

Skyview Capital, LLC v Conduent Bus. Servs., LLC

2023 NY Slip Op 34281(U)

December 7, 2023

Supreme Court, New York County

Docket Number: Index No. 650761/2020

Judge: Andrew Borrok

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

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SKYVIEW CAPITAL, LLC, CONTINUUM GLOBAL SOLUTIONS, LLC <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> CONDUENT BUSINESS SERVICES, LLC, CONTINUUM GLOBAL SOLUTIONS LIMITED, <p style="text-align: center;">Defendant.</p>	<table border="0"> <tr> <td style="width: 30%;">INDEX NO.</td> <td style="border-bottom: 1px solid black;">650761/2020</td> </tr> <tr> <td>MOTION DATE</td> <td style="border-bottom: 1px solid black;">07/24/2023, 07/24/2023</td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td style="border-bottom: 1px solid black;">016 017</td> </tr> </table> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>	INDEX NO.	650761/2020	MOTION DATE	07/24/2023, 07/24/2023	MOTION SEQ. NO.	016 017
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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 016) 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, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 519, 520, 521, 527, 528, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 560, 561, 562

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

The following e-filed documents, listed by NYSCEF document number (Motion 017) 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 522, 523, 524, 525, 526, 529, 530, 531, 554, 555, 556, 557, 558, 559, 563, 564

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents and for the reasons set forth on the record (12.5.23), Conduent’s summary judgment motion (Mtn. Seq. No. 016) is granted solely to the extent that (i) the fraud claim relating to Conduent’s slashing of the advertising budget in support of the 21 call center contracts extracted from Conduent’s much broader portfolio to be spun off as a part of the

transaction at issue in this case (**Liberty**) is dismissed because the only reliance Skyview alleged

as articulated by its counsel on the record is identical to its breach of contract claim – *i.e.*, that the slashing of this budget violated a clause of the Amended and Restated Equity Securities and Asset Purchase Agreement (NYSCEF Doc. No. 277; the **APA**) relating to material adverse effects (*see id.* at Sec. 2.8 & A-9; **MAEs**), that such MAEs had to be disclosed under APA Section 2.8, and Skyview relied on the absence of this disclosure to mean that this conduct was not occurring and (ii) Conduent is entitled to summary judgment on certain of its counterclaims (as discussed below).

Simply put, there are issues of fact as to the balance of Skyview’s claims sounding in fraud. Conduent is not entitled to dismissal on the fraud claim relating to the concealment of a certain July Q3 2018 reforecast prepared internally by Conduent that showed a downturn in Liberty revenue projections (NYSCEF Doc. No. 413 at 4; the **Reforecast**). Conduent understood, and indeed conceded in its papers, that the Reforecast was never disclosed to Skyview (NYSCEF Doc. No. 561 at 1; *see* NYSCEF Doc. Nos. 284, 285). They are not entitled to dismissal based on dissemination of a later forecast prepared in October 2018 (*i.e.*, after the original asset purchase agreement was executed in September), which does not appear to have accounted for all adjustments made due to evolving conditions at the time of the Reforecast (*i.e.*, there were lower Verizon revenues anticipated at that time), such that Skyview may well have negotiated a different price at that moment in time and was deprived of the opportunity to do so by Conduent’s knowing and intentional concealment of these numbers.

Conduent is also not entitled to dismissal of the fraud claim relating to promises that Sprint was going to repatriate and award to Liberty 150 highly profitable U.S. call center agent jobs and

Conduent's subsequent failure to inform Skyview that these jobs would never materialize. The record demonstrates, or at the very least, raises an issue of fact as to whether, promises were made about these 150 jobs to be added to one of Liberty's biggest customers. They were important to the Liberty business and material to Skyview. (NYSCEF Doc. No. 499 at 114, lines 2-21; at 134, lines 2-24; at 140-141, lines 1-10; NYSCE Doc. No. 501 at 251, lines 3-23; NYSCEF Doc. No. 502 at 273-275, lines 23-14; NYSCEF Doc. No. 503 at 181-183, lines 22-18; at 184, lines 9-19.) At most, any subsequent Sprint disclosures about a decrease in U.S. call center personnel creates an issue of fact for trial.

