

<b>Cables &amp; Chips, Inc. v Gerber</b>
2017 NY Slip Op 31237(U)
June 8, 2017
Supreme Court, New York County
Docket Number: 651019/2016
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

-----X  
CABLES AND CHIPS, INC.,

Plaintiff,

-against-

SCOTT GERBER and EVOLVE  
COMMUNICATIONS LLC,

Defendants.  
-----X

DECISION AND  
ORDER

Index No.  
651019/2016

HON. ANIL C. SINGH, J.:

An evidentiary hearing was held on May 16, 2017, on plaintiff Cables and Chips, Inc.’s (“CCI”) application that defendants Scott Gerber and Evolve Communications LLC (“Gerber” and “Evolve”) breached the parties’ settlement agreement dated August 22, 2016 (the “Settlement Agreement”). Defendants deny breaching the Settlement Agreement.

CCI is in the business of installing cabling, voice, data, and fiber networks, as well as selling computer peripherals that allow computer networks to function. CCI was founded by Susan and Howard Feinstein. Mr. Feinstein died in May 2014. Gerber was hired to work at CCI in 1998. His initial responsibilities involved sales and providing limited support to Mr. Feinstein. Starting in 2000,

Gerber's responsibilities at CCI increased. On July 27, 2000, Gerber entered into a Confidential Information and Restrictive Covenant Agreement ("the Agreement") with CCI. After Mr. Feinstein died in May 2014, Gerber became the sole CCI employee responsible for managing and maintaining CCI's customer relationships and took over Mr. Feinstein's role in dealing with CCI's vendors and handling pricing.

On January 19, 2016, Gerber tendered his resignation by e-mail effective January 29, 2016. Plaintiff alleges that while Gerber was still its employee, he began competing with CCI through Evolve, which was organized on January 11, 2016. On January 14, 2016, Gerber purchased the Evolve domain name and immediately began using the Evolve e-mail address (Complaint at paras. 53-54).

In February 2016, CCI moved by order to show cause for a temporary restraining order and preliminary injunction against Gerber and Evolve, alleging that Gerber breached the Agreement with CCI. Plaintiff alleged that Gerber surreptitiously formed Evolve to compete with CCI by usurping business opportunities belonging to CCI, and by misappropriating confidential and proprietary customer lists and pricing information to solicit and conduct business with CCI's clients.

On February 29, 2016, this Court granted CCI a temporary restraining order enjoining the defendants from, *inter alia*, soliciting any CCI customers to install cabling, voice, data and/or fiber networks for CCI customers. A hearing on CCI's application for a preliminary injunction was never held. Instead, the parties engaged in extensive negotiations over many months which consummated in the Settlement Agreement.

Under the Settlement Agreement, Gerber and Evolve agreed to pay CCI 12.5% of consideration received from "CCI's Clients" between December 1, 2015, and July 1, 2016 (Paragraph 3). Defendants also agreed to make future percentage payments for work performed on behalf of "CCI Clients" at the rate of 10% (Paragraphs 5 and 6).

"CCI Client" or "CCI Clients" are defined terms which "means the persons and entities set forth on the list (the 'CCI Client List') attached to this Agreement as Exhibit A" (Paragraph 1.e). The term "Consideration" is defined to mean "the gross aggregate of anything of value received by Defendants from CCI Clients, whether by payment, credit, setoff or otherwise." (Paragraph 1.f).

In addition, with respect to prior and existing projects, defendants represented and warranted that

“[S]ince December 1, 2015, Defendants have not directly or indirectly received any consideration from CCI Clients other than the Consideration that is set forth in the documents attached to Exhibit B to this Agreement, and that the Consideration of \$207,812.06 detailed in Exhibit B, represents the total Consideration received by Defendants from CCI Clients from December 1, 2015, to July 1, 2016.” (Paragraph 4.b).

The Settlement Agreement also gave CCI audit rights. By order to show cause dated November 14, 2016, CCI moved to compel Gerber and Evolve to produce certain books and records in accordance with its audit rights set forth under Section 10 of the Settlement Agreement. CCI maintained that the auditor’s report revealed that defendants had failed to report \$323,835.83 in consideration received from CCI clients. Gerber and Evolve opposed the order to show cause, contending that CCI was seeking information concerning non-CCI clients which it was not entitled to receive.

After an *in camera* review, the Court directed an evidentiary hearing to determine whether work performed by Gerber and Evolve on behalf of an entity known as “Amplify” is covered by the Settlement Agreement.

CCI contends that Gerber and Evolve performed work for Amplify, a CCI Client, commencing in early January 2016 while Gerber was still employed by CCI. He breached the Settlement Agreement by failing to disclose receipt of

\$337,131.44 on the Amplify project.

Gerber responds that Evolve was hired and paid pursuant to a contract with an unrelated entity, Two Trees, to perform work in Amplify's space. Two Trees is the property manager for 55 Washington Street, Brooklyn, New York and is not a CCI client. Defendants maintain that they are in full compliance with the terms of the Settlement Agreement, which has not been breached.

The hearing was held on May 16, 2017. The parties consented to the submission of exhibits. Plaintiff's exhibits are numbered 1 - 48. Defendants' exhibits are in letter form A - N. Closing statements were made on June 1, 2017.

Gerber testified on direct examination that in January 2016, while still working for CCI, he was asked to consult on a construction build-out project in Amplify's space located at 55 Washington Street, 8<sup>th</sup> floor, Brooklyn, New York. Some years earlier, CCI had done work for Amplify in the same space.

Gerber advised his contact at Amplify, Carlos Soto, by e-mail dated January 15, 2016, that he was leaving CCI (Ex. 1). In the e-mail, Gerber stated as follows: "I need all Cables & Chips references and emails removed. The JLL minutes and directory was distributed today with me listed as Cables & Chips but with my Evolve email address ...." Thereafter, Soto made a recommendation on January

27, 2016, to his co-workers at Amplify that Gerber and his new company Evolve should do the work on the build-out (Ex. 6). This recommendation was made while Gerber was a CCI employee.

Other e-mails introduced into evidence by plaintiff establish that Gerber, again while still employed by CCI, continued to consult on the build-out through January 29, 2016. He had project meetings by phone and in person with Amplify's project manager, Jones Lang LaSalle ("JLL") (Exs. 2, 4, 8, 9). JLL's minutes of a project meeting state that on January 19, 2016, Evolve agreed to "handle the design, drawings and implementation for both the IT and AV requirements." (Ex. 13, Section 6.1). Gerber confirms that he quoted Amplify \$3,500.00 for the cabling design plan for the 8<sup>th</sup> floor build-out (Ex. 7). In the Settlement Agreement, Gerber disclosed that he received \$3,500.00 from Amplify, a CCI client (Paragraph 4.a). It is undisputed that CCI was paid its share under the terms of the Settlement Agreement.

After Gerber resigned from CCI, he continued to provide AV/IT services for the build-out (Ex. 13, Section 6.3.1). On February 12, 2016, Joseph Buxbaum, JLL's senior project manager, e-mailed Two Trees stating as follows: "As we discussed during our meeting last [sic.] we would like to have Evolve be

contracted direct by Two Trees to main [sic.] consistency as a design build out approach for IT cabling. Can you confirm you are in agreement with this approach. We want to formally release Evolve to proceed with project planning.” (Ex. 14).

JLL’s project meeting minutes for February 16, 2016, state that “Two Trees will be pulling IT cabling using Evolve” (Ex. 15, Section 5.1.1). Gerber testified that at that juncture, he had not been retained on the project but was hopeful that he would get the work.

On March 22, 2016, Gerber submitted a bid to Two Trees for the cabling project for the build-out of Amplify’s space at the cost of \$292,250.00. Two Trees accepted the quote (Ex. 32). Subsequently, Two Trees, as the general contractor, and Evolve, as the subcontractor, entered into a written agreement. Evolve agreed to provide all cabling services in connection with the project for the sum of \$318,187.19 (Ex. 34). Amplify performed the work and was paid by Two Trees in accordance with the contract (Ex. 33).

On cross-examination, Gerber testified that he performed design and consultation work for Amplify on the build-out. Evolve invoiced Amplify for the work (Ex. M). Since Amplify was a CCI client, plaintiff received a percentage of

the monies pursuant to the terms of the Settlement Agreement. However, Two Trees is not listed as a CCI client in the Settlement Agreement.

Gerber stated that he was not involved with the sending of the e-mail sent by Joseph Buxbaum on February 12, 2016, to employees of Two Trees requesting the retention of Evolve to provide cabling for the build-out (Ex. 14). In fact, Two Trees sought bids for the cabling work on the build-out from different vendors. Gerber submitted a bid on behalf of Evolve. After discussing the bid with Two Trees, he submitted a revised bid at a lower price reducing the amount by approximately \$15,000.00. Gerber stated that he had no prior dealings with Two Trees while employed by CCI. Evolve sent invoices to and was paid by Two Trees. Gerber did not consider the monies received from Two Trees as indirect consideration under the Settlement Agreement.

