

Robert Walters PLC v Webrecruiter LLC

2007 NY Slip Op 31647(U)

June 11, 2007

Supreme Court, New York County

Docket Number: 0603735/2005

Judge: Richard B. Lowe

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SCANNED ON 6/15/2007
[* 1]
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 52

Index Number : 603735/2005
WALTERS, ROBERT PLC
vs
WEBRECRUITER LLC
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 4/16/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUN 15 2007

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 6/11/07

HON. RICHARD B. LOWE, III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

----- X

ROBERT WALTERS PLC and RESOURCE
SOLUTIONS,

Index No. 603735/05

Plaintiffs,

- against -

WEBRECRUITER LLC,

Defendant.

----- X

Hon. Richard B. Lowe, III

Plaintiffs Robert Walters PLC (RW) and Resource Solutions (Resource) commenced this action to recover 255,000 British Pounds, plus interest, that it paid to WebRecruiter LLC (WebRecruiter) pursuant to a purported agreement entitled "Term Sheet," dated December 23, 2004 (Term Sheet).¹

Plaintiffs now move, pursuant to CPLR 3212 and 3214, for summary judgment in the amount of £244,200, with interest from April 5, 2005, and for an order, pursuant to CPLR 3214, staying discovery. WebRecruiter cross-moves, pursuant to CPLR 3212, for summary judgment on its counterclaim, seeking £666,400 based on the Term Sheet.

Background

The following is taken, in part, from the parties' stipulation of agreed-upon facts, dated November 30, 2006 (Stipulation). Plaintiff RW is a United Kingdom public liability company, with its principal offices located in London, England, and with offices located in New York City. RW is in the business of temporary, contract, and permanent recruitment, specializing in

¹ The enforceability of the Term Sheet is in dispute.

accounting, human resources, sales and marketing, and secretarial and IT placements. Plaintiff Resource is a United Kingdom private company, with its principal offices located in London, England, and with offices located in New York City. Resource is in the business of recruitment outsourcing and managed service provider solutions in the recruitment industry, and it is a wholly-owned subsidiary of RW (Stipulation, ¶¶ 1-2)

Defendant WebRecruiter is a Delaware limited liability company, with offices located in New York City. WebRecruiter is a software company that enables Fortune 1000 companies and other large organizations to build competitive advantage through the integration and automation of the entire recruitment supply chain (*id.*, ¶ 3).

In August 2004, RW and WebRecruiter began negotiations toward developing a business relationship. After extensive negotiations, the parties signed the Term Sheet on December 23, 2004, with RW signing on behalf of its subsidiary, Resource. According to the Term Sheet, WebRecruiter was to provide to Resource: (1) five non-exclusive, non-transferable global licenses to use and sublicense to its existing and future customers its “WebRecruiter Enterprise.MSP” system; (2) as many as 500 “person days” of consulting services; (3) set-up and ongoing maintenance of all webserver and database software for the duration of the agreement; and (4) application support for the duration of the agreement, which was to be “ongoing until such time as either party exercises a termination.” The Term Sheet also provided that each party would negotiate with the other party in good faith the terms and conditions of a software license, sublicense, maintenance, consulting, and strategic alliance agreement on or before January 31, 2005 (Subsequent Agreement).

Thereafter, WebRecruiter began work on the standard system template that was to be

used for the systems that were to be deployed to Resource customers, with WebRecruiter having the responsibility to configure, install, and maintain the software (*id.*, ¶ 6). The Term Sheet had an exclusivity provision that was in effect from the time that the Term Sheet was executed until plaintiffs announced their intention not to proceed under the Term Sheet. Both sides contend that they honored the exclusivity provision (*id.*, ¶ 7).

On January 4, 2005, pursuant to the "Payment Terms" section of the Term Sheet (at page two), plaintiffs paid £255,000 to WebRecruiter. On January 31, 2005, the parties extended to February 28, 2005, the deadline for the Subsequent Agreement to be entered into under the Term Sheet, which deadline they again extended, on February 25, 2005, to March 31, 2005. The parties never entered into the Subsequent Agreement (*id.*, ¶¶ 8-9).

On April 5, 2005, ostensibly pursuant to the "Termination/Refund" section of the Term Sheet (at page six), plaintiffs notified WebRecruiter in writing that they were terminating the Term Sheet because the parties had been unable to reach an agreement as to the Subsequent Agreement, despite negotiating in good faith and agreeing to two extensions of time. That "Termination/Refund" section provides, in part:

"If the Parties do not execute an agreement on or before January 31, 2005, Resource Solutions shall be entitled to request a refund of any monies paid over less any license fees for any time and expense incurred by WebRecruiter from the date of the signing of this terms sheet to the date of such request, and WebRecruiter shall within thirty calendar days of its receipt of such request both: (1) provide Resource Solutions with an accounting of its time and expense incurred; and (ii) pay to Resource Solutions the amount paid less any time and expense incurred by WebRecruiter from the date of the signing of this terms sheet to the date of such request; provided however that if WebRecruiter's time and expense exceeds the amount already paid over, then Resource Solutions shall pay any overages to WebRecruiter. The Time [sic] and expenses incurred by WebRecruiter under this clause have to be reasonable and authorized by Resource Solutions."

Plaintiffs sought an accounting of the time and expenses that WebRecruiter had incurred. Plaintiffs also stated in the April 5, 2005 correspondence: "From our calculations, out of the £255,000 paid over, we would think that a balance that reflects the subtraction of the licence fee and your time and expenses would reflect the appropriate refund." Plaintiffs explained that there had been a change in its business requirements over the past three months, because many of Resource's clients no longer wanted technology enhancements around Resource's service, full scale technology, or new technology as they had initially indicated.

WebRecruiter declined to provide a refund, and this action ensued. The complaint contains three causes of action by which plaintiffs are seeking to recover most of the amount that they paid, plus interest, under theories of money had and received, unjust enrichment, and breach of contract.

In its answer, WebRecruiter denies that plaintiffs are entitled to any refund of the £255,000, and it counterclaims for breach of contract, alleging that plaintiffs owe it an additional £646,400 under the Term Sheet. WebRecruiter contends that the Term Sheet requires plaintiffs to pay £735,600 (in addition to the £255,000 that they had already paid) pursuant to the Term Sheet section, entitled "Failure to Pay" (at page five), that provides in part:

"In any event, no matter what the circumstances whatsoever, Resource Solutions shall pay a minimum of Two Hundred Fifty Five Thousand British Pounds (£255,000.00) on or before January 4, 2005, and an additional minimum of Seven Hundred Thirty Five Thousand Six Hundred British Pounds (£735,600.00) on or before December 31, 2005."

According to WebRecruiter, the £735,600 due it should be reduced to reflect a set-off for the £89,200 in unused consulting service fees that it concedes is otherwise due to plaintiffs under the Term Sheet's Termination/Refund provision. WebRecruiter alleges further that had the

parties entered into the Subsequent Agreement, plaintiffs would have owed £1,933,000 pounds, which includes, not only the five licenses and limited support and consulting services covered by the Term Sheet, but also the balance due for five years of support and maintenance for each of the five licenses, plus 500 person days of consulting services. WebRecruiter argues that, regardless of whether the parties entered into the Subsequent Agreement, plaintiffs were committed to pay for five software systems, and related support and consulting services.

WebRecruiter also asserts that a change in Resource's business requirements is not among the conditions permitting plaintiffs to invoke their right to cancel the licenses purchased through the Term Sheet. WebRecruiter asserts further that even if they could, their remedy is expressly limited to a refund of all unused prepaid consulting services and all unused maintenance and support fees, calculated on a pro rata basis, but it does not include amounts paid for license fees.

In support of their motion for summary judgment, plaintiffs argue that the Term Sheet is unenforceable, and, if enforceable, it entitles them to a refund.

