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Re: *Dawson v. Pittco Capital Partners, L.P.*
C.A. No. 3148-VCN
Date Submitted: October 11, 2012

Dear Counsel:

The merits of this action have been resolved.¹ The Plaintiffs, Dale E. Dawson and Bruce H. DeWolfson, obtained a declaratory judgment confirming their continuing rights under the Notes and the Security Agreement executed by Defendant LaneScan, LLC. LaneScan had unsuccessfully asserted that the Notes had been extinguished because of the Merger. LaneScan was not in default under

¹ *Dawson v. Pittco Capital P'rs, L.P.*, 2012 WL 1564805 (Del. Ch. Apr. 30, 2012) (the "Memorandum Opinion"). For convenience, the terms defined in the Memorandum Opinion will be used here. Familiarity with the Memorandum Opinion is presumed.

the Notes because no payment is yet due. Principal and interest were deferred until 2014, even though the Notes were executed in 2004.

The Plaintiffs now seek to recover their attorneys' fees and expenses. They rely upon the Notes² which, at Section 2.3, provide:

2.3 Remedies. Upon the occurrence of an Event of Default hereunder (unless all Events of Default have been cured or waived by Payee), Payee may, at its option, (i) by written notice to Maker, declare the entire unpaid principal balance of this Note, together with all accrued interest thereon, immediately due and payable regardless of any prior forbearance, and (ii) exercise any and all rights and remedies available to it under applicable law, including, without limitation, the right to collect from Maker all sums due under this Note. Maker shall pay all reasonable costs and expenses incurred by or on behalf of Payee in connection with Payee's exercise of any or all of its rights and remedies under this Note, including, without limitation, reasonable attorneys' fees.

* * *

Certain familiar principles of contract law guide the Court's reading and application of the Notes.³ "It is the Court's duty to enforce contracts according to

² The Plaintiffs also point to the Security Agreement. Their claims under the Security Agreement are addressed briefly, *infra*.

³ The Notes are to be construed under the law of Tennessee. Notes § 3.4. As a general matter, the parties do not suggest that the law of Tennessee differs in any material fashion from the law of Delaware. One possible exception is discussed *infra*.

their plain terms.”⁴ In addition, “[i]f the language of the contract is clear and unambiguous, the literal meaning controls the outcome of the dispute. In such a case, the contract is interpreted according to its plain terms as written, and the language used is taken in its plain, ordinary, and popular sense.”⁵ Agreements permitting the prevailing party to recover its attorneys’ fees are enforceable, but they are “strictly construed.”⁶

* * *

The first words of Section 2.3 of the Notes provide LaneScan with its primary argument against payment of attorneys’ fees and expenses to the Plaintiffs. Those words—“[u]pon the occurrence of an Event of Default”—are relied upon to defeat the Plaintiffs’ claims because there has been no Event of Default. The Notes define Event of Default, at Section 2.1, as a failure to pay principal or interest when due and that failure continues for more than ten days after notice.⁷ Nothing in the Notes expressly provides for the payment of attorneys’ fees if

⁴ *Cocke Cty. Bd. of Highway Comm’rs v. Newport Utils. Bd.*, 690 S.W.2d 231, 237 (Tenn. 1985).

⁵ *Maggart v. Almay Realtors, Inc.*, 259 S.W.3d 700, 704 (Tenn. 2008) (internal quotation and citation omitted).

⁶ *Adkins v. Chrysler Fin. Corp.*, 344 Fed. App’x 144, 148 (6th Cir. 2009) (applying Kentucky law).

⁷ Other events in the nature of bankruptcy and liquidation are also specified, but none has any relevance to the current dispute.

LaneScan should declare the Notes canceled and no longer of any force. The first sentence of Section 2.3 provides holders of the Notes, such as the Plaintiffs, with rights to exercise upon an Event of Default, including the ability to declare the entire unpaid balance due. The Plaintiffs, however, do not focus upon the first sentence of Section 2.3. Instead, they look to the second sentence which requires LaneScan to pay the Plaintiffs, as holders of the Notes, “all reasonable costs and expenses incurred by or on behalf of [the Note holders] in connection with [the Note holders’] exercise of any or all of [their] rights and remedies under [these] Note[s].”⁸ The Plaintiffs were not able to obtain payment on the Notes because the Notes were not in default and payment was not due. They did, however, exercise the inherent rights of a note holder to take timely action to avoid the consequences of the debtor’s purported repudiation or cancellation without cause of the documents establishing the debt obligation.

LaneScan improperly repudiated its obligations under the Notes. It is as if LaneScan had anticipatorily breached its duty to make payments under the Notes. LaneScan, in effect, announced that it would not pay the debts evidenced by the

⁸ The sentence goes on to make clear that “reasonable attorneys’ fees” are a primary objective of this sentence.

Notes. Its position essentially is that if the ten years and a few days had passed and no payment had been made and a default notice had been issued, the Plaintiffs would be entitled to an award of attorneys' fees, but, because the right to attorneys' fees is limited to a set of explicitly defined Events of Default and the Notes do not address repudiation (or anticipatory breach), attorneys' fees may not be recovered.

Thus, the question becomes whether the second sentence in Section 2.3, which appears to provide for attorneys' fees when Note holders must act to protect their rights, is somehow limited by the introductory words of the first sentence of Section 2.3, which expressly restrict the rights established, at least by that sentence, to Events of Default.

The second sentence of Section 2.3 refers to various "rights and remedies" accruing to Note holders under the Notes. Those rights and remedies are not necessarily tied to an Event of Default, although they would, most likely, be available if an Event of Default occurs. There are rights and remedies which exist outside the context of an Event of Default. For instance, if LaneScan declared the Notes invalid because of defects in their execution, but without a legal basis for doing so, the right to have the benefits of being Note holders would effectively be

denied to the Note holders. That denial of their rights would allow them to pursue claims against LaneScan related to their rights under the Notes even though there has been no Event of Default. For these reasons, the text of the Notes supports the Plaintiffs' reading.⁹ Thus, the Plaintiffs pursued their "rights and remedies" under the Notes, and, by the second sentence of Section 2.3, are entitled to their reasonable attorneys' fees in that effort.

* * *

The Notes were secured by the Security Agreement which also addressed the Plaintiffs' rights to attorneys' fees. At Section 10 of the Security Agreement, LaneScan agreed to indemnify the Plaintiffs for "the amount of any and all costs and expenses, including the fees and disbursements of the Secured Party's counsel . . . which Secured Party may incur in connection with . . . (iii) the exercise or enforcement of any of the rights of Secured Party hereunder, or (iv) the failure

⁹ Article 2 of the Notes, which includes the provision allowing for attorneys' fees under certain circumstances, carries the heading "Defaults." One could read the Notes as allowing an application for attorneys' fees only for some set of circumstances that fits under the heading of a "default." That argument fails by the express terms of Section 3.6 of the Notes which provides: "The headings of sections in this Note are provided for convenience only and will not affect its construction or interpretation." Perhaps one could view the heading of an article as different from a heading of a section, but the Court cannot ascribe such a hyper-technical reading to the drafters' intent.

by the Grantor to perform or observe any of the provisions hereof.”¹⁰ The indemnification provision does not apply to matters arising out of the Secured Party’s gross negligence or willful misconduct; that is not alleged to have occurred here. Also, the Security Agreement has a provision (Section 8) that speaks of attorneys’ fees but the introductory language which is applicable to all of the “remedies upon default,” begins with language “[i]f an Event of Default shall have occurred.”¹¹ That type of language, had it been applied to all instances of attorneys’ fees under both the Notes and the Security Agreement might have been effective to deny Plaintiffs’ opportunity for attorneys’ fees. Significantly, language of that nature, does not apply either to the second sentence of Section 2.3 of the Notes or to Section 10 of the Security Agreement. Plaintiffs’ efforts to maintain the validity of the Notes fall within subparagraphs (iii) and (iv) of Section 10 of the Security Agreement because the rights under the Notes are the critical foundation for any rights under the Security Agreement.

¹⁰ Security Agmt. § 10(b) (“Indemnity and Expenses”).

¹¹ Security Agmt. § 8.

* * *

The one possible material difference between Delaware law and Tennessee law that LaneScan has identified is that, under Tennessee law, a declaratory judgment does not give rise to a right to attorneys' fees. LaneScan relies upon *Boiler Supply Co., Inc. v. Lunn Real Estate Investments, Inc.*¹² That decision appears to turn on the fact that the declaratory judgment action had been brought to confirm that certain rights did not exist; it was not an effort to undo a debtor's rejection of its obligation to make payments. Default, simply because of timing, is not yet possible in this case.¹³ Moreover, the primary authority cited by LaneScan involves Illinois law and not Tennessee law.¹⁴ Tennessee law does not appear to support such a blanket preclusion of attorneys' fees. In addition, the debate is not so much over what the law of Tennessee provides, instead, it is about what the Notes say about the agreement of the parties with respect to attorneys' fees. The

¹² 1998 WL 684599, at *5 (Tenn. Ct. App. July 1, 1998).

¹³ Default and repudiation are not always simultaneous, but, under these circumstances, there is no material difference with respect to the consequences for the Plaintiffs' ability to recover the debts due them. The Court rejects LaneScan's notion that by repudiating the Notes instead of taking advantage of the ten year grace period before it had to make a payment under the Notes, it somehow avoided the clear intent of the parties that attorneys' fees would be recovered when necessarily expended to assure payment.

¹⁴ *Wheeling Trust & Savings Bank v. Citizens Nat'l Bank of Downers Grove*, 491 N.E.2d 866, 870 (Ill. App. Ct. 1986).

provision in the Notes which authorizes an award of attorneys' fees refers to "rights and remedies" generally and does not offer a technical basis for treating a declaratory judgment differently.¹⁵ In sum, an award of attorneys' fees and costs is not precluded by the law of Tennessee simply because this Court decided to use a declaratory judgment.

* * *

As can be seen from a cursory review of the Memorandum Opinion, the Plaintiffs failed to succeed on many of their claims. They have no right to attorneys' fees incurred with respect to any of their claims that are not directly related to the Notes. Separating out the time and effort devoted to failed claims in the litigation that did not involve the Notes will no doubt be a difficult task. The question for now, however, is whether Plaintiffs have a viable claim for attorneys' fees incurred in asserting claims relating to the Notes that were not the specific claims on which they prevailed. LaneScan would have the Court, if it ordered the payment of any attorneys' fees at all, limit the award to time spent pursuing the

¹⁵ In a sense, a declaratory judgment was selected by the Court in the exercise of its discretion in order to craft the most appropriate remedy. How a court crafts its equitable remedies to implement its decision should not necessarily be determinative of the question of attorneys' fees, especially where the parties have provided for attorneys' fees in the written documentation of their common understanding.

precise claim upon which the Plaintiffs prevailed. Thus, the Plaintiffs would not be able to recover attorneys' fees for any claims related to the Notes, which they lost or which the Court did not address. Although an item-by-item approach to the payment of attorneys' fees may be required by certain textual language, the Notes suggest a primary focus on the reasonableness of the fees if they were incurred in connection with the Plaintiffs' efforts to vindicate their rights under the Notes. The language chosen by the drafters of the Notes could have, but did not, limit the award narrowly and strictly to matters upon which success was achieved. The use of the phrases "all reasonable costs" and "in connection with [the Plaintiffs'] exercise of any or all of [their] rights" demonstrates a recognition that a legitimate litigation strategy may involve the assertion of claims or arguments upon which victory is not obtained. The Court is not at the stage where the fees to be awarded can be determined. That effort requires some assessment of the overall "reasonableness" of the fee application. All the Court can now resolve with respect to this argument is that merely because Plaintiffs' counsel dedicated time and effort to claims or contentions (relating to the Notes) on which Plaintiffs did not prevail is not a basis for denying those fees.

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Accordingly, for the foregoing reasons, the Plaintiffs are entitled to their reasonable attorneys' fees and expenses incurred in pursuing their claims to confirm the continuing viability of the Notes, despite LaneScan's efforts to repudiate.¹⁶

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

¹⁶ A determination of those fees and expenses must await preparation of the necessary record.