Conduent is likewise not entitled to dismissal of Skyview's fraud claim based on the concealed elimination of the U.S. recruiter workforce. There is at least an issue of fact as to whether Skyview had any knowledge or could determine how the workforce decreased from 81 U.S. recruiters to 38. It is simply false that Conduent provided accurate information to Skyview along the way as to the rosters and its 60% reduction in the U.S. recruiter workforce. The internal emails unequivocally establish that Conduent knew that there had been a significant reduction in its U.S. recruiter workforce and that Conduent knew that Skyview was not aware of it (*see, e.g.*, NYSCEF Doc. Nos. 419-421, 423 [“Buyer knows nothing about RIFs. We’ve just said some have left the company”], 508), and in fact, as of 2:46 am on January 31, 2019 (the day before the APA was executed), Conduent was still adjusting its roster and had not turned it over (NYSCEF Doc. No. 507). Indeed, it appears as though the exhibit showing the number of U.S. recruiters down to 38 from 81 was merely slipped in as a schedule attachment to an ancillary document at the closing – *i.e.*, the day after the January 31st email (NYSCEF Doc. No. 318 Attachment A-8, Exhibit A). Based on the record before the Court, it does not appear that any negotiation of this

number took place, and at a bare minimum there is an issue of fact as to whether or not Skyview had any knowledge of this substantial reduction in U.S. recruiters, which recruiters feed the lifeblood of the Liberty business.

Conduent is, however, entitled to summary judgment on its counterclaim for monies due in connection with transition services provided after the execution of the APA, *i.e.*, February 1, 2019, and pursuant to a certain Transition Services Agreement dated as of that date (NYSCEF Doc. No. 318; the **TSA**) because Skyview has no right of set-off against those monies. The carefully negotiated set-off provision in the promissory notes issued on February 1, 2019, in connection with the APA (NYSCEF Doc. Nos. 319-321; the **Notes**) does not provide for set-off against monies due in connection with these services. The relevant Notes provision, Section 4.06, permits, as relevant, set-off against: “any amount with respect to which there is a dispute as to whether such amount is payable by Seller to any Buyer Indemnified Party *under the Purchase Agreement* pending final determination of such dispute” (NYSCEF Doc. No. 319 Sec. 4.06 [emphasis added]). The Notes define Purchase Agreement as “that certain Amended and Restated Equity Securities and Asset Purchase Agreement dated as of the date hereof (as amended, supplemented or otherwise modified from time to time, the ‘Purchase Agreement’), between Skyview Capital, LLC, a Delaware limited liability company, and Holder” (NYSCEF Doc. No. 319 at 1). This definition does not include the TSA or other ancillary documents executed in connection with the APA. Thus, the parties did not negotiate a right of set-off as it relates to monies due under the TSA and only negotiated a right of set-off as to monies due under the APA. For the avoidance of doubt, the fact that Section 9.6 of the APA indicates that the APA along with all ancillary documents represents the entire understanding and agreement

between the parties does not change this result. Section 9.6 means only that these documents are part of an integrated transaction but does not change the fact that the right of set-off in the Notes that was negotiated between the parties only applies to monies due under the APA, and the monies due under the TSA are not due under the APA.

Conduent may serve judgment on notice solely with respect to monies due for transition services performed post-closing (*Parlux Fragrances, LLC v S. Carter Enterprises, LLC*, 204 AD3d 72, 92 [1st Dept 2022]). In the event of a dispute between the parties as to the amount due in respect of the foregoing, the Court may require additional briefing or may require a single-issue hearing to be held in January 2023 after reviewing the proposed judgment and any proposed counter-judgment.

Skyview is entitled to partial summary judgment (Mtn. Seq. No. 017) on its ordinary course violation claims relating to Conduent's elimination of a substantial portion of the U.S. recruiter workforce and slashing of Liberty's advertising. Section 2.8 of the APA states that "between the Balance Sheet Date [June 30, 2018] and the date hereof [February 1, 2019], (i) each of the members of the Seller Group has conducted the Business in the Ordinary Course of Business in all material respects" (APA Sec. 2.8; *see id.* Sec. 2.6[a]). Ordinary Course of Business is defined as "the ordinary and usual course of day-to-day operations of the Business consistent with past practice" (APA at A-9).

As discussed above, recruiters work constantly to combat the high attrition in the call center industry and to maintain a sufficient number of revenue-producing call center agents. They are

the lifeblood of the Liberty business. (NYSCEF Doc. No. 379 at 74-75, lines 12-16; at 63-64, lines 2-23; NYSCEF Doc. No. 380 at 64-65, lines 3-12; NYSCEF Doc. No. 389 at 180-181, lines 16-7; at 204-205, lines 14-5; at 254-255, lines 15-6; at 271-272, lines 14-17; NYSCEF Doc. No. 382 at 80, lines 13-21; at 110, lines 19-24; NYSCEF Doc. No. 392 at 6.) Skyview has more than met its burden of coming forward with evidence demonstrating that Conduent breached the ordinary course provisions by (i) significantly reducing the U.S. recruiter workforce by approximately 60% (from 81 agents in June 2018 to 38 in October of 2018 and 39 in January 2019 – significant enough for Conduent employees to raise internal alarms) (NYSCEF Doc. Nos. 419-421, 508; NYSCEF Doc. No. 389 at 112-113, lines 19-22; NYSCEF Doc. No. 436 at ¶146 & Figure 26) and (ii) slashing Liberty’s recruiting advertising budget to \$0 in October of 2018 and January of 2019 (NYSCEF Doc. No. 426 at 3 [row 909]; NYSCEF Doc. No. 382 at 285-288, lines 18-17; NYSCEF Doc. No. 389 at 194-195, lines 15-2; NYSCEF Doc. No. 425; *see* NYSCEF Doc. No. 389 at 254-255, lines 15-6; at 271-272, lines 14-17), when both of these activities directly impact maintaining a sufficient number of call center agents to generate revenue.

Inasmuch as Skyview met its burden of adducing substantial evidence establishing its prima facie entitlement to summary judgment, it was incumbent on Conduent to demonstrate a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). This Conduent has failed to do. Conduent does not dispute the number of U.S. recruiters terminated and argued only that it spent advertising sums in line with past practice on recruitment advertising *across Conduent’s entire business portfolio* (*see* NYSCEF Doc. No. 531 at 10-11) which includes many call center contracts beyond Liberty and spans across continents. To wit, they have not demonstrated or

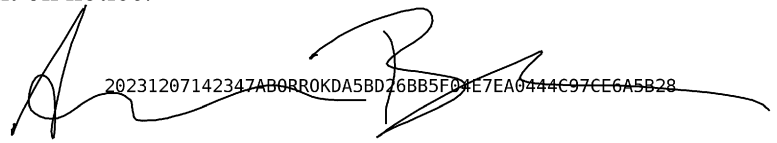
raised an issue of fact as to whether \$0 spent on Liberty contracts was consistent with any prior spending. Put another way, given the size and breadth of Conduent’s entire business portfolio, evidence of portfolio-wide spending fails to demonstrate that any of these dollars were put toward the Liberty call centers. In fact, the record suggests that Conduent starved the Liberty business both of advertising dollars and personnel and fed those dollars and people to its non-Liberty call centers (i.e., the call centers not sold pursuant to the APA), and Conduent has failed to create an issue of fact for trial to the contrary.

Accordingly, it is hereby

ORDERED that Conduent’s motion for summary judgment (Mtn. Seq. No. 016) is granted solely to the extent set forth in this Decision and Order; and it is further

ORDERED that Conduent shall serve judgment on notice for its counterclaims to the extent granted by this Decision and Order; and it is further

ORDERED that Skyview’s motion for partial summary judgment (Mtn. Seq. No. 017) is granted in its entirety and Skyview shall serve judgment on notice.



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12/7/2023
DATE

ANDREW BORROK, J.S.C.

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