SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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GREATER NEW YORK MUTUAL INSURANCE COMPANY, Plaintiff, - v - SKOUT MONITORING, LLC, CONSOLIDATED TECHNOLOGIES, INC. Defendants.	INDEX NO.	650539/2022
	MOTION DATE	06/07/2022, 06/27/2022
	MOTION SEQ. NO.	001 002
	DECISION + ORDER ON MOTION	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 20, 21
were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28
were read on this motion to DISMISS.

Defendants SKOUT Monitoring, LLC ("SKOUT") and Consolidated Technologies, Inc. ("CTI," and with SKOUT "Defendants") move pursuant to CPLR 3211(a)(7) to dismiss Plaintiff Greater New York Mutual Insurance Company's ("GNY" or "Plaintiff") First Amended Complaint ("Am. Cplt." [NYSCEF 3]). Defendants' motions to dismiss are DENIED.

BACKGROUND

GNY filed this action against SKOUT on February 3, 2022 (NYSCEF 1). The First Amended Complaint was filed against SKOUT and CTI on March 1, 2022 alleging breach of contract as against both defendants and breach of warranty against SKOUT.

A. The Agreement

This case involves three interrelated agreements and concerns an alleged failure by Defendants to protect GNY against cyberattacks launched from the Russian Federation. GNY filed this action against SKOUT on February 3, 2022 (NYSCEF 1). The First Amended Complaint was filed against SKOUT *and* CTI on March 1, 2022 (NYSCEF 3).

In 2017, GNY and SKOUT's predecessor, Oxford Solutions Analytics, LLC ("Oxford"), entered into a contract known as the Aegis Platform Services Agreement ("APS Contract" [Am. Cplt. Ex. A]) for Oxford to provide GNY with cybersecurity services (the "Services"). Paragraph 8(b) of the APS Contract includes a limitation of liability and damages clause as follows:

> Except for the indemnity obligation Oxford assumes under Sections 7 (c) and (d), under no circumstances will Oxford's liability to Client for any claim under or related to this Agreement, whether in contract, tort or otherwise, exceed the amount of fees paid by Client to Oxford under this Agreement during the twelve (12) months preceding the claim. In no event will either party be liable to the other party for any special, incidental, consequential, punitive or indirect damages arising from or in relation to this Agreement or the use of the Services, however caused and regardless of theory of liability. This limitation will apply even if such party has been advised or is aware of the possibility of such damages

Exhibit A to the APS Contract is a Statement of Work ("SOW"). Section 1.1 of the SOW provides that the "Aegis Platform is a fully monitored security service. . .Oxford will monitor the ingress and egress from your environment. . .Oxford will respond to events and alerts and notify our customers of action to take to facilitate remediation of events. . ." The SOW provides for "24/7/365 Monitoring" and that Oxford would be "working real-time to identify, notify and remediate threat as they arise within your enterprise."

Section 3(a) of the SOW provides that "Oxford warrants that it will perform the Services using personnel of required skill, experience, and qualifications, and in a professional and workmanlike manner, in accordance with generally accepted industry standards for similar services, and will devote adequate resources to meet its obligations under this Agreement" and further that:

> EXCEPT AS EXPRESSLY STATED IN THIS AGREEMENT, OXFORD MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, CONCERNING THE QUALITY, PERFORMANCE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT OF THE SERVICES, OR THE RESULTS TO BE OBTAINED THEREFROM.

Section 3(b) of the SOW provides, in relevant part, that:

> Oxford cannot guarantee that every system weakness, noncompliance issue or vulnerability will be discovered during the performance of the contracted engagement. Oxford uses industry accepted sampling methodology which attempts to reduce the cost to the Client while minimizing the impact to the accuracy and reliability of the results. Client acknowledges and accepts that limitations and inherent risks exist from approaches used by Oxford to deliver the Services.

In 2019, GNY, SKOUT and CTI entered an amendment to the APS Contract ("Amendment" [Am. Cplt. Ex. B]) pursuant to which CTI assumed the responsibility to bill for the Services. The Amendment reads, in relevant part:

> Except as expressly amended by this Amendment, all other provisions of the Agreement and SOW shall remain in full force and effect with SKOUT providing the Services to Client and [CTI] handling invoicing and collection of payment.

In 2020, GNY and CTI entered a renewal ("Renewal" [Am. Cplt. Ex. C]). The APS Contract, Amendment and Renewal are, collectively, the "Agreement" (Am. Cplt. ¶¶ 13-23). The Renewal is not signed by SKOUT. It is a CTI form bearing the CTI logo and reads, in relevant part, that "CTI and Client entered that certain amendment, effectively dated as of December 19, 2019 (the "Agreement") for CTI to provide certain SKOUT/Cyber-Security Monitoring Services ("Services") to Client." The Renewal's "Description" provides that it is for

"CTIQ Security Monitoring," and states that the Renewal incorporates CTI's Master Service Agreement.

B. The 2021 Cyberattack

GNY alleges that, beginning on May 19, 2021, GNY was the victim of a "brute force" cyberattack that resulted in GNY's computer systems becoming infected with ransomware on June 1, 2021, resulting in more than $1.5 million in losses (Am. Cplt. ¶¶2-6). According to GNY, a "brute force" attack is where the attacker repeatedly uses trial and error to obtain unauthorized access to a computer system (Am. Cplt. ¶24).

GNY contends that SKOUT "had real-time access to GNY's server logs" and, despite the obvious signs of the "brute force" cyberattack (*i.e.,* more than 910,000 attempted logins from the Russian Federation) and SKOUT's obligations under the Agreement, SKOUT failed to inform GNY of the cyberattack at any point prior to when the ransomware was deployed (Am. Cplt. ¶¶ 24-33). GNY alleges that other technology vendors contacted GNY after determining "that there was an obvious issue with GNY's system" before SKOUT became aware of the issue (Am. Cplt. ¶32).

Following the deployment of the ransomware, GNY retained a security and remediation consultant who requested information from SKOUT, including "domain controller and firewall logs" that should have been within SKOUT's control pursuant to the Agreement, which were not provided (Am. Cplt. ¶¶ 34-36). In addition to its security and remediation costs, GNY claims that it will incur significant expenses towards complying with various states' insurance and other regulations because of the cyberattack (Am. Cplt. ¶¶ 37-41). GNY now asserts claims for breach of contract against Defendants and breach of warranty against SKOUT (Am. Cplt. ¶¶42-57).

C. Defendants' Pre-Answer Motions To Dismiss

Defendants both moved for dismissal in lieu of answering the Amended Complaint. SKOUT moved first on April 4, 2022 and argues that GNY's Amended Complaint fails to allege a breach of contract, fails to allege a breach of warranty, and, in the alternative, that the Limitation of Liability clause should be enforced. After briefing was completed on SKOUT's motion, on June 10, 2022 CTI moved to dismiss, adopting SKOUT's arguments and separately arguing that CTI agreed only to provide billing services and never agreed to provide the cybersecurity Services relevant to GNY's breach of contract claim.

DISCUSSION

A. Legal Standard

"The elements of a breach of contract claim are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach, and (4) resulting damages" (*Alloy Advisory, LLC v 503 W. 33rd St. Assoc., Inc.*, 195 AD3d 436 [1st Dept 2021] *citing Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). "Under New York law, "[t]he material elements for breach of express warranty include (1) a material representation expressly made about the product by defendant, (2) the truthfulness of this representation was relied upon by plaintiff, (3) the product did not live up to the representation and (4) plaintiff suffered damages as a result of a breach of the express warranty" (*Meyer v Seidel*, 20-CV-3536 (VSB), 2021 WL 3621695, at *5 [SDNY Aug. 16, 2021] *citing Flores v Youm*, 69 Misc 3d 1216(A) [Sup Ct Bronx Co. 2020]).

"Under CPLR 3211(a)(7), pleadings are to be afforded a liberal construction, allegations are taken as true, the plaintiff is afforded every possible favorable inference, and a determination is made only as to whether the facts as alleged fit within any cognizable legal theory" (*CSC Holdings, LLC v Samsung Elecs. Am., Inc.*, 192 AD3d 556 [1st Dept 2021] *citing Leon v.*

Martinez, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]). Where contract documents are annexed to a pleading and are "subject to differing interpretations" dismissal is inappropriate because "[t]he court's role is not to determine whether the plaintiff will ultimately be successful on the claim" (*Id. citing Morgan Stanley Mtge. Loan Trust 2006–13ARX v. Morgan Stanley Mtge. Capital Holdings LLC,* 143 A.D.3d 1, 7, 36 N.Y.S.3d 458 [1st Dept. 2016]).

B. SKOUT's Motion is Denied

SKOUT argues that GNY's breach of contract claim should be dismissed because GNY does "not articulate a term of the contract that SKOUT actually breached," that "perfect notification was not a requirement" under Sections 3 and 9 of the SOW, and because GNY's allegations about the adequacy of SKOUT's personnel are "conclusory" (SKOUT Memorandum of Law at 10-13 [NYSCEF 9]). SKOUT argues that GNY's breach of warranty claim should be dismissed because GNY"s allegations "are conclusory and speculative. . ." (*Id.* at 13-15). Finally, SKOUT argues that the Court should enforce the APS Contract's Limitation of Liability Clause (*Id.* at 15-21).

Contrary to SKOUT's contentions, the Amended Complaint sets forth a breach of contract claim sufficient to withstand a motion to dismiss. Whether a breach occurred in this case is an issue of fact than cannot properly be resolved on a pre-answer motion to dismiss (*Seaport Glob. Sec. LLC v SB Group Holdco, LLC,* 162 AD3d 466, 467 [1st Dept 2018]). SKOUT's reading of the APS Contract is that, absent an allegation that it provided no services, that no breach can ever be alleged given the limitations in the SOW. Further proceedings are warranted to determine what obligations SKOUT owed to GNY under the Contract and whether it met those obligations.

With respect to the breach of contract claim, the Amended Complaint alleges, among other things, that "[t]he Defendants breached the Contract by failing to detect and/or notify GNY of the ongoing and prolonged attack on its systems. Under generally accepted standards in the industry, numerous red flags were present that should have resulted in an immediate notification to GNY that a potential attack was underway" (Am. Cplt. ¶44). The "red flags" identified in paragraph 44 include but are not limited to the "[m]ore than 910,00 login attempts. . ." using "veritas user credentials and. . .the TOR network, a system well known as a tool for cybercriminals" along with the use of "Empire PowerShell and Invoke-SessionGopher scripts, tools well understood to be associated with hacking activity" (*Id.*). The Amended Complaint also alleges "[o]n information and belief. . ." that Defendants failed to provide sufficient personnel and that they "were aware of material deficiencies with the cybersecurity monitoring system provided to GNY. . ." (Am Cplt, ¶¶43-47). In sum, the Amended Complaint sufficiently alleges that Defendants failed to provide the Services as defined in Paragraph 1 of the Contract and described in Sections 1.1 - 1.3 of the Statement of Work annexed as Exhibit A to the Contract.

With respect to the breach of warranty claim, the Amended Complaint alleges, among other things, that "SKOUT breached its warranty to GNY by failing to provide personnel of required skill, experience and qualifications. . .failing to provide Serviced under the Contract in a professional and workmanlike matter. . .failing to provide Services under the Contract, consistent with and in accordance with, generally accepted industry standards . . . failing to devote adequate resources to meet its obligations to GNY" (Am. Cplt. ¶¶53-56). Like the contract claim, whether SKOUT breached the express warranty in the APS Contract is a question that cannot be resolved on a motion to dismiss (*Capital v First Nat. Bank of Waverly*, 146 AD3d 741, 743 [2d Dept 2017] [collecting cases]).

Finally, SKOUT argues, in the alternative, that the Court should enforce the Limitation of Liability clause. Generally, limitation provisions are enforceable absent gross negligence amounting to "intentional wrongdoing" that shows "a reckless indifference to the rights of others" (*Abacus Fed. Sav. Bank v ADT Sec. Services, Inc.*, 77 AD3d 431, 433 [1st Dept 2010], *aff'd as mod,* 18 NY3d 675 [2012] [collecting cases]). On this record, accepting as true the factual allegations in the Complaint, the Court cannot conclude as a matter of law whether and to what extent the limitations clause impacts GNY's claim. In any event, the limitations clause would not warrant *dismissal* of the claims, but would instead (if applicable) impact the relief that could be obtained. In essence, SKOUT has prematurely sought summary judgment on a potential affirmative defense vis-à-vis damages (*Robert Plan Corp. v Perot Sys. Corp.,* 278 AD2d 119, 119 [1st Dept 2000] ["whether the demand for damages exceeds the contractual limitation of liability are premature, and can be better entertained after disclosure"]).

C. CTI's Motion Is Denied

To the extent CTI seeks to rely on SKOUT's motion, its motion to dismiss is denied. CTI separately argues that SKOUT – not CTI – contracted to provide the Services in the APS Contract, that CTI is merely a billing services provider under the Amendment and that "the inartfully drafted whereas clause" in the Renewal providing that the Amendment was "for CTI to provide certain SKOUT/Cyber-Security Monitoring Services" cannot be read to impose liability for SKOUT's failures under the APS Contract on CTI (CTI Memorandum of Law at 3-7 [NYSCEF 23]).

CTI cites *Matter of Legion of Christ, Inc. v Town of Mount Pleasant* for the proposition that a "whereas" clause cannot create an independent right beyond the operative terms of the Agreement (151 AD3d 858, 859 [2d Dept 2017]). Unlike this case, however, that case involved the interpretation of an unambiguous stipulation of settlement. SKOUT also relies on *Hampton Hall Pty Ltd. v Glob. Funding Services, Ltd.,* for the proposition that a "whereas" clause is "descriptive" and not binding (82 AD3d 523, 524 [1st Dept 2011]). However, in that case dismissal was awarded because the relevant defendant did not sign the contract. Sufficient ambiguities exist here to warrant denial of CTI's motion (*Schulte Roth & Zabel LLP v Metro. 919 3rd Ave. LLC*, 202 AD3d 641, 641 [1st Dept 2022]). Discovery is necessary to determine what, if any, liability CTI has to GNY (*Id. citing Hambrecht & Quist Guar. Fin., LLC v. El Coronado Holdings, LLC,* 27 A.D.3d 204, 809 N.Y.S.2d 454 [1st Dept. 2006]).

CTI does not dispute that it (1) signed the Amendment and (2) prepared and signed the Renewal, which is not signed by SKOUT. Moreover, the Renewal incorporates "Consolidated Technologies, Inc. CTiQ Master Service Agreement – Standard Terms & Conditions," which is not before the Court. Finally, the Amended Complaint asserts that it seeks to impose liability on CTI because "CTI collected fees from GNY for services that were not provided." CTI has not denied that it received payments or advanced any authority in support of dismissal on the grounds that it operated only as a payment collector. CTI's motion for dismissal is therefore denied.

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Accordingly, it is

ORDERED that Defendants' motions to dismiss are DENIED.

This constitutes the Decision and Order of the Court.

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10/18/2022	
DATE	**JOEL M. COHEN, J.S.C.**

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