

**AT&T Mobility Holdings B.V. v Grupo Salinas  
Telecom, S.A. De C.V.**

2023 NY Slip Op 32833(U)

August 15, 2023

Supreme Court, New York County

Docket Number: Index No. 650330/2020

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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AT&T MOBILITY HOLDINGS B.V.,	INDEX NO. <u>650330/2020</u>
Plaintiff,	MOTION DATE _____
- v -	MOTION SEQ. NO. <u>007 008</u>
GRUPO SALINAS TELECOM, S.A. DE C.V. and GRUPO SALINAS TELECOM II, S.A. DE C.V.,	<b>DECISION + ORDER ON MOTION</b>
Defendants.	
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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 197, 201, 206, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 236, 242, 246, 250, 254, 262

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 198, 202, 207, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 237, 243, 247, 248, 249, 252, 255, 263

were read on this motion to/for PRECLUDE.

Upon the foregoing documents, it is

This is an action for indemnification. On January 16, 2015, when plaintiff AT&T Mobility Holdings B.V. (AT&T) purchased certain affiliates from defendants Grupo Salinas Telecom, S.A. De C.V. and Grupo Salinas Telecom II, S.A. De C.V. (collectively, Grupo), Grupo agreed to indemnify AT&T for liabilities incurred by tax positions taken by the affiliates prior to the closing. A Grupo affiliate made prepayments of expenses to other affiliates in 2013 and took corresponding tax deductions. The Mexican tax authority (SAT) disallowed the 2013 prepayments.

The parties filed these motions in limine prior to the trial which is scheduled for September 5 to 19, 2023. Grupo's motions in limine were denied on May 24, 2023.

(NYSCEF 257, Decision [seq. nos. 005, 006]; NYSCEF 260, So Ordered Tr [seq. nos. 005, 006].) No motions for summary judgment were filed.

In motion seq. no. 007, AT&T moves to preclude Grupo's expert Arturo Perez Robles from offering evidence regarding the purported legality of the 2013 prepayments under Mexican law. Perez was retained by Grupo to opine on the following issues:

- “• The probability that [Grupo affiliates] could have successfully litigated SAT's challenges to the tax treatment of advance payments that were the subject of the audits described in this report.
- AT&T's ability as the taxpayer to withdraw from the negotiation of a conclusive agreement in connection with the tax treatment of the prepayments.
- The factors considered when a client decides to settle an audit or litigate a tax assessment.”

(NYSCEF 172, Perez Report ¶17.) AT&T argues that (1) there is no foundation for Perez to testify that the prepayments were legal and Grupo's tax treatment was proper, and in any case and (2) legality is not relevant. AT&T challenges Grupo's expert because only one Mexican court has addressed the issue of strict indispensability of the prepayments and rejected Perez's theory. The SAT rejected Perez's theory in this case, and no legal authority supports his interpretation of the relevant Mexican tax code. However, AT&T's foundation argument goes to the weight the court gives to Perez's testimony. Therefore, AT&T's motion in limine to preclude this evidence is denied.

In motion seq. no. 008, AT&T moves to preclude evidence regarding Grupo's consent, or alleged lack thereof, to the 2019 settlement with the SAT for \$14 million. AT&T argues that, because Grupo disclaimed their obligation to indemnify AT&T, in whole or in part, Grupo lost their consent right. Grupo argues that, under the 2014 Stock Purchase Agreement (SPA), Grupo had control of the 2013 audit including whether to settle and AT&T had consent rights. Grupo alleges that AT&T usurped

Grupo's right to control and defend and allegedly breached the SPA by settling the 2013 and 2015 audits. Grupo insists that their consent to the settlement was contingent on an allocation of the settlement pursuant to which Grupo would indemnify for the portion of the 2019 settlement pertaining to the 2013 audit. AT&T counters that Grupo, the indemnitors, were effectively holding the settlement hostage.

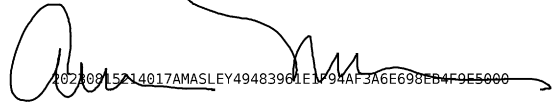
AT&T's motion is granted as a matter of law because Grupo waived their consent right when they disclaimed liability for indemnification. "Under New York law, 'if the indemnitor is given notice of the claim or proceeding against the indemnitee and declines to defend, then the indemnitor is bound by any reasonable good faith settlement the indemnitee may make.' Courts apply this rule even when the parties' agreement provides the indemnitor with an explicit consent right over settlements." (*Koch Indus., Inc. v AG.*, 727 F Supp 2d 199, 219 [SDNY 2010] [applying New York law].) That Grupo agreed to satisfy their 2013 obligation is irrelevant. A party "may not wield [its] consent-to-settlement right as a defense against plaintiffs' indemnity claim." (*Id.* at n 25.) Admittedly, Grupo refused to pay anything unless AT&T conceded to Grupo's demand to pay for 2013 only. Accordingly, AT&T has the burden to establish that the settlement was reasonable which is an issue of fact for trial.

While Grupo's lack of consent to the 2019 settlement is not a defense to this action, Grupo's other defenses continue: whether AT&T breached the SPA by impermissibly usurping control of the defense. Whether Grupo can avoid their indemnification obligation because they were not on notice of AT&T's indemnification claim for 2015 is an issue of fact. Likewise, whether the SPA imposes an indemnification obligation of post-closing tax years is a matter for trial in the absence of

a motion for summary judgment. (*Downtown Art Co. v Zimmerman*, 232 AD2d 270 [1st Dept 1996].)

Accordingly, it is

ORDERED that motion 07 is denied and 08 is granted.



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8/15/2023

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: