

<b>Polaris Venture Partners VI LP v Ad-Venture Capital Partners LP</b>
2018 NY Slip Op 33319(U)
December 18, 2018
Supreme Court, New York County
Docket Number: 650623/2018
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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POLARIS VENTURE PARTNERS VI LP and POLARIS  
VENTURE PARTNERS FOUNDERS' FUND VI, LP,

Plaintiff,

-against-

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AD-VENTURE CAPITAL PARTNERS LP and BRIAN  
F. ADDY,

Defendants.

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

In motion sequence 001, the defendants Ad-Venture Capital Partners LP and Brian F. Addy (collectively, "Ad-Venture") move pursuant to CPLR 3211 to dismiss the plaintiffs Polaris Venture Partners VI LP, and Polaris Venture Partners Founders' Fund VI, LP's (collectively, "Polaris") complaint (the "Complaint").

**Factual Background**

Briefly as alleged in the Complaint, on October 12, 2012, the parties executed a stock transfer agreement (the "STA") whereby Polaris purchased from Ad-Venture 201 shares of ISN Software Corporation ("ISN"). In addition, the STA provided Polaris an option to purchase an additional 76 shares of ISN from Ad-Venture (the "Option Shares") and obligated Ad-Venture to provide Polaris notice if Ad-Venture intended to transfer

or otherwise dispose of the Option Shares.

On January 16, 2013 ISN informed Polaris that as of January 9, 2013, ISN entered into a merger with a newly formed subsidiary (the "Merger"). Under the Merger, Polaris's existing shares were converted into a right to receive \$38,317 per share. However, Ad-Venture's 544 ISN shares were unaffected by the Merger and remained in Ad-Venture's possession.

On January 31, 2013, without notice to Polaris, Ad-Venture voluntarily tendered its 544 ISN shares including the 76 Option Shares to ISN for appraisal in a Delaware court proceeding.

On February 20, 2013, after learning of Ad-Venture's tender, Polaris exercised its option to purchase the Option Shares pursuant to the STA and set a closing date of March 13, 2013. Ad-Venture did not respond and otherwise ignored Polaris's demand for the Option Shares despite multiple letters.

On March 7, 2013, Ad-Venture filed a verified petition in the Delaware Court of Chancery for appraisal of its ISN shares including the Option Shares, effectively eliminating any potential for transferring the Option Shares to Polaris pursuant to the STA by March 13, 2013.

On August 11, 2016, the Delaware Court of Chancery issued an opinion determining that the fair value of a share of ISN was \$98,783, three times the exercise price for the Option Shares of \$29,783.30 as defined by the STA.

Polaris subsequently commenced this instant action seeking damages arising from Ad-Venture's failure to provide notice of the transfer to ISN and failure to transfer the Option Shares pursuant to the STA. The Complaint asserts causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. Thereafter, Ad-Venture moved to dismiss the Complaint pursuant to CPLR 3211(a)(7) on the basis that the Complaint fails to state a cause of action.

#### **Discussion**

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

"In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the

plaintiff to remedy any defects in the complaint and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'" (*id.*).

The Court finds that Polaris has sufficiently stated it's first and second cause of action for breach of contract in its Complaint. The Complaint clearly alleges that Ad-Venture breached Sections 2.1, 4.7, and 6.2 of the STA by failing to provide notice to Polaris of the tender and failing to comply with Polaris's demand for the Option Shares, resulting in damages to Polaris.

In its motion for dismissal, Ad-Venture does not dispute the alleged breaches, but contends that Polaris's Complaint must be dismissed on that basis that Polaris was never entitled to the appraised value of the Option Shares because it was not the owner of the Option Shares on the effective date of the Merger.

Ad-Venture's arguments relate to the amount of damages that Polaris may ultimately be able to recover, but fail to establish that Polaris does not have a cause of action as a matter of law. Based on this limited record, viewed in the light most favorable to Polaris, this Court cannot determine as a matter of law that Polaris would not have otherwise extracted any other benefit or value from the Option Shares.

Furthermore, the third cause of action for unjust enrichment and fourth cause of action for breach of the implied covenant of good faith and fair dealing may ultimately be duplicative of the breach of contract causes of action, but those causes of action are properly plead in the alternative, and do not warrant dismissal at this early stage.

Accordingly, it is

ORDERED that the motion to dismiss is denied in its entirety, and it is further

ORDERED that the parties contact the Part to schedule a conference within 60 days from the date of this order.

Dated: *12/18/18*

ENTER:

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J. S. C.