SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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WERECOVERDATA.COM, INC. d/b/a WERECOVERDATA.COM®,

Plaintiff,

-against-

EMAG SOLUTIONS, LLC

Defendant.

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DECISION AND ORDER

Index No. 651218/2016
Mot. Seq. 001

HON. ANIL C. SINGH, J.:

In this action for, *inter alia*, breach of contract, unjust enrichment, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, quantum meruit, trademark misappropriation and an accounting, WeRecoverData.com ("Plaintiff" or "WRD") alleges that eMag Solutions, LLC ("Defendant" or "eMag"), failed to pay Plaintiff a fee for referring a data recovery project from Venezuela. In this motion, eMag moves to dismiss the complaint based upon CPLR §§ 3211 (a)(1) and (7) on the grounds that the parties' Master Services Agreement ("MSA") contains a forum selection clause requiring WRD to irrevocably submit to Georgia federal and state courts. Alternatively, eMag moves

to dismiss pursuant to the common law doctrine of forum non conveniens and CPLR § 327(a). (mot. Seq. 001). Plaintiff opposes.

Facts

Both WRD and eMag, incorporated in New York and Delaware respectively, provide data restoration and recovery services for various damaged or corrupted computing mechanisms.

In early 2013, WRD secured several large accounts, which caused a corollary increase in project volume that exceeded its capacity. WRD, as a consequence, sought a third-party to whom it could outsource large accounts. WRD and eMag thus entered into negotiations, culminating in a Master Services Agreement ("MSA") that outlined an arrangement for future collaboration.

Pursuant to the MSA, each collaboration required mutual consent to a "Statement of Work" ("SOW") or "Project Authorization" ("PA"), which would become subsumed under the MSA and would control in the event of conflict. While the SOW or PA of a given transaction set forth the respective responsibilities of each party and the terms and conditions of pricing, assent to the MSA required that WRD "irrevocably submit to the exclusive jurisdiction and venue of Georgia state and federal courts." MSA, § 16.1.

In 2015, WRD "in accordance with the terms of the sharing agreement [...] contacted Defendant to refer the IBM-Venezuela account in the normal manner as had become ordinary in the course of their business dealings." Compl. ¶ 18.

Plaintiff alleges that, contrary to the terms of the MSA, there was an oral agreement for defendant to bill the client and pay Plaintiff thirty percent (30%) of the billing. Defendant contends that a previous employment agreement existed with IBM dating back to 2014 and that the alleged oral agreement contravenes the detailed procedure of the MSA.

Citing the forum selection clause of the MSA, the defendant moved pursuant to CPLR §§ 3211 (a)(1) and (7) to dismiss the complaint.

Analysis

Legal Standard

On a motion to dismiss on the ground that defenses are founded upon documentary evidence pursuant to CPLR §3211(a)(1), the evidence must be unambiguous, authentic, and undeniable. CPLR 3211(a)(1); Fountanetta v. Doe, 73 A.D.3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211(a)(1)] motion ... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of

the plaintiff's claim." Ozdemir v. Caithness Corp., 285 A.D.2d 961, 963 (2d Dept 2001), leave to appeal denied 97 N.Y.2d 605. Alternatively, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 (2002).

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), all factual allegations must be accepted as truthful, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court determines only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002).

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence,

are not entitled to such consideration." Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

Defendant's Motion to Dismiss the Complaint Filed by WRD

Forum selection clauses, which carry a presumption of validity, can serve as proper grounds for dismissal under 3211(a)(1). See, Lischinskaya v. Carnival Corp., 56 A.D.3d 116, 120 (2d Dept 2008); Fritsche v. Carnival; Corp., 132 A.D.3d 805 (2d Dept 2015). Valuing contractual certainty and predictability, it is "the well-settled policy of the courts of this State to enforce forum selection clauses." Sydney Attractions Group Pty Ltd. v. Schulman, 94 A.D.3d 476, 476 (1st Dept 2010). A forum selection clause will control absent a strong showing that "it is unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." Hluch v. Ski Windham Operating Corp., A.D.3d 861, 862 (2d Dept 2008), quoting Bernstein v. Wysoki, 77 A.D.3d 241, 248-49 (2d Dept 2010).

Where a forum selection clause exists, a threshold determination as to whether the clause is mandatory or permissive is required. In contrast to a permissive clause, which allows for litigation in multiple forums, a mandatory clause confines litigation

to the designated forum at the exclusion of any alternative. "Courts have repeatedly found forum selection clauses mandatory if they provide that a specified forum 'shall' hear a matter or that the forum is 'exclusive.'" Walker, Truesdell, Roth & Associates, Inc. v. Globeop Financial Services LLC, 43 Misc.3d 130 (A) at *9 (Sup. Ct. N.Y. Cnty. May 27, 2013) (citing cases).

Plaintiff and Defendant mutually agreed to Section 16.1 of the MSA, which states,

> **Governing Law; Jurisdiction.** This agreement shall be governed and construed under the laws of the State of Delaware, without reference to its choice of law principles. Partner irrevocably submits to the exclusive jurisdiction and venue of the Georgia federal and state courts.

The plain language of the forum selection clause establishes the permissibility of bringing suit in Georgia and unambiguously identifies the Georgia federal and state courts as the exclusive jurisdiction and venue. By assenting to the MSA, Plaintiff exercised its choice of forum and, in the process, waived its right to bring suit anywhere but the Georgia federal and state courts.

Attempting to distance itself from the contracted choice, Plaintiff points to an oral agreement and subsequent correspondence arguing that the IBM-Venezuela transaction was beyond the purview of the MSA. However, in its complaint, Plaintiff admits that it "referr[ed] the IBM-Venezuela account in the normal manner as had

become ordinary in the course of their business dealings." Compl. ¶ 18. Therefore, even taking all of Plaintiff's allegations as true, the parties contemplated the parameters of the MSA to include these kinds of referrals. See Id. ¶¶ 14-15 ("... a sharing agreement was made and entered into by Plaintiff and Defendant; and thereafter, Plaintiff began referring projects to Defendant...One such project that was procured by Plaintiff and referred to Defendant ... was IBM-Venezuela.")

As the forum selection clause contained in the MSA is valid and enforceable, Defendant's motion to dismiss is granted.

Accordingly it is,

ORDERED that Defendant eMag Solutions, LLC's motion to dismiss the complaint is granted.

Date: September 30, 2016
New York, New York

Anil C. Singh