

Travelsavers Enters., Inc. v Analog Analytics, Inc.

2014 NY Slip Op 33871(U)

October 7, 2014

Supreme Court, Nassau County

Docket Number: 602696/13

Judge: Timothy S. Driscoll

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This opinion is uncorrected and not selected for official publication.

ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL

Justice Supreme Court

-----X
**TRAVELSAVERS ENTERPRISES, INC. d/b/a
TRAVELSAVERS PARTNER SERVICES,**

Plaintiff,

-against-

**ANALOG ANALYTICS, INC., KENNETH KALB,
BARCLAYCARD UK, BARCLAYS BANK
DELAWARE, and BARCLAYS PLC,**

Defendants.
-----X

**TRIAL/IAS PART: 15
NASSAU COUNTY**

**Index No. 602696-13
Motion Seq. No. 3
Submission Date: 9/4/14**

Papers Read on this motion:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Affirmation in Opposition and Exhibits.....x**
- Memorandum of Law in Opposition.....x**

This matter is before the court on the motion filed by Plaintiff Travelsavers Enterprises, Inc. d/b/a Travelsavers Partner Services (“Travelsavers” or “Plaintiff”) on August 19, 2014 and submitted on September 4, 2014. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 2221(d), granting reargument of one specific ruling in the prior decision (“Prior Decision”) of the Court dated July 18, 2014 (Ex. A to Bowen Aff. in Supp.).

Defendants Analog Analytics, Inc. (“AA”), Barclays Bank Delaware and Barclays PLC

(“Company Defendants”) oppose the motion.¹

B. The Parties’ History

The parties’ history is set forth in a prior Order (“Prior Order”) of the Court dated April 16, 2014 and the Prior Decision and the Court incorporates the Prior Order and Prior Decision by reference as if set forth in full herein. As noted in the Prior Order and Prior Decision, the Complaint alleges that in January 2012 Travelsavers entered into an exclusive ten-year contract with AA (“Agreement”), pursuant to which the parties agreed to work together to advertise and market brand-named travel deals, including luxury ocean cruises and vacation resorts, through electronic and other media directly to consumers. Plaintiff alleges that AA and Kalb, its founder and chief executive, breached the Agreement and, instead of performing, misappropriated Travelsavers’ know-how and technology to launch a rival electronic travel offer service through Barclaycard UK which competes with, and undermines the value of, the Travelsavers contract and benefits Barclaycard UK, Barclays Bank Delaware and Barclays PLC (collectively “Barclays”).

In the Prior Order, the Court granted the motion to dismiss the eighth cause of action in the Complaint, for punitive damages and attorney’s fees. In the Prior Decision, with respect to the prior motion (“Prior Motion”) by the Company Defendants, the Court dismissed the second, fourth, fifth, sixth and seventh causes of action in the Complaint, and held that, with respect to the first cause of action alleging breach of the Agreement, Plaintiff’s claim for damages is limited, pursuant to the Agreement’s limitation of liability clause, to what AA was actually paid under the Agreement, and otherwise denied the motion. It is the Court’s determination in the Prior Decision with respect to the limitation of liability that is the subject of the motion to reargue now before the Court.

C. The Parties’ Positions

Plaintiff submits that the language of the limitation of liability clause of the Agreement (Ex. B to Brown in Supp.) supports the conclusion that the measure of damages is “what was paid or incurred *by* Analog Analytics” (Brown Aff. in Supp. at ¶ 5; emphasis in original) and not, as the Court determined in the Prior Decision, what was paid “*to* Analog Analytics” (*id.*; emphasis in original). Plaintiff asks the Court to determine that the limitation of liability clause

¹ In the Prior Decision, the Court dismissed the action as asserted against Defendant Kenneth Kalb, and Plaintiff’s motion to reargue does not address that determination.

is ambiguous as a matter of law, and that its proper construction and interpretation require a full factual record. Plaintiff submits that its proposed reading of the limitation of liability clause is also consistent with the Court's determination in the Prior Decision that Plaintiff's breach of contract claim is viable.

The Company Defendants oppose the motion, submitting that 1) Plaintiff advanced this same argument in opposition to the Prior Motion that was the subject of the Prior Decision (*see* P's Memo. of Law in Opp. dated 2/18/14, Ex. B to Gottridge Aff. in Opp., and 5/16/14 transcript of oral arg., Ex. C to Gottridge Aff. in Opp.), and the Court declined to adopt Plaintiff's position in the Prior Decision; 2) Plaintiff has not demonstrated that the Court overlooked or misapprehended matters of fact or law in reaching the Prior Decision; and 3) by limiting the amount of damages recoverable by Plaintiff to the amount that AA actually received under the Agreement, the Court acted consistently with the Agreement and "effectuated the bargain the contracting parties struck" (Gottridge Aff. in Opp. at ¶ 11).

RULING OF THE COURT

A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. *Matter of American Alternative Insurance Corp. v. Pelszynski*, 85 A.D.3d 1157, 1158 (2d Dept. 2011), *lv. app. den.*, 18 N.Y.3d 803 (2012), quoting CPLR § 2221(d)(2). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Mazinov v. Rella*, 79 A.D.3d 979, 980 (2d Dept. 2010), quoting *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999).

The Court denies the motion based on its conclusion that Plaintiff has not demonstrated that the Court overlooked or misapprehended matters of fact or law in reaching the Prior Decision. Plaintiff previously advanced its position with respect to the limitation of liability clause, which the Court declined to adopt that position in the Prior Decision, and Plaintiff has not demonstrated that modification of the Prior Decision is appropriate.

All matters not decided herein are hereby denied.

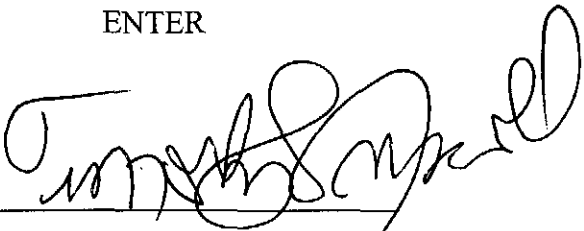
This constitutes the decision and order of the Court.

The Court reminds counsel for Plaintiff and counsel for the Company Defendants of their required appearance before the Court for a Compliance Conference on January 27, 2015 at 9:30 a.m.

ENTER

DATED: Mineola, NY

October 7, 2014

A handwritten signature in black ink, appearing to read "Timothy S. Driscoll", written over a horizontal line.

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

OCT 10 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE