IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

AIRCRAFT SERVICE INTERNATIONAL, INC., a Delaware corporation	)	
Plaintiff,	)	C.A. No. N13C-06-265 WCC CCLD
v.	)	
TBI OVERSEAS HOLDINGS, INC., a Delaware corporation,	)	
Defendant.	)	

Submitted: April 7, 2014
Decided: August 5, 2014

On Defendant's Motion to Dismiss – DENIED

MEMORANDUM OPINION

Christopher Viceconte, Esquire, Gibbons, P.C., 1000 North West Street, Suite 1200, Wilmington, DE 19801. Louis E. Dolan, Jr., Esquire, Nixon Peabody LLP, 401 9th Street, N.W., Suite 900, Washington, D.C. 20004. Attorneys for Plaintiff.

Joel Friedlander, Esquire, Friedlander & Gorris, P.A., 222 Delaware Avenue, Suite 1400, Wilmington, DE 19801. Andrew L. Morrison, Esquire and Jeffrey J. Davidson, Esquire, Manatt, Phelps & Phillips, LLP, 7 Times Square, New York, NY 10036. Attorneys for Defendant.

CARPENTER, J.

Before this Court is TBI Overseas Holdings, Inc.'s ("Defendant") Motion to Dismiss pursuant to the statute of limitations. The Court finds that the applicable statute of limitations for Aircraft Service International, Inc.'s ("Plaintiff") claims is two years from the date of closing. However, because the Court finds that Plaintiff provided notice of a potentially-indemnifiable claim, the statute was tolled and the claim survived until Plaintiff resolved the matter. When the claim was resolved is unclear to the Court and therefore it will deny the Motion and allow additional discovery on this issue. Accordingly, at this juncture, Defendant's Motion to Dismiss is **DENIED.**

1. FACTUAL BACKGROUND

On October 27, 2004, Plaintiff and Defendant entered into a Purchase and Sale Agreement through which Defendant sold Plaintiff all of its membership interests in its subsidiary AGI Holdings and AGI Holdings' subsidiary AGI, LLC, for $27 million (the "Agreement"). The sold entities were engaged "in the business of providing airport services, including ground handing, fuel farm management and into-plane refueling, at certain airports in the United States and its territories."[1] One of the airports served was the "Burbank Airport" at Glendale/Burbank, California, North Hollywood Operable Unit of the San

[1] Compl. Ex. 1 at A.

Fernando Valley Superfund Site (the "NHOU Site"). Due to the nature of the sold entities' business, the Agreement contained certain representations and warranties regarding litigation and environmental matters at the various airports and the parties conducted due diligence, which uncovered a number of pending or threatened litigation matters. The Agreement provided that the sole remedy for the breach of such representations and warranties was indemnification.

On March 21, 2006, Plaintiff received a statutory General Notice letter and information request from the Environmental Protection Agency ("EPA"), dated March 13, 2006, regarding potential liability at the NHOU Site. Plaintiff sent the letter to Defendant on April 12, 2006, stating that the potential liability "may constitute a loss or litigation expense for which [Plaintiff] is entitled to indemnification."[2] Defendant responded on June 16, 2006, declining to assume Plaintiff's defense in the matter. Plaintiff received a second letter from the EPA on July 1, 2010, again providing notice of potential liability and requesting that Plaintiff participate in negotiations to resolve the environmental issues at the NHOU site. Thereafter, it appears that Plaintiff began making payments to the EPA to resolve the matter.

Plaintiff brought suit against Defendant on June 26, 2013 for (i) Breach of

[2] Compl. Ex. 6.

Contract; (ii) Declaratory Judgment; (iii) Mandatory Injunction; and (iv) Fraud and Fraudulent Inducement. Defendant moved to dismiss the original complaint for lack of subject matter jurisdiction due to the equitable relief sought in the Complaint. After considering the motion, the Court provided Plaintiff an opportunity to decide whether they wanted equitable relief from the Court of Chancery or law relief from the Superior Court. Thereafter, Plaintiff filed the First Amended Complaint (the "Complaint"), dropping the mandatory injunction and fraud claims and instead asserts: (i) Breach of Contract; (ii) Indemnity; and (iii) Declaratory Judgment. All of Plaintiff's claims arise out of Defendant's alleged breach of the Agreement by failing to indemnify Plaintiff for losses Plaintiff incurred, allegedly due to Defendant's breaches of the representations and warranties relating to the NHOU Site's environmental liability. Defendant now moves to dismiss arguing that Plaintiff's claims are barred by the statute of limitations.

2. STANDARD OF REVIEW

Under Delaware Superior Court Civil Rule 12(b)(6), the Court may dismiss a plaintiff's claim for "failure to state a claim upon which relief can be granted."[3] When analyzing a motion to dismiss under Rule 12(b)(6), the Court must proceed without the benefit of a factual record and assume as true the well-pleaded allegations in the complaint.[4] A complaint is "well-plead" if it puts the opposing party on notice of the claim being brought against it.[5] Therefore, the Court may dismiss a complaint under Rule 12(b)(6) only where the Court determines with "reasonable certainty" that no set of facts can be inferred from the pleadings upon which the plaintiff could prevail.[6] Additionally, although the Court need not blindly accept as true all allegations nor draw all inferences in the plaintiff's favor, "it is appropriate . . . to give the pleader the benefit of all reasonable inferences that can be drawn from its pleading."[7] Further:

> A claim may be dismissed for failure to comply with the statute of limitations if the facts pled in the complaint, and the documents incorporated within the complaint, demonstrate that the claims are untimely. The plaintiff bears the burden to plead facts that demonstrate the applicability of an exception to the statute of limitations. Otherwise,

---

[3] Super. Civ. R. 12(b)(6).
[4] *See Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38-39 (Del. 1996).
[5] *See Precision Air v. Standard Chlorine of Del.*, 654 A.2d 403, 406 (Del. 1995).
[6] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).
[7] *In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991).

when that burden is not met, the court must dismiss the complaint if filed after expiration of the limitations period.[8]

3. DISCUSSION

The Court is tasked with determining the applicable statute of limitations to Plaintiff's action, when such statute was triggered, and whether the action has been timely filed. Defendant first argues that, generally, Delaware law should determine both the applicable statute of limitations and the accrual of Plaintiff's action. However, Defendant highlights that the parties have shortened the statute of limitations in the Agreement, as allowed by Delaware law, and argues that such shortened period applies to Plaintiff's action. Plaintiff disagrees that the shortened time frames apply to this action; however, Plaintiff does agree that the three-year Delaware statute of limitations applies. Although both parties agree to Delaware's three-year statute of limitations, Plaintiff argues that New York law, the choice of law made by the Agreement, determines when the statute is triggered and begins to run. Therefore, this Court must determine first whether the contract's statute of limitations applies to this action and second when the statute of limitations began to run. Then, the Court can calculate whether this action was timely filed.

[8] *Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 2012 WL 3201139, at * 15 (Del. Ch. Aug. 7, 2012).

I. Contractual Statute of Limitations

The Contract provides that indemnification is the sole and exclusive remedy for breaches of the representations and warranties.[9] The indemnification provision states:

> (b) Subject to the provisions of this Section 10.1, the Seller shall indemnify and save harmless the Buyer, the Affiliates of the Buyer and their respective successors and assigns (a "Buyer Indemnified Party") from, against, for and in respect of:
> (i) any Loss incurred or required to be paid because of the breach of any representations or warranty of the Seller in this agreement . . . ;"[10]

Within the indemnification section, the parties have shortened the statute of limitations of certain indemnifiable claims. The contract states as follows:

> (g) Except as otherwise provide in this Section 10.1(g), all covenants and agreements of the parties contained herein shall survive the execution, delivery and consummation of this Agreement until the expiration of the applicable statute of limitations. All representations and warranties of the parties contained herein shall survive the execution, delivery and consummation of this Agreement until the eighteen (18) month anniversary of the Closing Date, except for:
>
> . . .
>
> (iii) the representations and warranties of the Seller contained in Section 2.15 hereof shall survive until the second anniversary of the Closing Date.

[9] *See* Compl. Ex. 1 § 10.1(i) (setting forth that the sole remedies under the contract are sections 1.2 (inapplicable here), section 10.1, and section 10.11 (inapplicable here)).
[10] *Id.*

> In addition, if written notice of a violation or breach of any specified representation, warranty, covenant or agreement is given to the party charged with such violation or breach during the period provided for in this Section 10.1(g), such representation, warranty, covenant or agreement shall continue to survive until such matter has been resolved by settlement, litigation (including all appeals related thereto) or otherwise.[11]

Delaware courts will enforce contractual limitations periods that are reasonable and "[a] contractual provision that reasonably abbreviates the time for filing a claim is enforceable because it enhances public policy in favor of resolving claims."[12] The Court finds that 18-month and two-year provisions are reasonable and enforceable.

Defendant argues that Plaintiff's claims arise out of the representations and warranties on environmental matters, Section 2.15, and, as such, are subject to the two-year contractual limitations period set forth above. Plaintiff argues that the above provision is not applicable because the alleged breach is Defendant's failure to indemnify, not Defendant's breach of the representations and warranties. The Court finds, however, that Defendant's duty to indemnify does not arise unless there is an underlying breach of the representations and warranties. The only action through which Plaintiff can recover for breaches of the representations and

[11] Compl. Ex. 1 § 10.1(g).
[12] *Bonanza Rest. Co. v. Wink*, 2012 WL 1415512, at *1 (Del. Super. Apr. 17, 2012).

warranties is through indemnity; therefore, the contractual limitations period set for such breaches must apply to the indemnity action. To hold otherwise would render the provisions setting forth the truncated timelines superfluous, a holding at odds with the tenants of contract interpretation which state: "A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole."[13]

Therefore, the Court finds that the contractual limitations periods set forth in Section 10.1(g) are applicable to Plaintiff's claims. Reading the Agreement in a light most favorable to Plaintiff, the underlying claims are most akin to breaches of the representations and warranties contained in Section 2.15 (environmental concerns) and, thus, are subject to the two-year contractual limitations period.

II. The Breach

Having found that the two-year contractual limitations period applies to Plaintiff's claims, the Court must now determine when the statute began to run. Generally, breaches of the representations and warranties occur at closing.[14] Here,

[13] *Council of Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 7 (Del. 2002).

[14] *See, e.g.*, *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2001 WL 2682898, at *6 (Del. Ch. July 11, 2001) ("Because representations and warranties about facts pre-existing, or contemporaneous with, a contract's closing are to be true and accurate when made, a breach occurs on the date of the contract's closing and hence the cause of action accrues on that date.").

closing occurred on October 27, 2004. Working off of this date, Plaintiff had until October 27, 2006, two years later, to bring suit. However, the Agreement provides that:

> if written notice of a violation or breach of any specified representation, warranty, covenant or agreement is given to the party charged with such violation or breach during the period provided for in this Section 10.1(g), such representation, warranty, covenant or agreement shall continue to survive until such matter has been resolved by settlement, litigation (including all appeals related thereto) or otherwise.[15]

On April 12, 2006, within the original two year period, Plaintiff sent Defendant a notice that certain issues at the NHOU site "may constitute a loss or litigation expense for which [Plaintiff] is entitled to indemnification."[16] Defendant argues that the letter from Plaintiff was not specific enough to qualify as notice under the contract or, alternatively, the clause allowing for survival once notice is given impermissibly extends the statute of limitations, contrary to Delaware law. The Court disagrees.

First, given the context of Plaintiff's April 12, 2006 letter, the Court finds it was sufficient notice as required in Section 10.1(g) of the Agreement. The Agreement only requires that the notice be (1) written, (2) given within the contractual limitations period, and (3) related to a "specified representation,

[15] Compl. Ex. 1 § 10.1(g).
[16] *Id.* at Ex. 6.

warranty, covenant or agreement[.]"[17] Here, the notice was written, made within the contractual limitations period, and, through the attachment of the EPA notice, clearly referenced the representations and warranties in Section 2.15. Second, Defendant's public-policy argument also fails. Although Delaware courts have held that parties to a contract may not circumvent the law by extending statutes of limitations,[18] this is not what the Agreement does. The Agreement, instead, contains a bargained-for provision that tolls the truncated statute of limitations through a notice procedure. Contrary to Defendant's claims, survival under the contract is not indefinite and only lasts until the precise claim is "resolved." This practice of tolling the statute of limitations until losses are defined has been consistently upheld in Delaware consistent with the principles of common-law indemnity.[19]

Here, the contractual limitations period for the breach of representations and warranties began to run at closing. Within the subsequent two year period,

[17] *Id.* at Ex. 1 § 10.1(g).

[18] *See, e.g.*, *Shaw v. Aetna Life Ins. Co.*, 395 A.2d 384, 386-87 (Del. Super. 1978).

[19] *See, e.g.*, *Certainteed Corporation v. Celotex*, 2005 WL 217032, at *14 (Del. Ch. Jan. 24, 2005). The Court finds that the Agreement is a hybrid of both indemnification claims in *Celotex*. Although Plaintiff's claim is for breach of the Agreement, a contractual indemnification claim, the Agreement provides for a mechanism which alters the accrual of the contractual limitations period to be more like third-party indemnification claims. Specifically, the Agreement provides that if notice is given during the applicable contractual limitations period, the claim survives until the matter is "resolved." Conversely, the contract in *Celotex* specified that contractual indemnification claims survived "subject to the 'applicable statute of limitations,' making clear that the timeliness of any claim will be measured by the statute of limitations normally applicable to such claim." *Id.* at *5. There is no such qualification in the Agreement's survival statute and the Court, therefore, finds the holding in *Celotex*, as to the contractual indemnification claims, distinguishable.

Plaintiff gave notice to Defendant that there were potential upcoming losses to be incurred due to Defendant's alleged breach of the representations and warranties. This worked to toll the contractual limitations period until the matter was "resolved." Thereafter, Plaintiff had the two-year contractual limitations period in which to bring suit. The Court finds that this contractual provision is in accordance with Delaware law and was the product of extensive negotiations between sophisticated parties. Thus, as provided for under the Agreement, Plaintiff's written notice to Defendant during the contractual limitations period allowed Plaintiff's claims to survive until the matter was resolved.

III. Resolution of the Claim

The Complaint states that Plaintiff began making payments to the EPA in July, 2010. Further, in Plaintiff's Answering Brief, Plaintiff has an entire section entitled: "ASII's Cause of Action for Indemnification Accrued in July, 2010 When ASII Commenced Making Payments for which it is Entitled to Indemnity."[20] If true, the Complaint is untimely filed and would be dismissed. However, in fairness to Plaintiff, such argument was made in the context of a three-year statute

[20] Pl. Ans. Br. at 11.

of limitation and the New York law of accrual.[21] Plaintiff did not address the survival clause of the Agreement, nor did Plaintiff address when, under the contract, such matter would be considered "resolved." Therefore, the factual underpinning of how and when the dispute with the EPA was resolved and whether the payment in July, 2010, "resolved" the matter and, thus, began the Agreement's two-year statute of limitations is simply unclear to the Court. As a result, the Court finds that it is appropriate to allow discovery for the parties to gather additional facts and then in supplemental pleadings to the Court provide argument in a factual context as to the date they believe "resolution" occurred. Once presented with such arguments, the Court can decide if the action was timely filed.

[21] Plaintiff argued that, although Delaware law would determine the applicable statute of limitations, New York law should govern this Court's accrual analysis as such is a substantive issue and New York law was the choice of law in the Agreement. However, as Plaintiff admits, Delaware and New York law are in accord with regard to accrual of an indemnification claim: "that a claim for indemnity does not arise at least until the underlying payments for which recoupment is sought have been made and the issues resolved." *See* Pl. Ans. Br. at 11. Therefore, the Court finds it unnecessary to address the choice of laws issue at this time.

CONCLUSION

Therefore, at this juncture, Defendant's Motion to Dismiss is hereby **DENIED**, pending discovery into the precise date when the losses for which Plaintiff seeks indemnification were "resolved."

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.