

Video Elephant Ltd. v Deva Connection S.R.L.

2024 NY Slip Op 33747(U)

October 18, 2024

Supreme Court, New York County

Docket Number: Index No. 652102/2022

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LORI S. SATTLER PART 02M

Justice

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VIDEO ELEPHANT LIMITED

Plaintiff,

- v -

DEVA CONNECTION S.R.L.,

Defendant.

-----X

INDEX NO. 652102/2022

MOTION DATE 02/23/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

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

Plaintiff Video Elephant Limited (“Plaintiff”) commenced this action asserting causes of action for breach of contract, unjust enrichment, account stated, and promissory estoppel against Defendant Deva Connection S.R.L. (“Defendant”). Plaintiff now moves for summary judgment on its breach of contract and account stated causes of action. Defendant opposes the motion.

Plaintiff is a video content syndication platform based in Ireland, which provides media companies with access to a library of video content. Defendant is a media company based in Italy. The parties entered into a Video Content Licensing Agreement (NYSCEF Doc. No. 1, Exhibit A, “Agreement”), in which Plaintiff agreed to provide content to Defendant for a 12-month term beginning January 1, 2020, referred to in the Agreement as the “Initial Term” (Agreement, § 9[a]).

The fee structure for this service is laid out in a section of a table in the Agreement called “Commercial Terms.” As set forth therein, Defendant was to pay on a monthly basis either 25% of the net revenue generated on each platform hosting the content or a guaranteed minimum amount, whichever is higher. This minimum guarantee was €1,000 in the first three months,

€2,000 in the next three months, and €3,000 in month seven going forward. The Agreement further provides: “After the Initial Term, unless the Agreement is terminated by either party as provided herein, this Agreement shall automatically renew for additional twelve (12) month terms from the date that the Initial Term expires” (Agreement, § 9[a]). “Any time after the Initial Term, but in no event prior to the natural expiration thereof, either party may terminate this Agreement upon delivery of advance written notice to the other party of its intent not to renew at least ninety (90) days prior to the last day of the then effective Term” (*id.* § 9[b]).

Additionally, as set forth in Section 7(f), “in the event of non-payment of any amount that is due and payable VideoElephant may suspend its service to the publisher until such time as payments on overdue amounts have been made. Commercial terms as detailed in the Table remain in force during any suspension of service.” The parties agreed that interest was to accrue on all balances outstanding beyond their due date at a rate of 1% per month compounded from the due date (*id.* § 7[d]), and in the event of non-payment by Defendant, after Plaintiff exhausts reasonable efforts to collect, Defendant is responsible for all collection costs, including court filing fees and counsel fees (*id.* § 7[e]).

Defendant stopped paying the minimum guarantee in May 2020 after four months of the Initial Term. On September 1, 2020, Defendant gave notice of its intent to terminate the Agreement. On September 30, 2020, Plaintiff suspended Defendant’s access to its content in accordance with Section 7(f).

Plaintiff argues Defendant breached the Agreement in May 2020 when it stopped paying the requisite monthly minimum guarantees. It further argues that Defendant’s notice to terminate was not timely because it was made during the Initial Term, which it argues is not permitted by the Agreement. Therefore, it argues, the Agreement automatically renewed for a second 12-

month term commencing January 2021 and renewed again in January 2022. Plaintiff commenced this action in May 2022. It seeks unpaid monthly minimum guaranteed payments from May 2020 through March 2022, along with counsel fees totaling \$26,000.

Defendant does not dispute that it stopped paying as of May 2020. It argues the motion should be denied because the services provided by Plaintiff “were incompatible with [Defendant]’s system, provided no value, and were useless” (NYSCEF Doc. No. 43, *Stavolo* aff, ¶ 3). It further argues it is not responsible for making payments beyond September 30, 2020 because Plaintiff stopped providing the services. Additionally, it maintains it properly provided notice of its desire to terminate the Agreement on September 1, 2020.

On a motion for summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Should the movant make its prima facie showing, the burden shifts to the opposing party, who must then produce admissible evidentiary proof to establish that material issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

A cause of action for breach of contract requires a plaintiff to demonstrate “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010], citing *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]). “When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties’ reasonable expectations” (*112 West 34th St. Assoc., LLC v 112-1400 Trade Properties*

LLC, 95 AD3d 529, 531 [1st Dept 2012], quoting *Franklin Apt. Assoc., Inc. v Westbrook Tenants Corp.*, 43 AD3d 860, 861 [2d Dept 2007]).

