[* 1]

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

ITELAGEN, INC.,

Plaintiff,

INDEX NO. 111076/09

-against-

MOTION SEQ. NO. 002

L&L HOLDING COMPANY, LLC,

Defendant.

The following papers, numbered 1 - 4 were considered on this motion to amend:

PAPERS	NUMBERED
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	1, 2, 3
Answering Affidavits — Exhibits	4
Replying Affidavits	

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is decided to the extent set forth below.

This is an action for breach of contract resulting from plaintiff's written agreement with defendant to provide network service and management to defendant for a term of 12 months, with automatic renewal for three years thereafter. Plaintiff alleges in the complaint that defendant terminated the agreement early, in contravention of the terms of the agreement, and that defendant owes plaintiff for the remainder of the first one-year term.

Plaintiff now moves for partial summary judgment to be entered in its favor and against defendant on plaintiff's first cause of action for breach of contract in the amount of $20,145.50 and on plaintiff's fifth cause of action for legal fees in the amount of $5,453.05, or an amount to be determined at a separate trial or inquest. Plaintiff also moves to dismiss defendant's counterclaim. Further, plaintiff seeks leave to amend its complaint to add David Levinson and Robert Lapidus as parties, pursuant to CPLR 1002, and add causes of action against them, pursuant to CPLR 3025(b).

Partial Summary Judgment

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). However, it should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). "Moreover, the motion court should draw all reasonable inferences in favor of the nonmoving party in determining whether to grant summary judgment." *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 (1st Dep't 2002). In deciding such a motion, the court's role is "issue-finding, rather than issue-determination." *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted).

In order for plaintiff to succeed on its breach of contract cause of action, it must establish a *prima facie* showing of the following elements: (1) a valid and enforceable contract; (2) its performance of the contract; (3) breach by the other party; and (4) damages. *Terwilliger v Terwilliger*, 206 F3d 240, 245–46 (2d Cir 2000); *see also Furia v Furia*, 116 AD2d 694, 695 (2d Dep't 1986). As an initial matter, it is clear that an agreement was entered into between the parties. Plaintiff has attached a copy of the written agreement to its motion papers and defendant does not dispute such agreement. *See* Tara A. Tighe Affirmation, Exh B. Pursuant to the agreement, if defendant terminated the contract prior to the expiration of the one-year term, or without giving appropriate notice thereafter, plaintiff could take appropriate action to enforce payment. *See id.* at 6. It is further undisputed that defendant gave notice on March 15, 2009 that it was terminating the contract effective April 15, 2009, still within the one-year term.

However, while plaintiff contends that defendant wrongfully terminated the contract and it is, thus, owed payment for the remaining three-and-a-half months under the terms of the agreement, defendant contends that it had no choice but to terminate the contract because of plaintiff's defective

provision of materials and rendition of services. Defendant submits an affidavit by Howard L. Slavin, the Senior Vice-President and Director of Asset Management for defendant, which states that "[plaintiff] . . . created, rather than resolved, numerous problems in response time and fostered an atmosphere where communication became an issue," which was very problematic for a company that relies on electronic communications in order to conduct its business. Slavin Aff in Opp ¶ 4. Moreover, Slavin asserts: "The continued problems involved plaintiff's dysfunctional system for how it expected computer problems to be reported to them, and their inability to respond in a timely and efficient manner." *Id.* at ¶ 7. Slavin continues: "[E]ven after defendant was forced to terminate the relationship, defendant had to bring in a third party and had to spend upwards of $12,000.00 to remedy the problems caused by plaintiff." *Id.* at ¶ 8.

"The question of whether there has been substantial performance – or a breach – is to be determined, whenever there is any doubt, by the trier of fact." *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 189 (1st Dep't 2002). Here, defendant has set forth sufficient facts to withstand plaintiff's summary judgment motion. Disputed issues in this case exist, such as whether plaintiff substantially and adequately performed its obligations in providing the services described in the agreement and whether defendant had a valid excuse to terminate the agreement early. Although the agreement provided for a one-year term, presumably, if there were significant issues with the services performed by plaintiff, defendant should be entitled to raise them as a defense for its alleged breach. As such, it is clear that there are genuine issues of fact remaining and, therefore, that part of plaintiff's motion seeking summary judgment on the first and fifth causes of action is denied.

