

**MicroBilt Corp. v LSSi Data Corp.**

2016 NY Slip Op 31984(U)

October 14, 2016

Supreme Court, New York County

Docket Number: 653513/2014

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 39

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MICROBILT CORPORATION,

Plaintiff,

Index No.: 653513/2014

-against-

**DECISION AND ORDER**

LSSi DATA CORP.,

Defendant.

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**Saliann Scarpulla, J.:**

Defendant LSSi Data Corp. (“LSSi”) moves to dismiss the complaint. LSSi is an aggregator and seller of directory assistance and telephone data information acquired from various telephone service providers, including Comcast Phone LLC (“Comcast”) and Time Warner Cable, Inc. (“TWC”). Plaintiff MicroBilt Corporation (“MicroBilt”) provides consumer information and services to authorized and credentialed end user customers (“End Users”) that use the information in connection with enhancements, updates, verification of accuracy and identity, credit and collection determinations.

The parties’ dispute arises out of their Database Services Agreement, entered into on March 1, 2010 (the “Database Agreement”). Pursuant to the Database Agreement, MicroBilt purchased from LSSi certain telephone data for utilization and incorporation into MicroBilt’ s products for resale to its End Users. The Database Agreement had an

initial six-year term, with annual renewals thereafter. Under the Database Agreement, LSSi granted MicroBilt a license to access data from four databases: (1) National Directory Assistance Listings; (2) Wireless Listings; (3) Alternative Landline Listings; and (4) Historical Disconnect Listings.

The Database Agreement required LSSi to update the National Directory Assistance Listings database on a daily basis and to update the Wireless Listings, Alternative Landline Listings, and Historical Disconnect Listings databases upon availability, but not less than monthly. MicroBilt states that these updates were “critically important” to MicroBilt and its End Users because “[i]ncomplete or stale data degrades the quality and reliability of the product and places MicroBilt’s business and its End User customers at risk.”

The Database Agreement did not identify any specific suppliers of the data to LSSi. According to the MicroBilt, during the term of the Database Agreement LSSi was providing to MicroBilt access to data from Comcast and TWC. Although LSSi stopped receiving data from TWC after September 2010, and from Comcast after May 2011, it continued to pass along data from these two suppliers to MicroBilt.

Under the Database Agreement, LSSi further agreed to provide a minimum listing count for each of the four databases to MicroBilt. The Database Agreement provides:

If any of the databases listed above falls below its associated minimum listing count, then MicroBilt may elect to so notify

LSSiDATA in writing (email acceptable) and LSSiDATA shall have sixty days to meet or exceed such listing count. If after the sixty day period the applicable database is still below the minimum listing count, then MicroBilt shall have the right, but not the obligation, to terminate the Agreement upon written notice provided per the terms of Section 23 (Notices).

In addition, Paragraph 28 of the Database Agreement, entitled Warranty, states:

The services, Database, Listings, data, and information provided by LSSiDATA hereunder are provided AS IS and LSSiDATA makes no warranty, express or implied, regarding their accuracy or completeness.

Unbeknown to MicroBilt, in April, 2011, LSSi filed a complaint and sought a temporary restraining order against Comcast, directing Comcast to continue to provide LSSi with direct access to raw customer data. According to MicroBilt, “[d]espite its knowledge that Comcast had ceased providing it with raw customer data, LSSi failed to notify MicroBilt that its directory assistance database did not contain updated and current Comcast telephone data.” MicroBilt contends that even after the federal court denied LSSi’s request to compel Comcast to provide it with direct access to raw data, “LSSi concealed from MicroBilt the fact that Comcast had ceased providing direct raw telephone data to LSSi and that LSSi’s databases did not contain current Comcast telephone data” and continued to furnish stale Comcast data to MicroBilt.

In March 2011, MicroBilt filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Jersey. In the bankruptcy proceeding, MicroBilt agreed to assume the Database Agreement and paid \$19,457.75 to do so.

On July 5, 2011, also unbeknown to MicroBilt, LSSi commenced a declaratory judgment action against TWC. In that action LSSi alleged that TWC had unlawfully withheld from LSSi directory assistance listing data. According to MicroBilt, although LSSi knew of TWC's refusal to provide data to LSSi since at least September 2010, LSSi failed to notify MicroBilt that its directory assistance database lacked updated and current TWC telephone data. Instead, LSSi continued providing stale TWC data to MicroBilt.

MicroBilt alleges that it did not discover that LSSi had been providing it with stale Comcast and TWC telephone data until March, 2014. At that time, MicroBilt discovered that LSSi had been litigating against Comcast and TWC regarding those companies' refusal to provide raw telephone data to LSSi. MicroBilt asserts that it would have rejected the Database Agreement in the bankruptcy proceeding had it known that LSSi was providing it with stale Comcast and TWC data. Both parties then served the other with a notice of termination under the Database Agreement – MicroBilt on the basis of data degradation and LSSi on the basis of non-payment.

In its complaint, MicroBilt alleges breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, fraud, fraud in the inducement, and misrepresentation. At oral argument, I dismissed the unjust enrichment claim, the claim for breach of the implied covenant of good faith and fair dealing, and the fraud and misrepresentation claims. Thus, the only issues that remain to be decided on this motion are whether MicroBilt's claims for breach of contract and fraud in the inducement should be dismissed.

### **Discussion**

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1<sup>st</sup> Dept. 2003). The proper inquiry is whether a cause of action exists, not whether it has been properly stated. *Rosen v. Raum*, 164 A.D.2d 809, 811 (1<sup>st</sup> Dept. 1990). In addition, under CPLR 3211 (a) (1), where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law, dismissal is warranted. *Excel Graphics Tech. v. CFG/AGSCB 75 Ninth Ave.*, 1 A.D.3d 65, 69 (1<sup>st</sup> Dept. 2003) (internal quotation marks and citation omitted).

### **MicroBilt's Breach of Contract Claim**

MicroBilt alleges that LSSi breached the Database Agreement by: (a) failing to notify MicroBilt that its directory assistance database did not contain updated and current Comcast telephone data; (b) failing to notify MicroBilt that its Directory Assistance database did not contain updated and current TWC telephone data; (c) providing stale telephone data to MicroBilt; (d) failing to provide MicroBilt with the minimum listing count required by the Database Agreement; and (e) misrepresenting to MicroBilt the quality and completeness of the data MicroBilt provided to LSSi.<sup>1</sup>

In support of dismissal of the breach of contract claim, LSSi first argues that there is no provision in the Database Agreement that obligated LSSi to notify MicroBilt that certain listings were not updated or current. LSSi next argues that what MicroBilt now characterizes as stale data was simply the data as made available by LSSi's suppliers, which is exactly what MicroBilt bargained for. In support of this argument, LSSi points to Exhibit D to the Database Agreement, entitled Data File Description, which states that LSSiDATA agrees to provide MicroBilt the contents of its full commercial file as made available by its suppliers and compiled by LSSiDATA . . . for each of the four (4) databases listed in the table below.

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<sup>1</sup> In its memoranda of law in opposition, MicroBilt argues that it is not seeking to hold LSSi responsible for the accuracy or completeness of the data provided to it, thus abandoning this part of its breach of contract claim.

Finally, LSSi argues that under Note 3 of Exhibit D to the Database Agreement, MicroBilt had the right to notify LSSi in the event the listing count fell below the minimum and terminate the Database Agreement if it was dissatisfied with that count, but MicroBilt never did so.

In opposition, MicroBilt argues that it has a valid breach of contract claim, because it paid more than \$600,000 to LSSi for what was represented to be current telephone data. Further, the Database Agreement requires LSSi to update all data upon availability, either on a daily or a monthly basis. According to MicroBilt, LSSi had no obligation to supply to MicroBilt data from Comcast or TWC, but, because LSSi was providing data from these two suppliers, LSSi had a duty under the Database Agreement to update that data. When LSSi stopped receiving new data from Comcast and TWC, it was unable to update that data for MicroBilt, as was required, thereby breaching the Database Agreement.

