

<b>COR-IBS, Inc. v Portfolio Analysis Sys., Inc.</b>
2012 NY Slip Op 30025(U)
January 3, 2012
Sup Ct, NY County
Docket Number: 114362/2010
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

LOUIS E. YORK  
J.S.C.

PRESENT.

PART 2

Index Number : 114362/2010

COR-IBS, INC.

INDEX NO. \_\_\_\_\_

vs

PORTFOLIO ANALYSIS SYSTEMS

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. 1

SUMMARY JUDGMENT

IF \_\_\_\_\_

\_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *granted in accordance with the accompanying decision*

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

FILED

JAN 09 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/3/12

L. York, J.S.C.  
LOUIS E. YORK  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

-----x  
COR-IBS, INC.,

Index No.: 114362/2010

Plaintiff,

-against-

DECISION/ORDER

PORTFOLIO ANALYSIS SYSTEMS, INC.,

**FILED**

Defendant.

JAN 09 2012

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**LOUIS B. YORK, J.S.C.:**

NEW YORK  
COUNTY CLERK'S OFFICE

COR-IBS, Inc. (hereinafter "plaintiff") licenses financial-related software products and services, including software by the name of "Paragon." Plaintiff owned Portfolio Analysis Systems, Inc., also known as Bancmetrics, (hereinafter "defendant"), between July 2003 and January 2005. They are now separate entities. At the time that plaintiff installed Paragon onto defendant's computers for defendant's use, the two companies were still one entity. When the companies separated, defendant continued to use Paragon and made payments to plaintiff under an agreement (hereinafter "the Agreement") which commenced on or about January 31, 2005. The Agreement included general terms for both the software license as well as for support services rendered by plaintiff, with two subsequent addendums later added. The Agreement, along with subsequent addendums, is governed by New York law. With regard to termination of the contract, relevant portions of the Agreement state that

[w]ithout prejudice to any other rights or remedies of either party, either party may terminate this Agreement by written notice to the other if ... the other party commits any breach of this Agreement or the License Agreement and fails to remedy such breach ... within thirty (30) days after receiving written notice

requiring it so to do...

Within seven (7) days after the date of termination of this Agreement for whatever reason, [defendant] shall either:

- i. return or destroy (as instructed by [plaintiff]) the Software and certify to [plaintiff] that the same has been destroyed;
- ii. hold all Software and related documentation available for collection by [plaintiff]... (Affidavit of Charles D. Williams, Exhibit A).

As to the issue of waiver, the Agreement states that "[f]ailure or neglect by either party to enforce at any time any of its rights or remedies hereunder shall not be construed as or be deemed to be a waiver of the party's rights or remedies hereunder." (Williams Affidavit, Exh. A, page 5, ¶14).

On or about February of 2007, defendant began experiencing problems with Paragon. Most of the problems occurred after plaintiff performed an upgrade to the software which resulted in difficulties importing and properly indexing data. Emails between plaintiff and defendant, which defendant annexed to its motions papers, describe many issues left unresolved for approximately three years.

In a letter dated February 28, 2010 plaintiff informed defendant that the support services were not required in order to purchase the software license for Paragon. The letter stated that "[t]he Support Services Agreement dated 1/31/05 between [plaintiff] and [defendant] does not explicitly state that the support agreement is optional. Failure to receive the support agreement has no effect on the client's ability to utilize the licensing agreement..." (Defendant's Affirmation in Opposition, Exhibit G). The Agreement states that "no addition, amendment or modification of this Agreement shall be effective unless it is in writing and signed for and on behalf of each party by a duly

authorized officer” and that “all notices sent under this Agreement shall be in writing and delivered to the applicable address in this Agreement, unless changed by notice in compliance with this Section 17.” (Affidavit of Charles D. Williams, Exhibit A).

In January, 2010 Karen Smith, President of defendant company, emailed an employee for plaintiff, that defendant would not pay the support fees due in the January 1, 2010 annual invoice until plaintiff resolved the ongoing service issues. In a later email she informed plaintiff that defendant would pay half of the invoice. In response, plaintiff attempted to resolve the outstanding issues. Plaintiff and defendant continued correspondence regarding those problems, as well as about the outstanding payment, until on or about June 18, 2010.

