Subcontract. A-TS and S2 entered an enforceable Subcontract which, as discussed earlier, required, after delivery of the goods and nonpayment of the client to S2, S2 to pursue any rights and remedies available against the client for the nonpayment. A-TS issued two invoices in 2014 to S2 and never

received full payment on the invoices, only receiving partial payment on one. Compl. Ex. 2. A-TS created the invoice after delivery and acceptance of the goods³ and never received a notice of non-acceptance as required for any unacceptable goods. Trial Tr. 76-77; 109:2-6.

S2 contended the amounts were not due until they received payment under the Subcontract and subsequently, litigation was initiated against the client to recover the payment under Paragraph 24(b) of the Subcontract. S2 became obligated to pay Plaintiff for the outstanding invoice amounts upon the termination of the litigation in December 2017 and, upon failing to do so, at least at the time of the presentation of the demand letter in 2021 once PAE became aware of the breach of the Subcontract.

S2 breached their obligation by continuing to fail to pay Plaintiff the amounts due under the Subcontract. S2's breach caused damage to Plaintiff, as Plaintiff delivered goods pursuant to the terms of the Subcontract but failed to receive payment for it. As such, S2 is liable to Plaintiff for breach of the contract entered into on January 4, 2013, in the amount of \$539,408.34.

III. Successor Liability for Breach of Contract

Plaintiff has sued Constellis LLC, not Constellis Inc., arguing Constellis LLC is liable under a theory of successor liability for the breach of contract by S2.

Generally, when a company sells or transfers all its assets to another company, the latter is not liable for the debts and liabilities of the former. *States Roofing Corp. v. Bush Constr. Corp.*, 15 Va. App. 613, 617, 426 S.E.2d 124, 126 (1993). The Virginia Supreme Court has laid out four exceptions to the general rule against successor liability. *See Harris v. T.I., Inc.*, 243 Va. 63, 70, 413 S.E.2d 605, 609 (1992). To hold a purchasing corporation liable for the obligations of the selling corporation, it must appear

- (1) the purchasing corporation expressly or impliedly agreed to assume such liabilities,
- (2) the circumstances surrounding the transaction warrant a finding that there was a consolidation or *de facto* merger of the two corporations,
- (3) the purchasing corporation is merely a continuation of the selling corporation, or
- (4) the transaction is fraudulent in fact.

Id.

Constellis Inc. did not purchase the assets and liabilities of S2 unlike other cases in Virginia dealing with successor liability. *See, e.g., id.* at 66; *States*, 15 Va. App. at 615; *MDM Assocs. v. Johns Bros. Energy Techs., JFB, Inc.*, No. L01-1190, 2002 WL 31989156, at *1 (Norfolk Cir. Ct. July 31, 2002). Constellis Inc. acquired all the outstanding shares in S2

³ While the testimony conceded Plaintiff cannot prove the goods were delivered to S2, the testimony also showed the other nine paid invoices sent to S2 also had no proof of delivery but were still paid. Trial Tr. 109-112. Additionally, S2 partially paid one outstanding invoice, seemingly in recognition of A-TS's performance, and S2 sued the Iraq government over the remaining outstanding sums in recognition of the goods provided. Compl. Ex. 2.

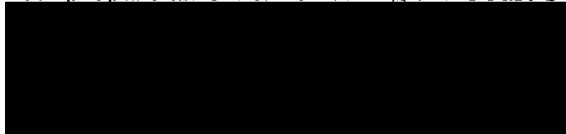
Assocs. v. Johns Bros. Energy Techs., JFB, Inc., No. L01-1190, 2002 WL 31989156, at *1 (Norfolk Cir. Ct. July 31, 2002). Constellis Inc. acquired all the outstanding shares in S2 Holdings through the Agreement from third-party sellers, making the relationship between Constellis Inc. and S2 Holdings, and by extension S2, one of a parent and a wholly owned subsidiary. Pl. Ex. 1; Pl. Ex. 4; Defs. Ex. 11. A successor liability theory running from S2 Holdings to Constellis Inc. would be inappropriate as the only proper theory of successor liability would run from the former unit owners of S2 Holdings to Constellis Inc., who were the sellers and buyers in the transaction. *See, e.g., Quality Intern. Packaging Ltd. v. Chamilia Inc.*, No. 13-5235, 2015 WL 4749156, at *8 (D.N.J. Aug. 5, 2015) (discussing successor liability amongst similar facts and corporate structures); *Harris*, 243 Va. at 70 (describing the standard for successor liability when attempting “to hold a *purchasing corporation* liable for the obligations of the *selling corporation*.”) (emphasis added).

Plaintiff contends the Amendment to the Agreement, and Constellis LLC’s subsequent actions in reliance on the Amendment, represent an acquisition by Constellis LLC of liability on the Subcontract and renders them liable as a successor. However, the same infirmity exists for recovery based on a theory of successor liability with the Amendment as the original Agreement. Even if the Court were to assume successor liability could arise from the Amendment based on the language about the litigation and the actions of the parties and run to Constellis Inc., Plaintiff has failed to prove how Constellis LLC could be held liable as a successor when Constellis Inc. was the party to the Amendment, not Constellis LLC.

The Agreement and Amendment essentially put Constellis Inc. in the shoes of the former unit owners of S2 Holdings. For the unit owners to have been liable under the Subcontract, Plaintiff would have had to pierce the corporate veil against the owners. Plaintiff would, likewise, also have to pierce the corporate veil of S2 Holdings to reach Constellis Inc., and then pierce the veil of Constellis Inc. to hold Constellis LLC liable on the Subcontract. This attempt at legal leapfrogging is unattainable. Therefore, the Court finds Plaintiff has failed to meet her burden showing Constellis LLC can be held liable under a theory of successor liability for the Subcontract at issue.

CONCLUSION

For the above stated reasons, the Court enters judgment against Defendant S2 for Plaintiff in the amount of \$539,408.34 for breach of contract plus post-judgment interest at the annual rate of six percent and enters judgment for Defendant Constellis LLC on the issue of successor liability. The Court requests Plaintiff’s counsel prepare an order reflecting the Court’s ruling.



Penney S. Azcarate, Chief Judge
Fairfax County Circuit Court

PSA/hcm

OPINION LETTER