With respect to the Agreement's Initial Term, Plaintiff has established *prima facie* an entitlement to summary judgment as a matter of law. The Agreement clearly provides that it may not be terminated prior to the conclusion of the Initial Term (Agreement, § 9[b]).

Nevertheless, it allows Plaintiff to suspend its service in the event of non-payment by Defendant, and states that "Commercial terms as detailed in the Table remain in force during any suspension of service" (*id.* § 7[f]). The "Commercial Terms" detailed in said table are the Agreement's fee provisions. Therefore, the Agreement unambiguously obligates Defendant to make monthly payments even when service is suspended due to non-payment. Defendant's statement that the services were incompatible, without value, and useless is insufficient to raise a triable issue of fact as to whether Plaintiff performed under the Agreement or whether Defendant breached by failing to make all monthly payments during the Initial Term.

Plaintiff fails to establish entitlement to summary judgment as to the second and third terms. The Agreement provides:

(a) . . . After the Initial Term, unless the Agreement is terminated by either party as provided herein, this Agreement shall automatically renew for additional twelve (12) month terms from the date that the Initial Term expires. . . . (b) Any time after the Initial Term, but in no event prior to the natural expiration thereof, either party may terminate this Agreement upon delivery of advance written notice to the other party of its intent not to renew at least ninety (90) days prior to the last day of the then effective Term.

(*id.* § 9). Plaintiff contends this means that Defendant could not give notice of its intent to terminate during the Initial Term, even if the termination itself would not occur until the conclusion of the Initial Term. The Court finds that that reading is not a practical interpretation of the language employed. While the Agreement clearly provides that termination cannot occur during the Initial Term, nothing in its plain language indicates that a party cannot provide notice

during that time. The parties do not dispute that Defendant delivered advance written notice more than 90 days prior to the Initial Term's last day as it was required to do in order to properly give notice. Therefore, the Court finds that Plaintiff is not entitled to the sums it seeks for any time following the Initial Term.

Plaintiff establishes its entitlement as a matter of law to counsel fees "associated with collecting [a] debt" pursuant to § 7(e). However, it fails to establish the amount to which it is entitled. Plaintiff claims it has incurred \$26,000 in connection with this action overall, as supported by an affidavit of its Chief Executive Officer and an affirmation of counsel (NYSCEF Doc. Nos. 33, 35). It cannot be discerned from these statements how much was incurred to collect unpaid sums from the Initial Term, as opposed to sums the Court has found Defendant had no obligation to pay. Accordingly, that portion of the motion is denied with leave to renew upon proper documentation.

"[A] claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract" (*Martin H. Bauman Assoc., Inc. v H & M Intl. Transp. Inc.*, 171 AD2d 479, 485 [1st Dept 1991]; *see also Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012]). Here, Plaintiff seeks the same damages based on an account stated theory as it does under its breach of contract theory. Because the Court has found Plaintiff is entitled to judgment on its breach of contract claim, the account stated cause of action must be dismissed.

Therefore, Plaintiff's motion is granted to the extent that it has proven entitlement to summary judgment on its breach of contract claim and to damages of €20,000, with interest as provided for in the Agreement. Accordingly, for the reasons set forth herein the motion is granted in part, and it is hereby:


ORDERED that Plaintiff Video Elephant Limited is entitled to judgment as against Defendant Deva Connection S.R.L. in the amount of €20,000 with interest at a rate of 1% per month compounded from the due date thereof as set forth in the Agreement, and the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that in accordance with Judiciary Law § 27(b), the Clerk shall calculate and render the former portion of the judgment in Euro and convert it into U.S. Dollars at the rate of exchange prevailing on the date of entry of judgment; and it is further

ORDERED that the portion of Plaintiff’s motion relating to counsel fees is denied with leave to renew as set forth herein.

This constitutes the Decision and Order of the Court.

10/18/2024
DATE


LOR/S. SATTLER, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION GRANTED IN PART OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE