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

PRESENT: HON. RICHARD B. LOWE, III PART 56

Index Number : 600722/2008
ICC CHEMICAL CORPORATION
vs.
AT&T COMMUNICATIONS
SEQUENCE NUMBER : 001
DISMISS

INDEX NO.
MOTION DATE 10/2/08
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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 9/24/08

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: I.A.S. PART 56

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ICC CHEMICAL CORPORATION,

Plaintiff,

Index No. 600722/08

-against-

AT&T COMMUNICATIONS OF NEW YORK, INC., and VERIZON NEW YORK, INC.,

Defendants.

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Hon. Richard B. Lowe, III:

Defendant Verizon New York, Inc. (Verizon) moves for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint against it for failure to state a cause of action.

Plaintiff ICC Chemical Corp. (ICC), a corporation engaged in international trade related to the chemical industry, brought this negligence action against Verizon and AT&T Communications of New York, Inc. (AT&T) to recover for damages suffered for alleged interruptions in its telephone and fax services, during the period of 2002 through March 2008. The complaint asserts two causes of actions: gross negligence against Verizon and AT&T (first) and willful misconduct against Verizon (second).

Verizon now moves for dismissal of the complaint, contending that the complaint fails to allege the existence of a duty of care that would support the tort claims asserted against it, since it has no contractual relationship with ICC.

In opposition, ICC essentially argues that its tort claims are not based on any contractual relationship with Verizon, but rather, as a third-party beneficiary of an agreement between AT&T and Verizon.

On a motion pursuant to CPLR 3211 (a) (7), the court is limited to ascertaining

whether the pleading states any cause of action and not whether there is evidentiary support for the complaint (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]). The complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true (id.; Morone v Morone, 50 NY2d 481 [1980]).

In order to prove a prima facie case of negligence, a plaintiff must establish: (1) the existence of a duty on the part of the defendant to the plaintiff, (2) a breach of that duty, and (3) injury suffered by the plaintiff as a result of the breach (Solomon v City of New York, 66 NY2d 1026 (1985). "[A] duty of reasonable care owed by a tortfeasor to an injured party is elemental to any recovery in negligence" (Palka v Servicemaster Management Services Corp., 83 NY2d 579, 584 [1994]). "[W]hile the absence of privity does not foreclose recognition of a duty, it is still the responsibility of courts, in fixing the orbit of duty, to limit the legal consequences of wrongs to a controllable degree and to protect against crushing exposure to liability" (Strauss v Belle Realty Co., 65 NY2d 399, 402 [1985] [citations omitted]). Courts have held that parties may seek recovery as third-party beneficiaries of a contract between other parties where there is an undertaking of a contractual duty to the third parties by one of the contracting parties (see Palka v Servicemaster Mgt. Services Corp., 83 NY2d 579, supra; Milliken & Co. v Consolidated Edison Company of New York, Inc., 84 NY2d 469 [1994]).

In liberally construing the allegations of the complaint (see Leon v Martinez, 84 NY2d 83 [1994]), and affording ICC the benefit of every possible favorable inference (see Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409 [2001]), the allegations in the complaint permit the inference that, in its contract with AT&T, Verizon undertook a duty to ICC to provide repair services to the telephone equipment in ICC's business. The complaint asserts, inter alia,

that Verizon owned all of the communications hardware in the building where ICC has its principal place of business; that AT&T "leased or otherwise contracted with Verizon to use this communications hardware continuously to provide telephone services to ICC" (Complaint, ¶ 4); that during the period of 2002 through March 2008, ICC sustained recurring telephone system failures at its place of business, of which ICC advised Verizon and AT&T; that ICC was routinely directly by AT&T to Verizon; that these telephone service failures were initially the result of equipment failures, which equipment Verizon failed to replace or properly maintain; that Verizon sent repair personnel on various occasions to ICC's premises to examine and repair ICC's communication center, and that Verizon, inter alia, failed to send repair personnel within a reasonable time, and timely resolve the service interruptions. Thus, the complaint sufficiently alleges a basis for recovery as an intended third-party beneficiary of the agreement between Verizon and AT&T.

Verizon submits for the first time in its reply papers excerpts from an interconnection agreement between Verizon and AT&T, upon which it relies to establish that it did not undertake any duties to AT&T customers. This court may not consider such documentary evidence, since ICC did not have the opportunity to refute same or respond to Verizon's reply papers absent express leave of the court (Voytek Technology, Inc. v Rapid Access Consulting, Inc., 279 AD2d 470 [2d Dept 2001]; Azzopardi v American Blower Corp., 192 AD2d 453 [1st Dept 1993]). However, even assuming, arguendo, that this court should have considered such documentation, it appears from a letter annexed to the aforementioned excerpts that the proffered agreement did not become effective until October 18, 2006, at least four years subsequent to ICC's complaints of service interruptions from 2002 (Verizon's reply affirmation,

Exhibit A, letter from State of New York Department of Public Service to Verizon dated 10/25/06).

Therefore, it is

ORDERED that Verizon's motion, pursuant to CPLR 3211 (a) (7), for dismissal of the complaint as against it is denied; and it is further

ORDERED that Verizon is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry and it is further

ORDERED that having reviewed the complaint in detail, it is apparent that this matter does not follow within the standards necessary to remain in the Commercial Division, therefore, it is directed that the Clerk in Room 119 transfer this action to a non commercial part.

Dated: September 24, 2008

FILED
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

HON. RICHARD B. LOWE, III