SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
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NEW MEDIA DISTRIBUTION COMPANY LTD,

Plaintiff,

Index No.
-against- 650754/09

IOTA VENTURES LLP, IOTA LP, and
KONSTANTIN KAGALOVSKY,

Defendants,

and

KONSTANTIN KAGALOVSKY and IOTA LP,

Defendants-Counterclaim Plaintiffs,

-against-

NEW MEDIA DISTRIBUTION COMPANY LTD,

Counterclaim Defendant.
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Charles Edward Ramos, J.S.C.:

Motion sequence numbers 011 and 012 are consolidated for disposition.

In motion sequence 011, defendants Iota LP (Iota), and Konstantin Kagalovsky (together, Iota Defendants) move for summary judgment dismissing the complaint of plaintiff New Media Distribution Company LLC (New Media Distribution).

In motion sequence 012, New Media Distribution moves for summary judgment as to liability on its causes of action for breach of contract and tortious interference with contract. New Media Distribution also seeks summary judgment as to damages as

against defendant Iota Ventures LLP (Iota Ventures).

Background

New Media Distribution, a Delaware LLC which was reincorporated in the Cayman Islands in 2010, is a producer and distributor of popular television programming in Russia, Ukraine and other former Soviet countries. Following negotiations in New York, New Media Distribution and Iota Ventures entered into three licensing agreements (Agreements), on January 1, 2009 (January 1 Agreement), January 14, 2009 (January 14 Agreement) and April 19, 2009 (April Agreement). Pursuant to the Agreements, New Media Distribution agreed to license television programming to Iota Ventures for broadcast on a Ukrainian television network called TVi.

Iota Ventures is a Delaware partnership formed for the purpose of owning and operating TRS, whose brand name is TVi. The two partners of Iota Ventures are defendant Iota, which is beneficially owned through a trust structure by defendant Kagalovsky, and non-party New Media Holding Company LLC (New Media Company), which is owned and managed by counterclaim defendant Vladimir Gusinski. New Media Company is also the majority shareholder of New Media Distribution.

In a related action pending before this Court, New Media Company is seeking damages and equitable relief against the Iota Defendants for breach for breach of fiduciary duty stemming from

their alleged surreptitious theft of TVi through a series of complex corporate transactions that diluted Iota Ventures' ownership of the television network to less then one percent (*New Media Holding Company LLC v Kagalovsky, et al* [603742/09]).

Prior to these events, Iota Ventures regularly broadcast television content licensed from New Media Distribution and made installment payments due under the Agreements. However, in early October 2009, Iota Ventures admittedly failed to make certain payments due thereunder.

According to New Media Distribution, the Iota Defendants tortiously caused Iota Ventures to breach its contractual obligations under the Agreements by directing Kagalovsky's agent, Andre Dementiev, who also served as a consultant to Iota Ventures, to instruct Iota Ventures' manager, Grant Brown, not to pay one outstanding installment payment, totaling $413,000.

On October 9, 2009, Brown informed New Media Distribution that it would not be pay the overdue fees because there was a dispute regarding the exact amount due and owing, and his belief that the parties extended certain payment deadlines.

On October 15, 2009, New Media Distribution purported to terminate the Agreements and revoke the licenses granted to Iota Ventures. To date, Iota Ventures allegedly owes a total of $3,681,870 under the Agreements.

On October 16, 2009, New Media Distribution filed suit in

the Southern District of New York against Iota Ventures for breach of contract. Subsequently, it voluntarily withdrew the lawsuit for lack of diversity jurisdiction, and later refiled in this court in late December 2009.

New Media Distribution asserts causes of action for breach of contract against Iota Ventures, tortious interference with contract against the Iota Defendants, and seeks a declaration that it validly terminated the Agreements.

In its amended answer, the Iota Defendants allege that Gusinski, through his domination and control of New Media Distribution and New Media Holding (plaintiff in the related action), mismanaged Iota Ventures since its inception by over-charging license fees and causing TVi to purchase premier shows that it could not afford.

Defendants interpose counterclaims against New Media Distribution and Gusinski for breach of fiduciary duty, fraudulent concealment, rescission, unjust enrichment, and aiding and abetting breach of fiduciary duty.

Discussion

The Iota Defendants move for summary judgment for lack of personal jurisdiction, and argue that the defense of economic justification undermines New Media Distribution’s cause of action for tortious interference with contract.

As to the portion of the motion which seeks dismissal for

lack of personal jurisdiction, the Iota Defendants previously moved to dismiss the complaint based upon this identical ground. The Court denied the motion on the merits (6/10/10 Tr; 6/30/10 Decision, mot seq 01), which is the subject of a pending appeal before the First Department, filed on July 14, 2010.

