

Nexgen Networks Corp. v International Bus. Machs. Corp.
2022 NY Slip Op 31109(U)
April 5, 2022
Supreme Court, New York County
Docket Number: Index No. 654065/2020
Judge: Andrew Borrok
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

-----X

NEXGEN NETWORKS CORPORATION,

Plaintiff,

- v -

INTERNATIONAL BUSINESS MACHINES
CORPORATION, SOFTLAYER TECHNOLOGIES, INC.,
SOFTLAYER TECHNOLOGIES JAPAN K.K., JOHN
DOES, ABC COMPANIES

Defendant.

INDEX NO. 654065/2020

MOTION DATE 07/02/2021,
07/09/2021

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 50, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 61, 63

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motions (Mtn. Seq. Nos. 2 and 3) to dismiss must be granted.

The beginning, middle and end of this story can be found in Section 19 of a certain Telecom

Agreement (Agreement 4917019147.000; the **Agreement**; NYSCEF Doc. No. 35), dated

November 10, 2017, between International Business Machines Corporation (**Buyer**) and Nexgen

Networks Corporation (**Supplier**).

Pursuant to the Agreement, the Buyer and Seller established the basis for a multinational

procurement relationship pursuant to which the Supplier was to provide deliverables and services

described in SOW¹s and/or Wa²s issued under the Agreement for which the Buyer may resell, deliver to or use in support of the Buyer's customers. In Section 19 of the Agreement, the Supplier expressly agreed that the Buyer would have no liability to the Supplier for any action or inaction under a WA or PA and that any action or inaction by any affiliate of the Buyer would not constitute a breach of the Agreement by Buyer:

Supplier acknowledges and agrees that all WAs or PA³s issued by Buyer's Affiliate(s) are independent agreements between Supplier or Supplier Affiliate and the Buyer Affiliate. Buyer shall not be liable to Supplier or Supplier Affiliate(s) for any actions or inactions of any Buyer Affiliate(s) under a WA or PA, nor shall any actions or inactions by Buyer's Affiliate(s) constitute a breach of the Agreement between Buyer and Supplier.

(NYSCEF Doc. No. 35 § 19).

The gravamen of the Supplier's complaint is that at the urging of Buyer and Softlayer Technologies, Inc. (**Softlayer Texas**), Softlayer Technologies Japan K.K., a Buyer subsidiary (**Softlayer Japan**) executed three SWOs on October 19, 2017 (*i.e.*, before the Agreement was executed) in connection with having the Supplier provide private fiber optic connections between a number of Buyer cloud computing sites located in Japan and that Softlayer Japan failed to

¹ "Statement of Work" or "SOW" means any document that: identifies itself as a statement of work, including an exhibit, or a schedule of rates and charges; is signed by both parties; incorporates by reference the terms and conditions of this Base Agreement; and describes the Deliverables and Services, including any requirements, specifications or schedules. (NYSCEF Doc. No. 35 §1)

² "WA" or "Work Authorization" is defined in the Agreement as Buyer's authorization in either electronic or tangible form for Supplier to conduct transactions under this Agreement in accordance with the applicable SOW (*i.e.*, a purchase order, bill of lading, or other Buyer designated document). A SOW is a WA only if designated as such in writing by Buyer (NYSCEF Doc. No. 35 §1).

³ "Participation Agreement" or "PA" means an agreement signed by one or more Affiliates which incorporates by reference the terms and conditions in this Base Agreement, any relevant SOW, and other attachments or appendices specifically referenced in the PA (NYSCEF Doc. No. 35 §1).

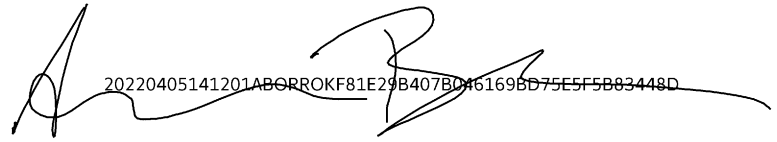
abide by the terms of the SWOs. The Agreement provides no room for doubt or ambiguity as to whether SWOs previously executed by affiliates of the Buyer can form the basis to ground liability against the Buyer. Nor can it be said that any affiliates are sham entities created to perpetrate a fraud on others. The clear intent of the parties to the Agreement is that the Supplier can only look to the party signing the SRO for responsibility with respect to the SRO. Inasmuch as neither the Buyer nor Softlayer Texas is alleged to have executed any of the SROs that form the basis for the amended complaint, dismissal is mandated pursuant to CPLR 3211(a)(1) (*Bronxville Knolls, Inc. v Webster Town Ctr. P'ship.*, 221 AD2d 248, 248 [1st Dept 1995]). For completeness, the Participation Agreement binds Softlayer Japan to the terms of the Agreement, not vice-versa (*i.e.*, the Buyer to the terms of the SWOs). The Court has reviewed the Supplier's remaining arguments and finds them unavailing. Accordingly, the complaint is dismissed as against the Buyer and Softlayer Texas. It would appear that dismissal may also be appropriate as to Softlayer Japan based upon CPLR 327 and leave is granted to bring such motion.

Accordingly, it is hereby

ORDERED that International Business Machines Corporation's motion to dismiss is granted; and it is further

ORDERED that Softlayer Technologies, Inc.'s motion to dismiss is granted; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on June 1, 2022 at 11:30 AM.



20220405141201ABORROKF81E29B407BDA61695D75E5F5B83448D

4/5/2022

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE