

**Pavonix, Inc. v Vista Equity Partners, LLC**

2013 NY Slip Op 32027(U)

August 21, 2013

Supreme Court, New York County

Docket Number: 651182/2011

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS
Justice

PART

Index Number : 651182/2011
PAVONIX, INC.
vs
VISTA EQUITY PARTNERS, LLC
Sequence Number : 008
REARGUE/ RECONSIDER

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits No(s).
Answering Affidavits -- Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with
accompanying Memorandum Decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/21/13

CHARLES E. RAMOS, J.S.C.

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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PAVONIX, INC. (f/k/a SOFTSCAPE, INC.),  
PAVONIX (MASSACHUSETTS), INC. (f/k/a  
SOFTSCAPE (MASS), INC.) PAVONIX ASIA  
LIMITED (f/k/a SOFTSCAPE ASIA LTD.)  
PAVONIX ASIA PACIFIC PTY LTD. (f/k/a  
SOFTSCAPE ASIA PACIFIC PTY LTD.) and  
PAVONIX EMEA, LTD. (f/k/a SOFTSCAPE EMEA,  
LTD.), HENRY WATKINS, DAVID WATKINS, and  
RICHARD WATKINS,

Plaintiffs,

Index No. 651182/2011

-against-

VISTA EQUITY PARTNERS, LLC, SUMTOTAL  
SYSTEMS, INC., SOFTSCAPE SOFTWARE LLC,  
SUMTOTAL SYSTEMS ANZ PTY LTD., SUMTOTAL  
SYSTEMS LTD., and SUMTOTAL SYSTEMS U.K.  
LTD.,

Defendants.

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**Hon. Charles E. Ramos, J.S.C.**

In motion sequence 008, the plaintiffs Pavonix, Inc. (f/k/a Softscape, Inc.), Pavonix (Massachusetts), Inc. (f/k/a Softscape (Mass), Inc.), Pavonix Asia Limited (f/k/a Softscape Asia Ltd.), Pavonix Asia Pacific Pty Ltd. (f/k/a Softscape Asia Pacific Pty Ltd.), Pavonix EMEA, Ltd. (f/k/a Softscape EMEA, Ltd.), Henry Watkins, David Watkins, and Richard Watkins (together, "Pavonix") move this Court pursuant to CPLR 2221 for reargument of this Court's March 28, 2013 order granting the defendants Vista Equity Partners, LLC, Sumtotal Systems, Inc., Softscape Software LLC, Sumtotal Systems ANZ PTY Ltd., Sumtotal Systems Ltd., and

Sumtotal Systems U.K. Ltd.'s (together, the "Buyers") motion for partial summary judgment.

### **Background**

By way of an agreement dated August 31, 2010 (the "Agreement"), Pavonix agreed to sell Softscape, a software company, to the Buyers for \$48 million, subject to post-purchase adjustments based on the net working capital of Softscape.

Pursuant to the Agreement, Pavonix would deliver to the Buyers no later than five days prior to the closing a "good faith estimate" of the estimated net working capital of Softscape as of the close of business on the day immediately preceding the closing date (the "Estimated Net Working Capital"). Then, within 120 days after the closing, the Buyers would prepare and deliver a closing statement (the "Closing Statement") setting forth the final net working capital "as of the close of business on the day immediately preceding the closing date" ("Closing Net Working Capital").

Upon submission of the Closing Statement to Pavonix, the purchase price would be recalculated substituting the Certified Net Working Capital for the Estimated Net Working Capital and the sale price would be adjusted accordingly to arrive at the final purchase price. The Buyers funded an escrow account with \$1,000,000 in cash to satisfy the anticipated working capital adjustment. If the final purchase price was greater than the

initial purchase price, the escrow agent would release the appropriate escrow funds to Pavonix and the Buyers would pay any additional amount owed to Pavonix. Conversely, if the final purchase price was less than the initial purchase price, the escrow agent would release the difference to the Buyers and Pavonix would pay any additional overage to the Buyers directly. All payments due under this arrangement must be made within ten days after delivery of the Closing Statement.

In the event that Pavonix disputed the Closing Net Working Capital, Section 2.5(e) of the Agreement sets forth the procedure by which it could object to the Closing Statement. Pursuant to the Agreement, Pavonix must submit any such objection to the Buyers within 20 days of receiving the Closing Statement. The parties would then have 15 days to resolve the dispute. Failing a resolution, the Agreement provides that the disputed matter "shall be submitted to and determined by an independent team of auditors of KPMG LLC" ("KPMG"), who "shall be given reasonable access to all of the records of [Pavonix] to resolve any dispute regarding the Closing Statement."

Regarding payment and interest, Section 2.5(d) provides the following:

The amount of any payment required to be made pursuant to Section § 2.5(c) shall be made to [Pavonix] or the Buyers, as applicable, within ten (10) days after the determination of such amount becomes final in accordance with Section 2.5(e). Any purchase price adjustment payable pursuant to the Section 2.5 shall

bear interest at [eight percent (8%) per annum] from the date payment is due pursuant to the immediately preceding sentence until the date payment is made to the applicable Party.

The Agreement also contains an indemnification provision whereby Pavonix agreed to indemnify the Buyers against any loss, including "reasonable legal expenses and costs" resulting from the following:

(A) the breach or alleged breach by any Seller or Principle Stockholder or any representation or warranty made by the Sellers or the Principle Stockholders contained in this Agreement or any agreement, document or instrument or certificate contemplated by this Agreement . . . , (B) the breach by any Seller or Principle Stockholder of any cotenant or agreement made by the Sellers or the Principle Stockholders contained in this Agreement or in any agreement, or document or instrument or certificate contemplated by this Agreement . . . (Mang Aff. Ex. C at 54).

On September 10, 2010, Pavonix provided the Buyers with a statement that indicated the Estimated Net Working Capital was negative \$2,752,000. The closing took place on September 17, 2010. On January 14, 2011, the Buyers provided Pavonix with a statement that indicated the Closing Net Work Capital was negative \$12,672,000. On February 11, 2011, Pavonix submitted a dispute notice to the Buyers challenging the alleged Closing Net Working Capital amount.

In February 2011, Pavonix initiated an Article 75 proceeding seeking to compel the Buyers to provide information necessary to further understand the Closing Statement (the "Article 75

Proceeding"). The Article 75 Proceeding was assigned to the Honorable Doris Ling-Cohan, who dismissed the petition as moot, concluding that the parties' dispute as to the accounting records could be resolved by KPMG, as provided for in the Agreement.

On May 2, 2011, Pavonix initiated this action by filing a summons and complaint alleging causes of action for fraud and fraudulent inducement, breach of contract, promissory estoppel, and a declaratory judgment declaring that the Closing Statement failed to reflect the Closing Net Working Capital in the manner required by the Agreement. On January 25, 2012, Pavonix filed an amended complaint adding allegations that the Buyers breached the Agreement by refusing to release the funds held in escrow.

On July 11, 2011, the Buyers moved this Court pursuant to CPLR 7503 to compel arbitration and pursuant to CPLR 3211 to dismiss the remainder of the complaint. In an order dated March 26, 2012, this Court granted the motion to compel arbitration and granted the motion to dismiss in part, retaining only the claim of fraudulent inducement not related to GAAP compliance issues (NYSECF document #13).

The parties then proceeded to arbitration.

On January 9, 2013, the Buyers moved pursuant to CPLR 3212 for partial summary judgment with respect to their counterclaim for indemnification, directing Pavonix to release the \$1,000,000 held in escrow, compelling Pavonix to pay the alleged remaining

balance due under the Agreement with interest dating from April 11, 2012, fees owed to KPMG, and attorneys fees. On March 28, 2013, after an oral argument on the motion, this Court granted the motion for partial summary judgment in its entirety.

On April 22, 2013, Pavonix filed the present motion pursuant to CPLR 2221 seeking reargument of the motion for partial summary judgment with respect only to the award of interest and attorneys fees.

#### **Standard of Review**

Pursuant to CPLR 2222(d)(2), a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." Within these guidelines, the decision to grant reargument is within the Court's discretion (*Rostant v Swersky*, 79 Ad3d 456, 456 [1<sup>st</sup> Dept 2010]).

#### **Discussion**

This Court previously awarded the Buyers interest on the balance owed calculated from April 11, 2011, the latest date on which payment would have been due if KPMG had made its determination in accordance with the time line laid out in the Agreement.<sup>1</sup> Pavonix argues that this Court overlooked and

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<sup>1</sup> The Buyers submitted their dispute notice to Pavonix on February 2, 2011. Pursuant to the Agreement, the parties agreed to submit any dispute regarding the Closing Statement to KPMG



misapprehended relevant facts and misapplied controlling New York law by awarding interest from this date rather than from September 3, 2012, ten days after KPMG made its final determination.

As confirmed by Justice Ling-Cohan's decision in the Article 75 proceeding and by the March 26, 2012 decision of this Court on the motion to compel, Pavonix was bound under the Agreement to submit any disputes arising from the Closing Statement to KPMG for determination. Having failed to do so, Pavonix was in breach of the Agreement. An award of interest calculated according to the time line outlined in the Agreement puts the parties in the position they would have been in had Pavonix complied with the terms of the Agreement. This Court, therefore, affirms its prior ruling.

With respect to attorneys fees, the language of the indemnification clause in Section 9.1(b) broadly encompasses breaches of "any covenant **or agreement** made by [Pavonix] . . . contained in this Agreement" (emphasis added). This provision does not make reference to Section 4 of the Agreement or otherwise contain language that indicates indemnification is

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within fifteen business days of Pavonix's receipt of the dispute, and KPMG was to deliver its determination of the dispute within twenty business days of receipt of the dispute. Had this time line been followed, the parties would have received KPMG's determination by April 1, 2011 and payment would have been due within ten days, April 11, 2011.

limited only the covenants and agreements contained in Section 4, and specifically includes "any covenants or agreement[s]" contained in the Agreement. Therefore, the determination of this Court is that the agreement to submit disputes arising from the Closing Statement is encompassed by the broad language of the indemnification clause in Section 9.1(b)(I).

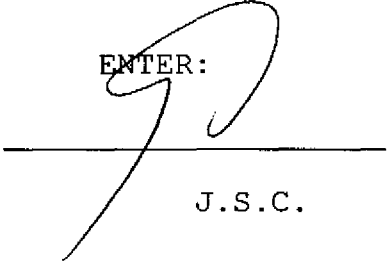
Accordingly, it is hereby

ORDERED that the plaintiffs' motion for leave to reargue the defendants motion for partial summary judgment is granted; and it is further

ORDERED that, upon reargument, the Court adheres to the terms of its Decision and Order dated March 28, 2013 order granting the motion for partial summary judgment.

Dated: August 21, 2013

ENTER:



J.S.C.