WebRecruiter argues that there are two reasons why the court should deny plaintiffs' motion for summary judgment (except to the extent of granting them the £89,200 set-off), and, instead, grant its cross motion for summary judgment on its counterclaim. First, plaintiffs seek to recover amounts that the Term Sheet expressly precludes from refund. Second, plaintiffs agreed to pay a fixed amount regardless of whether they entered into the Subsequent Agreement. WebRecruiter requests that any judgment granted in plaintiffs' favor should be stayed pending resolution of its counterclaim.

To avoid additional litigation expense and burden, the parties stipulated that the following

issues are either irrelevant, or amenable to resolution upon summary judgment without further discovery: (1) the parties' intention when entering into the Term Sheet regarding Resource's obligation to make further payment of £735,600, (2) the meaning of the Term Sheet's "Termination/Refund" provision, and (3) which payments by Resource constitute payments for "License Fees" within the meaning of the Term Sheet (Stipulation, ¶ 13).

The parties also stipulated to plaintiffs' acceptance of the statement of expenses incurred by WebRecruiter relevant to the Term Sheet's Termination/Refund provision, as conveyed by the June 10, 2005 letter of WebRecruiter's counsel, and WebRecruiter's acknowledgment that it has no other expenses in that regard (Stipulation, ¶ 12).

Discussion

For the reasons that follow, plaintiffs' motion is granted and WebRecruiter's cross motion is denied.

As a preliminary matter, plaintiffs' argument – that the Term Sheet is unenforceable, because it contemplates additional agreements into which the parties never entered, and the Term Sheet inadequately specifies Webrecruiter's obligations – is unconvincing. When parties do not intend to be bound until their agreement is reduced to writing and signed, there is no contract in the interim (*Chatterjee Fund Mgt. v Dimensional Media Assoc.*, 260 AD2d 159 [1st Dept 1999]). This is not the case here.

The Term Sheet reflects a clear and unambiguous agreement between the parties, the terms of which are both specific and comprehensive in scope. The purpose of the Term Sheet is clearly expressed, and a specific payment schedule is set forth, including a clause for the possible failure of the parties to enter into a second agreement. Moreover, the document is executed by

both parties on the last page, and they initialed a change on page five. These factors tend to establish a binding agreement between the parties, and a mutual intent to be bound, rather than a memorialization of inconclusive negotiations or a mere agreement to agree, in which a material term is left for future negotiations (*TAJ Intl. Corp. v Bashian & Sons*, 251 AD2d 98 [1st Dept 1998]).

The issue, then, is what is the effect, pursuant to the Term Sheet, of the parties' failure to execute the Subsequent Agreement, and plaintiffs' request for a refund. The Term Sheet squarely address this situation in its section entitled "Termination/Refund," quoted above. This section expressly pertains to a situation where the "the parties do not execute an agreement on or before January 31, 2005," which is what occurred, and it expressly entitled plaintiffs "to request a refund of any monies paid over *less any license fees or any time and expense incurred by WebRecruiter*" from the date of the signing of the Term Sheet to the date of the refund request (emphasis added). The court must enforce a written agreement that is complete, clear, and unambiguous on its face according to the plain meaning of its terms (*Greenfield v Philles Records*, 98 NY2d 562 [2002]; *Modugu v Continuum Health Partners*, 3 AD3d 422 [1st Dept 2004]).

WebRecruiter's argument – that plaintiffs owe it £735,600, minus a set-off for the £89,200 in unused consulting service fees – is in error, as is its reliance on the "Failure to Pay" section of the Term Sheet as the basis for this assertion. That section, quoted above in relevant part, has no bearing on the dispute at issue here.

The Failure to Pay section is intended to address the time and manner of payment as demonstrated by the sentence: "In any event no matter what the circumstances whatsoever,

Resource Solutions shall pay a minimum of Two Hundred Fifty Five Thousand British Pounds (£255,000.00) *on or before January 5, 2005* and an additional minimum of Seven Hundred Thirty Five Thousand Six Hundred British Pounds (£735,600.00) *on or before December 31, 2005* (emphasis added). The Failure to Pay section is necessary, because the Term Sheet contemplates that WebRecruiter might begin furnishing services and granting licenses prior to its receipt of full payment. Thus, this section contains remedies for plaintiffs' failure to make timely payments, i.e., it permits WebRecruiter to (1) shut down any systems that may be already deployed; (2) discontinue work on any system implementation already in progress; (3) opt out of any exclusivity and intellectual property clauses; and (4) seek damages or injunctive relief.

Moreover, that this section of the Term Sheet required plaintiffs to make payments in stated amounts "no matter what the circumstances whatsoever" does not negate their entitlement to a refund of all or some of those payments pursuant to the express terms of the Termination/Refund section that specifies the extent of the refund. To find otherwise would be in derogation of the settled contractual principal of *ejusdem generis*, which requires the interpreting court to give precedence to specific contractual clauses over general clauses (*Isaacs v Westchester Wood Works*, 278 AD2d 184 [1st Dept 2000]).

Furthermore, to the extent that the two provisions are in conflict, the court's interpretation accords with the principle that conflicting contract provisions should be harmonized, if reasonably possible, so as to not leave any provision without force and effect (*id.*). WebRecruiter's interpretation leaves the "Termination/Refund" provision without force and effect, because it would thereby be effectively nullified by the Failure to Pay section.

Thus, to retain any of the £255,000 paid, or to be entitled to any additional amount,

depends on whether WebRecruiter incurred any (1) license fees or (2) time and expense from December 23, 2004 (the date of the signing of the Term Sheet) to April 5, 2005 (the date of the refund request).

As set forth in the Term Sheet, of the £255,000 paid to WebRecruiter, £65,000 is “in consideration of the ‘Signing Fee,’” £100,000 is “in consideration of the 50% initial payment for the 500 days of consulting services,” and £90,000 is “in consideration of the 75% initial payment on the license fee for the first client system.” Plaintiffs contend, however, that WebRecruiter is entitled to retain only £10,800 of that amount, constituting its “time and expenses incurred,” as admitted in its counsel’s letter, dated June 10, 2005.

WebRecruiter contends that £65,000 of the fee paid was for license fees, and is not properly included in any refund request (Affidavit of Laurence J. Footer, sworn to January 29, 2007, ¶ 13). According to plaintiffs, however, WebRecruiter could not have incurred any license fees because no software was installed on plaintiffs’ behalf (Affidavit of Rosemary Curtin, sworn to November 28, 2006, ¶ 15). Significantly, this assertion is uncontroverted.² The fact that, of the £255,000 paid to WebRecruiter, £90,000 was deemed to be in consideration of the 75% initial payment on the license fee for the first client system, and WebRecruiter contends that £65,000 should also be deemed to be in consideration of license fees (*see* Oral Argument Transcript, 8), is inconsequential, because no license fees were incurred, as required by the Termination/Refund section. Moreover, the parties stipulated that WebRecruiter’s time and expense totals £10,800 (Stipulation, ¶12). Hence, plaintiffs are entitled to a refund of £255,000,

²Thus, there is no basis to preserve the issue of license fees for further fact-finding, as requested by WebRecruiter (in the alternative) in its Reply Memorandum, at 14. In addition, the parties stipulated that no further fact finding is necessary on this issue, and the court agrees.

minus £10,800, on their cause of action for breach of contract.

The other two causes of action are dismissed. An action for money had and received does not lie where there is an express contract between the parties (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268 [1st Dept 2003]). The same is true for the unjust enrichment cause of action (*Singer Asset Fin. Co. v Melvin*, 33 AD3d 355 [1st Dept 2006]).

Finally, there is no basis to stay the judgment, because WebRecruiter will not prevail on its counterclaim. Plaintiffs' request for a stay of discovery is moot.


Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment on the complaint is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiffs Robert Walters PLC and Resource Solutions and against defendant WebRecruiter LLC in the amount of two hundred forty four thousand two hundred British Pounds (£244,200), together with interest from April 5, 2005, at the statutory rate, as calculated by the Clerk, with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion by defendant WebRecruiter LLC for summary judgment on its counterclaim is denied.

Dated: June 11, 2007

ENTER:


J.S.C.
HON. RICHARD B. LOWE, III

FILED
JUN 15 2007
COUNTY CLERKS OFFICE
NEW YORK