Advent Software, Inc. v SEI Global Servs., Inc.
2021 NY Slip Op 30154(U)
January 13, 2021
Supreme Court, New York County
Docket Number: 655631/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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ADVENT SOFTWARE, INC.

Plaintiff,

- v -

SEI GLOBAL SERVICES, INC.,

Defendant.

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INDEX NO. 655631/2020

MOTION DATE 01/08/2021

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 94, 95, 96, 97, 98, 99, 100, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

SEI Global Services, Inc's **(SEI)** motion for a preliminary injunction is granted for the reasons set forth on the record (1.13.21) and as otherwise set forth below because it appears that the Advent Software, Inc. (**Advent**) has breached the SLSA (hereinafter defined) by refusing to supply the key codes for certain software products for which the defendant has licenses and have enjoyed those licenses for over 10 years pursuant to the SLSA which was entered into approximately 20 years ago. On the record before the court, it appears that when SEI refused to negotiate with Advent, Advent then, and based on certain pre-textual and potentially non-material alleged breaches of the SLSA (the factual allegations of which the defendant refutes [NYSCEF Doc. No. 74]), further breached the SLSA by attempting to terminate the SLSA without complying with its terms for termination. The alleged "notice" was insufficient as a matter of law because it failed to adequately identify the alleged breach or how such breach could be cured and in fact called for additional negotiations. SEI will suffer irreparable harm in

the absence of an injunction because of the potential destruction to its business. Money damages will not adequately compensate SEI. To date, SEI has spent millions of dollars and devoted 15 full time employees to develop a suitable alternative software platform. SEI estimates that it will take approximately two more years during which time it will suffer substantial and irreparable harm to its business and its reputation. Finally, given that Advent will continue to earn license fees, the balance of the equities favors granting the requested relief.

A preliminary injunction may be entered where the movant shows (i) a likelihood of success on the merits, (ii) irreparable injury in the absence of the sought relief, and (iii) a balance of the equities in its favor (*Manhattan Real Estate Equities Grp. LLC v Pine Equity, NY, Inc.* 16 AD3d 2929 [1st Dept 2005]). SEI satisfies these requirements.

Reference is made to a certain Software License and Support Agreement (the **SLSA;** NYSCEF Doc. No. 3), dated September 29, 2000, as amended. By letter (the **October 2019 Letter;** NYSCEF Doc. No. 78), dated October 31, 2019, Advent notified SEI, among other things, that unless Advent and SEI could reach mutually satisfactory terms for the renewal of certain software products and services that it was "elect[ing] not to renew" the Geneva, Moxy and AXP software products. Section 10.1 of the SLSA however provides that the SLA would "remain in effect perpetually unless and until terminated by mutual agreement of the parties or as set forth below." The Geneva and Moxy software products were licensed pursuant to Order Schedule 17 (NYSCEF Doc. No. 8) and the Advent Portfolio Exchange (AXP) software product was licensed pursuant to Order Schedule 21 (NYSCEF Doc. No. 12). Thus, SEI argues that the October 2019 Letter was a breach of the SLSA.

In response to SEI's rejection of the October 2019 Letter and its attempt to terminate, among other things, the Geneva, Moxy and AXP licenses, by letter, dated December 5, 2019 (the **December 2019 Letter**; NYSCEF Doc. No. 79), Advent (i) acknowledged SEI's rejection of the October 2019 Letter, (ii) disputed SEI's interpretation of the SLSA, (iii) claimed that SEI had breached Section 11.9 of the SLSA by soliciting Advent employees in 2016 and again in 2019 (but without identifying who SEI solicited and in fact suggested that SEI solicited different employees in 2016 and 2018, (iv) purported to provide 30 days notice of its termination of the SLSA, but (v) invited further negotiation with Advent. SEI disputes the factual allegations of these alleged solicitations (NYSCEF Doc. No. 74). That said, putting aside whether the alleged breaches were, in fact, material which SEI also disputes and which alleged breaches are discussed below, the December 2019 Letter did not provide SEI with the identification of which Advent employees SEI purportedly solicited or the opportunity to cure:

> It has come to our attention that on multiple occasions SEI has solicitated to hire Advent employees in breach of Section 11.9 of the Software License and Support Agreement dated September 29, 2000, as amended (the "SLSA"). These breaches ***give Advent the right to terminate the SLSA*** in accordance with Section 10.2 thereof and paragraph (H)(3)(b) of 2009 Order Schedule 17, as amended and otherwise modified by Amendment One thereto (as so amended and modified, "OS 17") and, together with the SLSA, collectively the "Contracts"). For example, in ***December 2016*** an ESI-engaged recruiter solicited ***an Advent employee*** for a position at SEI's headquarters in Oaks, Pennsylvania. Five SEI senior employees interviewed the Advent employee at SEI's offices. SEI also paid for travel arrangements to and from the interviews. Similarly, ***in 2019***, SEI again directly solicited ***an Advent employee***, offering the person employment at SEI and stating that the employment "door is always open" for a position at SEI. Advent ***reserves its rights*** under the Contracts and applicable law, including its right (a) ***to terminate SEI's License to use the Software under the Contracts following of a 30-day notice period provided hereby,*** and (b) to seek injunctive relief against SEI in accordance with paragraph 7 of Attachment 1 to OS 17…
>
> As stated in the Non-Renewal Letter, but subject to our reservation of rights, we had hoped to commence negotiation of a mutually agreeable amendment and restatement of the Contracts, and we had also believed that doing so is in both of our commercial

> interests. However, Advent will protect itself in the face of SEI's breaches, threats and aggressive interpretation.
>
> Our willingness to participate in commercial negotiations is not limitless. Should you wish to do so please advise us promptly.

(NYSCEF Doc. No. 79 [emphasis added])

Pursuant to Section 10.2 of the SLSA, Advent had the right to terminate the SLSA or a particular license if SEI failed to perform "any material obligation under this Agreement (including the obligation to pay amounts due hereunder) and fails to cure any such nonperformance within (30) days following written notice of such failure." As indicated above, the December 2019 Letter fails to provide notice to SEI because it does not identify which employee(s) SEI purportedly solicited some approximately three years prior to such December 2019 Letter or adequately detail as to how the remark allegedly made in 2019 per the December 2019 Letter amounted to a solicitation or to whom such alleged solicitation was made. Thus, SEI has demonstrated a likelihood of success on the merits.

In addition, even crediting the plaintiffs' allegations as true, it is not clear that either the alleged 2016 solicitation or the alleged 2018 "solicitation" (i.e., according to Nicholas Nolan's affidavit [NYSCEF Doc. No. 60], the later alleged solicitation was in 2018, not 2019) was a material breach. For one thing, following the 2016 alleged breach, Advent did not timely declare or allege a breach of the SLSA. According to the Advent, it was aware of the alleged breach in 2016 and, in fact, negotiated with Mr. Nolan to stay at Advent and increased his compensation. Advent continued the relationship with SEI and collected substantial fees over the ensuing approximately three years. Given that, and because the 2018 alleged solicitation (even if true) appears to be little more than a passing remark and not a serious calculated attempt to solicit an

Advent employee (NYSCEF Doc. No. 60, ¶ 13), it is hard to conclude that either the 2016 alleged solicitation or the 2018 conduct was a material breach of the SLSA particularly when Advent indicated in the December 2019 Letter that following the alleged breach that it remained willing to negotiate with SEI. Thus, Advent's no-waiver argument is simply unavailing and does not change the appearance that reliance on the dated 2016 alleged solicitation and the 2018 alleged passing remark appears to be simply pre-textual. Finally, according to the George Tsiarias' affidavit (NYSCEF Doc. No. 74), SEI did not solicit Mr. Nolan and, in fact, it was Mr. Nolan who solicited SEI in 2016 (*id.*, ¶ 15). According to Mr. Tsiarias, in 2016, although Mr. Nolan did interview SEI, he was introduced to SEI through a recruiting firm, applied for a sales position, and ultimately was not offered a job because John Alshefski was not interested in hiring Mr. Nolan "because he did not think he was a good fit for the sales position" (NYSCEF Doc. No. 74, ¶¶ 9-10). With respect to the alleged 2018 solicitation, Mr. Tsiarias flatly denies the allegations set forth in Mr. Nolan's affidavit and says that he would not have made any employment overture to Mr. Nolan "since Mr. Alshefski, who was my supervisor at the time who was responsible for hiring in the sales group had already met and unequivocally rejected Mr. Nolan's effort to join SEI in 2016 (*id.*, ¶ 13).

SEI has also established that in the absence of an injunction it will suffer irreparable harm. The Advent software has been in place for 20 years and SEI has provided its customers with consistent and uninterrupted access to Geneva, Moxy and APX for over 10 years. This software is used across all of SEI's business divisions. By way of example, only, SEI alleges that 1,500 funds and 20 institutional investment manager clients regularly rely on the Geneva platform. In addition, this software cannot be easily extracted or replicated. SEI has already devoted 15 full

time employees and millions of dollars to try to replicate these platforms based on Advent's failure to provide the requisite key code so that SEI's license will continue. The project cannot be completed before January 20, 2020 when the current key codes expire and will take approximately two more years to complete (NYSCEF Doc. No. 100). The ensuing destruction to SEI's business and reputation would be virtually impossible to calculate and the harm cannot be compensated by money damages alone.

Lastly, Advent's argument based on SEI's 10-Q (NYSCEF Doc. No 65) fails. SEI does not state that if it does not have access to the Advent software it will not cause irreparable harm. Quite the contrary, SEI indicates that SEI does not believe based on the SLSA that it will have to change providers – i.e., that it has a current and continuing right to use the software based on its perpetual license. In addition, SEI indicates that it believes that the litigation will take years and that ultimately (years from now), if unsuccessful, there will then be alternatives to provide services to its clients:

> SEI does not believe that it will have to change providers ***under the current terms of the contracts with SS&C or Advent*** and that the ***process of litigating its rights under this contract may be a multi-year process.*** Consequently, SEI does not believe that the Advent matter will create any consequences to the services it provides to its clients in the near term. SEI believes that it has alternatives available to it that will enable it to continue to provide currently provided services to its clients in all material respects in the unlikely event that there ***ultimately*** is a negative outcome in the Advent Matter.

(NYSCEF Doc. No. 65, p. 24 [emphasis added])

Finally, there is no prejudice to Advent. Advent must merely continue to provide the key code for the licenses that they have provided for 20 years and, in return, continue to be paid substantial annual license fees from SEI. To the extent, Advent will litigate its claims, SEI's

continued use of the software platforms will not prejudice their claims. By contrast, the harm to SEI would be catastrophic. The preliminary injunction is granted.

Accordingly, it appearing to this Court that a cause of action exists in favor of the defendant and against the plaintiff and that the defendant is entitled to a preliminary injunction on the ground that the plaintiff threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the defendant's rights respecting the subject of the action and tending to render the judgment ineffectual, as set forth in the aforesaid decision, it is

ORDERED that the undertaking is fixed in the sum of $1,000,000, which sum defendant shall post no later than February 1, 2021, conditioned that the defendant, if it is finally determined that it was not entitled to an injunction, will pay to the plaintiff all damages and costs which may be sustained by reason of this injunction; and it is further

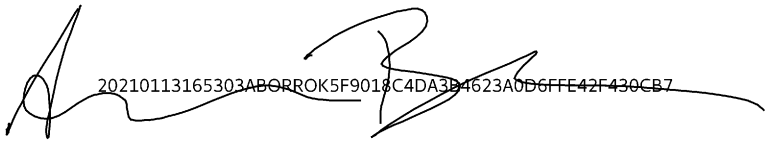
ORDERED that the defendant continue to timely make all license payments due to plaintiff; and it is further

ORDERED that plaintiff, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of plaintiff, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts:

1. Dishonoring their contractual obligations and commitments under the SLSA, including, denying SEI's licenses, rights, and privileges under the SLSA;
2. Failing to provide new license keys for the license keys due to Geneva, Moxy, and APX, and other software products licensed by SEI pursuant to the SLSA (such new license keys to be provided no later than January 15, 2021 at 10 A.M.);
3. Denying to SEI any and all access to the Geneva, Moxy, and APX software and related modules as are reasonably necessary to provide access to such software to SEI's clients; and
4. Denying to SEI any and all support, maintenance and technical support services for Geneva, Moxy, and APX.

and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 53, by Remote Means (MS Teams) on February 23, 2021, at 11:30 AM.



1/13/2021
DATE

ANDREW BORROK, J.S.C.

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