IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA EASTERN DIVISION Civil Action No. 4:11-cv-00059-FL

SIRSI CORPORATION d/b/a SIRSIDYNIX,

Plaintiff,

BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO Rule 12(b)(6)

v.

CRAVEN-PAMLICO-CARTERET REGIONAL LIBRARY SYSTEM,

Defendant.

Defendant submits this Memorandum of Law in support of its Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

STATEMENT OF THE CASE

Plaintiff, Sirsi Corporation doing business as SirsiDynix, (hereinafter "Plaintiff" or "SirsiDynix"), is a corporation organized under the laws of Delaware, with its principal place of business in Utah. Defendant, Craven-Pamlico-Carteret Regional Library System, (hereinafter "Defendant" or "CPC Regional"), is a regional public library system in North Carolina, comprised of nine (9) member libraries, with its administrative offices located in the New Bern, Craven County, public library.

This lawsuit arises from a dispute as to whether Plaintiff and Defendant entered into a binding, valid contract (hereinafter "Contract") on or about April 29, 2009, for the purchase of SirsiDynix's library management software entitled "Symphony", and whether Defendant breached that contract. Plaintiff alleges that Defendant, in exchange for the software and associated services, would pay Plaintiff a total of $146,844.80, over a period of three (3) years.

SirsiDynix filed the above-captioned action on or about April 15, 2011, alleging Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing. Plaintiff now seeks damages in the amount of $146,844.80 plus interest, and costs.

STATEMENT OF THE FACTS

On or about February 3, 2009, Plaintiff's representatives approached Defendant with respect to selling its Symphony software. During this conversation, Defendant did not agree to purchase any software or maintenance services from Plaintiff. Plaintiff provided Defendant (hereinafter "CPCR") with a quote which provided the cost of transitioning from CPC Regional's existing library management system, also a SirsiDynix product, to Symphony.

Thereafter, on or about February 5, 2009, CPC Regional received a document entitled "Schedule 1 SirsiDynix Quote" (hereinafter "Quote") from Plaintiff, which outlined the costs of Symphony. This quote was valid for a period of four (4) months, from February 4, 2009 until June 10, 2009. CPCR took no action on the Quote. In or around April of 2009, Plaintiff's representative approached CPCR and informed it that the Quote would expire on June 10, 2009, but if CPCR signed a Sirsi document entitled "Master Software License and Services Agreement" (hereinafter "Master Agreement" Exhibit A) Sirsi would hold the Quote indefinitely.

In the "Definition of Terms" section of the Master Agreement, the "Contract" or "Agreement" between the parties is defined as follows:

> "Agreement" means this Master Software License and Services Agreement, Ordering Forms, SaaS Schedule, reference to information contained in a SirsiDynix URL or policy and such other attachments and exhibits that the Parties' authorized representatives may mutually agree to in writing."

On its face the Master Agreement, as plead in the Complaint, standing on its own, does not contain the essential terms of a binding contract between the parties. The Master Agreement is reliant on documents entitled: "Ordering Forms" and the "SAAS Schedule" to supply the the necessary terms, including and most importantly in this Rule 12(b)(6) Motion to Dismiss, the date on which the parties obligation to perform arose. [1]

The Master Agreement defines Ordering Forms as;

> (i) the document executed by the Parties that describes in detail Customers order-specific information, including but not limited to, description of Software or Services ordered, fees, License Period or Term, or (ii) a Purchase Order."

The "SAAS Schedule" (Exhibit B) incorporated by reference into the Master Agreement by the Plaintiff, contains a form entitled "SAAS Migration Ordering Form" (hereinafter collectively referred to as "SAAS). The SAAS provides a: "Description of Items and services being purchased/licensed" which states:

> For the complete list of items and services to be delivered under this Ordering Form, please see Schedule 1- SirsiDynix quote dated 4 February 2009, attached hereto and incorporated herein by reference.

On its face the "SAAS Migration Ordering Form" contains no specific details of the Contract and is not the ordering form required by the Master Agreement to be a binding contract. The SAAS is a conduit which portends to transform the document entitled "Quote" (Exhibit C)

[1] These documents were previously filed with the Court as Exhibits to Defendant's Motion to Dismiss.

into the "Ordering Form" required by the Master Agreement. Hereinafter the Quote will be referred to as Quote/Ordering Form.

The Master Agreement contains no date defining when CPCR's obligation to perform arises. The SAAS which was incorporated into the Master Agreement contains no date defining when CPCR's obligation to perform arises. The Quote/Ordering Form, which was incorporated into the SAAS, which was incorporated into the Master Agreement, contains no date defining when CPCR's obligation to perform arises.

Plaintiff's Complaint is equally uninformative as to the date it alleges CPCR's obligation to perform arose. The Complaint does however allege that Sirsi agreed that CPCR did not have to perform because of financial burdens. (Comp. Para. 9)

Although The Master Agreement, the SAAS and the Quote/Ordering Form (hereinafter collectively referred to as "Contract") do not contain a specific date for the Parties performance, each document contains the term "Go Live Date" which Plaintiff has defined differently in each document.

The Master Agreement defines Go Live Date as:

"The date on which the SirsiDynix Software is placed into operational use for normal daily business…"

The Quote defines Go Live Date as:

"The date on which the SirsiDynix Software is available for operational use for normal daily business…"

The SAAS defines Go Live Date as:

"The date on which Customer is scheduled in the Installation Timetable set forth in the Ordering Form, to begin using the Hosted Application for normal daily business…"

The Master Agreement's definition provides no assistance in determining when the parties obligation to perform would arise, it simply states it's the date when the Software is placed into operational use. The software was never placed into operational use.

The Quote's definition states Go Live is the date the software is available for operational use, which provides no assistance on when the parties obligation to perform would arise. Additionally, the Quote and the Master Agreement seem to be in conflict as to the definition of Go Live Date.

The SAAS definition of Go Live refers the parties to the Quote/Ordering Form, and yet another sub-document entitled "Installation Timetable" which was to have been set forth in the Quote/Ordering Form. The Quote/Ordering Form does not contain an "Installation Timetable" arguably because it was merely a quote and not an Ordering Form.

ARGUMENT

On its face the Complaint fails to allege a date when the parties obligation to perform arose therefore it is impossible to determine when a breach would or could occur. Plaintiff plead that CPCR breached the Master Agreement, which includes the Quote/Ordering Form, and the SAAS, therefore because the documents are intrinsic to the Complaint it is proper for the Court, in a Rule 12(b)(6) Motion to Dismiss, to examine the documents. The Contract documents do not contain a date the parties obligation to perform would arise, which is an essential element in the formation of a contract. Without a performance date it is impossible to determine when the breach of contract date would occur, or even if a breach of contract could occur.

The Defendant now moves to dismiss Plaintiff's Complaint because:

1. Plaintiff's Complaint, on its face, does not allege facts sufficient for this Court to determine that a valid Contract existed between the parties.

2. Plaintiff has failed to establish a breach of contract action; and
3. The terms of the Master Agreement as plead in the Complaint, indicate that the alleged Contract was illusory and unenforceable.

The standard of review for a Rule 12(b)(6) motion, which tests the legal sufficiency of a complaint, "is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979); Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (2007). A motion to dismiss under Rule 12(b)(6) is properly granted by a court, provided one of the following conditions are met, including: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." Wood v. Guilford Cty., 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

In regards to such motion, "the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of facts are not admitted.' " Sutton v. Duke, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970); Quoting 2A Moore's Federal Practice § 12.08 (2d ed. 1968).

While a motion to dismiss for failure to state a claim, pursuant to Rule 12(b)(6), should not be granted freely, but instead "should only be granted in very limited circumstances[,]" it is properly granted when a defendant can successfully demonstrate that no law supports plaintiff's claim, facts essential to plaintiff's claim are missing, or, importantly, when a fact disclosed by plaintiff in their complaint defeats the plaintiff's claim. Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989); Hare v. Butler, 99 N.C. App. 693, 394 S.E.2d 231 (1990). The

Fourth Circuit has held that such a motion should be granted if "it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." Id.

A Motion to Dismiss should be treate as a Motion for Summary Judgment when a trial court considers materials outside the pleadings N.C.Gen.Stat. 1A-1, Rule 12(b)(6), Carlisle v. Keith, 169 N.C.App 674, 688-90, 614 S.E.2d 542, 551-52(2005).

I. PLAINTIFF FAILS TO PLEAD A CLAIM FOR BREACH OF CONTRACT

Under North Carolina law, a party asserting a claim for breach of contract must demonstrate: "(1) existence of a valid contract; and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000); citing *Jackson v. Carolina Hardwood Co.,* 120 N.C. App. 870, 871, 463 S.E.2d 571, 572 (1995). In addition the plaintiff must allege "that a valid contract existed between the parties, that defendant breached the terms thereof, the facts constituting the breach, and that damages resulted from such breach. *Claggett v. Wake Forest University*, 126 N.C. App. 602, 608, 486 S.E.2d 444, 447 (1997). A party asserting that a breach of contract must have either first performed or offered to perform their promise, so as to preserve their rights under the contract at issue." *Cater v. Barker*, 617 S.E.2d 113, 116 (2005); *Boyd v. Watts,* 73 N.C. App. 566, 570, 327 S.E.2d 46, 49 (1985).

The essential element necessary for a breach of the Contract to have occurred was a date for performance, and that element is missing, and the Plaintiff's have failed to make any allegation of an agreed upon date for performance of the Contract.

In addition to the Complaint alleging that the Plaintiff's waived performance of the Contract due the Library's financial troubles, the Master Agreement fails on its face to establish a date for performance. The Contract simply states, in three conflicting definitions, that the

Contract will begin on the "Go Live Date" which will be discussed below. No actual date was ever established for performance under the Contract and neither party ever performed on the Contract.

The essential elements of a breach of contract action are, 1) the existence of a valid contract, and 2) breach of the terms of the contract. Poor v. Hill, 138 N.C. App. 19, 26 (2000). While the Court must accept for true that a valid contract existed, Plaintiff has failed to plead facts sufficient to make out a valid cause of action for breach of contract.

Pursuant to the terms of the alleged Contract, specifically the Master Software License and Services Agreement, as well as the SAAS Schedule, which are all incorporated into the Complaint by reference, no time for performance of the Contract was agreed upon, and so no breach has occurred. The Contract and integrated subparts (hereinafter referred to as "Contract") purport that the performance begins on the "Go Live Date." According the to the Contract the Go Live Date would not only trigger the beginning of the contract, but serve as the time that "100% of total services and first year subscription fees were due.

Plaintiff's documents provide three conflicting definitions of the Go Live Date:

(1) The Master Software and License Services Agreement defines the Go Live Date as: "with respect to the SirsiDynix Software license orders, the date on which the SirsiDynix Software is placed into operational use for normal daily business, including searching the public access catalog and circulating materials[,]"

(2) Schedule I defines the Go Live Date as: "with respect to the SirsiDynix Software license orders, the date on which the SirsiDynix Software is available for

operational use for normal daily business, including searching the public access catalog and circulating materials."

Therefore, in the instant matter, Plaintiff has not asserted a claim upon which relief can be granted, pursuant to the Rules of Civil Procedure 12(b)(6), as Plaintiff has not sufficiently pleaded both essential elements for a breach of contract. The Complaint, on its face, fails to assert a claim for breach of contract, as it fails to demonstrate that a breach has occurred. Here, by the very language of Plaintiff's own documents, a Go Live date has not ever occurred. Defendants continued utilizing the "old" software, with both it and the server being maintenance by Plaintiff on a monthly basis, and have never placed Symphony into operational use for normal daily business. As such, an essential element for the claim of breach of contract fails, and a cause of action for same may therefore not stand. Not only does the Complaint reveal insufficient facts so as to establish a valid claim for breach of contract, but the Complaint itself discloses a fact which itself defeats the claim, specifically, that Plaintiff agreed to delay implementation and that the Symphony Software has not been installed to date. Therefore, pursuant to the holding in Woods, Plaintiff's claim is properly disposed of by a Rule 12(b)(6) Motion for Failure to State a Claim for which Relief can be Granted. Wood v. Guilford Cty., 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

Furthermore, similar to the matter in Jones v. Realty Co., discussed by the Court of Appeals of North Carolina in Orthodontic Centers of America, where the plaintiff sued to recover a sales commission for obtaining a purchaser of property who was a ready, willing, and able buyer pursuant to the agent's agreement with the sellers. 226 N.C. 303, 37 S.E.2d 906 (1946); 151 N.C.App. 133, 564 S.E.2d 573, 575 (2002). In that matter, the Court interpreted the

language of the agreement to mean the commission came due when the deal "closed up," and since it never did "close up," the Court held:

> It can make no difference whether the event be called a contingency or the time of performance. Certainly, under either construction, the result would be the same; since, if the event does not befall, or a time coincident with the happening of the event does not arrive, in neither case may performance be exacted. Nor will it do to say that a promise to pay 'when the deal is closed up' is a promise to pay when it ought to be closed up according to the terms of the contract. Such is not the meaning of the words used. **It is the event itself, and not the date of its expected or contemplated happening, that makes the promise to pay performable.**

Bowman v. Hill, 45 N.C.App. 116, 262 S.E.2d 376 (1980) (emphasis added). The Court there went on to state that the weight of authority denotes that "the use of such words as 'when', 'after', 'as soon as', and the like, gives clear indication that a promise is not to be performed except upon the happening of a stated event." Id. Finally, it is a well settled rule of construction "that an ambiguity in a written contract is to be inclined against the party who prepared the writing." Jones v. Palace Realty Co., 226 N.C. 303, 37 S.E.2d 906 (1946); citing Wilkie v. New York Mut. Life Ins. Co., 146 N.C. 513, 60 S.E. 427 (1908).

In the matter sub judice, the language of the alleged contract, in both the Master Software and License Services Agreement and Schedule I, although a software and support agreement, is readily comparable to the real estate agent agreement discussed in Jones, supra. In Jones, as in the matter at hand, a specific and identifiable date was never placed into the language of the agreement. Instead, words were used to describe when the alleged "time of performance," in other words, payment by the Defendant, would be due and owed. In the instant matter, the language defining such was titled the "Go Live Date," which would not only trigger the beginning of the contract, but serve as the time that "100% of total services and first year subscription fees under this ordering form due on date of initial live use of SaaS services." The

"Go Live Date" is defined in the Master Software and License Services Agreement as meaning: "with respect to the SirsiDynix Software license orders, the date on which the SirsiDynix Softward is placed into operational use for normal daily business, including searching the public access catalog and circulating materials[,]" and is again defined, although inconsistently, in the "Other Terms" section of Schedule I, as meaning "with respect to the SirsiDynix Software license orders, the date on which the SirsiDynix Software is available for operational use for normal daily business, including searching the public access catalog and circulating materials." As stated previously, such "Go Live Date" has never occurred. Therefore, pursuant to language of the Court in Jones, that "[i]t is the event itself, and not the date of its expected or contemplated happening, that makes the promise to pay performable[,]" here, as the "Go Live Date" has not yet occurred, which is the very event the agreement states would trigger the alleged promise to pay, has not yet happened, a cause of action for breach of contract cannot yet exist.

Furthermore, as the court in Bowman stated, the use of language, such as when, after, as soon as, or other similar language, serves as an indicator that a promise to perform is not triggered until the happening of a specific, stated event. In the matter sub judice, this stated event is defined in the Master Agreement, and its related and incorporated documents, as the Go Live Date. As evidenced by Plaintiff's own Complaint, Symphony Software is not now, nor was ever, put into normal daily business use for CPC Regional. Comp. ¶ 9. Therefore, without the event which triggers a promise to pay, the Go Live Date, no performance is required, nor can be expected, by CPC Regional. Simply put, Plaintiff's Complaint, at Paragraph 9, itself admits that a breach has not yet occurred, and therefore, pursuant to Rule 12(b)(6), an action for breach of contract is not ripe. Comp. ¶ 9. Therefore, Defendant respectfully requests the Court enter an Order dismissing the action against Defendant, as such action is premature at best.

II. PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT NECESSARILY FAILS AS PLAINTIFF'S COMPLAINT DEMONSTRATES THE TERMS THEREIN WERE ILLUSORY

Under North Carolina law, the courts hold that "[g]enerally, a party seeking to enforce a contract has the burden of proving the essential elements of a valid contract." Orthodontic Centers of America, Inc. v. Hanachi, 151 N.C.App. 133, 564 S.E.2d 573, 575 (2002). To prove same, a plaintiff must allege that there existed between the parties a binding agreement that involved "mutual asset, legal capacity, consideration, and a legal bargain." Id. One of the required elements of a valid contract is that there is a promise to perform, which is defined as "an assurance that a thing will or will not be done." Bowman v. Hill, 45 N.C.App. 116, 262 S.E.2d 376 (1980). In terms of contract law, the mere expression of the intention or desire to do something is not sufficient to amount to a promise. Id.; citing 17 Am.Jur.2d Contracts § 2, p. 334. Such an expression is referred to as an illusory promise, as an apparent promise simply makes performance optional with the promisor despite what future events or conduct may occur, and is therefore not in fact a promise at all. Id.

An illusory promise has been defined by the Court of Appeals of North Carolina as "[a]n apparent promise which, according to its terms, makes performance optional with the promisor no matter what may happen, or no matter what course of conduct in other respects he may pursue, is in fact no promise[,]" and when parties are not bound by promises, the contract can be set aside based on a lack of consideration. Bowman v. Hill, 45 N.C.App. 116, 117, 262 S.E.2d 376, 377 (1980). Further, even where a contract recites consideration, as in the case of the employment dispute in Milner Airco, Inc. v. Morris, but does not actually bind a party to any promise, a court may hold that the consideration is illusory and therefore a contract is unenforceable. Milner Airco, Inc. v. Morris, 111 N.C.App. 866, 433 S.E.2d 811 (1993). In Milner Airco, Plaintiff and Defendants entered into an employment contract with a covenant not-

to compete provisions in the 1980s, with Defendants engaged in the work of installer and installer helper for Plaintiff. Id. at 812. Subsequently, in 1990, Defendants were required to sign another employment contract, despite having recently been demoted, and such contracts held covenants not to compete. Id. Thereafter, in October 1991, Defendants resigned and began working for a competitor, and began soliciting customers of Plaintiffs, contrary to their previous employment contracts. Id. The Court held that while the contract itself recited consideration, it did not actually bind the employer to any promise at all. Id. at 814. As it was not a new employment relationship, and therefore employment alone would not be sufficient consideration, and because Plaintiff made no new promises that it would be required to keep in exchange for the promise to not compete, the court held that "[t]he purported consideration was illusory at best." Id. The court in Milner went on to state that a contract of that type, "wanting in mutuality, [and] presenting no equitable considerations," is not enforceable by a court of equity. Id.

While the matter in Milner dealt with an employer providing an illusory promise or consideration, the matter at hand proves analogous to that in Milner. Here, while the alleged contract appears to provide sufficient consideration, with the Plaintiff providing services and software in exchange for Defendant's payment, Plaintiff's own Complaint demonstrates that this agreement was illusory at best, just as the Court of Appeals found in Milner. Plaintiff's Complaint states: "After entering into the Master Agreement with SirsiDynix, CPC Regional asked to delay implementation of the Symphony system due to funding issues. SirsiDynix agreed to those delays." Comp. ¶ 9. By their own factual allegations, Plaintiff admits that it waived consideration; payment by Defendant in exchange for the implementation of software on the Go Live Date. Plaintiff has supplied this Court, through its pleadings, with the allegations necessary to find that the Contract was illusory, and similar to that in Milner. Neither party actually owed

the other anything, unless they desired to do so, which, as discussed above, is not a promise, but is rather merely an illusory promise. Therefore, Defendant respectfully requests the Court to find in favor of Defendant's Motion to Dismiss, and to issue an Order finding the consideration illusory, and holding the alleged contract as unenforceable.