Where the language of a contract is clear and unambiguous, the court must ascertain the intent of the parties from the plain meaning of the language employed, giving terms their plain ordinary, popular and non-technical meanings." *Id.* at 821. And, New York Courts "have been extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." *Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004) (citation omitted). Indeed, in interpreting a contract, Courts cannot "add or excise terms, nor

distort the meanings of those used and thereby make a new contract for the parties under the guise of interpreting the writing.” *Id.* (internal quotation marks and citations omitted).

Here, the Database Agreement does not require LSSi to “notify” MicroBilt that its Comcast or TWC data was not up to date. This lack of such an obligation is consistent with the lack of any contractual requirement in the Database Agreement concerning the identity of the suppliers. LSSi’s alleged failure to notify MicroBilt of its disputes with Comcast and TWC and/or their refusal to supply LSSi with updated information may not form the basis of a breach of contract claim, because no notification obligation exists under the Database Agreement.

With respect to MicroBilt’s claim that LSSi breached the Database Agreement by providing it with stale information from Comcast and TWC, I note that the Database Agreement does not require LSSi to supply information from any particular supplier, but the Database Agreement does require that the listings be updated by LSSi, either daily or monthly.

According to MicroBilt, after LSSi stopped receiving new data from TWC and Comcast, it continued sending “stale” information in an attempt to meet its contractual obligations towards MicroBilt. This allegation is sufficient to state a claim for breach of LSSi’s with regard to its obligation to “update” the data under the Database Agreement.

LSSi argues that because MicroBilt agreed to take the data “AS IS,” it may not sue for a breach on the basis that the data was stale. However, the “AS IS” clause of the Database Agreement addresses the “accuracy and completeness,” of the data, and does not specifically address whether stale data would suffice.

When reading the Database Agreement as a whole, the obligation to “update” the data may mean more than simply an obligation to offer the same stale data over and over again. MicroBilt’s interpretation of the Database Agreement as requiring updated (and updatable) data from all sources used is a reasonable one. As the updating requirement is subject to more than one interpretation, I find that the complaint adequately sets forth a cause of action for breach of the Database Agreement based upon LSSi’s alleged failure properly to update the data.<sup>2</sup>

Lastly, MicroBilt alleges that LSSI failed to provide “the minimum listing count required by the Agreement.” As described in Exhibit D to the Database Agreement, the parties agreed to a minimum listing count for each of the four databases. If any of the databases fell below its minimum,

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<sup>2</sup> Although Exhibit D to the Database Agreement discusses the terms “updating” and “availability,” Exhibit D does not resolve the issue. The words “as made available by its suppliers” does not nullify LSSi’s obligation to update the data daily and/or monthly under the Database Agreement.

MicroBilt may elect to so notify LSSiDATA in writing . . . and LSSiDATA shall have sixty days to meet or exceed such listing count. If after the sixty day period the applicable database is still below the minimum listing count, then MicroBilt shall have the right, but not the obligation, to terminate the Agreement upon written notice . . .

MicroBilt alleges that because it was receiving the “stale” Comcast and TWC data, it would not have known whether LSSi was meeting the minimum listing count with properly updated data, and, therefore, was unable to take advantage of its options set forth in Exhibit D. I find that this allegation also adequately sets forth a claim for breach of the Database Agreement.

In sum, I find that MicroBilt has adequately pled a claim for breach of the Database Agreement based on the allegations that LSSi failed properly to provide updated data to MicroBilt, and that LSSi failed to provide MicroBilt with the minimum listing count required by the Database Agreement;

#### **MicroBilt’s Fraud in the Inducement Claim**

The elements of fraud are: “a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages” *Fromowitz v. W. Park Assoc., Inc.*, 106 A.D.3d 950, 951 (2d Dept. 2013) (internal quotation marks and citations omitted). In support of its fraud claim, MicroBilt alleges that did not discover that LSSi was providing it with “stale Comcast and TWC telephone data until March 2014, and then only by chance.” MicroBilt alleges that LSSi was litigating against Comcast and TWC

“regarding those companies’ refusal to provide raw telephone data to LSSi” in 2010 and 2011 and “continued to hide the loss of updated Comcast and TWC data from MicroBilt for three years.”