Dismiss Counterclaim

Plaintiff also moves to dismiss defendant's counterclaim, wherein defendant seeks the sum of $12,199.18. Defendant alleges in its counterclaim that, as a result of "unworkmanlike and defective provision of materials and rendition of services by Plaintiff, Defendant was required to undertake

corrective measures to remedy the defective performance and materials provided by Plaintiff." Tighe Affirmation, Exh D, Def's Am Answer ¶ 15.

On a motion to dismiss, pursuant to CPLR 3211, the claim is given a liberal construction and the facts alleged therein are accepted as true. *Leon v Martinez*, 84 NY2d 83, 87 (1994). The motion to dismiss will only be granted if, upon giving the non-moving party every favorable inference, the facts do not fit within any cognizable legal theory. *Id.* at 87–88.

The motion to dismiss defendant's counterclaim is denied. Viewing the facts in the light most favorable to defendant, the non-moving party herein, and giving the counterclaim a liberal construction by accepting the facts alleged therein as true, defendant has stated a valid cause of action. As stated above, there are issues with regard to which party breached the agreement. Defendant has contended that plaintiff failed to provide the services plaintiff had contracted for. The Slavin Affidavit asserts that defendant incurred a significant cost to remedy the problems caused by plaintiff. *See* Slavin Aff in Opp ¶ 8. Thus, at this juncture, defendant has at least stated a claim against plaintiff, which requires denial of that part of plaintiff's motion to dismiss the counterclaim.

Amend Complaint

Leave to amend pleadings is generally freely granted, absent prejudice and surprise resulting from the delay. *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 (1983); *Antwerpse Diamantbank, N.V. v Nissel*, 27 AD3d 207, 208 (1st Dep't 2006). Nevertheless, in determining whether to grant leave to amend, a court must examine the merits of the proposed amendment "in order to conserve judicial resources . . . and leave to amend will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law." *Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 (1st Dep't 2001) (internal citations omitted); *Non-Linear Trading Co. v Braddis Assocs., Inc.*, 243 AD2d 107, 116 (1st Dep't 1998). A motion for leave to amend pleadings must be accompanied by an affidavit of merits and evidentiary proof that could be considered on a motion for

summary judgment. *See Marinelli v Shifrin*, 260 AD2d 227, 229 (1st Dep't 1999). Leave to amend a pleading should be denied where the proposed amendment clearly lacks merit. *See Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 (1st Dep't 2007).

Plaintiff's motion to amend its complaint to add David Levinson and Robert Lapidus as defendants is denied. While plaintiff alleges that "Itelagen also provided additional services and equipment to the Defendant and/or the principals of the Defendant," plaintiff has not asserted that any agreements exist between it and these individuals, nor has plaintiff adequately alleged that causes of action exist against these principals in their individual capacities. Plaintiff has attached copies of invoices listing such individuals' addresses as the project addresses; however, as they are principals of the corporation, this alone does not indicate that services were performed for them in an individual capacity, separate from services performed for the company. Therefore, as plaintiff has failed to show that an amendment adding David Levinson and Robert Lapidus has merit, the motion to amend to add such individuals is denied.

Accordingly, it is

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that discovery shall be expeditiously completed; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy of this order with notice of entry, upon plaintiff.

Dated: 6/21/10

DORIS LING-COHAN, J.S.C.

Check one: [ ] **FINAL DISPOSITION** [X] **NON-FINAL DISPOSITION**
Check if Appropriate: [ ] **DO NOT POST**

J:\Amend Caption\Amend Pleadings\Itelagen, amend compl, partial sj, dismiss countcl.wpd