

Keyspan Communications Corp. v Lightspeed Fiber Networks, LLC
2005 NY Slip Op 30450(U)
June 27, 2005
Supreme Court, New York County
Docket Number: 108410/04
Judge: Bernard J. Fried
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. BERNARD J. FRIED

PART 60

Justice

KEYSPAN Communications

INDEX NO. 108410/04

- v -

MOTION DATE _____

MOTION SEQ. NO. 004

LIGHT SPEED FIBER NETWORK

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED
JUN 28 2005
NEW YORK
COUNTY CLERKS OFFICE

Dated: 6/27/05

Bernard J. Fried

HON. BERNARD J. FRIED /s.c.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

-----X

KEYSPAN COMMUNICATIONS CORPORATION,

Plaintiff,

Index No. 108410/04

-against-

LIGHTSPEED FIBER NETWORKS, LLC, and
LIGHTSPEED FIBER NETWORK, INC.,

Defendants.

-----X

Fried, J.:

In this action for breach of contract, plaintiff KeySpan Communications Corporation (KeySpan) moves for partial summary judgment on its claims against LightSpeed Fiber Networks, LLC and LightSpeed Fiber Network, Inc. (together, LightSpeed).¹

On August 12, 2002, KeySpan and LightSpeed entered into a Fiber Optic Cable Agreement (the Agreement) (Aff. of DeCicco, Ex. E), giving Keyspan an indefeasible right to use certain fibers within a fiber optic cable owned by LightSpeed. The term of the Agreement was 26 years, for which KeySpan made a one-time payment to LightSpeed of \$3,272,592. Prior to the execution of the Agreement, LightSpeed entered into an agreement with non-party Empire City Subway Company, Ltd. (Empire), in which Empire granted

¹

Throughout the papers on this motion, the parties have alternated between calling themselves KeySpan and Keyspan, and, similarly, LightSpeed and Lightspeed. I apply the appellations used by the parties in their written agreement.

LightSpeed occupancy privileges in 13.3 miles of Empire's conduit system, in exchange for conduit rental fees and charges. The fibers which KeySpan rents from LightSpeed are contained within the cables which LightSpeed rents from Empire.

The Agreement required KeySpan to pay LightSpeed an annual maintenance fee of \$35,000, in return for which LightSpeed would maintain the cable and fibers, and make emergency repairs as needed. The Agreement also required LightSpeed to "maintain at all times, when necessary and as required, all Authorizations that are necessary, material and required for the performance by LightSpeed of its obligations under this Agreement." Agreement, § 11 (1) (b) (I).

According to KeySpan, LightSpeed has breached, and continues to breach, the Agreement in numerous ways, the most serious of which is LightSpeed's failure to pay the required franchise fees and conduit rental charges to Empire. KeySpan claims that it first learned of this failure in March 2003. As a result, KeySpan sent LightSpeed a Notice of Default, dated March 24, 2003, to which LightSpeed failed to respond. A second letter outlining LightSpeed's default was dispatched on March 26, 2003. As with the first notice, KeySpan received no response from LightSpeed.

By the time KeySpan learned of LightSpeed's alleged breach of LightSpeed's contract with Empire, LightSpeed was apparently already two years in default in its payment of conduit rental charges, and owed Empire approximately \$250,000. As a result, Empire terminated LightSpeed's conduit occupancy privileges, and expressed its intention to cut and remove LightSpeed's cable from its conduit, which would obviously have an adverse impact on KeySpan's operations.

The parties apparently attempted to negotiate a settlement, which would include a tolling agreement halting Empire from removing LightSpeed's cables. However, the talks allegedly fell apart as a result of LightSpeed's failure to respond to, or participate in, the negotiations. Empire again expressed its intent to remove LightSpeed's cables.

KeySpan commenced the present action against LightSpeed, accompanied by an application for a temporary restraining order and preliminary injunction against Empire, prohibiting Empire from removing LightSpeed's cables. On June 10, 2004, I issued an order from the bench, granting KeySpan's motion on the condition that either it or LightSpeed post a bond to cover the \$250,000 which LightSpeed owes to Empire.

When it became apparent that Lightspeed would not cover the bond, KeySpan settled the matter with Empire, by paying Empire a sum to partially cover LightSpeed's arrears, taking, in return, an assignment of Empire's rights against LightSpeed. KeySpan also claims that it agreed to pay LightSpeed's conduit rental fees going forward. These arrangements have stopped Empire from making good its threat to remove LightSpeed's cables, at least in the short-term.²

According to KeySpan, LightSpeed has also failed to perform routine as well as emergency maintenance and repair work on the fibers, and has failed to establish a 24-hour emergency service number, as required under section 6.4 of the Agreement. With regard to the last obligation, LightSpeed allegedly failed to respond in a timely manner, and failed to repair damages to some fibers caused by a fire in an Empire manhole mere days after the

²

KeySpan states, upon information and belief, that LightSpeed is making some payments to Empire to cover the arrears not paid by KeySpan.

