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SCANNED ON 3/4/2008

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

PRESENT: HON. RICHARD B. LOWE, III PART 57

Justice

Index Number : 603543/2007

ARJENT LTD.,

vs.

EZECASTLE INTEGRATION, INC.

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE 2/14/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his 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
MAR 04 2008
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: 2/27/08

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

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ARJENT LTD., ARJENT SERVICES, LLC and
ARJENT US, LLC,

Plaintiffs, Index no. 603543/07

-against-

EZE CASTLE INTEGRATION, INC., and
PAETEC COMMUNICATIONS CORP.,

Defendants.

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Hon. Richard B. Lowe, III:

Defendant Paetec Communications Corp. ("Paetec") moves to dismiss the complaint pursuant to CPLR 3211(a) (1), (2), (3), (5), (7), and (10).

Background

This is an action seeking consequential damages allegedly sustained by Plaintiffs Arjent Ltd., Arjet Services, LLC, and Arjent US, LLC ("Arjent US") (collectively, "Arjent"), arising out of an interruption of its telephone service in October of 2007.

The following facts are taken from the complaint:

Arjent is a broker-dealer regulated by the Financial Industry Regulatory Authority and the Securities and Exchange Commission, providing services to public and institutional clients. During trading hours[1], Arjent communicates telephonically with its clients. Arjent's phone lines are used to take and process customer orders. Paetec is a telecommunications service provider.

On November 28, 2006, Paetec Communications, Inc. (Paetec Inc.) entered into a service

[1] Regular trading hours are 9:30 am to 4:00 pm Eastern Standard Time.

agreement (the "Agreement") with Arjent US to provide telecommunications services for Arjent US offices in New York, New York. In exchange, Arjent US agreed to pay minimum monthly fees of $1,232.45 plus additional usage fees.

On October 17, 2007, at approximately 2:00 p.m., Arjent completely lost its phone services. Its telephone lines went down, the messaging system failed, and callers were greeted by an automatic message indicating all of Arjent's phone lines were disconnected. Arjent had no telephonic means of communication with its customers. Paetec Inc. and defendant EZE Castle Integration, Inc.(EZI)[2] were contacted immediately. Services remained down until 3:00 pm the following day. In total, Arjent lost its telephone services for more than 25 hours and had no telephone access to its customers.

Arjent's telephone services were thereafter temporarily restored, however on October 22, 2007, another outage occurred around 2:00 pm. Once again Arjent lost telephone service with its customers and could not take orders. Allegedly, Paetec Inc. was delayed in its response to the problem which caused Arjent to lose additional revenue via customer orders.

A technician from Verizon Communications, Inc. ("Verizon") was sent by Paetec Inc. to effectuate repairs. He allegedly left Arjent's offices on the evening of October 22nd despite having not restored the telephone services because his shift was over. Another technician did not take his place that evening and services were not restored until October 23, 2007.

As a consequence of the outages, Arjent had limited or no telephone services for approximately four business days which allegedly caused Arjent to suffer lost revenue as well as

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[2] ECI was hired by Arjent to provide consultant services in connection with the implementation of Arjent's telecommunications and phone management system. Plaintiff has entered into a settlement agreement with ECI.

damages to its reputation.

Arjent brings this action against Paetec alleging breach of contract and gross negligence. Paetec Corp.[3] moves to dismiss the breach of contract arguing, first, that there is no agreement between the plaintiffs and Paetec, rather the agreement was made with Paetec, Inc. Therefore, Paetec argues there is no privity between the parties. Second, Paetec argues the public service commission has primary jurisdiction over the issues contained in the complaint. Furthermore, the agreement arguably has a limitation of liability clause which precludes the claims. Lastly, Paetec argues the plaintiff does not adequately plead its claim for gross negligence and even if it did, the claim is duplicative of the breach of contract claim.

Privity

The defendant argues there is no such entity as Paetec Communications Corp. and therefore the complaint should be dismissed against Paetec because there is no privity with Arjent. The Agreement is between Paetec Inc. and Argent US. Defendant argues that not only is there no privity because Paetec is a wrongly named defendant, but also the Agreement was made between Patec Inc and Arjent US. Arjent Ltd. and Arjent Services LLC are not parties to the contract.

Where a plaintiff always intended to sue a party and only inadvertently named a similar party in the caption, the complaint will not be dismissed if the actual defendant was never misled or prejudiced by the fact that another entity was named in the caption (*Charlton v General Foods Inc.*, 52 AD2d 829 [1st Dept 1976]). Here, there has never been any confusion as to whether

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[3] Despite acknowledging there is no such entity (Black Aff ¶ 13), the attorney of record moves on behalf of Paetec Corp.

Paetec Inc. is the proper defendant named in this action. Both parties acknowledge the Agreement is related to services provided by Paetec Inc. (Black Aff ¶ 2). Paetec Inc. has also received and acknowledged service of the complaint (Black Aff ¶ 13). Therefore, where Paetec Inc. is not prejudiced nor has it been confused as to whether it is the proper defendant, the motion to dismiss on this ground is denied.

A cause of action to recover damages for a breach of contract cannot stand against a party with whom there is no privity (*see Alvord & Swift v Muller Construction Co*, 46 NY2d 276, 282 [1978]). Only a party to a contract may seek to enforce the contract and the party may do so only as to another party to the contract who may be in breach (*Blitman Constr. Corp. v Kent Village Housing Co.*, 91 AD2d 173, 177 [1st Dept 1983]). A person or entity may maintain a contractual cause of action against third parties if it can demonstrate it was an intended third-party beneficiary of a contract (*Port Chester Electrical Construction Corp.* v *Atlas*, 40 NY2d 652, 655-656 [1976]). A party asserting rights as a third-party beneficiary of a contract has the burden of establishing: (1) the existence of a valid and binding contract between other parties; (2) that the contract was intended for his or her benefit; and (3) the benefit to him or her is sufficiently immediate, rather than incidental (*Edge Management Consulting, Inc. v Blank*, 25 AD3d 364 [1st Dept 2006]). On a motion to dismiss the Court may consider documents and affidavits bearing on the validity of causes of action asserted by a plaintiff (*Rovello v Orofino Realty*, 40 NY2d 633, 635 [1976]).

At this stage, the plaintiffs have sufficiently alleged enough facts to sustain a cognizable claim that Arjent Ltd., and Arjent Services, LLC are intended third party beneficiaries of the Agreement (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977])(a defendant has a heavy

burden of establishing that the Plaintiff, without the benefit of discovery, does not have a cognizable claim). Here it is alleged that all of the entities making up Arjent were intended to benefit by the contract as they are all closely related, share the same offices, and all derived immediate benefit from the Agreement (Carrillo Affirmation ¶ 7). Therefore, there is privity among the parties, at least at this early stage of the litigation and the pre-answer motion to dismiss on this ground is denied.

Jurisdiction - Public Services Commission

The plaintiff does not dispute that the Public Service Commission has primary jurisdiction over a telephone company's service (*Hamilton Employment Serv. v New York Tel. Co.*, 253 NY 468 [1930]); (*Long Island Central Station, Inc. v New York Tel. Co.*, 54 AD2d 893 [2nd Dept 1976]). A party must exhaust its administrative remedies and the judiciary has a limited function of review only after the relevant agency has made a determination (*United States v Western Pacific R.R. Co.*, 352 US 59, 63-64 [1956]). This principle is recognized in New York courts (*see Young Men's Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371 [1975]). "The Public Service Commission has primary jurisdiction over complaints related "solely to the general deterioration of service" (*Warren v New York Telephone Co.*, 70 Misc 2d 794, 798 [NY City Civ Ct 1972]).

Plaintiff argues however this action should not be dismissed because this matter involves claims of gross, not ordinary, negligence. "[A]lthough the courts may not pass upon the adequacy of service generally, they do have original jurisdiction to remedy a case of gross negligence or willful misconduct, as applied to the individual subscriber" (*Warren*, 70 Misc 2d at 798).

Whether this case may be dismissed on the ground of lack of jurisdiction of this court turns on whether the plaintiff has sufficiently plead gross negligence. If it has adequately plead gross negligence, then the court may entertain the claims.

Gross Negligence

Defendant moves to dismiss the cause of action for gross negligence because the Plaintiff has failed to adequately plead the cause of action and because it is duplicative of the breach of contract action.

Gross Negligence is "reckless conduct that borders on intentional wrongdoing and is 'different in kind and degree' from ordinary negligence'" (*Lemoine v Cornell University* 2AD3d 1017, 1020 [3rd Dept 2003]). "[G]ross negligence implies wanton and reckless conduct, the lack of even scant care, or an intentional failure to perform a duty" (*Long Island Cent. Station, Inc.* 54 AD2d at 893). Where a complaint does not allege facts sufficient to constitute gross negligence, dismissal is appropriate (*Lemoine* 2AD3d at 1020.)

Plaintiff has failed to plead a cause of action for gross negligence. The complaint alleges the plaintiff was subject to two outages, the first being for 25 hours. Also, it alleges that a worker sent by a non-party walked off of the job without first repairing the telephone lines.

The allegations as plead lack conduct which rises to the level of reckless disregard and intentional conduct by the defendant which is necessary to deem it gross, rather than ordinary (*see also Par Fait Originals v ADT Sec Systems, Northeast, Inc.*, 184 AD2d 472 [1st Dept 1992]). Therefore, the cause of action must be dismissed.

Furthermore, a claim for gross negligence cannot stand where there is no duty existing independent of the alleged contract (*East Meadow Driving School v Bell Atlantic Yellow Pages*

Co., 273 AD2d 270[2nd Dept 2000]). Here the cause of action is duplicative of the cause of action alleged as a breach of the Agreement by the defendant. Therefore, the claim for gross negligence must be dismissed on this ground as well.

Limitation of Liability Clause

The Agreement contains a clause which precludes any recovery for consequential damages, including but not limited to lost profits, loss of revenue, or loss of customers (Notice of Motion, Ex A). Courts have recognized the validity of exculpatory and limitation of liability clauses in public service contracts (*Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992]); (*Hamilton Employment Service Inc. v New York Telephone Co.*, 253 NY 468 [1930]).

Plaintiff acknowledges the rule in *Sommer* that such clauses are enforceable however argues that the court in that matter said they only apply in cases involving ordinary, rather than gross negligence (*Sommer* 29 NY2d at 554). Because this court has found the plaintiff has failed to adequately plead gross negligence, then necessarily the cause of action for breach of contract must be dismissed on this ground as well.

Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is dismissed with

costs and disbursements to the defendant as calculated by the clerk.

It is directed that the Clerk enter judgment accordingly.

This shall constitute the order and decision of the court.

Dated: February 27, 2008

ENTER:

HON. [illegible], J.S.C.