Oorah, Inc. v Covista Communications, Inc.
2013 NY Slip Op 31545(U)
July 10, 2013
Supreme Court, New York County
Docket Number: 652316/11
Judge: Eileen Bransten
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN, *Justice* PART 3

Index Number : 652316/2011
OORAH, INC.
vs.
COVISTA COMMUNICATIONS, INC.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 652316/11
MOTION DATE 11/30/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 5, were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s). 1
Answering Affidavits — Exhibits	No(s). 2
Replying Affidavits	No(s). 3, 4, 5

☒ cross-motion

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FOR THE FOLLOWING REASON(S):

Dated: 7-10-13

[signature], J.S.C.
HON. EILEEN BRANSTEN

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 THREE
---X
OORAH, INC., d/b/a
CUCUMBER COMMUNICATIONS,

Plaintiff,

-against-

COVISTA COMMUNICATIONS, INC.,

Defendant.
---X

Index No. 652316/2011
Motion Date: 11/30/2012
Motion Seq. No.: 001

BRANSTEN, J.

This matter comes before the Court on Defendant's motion to dismiss. Defendant Covista Communications, Inc. ("Defendant") seeks dismissal of Plaintiff Oorah, Inc., d/b/a Cucumber Communications' ("Plaintiff") Amended Complaint in its entirety pursuant to CPLR 327, as well as New York Business Corporation Law ("BCL") § 1314. Plaintiff opposes and cross-moves to dismiss Defendant's counterclaims pursuant to CPLR § 3211(a)(1) and (a)(7). For the reasons that follow, Defendant's motion and Plaintiff's cross-motion are each denied.

I. <u>Background</u>[1]

a. Relationship Between the Parties

Plaintiff is a New Jersey corporation, with its principal place of business there. In exchange for commissions, Plaintiff marketed Defendant's residential long distance and

---

[1] The facts as described in this section are drawn from the Amended Complaint ("Compl.") unless otherwise noted.

calling card telecommunications services (the "Services") to a customer base in the New York tri-state area. (Compl. ¶¶ 2-3.) Defendant is a New Jersey corporation with its principal place of business in Tennessee. *Id.* at ¶¶ 4-5. Plaintiff and Defendant are both registered to do business in New York.

Plaintiff executed a reseller agreement with Capsule Communications, Inc. ("Capsule") on November 1, 2001 (the "Reseller Agreement"). *Id.* at ¶ 7. Defendant acquired Capsule in 2002 and is the successor in interest to Capsule and its obligations under the Reseller Agreement. *Id.* The Reseller Agreement permits the parties to select Pennsylvania as the forum for disputes arising thereunder. (Affidavit of Sandra Forquer ("Forquer Aff."), Ex. A ("Reseller Agreement"), § 10(a).)

Under the Reseller Agreement, Defendant was obligated to pay Plaintiff commissions based on the number of Defendant's Services Plaintiff sold to customers. *Id.* at ¶ 8. Ultimately, Plaintiff sold the Services to a number of its customers with the expectation that it would receive commissions from Defendant. *Id.* at ¶ 9.

At a certain point subsequent to the execution of the Reseller Agreement, Plaintiff began performing Services different from those expressly called for in the agreement. *Id.* In recognition of this performance, the parties established a course of conduct whereby Plaintiff sold Services other than those called for under the Reseller Agreement and received commissions on a basis other than as provided for under the Reseller Agreement. *Id.* In

order to reflect the changes in the relationship between the parties, the parties entered into the Independent Authorized Master Agency Agreement on June 6, 2004 (the "Agency Agreement"). *Id.* at ¶ 10. Pursuant to the Agency Agreement, Plaintiff earned, and Defendant paid, commissions for the sale of Services. *Id.* at ¶ 12. The Agency Agreement requires the parties to select Pennsylvania as the forum for disputes arising thereunder. (Forquer Aff., Ex. B ("Agency Agreement"), § 6(m).

Around May 2009, Plaintiff became aware that Defendant was approximately six months behind in its commission payments. *Id.* The parties discussed Defendant's outstanding payment obligations and Defendant made several assurances that it would make the required payments. *Id.* at ¶¶ 14-17. Despite these assurances, Plaintiff has not received a commission payment from Defendant since at least April 2011, and Plaintiff believes it is owed monthly commissions for all periods since at least June 2009. *Id.* at ¶ 17.

Additionally, Plaintiff alleges that it discovered that Defendant reclassified certain customers to remove them from the roster of customers for which Plaintiff was entitled to receive commissions. *Id.* at ¶ 18.

Discussions amongst the parties to settle this matter were unsuccessful. Plaintiff thus commenced the instant action on August 19, 2011. Plaintiff filed its Amended Complaint on November 10, 2011 asserting causes of action for breach of contract and breach of fiduciary duty.

b. The Tennessee Action

Prior to the filing, but not service, of this action, Defendant commenced an action against Plaintiff in the Chancery Court for Hamilton County, Tennessee (the "Tennessee Action") alleging that Plaintiff failed to make certain shortfall payments owed under the Reseller Agreement's minimum revenue commitment clause. (Forquer Aff. ¶ 13.) The Tennessee Chancery Court dismissed the Tennessee Action for lack of personal jurisdiction and the Court of Appeals of Tennessee at Knoxville affirmed the dismissal. *See* NYSCEF Doc. No. 24 (Decision and Order of the Court of Appeals of Tennessee at Knoxville dated November 14, 2012).

c. Defendant's Answer and Counterclaims

On November 30, 2011, Defendant answered Plaintiff's Amended Complaint and asserted its counterclaims (the "Counterclaims"). (Affirmation of Matthew Kane ("Kane Affirm."), Ex. F.) The Counterclaims seek the same relief that Defendant sought in the Tennessee Action – damages for Plaintiff's alleged breach of the Reseller Agreement in addition to a judgment declaring that the Reseller Agreement is valid and enforceable. *Id.*

II. Discussion

A. Motion to Dismiss Amended Complaint

1. Forum Non Conveniens

Defendant moves to dismiss the Amended Complaint on the ground of *forum non conveniens*. Defendant argues principally that the parties selected Pennsylvania as the forum

for this dispute and that Plaintiff should therefore not be allowed to bring this action in New York. Defendant also contends that New York is an inconvenient forum because: (a) Plaintiff is a New Jersey corporation with a principal place of business in Chattanooga; (b) Plaintiff performed its services pursuant to the agreements between the parties in Tennessee; (c) relevant witnesses and documents are located in Tennessee; and (d) neither party is a New York corporation or has an office in New York.[2] (Defendant's Memorandum of Law in Support of Motion to Dismiss ("Defendant's Memo"), pp. 4-6.)

Plaintiff counters that New York is an appropriate forum for this action. Plaintiff argues that: (a) Defendant waived enforcement of the Pennsylvania forum selection clause by commencing the Tennessee Action; (b) Defendant maintains an office in new York; (c) this action places no undue burden on the court; and (d) Defendant will suffer no hardship if required to defend this action in New York. (Memorandum of Law in Opposition to Defendant's Motion to Dismiss and in Support of Plaintiff's Cross-Motion to Dismiss Counterclaims ("Plaintiff's Memo"), pp. 5-9.)

A motion to dismiss for *forum non conveniens* is governed by CPLR 327. CPLR 327 (a) provides:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or

---

[2] As addressed herein by the Court *supra* at Part II.A.2, Defendant does maintain an office in New York.

> in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

On a motion to dismiss for *forum non conveniens*, the burden of proof rests upon the defendant, but the decision to dismiss rests in the court's discretion. *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984).

Among the factors to be considered on a motion to dismiss for *forum non conveniens* are: 1) the burden on the New York courts; 2) the potential hardship to the defendant; 3) the unavailability of an alternative forum; 4) the residence of the parties; and 5) the location of the events giving rise to the transaction at issue. *Pahlavi*, 62 N.Y.2d at 479; *Ghose v. CNA Reins. Co.*, 43 A.D.3d 656, 660 (1st Dep't 2007).

The Court concludes that this action is appropriately in New York because it does not place a burden on this Court, there is virtually no potential hardship to the defendant in litigating here, Defendant waived the Pennsylvania forum selection provision, and this case has a nexus to New York.

First, this action does not place any undue burden on this Court. This action is a commercial breach of contract dispute of the type resolved in the New York State Commercial Division on a regular basis. *See Sambee Corp v. Moustafa*, 216 A.D.2d 196, 198 (1st Dep't 1995) (finding that the burden on the court was minor where the action was "a basic commercial dispute of the type resolved in the [c]ourts of this Department on a frequent basis[.]").

[* 8]

Second, there is minimal potential hardship in requiring Defendant to defend itself here. Defendant argues that many witnesses and documents needed for this case are located in Tennessee, and Defendant would therefore endure hardship if forced to litigate this action outside of Tennessee. Defendant's argument ignores the fact that the Tennessee Action was dismissed. Thus, even if this Court granted Defendant's motion to dismiss based on *forum non conveniens*, Defendant would be unable to bring its counterclaims in Tennessee and would most likely be required to litigate in Pennsylvania or New Jersey based on the forum selection provision in the agreements and the incorporation of the parties. *See* NYSCEF Doc. No. 24 (Decision and Order of the Court of Appeals of Tennessee at Knoxville dated November 14, 2012). The Court sees no less a burden on Defendant were it required to litigate this action in Pennsylvania or New Jersey rather than in New York.

Third, Defendant waived the provision selecting Pennsylvania as the forum for disputes arising under the agreements between them. Rather than argue that it did not waive the forum selection provision, in Defendant's Reply Memo,[3] it states that "even if Covista has technically waived the forum selection clause in the parties' agreements by asserting counterclaims in this action, the exclusive forum selection provision is indicative of the parties' decision to deem Pennsylvania, not New York, as the appropriate forum." (Defendant's Reply Memo, p. 6.)

[3] Defendant's Reply Memorandum in Further Support of Motion to Dismiss for *Forum Non Conveniens* and in Opposition to Plaintiff's Cross-Motion to Dismiss Defendant's Counterclaims ("Defendant's Reply Memo")

Indeed, when a party disregards a forum selection clause and sues on a contract in an unauthorized forum, it waives the forum selection clause on the claims it pursues. *Unity Creations, Inc. v. Trafcon Indus.*, 137 F.Supp. 2d 108, 111 (E.D.N.Y. 2001) (applying New York law). Here, Defendant waived the forum selection provision by both commencing the Tennessee Action and also by asserting counterclaims in this action. Although Defendant here argues that, despite its waiver, the exclusive forum selection provision evidences the parties' intention that all disputes be heard in Pennsylvania, it took a contrary position in the Tennessee Action.

In its brief in support of its motion to the Chancery Court in Tennessee to alter or amend its decision dismissing the Tennessee Action for lack of personal jurisdiction, Defendant argued that "[a] Pennsylvania forum is inconvenient to both parties[.]" *See* Kane Affirm., Ex. A. Defendant also maintained that it has no connection to Pennsylvania. *See id.* at Ex. B, ¶¶ 4-5. Defendant cannot now claim, after its action in Tennessee has been dismissed and its Counterclaims are before this Court in New York, that it always intended to litigate disputes arising under the agreements in Pennsylvania.

Finally, this action is appropriately before this Court because this action has a nexus to New York. Defendant contracted with Plaintiff to sell its telecommunications Services to customers in the New York tri-state area and Defendant thus derives revenue from New York customers. (Affidavit of Jeffrey Stern in Opposition to Defendant's Motion to Dismiss ("Stern Aff.") ¶ 6.) As of May 7, 2012, as a result of the agreements between the parties,

Defendant provided its Services to approximately 500 customers residing in New York, which represented approximately half of the total number of Plaintiff's customers to which Defendant provided Services at that time. *Id.* Although the customers are not suing Defendant in this litigation, the agreements between the parties involve commercial activity aimed at the residents of this state. This action accordingly has a relation to New York and is properly here.

Because this case imposes no burden on this Court, there is minimal potential hardship to the Defendant in defending the case here, there is no better alternative forum, both parties are registered to do business in New York, and the goal of the relationship between the parties was for Plaintiff to sell Defendant's Services to customers in the New York tri-state area, Defendant's motion to dismiss on the ground of *forum non conveniens* is denied. *Pahlavi*, 62 N.Y.2d at 479; *Ghose v. CNA Reins. Co.*, 43 A.D.3d at 660.

2. Business Corporation Law § 1314

Defendant also moves to dismiss this action pursuant to BCL § 1314 which governs lawsuits between two foreign corporations. BCL § 1314(b) provides that a lawsuit may be maintained in New York between two foreign corporations only in certain enumerated circumstances. However, BCL § 1314(c) provides that "[p]aragraph (b) does not apply to a corporation which was formed under the laws of the United States and which maintains an office in this state." BCL § 1314 therefore allows a foreign corporation to maintain an action

against another foreign corporation provided that the defendant-foreign corporation was formed under the laws of the United States and maintains an office in New York.

Although Defendant initially contended that it did not maintain an office in New York, it came to light during discovery, and this Court became aware through supplemental submissions by the parties, that this contention is false. During his March 15, 2013 deposition, Defendant's general counsel, Ronald Kuzon, stated that Defendant has an office in New York at One Liberty Plaza. (Letter of Matthew D. Kane dated April 26, 2013 ("Kane Letter"), Ex. E (Ronald Kuzon Deposition Transcript), 5:5-12). This was reiterated and confirmed by Defendant's counsel at a compliance conference before this Court on March 19, 2013. (Kane Letter, Ex. C (Record of March 19, 2013 (Angela Tolas, C.S.R.), 3:14-16.)) ("It has come to light that Covista does have an office here in New York at which its general counsel works out of sometimes.")

Accordingly, since Defendant is a New Jersey corporation with an office in New York, Plaintiff is entitled to bring this action against Defendant in New York pursuant to BCL § 1314. Defendant's motion to dismiss the Amended Complaint based thereon is thus denied.

B. Cross-Motion to Dismiss Counterclaims

Plaintiff moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss Defendant's Counterclaims. Plaintiff argues that the Counterclaims are based entirely upon the Reseller

Agreement's minimum revenue commitment clause which requires Plaintiff to make shortfall payments if the revenue commitment is not met. (Plaintiff's Memo, pp. 11-12.) Plaintiff contends that the Reseller Agreement was superseded by the Agency Agreement entered into by the parties in June 2004. *Id.* Plaintiff bases this contention on a merger clause in the Agency Agreement. *Id.*

Defendant argues that, although the Agency Agreement contains a merger clause, it does not supersede the minimum revenue commitment clause in the Reseller Agreement. (Defendant's Reply Memo, p. 8.) Defendant contends that Plaintiff itself asserted in its Complaint and Amended Complaint that both the Reseller Agreement and Agency Agreement "are valid and enforceable contracts that have not been terminated by either party" and that Defendant breached both agreements by failing to pay commissions due thereunder. *Id.* at p. 9.

On a motion to dismiss for failure to state a cause of action, the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977); *see* CPLR 3211(a)(7). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994).

On the other hand, while factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dep't 1995).

Moreover, where the motion to dismiss is based on documentary evidence (CPLR 3211(a)(1)), the claim will be dismissed "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d at 88; *see also 150 Broadway N.Y. Assoc., L.P. v. Bodner*, 14 A.D.3d 1, 5 (1st Dep't 2004).

Defendant's Counterclaims for breach of contract and for a declaratory judgment are based on a minimum commitment clause in the Reseller Agreement. The Agency Agreement's merger clause states that "this [a]greement, together with the [e]xhibits attached hereto and as revised from time to time, constitutes the entire agreement between the parties relating to the subject matter hereunder, and supersedes any and all oral and/or written statements, discussions, representations and agreements made by either party to the other[.]" (Forquer Aff., Ex. B ("Agency Agreement"), § 6(a).)

Under New York law, a merger clause in one agreement will not be construed to extinguish a party's claim for breach of an earlier agreement unless there is definitive language indicating that the parties intended that the earlier agreement be superseded. *Globe Food Services Corp. v. Consolidated Edison Co.*, 184 A.D.2d 278, 821 (1st Dep't 1992).

Here, the Agency Agreement unequivocally supersedes any and all agreements relating to its same subject matter. *See* Agency Agreement § 6(a). It does not, however, unequivocally state that it supersedes any and all agreements between the parties relating to any subject matter.

Plaintiff implicitly concedes that the Agency Agreement and Reseller Agreement relate to different subject matter by stating that the Agency Agreement was executed because, "at a certain point subsequent to execution of the Reseller Agreement, [Plaintiff] began performing Services different from those expressly called for in the [Reseller] Agreement. (Amended Complaint ¶ 9.) Further, the Agency Agreement is entirely silent as to Plaintiff's minimum revenue commitment and any shortfall payments due to Defendant in the event Plaintiff fails to meet its minimum commitment. *See Kreiss v. McCown De Leeuw & Co.*, 37 F.Supp.2d 294, 301 (S.D.N.Y. 1999) (where a subsequent agreement contains certain provisions which pertain to some of the same subject matter in an earlier agreement between the parties, the subsequent agreement supersedes only those provisions which pertain to the same subject matter in the earlier agreement).

Thus, taking all inferences in favor of Defendant, as this Court must on Plaintiff's cross-motion to dismiss, the Court finds that the existence of the merger clause in the Agency Agreement does not conclusively establish that the Agency Agreement supersedes either the entirety of the Reseller Agreement or its minimum revenue commitment clause. *Guggenheimer*, 43 N.Y.2d at 275.

Accordingly, Plaintiff's cross-motion to dismiss Defendant's Counterclaims is denied.

ORDER

Accordingly, it is

ORDERED that Defendant's motion to dismiss Plaintiff's Amended Complaint is denied; and it is further

ORDERED that Plaintiff's cross-motion to dismiss Defendant's Counterclaims is denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 442, 60 Centre Street, on August 6, 2013, at 10:00 A.M.

Dated: New York, New York
July 10, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.