Reol Serv., LLC v BLL, LLC

2013 NY Slip Op 31783(U)

August 2, 2013

Sup Ct, New York County

Docket Number: 652297/2013

Judge: Shirley Werner Kornreich

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54

Justice

REOL Servs., LLC

INDEX NO. 652297/2013

MOTION DATE 7/22/13

-v-

MOTION SEQ. NO. 001

BLL, LLC

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 8/2/13

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

---X

REOL SERVICES, LLC,

Plaintiff,

-against-

BLL, LLC d/b/a THE RE SKUNKWORKS,

Defendant.

---X

Index No. 652297/2013

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

In this action arising out of a services contract, plaintiff REOL Services, LLC (REOL), a New York limited liability company, seeks a preliminary injunction enjoining defendant software developer, BLL, LLC, d/b/a, The Re Skunkworks (Skunkworks), from allowing a program developed by defendant for plaintiff to expire. The court grants the motion in part and denies it in part.

I. Background

By an agreement dated January 23, 2011, REOL retained Skunkworks to develop an application for an iPad (the app) (affidavit of Greg Clements, sworn to on June 28, 2013, exhibit A [the Service Contract]). In particular, REOL wanted Skunkworks to develop an iPad app that could be used by real estate owners to streamline the leasing process (Clements affidavit, ¶ 13). The Service Contract provides that, unless otherwise specified, Skunkworks would be compensated on a time and materials basis, to be billed monthly, with payment due within thirty days of the presentation of the invoice (Service Contract ¶ 3). Either party could terminate the contract, with or without cause, in writing (Service Contract ¶ 4), and dissatisfaction with

[* 3]

Skunkworks' performance was to be immediately reported to Skunkworks in writing (Service Contract ¶ 2). All materials and intellectual property, including source and object code, created by Skunkworks and delivered to REOL would become the property of REOL "[u]pon satisfaction of all payments due to" Skunkworks (*id.* at ¶ 7.1). Finally, Skunkworks''s liability to REOL for any claim arising from the product or service is limited to monetary damages and "shall in no event exceed $100 (Service Contract ¶ 9).

A version of the app was delivered in May 2013, and REOL promptly licensed it to a client for a "substantial license fee, as well as fixed monthly payments" (Clements affidavit, ¶¶ 14–15). However, while Skunkworks sent monthly bills to REOL and REOL never questioned the monthly invoices, REOL failed to pay any of the invoices issued from January 2013 and on (affidavit of Ivana Stjepanovic, sworn to on July 8, 2013, ¶¶ 4–6, exhibit C). After delivery of the app, REOL refused to pay the outstanding bill of $160,268.75, claiming that the charges were "grossly inflated" (*id.* at ¶¶ 5–11, exhibit C; complaint ¶¶ 12–13). During the course of negotiations concerning the bills, Skunkworks advised REOL that the version of the app delivered to REOL would expire on June 29, 2013, and that, absent payment, Skunkworks would render no assistance in replacing or renewing the program (Stjepanovic affidavit, ¶ 11).

To forestall this result, REOL commenced the instant action, seeking a declaratory judgment that REOL owes Skunkworks nothing, an order directing Skunkworks to deliver the source code for the app to plaintiff and to refrain from deactivating the program, and an award of attorneys' fees. The complaint was accompanied by an order to show cause seeking a preliminary injunction forbidding Skunkworks from "taking any action . . . that prevents or interferes with REOL's, or its licensees', full and uninterrupted use of the iPad app" (*REOL*

[* 4]

Servs., LLC v BLL, LLC, Sup Ct NY County, June 28, 2013, Kapnick, J., index No. 652297/2013). The court issued a temporary restraining order against Skunkworks granting the requested injunction pending argument on the preliminary injunction, which was scheduled for July 2 (*id.*). By stipulation, the parties agreed to adjourn the argument date until July 9. Moreover, defendant agreed to keep the app working for ten days following the expiration or termination of the temporary restraining order. Defendant then set the expiration date of the app to July 10 (transcript, July 9, 2013, 15:19–21).

II. The Nature of the Time Limit

At oral argument, the parties were directed to submit affidavits explaining the nature of the expiration date at issue in this action. Defendant submitted an affidavit from an employee named Jedediah Micka, who identifies himself as "Project Lead and Architect" for Skunkworks (affidavit of Jedediah Micka, sworn to on July 12, 2013, ¶ 1). Micka avers that the app in question was created for use on iPads and iPhones under the standard developer's agreement with Apple (*id.* at ¶ 3). He states that under this agreement, a developer is allowed to test an app on a limited basis for a certain period of time; in this case, REOL's test apps were limited to a duration of "less than 2 months" (*id.* at ¶¶ 3–4). Micka further states, however, that Skunkworks also imposes its own time limit on test apps "to gain better control over the trial period" (*id.* at ¶ 5). After the app has been tested, a finished version is submitted to Apple to be made available through the developer's chosen distribution mechanism (*id.* at ¶¶ 2, 6–8). Skunkworks would create that final version, which would have no expiration date (*id.*).

Plaintiff failed to submit an acceptable affidavit on the issue of the expiration date. Instead, pleading time constraints, plaintiff's counsel has submitted a summary of what he has

[* 5]

learned about the subject from a variety of sources (affidavit of David Ebert, sworn to July 11, 2013). As counsel concedes, such a statement cannot be accepted as evidence, but in any event Mr. Ebert's findings largely agree with Mr. Micka's affidavit. Accordingly, a further hearing on the subject is unnecessary.

III. Standard

To succeed on a motion for a preliminary injunction, the movant must demonstrate a likelihood of ultimate success on the merits, that irreparable injury would result in the absence of injunctive relief, and that a balancing of the equities to effect substantial justice and to preserve the status quo warrants the grant of this extraordinary relief (CPLR 6301; *Key Drug Co. v Luna Park Realty Assoc.*, 221 AD2d 598, 599 [2d Dept 1995]; *Pilgreen v 91 Fifth Ave. Corp.*, 91 AD2d 565, 567 [1st Dept 1982] *app dismissed*, 58 NY2d 1113 [1983]). The movant "must demonstrate a clear right to relief which is plain from the undisputed facts," to establish its likelihood of success (*Blueberries Gourmet Inc. v Aris Realty Corp.*, 255 AD2d 348, 349–50 [2d Dept 1998]). Where questions of fact exist which would substantially subvert the movant's likelihood of ultimate success, an injunction should not be granted (*Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co.*, 53 AD3d 612, 613 [2d Dept 2008]).

IV. Discussion

Based on the papers submitted, it appears that Skunkworks has delivered to REOL a test version of the app. Under the parameters set by Apple, that version would be available for slightly less than two months. To extend this deadline, Skunkworks would have to "rebuild" the app, essentially restarting Apple's clock. Separately, though, Skunkworks has imposed its own expiration date on the test app, which it can apparently set and reset at will, subject to the

[* 6]

overarching time limitations on the app's availability set by Apple. For example, when this action was commenced, the app was due to expire on June 29. That expiration date was extended to July 10, and then apparently extended again, after oral argument, to July 19 (Ebert affidavit ¶ 5). Moreover, defendant has promised plaintiff to extend the app's lifetime by at least ten days in the event the motion for a preliminary injunction is denied. As these dates are not in two month intervals, it would seem that they are manifestations of Skunkworks's internal time limit. It, therefore, appears that in requesting that Skunkworks be enjoined from allowing the app to expire, plaintiff is essentially asking the court to issue an order requiring Skunkworks to not only lift its own time limit but also periodically resubmit "builds" of the app, thereby providing a service of several hours at two month intervals, keeping the program alive until the issue of Skunkworks' fees is resolved.

The court declines to order Skunkworks to provide these services (*See In re Baby Boy C.*,84 NY2d 91, 101 [1994], citing *Amer. Broadcasting Cos. v Wolf*, 76 AD2d 162, 173-4 [1st Dept 1980], *affd* 52 NY2d 394 [1981] ["'It has long been a principle of equity that the performance of contracts for personal services depends upon the skill, volition and fidelity of the person who [was] engaged to perform such services and that it is impracticable, *if not impossible*, for a court to supervise or secure the proper and *faithful* performance of such contracts.'"]). To begin, there are question raised which undermine the likelihood of plaintiff's ultimate success on this action. In its original moving papers, plaintiff's sole argument in support of its position was the conclusory assertion that the charges from January 2013 and on "greatly exceeded the amount that REOL anticipated or was reasonable" (Clements affidavit, ¶ 16). Plaintiff declined to elaborate, except to complain that it had expected the app to be ready earlier (*id.* at ¶ 14). The

simple fact is that REOL paid approximately $140,000 for seven months work, but is now refusing to pay approximately $160,000 for another six months work. The disparity between these two sums, while not insignificant, is not enough to make it obvious to the court that the latter half of Skunkworks's billings are bogus. Plaintiff's supplemental affidavit[1] picking apart the time records submitted by Skunkworks at best raise an issue of fact as to whether the records are accurate, but the court is not ready to issue a preliminary injunction based on Mr. Levy's speculation that certain time entries were cut-and-paste or his bewilderment upon discovering that computer programs that are in development frequently crash (affidavit of Daniel Levy, sworn to on July 12, 2013, ¶ 6).

More important is the Service Contract itself. That contract provided for monthly bills, which indeed were sent, and were to be paid within thirty days. Plaintiff did not object to the invoices and continued to accept defendant's services. Consequently, not only is there a question of breach of the Service Contract by plaintiff, but there may well be an account stated cause of action in favor of defendant (*see White Plains Cleaning Servs., Inc. v 901 Props., LLC*, 94 AD3d 1108, 1109 [2d Dept 2012] [when party retains billing statements without rejecting or objecting to them within reasonable time, agreement as to correctness of account and balance *may occur*]).

Additionally, the equities in this case do not favor REOL. Skunkworks has not been paid for *any* of the work it claims to have done since December 2012. All of the payments that REOL did make have been late (Stjepanovic affidavit, exhibit B). Skunkworks, nevertheless, delivered what REOL ordered, namely, a test version of the app it hoped to make available for general

---

[1] This affidavit, submitted after oral argument, was unsolicited by the court, and defendant has not had an opportunity to respond to it.

[* 8]

distribution. Upon receipt of the app, REOL licensed it to a third-party for a "substantial fee," even though, through no fault of Skunkworks, the test version would ultimately expire, a fact which REOL either knew or should have known before it decided to go into the app business. REOL now turns to the court, seeking an order forcing Skunkworks to continue to "build" the app so REOLcan continue to lease it. Given the facts as presented on this record, Skunkworks is under no obligation to render any more services, and the court cannot direct it and its programmers to do the requisite work.[2]

Plaintiff having failed to clearly establish a likelihood of success on the merits or a balance of the equities in its favor, the court need not consider the issue of whether REOL will suffer irreparable harm (*See Eljay Jrs., Inc. v Rahda Exports*, 99 AD2d 408, 409 [1st Dept 1984] [where proof insufficient to show liklihood of success, court need not inquire into irreparable harm]; *Damon Creations, Inc. v James Talcott, Inc.*, 39 AD2d 677, 677 [1st Dept 1972][failure to establish clear liklihood of success precludes issuance of preliminary injunction]). The court, thus, denies plaintiff's application to require Skunkworks to resubmit builds of the app in order to keep a test version available pending the conclusion of this action. However, to the extent that Skunkworks has imposed its *own* time limit on the program's life "to gain better control over the trial period," the court directs that the limitation be removed, as there is no need for Skunkworks to have "better control" over the test app if it is refusing to render any further services.

Accordingly it is

---

[2] On July 9, the court agreed to continue the temporary restraining order pending a decision on this motion on condition that plaintiff give an undertaking of $175,000 by July 12 (transcript, 34). Rather than doing so, plaintiff submitted an affidavit (see note above) arguing for an amount seven times smaller (affidavit of Daniel Levy, sworn to on July 12, 2013, ¶ 4).

[* 9]

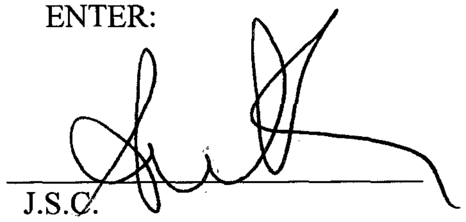
ORDERED that the motion of plaintiff REOL Services LLC for a preliminary injunction against defendant BLL, LLC d/b/a The Re Skunkworks is granted, to the extent that defendant is ordered to either disable its "own [] limited trial period time limit" (Micka affidavit, ¶ 5) or to set such trial period time limit to coincide with the end of the app's lifetime as dictated by the applicable Apple procedures, and is otherwise denied; and it is further

ORDERED that upon defendant's compliance with the above order, the temporary restraining order set forth in the court's order entered June 28, 2013 shall be and is hereby discontinued, subject to the parties' stipulation entered July 2, 2013; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on August 15, 2013 at 9:30 a.m., in Room 228 of the courthouse located at 60 Centre Street, New York, NY.

Dated: August 2, 2013

ENTER:



J.S.C.