United States District Court

District of Massachusetts

Kahn, Litwin, Renza & Co., Ltd. v. EarthLink Business, LLC,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 16-11126-NMG**
EarthLink Business, LLC,	)	
Defendant.	)	

MEMORANDUM & ORDER

GORTON, J.

This dispute arises out of an alleged breach of contract claim in which Kahn, Litwin, Renza & Co., Ltd. ("plaintiff" or "KLR") contends that EarthLink Business, LLC ("EarthLink" or "defendant") breached two service contracts by continuously billing plaintiff for services rendered well beyond the contract period. Plaintiff has raised the following claims in its complaint: 1) breach of contract (Count I), 2) breach of covenant of good faith and fair dealing (Count II), 3) negligent and/or intentional misrepresentation (Count III), 4) unjust enrichment (Count IV) and 5) unfair and deceptive practices under M.G.L. c. 93A (Count V).

Pending before the Court is defendant's motion for summary judgment. For the reasons that follow, that motion will be allowed.

I. Background and Procedural History

On May 20, 2009, and June 9, 2009, defendant's predecessor, One Communications ("OC") entered into two service contracts with KLR to provide internet and telephone services for KLR's new office in Waltham, Massachusetts.[1] The form contracts, provided by defendant, include an integration clause disavowing prior agreements and extending service

> on a month-to-month basis unless and until KLR provided written notice of its intention to terminate services.

The form contracts, which plaintiff now contends are invalid, were signed by plaintiff's consultant, Todd Knapp ("Knapp"). Plaintiff asserts that Knapp, who was otherwise unauthorized to sign on plaintiff's behalf, sent notice of written termination to OC within the first eight months of the contract period. Neither plaintiff nor defendant has any written documentation of the purported termination and the parties agree that defendant continued to provide internet and phone services to KLR's Waltham office for several years

[1] Defendant asserts that EarthLink purchased One Communications on April 1, 2011.

thereafter. Plaintiff avers that it disconnected the relevant circuits in or about 2010, and again attempted to terminate services in writing in 2013. Defendant, on the other hand, maintains that written termination was not received until July, 2015, when Jose Ramos, an employee at KLR, sent defendant a Disconnect Form ("2015 Disconnect Form"). That form references the earlier uncorroborated termination.

Despite the ongoing dispute, defendant continued to bill (and plaintiff continued to pay) for services rendered from in or about 2010 until 2015, when defendant believes written termination was tendered. It submits that throughout that time period, it provided internet and telephone services, monitored the live lines and paid Verizon for related services. Plaintiff does not dispute that its accounting group reviewed and approved defendant's invoices from 2010 to 2015 but claims that its payments were made "by mistake".

In April, 2016, plaintiff filed a complaint in Massachusetts state court, which was amended in June, 2016. Defendant timely removed the case to this federal court under 28 U.S.C. §§ 1132 and 1441(a) on undisputed diversity grounds. Plaintiff claims damages of over $130,000 which satisfies the amount-in-controversy threshold. Defendant subsequently filed an answer to plaintiff's first amended complaint.

II. Motion for Summary Judgment

A. Legal Standard

The role of summary judgment is to assess the proof in order to see whether there is a genuine need for trial. Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991). The burden is on the moving party to show, through the pleadings, discovery and affidavits, that there is "no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law". FED. R. CIV. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law". Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue of material fact exists where the evidence with respect to the material fact in dispute "is such that a reasonable jury could return a verdict for the nonmoving party". Id.

If the moving party has satisfied its burden, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine, triable issue. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The Court must view the entire record in the light most favorable to the nonmoving party and indulge all reasonable inferences in that party's favor. O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993). Summary judgment is appropriate if, after viewing the record in the nonmoving party's favor, the Court determines that no genuine

issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Celotex Corp., 477 U.S. at 322-23.

B. Earthlink's Motion for Summary Judgment

This case, in essence, involves a dispute as to which of two separate contractual relationships between the parties is binding. Plaintiff (KLR) alleges that, with the assistance of an agent, it entered into a services contract with defendant in 2009 for a fixed term of 12 months which has long since expired. It also avers that payments made by plaintiff to defendant after the expiration of that contract were made by mistake and that such payments ought to be reimbursed.

Defendant counters that the parties actually entered into subsequent written service contracts in May and June, 2009 which superseded the original agreement, included an integration clause disavowing prior agreements and extended service on a month-to-month basis until when and if plaintiff gave defendant written notice of termination. Defendant goes on to assert that no such termination was made by plaintiff until 2015.

As an initial observation, this Court notes that plaintiff's opposition to defendant's motion for summary judgment is internally inconsistent. Plaintiff sues for breach of a contract which it vigorously asserts was invalid from the outset. That is a non-sequitur. Either there was a contract

that was allegedly breached or there was no contract and therefore no breach. Apparently, what plaintiff claims, without saying so, is that defendant was unjustly enriched because there was no contract between the parties yet defendant got paid anyway. The Court will proceed to examine the issues briefed with that in mind.

1. Contract Claims (Count I)

Plaintiff opposes defendant's motion to dismiss on the grounds that there are genuine issues of material fact with respect to the contractual relationship between the parties, written notice of termination and disputed invoices.

a. Validity of the Contracts

Plaintiff alleges that the two service contracts are not binding because its signatory lacked apparent authority and that a prior agreement between the parties governs. This Court disagrees, however, and finds that the signed service contracts are binding for the reasons set forth below.

i. Apparent Authority

Plaintiff now contends that 1) the signed service contracts are not legally binding because Knapp was an IT consultant who lacked legal authority to enter into a contract with defendant, 2) defendant never interacted with employees of KLR and 3) defendant was on notice that Knapp was an outside consultant because he did not have a KLR email address.

Defendant responds that, to the contrary, apparent authority existed and this Court agrees. Apparent authority exists when conduct of the principal causes a third person reasonably to believe that the particular person has the authority to enter into negotiations and make representations as its agent. Hudson v. Mass. Prop. In. Underwriting Ass'n., 386 Mass. 450, 457 (1982). When determining whether an individual has authority to enter into a contract, courts consider the usual and necessary functions of the individual's duties, whether she performed similar acts in the past and the generally-understood industry standard as to the individual's position. Commercial Masonry Corp. v. Barletta Engineering Corp., 2014 WL 1758057 at *26 (Mass. Super. Mar. 12, 2014).

Defendant has demonstrated that Knapp 1) performed different jobs for KLR prior to 2009, 2) entered into several contracts for internet and phone services on behalf of KLR and 3) understood contracting for such services to be part of his job. Furthermore, Knapp presented himself to defendant as KLR's IT Director and admitted in his deposition that it was industry practice to enter into such contracts on his clients' behalf. These facts leave little doubt that Knapp had apparent authority and defendant acted in reliance on that authority in providing services and subsequently billing for them.

Massachusetts courts have also held that if one alters her position in reliance on such a reasonable belief, the principal is estopped from denying that the agent is authorized. Hudson, 386 Mass. at 457. Defendant has provided internet and telephone services to plaintiff during the disputed period based upon its reasonable belief that Knapp was authorized to enter into a contract on behalf KLR. Thus, plaintiff is estopped from denying that he was authorized in this instance. Moreover, a principal may still be bound if it

> acquiesces in the agent's conduct or fails to promptly disavow the unauthorized conduct after disclosure of all the material facts.
>
> Id.

Defendant reasonably contends that KLR was aware of the contracts, had an opportunity to disavow them and received and approved defendant's invoices for the contracted services for five years. As such, plaintiff's consistent payment of invoices ratified the contracts signed by Knapp. Accordingly, plaintiff cannot claim, as a matter of law, that the contract is invalid for lack of apparent authority.

ii. Prior Agreement and Commercial Code Claims

Plaintiff avers that the signed service contracts do not govern because the parties entered into a prior agreement for a fixed term of 12 months based on email communications between an OC employee and Knapp. In support of that argument, plaintiff

suggests that defendant's form agreements (the subject service contracts) were either an acceptance with materially different terms or an improper modification to the original email contract. Plaintiff has, however, proffered only minimal evidence that a valid 12-month term contract existed prior to the signing of the service agreements. Cf. O'Marah v. Walkey, 2009 WL 981678, at *12 (Mass. Super. Nov. 26, 2008), afff'd, 76 Mass. App. Ct. 1136, 927 N.E.2d 530 (2010) (where parties negotiated at length, through counsel, and reached agreement on the language of a "very formal document"). Even assuming arguendo that a valid prior agreement existed, plaintiff has offered no reason as to why the signed contracts, which contain integration clauses, do not supersede such alleged prior agreement. Cambridgeport Sav. Bank v. Boersner, 413 Mass. 432, 440 (1992) (extrinsic evidence cannot be admitted to alter the terms of an integrated and complete written contract where there is no ambiguity).

Plaintiff contends, as well, that defendant was required to make clear that it would not proceed with the transaction unless plaintiff assented to the terms in the proposal. Not only is its Uniform Commercial Code analysis irrelevant for the purposes of a services contract but also, for plaintiff's assertion to be true, defendant's form contracts would have had to serve as an acceptance of plaintiff's offer. There is, however, no evidence

that defendant's form contracts constituted "acceptance" of plaintiff's "offer". In fact, plaintiff's primary argument hinges on the contrary supposition that a prior contract already existed.

Finally, the First Circuit has held that a party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding. Schott Motorcycle Supply, Inc. v. American Honda Motor Co., Inc., 976 F.2d 58, 59 (1992). While a pleading will not be construed as a judicial admission against an alternative or hypothetical pleading, plaintiff in this case has not alternatively pled that the service contracts are invalid or binding. See id. Rather, similar to the facts in Schott, plaintiff has asserted in their first amended complaint that the two service contracts in dispute are true and accurate copies of the contracts between the parties. Only now, in its opposition to summary judgment does plaintiff raise the argument that the contracts were invalid (based on contradictory arguments that Knapp lacked apparent authority to act on behalf of KLR yet entered into a prior agreement via oral and written communications).

Accordingly, because plaintiff has 1) failed to show that an earlier agreement existed but was not superseded and 2) previously asserted in its complaint that the service contracts

are valid, this Court finds that the signed contracts are valid and legally binding.

b. Breach of Contracts: Disputed Termination and Invoices

To prove a breach of contract claim under Massachusetts law, plaintiff must show 1) a valid, binding agreement, 2) that defendants breached the terms of this agreement and 3) plaintiff suffered damages from the breach. Michelson v. Digital Financial Services, 167 F.3d 715, 720 (1st Cir. 1999).

The subject contracts require plaintiff to notify defendant in writing of 1) termination and 2) any charge or amount disputed, in good faith, within 30 days of receipt of each invoice. Defendant asserts that it is entitled to summary judgment because plaintiff failed to provide written notice of termination and failed to dispute any invoices received during the relevant period.

Plaintiff disputes defendant's assertions and avers that 1) Knapp provided written notice of termination eight months into the contract, 2) in January, 2013, plaintiff informed defendant of the erroneous billing and 3) defendant confirmed that the lines were not being used by plaintiff. Notwithstanding the alleged dispute relating to termination and invoices, plaintiff continued, however, to pay defendant's invoices until 2015 without objection.

Courts have routinely enforced billing notice provisions as binding between the parties where the terms are clear and unambiguous. See, e.g., MacDonald v. Saia, 2007 Mass. App. Div. 72 (May 30, 2007) (upholding a 60-day notice provision for disputing charges); Atl. Packaging Prod., Ltd. v. C&S Wholesale Grocers, Inc., 2004 WL 3091647, at *2 (Mass. Super. Aug. 31, 2004) (finding the 10-day limit on disputing invoices as valid). Accordingly, this Court finds that the 30-day notice provision in the subject contracts is clear, unambiguous and thus binding on the parties.

Furthermore, plaintiff alleges the initial "breach" (of the "invalid contracts") occurred in 2010 yet it continued to pay and did not notify defendant of any improper billing until 2013. Even after the alleged notification in 2013, plaintiff continued to pay defendant's bills until 2015 without objection. Accordingly, plaintiff waived any breach of contract claim by virtue of its action and inaction. See AM Cosmetics, Inc. v. Solomon, 67 F. Supp. 2d 312, 317 (S.D.N.Y. 1999) (where an injured party has actual knowledge of a breach but continues to perform during the period of the alleged breach, it waives its right to sue unless timely notice of the breach was provided).