Agreement was signed, requiring KeySpan to have the work done at a cost to it of over \$35,000. KeySpan offset the costs of repair out of the maintenance fees it owed LightSpeed, after LightSpeed failed to respond to the invoices sent to it by KeySpan. In fact, KeySpan alleges that it was required on "numerous occasions" to have repair work performed on the fibers at its own expense, after LightSpeed failed to respond to KeySpan's request for repairs, or invoices for reimbursement. DeCicco Aff., at 9. KeySpan also maintains that LightSpeed's failure to repair KeySpan's damaged fibers over a two-year period has nearly depleted KeySpan's capacity of "good" (i.e., usable) fibers, apparently endangering its ability to service its customers. *Id.* at 11. As a result, KeySpan claims that it is entitled to damages for the cost of any maintenance or repairs which it performed at its own expense, and damages which may result should it have to repair any damaged section of fibers in the future. KeySpan also alleges that LightSpeed has also failed to pay New York City franchise fees, as required under the Agreement.

LightSpeed does not dispute the fact that it has failed, and continues to fail, to pay Empire the conduit rental fees which it owes, both past and present, partly due, it claims, to the instability of the stock market following the boom of the 1990's, which adversely affected LightSpeed's finances. In its defense, LightSpeed claims that KeySpan has itself breached the Agreement in several ways, and that KeySpan, as a result, owes various sums of money to LightSpeed.

"It is well settled that once a party has demonstrated a prima facie entitlement to summary relief, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to raise a material issue of fact." *Lewis v Safety Disposal System*

of Pennsylvania, Inc., 12 AD3d 324, 325 (1st Dept 2004). Where there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *F. Garofalo Electric Co., Inc. v New York University*, 300 AD2d 186 (1st Dept 2002).

It is apparent that the conduit rental fees which LightSpeed owes to Empire are “Authorizations” under the Agreement. The interpretation of unambiguous language in contracts is, of course, a matter of law for the court to address. *See Kohman v Rochambeau Realty & Development Corp.*, 17 AD3d 151 (1st Dept 2005). “Authorizations” is defined under of the Agreement as “all governmental or private licenses, easements, rights-of-way and building access agreements, franchises, contracts, approvals, permits, ordinances, consents and all other rights necessary for the installation, operation and maintenance of the System” Certainly, the fees and charges which LightSpeed owes to Empire, which are absolutely necessary to KeySpan’s operations, fall under this broad definition, as they are, at the very least, “rights necessary for the installation, operation and maintenance of the System.”³

There is no issue of fact concerning whether LightSpeed is responsible to pay KeySpan for the sums that KeySpan has expended on LightSpeed’s behalf. LightSpeed’s failure to pay its obligations to Empire is a clear breach of the Agreement. LightSpeed’s conclusory argument that KeySpan’s agreement to assume LightSpeed’s obligations to Empire were purely voluntary is insufficient to defeat summary judgment. *See Regan v City of New York*, 8 AD3d 462 (2d Dept 2004)(conclusory allegations insufficient to defeat

³

LightSpeed makes no attempt to dispute that the fees it owes Empire are “Authorizations.”

summary judgment). Consequently, KeySpan is entitled to partial summary judgment in the sum of \$147,644.36 as the amount it claims to have paid to Empire for LightSpeed's arrearages, and for the amounts it has expended up to the date of the motion in monthly rental fees.

KeySpan has not made a prima facie case for its claim for damages due to LightSpeed's failure to make repairs, or for its request for a hearing on the amount of damages it claims to have sustained allegedly as a result of having to make repairs in lieu of LightSpeed. While KeySpan maintains that it has had to make certain repairs, it does not mention any specifics as to when any actual repairs were made, and at what cost, facts surely within its knowledge. The only reference to repairs it was compelled to make itself concerns the manhole fire, and the \$35,000 it allegedly expended as a result. However, KeySpan admits that it offset this amount out of the contractual amount which it owed LightSpeed, negating any claim for damages based on those repairs.

Further, no recovery may be had for KeySpan's speculative losses based on the damages which it may incur should it run out of "good" fibers in the future. As a result of KeySpan's failure to make a prima facie case for summary judgment on its claim for repairs, it is not necessary to address LightSpeed's arguments concerning its obligation to make repairs. *See JMD Holding Corp. v Congress Financial Corporation*, 4 NY3d 373 (2005).

Accordingly, it is

ORDERED that KeySpan Communications Corporation's motion for partial summary judgment is granted as to its claim for damages arising out of defendants LightSpeed Fiber Network, LLC and LightSpeed Fiber Network, Inc.'s failure to pay its

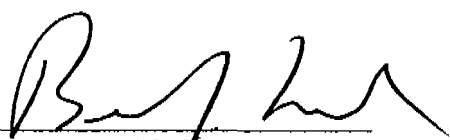
obligations to Empire Subway Company Ltd., in the sum of \$147,644.36, plus interest at the statutory rate, as computed by the Clerk from the date of receipt of a copy of this order with notice of entry; until the date of judgment; and it is further

ORDERED that this portion of the action is severed, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 6/27/05

ENTER:



J.S.C.

HON. BERNARD J. FRIED

FILED
JUN 28 2005
NEW YORK
COUNTY CLERK'S OFFICE