This Court's denial of the motion to dismiss based on lack of personal jurisdiction is law of the case (*see Penn Warranty Corp. v DiGiovanni*, 10 Misc 3d 998, 999 [Sup Ct, NY County 2005]), and no persuasive ground for reconsideration of the prior order is presented.

In addition, for the reasons set forth on the record, the Iota Defendants' motion to dismiss the cause of action for tortious interference with contract is granted (4/6/11 Tr 22:8-11, 23:21-22, 35:10-21, 36:19-21).

New Media Distribution also moves for summary judgment seeking to hold Iota Ventures liable for breach of contract.

In opposition, Iota Ventures asserts that it could not have breached the Agreements because New Media Distribution extended the June 1 and August 1 deadlines for payment until the end of October 2009, and the September 30 deadline until the end of the November pay period thereby orally modifying the Agreements. Iota Ventures relies upon *Rose v Spa Realty Assocs.,* 42 NY2d 338, 343-44 [1977]), and argues that New Media Distribution is estopped from disputing modification of the Agreements.

As to the applicable law, the January 1 Agreement contains a choice-of-law clause indicating that English laws governs, while the January 14 and April Agreements indicate that New York law governs (Exhibit H, annexed to the Defendants' Rule 19-A Statement).

New York courts enforce choice-of-law clauses, provided that the chosen law has a reasonable relationship to the agreement and does not violate a fundamental public policy of New York (*Hugh O'Kane Elec. Co., LLC v MasTec N. Am., Inc.*, 19 AD3d 126, 127 [1st Dept 2005]).

Under the parties' election to apply New York law, which amounts to implied consent (*see MBIA Ins. Corp. v Royal Bank of Canada,* 28 Misc 3d 1225[A][Sup Ct, Westchester County 2010]), and the connections to New York insofar as the Agreements were negotiated here, the Court will apply New York law to the contract cause of action and the defense of waiver and modification.

It is well-settled that where an oral agreement to modif y has been acted upon to completion, past oral exchanges and conduct may be relied upon to test the alleged modification (*Rose*, 12 NY3d at 343-44; *Taylor v Baylock Partners, L.P.,* 240 AD2d 289 [1st Dept 1997]). With respect to partial performance of an alleged modification, past oral exchanges and conduct of the parties will be considered only to the extent that they are

“unequivocally referable to the oral modification” (*Rose*, 12 NY3d at 343-44). This rule is applicable irrespective of whether the written agreement contains a proscription against oral modifications, which itself may be waived (*Id.*).

In addition, under the principle of equitable estoppel, “once a party to a written agreement has induced another’s significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute [General Obligations Law § 15-301] to bar proof of that oral modification” (*Id.*). However, conduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written” (*Id*.).

Iota Ventures submits the testimony of Andrei Dementiev, an Iota Ventures consultant, and Grant Brown, Iota Venture’s manager, who both testify that the June 1 and August 1 deadlines for payment under the Agreements were extended on the instructions of Yevgeny Yakovich, who is Gusinski’s and New Media Distribution’s agent at TVi and an Iota Ventures consultant.

First, it is undisputed the only sources of funding for Iota Ventures’ obligations, including its operation of TVi and its license payments due under the Agreements, came from periodic cash injections from Iota Venture’s partners: New Media Holding and Iota (Exhibits 1, 7, annexed to the Dementiev Aff., Gusinski Dep Tr 170:3-5, 408:22-25, 409:2-7; Brown Dep Tr 154).

At some point in the parties' contractual relationship, it is undisputed that Yakovich took over the process of creating TRS' budget and would give Dementiev instructions regarding which payments Iota Ventures should make, who would then instruct payments to Brown.[1]

Dementiev and Brown both testify that, in accordance with this practice, Yakovich instructed them to defer the June 1 and August 1 deadlines for payment until the end of October 2009, and the September 30 deadline until the end of the November due to tax implications involved in non-party New Media Holding's funding of Iota Ventures, and because New Media Holding had not yet funded Iota Ventures during the summer of 2009 (Exhibits 8, 13, annexed to Iota Ventures' Rule 19-A Statement, Dementiev Aff., ¶¶ 13-17; Dementiev Dep Tr 255-257, 259-64; Brown Dep Tr 415-16, 419-20, 446-47).

Beyond these oral exchanges testified to by Brown and

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[1] Specifically, the practice of the parties was that Dementiev and Yakovich, as representatives of the partners, prepared budgets and payment schedules for both Iota Ventures and TVi (Exhibits 2, 19, annexed to the Dementiev Aff., Gusinski Aff., ¶ 20; Exhibit 31, annexed to the Gimbel Aff., Yakovich Dep Tr 127-128, 214, 263; Dementiev Dep Tr 116, 119, 136; Brown Dep Tr 383-84).

