Syndigate Media, Inc. v Comtex News Network, Inc.
2022 NY Slip Op 30249(U)
January 23, 2022
Supreme Court, New York County
Docket Number: Index No. 654818/2018
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA CRANE** **PART** **60M**

Justice

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INDEX NO. 654818/2018

SYNDIGATE MEDIA, INC.,AL-BAWABA MIDDLE EAST, LTD.

MOTION DATE 05/07/2021, 05/07/2021

Plaintiff,

MOTION SEQ. NO. 002 004

- v -

COMTEX NEWS NETWORK, INC.,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 106, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 201, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 334, 335, 336, 337, 338, 339, 340, 341, 342

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

On motion sequence 002, plaintiffs Syndigate Media, Inc. and Al-Bawaba Middle East, Ltd. move for summary judgment on their breach of contract claims against defendant Comtex News Network, Inc. Plaintiffs further move for summary judgment against defendant's counterclaim for breach of contract. On motion sequence 004, defendant Comtex News Network, Inc. moves for summary judgment dismissing plaintiffs' claims against defendant. For the following reasons, plaintiff's motion is granted and defendant's motion is denied.

BACKGROUND

The following facts are from the parties' statements of material facts (Pl. Fact Statement [NYSCEF Doc. No. 87]; Def. Fact Statement [NYSCEF Doc. No. 96] [together, "Party Fact Statements"]). Plaintiff Syndigate Media, Inc. ("Syndigate") is a content aggregator (Party Fact Statements ¶¶ 1-3). Defendant Comtex News Network Inc. ("Comtex") is a news aggregator that receives content from sources like Syndigate and Al-Bawaba (Party Fact Statements ¶ 4). Comtex redistributes content it receives to its customers who pay it fees and, in turn, Comtex pays royalties to its content providers (Party Fact Statements ¶¶ 5-6). Effective July 30, 2014, Syndigate and Comtex entered into an Information Provider Agreement (the "Agreement"), pursuant to which Syndigate granted Comtex "a worldwide, non-exclusive license and right to use, market, distribute, sell and transmit the Information to Users." The Agreement defines "Users" as "all parties to whom Comtex directly or indirectly licenses, sells, transfers, makes available or otherwise distributes the Content" (Party Fact Statements ¶ 7; Saunt Aff., Ex. 1 §§ 1-2 [the "Syndigate Agreement"] [NYSCEF Doc. No. 83]). Section 5(b) of the Syndigate Agreement established that "Royalties will be paid to Provider according to the terms in Exhibit B" (Party Fact Statements ¶ 8; Agreement § 5(b)). Exhibit B to the Syndigate Agreement provided a Royalty calculation that determines what Comtex will pay to Syndigate monthly for providing customers with content from Syndigate sources (Syndigate Agreement, Exhibit B). Comtex provided this content to its customers through "CustomWires," a selection of content at Comtex's sole discretion from various news sources, at times including Syndigate (*id.*). Section 5(a) of the Syndigate Agreement provided that Comtex would provide Syndigate with a report "listing the Comtex customers who receive the Content" monthly (*id.* § 5(a)).

The Syndigate Agreement also granted Syndigate the right to inspect and audit Comtex's "relevant" books and records to ascertain whether Syndigate had received the correct amount of

royalties. The audit was generally at Syndigate's expense (Part Fact Statements ¶ 12; Agreement, Section § 5(c)). However, the audit provision also contained a provision to shift fees onto Comtex if the audit revealed an error of 10% or more (Syndigate Agreement, § 5(c)). Plaintiffs allege that Comtex provided Syndigate news stories to Boeing Intelligence and Analytics and affiliated companies Kestrel and Skarven (collectively, "Boeing") between August 2014 and June 2017 without reporting or paying royalties to Syndigate. It is undisputed that Comtex' monthly reports identifying customers who received Syndigate or Al-Bawaba content did not name Boeing (*id.* ¶ 25).

In 2017 and 2018, Syndigate attempted to audit defendant's books and records through its accounting firm, Cohn Reznick, to determine whether Syndigate received proper royalties (*id.* ¶ 26). Plaintiffs allege that defendant hid that Boeing was receiving Syndigate content during these audits (*id.* ¶ 27).

Prior to the Syndigate Agreement, plaintiff Al-Bawaba, an affiliate of Syndigate, provided content to Comtex via an Information Provider Agreement (*id.* ¶¶ 29, 31; Saunt Aff., Ex. 2 [the "Al-Bawaba Agreement"] [Doc. No. 84]). Like the Syndigate Agreement, the Al-Bawaba Agreement contained terms establishing royalty rates that defendant committed to pay Al-Bawaba in exchange for using its content (Party Fact Statements ¶ 32). The Al-Bawaba Agreement provided that, on a quarterly basis, defendant was required to provided Al-Bawaba with a report listing third parties to whom defendant has distributed Al-Bawaba content (*id.* ¶ 38; Al-Bawaba Agreement § 5(a)).

Plaintiffs allege, as with the Syndigate Agreement, Comtex did not report to Al-Bawaba that Boeing was accessing its content. Nor did Comtex pay Al-Bawaba royalty fees that Boeing

paid to defendant (*id.* ¶¶ 34-36, 39). Plaintiffs claim that Comtex's documents show that Boeing paid Comtex $373,381.00 during the September 2012 through July 2014 time period.

DISCUSSION

Plaintiffs seek summary judgment against defendant as to the two breach of contract claims in the amended complaint: (i) breach of the Syndigate Agreement, sections 5(a), (b), and (c), and (ii) breach of the Al-Bawaba Agreement, sections 5(a) and (b) (Amended Compl. ¶¶ 26-35 [Doc. No. 5]). Plaintiffs further seek summary judgment to dismiss defendant's counterclaim for breach of contract against plaintiffs (Amended Answer, Counterclaim ¶¶ 1-9 [Doc. No. 7]). At oral argument, the court rejected Comtex's assertion that plaintiffs' claims are barred by the statute of limitations. Consequently, this order addresses only the substance of the motion for summary judgment on breach of contract.

A. Syndigate's Breach of Contract Claim

Plaintiffs argue that defendant breached the Syndigate Agreement by failing to: (i) pay royalties due to Syndigate (Syndigate Agreement, § 5(b); *id.*, Exhibit B), (ii) provide Syndigate with the required lists of Comtex customers receiving Syndigate content (*id.*, § 5(a)), and (iii) permit Syndigate's audit of Comtex's books and records (*id.* § 5(c); Pl. Br. at 11 [NYSCEF Doc. No. 86]). Defendant opposes, arguing that: (i) plaintiffs rely on "unauthenticated" and "inadmissible" evidence, (ii) no royalties are due as Boeing was merely "trialing" plaintiffs' content for nearly five years, (iii) it is impossible to prove that plaintiffs' content was shown to particular customers, and (iv) plaintiff has not provided proof that requires cost-shifting under the audit provision.

Section 5(a) of the Syndigate Agreement states that, "on a monthly basis, Comtex will provide [Syndigate] a report, in a format to be mutually agreed upon by the parties, listing the

Comtex customers who receive the Content which includes the Information" (Syndigate Agreement § 5(a)). Section 5(b) states that "[r]oyalties will be paid to [Syndigate] according to the terms in Exhibit B" (Syndigate Agreement § 5(b)). Exhibit B to the Syndigate Agreement outlines a Royalty Calculation that defendant is obligated to pay plaintiff Syndigate monthly for "CustomWires" sold containing Syndigate content (*id.*, Exhibit B).

Plaintiffs have produced evidence showing that Comtex provided Syndigate content to non-party Boeing. This evidence includes: (i) spreadsheets showing that Boeing accessed Syndigate content was accessed (Gordon Aff., Exs. B & C [Doc. Nos. 74-75]), (ii) emails between defendant's employees indicating that Boeing received Al-Bawaba/Syndigate content in both May 2016 and July 2017 (Gordon Aff., Exs. E, F [Doc. Nos. 77-78]), and (iii) an email between defendant's Controller and Boeing from 2013 indicating that Boeing received plaintiff's content (*id.*, Ex. F). In response, defendant argues in its opposition that the spreadsheets are not admissible because the "reliability of the 'evidence' has not been established." However, the spreadsheets derive from Contex's own production (Def. Opp. At 6-7 [Doc. No. 97]). Comtex's opposition does not appear to refute, or even address, the emails establishing Comtex was aware that Boeing was receiving plaintiffs' content.

At oral argument, defendant's counsel conceded that Boeing received plaintiffs' content, but argues that because Comtex never charged Boeing for this content, it is impossible to calculate royalty damages (Second Transcript, at 3-6 [NYSCEF Doc. No. 343]).

Comtex's failure to collect money from Boeing for plaintiff's content does not mean that Comtex is not liable. Section 5(a) of the Syndigate Agreement required Comtex to provide Syndigate with a report listing customers who received Syndigate's content. It is undisputed that Comtex never listed Boeing as a customer despite receiving Syndigate's custom content as the

Agreement required it to do. Finally, it is undisputed that Comtex did not pay plaintiff royalties for Boeing's access to Syndigate content. That Boeing was accessing Syndigate's content on an unapproved extended "trial" basis is immaterial. At oral argument, defense counsel conceded that content trials are to be limited to thirty days. Here, the content trial lasted five years (Second Transcript, at 4-5). Consequently, plaintiffs' motion for summary judgment is granted as to breach of the Syndigate Agreement Sections 5(a) and (b), and defendant's motion is denied.

Section 5(c) of the Syndigate Agreement states that

> "[Syndigate] or its representative may, during business hours and upon reasonable notice, inspect and audit the relevant books and records of Comtex annually for the sole purpose of verifying information and payments to be provided under this Agreement. Such inspection and audit will be at the sole expense of [Syndigate] unless the audit shows an error of ten percent (10%) or more in the calculation of fees in Comtex's favor, in which case Comtex will bear the expense of such inspection and audit. Any deficiency in the payment of fees discovered by [Syndigate's] audit will be provided by Comtex to [Syndigate] within sixty (60) days of [Syndigate] notifying Comtex of such deficiency"

(Syndigate Agreement § 5 [c]).

Plaintiffs allege that Comtex owes Syndigate $142,253.46 related to Boeing's access of its content, accounting for "approximately 45% more than the $97,599.00" than what Comtex has paid to Syndigate (Saunt Aff. ¶¶ 8, 16 [Doc. No. 82]). In response, defendant argues it is impossible to calculate damages under section 5 (c) because plaintiffs produced no discovery to prove its audit costs and, instead, relies only on the cost from Mark Saunt, Syndigate's Director of Content Sales & Licensing (Saunt Aff., ¶ 1), who had limited knowledge of the audit when deposed (Def. Br. at 10-11; Saunt Tr., at 98-100, 102, 106-109 [Doc. No. 329]).

Plaintiffs have established that Comtex failed to include Boeing as a customer both in its monthly reports and in its report given to Cohn Reznick. Further, defense counsel conceded at oral argument that content trials are limited to thirty days, but Boeing had access to Syndigate

(and Al-Bawaba) content through Comtex for fifty-seven months. Whether Comtex gave Boeing the content on a trial basis or by accident does not change the fact that Boeing was never officially reported to Syndigate. The parties' submissions demonstrate that Comtex was aware that Boeing was accessing Syndigate content but failed to provide a sufficient report to Syndigate or Cohn Reznick to notice or cure the deficiency. However, plaintiffs have not established *prima facie* that it sustained any damages as a result of Comtex's breach of the audit provision of the Syndigate Agreement. Plaintiff has not established the amount of royalties it was owed or the degree to which Comtex underpaid it for Boeing's use of plaintiffs' content. Thus, Syndigate has not demonstrated *prima facie* that it is entitled to cost-shifting under section 5 (c). Accordingly, plaintiffs' motion for summary judgment is denied as to Comtex's alleged breach of section 5 (c) of the Syndigate Agreement, subject to further development of the record at inquest.

B. Al-Bawaba's Breach of Contract Claim

Plaintiffs argue that defendant breached the Al-Bawaba Agreement by failing to (i) pay royalties to Al-Bawaba (Al-Bawaba Agreement, § 5(b); *id.*, Exhibit B), and (ii) provide Al-Bawaba with the required lists of Comtex customers receiving Al-Bawaba content (*id.*, § 5(a)) (Pl. Br. at 18). Defendant opposes on the same basis as the Syndigate Agreement.

Section 5(a) of the Al-Bawaba Agreement states "On a quarterly basis, Comtex shall provide a report, in a format to be agreed to by the parties, listing the Comtex customers who receive [content from Al-Bawaba]" (Al-Bawaba Agreement, § 5(a)). Section 5(b) of the Al-Bawaba Agreement states "[r]oyalties shall be paid to [Al-Bawaba] according to the terms in Exhibit B attached hereto" (*id.*, § 5(b)). Like the Syndigate Agreement, Exhibit B to the Al-Bawaba Agreement provides a Royalty Calculation that defendant was obligated to pay Al-Bawaba monthly for "CustomWires" sold containing Al-Bawaba content (*id.*, Exhibit B).

Plaintiffs have provided evidence showing that defendant provided Al-Bawaba content to non-party Boeing, including: (i) the contract between Comtex and Boeing, showing the content Boeing would be receiving including the Community, International, and Wall Street wires (Gordon Aff., Ex. D at DEF 103, 106, 109, 117 [Doc. No. 76]), (ii) Ms. Rollins' testimony that Al-Bawaba's content was included in the Community and International wires (Rollins Tr. at 188) (iii) spreadsheets showing that Al-Bawaba content was accessed by Boeing (Gordon Aff., Exs. B & C), and (iv) an email between defendant's Controller and Boeing from 2013 indicating that Boeing was receiving plaintiff's content (Gordon Aff., Ex. F). As above, defendant argues that the reliability of the spreadsheets has not been established and that it received no royalties from Boeing. Defendant further argues that the testimony of Ms. Rollins, that plaintiffs proffer on this point, is "misleading" as her testimony was based on only a one-month sampling of the spreadsheets (Def. Br. at 12-13; Rollins Tr. At 128, 186-187). Defendant also argues that plaintiffs did not ask Ms. Rollins whether Al-Bawaba's content was included in the Wall Street wire. Defendant does not address the inclusion of Al-Bawaba content on the Community wire and, again, does not address the emails establishing that Boeing was receiving plaintiffs' content.

It is undisputed that Section 5(a) of the Al-Bawaba Agreement required Comtex to provide Al-Bawaba with a report listing customers who received Al-Bawaba's content. It is further undisputed that Boeing was never listed as a customer despite receiving Al-Bawaba content. Finally, it is undisputed that defendant did not pay plaintiff royalties for Boeing's access to Al-Bawaba content. Defendant's arguments here are, once again, unavailing. A read through of each spreadsheet provided under Exhibit C of the Gordon Affirmation shows that Boeing accessed the Community, International, and Wall Street wires consistently throughout the relevant period (Gordon Aff., Ex. C). Even if defendant is correct in arguing Al-Bawaba's

content was not included in the Wall Street tab (which the court is not making a finding on), it is undisputed that Al-Bawaba's content was dispersed through the Community and International wires and it cannot be disputed that Boeing had access to this content between September 2012 and July 2014. As above, the fact that Boeing may not have paid defendant for access to Al-Bawaba's content is not a defense against liability. Consequently, plaintiffs' motion for summary judgment is granted as to breach of the Al-Bawaba Agreement Sections 5(a) and (b), and defendant's motion is denied. This judgment, however, is again limited to liability with a hearing on damages to follow, as defendant correctly notes that the spreadsheets plaintiffs proffered have not been authenticated for the purposes of calculating damages (Def. Br. at 8-9; *Commissioners of State Ins. Fund. v Albany Capitaland Enterprises, Inc.*, 18 AD3d 934, 935-936 [3d Dept 2005]; *see also Moon 170 Mercer, Inc. v Vella*, 45 NYS3d 415, 418 [1st Dept 2017]).

C. Comtex's Breach of Contract Counterclaim

Defendant asserts in its counterclaim that it paid plaintiffs approximately $40,000 more than it owes plaintiffs. Plaintiff moves in motion sequence 002 to dismiss this counterclaim and defendant moves in motion sequence 004 for summary judgment on its counterclaim. Both motions are denied with regard to defendant's counterclaim. None of the parties submit evidence to establish *prima facie* entitlement to summary judgment either dismissing or granting these motions with respect to the counterclaim.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment (MS 02) against defendant Comtex News Network, Inc. is granted in part as to Comtex's liability only for plaintiffs' breach of contract claims (the first and second causes of action) as they relate to sections 5 (a) and 5 (b) of the Syndigate Agreement and Al-Bawaba Agreement. Plaintiffs' motion is denied with respect

to the first cause of action to the extent that it alleges breach of section 5 (c) of the Syndigate Agreement; and it is further

ORDERED that plaintiffs' motion is denied as to the request to dismiss defendant's counterclaim for breach of contract; and it is further

ORDERED that the court awards plaintiff judgment against the defendants as to liability only for breach of sections 5 (a) and 5 (b) of the Syndigate and Al-Bawaba Agreements; and it is further

ORDERED that an inquest to assess damages against defendant Comtex New Network, Inc. will be conducted. To that end, the parties will appear for a pretrial conference on March 23, 2022 at 2:15 p.m.

ORDERED that defendant's motion for summary judgment (MS 04) against plaintiffs Syndigate Media, Inc. and Al-Bawaba Middle East, Ltd. is denied in its entirety; and it is further

1/23/2022
DATE

MELISSA CRANE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE