

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 600282/2008
ECHOSTAR SATELLITE L.L.C.,
vs.
ESPN, INC., ESPN CLASSIC,
SEQUENCE NUMBER : 010
RENEWAL

PART _____

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memo decision.

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IRA GAMMERMAN

Dated: 3/15/10

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

15/11/10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 27M

----- X
ECHOSTAR SATELLITE L.L.C.,

Plaintiff,

Index No. 600282/08
PC No. 21101

- against -

ESPN, INC., ESPN CLASSIC, INC., ABC CABLE
NETWORKS GROUP, INC., SOAPNET, L.L.C. and
INTERNATIONAL FAMILY ENTERTAINMENT,
INC.,

Defendants.
----- X

GAMMERMAN, J.H.O.:

Motion Sequence Numbers 008, 009, and 010 are consolidated for disposition.

In motion 008, plaintiff EchoStar Satellite L.L.C. ("EchoStar") moves, pursuant to CPLR 3212, for summary judgment on its breach of contract claims contained in the amended complaint, for an order requiring defendants to comply with and specifically perform their obligations under the parties' agreements, and for an award of attorneys' fees as provided for in said agreements.

In motion 009, defendants ESPN, Inc., ESPN Classic, Inc. (together, "ESPN"), ABC Cable Networks Group, SOAPnet L.L.C. (together, "ACNG"), and International Family Entertainment, Inc. ("IFE") move, pursuant to CPLR 3212, for summary judgment dismissing all four causes of action asserted in the amended complaint.

In motion 010, EchoStar moves (1) for leave to renew its motion for summary judgment, filed May 9, 2008, dismissing the counterclaim asserted by defendants, decided by me in a signed order dated April 20, 2009 (the "Prior Order"), memorializing a decision on the record rendered on April 15, 2009; (2) for leave to renew its opposition to defendants' motion for summary

judgment on their counterclaim, decided in the Prior Order; (3) for a grant of EchoStar's motion for summary judgment on the counterclaim; and (4) for a denial of defendants' motion for summary judgment on the counterclaim.

Background

The underlying facts and allegations were discussed in a prior written decision (motion 002), dated March 12, 2008, in which EchoStar unsuccessfully sought a preliminary injunction, and in the Prior Order. Summarized, EchoStar offers video, audio, and data services to its customers via a "Direct Broadcast Satellite" system, using high powered satellites to broadcast movies, sports, and general entertainment programming services to subscription fee-paying members of the public. Defendants license programming networks, consisting of standard definition and high definition programming, to distributors such as EchoStar. The dispute in this action includes (1) whether defendants have a contractual obligation to provide EchoStar with certain other high definition programming, the meaning of which is one of the primary issues to be resolved on these motions and in this action, and (2) whether EchoStar is liable for late payment interest and, if so, the date as of which such interest is due.

The contractual obligation at issue arises out of the following three license agreements: (1) a Distribution License Agreement, dated as of September 15, 2005 (the "ESPN Agreement"), by which ESPN licensed to EchoStar six standard definition networks (the "SD Networks") and two high definition networks (the "HD Networks"); (2) a Direct Satellite Distribution License Agreement, dated as of September 15, 2005 (the "ACNG Agreement"), by which ACNG licensed to EchoStar three SD Networks; and (3) a Direct Satellite Distribution License Agreement, dated as of January 1, 2007 (the "IFE Agreement"), by which IFE licensed to

EchoStar one SD Network.

The six SD Networks that ESPN licensed to EchoStar under the EchoStar Agreement are: “ESPN,” “ESPN2,” “ESPNEWS,” “ESPNU,” “ESPN Classic,” and “ESPN Deportes,” and the two HD Networks are “ESPN-HD” and “ESPN2-HD.” The three SD Networks that ACNG licensed to EchoStar under the ACNG Agreement are: “Disney Channel,” “Toon Disney,” and “SOAPnet.” The SD Network that IFE licensed to EchoStar under the IFE Agreement is “ABC Family.”

According to EchoStar, other distributors, in the same territory as EchoStar, announced that defendants would be providing the following “simulcast” feeds of the following Networks: “Disney Channel HD,” “Toon Disney HD,” “ABC Family HD,” and “ESPNNews HD” (collectively, the “Disputed HD Programs”),¹ but defendants indicated to EchoStar that they will not be providing the Disputed HD Programs to EchoStar.

In bringing this action, EchoStar contends that defendants breached the three license agreements by failing to provide it with the same high definition feeds of defendants’ network programming that they provide to other cable, satellite, residential wireless or wireline distributors in the USA and its territories.

The amended complaint contains four causes of action. The first, for breach of contract, seeks an order requiring defendants to specifically perform their obligations under the agreements. The second is based on section 13 of the ESPN Agreement. It alleges that defendants breached that section by providing a lower “Net Effective Rate” and “More Favorable

¹ EchoStar deems these programs to be “feeds,” whereas defendants deem them to be “Networks.”

Provisions” to other distributors for ESPNU and ESPN Deportes than the rate and provisions that defendants provide to EchoStar, and that EchoStar is entitled to the same “More Favorable Provisions” regarding ESPN Deportes and ESPNU, which includes receiving “HD Feeds.”

The third cause of action seeks damages as an alternate remedy to specific performance. The fourth cause of action alleges that, based on the foregoing, defendants breached the covenant of good faith and fair dealing implied in the agreements.

The answer to the amended complaint contains a counterclaim, which was the subject of two prior motions (003 and 004, both of which are relevant to the motions at issue here), and which alleges as follows: since the inception of these three license agreements, EchoStar has failed to make its payments within the agreed-upon time periods. As for the ESPN agreement, on average, it has taken EchoStar 72 days to make its payments, well past the contractual 45-day period, and 76 days in the case of the ACNG and IFE agreements. As a result, the license agreements require EchoStar to pay interest at the rate of one and one-half percent per month, compounded monthly from the date such amounts were due.

On those prior motions, defendants argued that summary judgment in their favor was warranted since it is undisputed that EchoStar failed to abide by its unambiguous contractual obligations. In seeking summary judgment dismissing the counterclaim, EchoStar argued that the late payment interest is not recoverable because (1) the parties’ correspondence establishes an accord and satisfaction, (2) the agreements have been modified based upon the continuous and consistent conduct of the parties, and (3) the doctrine of equitable estoppel bars the counterclaim.

I granted defendants’ motion for summary judgment, but as to liability only, and referred the issue of damages (i.e., the amount of interest owed) to a Referee. Conversely, I denied

EchoStar's motion for summary judgment, which sought dismissal of the counterclaim, but granted EchoStar's motion to amend the complaint to add the second cause of action based upon section 13 of the ESPN Agreement.

As indicated above, in motion 008, EchoStar seeks summary judgment on its breach of contract claims, requiring defendants to comply with and specifically perform their obligations under their agreements with EchoStar, and for an award of attorneys' fees as provided for in the license agreements. In motion 009, defendants seek summary judgment dismissing all four causes of action of the complaint. In motion 010, EchoStar seeks renewal of the prior motion regarding the counterclaim for interest.

EchoStar argues that it is entitled to summary judgment because the express terms of the agreements reflect the parties' intent to include HD feeds, and evidence in the record establishes that the parties rejected defendants' draft provisions excluding such feeds. EchoStar asserts that its interpretation of the agreements is buttressed by defendants' admissions as to the purpose of the agreements, and the practice in the industry.

Defendants argue that, on their face, the agreements support their position, and, therefore, it is impermissible for EchoStar to use extrinsic evidence to interpret or contradict the meaning of the agreement. In addition, even if extrinsic evidence were considered, it is disputed, and thus, not a basis for summary judgment in EchoStar's favor.

Determination

Defendants' motion for dismissal of the complaint is granted and, conversely, EchoStar's motion for summary judgment is denied. The motion for renewal is denied. As for the issue of the amount of interest owed, I find that the accrual period for interest is 30 days from the end of

the applicable reporting period.

Discussion

At issue is section 4 (d) of the ESPN Agreement, which contains the following provision:

“For clarity, EchoStar shall be entitled to receive and distribute all feeds of the Network(s), including without limitation, all regional feeds of the Networks.”

Section 4 (e) of the ACNG and IFE Agreements contains almost an identical provision.

According to EchoStar, this provision obligates defendants to provide it with the Disputed HD Programming at no additional cost. It claims that these are not separate networks, but, instead, merely “feeds,” and thus, because Echostar is contractually entitled to receive “all regional feeds of the Networks,” it is entitled to these feeds. Defendants assert, correctly, that the Disputed HD Programming are not merely feeds of the Networks, but are their own separate networks, and, thus, they are not part of the licensing agreements at issue.

The ESPN Agreement identifies six SD Networks and two HD Networks. The six SD Networks are: (1) ESPN, the “programming network in existence since 1979,” (2) ESPN2, the “programming network in existence since 1993,” (3) ESPNEWS, the “programming network in existence since 1996,” (4) ESPN Classic, the “programming network in existence since 1995,” (5) ESPNU, the “programming network in existence since 2005,” and (6) ESPN Deportes, the “programming network in existence since 2004.” The two HD Networks are: (1) ESPN-HD and (2) ESPN2-HD.

Each network is treated as a distinct programming entity, with a description of when it was created, and the content of each set forth in section 4 (a) of each agreement. Section 4 (a) does not specifically include a programming content description for the two HD Networks, because the agreement contemplates that the content of ESPN-HD and ESPN2-HD will be

similar to that of ESPN and ESPN2, respectively, but not necessarily the same; section 6 (a) (“Special Provisions Applicable to HD Networks”) provides that “ESPN reserves the right to include as part of ESPN-HD and ESPN2-HD programming and advertising other than simulcast programming contained in the ESPN Network and ESPN2.” Thus, the programming may differ, and ESPN-HD is not a mere feed of ESPN, and ESPN2-HD is not a mere feed of ESPN2. The construction proposed by defendants is consistent with the agreement as a whole and the parties’ purpose, *Goldsmith v Metromedia Fiber Network*, 293 AD2d 383 (1st Dept), *lv denied* 99 NY2d 502 (2002).

A fundamental rule of contract interpretation is that an agreement is to be interpreted according to the parties’ intent, *Greenfield v Philles Records, Inc.*, 98 NY2d 562 (2002). The “best evidence of what the parties to a written agreement intend is what they say in their writing” [citation omitted], *id.*, 98 NY2d 562. EchoStar contends that it negotiated for “all feeds,”² but the ESPN Agreement does not contain this language; rather, it provides for “all feeds of the Networks.” As discussed above, the intent of the ESPN Agreement is to recognize that an HD Network is separate from an SD Network, and the agreement grant EchoStar entitlement to all feeds of the Networks, but not to all Networks. EchoStar’s argument that “all” means “all” ignores the remainder of the phrase “of the Networks.” The ESPN Agreement defines ESPN-HD and ESPN2-HD as Networks, not as feeds. No reasonable reading of the subject agreement permits EchoStar’s construction of the contractual language at issue, *Goldsmith v Metromedia Fiber Network*, *supra*. Indeed, some of the Disputed HD Programming pertain to the ACNG

² See e.g. Dep. Tr. of Christopher J. Kuelling at 185:6-10, at Exh 15 to Affirmation of Lisa C. Gipson, Esq. (“They wanted to exclude – they specifically said, as I recall, that ‘additional feeds’ would exclude high-definition feeds. We did not agree to that language and we took it out”).

agreement (Disney Channel HD and Toon Disney HD) and the IFE agreement (ABC Family HD), and, unlike the ESPN Agreement, neither of these agreements makes any mention of HD programming.

EchoStar also relies upon extrinsic evidence, but because the contract represents a clear and complete document, summary judgment is appropriate without reference to such evidence, *W.W.W. Assocs. v Giancontieri*, 77 NY2d 157 (1990). Moreover, EchoStar's reliance on prior drafts to establish the parties' intent is irrelevant, because the agreements contain a merger clause providing that the agreement contains the full understanding of the parties, and supercedes any of the parties' previous agreements, *Kindler v Newsweek, Inc.*, 277 AD2d 159 (1st Dept 2000).

The second cause of action is based on section 13 (the "Most Favored Nation provision") of the ESPN Agreement. It alleges that defendants breached that section by providing a lower "Net Effective Rate" and "More Favorable Provisions" to other distributors for ESPNU and ESPN Deportes than provided to EchoStar, and EchoStar is entitled to the same More Favorable Provisions regarding ESPN Deportes and ESPNU, including receiving "HD Feeds."

EchoStar alleges that it pays the same license fee rates for ESPN Deportes and ESPNU as defendants' other top three distributors, but those other distributors receive these networks as well as the Disputed HD Programming, whereas EchoStar receives only ESPN Deportes and ESPNU. Therefore, the other distributors are treated more favorably and pay a lower "Net Effective Rate" than EchoStar, which, allegedly, is entitled to the same rate plus any "in-kind consideration" or "more favorable provision."

Defendants argue that section 13 does not apply to the Disputed HD Programming, and that, even if it did, the terms are actually favorable to defendants, not to the other distributors.

They contend that the Most Favored Nation provision relates only to rates and packaging obligations, and cannot be read to encompass all terms and conditions, i.e., an agreement with another distributor that includes the Disputed HD Programming, *see* Affidavit of David C. Preschlack, ¶ 10.

Defendants' contention is persuasive. The plain language of the section indicates that this Most Favored Nation provision was not meant to encompass agreements with other distributors, and therefore, resort to extrinsic evidence is unnecessary, *CBS, Inc. v American Socy. of Composers, Authors & Publs.*, 276 AD2d 337 (1st Dept 2000). Section 13 pertains to (1) a lower "Net Effective Rate" or (2) "more favorable packaging rights or obligations." Examples of the latter include the "ability to distribute a Network on an a la carte basis," "removing any packaging or bundling requirements," and "removing the obligation to distribute a Network on Basic or Expanded Basic tiers and/or the availability of multi-package distribution of a Network such as, for example, on a cable television system's Expanded Basic tier and a separate sports tier." EchoStar does not appear to argue that any of these are relevant.

Calculation of the "Net Effective Rate" is based upon "residential, commercial and other rates paid by such Other Distributor" and:

"reducing such amount by all packaging, volume, penetration or other discounts (including specifically and without limitation any rate reductions, adjustments, rebates or discounts associated with the loss of NFL or any other programming), rebates, allowances, launch support, marketing support, advertising or media purchases, incentives, credits, revenue sharing arrangements (e.g., with respect to home shopping), discounted marketing materials or other cash or in kind consideration"

EchoStar contends that the Disputed HD Programming constitutes "in kind consideration" even though this does not relate to any of the items listed in the provision, and EchoStar fails to

support its conclusory assertion that the Disputed HD Programming constitutes in kind consideration as contemplated by this provision.

The Counterclaim

As for the counterclaim, EchoStar contends that after the prior summary judgment motions were submitted, numerous documents pertaining to EchoStar's waiver and estoppel defenses surfaced in discovery. In essence, however, it is seeking reargument, not renewal, because, in so doing, it makes essentially the same arguments, and relies upon essentially the same evidence as in the prior motion, *Fontanez v St. Barnabas Hosp.*, 24 AD3d 218 (1st Dept 2005). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided, *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 (1st Dept), *lv dismissed in part, denied in part* 80 NY2d 1005 (1992), *rearg denied* 81 NY2d 782 (1993).