Once money was received into Iota Ventures by its partners, Dementiev submitted final payment instructions to Brown (*Id.*). Thereafter, Brown would submit the funding request to the partners by mid-month, in order to give them sufficient time to arrange financing in order to pay the bills for TVi and Iota Ventures at the end of the month (Yakovich Dep Tr, 56-58; Exhibit 29, annexed to the Dementiev Aff.).

Dementiev, Iota Ventures submits an e-mail exchange between Brown and Yakovich, dated September 25, 2009. In the e-mail, Yakovich directs Brown to “stop all payments” under the Agreements, and includes a list of payments due third-party vendors and New Media Distribution. Corresponding to the names of the vendors, Yakovich indicates which payments (that have become due) are “postponed until late October,” “almost on schedule,” “on schedule,” or “not in plan.” He writes that the two payments due New Media Distribution are “not paid,” and “postponed from June 1, 2009,” and “August 1, 2009" (*Id.*). Yakovich writes:

> “Dear Grant [Brown], Please stop all payments because the list of payments provided by you is not the same agreed between the parties” (Yakovich Dep Tr 119-122; Exhibit 20, annexed to the Dementiev Aff.).

Shortly thereafter, Yakovich sent another e-mail directly to Kagalovsky and copied to Dementiev, in which he includes the same list of vendors and writes:

> “I want to inform you that the payments being made by Grant [on behalf of Iota Ventures] do not match the list of payments agreed upon with Andrei [Dementiev] ... I deemed it necessary to send Grant and a copy to you and Andrei [Dementiev] a demand to stop payments (*Id.*).

Kagalovsky then asks Yakovich, “Which specific payments should not be paid or, on the contrary, are not included in the payment list” (*Id.*).

At his deposition, Yakovich testified that, on occasion when Iota Ventures was without sufficient funding, New Media Distribution’s practice was to permit Iota Ventures to pay other

third parties before it would require payment under the Agreements from Iota Ventures (Exhibits 8-9, annexed to the Dementiev Aff., Renaud Dep Tr 115-116, Yakovich Dep Tr 128-29, 267-69, 271). During the summer of 2009, Yakovich even elected to defer the payment of his own salary from Iota Ventures due to lack of funding from the partners (*Id.*).

The week following Yakovich's e-mail to Brown to "stop all payments," in-house counsel for New Media Distribution, Troy Selvaratnam, wrote to Brown claiming that Iota Ventures had failed to pay license fees on their original due dates and demanded that these fees be paid by October 8, 2009, or else New Media Distribution would revoke the rights licensed under the Agreements and file suit.

Brown responded that the sums were not overdue because the payment deadlines had been modified (Exhibit 18, annexed to the Dementiev Aff.). Although he reiterates that the licenses granted to Iota Ventures would be revoked in several days if it failed to pay amounts outstanding since September 30, 2009, Selvaratnam appears to confirm that New Media Distribution did in fact agree to the extention of certain payment deadlines. He writes:

> "Iota Ventures LLP (...) should have paid the license fees ... **originally due** on June 1, 2009 and August 1, 2009 respectively, **no later than the end of September 2009**" (emphasis added) (Exhibit 28, annexed to the Dementiev Aff.).

Selvaratnam subsequently testified that he did not demand payment after Iota Ventures failed to meet the original April and June 1 deadlines under the Agreements, although one day after the original September 30 payment was overdue he threatened to revoke Iota Ventures' licenses unless payment was made immediately (Exhibit 26, annexed to the Dementiev Aff., Selvaratnam Dep Tr 421-22). New Media Distribution commenced this action two weeks later and now denies that it agreed to extend any payment deadlines under the Agreements.

The Court concludes that there is sufficient evidence in the record to raise a triable issue as to whether New Media Distribution induced Iota Ventures' reliance upon the instructions of Yakovich (New Media Distribution's agent) to defer payments beyond the original deadlines set forth in the Agreements (*see generally Rose*, 42 NY2d at 343-44). In addition, there is a triable issue as to whether the parties' conduct evinces a mutual departure from their written agreement with respect to payment deadlines (*Id.*).

New Media Distribution's contention that "no oral modification" clauses bar Iota Ventures' defense of estoppel is unavailing. First, the January 1 and April Agreements do not contain "no oral modification" clauses. In any event, clauses that proscribe oral modification may themselves be waived (*Rose*, 42 NY2d at 343-44).

Therefore, due to triable issues of fact in the record, New Media Distribution has failed to demonstrate prima facie entitlement to summary judgment on the issues of liability and damages on its cause of action for breach of contract.

Accordingly, it is

ORDERED that the motion of defendants Iota Ventures LLP and Konstantin Kagalovsky (011) for summary judgment is granted in part as to the cause of action for tortious interference and is otherwise denied; and it is further

ORDERED that the motion of plaintiff New Media Distribution Company Ltd. (012) for summary judgment is denied.

Dated: August 5, 2011

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J.S.C.