

Telefonica S.A. v Millicom Intl. Cellular S.A.
2023 NY Slip Op 30120(U)
January 9, 2023
Supreme Court, New York County
Docket Number: Index No. 651838/2020
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

TELEFONICA S.A.,	INDEX NO.	651838/2020
Plaintiff,		
- v -	MOTION DATE	12/01/2022, 12/01/2022
MILLICOM INTERNATIONAL CELLULAR S.A., MILLICOM SPAIN S.L.	MOTION SEQ. NO.	003 004
Defendant.	DECISION + ORDER ON MOTION	

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 244, 245, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 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

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 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, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 239, 240, 243, 246, 247, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, the plaintiff’s motion for a protective order (Mtn. Seq. No. 003) is granted and the defendants’ motion to compel document production (Mtn. Seq. No. 004) is denied.

Reference is made to a Decision and Order of this Court dated January 5, 2021 (the **Prior**

Decision; NYSCEF Doc. No. 66). The facts are set forth in the Prior Decision. Familiarity is

presumed. Terms used but not otherwise defined herein shall have the meaning set forth in the Prior Decision.

In the Prior Decision, this Court held that the defendants were not entitled to dismissal because if the contract is clear and unambiguous as the defendants argue, the contract required an “authorization” and not an “endorsement” of the SPA. An authorization is not something the Comptroller can grant — it is granted by the Sutel. Thus, there was no failure of condition that relieved the defendants of their obligation to close. If, on the other hand, the contract is not clear and unambiguous, extrinsic evidence should be considered by the Court as to what the parties intended by “General Comptroller’s Office authorization” — *i.e.*, whether the parties intended “authorization” to mean endorsement. As discussed in the Prior Decision, plaintiff’s local counsel had provided an affidavit which indicated that the language in the SPA was deliberate, negotiated and intentional, and that endorsement and authorization are not synonymous. To the extent the defendants meant something else, this Court indicated that it may be that there was a unilateral mistake.

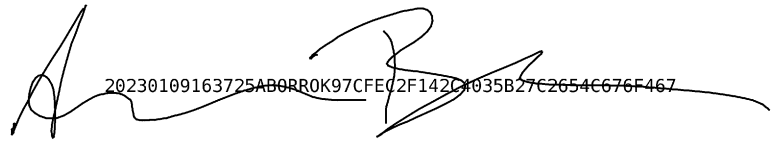
Putting aside that fact discovery had concluded in this case in May, 2022, on the record before the Court, the defendants have already explored the allegedly “chummy” relationship between Mr. Torres and Mr. Estrada, and the evidence that the defendant now seeks is not remotely relevant to the negotiation or interpretation of the SPA. The defendants have also not satisfied the crime-fraud exception to justify overcoming the attorney-client privilege. The crime fraud exception requires (i) a fraud or crime to have been committed and (ii) the communications were

in furtherance of the crime or fraud (*MacNamara v City of New York*, 2008 WL 186181, *3 [SD NY, Jan. 18, 2008, No. 04-CIV-9216 (RJS/JCF)]).

The defendants fall woefully short of meeting this threshold. Most significantly, the record before the Court demonstrates that MICITT's October 30, 2019 decision (which did not include Estrada) indicated that the endorsement should be obtained after closing. In addition, there simply is inadequate evidence that that Telefonica directed or edited any of MICITT's communications. There is only argument and conjecture. The references appear more to be consistent with the position that MICITT would accommodate Millicom only insofar as it promised to close. Moreover, there are plenty of explanations as to why MICITT rejected Millicom's last minute effort to insert an End Date including that the parties had been working for 13 months to get regulatory clearance, MICITT had already agreed to accommodate Millicom's unusual request for an endorsement prior to closing and MICITT wanted the deal done at that point. Lastly, and for completeness, to the extent that the Court authorized certain additional discovery in support of the defendants' added *in pari delicto* defense, the defendants represented that they only needed to serve two narrow requests in support of its then new added defense, and at no such time did the defendants indicate that they needed to seek the additional discovery they seek here. The defendants offer insufficient explanation as to why leave was never sought by the Court sooner. Thus, the plaintiff's motion for a protective order (Mtn. Seq. No. 003) is granted and the defendants' motion to compel document production (Mtn. Seq. No. 004) is denied.

It is hereby ORDERED the plaintiff's motion for a protective order (Mtn. Seq. No. 003) is granted; and it is further

ORDERED that the defendants' motion to compel document production (Mtn. Seq. No. 004) is denied.



20230109163725ABORROK97CFE02F142C4035B27C2654C676F467

1/9/2023
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