For example, EchoStar again asserts that defendants never mentioned in communications with it that they would seek interest. The decision on the record acknowledged EchoStar's assertion that defendants' repeated acceptance of late payments and failure to demand interest or late fees induced its reasonable belief that interest and late fees would not be imposed, but stated that EchoStar had not attributed any conduct to defendants whereby they caused it to believe that they would not seek the interest payments to which they were contractually entitled. As stated in the Prior Order, to deem the statements by defendants that they appreciate "these more timely payments," and that EchoStar's efforts "clearly strengthen our already positive business relationship," as conduct evincing waiver would be in derogation of the principal that waiver of contractual rights is not to be lightly presumed, *Braddock v Braddock*, 60 AD3d 84 (1st Dept),

appeal withdrawn 12 NY3d 780 (2009). EchoStar has not demonstrated an intentional relinquishment of a known right, nor any evidence of additional consideration paid for the alleged modification, *Basciano v Toyet Realty Corp.*, 167 AD2d 203 (1st Dept 1990).

EchoStar also states that defendants accepted “full and final payment,” but this accord and satisfaction argument was also addressed in the Prior Order. The letters accompanying the payments did not inform defendants that “acceptance of the amount offered will settle or discharge a legitimately disputed unliquidated claim,” *Merrill Lynch Realty/Carl Burr, Inc. v Skinner*, 63 NY2d 590 (1984), *rearg denied* 64 NY2d 885 (1985), and EchoStar’s evidence did not show a “clear manifestation of intent by the parties that the payment was made, and accepted, in full satisfaction of the claim,” *Nationwide Registry & Sec. v B&R Consultants*, 4 AD3d 298 (1st Dept 2004). The “new” evidence does not change the determination, and the waiver and estoppel arguments are unavailing.

Interest Accrual Period

As stated above, I previously granted defendants’ motion for summary judgment on their counterclaim for interest due, but as to liability only, and referred the issue of damages to a Referee. The issue to be determined was the amount of interest due based on the date on which interest on the late payments accrued. The parties entered into a stipulation as to the amount due depending upon the court’s determination as to this issue, i.e., whether interest accrues 30 days, 45 days, or 60 days after the end of the applicable reporting period.

EchoStar argues that the express terms of the licensing agreements, and defendants’ own admissions, preclude any attempt by defendants to now assert an accrual period that is shorter than 45 days. I am not persuaded by Echostar’s arguments.

The agreements unambiguously provide for payment within 30 days of the end of the Reporting Period. Specifically, the ESPN Agreement provides, in relevant part, in section 8 (a) (i):

“Payment of the License Fees for the Networks shall be made monthly, not later than thirty (30) days following the end of the Reporting Period for which they are due.”

The IFE and ACNG Agreements contain substantially the same provision at section 7 (a) (i). As for the interest accrual date, section 8 (a) (v) (b) of the ESPN Agreement³ provides:

“Any amounts not paid by EchoStar within forty-five (45) days following the end of the Reporting Period for which such amounts are due shall accrue interest at the rate of one and one-half percent per month or at the highest lawful rate, whichever shall be the lesser, compounded monthly from the date such amounts were due until they are paid.”

According to the plain language of these provisions, if EchoStar makes its payment within 45 days of the due date (i.e., within 15 days after the end of the 30-day reporting period), then it will not be charged interest. But if the payment is made after that 45-day period, then interest of one and one-half percent is charged, but the interest accrues from the earlier 30-day date, not the 45-day date. These provisions are not susceptible to any other reasonable interpretation and the issue can be decided as a matter of law, *Goldsmith v Metromedia Fiber Network, supra*.

To interpret them as providing that interest begins to accrue only at the end of the 45-day period, rather than at the end of the 30-day period, would violate the long-settled rule of contract construction that a court should not interpret a contract so as to render a provision meaningless, *Two Guys from Harrison-N.Y. v S.F.R. Realty Assocs.*, 63 NY2d 396 (1984); *Vertical Computer*

³See Section 7 (b) of the IFE and ACNG Agreements.

