

307 Canal St. Ltd. v Omnipoint Communications

2013 NY Slip Op 30892(U)

April 23, 2013

Sup Ct, New York County

Docket Number: 102805/10

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

307 Canal Street
Plaintiff,
- v -
Omnipoint
Defendants.

INDEX NO.: 102805/10
MOTION DATE:
MOTION CAL. NO.
MOTION SEQ. NO. 03

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
_____	_____
_____	_____
_____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the awarded Memorandum Decision + order

FILED
APR 29 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 23, 2013

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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307 CANAL STREET LTD.,
Plaintiff,

-against-

Index No. 102805/10

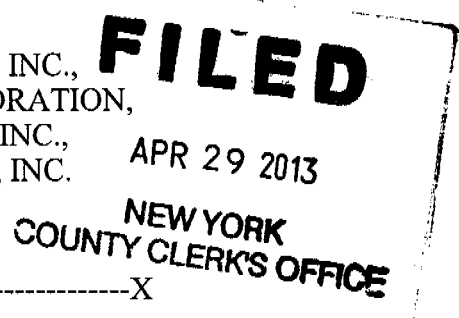
OMNIPOINT COMMUNICATIONS d.b.a.
T-MOBILE USA, INC.,
Defendant.

-----X

T-MOBILE NORTHEAST LLC f/k/a OMNIPOINT
COMMUNICATIONS, INC.,
Third-Party Plaintiff,

-against-

USI REAL ESTATE BROKERAGE SERVICES INC.,
UNITED SYSTEMS INTERGRATORS CORPORATION,
USI DESIGN & CONSTRUCTION SERVICES INC.,
USI RASILITIES MANAGEMENT SERVICES, INC.
and SEQUENTRA SOLUTIONS LLC,
Defendants.



-----X

JOAN A. MADDEN, J.

Defendant Omnipoint Communications d.b.a. T-Mobile USA, Inc. (hereinafter "T-Mobile") moves for an order (i) clarifying and/or modifying the court's amended decision and order dated January 13, 2012 to require plaintiff at the hearing ordered by the court before the Special Referee to prove not only damages but that such damages were caused by T-Mobile's work, and (ii) adjourning the Special Referee's hearing until the newly added third-party defendants have appeared, discovery is completed and the note of issue is filed. Plaintiff 307 Canal Street opposes the motion (motion seq. 003). Third-party defendants separately move to compel arbitration of the claims in the third-party complaint (motion seq. no 004). T-Mobile opposes the motion, and 307 Canal cross moves to sever the third-party action.¹

Background

This is an action for damages arising out of alleged breaches of a commercial lease agreement (the "Lease"), executed on June 22, 2004, relating to a ground floor store and

¹Motion seq. nos 003 and 004 are consolidated for disposition.

basement in a landmarked building located at 307 Canal Street, New York, New York (the “Premises”). The Premises was owned by 307 Canal and leased to T-Mobile. Paragraph 6 of the Lease, as amended by language in the Lease rider (italicized), provides that T-Mobile:

Prior to the commencement of the Lease term, if Tenant [i.e. T-Mobile] is then in possession and at all times thereafter, at [T-Mobile’s] sole cost and expense, shall promptly comply with all present and future laws, orders and regulations of all state, federal, municipal and local governments, departments, commissions and boards and any direction of any public officer pursuant to law, and all orders, rules and regulations of the New York Board of Fire Underwriters or the Insurance Services Office, or any similar body which shall impose any violation, order or duty upon [307 Canal] or [T-Mobile] *with respect to the demised premises the sidewalks adjoining thereto and the building, provided such compliance is necessitated by [T-Mobile’s] particular unique use (as permitted under Article 41 hereof) or manner of use of the demised premises or the building, or by any installation, alteration, addition, or improvement made by or on behalf of [T-Mobile] in the demised premises or the building....* [N]othing herein shall require [T-Mobile] to make structural repairs or alterations unless [T-Mobile] has by its manner of use of the demised premises or method of operation therein violated any such laws, ordinances, rules, regulations or requirements with respect thereto...[T-Mobile] shall pay all costs, expenses, fines, penalties, or damages which may be imposed on [307 Canal] as a result of [T-Mobile’s] failure to comply with the provisions of this article.

Paragraph 19 of the Lease, as amended by language in the Lease rider (italicized), provides in pertinent part that:

“If [T-Mobile] shall default in the observance or performance of any term or covenant on [T-Mobile’s] part...and...[307 Canal]...makes any *reasonable* expenditures or incurs any obligation for the payment of money[,] including but not limited to reasonable attorney’s fees...in instituting [an action against T-Mobile for payment, then, if 307 Canal is the prevailing party, such sums shall be recoverable by 307 Canal as additional rent during the Lease term or, following the expiration of the Lease, as damages].

During the term of the Lease, USI Real Estate Brokerage Services, Inc., United Systems Integrators Corporation, USI Design & Construction Services Inc., USI Facilities Management Services Inc., and Sequentra Solutions LLC (together, the “USI Companies”) entered into an Integrated Real Estate Services Alliance Agreement (the “USI Agreement”) with T-Mobile to become T-Mobile’s “consultant and exclusive provider to create... specific real estate, design

and construction, facilities management, and information services and systems....” USI

Agreement, Preamble. The USI Agreement also provides that:

“Except, as otherwise set forth in this Agreement, in the event of a dispute, including a dispute involving the determination of the scope of this Agreement to arbitrate, that is not settled within thirty (30) days from the date of written notice provided in Section 13.1..., such dispute shall be submitted to mandatory and binding arbitration at the election of a party....” Third-Party Agreement, Section 13.2.

The USI Companies acted as construction project managers and consultants with respect to renovations that T-Mobile made to the Premises during the Lease term.

307 Canal alleges that T-Mobile breached its obligations under the Lease by creating building conditions that caused the New York City Landmarks Preservation Commission (the “LPC”) to issue at least three separate warning letters (the “Warning Letters”) to 307 Canal citing violations of the Landmarks Law under New York City Administrative Code Sections 25-305 and 25-310 at the Premises. The LPC asserted violations against the Premises for (i) alterations to the Howard Street ground floor entrance without permit(s), (ii) “[r]eplacement of entrance infill at easternmost Canal Street ground floor bay without [permit(s)],” and (iii) “[i]nstallation of signage at Canal Street without [permit(s)].”

On January 26, 2009, T-Mobile exercised its right to terminate the Lease early and paid the contractually specified early termination fee of \$190,000.00 (the “Termination Fee”). On or about March 4, 2010, 307 Canal filed a summons and complaint against T-Mobile asserting five causes of action. In its first cause of action, 307 Canal alleges that T-Mobile was notified by the LPC that certain portions of the Premises were not in conformity with applicable laws and regulations and that T-Mobile failed to correct the non-compliant conditions in violation of its obligations under the Lease, causing damages to 307 Canal. In its second cause of action, 307 Canal asserts that T-Mobile undertook renovations to the Premises, which were performed in a manner that caused the LPC to issue violations with respect to the Premises and which caused damages to 307 Canal. In its third and fourth causes of action, 307 Canal asserts claims for

negligence and payment of real estate taxes, respectively. In its fifth cause of action, 307 Canal asserts that based on breaches of T-Mobile's obligations under the Lease, it is entitled to indemnification for the legal fees it incurred with respect to these breaches.

In its answer, T-Mobile generally denies the allegations in the complaint and asserts various affirmative defenses, including a defense that 307 Canal's claims are barred by the doctrine of accord and satisfaction based upon its acceptance of the Termination Fee. On or about February 23, 2011, T-Mobile moved for summary judgment dismissing 307 Canal's complaint. T-Mobile argued, in pertinent part, that since 307 Canal was aware of the non-compliant conditions cited in the Warning Letters and accepted, without any reservation of rights, the Termination Fee, 307 Canal waived its right to seek damages relating to these conditions. 307 Canal opposed the motion based on the affidavit of Anthony Michaels ("Michaels") who is 307 Canal's agent and its manager and who is involved in dealing with the violations of the Landmarks Law on the Premises, and exhibits attached to the Michaels affidavit. Michaels stated that 307 Canal did not waive any rights it had under the Lease by accepting the Termination Fee, nor did it accept the payment of the Termination Fee in satisfaction of T-Mobile's obligations. While 307 Canal did not submit a cross motion for summary judgment, Michaels stated in his affidavit that it "was in support of plaintiff's cross motion for summary judgment." (Michaels Aff. at ¶1), and 307 Canal's papers included arguments in seeking summary judgment in its favor. T-Mobile's reply was limited to the issues raised on its motion for summary judgment, and did not address 307 Canal's request for summary judgment.

On October 18, 2011, this court issued a decision and order which was subsequently amended by decision and order dated January 13, 2012 (the "January decision").² In the

²The January decision is identical to the October 18, 2011 decision and order, except that it corrected certain typographical errors.

January decision, the court denied T-Mobile's motion for summary judgment, finding that 307 Canal did not waive any defaults when it permitted T-Mobile to exercise its option to terminate the Lease early. It also granted 307 Canal's request for summary judgment as to liability on its first, second, and fifth causes of action, noting that T-Mobile "[did] not deny that it breached the Lease by violating the Landmarks Law," and directed that the amount of damages incurred by 307 Canal with respect to its first, second, and fifth causes of action, be determined by a Special Referee. January decision, at 9. The court also dismissed 307 Canal's third and fourth causes of action. Following the issuance of the January decision, T-Mobile filed a Notice of Appeal. A hearing before a Special Referee was subsequently scheduled for March 29, 2012.

On or about February 15, 2012, T-Mobile filed a third-party summons and complaint against the USI Companies. In the third-party complaint, T-Mobile seeks compensation for breach of the USI Agreement and indemnification with respect to the present action.

T-Mobile's Order To Show Cause

On or about March 14, 2012, T-Mobile made this motion, by order to show cause, for an order: (i) directing 307 Canal to prove that any damages it is entitled to collect from T-Mobile were caused by T-Mobile's construction work at the Premises, and (ii) adjourning the hearing before the Special Referee until (a) the USI Companies enter an appearance, (b) all outstanding discovery has been completed, and (c) 307 Canal has filed a note of issue. T-Mobile also sought a stay of the hearing before the Special Referee.

By interim order dated March 26, 2012, this court granted the temporary restraining order staying the hearing before the Special Referee conditioned on T-Mobile "provid[ing] plaintiff within seven days all documents, including emails reflecting communications between or concerning T-Mobile and/or its contractors and the LPC." By further interim order dated May 15, 2012, this court adjourned the hearing before the Special Referee pending settlement negotiations between the parties and/or possible disposition before the court. However, after

settlement negotiations failed in July 2012, this motion was marked fully submitted. While this motion was pending, the discovery directed in the March 26, 2012 order was provided and the deposition of Michaels was taken.

In this motion, T-Mobile seeks clarification of the January decision, which it argues merely held that 307 Canal's acceptance of the Termination Fee did not extinguish 307 Canal's right to sue T-Mobile in the event that 307 Canal can prove that T-Mobile breached the Lease and that such a breach resulted in damages. T-Mobile further argues that there is no dispute that two of the violations cited by T-Mobile, the violations with respect to alterations to the Howard Street ground floor and replacement of entrance infill at the easternmost Canal Street ground floor bay, were not caused by T-Mobile and, in fact, occurred prior to the Lease term. T-Mobile further asserts that while the Warning Letter regarding the installation of unapproved signage on Canal Street arguably concerns T-Mobile, T-Mobile removed this signage in September 2009 when it vacated the Premises. Additionally, T-Mobile argues that it never conceded that it had breached any terms of the Lease or violated any LPC regulations, and that since discovery has not been completed and issue has not yet been joined by the USI Companies, a hearing on damages would be premature.

307 Canal counters that the hearing on damages should not be stayed further as the delay will cause prejudice to 307 Canal since the LPC ordered it to cure the violations by December 2012, and a failure to do so could result in fines of a minimum of \$1,500 per day, which could also be assessed retroactively, and that the third-party claims against USI Companies should be severed to avoid further delay. 307 also notes that the under the Lease, T-Mobile is responsible for obtaining permits for its work from the LPC, and that from the inception of the Lease T-Mobile agreed to take the lead and be responsible for obtaining such permits³, and employed an

³Section 40(K) of the Lease Rider provides that T-Mobile shall "promptly effect all alterations, renovations, decorations and improvements which are needed to make the demised premises suitable and ready for occupation and use by [T-Mobile]... *provided, however, ... that [T-Mobile]*

* 8]

architect to cure any violations. 307 Canal also argues that before T-Mobile's renovation, the building had no issues with the LPC, and that the warning letters were issued as no valid permits were issued for the work on the sign on the Canal Street side of the Premises or work done on the Howard side street. 307 Canal also asserts that T-Mobile's consultants began negotiations with the LPC to cure the violations but that before the plan was finalized T-Mobile decided to leave the Premises.

307 Canal thus argues that additional discovery is not necessary as only unresolved issue is the extent of damages, and that there is no need for clarification of the January decision, which unambiguously holds that pursuant to the Lease, T-Mobile was responsible for the costs of curing the three conditions set forth in the Warning Letters while T-Mobile was still a tenant. 307 Canal also argues that the clarification motion is an untimely attempt to seek reargument even though T-Mobile conceded the issue of liability by failing to respond to its summary judgment motion and that, in any event, T-Mobile has failed to establish any legal basis for reconsideration of the court's decision.

In reply, T-Mobile argues that, when read as a whole, the Lease shows that T-Mobile was not required to fix violations it did not create, and that the record shows that it did not create the violations. T-Mobile further argues that to the extent it undertook to correct outstanding LPC violations to improve the appearance of the Premises during its Lease term, it is not obligated to correct such violations. In support of its position that it was not responsible for creating the conditions in the Warning Letters, T-Mobile points to Michaels' deposition testimony that the violations in the LPC warning letters related to conditions created before T-Mobile's tenancy. T-Mobile also submits the affidavit of Richard Rapkin ("Rapkin"), who was in charge of the design, installation, and servicing of signs at the Premises, who states that no T-Mobile signage

first obtains any sign-off or approval from...[the LPC] ."

was installed before May 16, 2005, and therefore the LPC warning letter issued in February 2005 regarding the signage could not have related to any installation of signage made by T-Mobile.

In a letter dated April 20, 2012, 307 Canal requests that the court not consider Rapkin's affidavit as it seeks to improperly introduce new material in the reply that was not included in the original motion papers. In addition, 307 Canal asserts that Michaels' deposition testimony is not dispositive as to work performed by T-Mobile at the Premises and the timing of such work as Michaels was not present at the Premises on a regular basis. In addition, 307 Canal submits emails which it asserts shows that T-Mobile's employees were communicating with the LPC in November and December 2004, prior to the issuance of the Warning Letters and sought to hire special counsel to deal with LPC issues, including those related to signage.

Whether properly identified as a motion for clarification or for reargument,⁴ in the exercise of its discretion, this court shall reconsider that part of the original decision granting 307 Canal summary judgment as to liability on its first cause of action (alleging that T-Mobile's failure to cure conditions at the Premises which based on notices issued by the LPC were in violation on certain applicable laws), its second cause of action (alleging the T-Mobile undertook certain renovations and alterations to the Premises which were not conducted in a manner permitted by law and resulted in certain violations being placed on the Premises which T-Mobile failed to cure) and its fifth cause of action (seeking legal fees resulting from breach of the Lease). See Garcia v. Jesuits of Fordham, Inc., 6 AD3d 163 (1st Dept 2004); Itkowitz v. King Kullen Grocery Co., Inc., 22 AD3d 636 (2d Dept 2005).

Upon reconsideration, the court finds that the original decision should be amended to reflect that there are issues of fact as to whether T-Mobile's actions taken in connection with

⁴Contrary to 307 Canal's position, it cannot be said that T-Mobile's motion, if identified as one for reargument, would be untimely. As T-Mobile filed a notice of appeal within 30 days of entry of the January decision, this motion is timely and, in any event, the court has discretion to extend the 30-day deadline. See Itkowitz v. King Kullen Grocery Co., 22 AD3d at 636.

alterations and renovations that it undertook in connection with its use of the Premises resulted in the issuance of the LPC violations at issue in this action. The court finds, however, that contrary to T-Mobile's argument, evidence that certain violations of the Landmark laws existed prior to its tenancy is insufficient to relieve T-Mobile of liability, since there is evidence that T-Mobile applied for permits, and made alterations to the Premises, which related to its use of the Premises for the purposes of paragraph 6 of the Lease, and that such actions triggered the Warning Letters, LPC inspections, and impositions of fines. Moreover, with respect to the signage, while Rapkin states that the signage did not exist at the time of the warning letter regarding the signage, there is other evidence to the contrary including Michaels' testimony that the warning letter referred to T-Mobile's signage.

Next, as T-Mobile points to no further discovery needed in connection with the issues relating to its liability in to 307 Canal and as for the reasons below, the third-party action shall be severed, T-Mobile's request to stay the hearing of the Special Referee pending the completion of discovery and the filing of a note of issue, is denied.

Accordingly, T-Mobile's motion is granted to the extent of referring to the Special Referee not only the issue of damages, but also the issues of the protocols of the LPC, the nature of the violations issued with respect to the Premises and whether T-Mobile's actions caused the violations to be issued.

USI Companies' Motion to Stay the Third-party Action and to Compel Arbitration

USI Companies move to stay the third-party action and to compel arbitration of T-Mobile's claims against it, pursuant to CPLR Section 7503, or, in the alternative, to dismiss T-Mobile's complaint against it, pursuant to CPLR Section 3211(a)(1), based on T-Mobile's failure to submit its claims against the USI Companies to mandatory arbitration as provided in the USI Agreement. In support of their motion, the USI Companies point to section 13.2 of the USI Agreement which provides that "in the event of a dispute, including a dispute involving the

scope of this Agreement to arbitrate, that is not settled in thirty (30) days...shall be submitted to mandatory and binding arbitration at the election of a party....”

In opposition, while T-Mobile concedes that the USI Agreement contains an arbitration clause, it argues that T-Mobile’s claims against the USI Companies should be litigated together with the main action as the third-party claims arise from the same facts underlying the main action and are inextricably intertwined with, and dependent on, the claims and defenses in the main action. T-Mobile further argues that arbitration at this stage would be futile since the full measure of indemnification cannot be determined prior to the resolution of 307 Canal’s claims against T-Mobile.

307 Canal cross moves to sever and/or dismiss the third-party action, asserting that it will be substantially prejudiced by the further delay that would be occasioned by the third-party action. 307 Canal also argues that there are no intertwined issues of fact between the main action and the third-party action.

In reply, the USI Companies argue that the court should stay the third-party claims against them pending resolution of the main action and order T-Mobile to pursue its arbitration remedy against them when it is ripe. The USI Companies argue that T-Mobile’s delay in joining them as third-party defendants undermines T-Mobile’s argument that the facts in the main action and the third-party action are inextricably intertwined and that none of the case law cited by T-Mobile requires this court to override the arbitration provision in the USI Agreement, particularly as New York favors arbitration as a dispute resolution mechanism.

CPLR 7503(a) provides that a “party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration.” On a motion to compel arbitration, the court addresses three threshold questions: (1) whether the parties have made a valid agreement to arbitrate, (2) if so, whether the particular dispute falls within the arbitration clause, and (3) whether a condition precedent to arbitration has been complied with. See Rockland County v.

Primiano Construction Co, Inc., 51 NY2d 1, 7 (1980); Grossman v. Laurence Handprints, N.J., Inc., 90 AD2d 95, 99 (2d Dept 1982). In this case, there is no dispute that the parties entered into a valid agreement to arbitrate, and the third requirement is inapplicable since there is no condition precedent with which to comply.

Moreover, the claims in the third-party action, which seek indemnification arising out of the services provided by the USI Companies under the USI Agreement, fall within the scope of the broad arbitration provision in the USI Agreement which encompasses not only disputes relating to the USI Agreement but also those as to the scope of the arbitration agreement. In fact, T-Mobile does not dispute that its third-party claims are subject to the arbitration provision but instead argues that as the third-party claims are “inextricably intertwined” with those involved in the main action, the court should not enforce the parties agreement to arbitrate.

T-Mobile’s position is without merit as it cannot be said that the third party claims, which are subject to the arbitration provision, are so intertwined with the claims in main action that the parties’ agreement to be arbitrate should be overridden, and there is no evidence that USI Companies elected to participate in litigation of the third-party claims or otherwise waived its right to arbitrate. See Assael v. Assael, 132 AD2d 4 (1st Dept 1987); Queens Avon Co. v. Gerstenhaber, 111 AD2d 94 (1st Dept 1985); 50 Madison Ave. LLC v. RC Dolner, 30 Misc3d 1201(A)(Sup Ct, NY Co. 2010); Compare Young v. Jaffe, 282 AD2d 450 (2d Dept 2001)(holding that as plaintiff’s claims against a contractor’s allegedly defective construction of their home were inextricably intertwined with their pending claims in a consolidated action against an architect’s estate and architectural firm, the claims against the contractor were not subject to arbitration).

In fact, the resolution of the main claims, which concern T-Mobile’s liability for violations of the Landmark’s law, are separate and distinct from the issue of whether the USI Companies breached the USI Agreement and must therefore indemnify T-Mobile in the event that T-Mobile is held liable for the violations at issue. Accordingly, the motion to compel

arbitration should be granted and the third-party action is dismissed and severed from the main action See Harris v. Iannaccone, 107 AD2d 429 (1st Dept), aff'd, 66 NY2d 728 (1985) (when, as here, an action contains arbitrable and non-arbitrable claims, the court may sever the arbitrable claims).

Conclusion

In view of the above, it is

ORDERED that the motion by T-Mobile (motion seq. no. 003) is granted to the extent that the January 2012 decision is modified to refer to the Special Referee to hear and report with recommendations the issue of whether T-Mobile's actions caused 307 Canal to incur damages and, in connection with this issue, the Special Referee shall consider, *inter alia*, the protocols of the LPC, the nature and timing of the violations, and whether the violations resulted from T-Mobile's actions notwithstanding that the condition(s) underlying the violation(s) may have existed prior to T-Mobile's tenancy and/or actions, and is otherwise denied; it is further

ORDERED that in the event the Special Referee determines that T-Mobile's actions caused 307 Canal to incur damages, the Special Referee shall also hear and report with recommendations as to the issue of the amount of such damages; and it is further


ORDERED that the stay of the hearing before the Special Referee is vacated; and it is further

ORDERED that the motion by the USI Companies to compel arbitration (motion seq. no. 004) is granted to the extent of severing and dismissing the third party action and directing that the claims in third -party action be arbitrated following that resolution of the main action; and it is further

FILED
APR 29 2013

ORDERED that 307 Canal's cross motion for summary judgment is granted in accordance with the immediately preceding paragraph.

DATED: April 23 2013

NEW YORK
COUNTY CLERKS OFFICE

J.S.C.