MicroBilt claims that it would not have assumed the Database Agreement during the course of its bankruptcy if it had known that LSSi’s databases did not contain current Comcast and TWC data, and that it relinquished its statutory right under the Bankruptcy Code to reject the Database Agreement. MicroBilt further alleges that it relied on LSSi’s misrepresentations in making a cure payment to LSSi and continuing to pay monthly data fees to LSSi.

LSSi urges the Court to dismiss MicroBilt’s fraud claim because it is not pled with sufficient particularity and is duplicative of the breach of contract claim.

A claim for fraudulent inducement, “based merely on a ‘misrepresented intent to perform,’ is duplicative of the breach of contract claim ” *Community Counseling & Mediation Servs. V. Chera*, 115 A.D.3d 589, 591 (1<sup>st</sup> Dept. 2014) (internal citations omitted). “In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . .” *Hawthorne Group v. RRE Ventures*, 7 A.D.3d 320, 323 (1<sup>st</sup> Dept. 2004). Moreover, a plaintiff has not sufficiently alleged fraud in the inducement, where the plaintiff is able to sufficiently

allege all of the other elements of fraud in the inducement, but fails to properly allege damages that are not recoverable under its breach of contract claim. *Teachers Ins. Annuity Assn. of Am. V. Cohen's Fashion Opt. of 485 Lexington Ave., Inc.*, 45 A.D.3d 317, 319 (1<sup>st</sup> Dept 2007).

Here, MicroBilt's allegation of fraud in the inducement relies upon the same breach of duty as set forth in MicroBilt's breach of contract claim. In both causes of action MicroBilt is claiming that LSSi breached its duty to update the data and not provide "stale" data to MicroBilt. To support its fraud claim, and establish intent, MicroBilt relies on a November 2011 email sent by LSSi, making alleged false promises about providing Comcast data to MicroBilt. This alleged misrepresentation involves the same duty required of LSSi under the Database Agreement. Further, the damages claimed by MicroBilt for its fraud in the inducement claim are duplicative of those sought on its breach of contract claim.<sup>3</sup> Accordingly, I dismiss the fraud in the inducement claim as duplicative.

In accordance with the foregoing, it is

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<sup>3</sup> On its breach of contract claim, MicroBilt seeks \$600,082.75, which is the sum of payments it made to LSSi, from August 4, 2010 to February 7, 2014 under the Database Agreement. On its fraud in the inducement claim, MicroBilt seeks \$227, 793.75, representing MicroBilt's payments to LSSi from November 20, 2012 to February 7, 2014, which is a portion of those same payments to LSSi, under the Database Agreement.

ORDERED that defendant LSSi Data Corp.'s motion to dismiss the complaint is granted as to second, third, fourth, fifth and sixth causes of action, and part of the first cause of action for breach of contract, as set forth above and on the record on March 2, 2016; and it is further

ORDERED defendant's motion to dismiss the complaint is denied as to the remainder of the first cause of action for breach of contract, as set forth above; and it is further

ORDERED that defendant LSSi Data Corp. is directed to file an answer within 20 days of this decision and order; and it is further

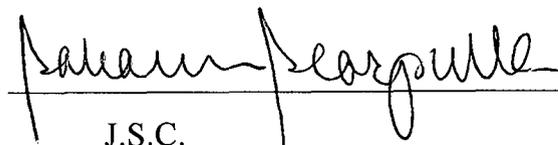
ORDERED that the parties are directed to appear for a conference in Part 39, on December 14, 2016 at 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: New York, New York

October 14, 2016

ENTER:

  
J.S.C.  
**HON. SALIANN SCARPULLA**