On re-direct, Gerber was questioned about the representations and warranties made by him in the Settlement Agreement. Gerber agreed that the consideration stated in the Settlement Agreement included contracts that he was yet to be paid on.

The next witness called was Joseph Buxbaum, employed by JLL as a senior project manager. He represented Amplify on the build-out. Buxbaum testified

that he recommended the hiring of Evolve to stay consistent by using the same company for the design and installation components of the project. Since Gerber had designed the cabling project, his recommendation was that he should perform the work. However, since Two Trees was covering the cost of the work, it was responsible for the hiring. Buxbaum stated that had Amplify been responsible for payment, JLL would have had the authority to hire Evolve. Two Trees wanted Evolve to be competitive. Two Trees received Amplify's bid and handled the bidding process.

Buxbaum testified further that the work being performed in Amplify's space was a tenant improvement or "TI." The landlord was doing the work. The cabling performed by Evolve was part of the TI. It was neither typical or unusual for the landlord to hire personnel to perform the cabling.

Also called as a witness was Brendon Price, an employee of Two Trees, the property manager of 55 Washington. The building is owned by 55 Washington LLC. Two Trees is the parent company. Price testified that he was familiar with Gerber as he got to know him several years ago when he performed work in the building for a tenant now known as Amplify.

Price stated that he was involved in the build-out. Buxbaum/JLL

recommended Gerber and Evolve but did not govern the hiring. All decisions were made based on the numbers. Two other electric and low voltage consultants, Horse Power Electric and Romo Electric Corp., also submitted bids (Exs. K & L). Two Trees had no objection to hiring Evolve, provided the price was competitive. After Evolve submitted its bid, Two Trees asked the company to lower its price. Two Trees as the general contractor hired Evolve as subcontractor to perform the cabling work. While Two Trees chose to go with Gerber, it received no benefit by hiring him and could have gone with the other contractors.

Price explained that a tenant improvement is the money allocated for a tenant build-out. A TI has an impact on the rental rate, as a percentage of rent is allocated to the TI. Without a TI, the rent in some cases would be lower. There had been no discussions with Gerber regarding the TI for Amplify's space.

Next to testify was Caroline Vanderlip, a senior vice president at Amplify. Amplify was the tenant at 55 Washington. The build-out was necessitated by a consolidation in the 8<sup>th</sup> floor space. Amplify never considered performing the build-out on its own. Vanderlip testified that there was no benefit to Amplify, who performed the cabling project. Amplify did not authorize the hiring of Gerber as it was not Amplify's decision to make.

Vanderlip stated that she negotiated the business terms of the lease with the landlord. Without a TI, Amplify would pay a lower rent. A higher TI would result in a higher rent. Amplify and Two Trees agreed that the TI allowance was \$70 per rental square foot (Exs. 39 & 40).

Vanderlip was shown the lease entered into with the landlord (Ex. 27). Under paragraph 45 of the lease, in the event the landlord did not perform its work, Amplify had the right to complete the landlord's work and obtain a setoff of rent. Additionally, paragraph 57 of the lease permitted the tenant to terminate the lease upon payment of a termination fee. The tenant would be required to pay the landlord "the costs associated with performing the Landlord's TI work ...."

The final witness to testify was Susan Feinstein, a principal of CCI. Feinstein testified that the Settlement Agreement had been breached. While Two Trees was not a client, the work done was for Amplify, who was a CCI client. Gerber and Evolve received an indirect payment from Amplify.

The Settlement Agreement is subject to the same rules governing a contract (Kleinberg v. Ambassador Associates, 103 AD2d 347 [1<sup>st</sup> Dept 1984]). To determine the meaning of a contract, a court looks to the intent of the parties as expressed by the language they chose to put into their writing (Ashwood Capital,

Inc. v. OTG Mgt., Inc., 99 AD3d 1 [1<sup>st</sup> Dept 2012]; Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v. Kvaerner a.s., 243 AD2d 1, 6 [1<sup>st</sup> Dept 1998]). The court examines the parties' obligations and intentions as manifested in the entire agreement and seeks to afford the language an interpretation that is sensible, practical, fair, and reasonable (Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 13 NY3d 398, 404 [2009]; Abiele Contr. v. New York City School Constr. Auth., 91 NY2d 1, 9-10 [1997]; Brown Bros. Elec. Contr. v. Beam Constr. Corp., 41 NY2d 397, 400 [1977]).

Here, it is undisputed that Two Trees is not a CCI client. However, the Court's inquiry does not end here. The Settlement Agreement defines Consideration as "the gross aggregate of anything of value received by Defendants from CCI Clients, whether by payment, credit, setoff or otherwise." Consideration is not limited to payments made by third parties based on collusion, as defendants suggest. Consideration is broadly defined to be more than payment for services.

Although payment was received from Two Trees, defendants received value from Amplify in the "or otherwise" category of Consideration. Amplify is a longtime client of CCI. Gerber was asked to provide consulting services for the

2016 build-out of Amplify's space because of CCI's prior relationship with Amplify. Gerber had provided cabling services to Amplify while employed by CCI. On January 19, 2016, Gerber – while still a CCI employee – agreed to handle the IT/AV design, drawings and implementation for Amplify's build-out through his newly formed company, Evolve. Gerber provided services for the build-out through January 28, 2016.

The Consideration or "value received" by Gerber from Amplify, a CCI client, is derived from the recommendation made by Soto that Evolve be retained to do the work (Ex. 6). This was done prior to Gerber's effective date of resignation from CCI. Thereafter, Buxbaum, JLL's project manager and Amplify's agent recommended that since Gerber prepared the cabling design plan, he should pull the cable (Ex. 14). Had Gerber remained employed by CCI, it is reasonable to infer that Amplify and JLL would have recommended that CCI be retained to perform the cabling work. In short, Evolve's contract with Two Trees was obtained based on the recommendation of a CCI client, Amplify, and constitutes Consideration as defined by the Settlement Agreement.

Furthermore, Gerber's contention that he did not receive the job until he submitted a bid is not credible. The project minutes for February 23, 2016 state

that Evolve had been hired to pull the IT cabling (Ex. 15, *supra*, at p. 7). Evolve was retained for the project well before a formal bid was submitted by Gerber on March 22, 2016.

Moreover, defendants warranted that since December 1, 2015, they “have not directly or indirectly received any consideration from CCI Clients other than the Consideration that is set forth in the documents attached ... and that the Consideration of \$207,812.06 detailed in Exhibit B, represents the total Consideration received by Defendants from CCI Clients from December 1, 2015, to July 1, 2016.” (Paragraph 4.b).

Contrary to the argument of defendants, the Two Trees contract falls squarely within the warranties and representation provision of the Settlement Agreement. The consideration to Gerber and Evolve is not derived from Amplify’s rent payments to the landlord. Rather, it arises from the build-out made on behalf of Amplify. The TI is an allocation of money by the landlord for the build-out. Certainly, the landlord was not making the improvements to Amplify’s space without an expectation of recouping the monies expended in the build-out.

While the lease does not make a specific allocation for the TI, the cost is taken into account in setting the rent. Price testified that TI has an impact on the

rent charged by the landlord. Vanderlip, who negotiated the business terms of the lease, confirmed that without a TI, Amplify would pay a lower rent. Conversely, a higher TI would cause Amplify to pay a higher rent. In fact, the landlord and tenant agreed to a \$70 per rentable square foot allowance of rent.

Amplify's indirect payment for the build-out is further established by the lease. Had the landlord breached its obligation to perform the build-out, Amplify had the right to complete the work and receive a setoff of rent. The rent factors in the landlord's costs for the build-out. Additionally, in the event Amplify terminates the lease, it is required to pay the landlord "the costs associated with performing the Landlord's TI work ...." (Ex. 27, paragraph 57 of the lease).

The record establishes that Amplify was paying for the build-out over time as a percentage of the rent. Two Trees' payment to Amplify for the cabling work performed in Amplify's space is a pass through or indirect consideration received by defendants from a CCI client. Therefore, defendants received indirect consideration or value from Amplify, a CCI Client.

The court rejects defendants' argument that CCI has buyer's remorse after entering the Settlement Agreement and failed to do adequate due diligence. Rather, plaintiff contracted for a representation from defendants with respect to

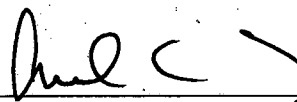
the consideration received from CCI clients. Gerber and Evolve breached the representations and warranties provision of the Settlement Agreement by failing to account for the full amount of monies received as a result of providing cabling services to Amplify for the 2016 build-out at 55 Washington Street, Brooklyn, New York.

For the reasons stated above, the Court holds that defendants breached the Settlement Agreement by not disclosing receipt of \$337,131.44 on the Amplify build-out.

The foregoing constitutes the decision and order of the court.

Date: June 8, 2017

New York, New York

  
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Anil C. Singh