

Zodiac Gaming L.L.C. v Microstrategy Inc.

2009 NY Slip Op 32760(U)

November 12, 2009

Supreme Court, Nassau County

Docket Number: 009918-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ZODIAC GAMING L.L.C.,

**TRIAL/IAS PART: 25
NASSAU COUNTY**

Plaintiff,

-against-

Index No: 009918-09

**MICROSTRATEGY INCORPORATED and
MATTHEW JOHNSON,**

**Motion Seq. No: 1
Submission Date: 9/24/09**

Defendants.

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The following papers having been read on this motion:

- Notice of Motion, Affirmation in Support,**
- Affidavit in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Affirmation in Opposition, Affidavit in Opposition and Exhibits....x**
- Reply Affirmation in Further Support,**
- Reply Affidavit in Further Support and Exhibits.....x**
- Reply Memorandum of Law in Further Support.....x**

This matter is before the Court for decision on the motion by Defendant MicroStrategy Incorporated (“MicroStrategy”), filed August 12, 2009 and submitted September 24, 2009, seeking 1) dismissal of this action (“Instant Action”), pursuant to CPLR § 3211(a)(4), on the grounds that there is another action pending in the Commonwealth of Virginia (“Virginia Action”) between the same parties for the same cause of action; or, alternatively, 2) staying this action pending the outcome of the Virginia Action. For the reasons set forth below, the Court 1) grants MicroStrategy’s application and dismisses the complaint in the Instant Action against

Defendant MicroStrategy Incorporated; and 2) directs that Plaintiff's claims against Defendant Matthew Johnston in the Instant Action are severed and shall continue in this court. In addition, the Court denies the application by MicroStrategy in its reply papers for an Order sealing Exhibits A and B to Zodiac's opposition papers.

BACKGROUND

A. Relief Sought

MicroStrategy moves for an Order 1) pursuant to CPLR § 3211(a)(4), dismissing the Instant Action on the grounds that the Virginia Action is pending between the same parties for the same cause of action; or, alternatively, 2) staying this action pending the outcome of the Virginia Action.

Plaintiff Zodiac Gaming L.L.C. ("Zodiac") opposes MicroStrategy's motion.

MicroStrategy, in its reply papers, also asks the Court to seal the Agreement and other documentation comprising the 2007 Contract, which are Exhibits A and B to Zodiac's opposition papers. In support, MicroStrategy argues that 1) those documents are designated on their face as "Confidential and Proprietary" to MicroStrategy; and 2) MicroStrategy was prepared to make those documents available for an *in camera* inspection by the court if necessary, in an effort to safeguard its confidential and proprietary material.

B. The Parties' History

Plaintiff entered into a one-year renewable Customer Agreement in December 2006 ("Agreement") (Exhibit A to the opposition papers), with MicroStrategy doing business as Angel.com for a license to access "ASP Service." The Definition section of the Agreement defines "ASP Service" as "the proprietary software application, the underlying graphical user interface and voice user interface for creating interactive audio and speech content that can be accessed via the telephone and the corresponding interactive telephone service known as the Angel.com Voice Network."

MicroStrategy affirms that Angel.com ("Angel") is a wholly-owned subsidiary of MicroStrategy which, at the time that the business relationship began with Zodiac, operated as a business unit of MicroStrategy. David Rennyson ("Rennyson"), the President and Chief Operating Officer of Angel, describes Angel as "a leading provider of voice solutions, including on-demand Interactive Voice Response ("IVR") and call center solutions delivered via a state-

of-the-art Software-as-a-Service platform (Rennyson affidavit, par. 3).” Rennyson affirms that this platform provides a customizable solution which greets callers, takes messages, and routes calls even during non-business hours.

In the end of 2007, MicroStrategy sought to renew the Agreement, and to amend it to include Schedule A and Schedule B (Exhibit B to the opposition papers), providing for increased fees. Zodiac alleges that Matthew Johnston (“Johnston”),¹ the former Vice President of Zodiac who executed the additional schedules on Zodiac’s behalf, had no authority to do so and that Zodiac was unaware of the schedules with greatly increased fees until after Johnston’s employment with Zodiac was terminated.

Plaintiff commenced the Instant Action by the filing of a summons with notice (“Summons”) dated May 19, 2009 (Exhibit B to MicroStrategy’s Motion). The Notice portion of the Summons reflects that the object of Plaintiff’s action is to seek a declaratory judgment that 1) the Agreement was invalid; or, in the alternative, 2) MicroStrategy failed to fulfill its obligations pursuant to the Agreement; or 3) the Agreement was induced by fraud. The Notice portion of the Summons also states that the action against Johnston sounds in breach of contract and breach of duty. The Summons states that Plaintiff seeks relief in the form of a declaratory judgment, and money damages in an amount to be determined at trial.

With respect to the Virginia Action, MicroStrategy filed a summons and complaint against Zodiac and its president in the Circuit Court of Fairfax County, Virginia on June 26, 2009. The caption of the Virginia Action is *MicroStrategy Incorporated t/a Angel.com v. Zodiac Gaming LLC and Zodiac Interactive, LLC and Alexander V. Libkind*, Civil Action Number 9239-2009. In the Virginia Action, MicroStrategy asserted claims against the defendants for breach of contract, ostensible and apparent authority, fraudulent inducement, and conspiracy to injure.

Plaintiff served and filed its Amended Summons and Complaint in the instant action on July 17, 2009, alleging causes of action for declaratory relief, indemnification, breach of contract by MicroStrategy, and fraud. On or about July 24, 2009, MicroStrategy served the summons and complaint on the defendants in the Virginia Action.

¹ Although Matthew Johnston’s last name is spelled “Johnson” in the caption in the Instant Action, his correct name is apparently Matthew “Johnston.”

Both MicroStrategy and Zodiac are organized under the laws of Delaware. Their offices are in the respective states where each commenced an action. Zodiac affirms that the bulk of the services provided in Schedule A were to be used by Zodiac at its offices in New York, and that the setup services were to have been performed in conjunction with Johnston out of Zodiac's office located in Valley Stream, New York.

MicroStrategy submits that the contractual documents ("2007 Contract") were executed in Virginia and the Agreement provided for Virginia Law to govern all contract matters. MicroStrategy disputes Zodiac's contention that the bulk of the services under the 2007 Contract were for minutes to be used by Zodiac at its offices in Nassau County, New York. Instead, MicroStrategy affirms, the callers accessed the Angel telephone network through servers located in Virginia and all callers would have been processed by Angel's hosted application service in Virginia (Rennyson reply affidavit, par. 6).

C. The Parties' Positions

MicroStrategy argues that the Court should dismiss the Instant Action against MicroStrategy, pursuant to CPLR § 3211(a)(4) on the grounds that 1) there is substantial identity of the parties in both actions; 2) the relief sought in both actions is substantially the same; 3) the first-filed rule warrants dismissal of this action because, although Zodiac filed its Summons in this action on or about May 21, 2009, it did not file its Complaint until on or about July 17, 2009, after MicroStrategy commenced the Virginia Action; and 4) other factors, such as the presence in Virginia of a majority of relevant witnesses and documents, militate in favor of dismissal of this action in favor of the Virginia Action.

Alternatively, MicroStrategy submits that the Court should stay the proceedings in this action, pending the outcome of the Virginia Action. In support, MicroStrategy argues that the two actions are sufficiently similar that a stay of this action will preserve judicial and party resources, prevent an inequitable result and avoid the duplication of effort. In addition, MicroStrategy argues, the resolution of the claims in the Virginia Action will likely dispose of the claims asserted in this Action.

Zodiac opposes MicroStrategy's motion, submitting that the Court should neither dismiss nor stay the Instant Action. Zodiac argues, *inter alia*, that 1) the Court is not bound to follow the "first in time" rule in determining this motion; 2) while there is some overlap, there is not

substantial similarity of parties, causes of actions and relief in the Instant Action and the Virginia Action, as reflected by the facts that a) the Instant Action asserts an indemnification claim against Johnston, who is not a party in the Virginia Action; and b) Moving Defendant asserted claims in the Virginia Action against an individual and entity who are not parties in the Instant Action; 3) a Virginia court may decline to exercise jurisdiction over Johnston because of his minimal contacts with that state, while New York has jurisdiction over Johnston, who is a resident of New York; 4) New York courts have a significant interest in this litigation because the goods and services were provided to Zodiac in New York; and 5) the choice of law clause is not dispositive because a New York court may apply substantive Virginia law.

RULING OF THE COURT

A. Zodiac's Action Against MicroStrategy Should Proceed in Virginia

A court is vested with broad discretion in considering whether to dismiss an action on the ground that another action is pending pursuant to CPLR § 3211(a)(4). *Whitney v. Whitney*, 57 N.Y.2d 731 (1982); *Simonetti v. Larson*, 44 A.D.3d 1028 (2d Dept. 2007); *Montalvo v. Air Dock Systems*, 37 A.D.3d 567 (2d Dept. 2007).

According to one line of authority, the critical conduct in determining the chronology of litigation, as it relates to a motion made pursuant to CPLR §3211(a)(4), is not when the prior action was filed, but rather when a complaint was served in the prior action. *Wharton v. Wharton*, 244 A.D.2d 404 (2d Dept. 1997); *Graev v. Graev*, 219 A.D.2d 535 (1st Dept. 1995); *Sotirakis v. United Services Automobile Assn.*, 100 A.D.2d 391 (2d Dept. 1984); *San Ysidro Corp. v. Robinow*, 1 A.D.3d 185 (1st Dept. 2003). In the matter at bar, service was effected on the defendants in the Virginia Action on or about July 24, 2009, after service of the amended complaint in New York. Thus, with respect to technical priority, the Virginia Action would not be a “prior action” for the purposes of CPLR 3211(a)(4) dismissal.

