SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

MARCATEL TELECOMMUNICATIONS, LLC,

DECISION AND ORDER

Plaintiff,

-against-

Index No.: 651873/2014
Mot. Seq. No. 003

ANGEL AMERICAS, LLC f/k/a NEXT ANGEL LLC, ANGEL TELECOM (USA) INC., ANGEL TELECOM HOLDING AG, and ANGEL TELECOM AG,

Defendants.

----------X

O. PETER SHERWOOD, J.:

Before the Court is the plaintiff's unopposed motion for an order pursuant to CPLR 3215 directing entry of default judgment based on defendants' failure to retain new counsel and appear in the action.

Marcatel Telecommunications, LLC ("Marcatel") is a telecommunications carrier which primarily serves Mexico and Latin America. In or around January 2013, it alleges it entered into a joint venture with certain of the defendants pursuant to which it would own a minority interest in a pre-paid calling card company and would also provide telecommunications services to the company. Marcatel, however, alleges that it never received the telecommunications traffic it had bargained for because the traffic was wrongfully diverted to Angel Telecom AG. As a result, Marcatel alleges it suffered $8,943,051 in lost profits.

Additionally, based on defendant's default, Marcatel seeks a judicial declaration that: (i) Marcatel owns and continues to own 25% of the equity of Angel Americas, LLC; (ii) any actions taken or written consents signed by the affirmative vote of any two managers of the Board of Managers, including but not limited to the Written Consent purporting to dilute Marcatel's interest, a redeemed to be null and void; and (iii) any action taken or purported to be taken regarding "Major Decisions" (as defined in the parties limit liability company agreement) are deemed to be null and void unless they were obtained with the express consent and approval of Marcatel. Finally, Marcatel seeks an order permitting Marcatel to inspect the books and records of Angel Americas, LLC.

For the following reasons, plaintiff's motion is denied in its entirety.

Background

A. Marcatel, Angel Telecom USA, and Next Communications, Inc. Become Partners

On September 5, 2012, Vivaro Corporation and its subsidiaries (collectively,"Debtors") filed chapter 11 petitions in the Bankruptcy Court, Southern District of New York. During the proceedings, the Debtors filed a motion to sell substantially all of their assets to the highest and best bidder at an auction. The Debtors' assets included, among other things, pre-paid international calling cards for consumer end users (Rojas Aff. ¶ 11).[1]

Defendant Angel Telecom Holding AG ("AT Holding," the ultimate parent of defendant, Angel Telecom AG, "Angel Telecom"), Next Communications, Inc. ("Next Communications") and Marcatel, formed Next Angel LLC ("Next Angel") to bid on Debtors' assets. They documented their rights and obligations regarding their joint venture in a limited liability company agreement, dated as of January 14, 2013 (the "LLC Agreement") (Rojas Aff. Ex. D). Pursuant to the LLC Agreement, Next Communications and Angel Telecom would each own 42.5% of Next Angel, and Marcatel would own 15% of the new venture. With Court approval, the sale of Debtors' assets to Next Angel closed on February 8, 2013 (Rojas Aff. ¶¶ 11-15).

B. Next Communications Is "Bought Out"

In June 2013, the parties negotiated a "buyout" of Next Communications' 42.5% interest in Next Angel (the "Buyout"), which occurred on or about July 3, 2013 (Rojas Aff. 16). In connection with the Buyout, Marcatel and Angel Telecom (USA) Inc. entered into an agreement dated July 2, 2013, which amended the LLC Agreement in several ways (the "Amendment") (Rojas Aff. Ex. E). As a result of the Buyout, Angel Telecom USA became a 75% owner of Next Angel and Marcatel became a 25% owner of the company. Shortly after, Next Angel LLC changed its name to Angel Americas, LLC. ("Angel Americas") (Rojas Aff. ¶¶ 19-20).

---

[1]References to "Rojas Aff." are to the Affidavit of Arturo Rojas sworn to on February 19, 2016 (NYSCEF Doc. No. 37). Mr. Rojas is currently the General Manager of Doctors & Doctors LLC, a distant affiliate of plaintiff (*id.* at ¶ 1). From May 15, 2013 to May 14, 2014, he was the VP of Internal Audit and Controlling at Angel Americas, LLC, a defendant in this action (*id.*). From October 23, 2010 to February 8, 2013, he was the VP of Operations of Vicaro Corporation and its related entities (*id.*).

C. Plaintiff Alleges that It Was Deprived of Global Telecommunications Traffic

Plaintiff alleges that for the calling cards sold by Next Angel/Angel Americas to function, the company needed to purchase air time from telecommunications carriers. As each of the members of Next Angel/Angel Americas was a telecommunications carrier, the parties agreed to an allocation of telecommunications traffic amongst themselves. That allocation is set forth in Section 6.01(c) of the LLC Agreement, as later amended by the Amendment to the LLC Agreement.

Section 6.01(c) of the LLC Agreement provides that:

> Marcatel will have a right of first refusal with regard to all of the Company's Mexican NEA traffic, provided, however, that Marcatel offers its services to the Company at prices not to exceed Tier 1 prices plus 3%, coupled with Tier 1 quality. The remaining traffic shall be dividedamong the Members on a pro rata basis, based upon each Member's Percentage Interest.

Before the Buyout, Marcatel's Percentage Interest was 15% and, after the Buyout, Marcatel's Percentage Interest is 25% (Rojas Aff. ¶¶ 13, 19; Ex. D).

Moreover, after the Buyout, the parties agreed in the Amendment to the LLC Agreement that:

> Section 6.01 of the LLC Agreement shall be amended to include in Marcatel's right of first refusal thereunder all land and mobile traffic to Mexico. The parties hereto acknowledge and reaffirm the allocation of telephone traffic contemplated by Section 6.01(c) of the LLC Agreement (the "Traffic Allocation"), and Angel agrees that, to the extent Marcatel's rights under such provision shall heretofore not have been honored by the Company to the extent possible under applicable law, rules and regulations (after giving effect to any traffic subject to the Traffic Allocation which Marcatel shall have received via Angel or any of its affiliates), Marcatel shall be entitled to be allocated a disproportionate share of traffic or, to the extent such disproportionate allocation of the Company's profits until Marcatel shall have been made whole for such failure to allocate traffic pursuant to Section 6.01(c) of the LLC Agreement.

(Rojas Aff. ¶ E). Accordingly, plaintiff alleges that after the Buyout, Marcatel had the right of first refusal to all Mexican telecommunications traffic generated from the calling cards and 25% of calling card traffic from the rest of the world (Rojas Aff. ¶ 29).

Marcatel alleges that from the beginning of the venture until Angel Americas ceased operations, defendants continuously failed to provide Marcatel with its allocation of both Mexican telecommunications traffic and traffic for the rest of the world, as required by the LLC Agreement

and Amendment. Furthermore, Marcatel alleges that defendants diverted the traffic that otherwise should have been provided to it to Angel Telecom. It alleges that bank records for Angel Americas' operating account obtained from Citibank, by way of subpoena in this case show that Angel Americas did not make any payments to Marcatel, but did make payments to Angel Telecom. Additionally, Tillman Zschucke (the Chief Technology Officer of Angel Americas) admitted to Mr. Rojas that the traffic was being routed to Angel Telecom (Rojas Aff. ¶¶ 23-25).

D. Defendants' Answer and Withdrawal of Counsel

In or around June 2014, Marcatel commenced the instant action. Defendants Angel Americas and Angel Telecom (USA), Inc., initially appeared through the law firm of Wuersch & Gering LLP ("W&G") and on August 22, 2014 filed an answer. The unverified answer contains affirmative defenses alleging, *inter alia*, that any failure of Angel Americas to perform with regard to any right of first refusal with respect to Mexican telecommunications traffic was excused since Angel Americas was barred from honoring that right by federal law and an order of a U.S. Bankruptcy Court for a period of time and that thereafter Marcatel received at least as much traffic as it claimed it was entitled to receive (NYSCEF Doc. No. 19).

On May 12, 2015, W&G moved by order to show cause to be relieved as counsel for the Angel Defendants and on May 26, 2015 the Court granted the firm's motion to be relieved as counsel (the "Withdrawal Order") (Roth Aff. ¶ 3; Ex. A).[2] The Withdrawal Order directed them to "appoint substitute attorney within thirty (30) days from the date of mailing the notice" and any new attorney retained by Defendants was directed to file a notice of appearance "within 30 days from the date the notice to retain new counsel is mailed" (Roth Aff. Ex. A). On May 28, 2015, Wuersch & Gering LLP mailed the Notice to Retain New Counsel to all defendants (Roth Aff. Ex. B). Defendants were to appear by new counsel no later than June 27, 2015. To date, defendants have failed to appear through new counsel. Moreover, no counsel appeared for defendants at the July 7th status conference (Roth Aff. ¶¶ 4-5, Ex. B).

---

[2]References to "Roth Aff." are to the Affirmation of Linda Roth dated February 19, 2016.

Discussion

CPLR 3215(a) provides that "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, . . . the plaintiff may seek a default judgment against him" (CPLR 3215[a]). Pursuant to CPLR 321(a), a corporation "shall appear by attorney." "A corporate defendant's failure to retain counsel is grounds for entry of default judgment against the corporation" (*Mail Boxes Etc. USA, Inc.* v *Higgins*, 281 AD 2d 176, 721 NYS 2d 524 [1st Dept 2001]).

In addition, Uniform Civil Rule 202.27 provides in relevant part that, "At any scheduled call of a calendar or at any conference, if all parties do not appear ... the judge may note the default on the record and enter an order as follows: (a) If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order any inquest." Here, although Marcatel appeared at the July 7th status conference, Defendants did not.

Accordingly, Marcatel is entitled to seek a default judgment.

A. Breach of Contract/Unjust Enrichment Claims

A default judgment requires "proof of the facts constituting the claim, the default and the amount due by affidavit made by the party," or a verified complaint (CPLR 3215[f]; *Zelnik v. Bidermann Indus. U.S.A., Inc.*, 242 AD2d 227, 228 [1st Dept 1997]). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]).

Marcatel seeks judgment on its first cause of action (breach of contract) against defendants Angel Americas and Angel Telecom. Specifically, Marcatel alleges that Angel Americas and Angel Telecom breached the terms of the LLC Agreement and the Amendment and, thereby, injured Marcatel. In support, Marcatel submits the affidavit of Aruto Rojas, VP of Internal Audit and Controlling at defendant Angel Americas, that alleges Marcatel never received the telecommunications traffic it was entitled to receive pursuant to the LLC Agreement and the Amendment (*see* Rojas Aff. ¶ 23). To sustain a breach of contract cause of action, plaintiffs must prove each of the following elements: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages sustained by plaintiff as a result of the breach (*see Kraus v Visa Intl Serv Assn*, 304 AD2d 408 [1st Dept 2003]).

Here, while the non-verified complaint alleges that "Marcatel has substantially complied with all of the material terms of the LLC Agreement and the Amendment to the LLC Agreement" (Compl.¶ 41), Marcatel fails to submit an affidavit from an individual with personal knowledge of this allegation. This allegation is denied in the answer. Because Marcatel fails to submit proof of facts satisfying this basic element of its breach of contract claim, element two, it fails to satisfy CPLR 3215(f).

Marcatel also seeks judgment based on its second cause of action (unjust enrichment) against Angel Telecom and AT Holding. It asserts that telecommunications traffic Marcatel was entitled to was instead directed to Angel Telecom and that Angel Telecom and its corporate parents were thereby unjustly enriched; an allegation which is denied in the answer. Specifically, Marcatel alleges that bank records for Angel Americas' operating account obtained from Citibank by way of subpoena in this case show that Angel Americas did not make any payments to Marcatel but did make payments to Angel Telecom. Additionally, Tillman Zschucke (the Chief Technology Officer of Angel Americas) admitted to Mr. Rojas that the traffic was being routed to Angel Telecom (Rojas Aff. ¶¶ 23-25). "The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading Ltd. v J Wildenstein*, 16 NY3d 173, 182 [2011] [citation omitted]). To establish this claim, a plaintiff must show: "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*id.* at 182 [citations omitted]).

Here, first, plaintiff does not identify which alleged payments in the voluminous bank statements provided were made to Angel Telecom (Rojas Aff., Ex. F). Second, the bank statements do not indicate whether those payments were made in connection with the joint venture Marcatel was involved with, or payment for some other reason. Mr. Zschucke's purported statement also does not comprise "firsthand" knowledge. For these reasons, Marcatel fails to satisfy CPLR 3215(f) with respect to its unjust enrichment claim.

B. Request For Declaratory Judgment

Marcatel also seeks a judicial declaration that: (i) Marcatel owns and continues to own 25% of the equity of Angel Americas; (ii) any actions taken or written consents signed by the affirmative

vote of any two managers of the Board of Managers, including but not limited to the Written Consent purporting to dilute Marcatel's interest, a redeemed to be null and void; and (iii) any action taken or purported to be taken regarding "Major Decisions" (as defined in the parties limit liability company agreement) are deemed to be null and void unless they were obtained with the express consent and approval of Marcatel. Finally, Marcatel seeks an order permitting Marcatel to inspect the books and records of Angel Americas.

An action for a declaratory judgment under CPLR 3001 requires a actual controversy or real dispute between adverse parties. A default judgment in a declaratory judgment action will not be granted on the default and pleadings alone (*Foddrell v Utica First Ins. Co.*, 50 Misc 3d 1215(A) [Sup Ct 2016] [citing Patrick M. Connors, Practice Commentaries, McKinney's Cons.Laws of NY, Book 7B, CPLR, C3001:23]).

Here, the Rojas affidavit does not even attest to any facts regarding the declaratory judgment claims. As such, Marcatel fails to satisfy CPLR 3215(f) with respect to its request for declaratory judgments.

Accordingly, it is hereby

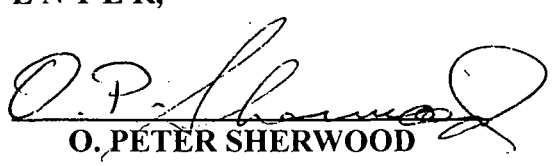
ORDERED that the motion for default judgment is DENIED without prejudice; and it is further

ORDERED that, within fourteen (14) days of entry, plaintiffs shall serve a copy of this order with notice of entry upon defendants.

This constitutes the decision and order of the Court.

DATED: April 25, 2016

E N T E R,



O. PETER SHERWOOD
J.S.C.