

AT&T Corp. v Service W., Inc.

2016 NY Slip Op 31788(U)

September 27, 2016

Supreme Court, New York County

Docket Number: 652263/2015

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

<u>AT&T CORP.,</u>		INDEX NO.	<u>652263/2015</u>
	Plaintiff,	MOTION DATE	<u>08/24/2016</u>
-against-		MOTION SEQ. NO.	<u>002</u>
<u>SERVICE WEST, INC.,</u>		MOTION CAL. NO.	<u> </u>
	Defendant.		

The following papers, numbered 1 to 6 were read on this motion to dismiss, or for a more definitive statement.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5</u>
Replying Affidavits _____	<u>6</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion is granted to the extent stated herein.

Plaintiff commenced this action on June 25, 2013, alleging a breach by the Defendant of the Master Agreement entered into between the parties on November 12, 2007, wherein Plaintiff provided telecommunication services to the Defendant, and the Defendant was to pay plaintiff for these services. (Mot. Exh. A). Defendant made a pre-answer motion to partially dismiss the complaint under Motion Sequence No. 001.

In an Order dated April 13, 2016, this Court granted Defendants' motion to the extent of (1) dismissing Plaintiff's third cause of action for quantum meruit and unjust enrichment as duplicative of the breach of contract causes of action, and (2) limiting Plaintiff's first, second, and fourth causes of action for breach of contract for failure to pay for services rendered, for finance charges and attorneys' fees, and for account stated, to any claims based on invoices dated from May 25, 2013 and later. (Mot. Exh. C). It was determined that in the Master Agreement the parties agreed to a shortened statute of limitations period, providing that any action was to be commenced within two years after the cause of action arose. (Id.) It was also determined that the Master Agreement provided that payment for Plaintiff's services were due within thirty days after the date of the invoice. (Id.) Therefore, it was held that since the Complaint was filed on June 25, 2015, any invoices dated between May 25, 2013 and June 25, 2013,

were timely. That period being the result of the two years prior to the Complaint being filed, plus an extra thirty days because Plaintiff's right to demand payment would have been 30 days from the date invoiced. (Id.)

After this Court's decision under Motion Sequence No. 001, Defendant filed its Answer and Counterclaims on April 25, 2016. (Mot. Exh. B). Defendant asserted counterclaims against the Plaintiff for (1) breach of the Master Agreement, (2) improper billing practices, and (3) a right to set-off against any amounts owed.

Plaintiff now moves (1) to dismiss the counterclaims pursuant to CPLR §3211(a)(5), or in the alternative (2) for a more definite statement pursuant to CPLR §3024. Defendant opposes the motion.

Plaintiff contends that any counterclaims are time barred pursuant to the two year statute of limitation period set forth in the Master Agreement, and per the "law of the case" that was established in this Court's prior Order. The "law of the case" being that any claims accruing before June 25, 2013 have been declared time barred. Plaintiff contends that the "Schedule A" attached in support of the counterclaims appears to show credits due and owing the Defendant for overpayment to Plaintiff "[a]s of March 2013". (See Schedule A attached to Mot. Exh. B & Mot. Exh. D). Although the counterclaims omit any dates and/or a time period for which the Plaintiff allegedly breached the agreement and/or overcharged the defendant, it appears that the Defendant is relying upon the "overpayments" listed in Schedule A as the basis for its counterclaims. If that is the case, then these claims are all time barred.

Alternatively, Plaintiff argues that if the Court finds there is insufficient information to allow for dismissal of the counterclaims, then the Plaintiff is entitled to a more definite statement because the counterclaims are vague and ambiguous. Plaintiff contends that it cannot interpose an appropriate response because the counterclaims fail to fully describe Plaintiff's wrongful conduct, and fail to provide a time period for which this alleged misconduct took place.

Defendant opposes the motion arguing that the counterclaims are not time barred nor are they vague and ambiguous. However, if the Court finds that the claims are time barred, Defendant is still entitled to assert the counterclaims as a setoff or recoupment pursuant to CPLR §203(d).

Defendant contends that the counterclaims are based on Plaintiff's improper billing for services provided to locations where the Defendant no longer operated, or for services that were never provided. The "Schedule A" sets forth the amount Defendant has overpaid Plaintiff as of March 2013, totaling \$144,138.00. Defendant argues that the counterclaims related to issues that were continuing in nature, and remained unresolved through the end of the parties' business relationship in 2013. Further, the Defendant argues that there remain material questions of fact as to

whether or not the Counterclaims are within, or outside, the two year statute of limitations set forth in the Master Agreement.

Defendant further contends that if the counterclaims are time barred, then the claims are still permitted for a setoff against, and up to, any amount it may owe the Plaintiff. The counterclaims for \$144,183.40 far exceeds the \$41,411.02 Plaintiff claims are unpaid. Finally, the Defendant argues that the counterclaims are sufficiently pled because it alleged that the Plaintiff breached the agreement by failing to timely and properly install the agreed upon services, the plaintiff failed to terminate the services at Defendant's prior locations, and Plaintiff improperly billed for work not performed and/or improperly performed.

"In contract actions, a claim generally accrues at the time of the breach..." *Elie Intern., Inc. v. Macy's West Inc.*, 106 A.D.3d 442, 965 N.Y.S.2d 52 (1st Dept. 2013), citing *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402, 599 N.Y.S.2d 501 (1993), and "the statute of limitations is triggered when the plaintiff had the right to demand payment." See *Elie, supra*, citing *Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co.*, 18 N.Y.3d 765, 944 N.Y.S.2d 742 (2012).

This Court held in its April 13, 2016 Order that "the statute of limitations... was triggered when the party that was owed money had the right to demand payment..." (*Hahn, Supra*). Therefore, this Court held that the claims were limited to any invoices dated from May 25, 2013 and after. (See prior Order- Mot. Exh. C).

The law of the case doctrine is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, and is not a limit to their power. (*People v. Evans*, 94 N.Y.2d 499, 727 N.E.2d 1232, 706 N.Y.S.2d 678 [2000]). The law of the case is designed to limit relitigation of issues which the parties had a full and fair opportunity to litigate at the initial determination of an issue, but when no final judgment had been rendered. (*Seward Park Hous. Corp. v. Greater N.Y. Mut. Ins. Co.*, 25 Misc.3d 772, 884 N.Y.S.2d 298 [Sup. Ct., NY County 2009], citing *Evans, Supra*). The doctrine of the law of the case expresses the practice of the courts generally to refuse to reopen what has been decided by a judge in the case on the same or higher level of the judiciary and to adhere to the prior decision on a judicially determined issue. (*Id.*)

It was held, in this Court's April 13, 2016 Order, that Plaintiff's claims in this action were limited to those that accrued on May 25, 2013 and after. Therefore, it has already been decided that the statute of limitations in this case is limited to May 25, 2013. To the extent that the Defendant has counterclaims it wishes to pursue against the Plaintiff, these claims are limited to claims arising on May 25, 2013 or after.

The Defendant's counterclaims are vague and ambiguous as they do not set forth a time period for which the Defendant alleges it overpaid the Plaintiff, and/or when the Plaintiff breached its duties under the Master Agreement. The Defendant

also fails to clarify its position in its opposition papers.

CPLR §3024(a) states in relevant part that, “[i]f a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a response he may move for a more definite statement.” If the Defendant has counterclaims accruing as of May 25, 2013 or after due to a breach by the Plaintiff, then it needs to plead these counterclaims by identifying the time period when the Plaintiff engaged in this breach, and the time period for when the Defendant made the overpayments.

If the Defendant is relying upon actions, or inaction by the Plaintiff that resulted in the Defendant overpaying its invoices, and these overpayments are based on the “Schedule A” which lists overcharges due Defendant from Plaintiff as of March 2013, then these counterclaims are time barred.

For the foregoing reasons, the Defendant is to correct its Answer to clarify the time period of Plaintiff’s conduct on which it is basing its counterclaims. Any counterclaim based upon the Plaintiff’s conduct that accrued prior to May 25, 2013, is time barred.

ACCORDINGLY, it is ORDERED, that Plaintiff’s motion to dismiss Defendant’s counterclaims, or in the alternative for a more definite statement is granted, and it is further,

ORDERED, that the Defendant serve an amended Answer within 10 days of service of this Order with Notice of Entry, clarifying the conduct and the time period for which it is alleging that the Plaintiff breached the Master Agreement, and clarifying the time period of the invoices for which the Defendant claims the Plaintiff overcharged and the Defendant overpaid for the services rendered, and it is further,

ORDERED, that any reply by the Plaintiff to Defendant’s amended Answer is to be served within 20 days from the date of service of the amended Answer upon Plaintiff, and it is further,

ORDERED, that any claims or counterclaims accruing prior to May 25, 2013, are time barred, and it is further,

ORDERED, that Plaintiff is to serve the Defendant with a copy of this Order with Notice of Entry within 10 days from the date of entry of this Order.

ENTER:

Dated: September 27, 2016



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE