

**PEG Bandwidth, LLC v Optical Communications  
Group, Inc.**

2018 NY Slip Op 30987(U)

May 22, 2018

Supreme Court, New York County

Docket Number: 154391/2015

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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PEG BANDWIDTH, LLC,

Plaintiff,

- v -

OPTICAL COMMUNICATIONS GROUP, INC.,

Defendant.

INDEX NO. 154391/2015

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76

were read on this application to/for SUMMARY JUDGMENT (AFTER JOINDER)

HON. SALIANN SCARPULLA:

In this breach of contract action, Plaintiff PEG Bandwidth, LLC (“PEG”) moves for summary judgment on its complaint. Defendant Optical Communications Group, Inc. (“OCG”) opposes the motion.

**Background**

PEG and OCG entered into a Master Service Agreement for the Provision of Dedicated Transport Services (“Agreement”) on October 23, 2013 (“Effective Date”), which sets forth the procedures and requirements for OCG to provide communication

Services<sup>1</sup> to PEG. The Agreement provides that it would terminate seven years after the Effective Date (“Termination Date”) and that it would automatically renewed for one-year terms (“Renewal Terms”) “unless terminated by thirty (30) days prior written notice by either Party or as otherwise provided in this Agreement.” Agreement ¶2.1.

Although the Agreement sets forth the procedures and requirements for OCG to provide communication Services to PEG, the “Agreement does not by itself order any Service. [PEG] shall order Service(s) by submitting a Service Order or Service Orders hereunder.” Agreement ¶4.1. “Unless otherwise mutually agreed by the Parties, each Service Order shall specify the type of Service ordered, quantity of circuits, origination and destination points, requested Installation Date, Circuit term, and price.” Agreement ¶4.2.

Once OCG received a Service Order, OCG

shall notify the [PEG] contact specified on the Service Order of any matters that are incomplete or inaccurate within two (2) business days. If [OCG] cannot meet [PEG’s] requested Installation Date, [OCG] shall provide in such notification a proposed alternate Installation Date. Upon receipt of a complete and accurate Service Order, [OCG] shall provide [PEG] a [Firm Offer Commitment (“FOC”)]<sup>2</sup> within three (3) business days.

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<sup>1</sup> “Service” is defined as “[OCG]-provided telecommunications service as set forth in the applicable Service Orders issued under this Agreement.” Agreement ¶1(w). “Service Order” is defined as “[a]n order for Service issued pursuant to this Agreement.” Agreement ¶1(y).

<sup>2</sup> A “Firm Order Commitment” is defined as “[OCG’s] response to [PEG’s] Service Order, confirming acceptance of the Service Order and commitment to install Services as specified therein.” Agreement ¶1(k).

Agreement ¶4.3 (footnote added). The Agreement further provides that PEG “*may cancel a Service Order* without liability if Notice of such cancellation is sent prior to [PEG’s] receipt of the FOC.” Agreement ¶4.5 (emphasis added).

If there is a material default<sup>3</sup> under the Agreement, the Agreement may be terminated by the non-defaulting party, prior to the Termination Date, after that party provides a written 30-day notice giving the defaulting party an opportunity to cure the default. Agreement ¶¶11.2 & 11.2.3.

In its complaint, PEG asserts that OCG agreed to install and provide Services to eleven separate locations for \$550,000, which PEG prepaid to OCG. PEG further asserts that it never received an FOC from OCG and that OCG failed to finish any of the installations within one year; as a result, by letter dated October 24, 2014 PEG cancelled the orders, terminated the Agreement, and demanded that OCG return the prepaid funds pursuant to Agreement ¶4.5.

Based on the foregoing, PEG commenced this action for breach of contract in May 2015 seeking a judgment against OCG for \$550,000 plus interest. PEG now moves for summary judgment on its complaint pursuant to CPLR 3212. In support of its motion for summary judgment, PEG submits, *inter alia*: the Agreement (Payne Aff. Ex. A, NYSCEF 44); a Purchase Order from PEG to OCG dated October 15, 2013, an invoice from OCG

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<sup>3</sup> The Agreement does not define “material default,” but it does provide that either PEG or OCG “will be in default under this Agreement if it becomes insolvent, liquidates, is adjudicated as bankrupt, makes an assignment for the benefit of creditors, invokes any provision of law for the relief of debtors or initiates any proceeding seeking protection from its creditors.” Agreement ¶ 11.1.

to PEG dated October 21, 2013, and a copy of a check for \$550,000 made payable to OCG and dated October 24, 2013 (Payne Aff. Ex. B, NYSCEF 45); and a letter to OCG terminating the purported Service Orders, dated October 24, 2014 (Payne Aff. Ex. D, NYSCEF 47). PEG argues that, under the terms of the Agreement, it was entitled to cancel the alleged Service Orders without liability because OCG never sent PEG an FOC.

In opposition, OCG argues that it did not breach the Agreement because PEG never issued a Service Order pursuant to the Agreement; because of this, PEG improperly terminated the Agreement under Agreement ¶4.5. PEG further argues that PEG would only be able to terminate the Agreement under ¶11.2 if OCG materially defaulted under the Agreement and after providing OCG thirty days to cure the default.

### Discussion

To prevail on a claim for breach of contract, a plaintiff must establish the “existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Where, as here, “a written agreement . . . is complete, clear and unambiguous on its fact[, it] must be enforced according the plain meaning of its terms.” *Beinstein v Navani*, 131 AD3d 401, 405 (1st Dept 2015) quoting *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002).

Upon a review of the papers submitted, PEG has failed to meet its *prima facie* burden of establishing its entitlement to summary judgment. Although it is undisputed that the parties entered into the Agreement, OCG argues that it never received a Service Order, and PEG has failed to submit the purported Service Orders upon which OCG’s

alleged breach is based.<sup>4</sup> See *Hussain v Try 3 Bldg. Services, Inc.*, 308 AD2d 371, 371–72 (1st Dept 2003); *Zurich Am. Ins. Co. v Argonaut Ins. Co.*, 204 AD2d 314, 315 (2d Dept 1994).

Throughout PEG’s motion papers, PEG refers to “Service Order” and “Agreement” interchangeably. It is unclear from PEG’s papers on this motion whether PEG is referring to an actual Service Order, which ¶4.2 of the Agreement states must “specify the type of Service ordered, quantity of circuits, origination and destination points, requested Installation Date, Circuit term, and price”; or whether it is PEG’s position that the Agreement constitutes a Service Order, even though the Agreement expressly and unambiguously provides that it “does not by itself order any Service.” Agreement ¶4.1.

Because PEG has not submitted Service Orders to OCG it has not shown as a matter of law that it complied with the terms of the Agreement. Issues of fact also exist as to the specific terms of the Service Orders, including the Installation Date – and whether OCG breached the Agreement. “Since the [PEG] failed to meet [its] initial burden, the sufficiency of [OCG’s] opposition papers do not need to be considered.” *Henning v 17 Murray Rest Corp.*, 137 AD3d 1216, 1217 (2d Dept 2016) citing *Winegrad*, 64 NY2d at 853; *Hussain v Try 3 Bldg. Services, Inc.*, 308 AD2d at 372 (1st Dept 2003) citing *Alvarez*, 68 N.Y.2d at 324.

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<sup>4</sup> While Nicholas Hoenemeyer, general counsel for OCG, testified that OCG received service orders from PEG (Smith Aff., Ex. C, NYSCEF 73), I cannot determine the terms of the orders and whether they constitute “Service Orders” under the Agreement because the orders were not produced in this litigation.

Finally, PEG argues that, because OCG failed to respond to its statement of material facts, the entirety of PEG's statement must be admitted. However, "[w]hile the rule gives a motion court the discretion to deem facts admitted, the court is not required to do so." *Abreu v Barkin and Assoc. Realty, Inc.*, 69 AD3d 420, 421 (1st Dept 2010) ("There was sufficient evidence in the record to raise triable issues of fact and the court was not compelled to grant summary judgment solely on the basis of blind adherence to the procedure set forth in Rule 19-a."); see generally *Moonstone Judge, LLC v Shainwald*, 38 AD3d 215, 216 (1st Dept 2007).

Even though OCG did not formally respond to PEG's Statement of Material Facts, much of which consists of PEG's disputed interpretation of the Agreement, the nature of OCG's argument is such that the statements are not admitted as true. Accordingly, I deny PEG's motion for summary judgment.

In accordance with the foregoing it is

ORDERED that Plaintiff PEG Bandwidth, LLC's motion for summary judgment is denied; and it is further

ORDERED that the parties are directed to appear for trial at 60 Centre Street, Room 2018 on May 31, 2018 at 9:30am.

This constitutes the decision and order of the Court.

5/22/18  
DATE

  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: