

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-16-427

FILED
2018
AUG 21
10 41 AM
CLERK OF COURT
MAINE
✓

INFOBRIDGE, LLC,

Plaintiff

v.

ORDER ON PENDING
MOTIONS

CHIMANI, INC.,

Defendant

The court orders the following on the pending motions:

1. Plaintiff's Motion for Clarification pending Order on Motion to Compel Arbitration:

The motion for clarification pending order on motion to compel arbitration is moot.

2. Plaintiff's Motion for Clarification of the Attachment Order:

The court signed the order of attachment submitted by plaintiff. Plaintiff now seeks clarification that the order of attachment includes defendant Chimani, Inc.'s trademark. This issue was not addressed in plaintiff's motion for attachment. The motion for clarification of attachment order is denied.

3. Defendant's Motion for Attachment:

The motion for attachment is denied.

4. Defendant's Motion to Vacate the Order of Attachment:

The motion to vacate order of attachment dated March 6, 2017 is denied.

5. Plaintiff and Third-Party Complaint Defendant's Motion to Dismiss Counterclaim and Third-Party Complaint:

This motion was filed on August 2, 2017. Opposition was filed on January 5, 2018. By agreement of the parties, an amended counterclaim and third-party complaint was also filed on

January 5, 2018. In plaintiff's reply filed January 18, 2018, plaintiff addressed the amended counterclaim and third-party complaint.

Before the court is a motion to dismiss, not a motion for summary judgment or a Rule 50 motion made during trial. M.R. Civ. P. 50, 56; (see e.g., Pl.'s Reply Mem. on Mot. to Dism. 2 n.4, 3 n.5; Def.'s Surreply 2 n.2.) On a motion to dismiss, the allegations in the counterclaim and third-party complaint are considered true. See Saunders v. Tisher, 2006 ME 94, ¶ 8, 902 A.2d 830 ("we consider the facts stated in the complaint as if they were admitted"). "For a court to properly dismiss a claim for failure to state a cause of action, it must appear 'beyond doubt that [the] plaintiff is entitled to no relief under any set of facts that might be proven in support of the claim.'" Dragomir v. Spring Harbor Hosp., 2009 ME 51, ¶ 15, 970 A.2d 310 (quoting Plimpton v. Gerrard, 668 A.2d 882, 885 (Me. 1995)).

Defendant has alleged transactions that fall within the statute of limitations for breach of contract. The court is unwilling at this stage of the proceedings, considering only defendant's allegations, to determine that defendant's tort claims cannot be sustained. See Banknorth, N.A. v. BJ's Wholesale Club, Inc. 394 F. Supp. 2d 283, 287 (D. Me. 2005).

The existence of a fiduciary relationship is fact specific. See Bryan R. v. Watchtower Bible & Tract Soc'y, Inc. 1999 ME 144, ¶ 20, 738 A.2d 839. Plaintiff relies on Maine Rubber Int'l v. Envtl. Mgmt. Group, Inc., a case decided on a motion for summary judgment. In that case, the court observed that the environmental services contract at issue did not involve a fiduciary relationship. See Me. Rubber Int'l v. Envtl. Mgmt. Group, Inc., 298 F. Supp. 2d 133, 137 (D. Me. 2004); see also Morris Resolution Trust Corp., 622 A.2d 708, 711-12 (Me. 1993).

"[W]hile generally an independent contractor does not owe a fiduciary duty to the one who engages its services, a fiduciary relationship may be found to exist if the parties understand that the

relationship is one of special trust or confidence.” McGregor v. Hunting Specialized Coating, Inc., No. 04-73547, 2005 U.S. Dist. LEXIS 49786 at *8 (E.D. Mich. June 3, 2005). (holding that, on a motion to dismiss, a corporation had alleged facts sufficient to support a claim for breach of fiduciary duty against an individual and a limited liability company and that a fully developed record was required to make the final determination); see also Northeast Harbor Golf Club v. Harris, 661 A.2d 1146, 1148 (Me. 1995) (corporate officers and directors owe duty of loyalty to corporations they serve). The motion to dismiss amended counterclaim and third-party complaint is denied.

The clerk is directed to incorporate this order into the docket by reference. M.R. Civ. P. 79(a).

Date: March 14, 2018


Nancy Mills
Justice, Superior Court

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-16-427 ✓

INFOBRIDGE, LLC,

Plaintiff

v.

CHIMANI, INC.,

Defendant

STATE OF MAINE
Cumberland County District Office

MAR 06 2017

RECEIVED

ORDER ON MOTIONS

Before the court are (1) plaintiff InfoBridge, LLC's motion for attachment and trustee process, (2) defendant Chimani, Inc.'s motion to compel arbitration and to dismiss plaintiff's complaint, and (3) defendant's motion to seal. For the following reasons, plaintiff's motion for attachment and trustee process is granted, defendant's motion to compel arbitration and to dismiss is denied, and defendant's motion to seal is granted.

BACKGROUND

Plaintiff filed a complaint on November 4, 2016. In the complaint, plaintiff alleged: count I, breach of contract; count II, quantum meruit; and count III, unjust enrichment. Plaintiff filed a motion for attachment and trustee process with the complaint. On November 28, 2016, defendant filed an opposition to plaintiff's motion for attachment and trustee process and a motion to compel arbitration and dismiss the complaint. Plaintiff filed an opposition to the motion to compel arbitration and to dismiss on December 19, 2016. On December 29, 2016, defendant filed a reply to plaintiff's opposition to the motion to compel arbitration and to dismiss and a motion to seal. Plaintiff filed an opposition to the motion to seal on January 11, 2017. Defendant filed a reply to plaintiff's opposition to the motion to seal on January 17, 2017.

DISCUSSION

1. Motion for Attachment and Trustee Process

a. Standard of Review

Attachment and trustee process may be made if the attachment is for a specified amount and the court finds that it is more likely than not that the plaintiff will recover judgment in an amount equal to or greater than the aggregate sum of the attachment. Plourde v. Plourde, 678 A.2d 1032, 1034-35 (Me. 1996); see M.R. Civ. P. 4A(c), 4B(c). Under this standard, the moving party must show “a greater than 50% chance of prevailing.” Richardson v. McConologue, 672 A.2d 599, 600 (Me. 1996) (citation omitted). “In making this determination, the court assesses the merits of the complaint and the weight and credibility of the supporting affidavits.” Porrazzo v. Karofsky, 1998 ME 182, ¶ 7, 714 A.2d 826.

b. Analysis

Plaintiff seeks an order of attachment and trustee process against defendant’s real and personal property in the amount of \$149,075.77. (Mot. Attach. 1.) To prevail on its breach of contract claim, plaintiff must establish that: (1) a legally binding contract existed between the parties, (2) defendant breached a material term of that contract, and (3) defendant’s breach caused plaintiff to suffer damages. Tobin v. Barter, 2014 ME 51, ¶¶ 9-10, 89 A.3d 1088.

Plaintiff supports its motion with the affidavit of Shaun Meredith. Mr. Meredith is plaintiff’s principal and also served as defendant’s Chief Technology Officer from 2013 until September 22, 2016. (Meredith Aff. ¶¶ 1, 13, 15.) Between April 1, 2015 and September 22, 2016, Mr. Meredith also served on defendant’s board of directors. (Meredith Aff. ¶ 15.)

Plaintiff has produced a contract signed by defendant’s president and plaintiff’s principal. (Meredith Aff. ¶¶ 1, 5-6; Ex. A.) The parties entered into the contract on February 11, 2010.

(Meredith Aff. ¶¶ 4-6; Ex. A to Meredith Aff.) The contract provided that plaintiff would design, create, and develop for defendant an iPhone-based software application and expansion architecture for other mobile platforms (the program). (Meredith Aff. ¶ 7.)

The contract provides in part that defendant will pay to plaintiff: “Fourteen and one-half percent (14.5%) of the Net Revenue from each sale and download of the Program up to a total amount of \$150,000 in the aggregate from all revenue sources derived from the Program including, but not limited to: sales, downloads, advertising fees, and volume purchasing agreements.” (Meredith Aff. ¶ 9; Ex. A § 2(a)(iv).) The contract further provides that payment will be made “on a quarterly basis not later than one (1) month after the end of each calendar quarter.” (Meredith Aff. ¶ 10; Ex. A § 2(c).)

Plaintiff performed its obligations under the contract. (Meredith Aff. ¶ 11.) Defendant paid plaintiff \$384.57 in September 2010 and \$539.66 in January 2011. (Meredith Aff. ¶ 12.) By letter dated September 27, 2016, plaintiff informed defendant that defendant was in breach of the contract and demanded payment of \$149,075.77. (Meredith Aff. ¶ 30; Ex. D to Aff.) By letter dated October 2, 2016, defendant responded that plaintiff’s demand was invalid. (Meredith Aff. ¶ 31; Ex. E to Aff.)

Plaintiff has shown it is more likely than not that plaintiff will recover judgment in an amount equal to or greater than \$149,075.77. See M.R. Civ. P. 4A(c). Further, the affidavit provided by defendant in opposition to plaintiff’s motion does not dispute these facts. (See Lambert Aff.)

2. Motion to Compel Arbitration and to Dismiss

a. Standard of Review

Maine's Uniform Arbitration Act "requires that when there is a complaint or motion to compel arbitration, the matter should proceed to arbitration unless there is a bona fide dispute about the existence of the agreement to arbitrate." Macomber v. Macquinn-Tweedie, 2003 ME 121, ¶ 12, 834 A.2d 131. "Maine has a broad presumption favoring substantive arbitrability, which dictates a conclusion that a dispute has been subjected to arbitration if (1) the parties have generally agreed to arbitrate disputes, and (2) the party seeking arbitration presents a claim that, on its face, is governed by the arbitration agreement." Roosa v. Tillotson, 1997 ME 121, ¶ 3, 695 A.2d 1196. Doubts should be resolved in favor of arbitrability. V.I.P., Inc. v. First Tree Dev., 2001 ME 73, ¶ 4, 770 A.2d 95 (citation omitted).

b. Analysis

Section 12.3 of the contract provides:

Settlement of Disputes. In the event of any dispute or disagreement between the parties, either with respect to the interpretation of any provision of this Agreement or with respect to performance by Customer or by InfoBridge hereunder, except for a dispute or disagreement involving the substantial breach of this Agreement, each of the parties will appoint a designated officer to meet for the purpose of endeavoring to resolve such dispute. No formal proceedings for the resolution of such dispute, except for the seeking of injunctions or other equitable relief from a court of appropriate jurisdiction, may begin until the parties' have attempted to resolve such dispute amongst themselves for a period of ten (10) days. In the event the parties cannot resolve the dispute by negotiation within such ten (10) day period, either party may submit the dispute to binding arbitration under the expedited commercial arbitration rules of the American Arbitration Association then in effect.

(Ex. A § 12.3 (emphasis added).) The underlined language makes clear that the parties specifically exempted from the arbitration provision any dispute involving a substantial breach of the contract. Plaintiff has brought a breach of contract claim alleging that defendant has failed to

make payments under the contract. (Pl.'s Compl. ¶¶ 27-33.) As a result, plaintiff's claims are not subject to arbitration.

Defendant's argument that plaintiff's claims are subject to arbitration because they involve a dispute with respect to the interpretation of the contract is unpersuasive. (Def.'s Reply to Pl.'s Opp'n to Mot. Compel Arbitration 2-3.) That arbitration provision applies only to those disputes that involve interpretation of the contract's provisions or the parties' performance and do not involve an alleged substantial breach of the contract. Defendant's argument that the alleged breach is not substantial because defendant is liable for at most \$21,750.00 is equally unpersuasive. (*Id.* at 3-6.) Regardless of the amount of defendant's potential liability, plaintiff's allegation that defendant has failed to pay plaintiff the amount owed under section 2(a)(iv) represents a dispute involving a substantial breach of the contract.

3. Motion to Seal

Defendant requests that the court seal the following documents: (1) exhibits B and C to plaintiff's complaint, (2) Mr. Meredith's affidavit and accompanying exhibits, and (3) Kerry Gallivan's affidavit and accompanying exhibits, submitted with defendant's reply to plaintiff's opposition to defendant's motion to compel arbitration and to dismiss. (Def.'s Mot. Seal 1); see M.R. Civ. P. 79(b)(1). Defendant represents, under oath, that these documents "contain sensitive financial information about Chimani, Inc., its financial relationship with its customers and other information about its business plans that would provide Chimani's competitors with an advantage to the harm of Chimani." (Def.'s Mot. Seal 1.) The contract recognizes that information related to the contract may be confidential. (Ex. A to Compl. § 12.4.) Defendant has shown an interest in maintaining the confidentiality of these documents.

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The entry is

Plaintiff's Motion for Attachment and Trustee Process is
GRANTED.

Defendant's Motion to Compel Arbitration and to Dismiss is
DENIED.

Defendant's Motion to Seal is GRANTED.

Date: March 6, 2017



Nancy Mills
Justice, Superior Court