

<b>Open Access Inc. v Light Tower Fiber Long Is. LLC</b>
2010 NY Slip Op 31375(U)
May 25, 2010
Supreme Court, Nassau county
Docket Number: 006291/09
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 2  
NASSAU COUNTY

\_\_\_\_\_  
OPEN ACCESS INC. and TOPSPIN PARTNERS,  
L.P.,

INDEX No. 006291/09

Plaintiffs,

MOTION DATE: April 15, 2010  
Motion Sequence # 004

-against-

LIGHT TOWER FIBER LONG ISLAND LLC,  
formerly Keyspan Communications Corporation,

Defendant.

\_\_\_\_\_  
The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Reply Affidavit.... ..... X

Motion by plaintiffs for leave to reargue is **granted**. Upon reargument, the court's order of December 15, 2009 is modified to the extent indicated below.

This is an action for a declaratory judgment concerning the parties' rights under a contract concerning fiber optic communications. Simply put, fiber optics is a medium for transmitting large amounts of electronic data by using light impulses. Plaintiff Open Access, Inc. is in the business of providing data transportation services over fiber optic networks. Plaintiff Topspin Partners, LP provided venture capital and financing to Open Access. Defendant Light Tower Fiber Long Island, LLC, formerly known as "Keyspan

Communications,” is the principal supplier of fiber optic routes to Open Access.

On May 16, 2001, Keyspan and Open Access entered into a written “Fiber Optics and Cable Co-Construction and Exchange Agreement.” The agreement provided that in exchange for Keyspan’s constructing fiber optic routes and granting access to its infrastructure, Open Access was to pay Keyspan 50% of its “gross sales to customers.”

On December 6, 2001, the parties entered into a restated and amended agreement. The restated agreement provided that Open Access could propose that Keyspan construct a particular fiber optic route, and Keyspan would construct the route, if Open Access accepted Keyspan’s proposed cost.

The parties entered into a second restated and amended agreement on June 26, 2007. Pursuant to the second restated agreement, if Keyspan declined to construct a proposed fiber optic route, it was nevertheless required to provide connectivity to Open Access through Keyspan’s own fiber transmission system. The second restated agreement defined the KC System as “the combination of all optical fiber infrastructure...owned and operated by KC.”

Section 6.1 of the second restated agreement provides that Open Access shall pay to Keyspan 50% of its “Gross Receipts for the sale of Ethernet Transport.” Section 1.19 defines “Gross Receipts” as “Gross Sales billed and actually received from a customer for the sale of services.” Section 1.19 defines “Gross Sales” as “all sales revenue generated by use of the KC System pursuant to this Agreement; provided, however, that Gross Sales shall not include revenue received from the Value Added Services.” Section 1.41 defines “Value Added Services” as “additional services provided to a customer using Transport.” Section 1.40 defines “Transport” as “the ability to physically deliver or the act of physically delivering bits of data between two points. Examples include...Etheret.” Section 1.11 defines “Ethernet” as “the widely used network standard for local area network communication (LAN) based on the IEEE standard 802.3.”

Reading section 1.19 and section 1.40 together, Keyspan is not entitled to share in revenues derived from “additional services” provided to a customer using Ethernet. Nevertheless, plaintiffs claim a broader exemption from the sharing of Ethernet revenues if the transport was through the “Open Access System.” Plaintiffs rely upon Section 1.19 of the agreement which provides, “Services of any kind that are provided by OA to its customers that do not use the KC System for Transport are not included in Gross Sales or Gross

Receipts and are not subject to revenue sharing.”

Section 1.36 of the agreement defines Open Access System as “all communications facilities or transport to which OA has title, IRU or other rights to use, including the system constructed and/or provisioned for Open Access and its customers pursuant to this Agreement and each Fiber Optic Route Addendum, but excluding the Open Access Allocated Fibers.”

However, Section 1.36 further provides that, “Fiber Strands in the Cable System that are allocated to Open Access pursuant to the Fiber Optic Route Addendum, whether through IRU, title sale or lease, shall be considered part of the Open Access System, regardless of whether Open Access holds title to such Fiber Strands. For the avoidance of doubt, the Open Access Reserved Fibers shall not be considered part of the Open Access System.” Section 1.20 defines “IRU,” or Indefeasible Right to Use, as “the exclusive right of Open Access to use the Fiber Strand(s) in the Open Access System, set forth by KC and Open Access in one or more Fiber Optic Route Addenda....”

Thus, the agreement appears to provide that Keyspan is not entitled to revenue sharing on data transported over the system constructed or “provisioned” for Open Access. However, Keyspan appears to be entitled to revenue sharing on data transported over fibers “allocated” to Open Access, unless the data is transported over “Fiber Strands” allocated to Open Access pursuant to a Fiber Optic Route Addendum.

Plaintiffs allege that Keyspan is not only Open Access’ supplier but is also a competitor. Plaintiffs further allege that, during the course of negotiations for Keyspan to acquire Open Access, Keyspan engaged in a course of conduct designed to reduce the value of the company. Plaintiffs allege that Keyspan’s wrongful conduct includes breaches of the second restated agreement as described below.

In the first cause of action, plaintiffs request a declaratory judgment that, under the second restated agreement, Keyspan is required to provide fiber strand connectivity to the fiber optic system to Open Access. In the second cause of action, plaintiffs request a declaratory judgment that Keyspan is not entitled to share in the revenue received by Open Access from the sale of Ethernet if the transport is through the “Open Access System.” In this cause of action, plaintiffs request a further declaration as to which routes are part of the

Open Access System.

The third cause of action is for specific performance of the second restated agreement. Plaintiffs request an order directing Keyspan to provide Open Access with detailed descriptions of the fiber optic routes, including mappings, termination points, and connection points. The fourth cause of action is for breach of contract. Plaintiffs allege that Keyspan breached the agreement by demanding revenue sharing payments and construction overcharges not provided in the contract. In the fifth cause of action, plaintiffs allege that Keyspan converted fiber strands which belonged to Open Access. In the sixth cause of action, plaintiffs allege that Keyspan fraudulently induced Topspin to fund the construction of fiber optic routes by falsely representing that Keyspan would itself perform the construction at the highest quality and lowest possible cost.

In the seventh cause of action, plaintiffs seek a declaratory judgment the Keyspan's right to audit Open Access' books and records is limited to the extent provided by section 5.6 of the agreement. That section provides that Keyspan shall have the right to audit the books and records "including customer invoices or other documents of Open Access directly relating to KC's remuneration pursuant to this Agreement." Plaintiffs argue that Keyspan is not entitled to use customer and pricing information in order to compete with Open Access.

Section 2(G) of the second restated agreement provides that "all work performed on the KC System including splicing, rearrangements, and any other modifications or additions shall be performed solely by KC or its designee..." In the eighth cause of action, plaintiffs seek a declaratory judgment that under the agreement Open Access has the right to perform any and all work on the Open Access System, including splicing, rearrangements, and any other modifications or additions.

Section 2.9 of the second restated agreement provides that the parties agree to release each other from "any and all claims relating to the Route Cost for all Fiber Optic Routes constructed pursuant to the Original Agreement or First Amended Agreement." In the ninth cause of action, plaintiffs seeks a declaratory judgment that the release provision is null and void or, in the alternative, does not bar plaintiffs' claims based on the second restated agreement. In the tenth cause of action, plaintiffs allege that Keyspan breached the implied covenant of good faith and fair dealing in the second restated agreement.

Defendant moved to dismiss the amended complaint on the grounds of a defense founded upon documentary evidence and failure to state a cause of action. By order dated

December 15, 2009, the court granted defendant's motion to dismiss the first cause of action on the ground that there was no justiciable controversy between the parties as to Keyspan's obligation to provide Open Access with connectivity to the fiber optic system.

With respect to the second cause of action, the court issued a declaratory judgment that Keyspan is entitled to revenue sharing payments for data transported over the KC System. The court's order did not define the parameters of that system. More specifically, the court's order did not determine whether any particular fibers, or fiber strands, were allocated to Open Access, either pursuant, or not pursuant, to a Fiber Optic Route Addendum.

