

**Customers' First Call Ctrs., Inc. v Halstead
Communications, Ltd**

2007 NY Slip Op 33607(U)

November 1, 2007

Supreme Court, New York County

Docket Number: 0114305/2006

Judge: Marcy S. Friedman

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

PRESENT: **Hon. Marcy S. Friedman**
Justice

PART 57

Customers' First Call Centers

INDEX NO. 114305/06

Halstead Communications

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

| | PAPERS NUMBERED |
|---|-----------------|
| Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ... | <u>1, 1a</u> |
| Answering Affidavits -- Exhibits | <u>2</u> |
| Replying Affidavits | |

Cross-Motion: Yes No

Memo of Law M1-3

Upon the foregoing papers, it is ordered that this motion *is decided per accompanying decision/order dated 11-1-07.*

FILED
NOV 08 2007
NEW YORK
COUNTY CLERK

Dated: 11-1-07

MCF
Hon. Marcy S. Friedman J.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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

CUSTOMERS' FIRST CALL CENTERS, INC.,

Index No.: 114305/06

Plaintiff,

DECISION/ORDER

- against -

HALSTEAD COMMUNICATIONS, LTD,

Defendants.

_____ x

FILED
NOV 06 2007
NEW YORK
COUNTY OF NEW YORK

In this action, plaintiff, the supplier of telecommunications services to defendant, alleges six causes of action: the first for tortious interference with contract; the second for goods sold and delivered; the third for account stated; the fourth for unjust enrichment; the fifth for quantum meruit; and the sixth for breach of contract. Defendant moves, pursuant to CPLR 3211 and CPLR 3016(f), to dismiss the complaint.

The standards for determination of a motion to dismiss are well settled:

The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law." In furtherance of this task, we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference. Dismissal under CPLR 3211(a)(1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law."

(511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002] [internal citations omitted].)

In the instant case, defendant argues that plaintiff's causes of action are time-barred based

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on paragraph 15 of the parties' contract, a statute of limitations provision. This paragraph states in pertinent part:

The parties agree that any claim or cause of action by either party against the other or its principals based upon or arising from this Agreement shall be barred unless asserted by the party making the claim by commencement of an action in a court of competent jurisdiction by the filing of a complaint within one year after the first act, occurrence or omission upon which such claim or cause of action or any part is based and service of the summons and complaint within 30 days after the filing of the complaint.

Plaintiff's first cause of action for tortious interference with contract seeks damages based on defendant's entry into a direct contract with BNKe Solutions Pvt. Ltd. ("BNK"), the company that plaintiff had contracted with to provide the telecommunication services to plaintiff. This cause of action clearly is not based upon and does not arise under the contract between plaintiff and defendant and therefore is not barred by the one-year statute of limitations contained in such contract.

In contrast, the second and fourth through sixth causes of action all assert claims based on non-payment for the services provided for under the contract. The statute of limitations in the contract therefore applies to these claims.

A defendant who moves to dismiss a cause of action based on the statute of limitations "bears the initial burden of establishing such ground by prima facie proof that the time in which to sue has expired." (Hertzberg & Sanchez P.C. v Friendship Dairies Inc., 14 Misc 3d 136(A), 836 NYS2d 493 [App Term, 2d Dept 2007].) The breach of contract and related claims accrued, for statute of limitations purposes, by the date plaintiff's invoices demanded payment and defendant failed to pay. (See Verizon New York, Inc. v Sprint PCS, 43 Misc 3d 686 [1st Dept 2007].) All of the invoices stated: "Terms: Balance due in 5 Days." It is undisputed that the

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invoices dated September 19, 2005 or earlier were mailed and that the 5 days expired more than one year before the complaint was filed on October 5, 2006. The second and fourth through sixth causes of action, to the extent based on these invoices, are therefore time-barred. However, the affidavit of plaintiff's president, Dipak Nandi, raises a triable issue of fact, which cannot be resolved on this motion to dismiss, as to when the invoice dated September 26, 2005 was mailed and therefore whether the complaint was filed within one year of the date the balance under this invoice became due.

The third cause of action for account stated, which covers all of the invoices, is not subject to the statute of limitations contained in the parties' agreement, as an account stated "is an agreement, independent of the underlying agreement." (See Duane Reade v Cardinal Health, Inc., 21 AD3d 269 [1st Dept 2005] [emphasis in original].) This cause of action is subject to a six year statute of limitations which has not passed. (See CPLR 213[2].)

Defendant further argues that the complaint fails to state a cause of action for tortious interference with contract because the complaint fails to plead that defendant's acts were without economic justification and were motivated by malice. As plaintiff correctly points out, defendant does not distinguish between the elements of a cause of action for interference with existing contract and one for interference with prospective contractual relations.

It is well settled that "the degree of protection" available to a plaintiff for tortious interference with contract "is defined by the nature of the plaintiff's enforceable legal rights. Thus, where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior. Where there has

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been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant.” (NBT Bancorp Inc. v Fleet/Norstar Fin. Group., Inc., 87 NY2d 614, 621 [1996] [internal citations omitted], citing Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 193-194 [1980].) Thus, “[w]ith respect to a contract for a definite term, persuasion to breach alone * * * has been sufficient to impose liability on one who thereby interferes with performance.” (Id. at 194.) In contrast, a contract that is terminable at will can support a claim only for tortious interference with prospective contractual relations and not for tortious interference with an existing contract. (Id. at 192-193; Snyder v Sony Music Entertainment, Inc., 252 AD2d 294 [1st Dept 1999].) Moreover, damages for interference with prospective relations may be awarded only “when the alleged means employed by the one interfering were wrongful.” (Guard-Life Corp., 50 NY2d at 194.) “‘Wrongful means’ include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract.” (Id. at 191.) Wrongful means also include “conduct for the sole purpose of inflicting intentional harm” on the plaintiff. (Carvel Corp. v Noonan, 3 NY3d 182, 190 [2004] [internal quotation marks and citation omitted]; Hoesten v Best, 34 AD3d 143 [1st Dept 2006]; Miller v Mount Sinai Med. Ctr., 288 AD2d 72 [1st Dept 2001].)

Herc, neither party discusses whether plaintiff’s contract with BNK should be viewed as a contract for a definite term or one terminable at will. The required elements of the pleading therefore cannot be determined on this inadequately briefed record.

Finally, defendant argues that plaintiff has failed to comply with the requirement of

CPLR 3016(f) regarding itemization of the services performed. Compliance with this section is not mandatory and therefore non-compliance, if any, is not a basis for dismissal of the complaint.

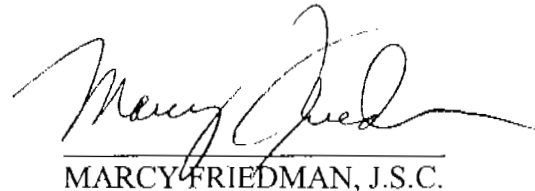
It is accordingly hereby ORDERED that plaintiff's motion to dismiss is granted only to the following extent: The second and fourth through sixth causes of action are dismissed to the extent based on invoices dated September 19, 2005 or earlier; and it is further

ORDERED that denial of this motion is without prejudice to a motion to dismiss the first cause of action on proper papers which address the legal issue identified in this opinion; and it is further

ORDERED that pursuant to separate order of the same date, this action is transferred to the Civil Court pursuant to CPLR 325(d); and any further motions shall be brought in the Civil Court.

This constitutes the decision and order of the court.

Dated: New York, New York
November 1, 2007



MARCY FRIEDMAN, J.S.C.

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NOV 03 2007
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