Sys., Inc. v Ross Sys., Inc., 59 AD3d 205 (1st Dept 2009). EchoStar's construction would render meaningless the agreements' provision calling for a due date within 30 days after the end of the reporting period.

Indeed, EchoStar appears to impliedly concede this, because it quotes only part of the relevant provision of the agreements, i.e., "[a]ny amounts not paid by EchoStar within forty-five (45) days following the end of the Reporting Period for which such amounts are due shall accrue interest at the rate of one and one-half percent (1 ½ %) per month . . .," Memo. in Support, at 4, but omits the crucial ending of that sentence "from the date such amounts were due until they are paid [emphasis added]."

EchoStar also contends that the Prior Order already acknowledged a 45-day interest accrual period. The issue of the accrual date was not previously before me, however. The issue decided in the Prior Order was only whether EchoStar was liable for interest based on its late payments. A fair reading of that decision reveals that there was no finding as to the accrual date.

EchoStar next argues that defendants admitted years ago that the agreements contains a 45-day interest accrual term, and conceded that interest should be calculated no sooner than 45 days. In making this argument, EchoStar relies upon a January 5, 2006 e-mail, and a February 27, 2006 e-mail, both from Robert Savinelli, defendants' Senior Director of Accounting, to Paul Orban, EchoStar's Controller, attaching an invoice that provided for interest from the 45-day mark. These e-mails do not change the terms of the agreements, and there is nothing in them that demonstrates an intentional relinquishment of a known right, *Basciano v Toyet Realty Corp.*, *supra*.

Moreover, in a January 5, 2006 e-mail, also from Robert Savinelli to Paul Orban,

Savinelli stated: "October's payment is due technically 30 days after that, or 45 days prior to us being able to charge interest," and "I am not going to apologize for our contract that both parties agreed to . . . which is 30/45 day terms from Reporting Period, we definitely need to move the needle much closer to that 45 day mark" This shows that defendants had not waived the 30-day/45-day time frame. I have considered the other extrinsic evidence, including the statement by Richard Grustus, and do not find it persuasive.

As a third argument, EchoStar contends that, based on the parties' consistent practice, the accrual period is 60 days after the end of the applicable reporting period. They argue that defendants told them that they understood that EchoStar would be unable to pay in 45 days, and they were willing to accept 60 days, but they put the 45-day provision in the contract to protect their Most-Favored Nation clauses. This assertion fails as, among other reasons, each of the three license agreements at issue contains a merger clause.

As for EchoStar's argument that defendants' repeated acceptance of late payments and failure to demand interest or late fees pursuant to the agreements induced its reasonable belief that interest and late fees would not be imposed, that argument was, in essence, addressed in the Prior Order. The notion that the parties had a "back office agreement" as to a 60-day accrual period is belied by evidence in the record, *see e.g.* Exh C to Affirmation of David Yolkut (wherein Savinelli states: "I don't agree or accept the 'back office' agreement to 60 day payment terms").

Finally, EchoStar's assertion that an adverse inference should be applied against defendants, because they failed to turn over records that contain their own internal calculations and accounting records regarding what interest, if any, was actually accruing on EchoStar's

accounts, is unavailing. As stated in the Prior Order, regarding the granting of EchoStar's motion to amend the complaint, "EchoStar has represented it does not require any further discovery."

Accordingly, it is hereby

ORDERED that motion 008 by plaintiff EchoStar Satellite L.L.C. for summary judgment is denied; and it is further

ORDERED that motion 009 by defendants ESPN, Inc., ESPN Classic, Inc., ABC Cable Networks Group, SOAPnet L.L.C., and International Family Entertainment, Inc. for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that motion 010 for renewal is denied; and it is further

ORDERED that interest on the counterclaim is the amounts set forth in the parties' stipulation based on an accrual 30 days after the applicable reporting period; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 3/15/10

ENTER:

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J.H.O.

IRA GAMMERMANN