SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11
Justice

Index Number : 150869/2012
STAGE 2 NETWORKS, LLC
vs
WYCKOFF HEIGHTS MEDICAL
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision + Order.

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

Dated: January 2, 2014

HON. JOAN A. MADDEN, 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: PART 11

----------X

STAGE 2 NETWORKS, LLC,

Index No. 150869-12

Plaintiff,

-against-

DECISION AND ORDER

WYCKOFF HEIGHTS MEDICAL CENTER,
a/k/a WYCKOFF MEDICAL SERVICES,

Defendant.

----------X

JOAN A. MADDEN, J.:

In an action arising out of an alleged breach of contract, plaintiff moves for summary judgment on its complaint in the amount of $197,724.71, plus interest and to strike defendants' answer.[1] Defendants oppose the motion, and cross move for summary judgment dismissing the complaint. For the reasons below, the motion and cross motion are denied.

BACKGROUND

Plaintiff is a technology corporation. Defendant is a medical provider that operates various medical facilities, including a hospital. On or about August 12, 2009, the parties entered into a "Hosted PBX and Enhanced Voice Services Agreement" under which plaintiff agreed to provide data and voice networks for defendant's various facilities for a monthly fee (hereinafter "the Contract"). The Contract provides that plaintiff "guarantees the data network to be secure and all data will transit through the customer provided firewall at main location." It also lists the services provided as including, inter alia, 161 digital phone lines, one 100-megabyte "Metro

[1]While plaintiff seeks to dismiss defendant's counterclaim, a review of defendant's answer reveals that it has not asserted a counterclaim.

Ethernet" line with "50 MB Guaranteed Bandwidth" for defendant's main hospital, and two 10-megabyte "Metro Ethernet" lines with "10MB Guaranteed Bandwidth" for other of defendant's facilities. The Contract was for a 36 month period commencing with the date of installation on January 30, 2010, with payments to be made to plaintiff by defendant each month until and including, January 30, 2013.

Defendant terminated the contract effective on September 1, 2011, and on March 15, 2013, plaintiff commenced this action in which it asserts claims for breach of contract and an account stated. The complaint alleges that defendant breached the Contract by terminating it early and is therefore liable to it under paragraph 7 of the Contract which provides, in part, that "'in the event [defendant] terminates the contract early [it] will be obligated to pay the Early Termination Fee, which shall be calculated as the sum of (a) the number of months remaining in the then current term of [the Contract] multiplied by the agreed-upon monthly recurring fees for fixed recurring charges, and (b) number of months remaining in the then current term of [the Contract] multiplied by the average monthly usage charges over the two most recent 30-day billing periods or minimum revenue commitment associated with the Service, whichever is greater based on usage charges.'" Complaint, ¶ 10. It is further alleged that the amount due and owing to plaintiff under paragraph 7 is $197,724.71.

Defendant answered the complaint and asserted various defenses. Discovery is in its initial stages.

Plaintiff now moves for summary judgment, arguing that it has established, as a matter of law, that defendant prematurely terminated the Contract and that it is therefore entitled to recover the Early Termination Fee as defined by the Contract.

Defendant opposes the motion, noting that under paragraph 7 of the Contract, on which the plaintiff relies, the Early Termination Fee will be paid "except in response to a material breach of the [Contract] by plaintiff (before which [plaintiff] shall be given written notice and thirty days to cure)." Defendant also asserts that under the terms of the Contract, plaintiff "guaranteed" the data network services.

Defendant further argues that plaintiff materially breached the contract and was given timely notice to cure but failed to do so. In support of this argument, defendant submits emails exchanged between the parties in the months leading up to the termination of the Contract. These emails include an email sent by defendant's representative to plaintiff dated July 22, 2011, which states that "[o]n May 20th, 2011, [defendant] serviced notice of its intent to terminate its contract for cause, unless [plaintiff] rectified the service outages it was experiencing. This notice was given per the terms set forth in paragraph 7 of our agreement. You stated that you understood our issues and would work to correct them. Since then we have continued to experience service outages that severely disrupted the hospitals operations and [have] not been rectified. These service failures are evidenced by the trouble tickets listed below together with the relevant outages dates." The email goes on to list six alleged service failures between May 31, 2011 to July 15, 2011, as well as eleven alleged service failures prior to the May 20, 2011 notice.

In reply, plaintiff argues that the minor service interruptions referred to by plaintiff are not a basis for finding a material breach of the Contract and notes that paragraph 12 of the Contract, entitled General and Specific Disclaimer of Warranties, specifically states that service may not be "uninterrupted and continuous," or "error or virus free."

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept 2006), quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept 2006).

The elements of a cause of action for breach of contract are (1) the existence of a contract between plaintiff and defendant; (2) performance by the plaintiff; (3) defendant's failure to perform; and (4) damages resulting from such failure to perform. Noise in the Attic Productions v. London Records, 10 AD3d 303, 307 (1st Dept.2004). It is well settled that "[w]hen a party materially breaches a contract, the non-breaching party must choose between two remedies: it can elect to terminate the contract or continue it." Awards.com, Inc. v. Kinko's, Inc., 42 AD3d 178, 188 (1st Dept.2007).

In most cases, 'the question of materiality of breach is a mixed question of fact and law usually more of the former and less of the latter and thus is not properly disposed of by summary judgment'" CMI II, LLC v. Interactive Brand Development, Inc., 13 Misc3d 1214(A) (Sup Ct NY co. 2006), *quoting* Bears, Stearns Funding, Inc. v Interface Group–Nevada, Inc., 361 F Supp 283, 295 [SD N.Y.2005]. See also, Magi Comm., Inc. v. Jac–Lu Assocs., 65 A.D.2d 727, 729 [1st Dept 1978] ["Materiality of a breach is for trial"]).

Here, even assuming *arguendo* that plaintiff made a prima facie showing entitling it to summary judgment, defendant has controverted this showing by submitting evidence sufficient to

raise a triable issue of fact as to whether disruptions in services constituted a material breach of the Contract. Furthermore, it cannot be said as a matter of law that the disclaimer language in paragraph 12 excuses plaintiff from performing under the Contract, particular in light of contractual language providing that plaintiff's service is "guaranteed." In this connection, it would appear that discovery may shed light on the nature and origins of the service disruptions and therefore whether they provide a basis for finding a material breach of the Contract by the plaintiff and/or whether loss of service were covered by the disclaimer.

Accordingly, it is

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street on February 20, 2014, at 9:30 am.

DATED: January 2, 2014

HON. JOAN A. MADDEN
J.S.C.