

IDT Corp. v Tyco Group
2011 NY Slip Op 33843(U)
June 20, 2011
Sup Ct, New York County
Docket Number: 652097/10
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITLER
Justice

PART 45

IDT CORP. and IDT EUROPE, B.V.B.A.

INDEX NO.

652097/10

MOTION DATE

TYCO GROUP S.A.R.L., TYCOM (US) INC.,
TYCO INTERNATIONAL, LTD., TYCO
INTERNATIONAL (US) INC. and TYCOM LTD

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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 *by defendant* to dismiss the Complaint is GRANTED per the attached Decision and Order.

Dated: June 20, 2011

Melvin L. Schweitler
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

joint venture between IDT and Tyco to build a multi-billion dollar global undersea fiber optic network.

In February 2000, IDT filed a suit in the United States District Court for the District of New Jersey against Tyco and TSSL for breach of contract and breach of the implied covenant of good faith and fair dealing based on the defendant's breach of the MOU and the Instruction to Proceed. IDT sought compensatory damages of \$1 billion and punitive damages of \$3 billion. This federal action was dismissed without prejudice for lack of jurisdiction.

In March 2000, Tyco filed a complaint in this court alleging that IDT filed a baseless lawsuit, improperly disclosed confidential information to the press and otherwise obstructed efforts to build the TyCom Global Network. Tyco's complaint sought compensatory damages of at least \$1 billion, punitive damages and declaratory and injunctive relief. IDT filed a motion to dismiss the complaint, which was denied in June 2000.

In June 2000, IDT filed another complaint in New Jersey Superior Court, raising factual allegations and legal claims similar to those raised in its earlier federal complaint. In August 2000, the court granted Tyco's motion to dismiss without prejudice.

The Settlement Agreement

In October 2000, IDT and Tyco entered into a 19-page Settlement Agreement (Settlement Agreement), "to resolve fully and finally all differences between them" and to dismiss with prejudice the federal and state litigations between IDT and Tyco.

The Settlement Agreement provided that each party "forever release[d]" any claims it could have brought against the other in the prior lawsuits arising out of the MOU and Instruction to Proceed. In exchange for IDT's release, Section 2 of the Settlement Agreement required Tyco

to give IDT a 15-year Indefeasible Right to Use (“IRU”) Tyco’s telecommunications capacity on specified networks. The Settlement Agreement detailed all the essential terms of the bargain, such as the type of capacity to be supplied by Tyco, the price, the delivery dates, the configuration and the specified endpoints.

The capacity consisted of two “wavelengths” each in a ring configuration. This capacity was to be delivered on Tyco’s Transatlantic and Transpacific Networks – these two “zones” were to comprise parts of Tyco’s network. When the Settlement Agreement was signed, the TyCom Global Network was not complete and Tyco had not yet developed a standard form of IRU Agreement; the 2000 Settlement Agreement, therefore stated that IDT and Tyco would negotiate the remaining terms of the IRU Agreement and other “definitive” agreements. These further definitive agreements, and the IRU Agreement, “were to be in writing and consistent with Tyco’s standard agreements with similarly situated customers.”

The 2001-2004 Negotiations

In June 2001, Tyco submitted a proposed IRU Agreement to IDT. The parties and their counsel negotiated the terms of the IRU Agreement over the next eight months, so that IDT could use the first of the four wavelengths on its January 2002 Handover date. The parties discussed various commercial terms of the agreement, including “decommissioning” and limitation of liability. Despite resolving most of these issues, negotiations ended shortly thereafter.

In May 2002, IDT contacted Tyco about “closing out the IRU.” Although after this exchange, “[d]iscussions completely stopped,” the parties resumed such discussions in August 2003. IDT stated that it was “interested in selling certain capacity after IDT receives it via swap . . .” In response, Tyco advised IDT that it wanted to “bring the intent of the Settlement

Agreement to fruition,” and stated that “a definitive IRU Agreement is necessary.” Months later, IDT sought the right to sell excess capacity to third parties. However, because Tyco planned to sell the TyCom Global Network, it offered to pay IDT a cash amount equal to a percentage of the sale value of the network, based on a percentage that IDT’s wavelengths represented of the total capacity of the network. Negotiations ended shortly thereafter, upon the filing of the 2004 complaint referred to below.

The 2004 Complaint and Litigation

In May 2004, IDT filed a complaint against Tyco in this court. In the complaint, IDT asserted that Tyco breached the Settlement Agreement by “fail[ing] to meet its obligations under the Settlement Agreement to provide IDT the use of the wavelengths by the applicable Handover dates,” and sought \$314 million in damages.

In 2007, the parties cross-moved for summary judgment. IDT claimed that Tyco had breached the Settlement Agreement by proposing IRU Agreement terms that were allegedly inconsistent with the Settlement Agreement, focusing specifically on decommissioning and limitation of liability. Tyco claimed that the Settlement Agreement imposed only a duty to negotiate in good faith, that Tyco had done so and that Tyco was relieved of any obligation under the Settlement Agreement. This court (Lowe, J.) granted IDT’s motion, finding Tyco liable, and dismissed Tyco’s counterclaims and cross-motion.

In August 2008, the Appellate Division, First Department reversed the order, holding that IDT’s motion for partial summary judgment on liability should have been denied, and that Tyco’s cross-motion for summary judgment seeking dismissal of the complaint should have been granted. *IDT Corp. v Tyco Group S.a.r.l.*, 54 AD3d 273 (1st Dept 2008).

First, the Appellate Division found that the Settlement Agreement called for an IRU Agreement that was “to be consistent with [Tyco’s] standard agreements for similarly situated customers and ‘in any event’ consistent with the settlement agreement.” *Id.*, 54 A.D.3d at 274. However, “[b]ecause [Tyco’s] standard agreements, including the IRU Agreement, were not in existence at the time the Settlement Agreement was entered into, essential terms of the Settlement Agreement remained indeterminate” *Id.* Despite the Settlement Agreement’s express representation of enforceability, the court held that “[it] was not a fully enforceable agreement when the parties entered into it.” *Id.*

The Appellate Division then identified the two types of binding preliminary agreements that have been recognized by the United States Court of Appeals for the Second Circuit: (1) a “Type I” preliminary agreement is “complete” and reflects “a meeting of the minds on all the issues perceived to require negotiation” and “binds both parties to their ultimate contractual objective;” (2) in contrast, a “Type II” preliminary agreement is binding “only to a certain degree, reflecting agreement on certain major terms, but leaving open terms for further negotiation” – Type II agreements “do not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith in an attempt to reach the . . . objective within the agreed framework.” *Id.*, 54 A.D.3d at 275. The Appellate Division then announced a new category of preliminary agreement, holding that the Settlement Agreement at issue here “reflects a third, hybrid category of preliminary agreement,” which is incomplete but nonetheless “binds both sides to their ultimate contractual objective upon the subsequent occurrence of a contingency.” *Id.* The court found there was a contingency here of either: (1) the insistence of one party on the terms of the “standard agreements” after they came into existence; or (2) a

resolution of the remaining terms through further negotiation. *Id.* Under this hybrid approach, which the Appellate Division said “might be called a ‘contingent Type I Agreement,’” both parties were required to “negotiate the open issues in good faith” unless and until one party insisted on the terms of the standard agreements. *Id.* Applying this ‘contingent Type I Agreement,’ the Appellate Division held that “[n]othing in the settlement agreement prohibited [Tyco] or [IDT] from merely proposing terms that were inconsistent with the settlement agreement.” *Id.*

Accordingly, the Appellate Division held that Tyco, as a matter of law, had not breached the Settlement Agreement.

The Court of Appeals Decision

In October 2009, the Court of Appeals affirmed the Appellate Division’s order. *IDT Corp. v Tyco Group S.a.r.l.*, 13 NY3d 209 (2009).

First, the Court of Appeals held that it “agree[s] with IDT that the parties entered into a valid settlement agreement.” *Id.* 13 N.Y.3d at 213.

Second, the Court of Appeals held that “[a]lthough there was a valid settlement agreement in this case, Tyco’s obligation to furnish capacity never became enforceable because agreed-upon conditions were not met.” *Id.*, 13 N.Y.3d at 214. Specifically, the Court of Appeals found that the Settlement Agreement “contemplated the occurrence of numerous conditions, i.e., the negotiation and execution of four additional agreements, most importantly, the IRU.” *Id.* With regard to the IRU, the court found that “the clear intent of the parties was that it had to be executed before any handover of capacity.” *Id.* The court further found that Tyco did not breach

the Settlement Agreement “by merely proposing an IRU which allegedly contained terms inconsistent with settlement.” *Id.*, 13 N.Y.3d at 214.

The court recognized that “under the settlement agreement, the parties were required to negotiate the terms of the IRU and other agreements in good faith.” *Id.* Yet, “despite the fact that (1) the parties negotiated various open terms on and off for almost three years and (2) each side had a right to require conformance with Tyco’s standard agreements, except to the extent that any term conflicted with the settlement agreement . . . the IRU was never executed.” *Id.*, 13 N.Y.3d at 214-15. The court concluded that Tyco did not breach any of its obligations under the Settlement Agreement. *Id.*, 13 N.Y.3d at 215.

The 2010 Events

In November 2009, IDT reinstated discussion with Tyco regarding the IRU Agreement. At that time, Tyco responded that under the rulings of the First Department and the Court of Appeals, it did not have any further obligations under the Settlement Agreement. However, in an apparent effort to avoid further litigation by IDT, the parties exchanged draft IRU documents and continued to negotiate for almost one year. During those negotiations, IDT raised objections to proposed decommissioning and limitation of liability provisions. The negotiations ended in October 2010, and IDT commenced this suit shortly thereafter.

The 2010 Complaint

In its 2010 complaint, IDT asserts that Tyco “failed to meet [its] obligations under the Settlement Agreement to provide IDT the use of the wavelengths by the applicable Handover dates.” IDT claims that Tyco breached the Settlement Agreement by proposing “significant provisions” that “were inconsistent with the terms of the Settlement Agreement.” Specifically,

the 2010 complaint contains two counts: (1) breach of contract and (2) breach of the duty to negotiate in good faith. IDT seeks an order directing Tyco to pay damages. Tyco seeks dismissal of IDT's claims based on, *inter alia*, CPLR 3211 (a) (7).

Discussion

CPLR 3211 (a) provides, in pertinent part, “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that (7) the pleading fails to state a cause of action”

Courts are instructed to construe a complaint liberally when determining if it withstands a motion to dismiss under CPLR 3211 (a) (7), accepting all allegations as true and giving the plaintiff the benefit of every favorable inference. *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002). “[T]he sole criterion is whether the pleading states a cause of action.” *Weiss v Cuddy & Feder*, 200 AD2d 665, 666-67 (2d Dept 1994) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). If allegations are discerned from the four corners of the complaint which, taken as a whole, state *any* cause of action recognized by law, a motion to dismiss under CPLR 3211 (a) (7) must be denied. *Id.*, 200 AD2d at 667; *Cooper v 620 Prop. Assoc.*, 242 AD2d 359, 360 (2d Dept 1997).

Tyco contends that in light of the rulings of the First Department and the Court of Appeals, it does not have any further obligations under the Settlement Agreement. Tyco bases its argument on the Court of Appeals holding that “Tyco’s obligation to furnish capacity *never became enforceable* because agreed-upon conditions were not met.” *IDT Corp. v Tyco Group S.a.r.l.*, 13 NY3d 209, 214 (2009) (emphasis added). IDT asserts, however, that the Court of Appeals decision should be construed as holding that the Settlement Agreement had not *yet*

become enforceable, not that it *could never* become enforceable. Thus, IDT asserts that based on the parties' communications between November 2009 and October 2010, Tyco breached the Settlement Agreement by frustrating the occurrence of the condition precedent, namely, the execution of the IRU Agreement, as well as breached its duty to negotiate the terms of the IRU Agreement in good faith.

The court is unconvinced of IDT's contentions. Based on the plain language of the Court of Appeals decision, this court is of the view that Tyco has no further obligations under the Settlement Agreement. Therefore, there is no cause of action on which IDT may commence a suit against Tyco. The complaint must be dismissed.

Although the Court of Appeals held that the "parties entered into a valid settlement agreement," it recognized that certain conditions precedent must be satisfied before the Settlement Agreement could become enforceable. Specifically, the Settlement Agreement "contemplated the occurrence of numerous conditions, i.e., the negotiation and execution of four additional agreements, most importantly, the IRU." *Id.*, 13 N.Y.3d at 214. The court further recognized that the parties were required to negotiate the terms of the IRU and other agreements in good faith.¹ *Id.*, 13 N.Y.3d at 214. Yet, "despite the fact that (1) the parties negotiated various open terms on and off for almost three years and (2) each side had a right to require conformance with Tyco's standard agreements, except to the extent that any term conflicted with the settlement agreement . . . the IRU was never executed." *Id.* Therefore, "Tyco's obligation to furnish capacity never became enforceable . . ." *Id.* 13 N.Y.3d at 214. Nowhere did the court

¹ The Court of Appeals held that Tyco did not breach its duty to negotiate in good faith. *IDT Corp. v Tyco Group S.a.r.l.*, 13 NY3d 209, 215 (2009) ("[T]he record does not support a finding that Tyco breached any of its obligations.").

say that Tyco's obligation *had not yet* become enforceable or that the IRU *had not yet* been executed. If the court intended to reserve a future right of action in IDT, it would have indicated as much. Instead, the language of the court's decision makes it clear that Tyco does not have any further obligations under the Settlement Agreement. This includes no further duty to negotiate the terms of the IRU Agreement in good faith. As a result of both the First Department and Court of Appeals decisions, all rights of IDT under the Settlement Agreement were extinguished. *See e.g. MHR Cap. Partners LP v Presstek, Inc.*, 12 NY3d 640, 647 (2009) ("Presstek had no duty to proceed with the stock purchase agreement due to the nonperformance of an express condition"); *Teachers Ins. & Annuity Ass'n of Am. v Tribune Co.*, 670 F Supp 491, 505 (SDNY 1987) ("[I]f, through no fault on either party, no final contract is reached [] because the parties in good faith failed to agree on open secondary terms, . . . no enforceable rights would survive."). Although IDT correctly observes that a party to a contract cannot rely upon the failure of a condition precedent when that party prevented or frustrated the occurrence of the condition, this point is irrelevant – there were no remaining extant conditions under the Settlement Agreement after the decisions referred to above.

Thus, there is no cause of action which IDT may assert against Tyco. The court dismisses IDT's claim for breach of contract as well as IDT's claim for breach of the duty to negotiate in good faith.

Accordingly, it is Ordered that defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) is granted.

Dated: June 20, 2011

ENTER:



J.S.C.