However, the practice of determining priorities between pending actions on the basis of dates of filing is a general rule, not to be applied in a mechanical way. *White Light Productions Inc. v. On the Scene Productions, Inc.*, 231 A.D.2d 90, 97 (1st Dept. 1997). Another line of cases recognizes that the race to the courthouse should not be determinative and is merely a factor to be considered in choice of forum litigation where, as here, commencement of the competing actions has been reasonably close in time. *San Ysidro Corp.*, 1 A.D.3d at 186; *White*

Light Productions Inc., 231 A.D.2d at 99; *The Flintkote Company v. American Mutual Liability Ins. Co.*, 103 A.D.2d 501, 505 (2d Dept. 1984), *app. dismiss. in part* 64 N.Y.2d 882 (1985), and *aff'd*, 67 N.Y.2d 857 (1986). According to this line of cases, the relevant inquiry is similar to that undertaken in applying the doctrine of *forum non conveniens*, namely, whether the litigation and parties have sufficient contact with this state to justify the burdens imposed on our judicial system. *Flintkote*, 103 A.D.2d at 507. Relevant considerations include comity, the prevention of multiple and vexatious litigation, judicial economy, the interests of the forum and the convenience of the parties. *White Light Productions Inc.*, 231 A.D.2d at 95. The Court views the *White Light* analysis as the more appropriate method of resolving the instant case.

To reach the issue of the appropriate forum, the Court must first determine that there is a substantial identity of the parties and the claims in the respective actions. *White Light Productions Inc.*, 231 A.D.2d at 93. MicroStrategy alleges, and this Court agrees, that such substantial identity is present here in light of the fact, *inter alia*, that both Actions concern the parties' performance pursuant to the 2007 Contract. Therefore the Court looks to the contacts between the parties' claims and the two possible forum states. The Court concludes that the dispute among the parties has a stronger connection to Virginia than New York, based in part on the facts that 1) the services provided to Zodiac pursuant to the 2007 Contract were from computers and servers based in Virginia; 2) the 2007 Contract provides that Virginia law governs all matters relating to the Contract; and 3) setup services were performed at Angel's headquarters in Virginia.

Thus, the Court concludes that dismissal pursuant to § CPLR §3211(a)(4) is appropriate and dismisses the Instant Action as alleged against MicroStrategy. The Court directs that the Instant Action against Defendant Matthew Johnston is severed and shall proceed in this court.

B. The Court Denies MicroStrategy's Application to Seal Certain Submissions

The Court denies the application by MicroStrategy in its reply papers to seal Exhibits A and B to the opposition papers. The right of public access to court proceedings and court records is based upon both constitutional and common-law principles. *Gryphon Domestic VI, LLC v. APP International Finance Co., BV*, 28 A.D.3d 322 (1st Dept. 2006), *lv. app. den.* 10 N.Y.3d 705 (2008); *Fordham-Coleman v National Fuel Distribution Group*, 42 A.D.3d 106 (4th Dept. 2007), *lv. app. den.* 42 A.D.3d 975 (4th Dept. 2007). To overcome the presumption of openness

the party seeking sealing must demonstrate "good cause"(22 NYCRR § 216.1(a)) by compelling reasons. *See generally Herald Co. Inc. v. Weisenberg*, 59 N.Y.2d 378, 385 (1983). MicroStrategy's assertion that these documents "relate to MicroStrategy's competitive pricing and contract terms for its proprietary Interactive Voice Response services," (Rennyson reply affidavit, p. 3, n. 3) does not suffice to establish "good cause." It is also significant that, according to Zodiac's affirmation, the 2007 Contract raised the monthly fee from \$500.00 to approximately \$52,000, an increase of more than 10,000 %, allegedly without notification to or approval by Zodiac. (Libkind affidavit, par. 10). In light of the foregoing, the Court concludes that the pricing terms of the 2007 Contract may be an important part of the dispute, and that sealing of these documents is inappropriate. Accordingly, the Court denies MicroStrategy's application to seal Exhibits A and B to Zodiac's opposition papers.

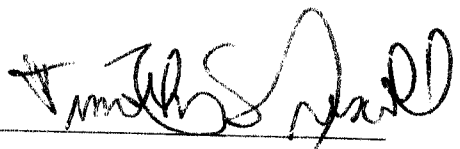
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

November 12, 2009


 HON. TIMOTHY S. DRISCOLL

J.S.C.

XXX **ENTERED**

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NASSAU COUNTY
 COUNTY CLERK'S OFFICE