Accordingly, defendant's motion for summary judgment on the breach of contract claim (Count I) will be **ALLOWED.**

2. Covenant of Good Faith and Fair Dealing (Count II)

In Massachusetts, every contract is subject to the covenant of good faith and fair dealing. Chokel v. Genzyme Corp., 449 Mass. 272, 276 (2007). A party breaches the implied covenant when one party violates the reasonable expectations of the other. Eigerman v. Putnam Investments, Inc., 450 Mass. 281, 288 (2007). In determining whether a party violated the implied covenant, courts consider the "totality of the circumstances". Robert and Ardis James Foundation v. Meyers, 474 Mass. 181, 189-90 (2016).

Defendant asserts that it acted in good faith because it maintained active circuits for the plaintiff's internet and phone connections, continued to pay Verizon for local access and monitored plaintiff's circuits as it was contractually obligated to do. Plaintiff responds that 1) defendant did not monitor the circuits after plaintiff unplugged them, 2) in January, 2013, it informed defendant of the erroneous billing and 3) defendant confirmed that plaintiff was not using the lines. Again, however, despite the alleged request to terminate in 2013, plaintiff continued to pay defendant's invoices for 30 months more.

Furthermore, plaintiff has failed to show that by unplugging defendant's equipment it accomplished the purported

termination. Nor does plaintiff dispute that defendant paid Verizon for services on its lines. Thus, because no reasonable juror could conclude that defendant acted in bad faith under the circumstances, defendant's motion for summary judgment as to Count II will be **ALLOWED.**

3. Negligent/Intentional Misrepresentation (Count III)

Negligent misrepresentation requires a finding that 1) defendant in the course of its business, 2) supplies false information for the guidance of others, 3) in their business transactions, 4) causing and resulting in pecuniary loss, 5) by their justifiable reliance upon the information and 6) failed to exercise reasonable care or competence in obtaining or communicating the information. DeWolfe v. Hingham Center, Ltd., 464 Mass. 795, 800 (Apr. 2013). Intentional misrepresentation requires a finding that 1) defendant made a false representation of material fact, 2) with knowledge of falsity, 3) for the purpose of inducing plaintiff to act on this representation, 4) plaintiff justifiably relied on the false representation and 5) plaintiff suffered damage because of their reliance. Commonwealth v. Lucas, 472 Mass. 387, 394 (2015).

Defendant asserts that there are two valid contracts and that plaintiff has failed to produce any evidence that defendant provided misinformation upon which plaintiff relied. Because

plaintiff has failed to proffer evidence of defendant's negligent or intentional misrepresentation and continued to make payments on the invoices, defendant's motion for summary judgment as to Count III will be **ALLOWED.**

4. Unjust Enrichment (Count IV)

Unjust enrichment is an equitable remedy and should not apply when the "moving party has an adequate remedy at law". Infinity Fluids Corp. v. General Dynamics Land Systems, Inc., 210 F.Supp.3d 294, 309 (D. Mass. 2016). Defendant asserts, and the Court agrees, that the subject contracts govern the dispute between the parties and thus any remedy due is dependent upon those contracts.

If unjust enrichment were an appropriate remedy, plaintiff would need to show that 1) a benefit was conferred by plaintiff to defendant, 2) there was appreciation or knowledge of the benefit by defendant and 3) retention of the benefit by defendant would be inequitable. Id. Plaintiff asserts that because it unplugged the circuits, defendant received a windfall when it billed plaintiff for unused services. Plaintiff does not, however, dispute that defendant continued to provide some services at a cost to defendant (which plaintiff then paid) pursuant to the governing contracts.

Because this is a breach of contract claim and because, in any event, plaintiff has failed to show that retention of the payments is unjust, defendant's motion for summary judgment as to Count IV will be **ALLOWED.**

5. Unfair and Deceptive Practices (Count V)

To support a cause of action for unfair and deceptive practices, Massachusetts state law provides that a person engaged in trade or commerce may bring an action in state court if they can show they suffered a loss as a result of another person who acted unfairly or deceptively under the statute. M.G.L. c. 93A, § 11.

Defendant asserts that no evidence of unfair or deceptive practices has been proffered by plaintiff because both contracts contain express and unambiguous renewal language and there is no record of written termination until July, 2015. While plaintiff has proffered some evidence regarding written termination, it has not shown that defendant acted unfairly or deceptively under the statute. Accordingly, defendant's motion for summary judgment as to Count V will be **ALLOWED.**

ORDER

For the foregoing reasons, defendant's motion for summary judgment (Docket No. 41) is **ALLOWED.**

So ordered.

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton
United States District Judge

Dated October 15, 2018