The court granted defendant's motion to dismiss the third cause of action, for specific performance, on the ground that Open Access had failed to give 30 days written notice of default as required by the terms of the contract. The court granted defendant's motion to dismiss the fourth cause of action, for breach of contract, based upon the release and failure to give the required notice. The court similarly granted defendant's motion to dismiss the fifth cause of action, for conversion, based upon the release. The court granted defendant's motion to dismiss the sixth cause of action, for fraud, on the ground that Keyspan had failed to make a representation as to a material fact.

With respect to the seventh cause of action, the court issued a declaratory judgment that Keyspan is entitled to audit Open Access' books and records in accordance with Section 5.6 of the second restated agreement. The court reasoned that Keyspan was entitled to audit customer and pricing information in order to determine whether it had been correctly remunerated for use of the KC System.

With respect to the eighth cause of action, the court issued a declaratory judgment that Open Access is not entitled to conduct any work on fiber optic strands which are located in cables within the KC System.

With respect to the ninth cause of action, the court issued a declaratory judgment that the release contained in Section 2.9 of the second restated agreement was valid and enforceable as against Open Access.

Finally, the court granted defendant's motion to dismiss the tenth cause of action, for breach of the implied covenant of good faith, on the ground that it was duplicative of

plaintiffs' claim for breach of contract.

Plaintiffs move for leave to reargue defendant's motion to dismiss the complaint to the extent that the court failed to grant declaratory relief in favor of Open Access with respect to the second, eighth, and ninth causes of action in the amended complaint. Plaintiffs argue that the court misapprehended the release provision, the provisions in the contract covering the sharing of revenue derived from the sale of Ethernet, and the provisions covering Open Access' right to perform work on the Open Access System.

Plaintiffs assert in essence that the fiber optic routes which are owned and operated by Keyspan constitute the "KC System," while the fiber optic routes which are owned by Open Access constitute the Open Access System. As Open Access interprets the contract, if Keyspan constructs a fiber optic route "for" Open Access, it becomes part of the Open Access System. Open Access also asserts that fiber strands that are "allocated" to Open Access are part of the Open Access System, regardless of whether Open Access has title to those fiber strands. Open Access concedes that it is required to share with Keyspan revenue which is derived from the sale of Ethernet that is transported over the KC System or over both systems. However, Open Access asserts that if Ethernet data is transported over fibers in the Open Access System only, Keyspan is not entitled to share in the revenue.

CPLR 2221(d) provides that a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion. By its express terms, the release provision applies only to the original agreement and the "first amended" (and restated) agreement. Thus, the release provision does not bar plaintiffs' claims, based on the second restated agreement, with respect to revenue sharing, definition of the Keyspan and Open Access Systems, and Open Access' right to perform modification work on its system. Accordingly, plaintiffs' motion for leave to reargue defendant's motion to dismiss the amended complaint is granted.

While the existence of factual issues will not preclude the issuance of declaratory relief, underlying factual issues must frequently be resolved before a declaratory judgment can be granted (*See, e.g. Larry E. Knight Inc. v OBE Ins. Corp.*, 60 AD3d 498 [1<sup>st</sup> Dept 2009]). As indicated above, there are factual issues as to which fibers were constructed or "provisioned" for Open Access. Additionally, there are factual issues as to which fibers were "allocated" to Open Access, and whether the "Fiber Strands" were allocated pursuant to a Fiber Optic Route Addendum. The resolution of these issues will effect not only revenue

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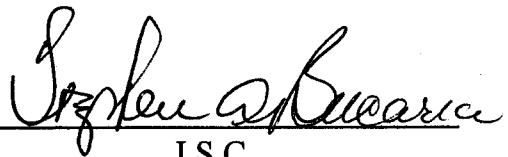
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sharing but also whether Open Access is entitled to perform modification work.

Upon reargument, a declaratory judgment is **granted** declaring that the release provision in the second restated agreement does not bar plaintiffs from obtaining declaratory relief with respect to the second and eighth causes of action. The declaratory relief previously issued with respect to the second and eighth causes of action is vacated with leave to renew upon the completion of discovery. To the extent not modified herein, this court's order of December 15, 2009 remains in full force and effect.

So ordered.

Dated

25 May 10  
J.S.C.**ENTERED**

MAY 27 2010

NASSAU COUNTY  
COUNTY CLERK'S OFFICE