On or about July 27, 2010 plaintiff notified defendant in writing that “[u]nless the outstanding amount is paid within thirty (30) days, [plaintiff] will be forced to pursue collection and refer this matter to its attorneys, and ... terminate the Agreement and the licenses.” (Affidavit of Charles D. Williams, Exhibit D). Plaintiff continued providing support services though September 7, 2010. Among other things, plaintiff allegedly resolved many problems for which defendant had withheld payments. Then, as defendant had failed to respond to the July letter and more than 30 days had passed, plaintiff terminated the Agreement and software license in the termination letter of plaintiff which stated that use of Paragon by defendant would constitute a violation of the Agreement and plaintiff’s intellectual property rights. This letter also states that “***the Software must be Immediately uninstalled, and all use of the Software must Immediately cease... we reiterate that continued use of the Software is in***

**violation of the Agreement and [plaintiff's] Intellectual property rights."** (Affidavit of Charles D. Williams, Exhibit E, emphasis in original). On October 20, 2010, defendant sent plaintiff notice that it would not extend or renew the Agreement at the term ending January 31, 2011. Portions of the Agreement relevant to plaintiff's liability to defendant are in the Affidavit of Charles D. Williams (hereinafter "Williams Affidavit") Exhibit A, page four, ¶ 8(c), which states:

The liability of [plaintiff] in contract, tort or otherwise for any loss or damage sustained by [defendant] or any third party, from the Service or the Software, shall be limited to the lesser of (a) the total amount of Fees and Charges paid by [defendant] to [plaintiff] under this Agreement and (b) the liability of [defendant] in contract, tort or otherwise for any loss or damage sustained by any third party from the Service or the Software...

Subsequently, plaintiff commenced this action for breach of contract and unjust enrichment. Currently, plaintiff moves for summary judgment and dismissal of defendant's counterclaims pursuant to CPLR § 3212(b). Plaintiff initially argues that defendant breached the Agreement by withholding payment for support services on the January 1, 2010 annual invoice, which entitled plaintiff to terminate the Agreement between the two companies. Plaintiff then states that the withholding of payment by defendant both violates the Agreement and New York law. Finally, plaintiff claims that regardless of whether there are losses or damages to defendant, the Agreement and New York law absolve plaintiff of liability, and thus all counterclaims should be dismissed with prejudice. Defendant opposes this motion, arguing that there are multiple triable issues of fact which remain in dispute. For the reasons below, the Court grants summary judgment in favor of defendants.

Plaintiff's first argument states that defendant breached the Agreement, which

then entitled plaintiff to terminate the software license. Both parties agree defendant received an invoice on January 1, 2010 and failed to pay plaintiff \$13,483.20 of the 2010 annual invoice of \$26,966.40. Subsequently, plaintiff provided notice of breach on July 27, 2010 and, after allowing 30 days for defendant to remedy the breach as required under the terms of the Agreement, finally terminated the Agreement on September 7, 2010 when it received no response. The letter in which plaintiff terminated the Agreement stated that defendant had to stop all use of the software and immediately uninstall it. The Agreement, Exhibit A of the Williams Affidavit, clearly requires that, after a party terminates the Agreement, defendant must comply if plaintiff instructed them to either destroy or return the software. Defendant does not contest that it did not destroy the software as plaintiff requested. In her Affidavit in Opposition, Defendant's President Karen Smith states that it would be impossible to return the software, as they do not have the physical software disks, but does not state that they cannot uninstall it. Defendant has provided no indication that any steps have been taken to comply with the plaintiff's letter of termination, nor a valid excuse explaining why it has not.

Plaintiff argues that defendant is responsible for unpaid support fees, those for following annual period and the license and support fees necessary to reinstate the terminated license. Plaintiff claims that evidence of defendant's continued possession of the software is that there was not a return or notice of destruction of the software and until about March 25, 2011 defendant continued to claim use of the software on its company website. (William's Affidavit Exh. G; Affirmation of Robert S. Bennett, ¶ 10).

Defendant argues that there remains a question of fact as to whether defendant continues to use the software because the website simply had not been updated. However, ¶ 17 of defendant's Affirmation in Opposition, states that "[a]lthough Defendant continues to use the software, they do so at their own risk..." indicating that the defendant is still using Paragon. Therefore, there cannot be an issue of fact regarding whether defendant is using the software when they have admitted to doing so.

Defendant claims that there is also a question of fact as to whether the February 28, 2010 letter entitles them to continue utilizing the software. Defendant argues that if it did breach the Agreement by withholding payment, this was only a violation of the service agreement and not the licensing agreement so it retains the right to use the software. The February 28 letter explicitly states that the support services were optional and that ending the support agreement would have no effect on the licensing agreement. However, as plaintiff argues, defendant did not discontinue the support agreement. Instead, plaintiff notes, defendant explicitly withheld payment for services until plaintiff provided solutions to defendant's problems with the software. Thus, defendant clearly expected plaintiff to continue providing technical support. Although the February letter allowed defendant to opt out of the service portion of the Agreement, under its terms defendant still had to destroy or return the software upon termination as plaintiff requested. Thus, as plaintiff argues, there are no issues of fact as to whether the February letter allowed defendant to breach of the Agreement yet continue to possess and use the software.

Plaintiff's second argument is that defendant was not entitled to withhold payment for the January 1, 2010 invoice. The Agreement does not contain provisions allowing the withholding of payment for any reason. Defendant states that there remains a question of fact as to whether payment could be withheld, as the February 28, 2010 letter made the support services optional. Plaintiff responds that defendant did not utilize the February letter to refuse support services, but rather requested a continuation of the support services, and withheld payment until it received a more satisfactory level of performance. Thus, defendant's withholding of payment did not constitute termination of support services.

Defendant also states that there remains a question as to whether the actions of plaintiff's employee in attempting to resolve issues with the software rather than demanding payment qualified as acquiescence to a modification of the Agreement. Plaintiff responds that while the parties were able to amend the Agreement in order to acquiesce, under the terms of the Agreement this had to be in writing and signed by an authorized officer of both parties, which did not occur. Therefore, plaintiff did not acquiesce to defendant's withholding of payment.

Plaintiff's fourth argument states that, under the terms of the Agreement and the support of New York Law, it is precluded from liability for defendant's counterclaims of negligence and breach of contract. As a result, plaintiff claims that defendant is not entitled to damages and all counterclaims should be dismissed with prejudice. As previously stated, the software licensing section of the Agreement provides that plaintiff is only liable for damages to defendant for the lesser of either the amount defendant

owed to a third party for damage caused by Paragon or the amount plaintiff owed to defendant. Plaintiff argues that, under this provision, because no loss or damage was brought by a third party, that lesser amount is zero.

Defendant claims that either this clause is ambiguous or, at the very least inequitable and unconscionable and should not be enforced by the Court. On the issue of ambiguity, under New York law, ambiguity only exists when the writing in question can "reasonably [be] interpreted in two conflicting manners." *Mostow v State Farm Ins. Companies*, 88 NY2d 321, 326 [1996]. Defendant provides, as the conflicting interpretation, that it seeks to limit plaintiff's liability only in the contexts involving a third party. However, plaintiff points out that the clause provides no indication that its application is conditional. Plaintiff points out that the clause, as quoted previously, begins stating that plaintiff's liability for damages to the defendant or any third party "shall be limited to" the subsequent terms. Plaintiff argues that it is unreasonable to interpret this as referring to the liability of plaintiff to defendant, but only *in the event* of third party loss or damage when the clause specifically refers to any liability to the defendant *or* a third party. Thus, defendant's alternative interpretation of the clause is not a reasonable one.

As for defendant's claim that the clause is inequitable and unconscionable, although defendant includes brief mention of this, it fails to support such claim with any case law or factual allegations. Plaintiff responds, showing that New York Courts have found these types of exculpatory clauses enforceable where there is no act of willful or gross negligence. e.g. *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385

(1983); Gross v. Sweet, 49 N.Y.2d 102, 106 (1979); Ciofalo v. Vic Tanney Gyms, 10 N.Y.2d 294, 297 (1961). Here, defendant does not claim willful or gross negligence, and provides no argument as to why the clause is inequitable or unconscionable under New York law.

The Court does not address issues of fact which might arise from defendant's counterclaims, as they are moot.

ORDERED that the motion is granted and the counterclaims are dismissed.

ENTER;

**FILED**

**JAN 09 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/3/12



LOUIS B. YORK, J.S.C.

**LOUIS B. YORK**  
**J.S.C.**