

Powerquest Enters., Inc. v Mojaly

2014 NY Slip Op 33474(U)

July 31, 2014

Supreme Court, New York County

Docket Number: 150832/13

Judge: Debra A. James

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

agreed to pay defendants a transaction fee of \$1.65 per transaction and the Agreement also contained an exclusivity clause requiring defendants to use the plaintiff as the exclusive transaction processing service provider for the premises during the term of the Agreement and any renewals. Paragraph 11 of the Agreement stated in pertinent part

This Agreement shall be for a term of five (5) years from the date of installation, unless amended or terminated by written agreement signed by [plaintiff] and [defendants] or terminated by [plaintiff]. . . . Notwithstanding anything contained herein to the contrary, [plaintiff] shall have the option, in its sole discretion, to extend this Agreement for additional periods of five (5) years each. [Defendants] agree that any changes in processing or an early termination of the processing service with [plaintiff] will cause a lost revenue due to extended warranty purchases, repairs and /or any up-front cost.

According to plaintiff's complaint, in December 2012 defendants without notice to or approval from plaintiff changed their data processing service provider. Plaintiff claims that as a result of this alleged breach defendants owe plaintiff damages in accordance with Paragraph 11 of the Agreement.

Defendants in support of their motion argue that they were entitled to seek services from another provider because the Agreement had terminated, insofar as it had not automatically renewed on the terms therein, due to plaintiff's failure to comply with GOL 5-903.

GOL §5-903 (2) provides in pertinent part that

No provision of a contract for service, maintenance or repair to or for any real or personal property which

states that the term of the contract shall be deemed renewed for a specified additional period unless the person receiving the service, maintenance or repair gives notice to the person furnishing such contract service, maintenance or repair of his intention to terminate the contract at the expiration of such term, shall be enforceable against the person receiving the service, maintenance or repair, unless the person furnishing the service, maintenance or repair, at least fifteen days and not more than thirty days previous to the time specified for serving such notice upon him, shall give to the person receiving the service, maintenance or repair written notice, served personally or by certified mail, calling the attention of that person to the existence of such provision in the contract.

The court holds, and the plaintiff does not dispute, that the statute applies to the Agreement at issue here. As stated by the Court,

General Obligations Law §5-903 does not define "personal property," although it broadly defines "person" as "an individual, firm, company, partnership or corporation" and also states that its restrictions apply unless "the person receiving the service" is served with advanced notice calling its attention to the renewal clause in the contract (General Obligations Law §5-903[2]). The statute does not require that the person own the "personal property" being serviced, and section 5-903 has been analyzed by courts in a variety of circumstances to determine its applicability. Personal property has been interpreted to include intellectual property as well as tangible personal property. The purpose of the notice provision is to protect service recipients from the harm of unintended automatic renewals of contracts for consecutive periods. Since §5-903 is remedial in nature it is construed broadly.

Healthcare I.O., LLC v Tsai Chung Chao, 118 AD3d 98 (1st Dept 2014) (citations omitted). The ATM servicing contract at issue clearly comes within the ambit of the statute.

The issue on this motion is whether defendants have set forth a prima facie case that plaintiff failed to comply with the statute so as to cause the Agreement not to have been automatically renewed. Defendants' affidavit in support of the motion which states that plaintiff has never personally delivered or mailed by certified mail notice of the renewal to the affiant or the other defendants suffices to meet defendants' prima facie burden.

In response, plaintiff's affidavit in opposition to the motion fails to set forth cognizable evidence that at the expiration of the initial term of the Agreement notice of the automatic renewal was either personally served upon or sent by plaintiff to defendants. The affidavit by plaintiff's record-keeper fails to cite any business records, such as a log or affidavit of service, supporting the record-keeper's assertion that plaintiff served a notice of such initial renewal upon defendants as required by the statute. In the absence of such evidence plaintiff fails to raise an issue of fact that the statute was complied and therefore the, pursuant to the statute the contract was not renewed upon its initial expiration.

The parties' continued performance under the original terms of the Agreement following the expiration of its initial term does not revive the contractual renewal provision. See Protection Indus. Corp. v DDB Needham Worldwide, Inc., 306 AD2d

175 (1st Dept 2003) ("motion court properly found that General Obligations Law §§ 5-901 and 5-903 render the automatic renewal clause in the parties' contract unenforceable . . . even though defendant made payments after the [] termination date").

Defendants have therefore shown, and plaintiff has not raised an issue of fact, that the Agreement was not renewed after the initial term and defendants were entitled to terminate the Agreement. See Concourse Nursing Home v Axiom Funding Group, Inc., 279 AD2d 271 (1st Dept 2001).

As plaintiff's arguments were legally cognizable, the court shall dismiss defendants' counterclaim.

Therefore, it is

ORDERED and ADJUDGED that defendants' counterclaim for sanctions is hereby DISMISSED, and it is further

ORDERED and ADJUDGED that defendants' motion for summary judgment is GRANTED and plaintiff's complaint is DISMISSED with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: July 31, 2014

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.