

**Manhattan Telecom. Corp. v Kraft Power Corp.**

2020 NY Slip Op 31144(U)

May 5, 2020

Supreme Court, New York County

Docket Number: 153826/2019

Judge: Kathryn E. Freed

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

<p><b>PRESENT:</b> <u>HON. KATHRYN E. FREED</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>MANHATTAN TELECOMMUNICATIONS CORPORATION</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>KRAFT POWER CORPORATION,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p><b>PART</b></p>	<p><b>IAS MOTION 2EFM</b></p> <p><b>INDEX NO.</b> <u>153826/2019</u></p> <p><b>MOTION DATE</b> <u>02/15/2020,</u> <u>02/15/2020</u></p> <p><b>MOTION SEQ. NO.</b> <u>001 002</u></p> <p style="text-align: center;"><b>DECISION + ORDER ON MOTION</b></p>
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 39, 47, 48, 49, 50, 51, 52, 53, 54 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 40 were read on this motion to/for STAY.

In this action, plaintiff Manhattan Telecommunications Corporation (MTC) seeks to recover sums that are allegedly owed to it, from January 2019 to April 2019, by defendant Kraft Power Corporation (KPC). The complaint (NYSCEF Doc. No. 1) alleges that, pursuant to an agreement between MTC and KPC, defendant owed plaintiff \$51,598.48 (plus interest and attorneys' fees) for services rendered but unpaid. By the instant motion (sequence number 001; NYSCEF Doc. No. 14), defendant seeks an order dismissing plaintiff's complaint pursuant to CPLR 3211 (a) (1) and (a) (7). In a separate motion (sequence number 002; NYSCEF Doc. No. 36), apparently filed in response to plaintiff's demand for discovery (NYSCEF Doc.

No. 8), defendant seeks to stay disclosure or for a protective order. For the reasons stated herein, the relief requested in motion sequence number 001 is granted in favor of defendant, which renders the relief requested in motion sequence number 002 moot or academic.

### **Factual and Procedural Background**

Plaintiff's complaint, less than five pages, alleges causes of action sounding in breach of contract, account stated and for attorneys' fees. In response to the complaint, defendant filed an answer, asserting various affirmative defenses and counterclaims (NYSCEF Doc. No. 5). In turn, plaintiff filed a reply to the counterclaims asserted in defendant's answer (NYSCEF Doc. No. 7). After defendant filed its motion for a stay or protective order, plaintiff sought an order to show cause (motion sequence number 003; NYSCEF Doc. 41) adjourning the return dates for defendant's motions to dismiss and for a protective order, and extending plaintiff's time to respond to the motion to dismiss. Pursuant to a so-ordered stipulation between the parties, this Court granted the relief requested in motion sequence number 003 (NYSCEF Doc. Nos. 45-46). Because the stipulation did not provide plaintiff with an extension of time to respond to defendant's motion for a protective order, and plaintiff did not file any opposition thereto, this Court deems the motion to be unopposed.

Notably, the complaint contains only a scant description of the facts giving rise to the claim. Hence, the statements below are derived primarily from the filed affidavit of Angela Champigny, KPC's controller, in support of defendant's motion to dismiss (Champigny Aff.; NYSCEF Doc. No. 16). These statements are generally undisputed, unless otherwise indicated herein.

On October 23, 2012, MTC and KPC entered into a Master Services Agreement (Agreement) for the provision of telecommunication services (Champigny Aff., ¶ 4). By early 2017, KPC was dissatisfied with MTC's performance and KPC began to solicit proposals from multiple service providers, including MTC (*id.*, ¶¶ 5-6). During the course of the negotiations, MTC eventually offered a proposal which was more attractive than its competitors and, as a result, KPC was induced to remain in contract with MTC (*id.*, ¶¶ 7-10). MTC's proposal was memorialized in an amendment to the Agreement in September 2017 (the 2017 Amendment), which was signed and accepted by KPC and returned to MTC (*id.*, ¶¶ 11-13). After the time-frame for KPC to terminate the Agreement in 2017 had passed, MTC's representatives delayed in countersigning the 2017 Amendment, and in November 2017, MTC's representatives admitted that they did not intend to perform in accordance with the pricing and technical specifications contained in the 2017 Amendment (*id.*, ¶¶ 14-20).

By July 2018, KPC was determined to terminate the Agreement and, thus, in a letter dated July 16, 2018, Champigny wrote to MTC stating KPC's intention to terminate the Agreement, pursuant to paragraph two therein (which requires 90 days prior notice), effective with the expiration of its then-current term on October 22, 2018 (*id.*, ¶¶ 21-23; Termination Notice; NYSCEF Doc. No. 19). FedEx records reflect that the Termination Notice was received by MTC on July 18, 2018, which was 96 days before the expiration date of the Agreement (NYSCEF Doc. No. 20).

In the ensuing months, through various other communications, including via e-mails, to the representatives of MTC, KPC repeatedly stated its position that the Agreement had been terminated, and restated its desire to disconnect all telecommunication services (Champigny Aff., ¶¶ 24, 27-35 and exhibit D thereto; NYSCEF Doc. No. 21 [reflecting e-mail exchanges between KPC and MTC in November and December 2018]). Despite the Termination Notice provided to MTC and its acknowledgment of same, MTC continued to send invoices to KPC after the Agreement was terminated on October 22, 2018, which invoices were objected to by KPC on a timely basis after receipt (*id.*, ¶¶ 25-26). For example, on November 2, 2018, Champigny e-mailed Barberie Hodge, a portfolio analysis at MTC, stating: "I do want to bring your attention to the latest November billing. Why is that for a full month? We disconnected all [services] by end of month October." (*id.*, ¶ 27; exhibit D). In reply, Hodge wrote: "Don't pay the November invoice right now.

The circuits are in the process of being disconnected. Once we have a final invoice, we'll review the November charges" (*id.*, ¶ 28; exhibit D).

Thereafter, in an e-mail dated December 4, 2018, Hodge wrote: "Please find the December invoice attached. All of the circuits on the disconnect requests have been disconnected from billing" (*id.*, ¶ 29; exhibit D). In reply, Champigny stated: "We are totally confused. We contacted you by letter [Termination Notice] that we were cancelling the services. Also, discussed in the email in this chain to NOT PAY the November billing as the disconnects were being accomplished . . . What is it that we are paying?" (*id.*, ¶ 30; exhibit D). On December 10, 2018, Champigny again wrote: "We need to get this settled. We are now receiving final disconnect notices. We want everything disconnected on the timeline which we had sent in our letter [Termination Notice]. What do we need to do to get this squared away?" (*id.*, ¶ 32; exhibit D). On the same day, Jonathan Sarofeen, a MTC manager, responded: "Do you want me to proceed with disconnecting all voice services, your entire inventory? I can date this back to 10/23 and include this in the credit amount" (*id.*, ¶ 33; exhibit D). After Champigny confirmed that KPC wanted MTC to disconnect all services, as she had made clear on numerous prior occasions, MTC continued to send invoices that never reflected the credit indicated in Sarofeen's e-mail (*id.*, ¶¶ 34-35; exhibit D).

Thereafter, in a letter dated January 29, 2019 addressed to Joseph Farano, MTC's general counsel, Champigny described how KPC had "continued to receive bills, including late charges and even dunning notices," even though KPC had provided MTC the Termination Notice at least 90 days prior to the expiration date of the Agreement (*id.*, ¶ 36, referencing exhibit E; NYSCEF Doc. No. 22). Farano did not respond to the letter, while FedEx records reflect that it was received by MTC on February 1, 2019 (*id.*, ¶ 37; exhibit F; NYSCEF Doc. No. 23). KPC continued to receive bills from MTC, including the one dated April 1, 2019 that simply restated the amounts allegedly overdue from January 2019 to March 2019 (a copy of which was attached as exhibit A to the complaint), and KPC timely objected to the April bill (*id.*, ¶¶ 38-39). Prior to the expiration date of the Agreement, KPC had switched to its new internet service provider, New Horizon Communications, on July 1, 2018, and to its new phone service provider, Mitel, on September 2018, as KPC did not intend to use MTC after October 22, 2018 (*id.*, ¶¶ 40-41; referencing first invoices of new service providers which reflect services rendered by them in August 2018 and September 2018; NYSCEF Doc. Nos. 34 and 35).

After the commencement of this action by MTC on April 12, 2019, KPC wrote a letter to MTC's counsel on April 19, 2019, stating, in relevant part, that after months of effort on the part of KPC to "straighten out" MTC's "self-inflicted errors," it was KPC's hope that after MTC's filing of the complaint, MTC might "actually

get someone in [its billing office] to pay attention to the fact that the contract between [MTC] and KPC was terminated in accordance with its terms long before [MTC's] attempt to assess the charges described in the Complaint" (NYSCEF Doc. No. 24; exhibit G; referencing April 19, 2019 letter from KPC's counsel to MTC's counsel).

### **Legal Conclusions**

Pursuant to motion sequence number 001, defendant seeks to dismiss the complaint and the causes of action therein under CPLR 3211 (a) (1) and (a) (7). In considering a CPLR 3211 (a) (7) motion to dismiss, the court is to determine whether the pleading states a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Richbell Info. Servs., Inc. v Jupiter Partners*, 309 AD2d 288, 289 [1st Dept 2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]). The pleadings are afforded a liberal construction, and the courts are to "accord plaintiffs the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see also *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]). While factual allegations are given a favorable inference, bare legal conclusions and inherently incredible facts in the pleadings are not entitled to preferential treatment (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

On the other hand, if the movant seeks dismissal pursuant to CPLR 3211 (a) (1) and offers evidentiary or documentary material, the court must determine whether the complaint has a cause of action, not whether it has stated one (*Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 [2d Dept 2005]). When a complaint's allegations consist of bare legal conclusions and "documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable inference is rebutted" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 [1st Dept 2001]).

In support of its motion to dismiss, defendant relies extensively on Champigny's affidavit and the annexed exhibits, as well as the memorandum of law filed in connection therewith (Def. Brief; NYSCEF Doc. No. 15). In particular, defendant highlights the following documentary evidence to support the dismissal pursuant to CPLR 3211 (a) (1) and (a) (7): the Termination Notice annexed as exhibit B (provided to MTC 96 days before the Agreement's expiration date, which required 90 days of prior notice under paragraph 2 thereof); the e-mail exchanges between the parties annexed as exhibit D (showing, among other things, KPC's confusion about its continued receipt of invoices from MTC after the Agreement had been timely terminated); the January 29, 2019 letter from Champigny to MTC's counsel annexed as exhibit E (explaining that KPC had terminated the Agreement but continued to receive invoices); and the April 19, 2019 letter from KPC's counsel to

MTC's counsel after plaintiff's commencement of this action, annexed as exhibit G (showing KPC's consistent assertion that the Agreement had ended in October 2018 and hoping to resolve this action without further litigation) (Def. Brief at 8).

With respect to the breach of contract claim, defendant argues that the Agreement was duly terminated pursuant to the Termination Notice; that KPC stopped using MTC's services after October 22, 2018, as reflected by KPC's retention of new service providers prior to the termination date and the new providers' invoices for new services; and that the breach of contract claim is without merit because it seeks to recover sums after the Agreement had been terminated (Def. Brief at 8-13). As to the account stated claim, defendant argues that the alleged invoices for post-termination services were a "legal nullity" after the Agreement had expired, and that such invoices were timely objected to by KPC (*id.*, at 13-14). Defendant argues that the claim for attorneys' fees must be dismissed because plaintiff cannot prevail on its other claims against defendant. (*id.*, at 14-15). Based on the foregoing, defendant seeks dismissal of the complaint and the causes of action asserted therein in, with prejudice (*id.*, at 15).

Importantly, plaintiff neither disputes the statements in Champigny's affidavit nor addresses the exhibits annexed thereto. Instead, in opposing the motion to dismiss, plaintiff raises, for the first time after the filing of its complaint, the contention that there are other agreements between the parties that do not support

dismissal of the complaint, as explained in the affirmation of its counsel in opposition (Plf. Opp.; NYSCEF Doc. No. 47), and the affidavit of its portfolio analyst, Barberie Hodge, and the exhibits annexed thereto (Hodge Aff.; NYSCEF Doc. Nos. 48-53). Specifically, plaintiff contends that, in addition to the Agreement executed in 2012 that was for “T1 telephone lines” (redefined by plaintiff as 2012 MSA; NYSCEF Doc. No. 49), there is a prior agreement between the parties in 2010 for plain old telephone lines code-named “POTs” (2010 MSA; NYSCEF Doc. No. 51), as well as the 2017 Amendment to the 2012 MSA (Plf. Opp., ¶¶ 3-6; referencing exhibits to the Hodge affidavit). Plaintiff then points to paragraph 4 in the 2010 MSA and the 2012 MSA, which provides that, if KPC discontinues MTC services before the “Initial Service Term or Additional Service Term,” KPC is liable to MTC for termination charges equal to the monthly charges for those discontinued services multiplied by the number of months remaining in the term, plus any charges MTC may incur from third parties because of KPC’s early termination, and that MTC is entitled to recover attorneys’ fees and other collection costs incurred with respect to the KPC account (Plf. Opp., ¶ 7; referencing paragraph 4 of the MSAs).

Plaintiff also contends that, under the 2012 MSA, the “T1 Initial Service Term was for 36 months” and “renewing or terminating” in October 2020, and that under the 2017 Amendment, the “T1 lines provided by Plaintiff to Defendant were still under the Initial 36-month service term when Defendant sent the July 16, 2018

termination letter” (*id.*, ¶¶ 8-9; referencing Hodge Aff., ¶ 12). Plaintiff further contends that, under the 2010 MSA, “the service term for POTs lines provided by Plaintiff to Defendant had already automatically renewed for an additional year when Defendant’s July 16, 2018 letter was received” (*id.*, ¶¶ 10-11; referencing Hodge Aff., ¶¶ 10, 14). Plaintiff contends that “Defendant owes Plaintiff the sum of \$48,192.83 for early termination charges and usage charges” (*id.*, ¶ 12; referencing Hodge Aff., ¶¶ 11, 16-17). In sum, plaintiff contends that, pursuant to the 2010 MSA, the 2012 MSA and the 2017 Amendment, these documents “irrefutably show that Defendant was still under two separate contract terms” when it requested all MTC services be terminated in accordance with the Termination Notice (*id.*, ¶¶ 13, 17). Accordingly, plaintiff asserts that the complaint states all three causes of action, and this Court is required to “liberally construe” the complaint and “accept the alleged facts” therein as true (*id.*, ¶¶ 18-20).

In its reply brief in further support of the motion to dismiss (Def. Reply; NYSCEF Doc. No. 54), defendant points to the fact that the additional agreements mentioned in plaintiff’s opposition papers were not referred to in the complaint, and argues that plaintiff’s “eleventh hour attempts to muddy the waters” warrant dismissal of the complaint with prejudice, in light of the undisputed documentary evidence submitted by defendant (Def. Reply at 1). More specifically, defendant argues that plaintiff’s allegation that the Termination Notice was ineffective because

a new, three-year initial term was triggered by the 2017 Amendment, is “frivolous” (*id.*). Defendant explains that “**the parties never entered into the Draft 2017 Amendment. Despite KPC’s demands that it do so, [MTC] refused to sign it**” (*id.*; emphasis in original). Defendant’s explanation is reinforced by the absence of MTC’s countersignature on the 2017 Amendment, a copy of which is annexed as an exhibit to the Hodge affidavit (NYSCEF Doc. No. 50), and is also reflected in defendant’s filed answer with counterclaims (NYSCEF Doc. No. 5, ¶ 16 [describing MTC’s refusal to sign the 2017 Amendment after KPC’s window for termination of the Agreement in 2017 had passed]). Defendant’s argument is meritorious because “the Statute of Frauds [for an unsigned document] bars the argument that the Draft 2017 Amendment, with a 3-year initial term, may have been ratified by the parties” (Def. Reply at 1-3; citing cases).

Defendant also argues that the 2012 MSA superseded the 2010 MSA, which is diametrically contrary to plaintiff’s allegation that 2010 MSA survived the 2012 MSA (Def. Reply at 2, 4). Plaintiff’s allegation has no merit, because the 2012 MSA contains an “integration clause” in paragraph 12 thereof which states, in relevant part: “This Agreement . . . constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other . . . agreements that are not expressed herein, whether oral or written” (*id.*, quoting ¶ 12). Defendant further argues that the 2012 MSA “does not incorporate the 2010 MSA by reference,” and

MTC should not be permitted to conduct discovery on its “frivolous” argument that there was a “second agreement which existed parallel to the 2012 MSA” (*id.* at 4). Defendant’s argument is convincing, particularly in light of the integration clause in the 2012 MSA, which states that it supersedes all other agreements, whether oral or written.

Finally, defendant asserts that plaintiff should not be afforded an opportunity to amend the complaint because, among other things, the complaint does not mention the 2010 MSA, nor does it refer to the 2017 Amendment or the purported 2020 expiration date under the alleged term (*id.*, at 6). Defendant also points out that plaintiff has failed to cross-move to amend the complaint, and should not be permitted to do so now because the documentary evidence establishes that “neither the 2010 MSA nor the Draft 2017 Amendment were valid or enforceable contracts” (*id.*, at 6-7). Defendant asserts that any amendment of the complaint “would cause prejudice and/or surprise to KPC,” and, therefore, the complaint and the causes of action therein should be dismissed with prejudice (*id.*, at 7). Defendant’s assertions are persuasive, in light of the totality of the circumstances described herein.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant’s motion seeking dismissal of plaintiff’s complaint (motion sequence number 001) is granted and the causes of action therein are

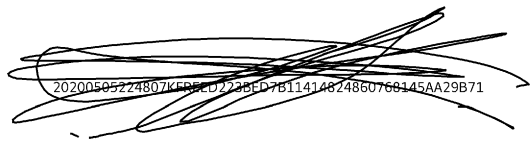
dismissed with prejudice, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant and closing this matter; and it is further

ORDERED that defendant's motion seeking a stay or protective order (motion sequence number 002) is deemed moot and academic, in light of the relief granted in favor of defendant with respect to motion sequence number 001; and it is further

ORDERED that, within 10 days after entry of this order, defendant shall serve the same, with notice of entry, on all parties; and it is further

ORDERED that this constitutes the decision and order of the court.

5/5/2020  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE