SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK** PART 39
Justice

Index Number : 603547/2007
KEANE TELECOM CONSULTING,
vs
MANHATTAN TELECOMMUCATIONS
Sequence Number : 004
PARTIAL SUMMARY JUDGMENT

INDEX NO. 603547/07
MOTION DATE
MOTION SEQ. NO. 004

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion ~~is~~ and cross-motion are decided in accordance with the accompanying memorandum decision.

~~So Ordered~~

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

Dated: 9/19/13

BARBARA R. KAPNICK, J.S.C.
BARBARA R. KAPNICK J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ~~☐ SETTLE ORDER~~ ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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KEANE TELECOM CONSULTING, LLC,

Plaintiff,

-against-

MANHATTAN TELECOMMUNICATIONS CORPORATION D/B/A METROPOLITAN TELECOMMUNICATIONS A/K/A METTEL,

Defendant.

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DECISION/ORDER
Index No. 603547/07
Motion Seq. No. 004

BARBARA R. KAPNICK, J.:

In this action to recover monetary damages for breach of contract, unjust enrichment, quantum meruit and tortious interference with contractual relations, plaintiff seeks partial summary judgment on its first, second and fifth causes of action for breach of contract. Defendant cross-moves for partial summary judgment dismissing plaintiff's causes of action for unjust enrichment, quantum meruit, and tortious interference with contract.[1]

Factual Background

On February 1, 2005, plaintiff and defendant entered into a "MetTel Independent Sales Agreement" (the "Sales Agreement"), pursuant to which, in exchange for commissions,

[1] Plaintiff agreed on the record during oral argument on May 9, 2012 to withdraw its quasi-contractual claims and proceed only on its three breach of contract causes of action.

plaintiff would market, on a non-exclusive basis, and sell defendant's telecommunications services. Plaintiff, which sells telecommunications services on behalf of several suppliers, engages sub-agents to find opportunities and to sell such suppliers' products and services to customers.

Plaintiff claims it was to be paid for its services on a commission basis based on its productivity, with various commission rates applicable to different services purchased and used by its customers. According to plaintiff, the Agreement also contained a so-called "evergreen" clause, pursuant to which defendant is required to continue to pay plaintiff commissions on services used by customers obtained for MetTel by KeaneTel even after the Agreement has expired or been terminated.

At the time that plaintiff and defendant entered into the Sales Agreement, plaintiff alleges that it was its general practice to enter into written agreements with such sub-agents, whereby sub-agents would be paid 100% of the commissions after they were received by plaintiff, minus a back office processing fee to cover plaintiff's administrative costs. (*See* P. Keane Dep. 34: 5-11, Nov. 11, 2010).

According to Peter J. Keane ("P. Keane") plaintiff's Manager,

Marc Greene ("Greene") was the only sub-agent he recalls ever having been engaged by plaintiff without a written agreement.[2] (P. Keane Dep. 31: 14-32:10). According to P. Keane, plaintiff had an oral agreement with Greene, which provided that he was to be paid a 75% commission. (P. Keane Dep. 32: 11-13).

Plaintiff contends that sometime in 2006, MetTel sought to renegotiate the Sales Agreement in two ways: first, plaintiff's commission rates would be cut; and second, defendant would not pay plaintiff commissions after either the Sales Agreement was terminated or it expired. Plaintiff, however, argues that it never agreed to any such modification, and asserts that the Sales Agreement remained in effect as originally signed throughout the period in question.

Plaintiff further maintains that despite the fact that it did not agree to any modifications, beginning in late 2006, defendant began to pay plaintiff at the proposed, but not agreed to, lower rate, which breached the Sales Agreement. Plaintiff contends that the Sales Agreement was further breached when, in March 2007, defendant stopped making any commission payments to plaintiff. Plaintiff asserts that as a result of these breaches, it notified defendant on September 19, 2007 that it was terminating the Sales

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[2] Greene operated under the name MAAPS Group ("MAAPS").

Agreement for cause. Plaintiff maintains, however, that its customers continued to use defendant's services through the date of the instant motion, and that, therefore, under the contract, plaintiff continued to earn commissions on those services.

Finally, plaintiff argues that since the commencement of the instant action, it has discovered that defendant has been making payments directly to plaintiff's sub-agents, which also violates the Sales Agreement.

The Sales Agreement

The Sales Agreement contains the following provisions which are relevant to this motion:[3]

> 1.10 Agent shall be solely liable for, and MetTel shall have no liability for, expenses incurred by Agent in performing its duties under this Agreement. Agent shall be solely responsible for all of its own expenses including, without limitation, any fees and expenses of Agent's employees, sub-agents, representatives, counsel, and accountants.
>
> * * *
>
> 2.1 Best Efforts. Agent shall use its best efforts to Market MetTel's Services to Customers.
>
> * * *
>
> 2.15 Agent's Responsibility for its Own Employees. Any such person or entity with whom Agent contracts to perform all or any part of Agent's duties hereunder,

[3] The Sales Agreement refers to plaintiff as the "Agent" and defendant as "MetTel."

shall be the sole responsibility of Agent, and MetTel shall have no responsibility toward such person or entity. Payment of all commissions shall be made to Agent.

* * *

4.10 Regardless of any other language or interpretation of this Agreement, all Agents shall receive commissions on all Agents' active accounts paid by customer as long as customer receives service from MetTel or any affiliate or assignee of MetTel. This provision shall survive the termination of this Agreement.

* * *

7.3 Termination for Cause. Either party may immediately terminate this Agreement for cause, at any time during the term of this Agreement, upon written or actual notice to the other party. Cause shall include any material breach of the obligations and representations set forth in this Agreement. (As amended by the "Rider to Sales Agreement", also dated February 1, 2005).

* * *

11.5 Amendment and Waiver. Unless otherwise provided herein, this Agreement may be amended only by an instrument in writing duly executed by the Parties. Any waiver by any Party of any breach of or failure to comply with any provision of this Agreement by the other Party shall not be construed as, or constitute, a continuing waiver of such provision, or a waiver of any other provision hereof.

The Emails

Plaintiff was seeking its commission checks in late February 2007, when Kristen Keane ("Kristen") sent an email to MetTel's Charlie Firneno ("Firneno") and Mike Cortes ("Cortes") on February 23, 2007 at 12:43 p.m. In the email, Kristen tells defendant's managers: "Our check is still not here. I need a check sent

priority mail to be received by Monday morning. Please respond ASAP."

Cortes responded: "[a]ll checks have been sent out earlier in the week. You will have to wait until Monday or Tuesday to get another check sent out."

At 1:00 p.m. on the same day, Kristen replied to Firneno and Cortes:

> This is ridiculous. Every month it is another story with the commission checks. I want to be set up on direct deposit and I also want the pay dates that MetTel pays their commissions since every month they come at different times. I have to manage my cash flows and I need to know when we are going to receive this money every month. If I do not receive this check by Monday, I better have a check overnighted and in my hands by Tuesday morning.

A few minutes later, Cortes responded: "[i]f you don't receive the check on Monday I will ask [M]etTel to STOP payment on the check, and I will ASK them to resend a new check out."

On that Monday, February 26, 2007, plaintiff's President Jeff Keane ("J. Keane") got involved in the email exchange, writing:

> Once again, you are late in paying us. I want to know where my money is, and I am tired of playing this game. We go through this garbage every month, and you wonder why we won't sign your new deal? I want my money, and I want it today, with a schedule of when your payments are scheduled to go out.

That afternoon, Anthony Arote ("Arote"), defendant's director of Agent Sales, sent J. Keane and Kristen an email indicating that the commission monies were being held. Arote wrote as follows:

> Your check is being held because we have recently been advised by one of your subs, Marc Greene, that you are no longer paying him on MetTel business. Quite frankly, we are not certain of what our responsibilities are and to whom under such circumstances so, in order to assure we do the right thing for all concerned, we have referred the matter to our legal counsel. We are seeking a quick response and will get back to you as soon as we possibly can. In the interim, if you can confirm that Marc's allegation is inaccurate please do so.

P. Keane responded to Arote within forty-five minutes, stating:

> Marc Greene sold two accounts .... He was repeatedly told he needed to sign a contract with us. He repeatedly said he would sign and send it. After over a year of no contract (and repeated payments we made him) I finally had to make a decision. As he would not send in a signed contract I could no longer pay him. Would you pay us without a contract? Of course not.
>
> That said, I have no problem reinstating him if: 1. he signs the contract, 2. he fulfills the terms of the contract thereafter. To that point I even called him with [Cortes] the Friday before last. He said he would call back. He did not return the call. I can't resolve this if he doesn't respond.
>
> In any event if you want to hold the commissions from [Greene's two accounts], the only two accounts in dispute, fine. But to withhold all the commissions for all our accounts, is ridiculous. Send me our check. And please don't make us have to call you every month for payment.

Two days later, on March 1, 2007, P. Keane sent an email to Cortes (the "March 1, 2007 email"), which was copied to the sales

department at MAAPS Group, and stated as follows: "[p]lease accept [t]his email and release by KeaneTel for any business submitted by MAAPS Group. Moving forward you are free to work directly with them and pay them directly."

On March 9, 2007, J. Keane sent an email message addressed to his "Sales Partners" (the "March 9, 2007 email") which states:

> Effective March 1, KeaneTel can no longer accept any orders moving forward for MetTel. As per Tony Arote, Director, MetTel, MetTel would like to 'divorce' KeaneTel, NOT CANCEL KeaneTel. What that means, according to Tony, is that due to irreconcilable differences, which I will be happy to go into personally with any of you on a one on one basis, MetTel will no longer accept any new orders from KeaneTel, under our existing contract. (NOTE that we have never signed their new agreement).
>
> MetTel has committed to continue to pay KeaneTel on all existing orders which had previously been placed, and has said that they will also pay us, KeaneTel, an over-ride on any orders placed by any of you that end up signing direct with MetTel. If this seems confusing to you, imagine my surprise. I do not want to jeopardize any future payments to KeaneTel, so I will leave it at that, however, again, I will be more than happy to explain personally to any of you, how we got to this point.
>
> For those of you who have had compensation issues, such as selling MetTel services in areas that have turned out to be non-compensable, I assure you, that I have made the request to Mike Cortes, and Tony Arote, that you be allowed to convert your customer, regardless of contract terms, as it is simply not profitable for you. I have even made that request again today. What I have been told for about 3 weeks, is that Marshall (CEO of MetTel) has said this would be acceptable, but ONLY on an ICB, and MetTel will make the decision on this based upon profit margin, if any, on their end. When I asked which areas would be considered acceptable, I have yet to see a response. So at this point, all of that is still up in

the air.

KeaneTel is reviewing replacement carriers such as Cavalier, and Ernest, to address this situation.

Please contact me with any questions.

Procedural Background

Plaintiff filed the Summons and Complaint in this action on or about October 25, 2007. Plaintiff then moved for partial summary judgment in September 2008. After hearing oral argument, this Court granted plaintiff's motion for a money judgment in the amount of $63,243.81 on the record, and severed and continued plaintiff's remaining causes of action (see decision dated December 22, 2008, on mot. seq. no. 001). However, this Court subsequently granted defendant's motion for leave to renew/reargue (see decision dated November 2, 2009, on mot. seq. no. 002), based upon the need for further discovery.

A Note of Issue and Certificate of Readiness were filed on October 17, 2011, followed by defendant's motion to vacate the Note of Issue on November 9, 2011 (mot. seq. no. 003), which was withdrawn pursuant to Stipulation dated February 8, 2012.

Plaintiff then filed this partial summary judgment motion and defendant filed its cross-motion for partial summary judgment.

Discussion

Timeliness of Cross-Motion

In its reply papers, plaintiff raised the issue of the timeliness of defendant's cross-motion. However, plaintiff agreed in a February 8, 2012 Stipulation that the cross-motion could proceed notwithstanding the timeliness issue. *See* February 8, 2012 Decision and Order of this Court incorporating the Stipulation.

Failure to File a 19-a Statement

Defendant opposes plaintiff's motion for partial summary judgment, in the first instance, asserting that plaintiff failed to file a Statement of Material Facts as required under Rule 19-a of the Commercial Division Rules of the Supreme Court. Pursuant to 22 NYCRR 202.70, Rule 19-a requires,

> (a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.
>
> * * *
>
> (c) Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

Failure to file a Rule 19-a Statement of Material Facts is "a mere non-prejudicial irregularity that may be ignored." *Melvin D.*

Hiller & Jeffrey Hiller LLC v Buel, 33 Misc 3d 1213(A), *7 (Sup Ct, Kings County 2011); *see also Abreu v Barkin and Assoc. Realty, Inc.*, 69 AD3d 420 (1st Dept 2010). Therefore, although this Court does not condone plaintiff's failure to comply with Rule 19-a of the Commercial Division Rules, should plaintiff otherwise be entitled to partial summary judgment, its failure to provide the Court with a Statement of Material Facts is insufficient to deny summary judgment.

Summary Judgment

Plaintiff seeks damages a) in the amount of $55,826.81 with respect to the earnings for which MetTel has not made any commission payments; b) in the amount of $63,243.81 for the earnings as to which this Court originally entered judgment; and c) in the amount of $108,768.44 with respect to payments made directly to sub-agents in breach of the Agreement.

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]), because summary

judgment is a drastic remedy which should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957); *see also DuLuc v Resnick*, 224 AD2d 210, 210-211 (1st Dept 1996).

The "elements of a cause of action to recover damages for breach of contract [are]: the existence of a contract, . . . performance under the contract, . . . breach of that contract, and resulting damages." *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 (2d Dept 2010); *see also US Bank N.A. v Lieberman*, 98 AD3d 422, 423 (1st Dept 2012).

Existence of the Contract

Both plaintiff and defendant agree that the Sales Agreement was in force during the time that the alleged breach took place. However, defendant contends that the March 1, 2007 and March 9, 2007 emails modified the Sales Agreement, such that defendant was authorized to directly pay plaintiff's sub-agents the commissions that had been earned both before and after the alleged modifications.

Pursuant to section 11.5 of the Sales Agreement, modifications could only be made "by an instrument in writing duly executed by

the Parties." Under New York General Obligations Law § 15-301 (1), a written agreement that contains such a provision "cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent." "[O]ral modifications are barred." *Richardson & Lucas, Inc. v New York Athletic Club of City of N.Y.*, 304 AD2d 462, 463 (1st Dept 2003). Although there are two exceptions to the written modification requirement of General Obligations Law 15-301 (*see Rose v Spa Realty Assoc.*, 42 NY2d 338, 340-341 [1977]), the first issue to be addressed by this Court is whether the March 1, 2007 and March 9, 2007 emails were written modifications of the Sales Agreement.

"An e-mail sent by a party, under which the sending party's name is typed, can constitute a writing for purposes of the statute of frauds." *Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC*, 80 AD3d 476, 477 (1st Dept 2011). However, an agreement contained in the email must be "sufficiently clear and concrete to constitute an enforceable contract." *Williamson v Delsener*, 59 AD3d 291, 291 (1st Dept 2009). An email sent by a party can also constitute a modification under General Obligations Law § 15-301; however, the requirements of General Obligations Law § 15-301 are more stringent than those under the statute of frauds -- more than a simple note or cover letter is required to comply with General

Obligations Law § 15-301. *See DFI Communications v Greenberg*, 41 NY2d 602, 606 (1977), rearg den 42 NY2d 910 (1979).

The Court finds that the March 1, 2007 email constitutes a modification of the Sales Agreement, as it was sent directly to defendant, and plaintiff states that the email was to serve as "a release by KeaneTel for any business submitted by MAAPS." Despite plaintiff's contention that this email was not intended to amend, waive or modify the Sales Agreement (P. Keane Dep. 157: 8-22), the plain language of the email states that it served as a release for business submitted by MAAPS going forward.

However, the March 9, 2007 email, which was sent to plaintiff's "Sales Partners," and not to the defendant, cannot constitute a modification under General Obligations Law § 15-301, because an email that was not sent to the relevant counter party cannot reflect an agreement among those parties. *See, e.g., Moras v Marco Polo Network, Inc.*, 2012 WL 6700231 at *4, *9 (SDNY Dec. 20, 2012) (no modification found where there was no evidence of a contemporaneous, signed written agreement to modify the agreement).

With respect to this email, defendant next asserts that although the Sales Agreement was not modified in writing, plaintiff was equitably estopped from contending that the Sales Agreement was

not so modified. "Once a party to a written agreement has induced another's significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute to bar proof of that oral modification." *Rose v Spa Realty Assoc.*, 42 NY2d at 344.

Despite the fact that defendant maintains that receipt of a copy of the March 9, 2007 email, which was sent to plaintiff's sub-agents and not to defendant, induced it to pay those sub-agents directly, there was no oral modification herein. There is no evidence proffered that plaintiff communicated orally or otherwise with defendant, relaying that defendant could pay plaintiff's sub-agents directly for monies owed on business that was previously placed. Therefore, defendant's claim of estoppel fails.

Performance Under the Contract

It is uncontested that both sides performed under the Sales Agreement until some time in 2006.

Breach of Contract

Both plaintiff and defendant are asserting that the other breached the Sales Agreement.

Defendant contends that because plaintiff failed to remit

commissions to MAAPS, plaintiff breached its contract with defendant. Defendant further asserts that by withholding commission payments to Greene/MAAPS, plaintiff breached paragraph 2.1 of the Sales Agreement (plaintiff "shall use best efforts to Market [defendant's] Services to Customers") and that, as a result, defendant was entitled to withhold commission payments to plaintiff.

Despite defendant's assertion that plaintiff's decision to withhold commission payments to Greene/MAAPS breached the Sales Agreement, plaintiff paid other sub-agents that sold services under the Sales Agreement, and plaintiff resolved the controversy with Greene/MAAPS by sending the March 1, 2007 email releasing Greene/MAAPS to do business directly with defendant. No evidence was proffered to this Court indicating that other sub-agents were unpaid.

Further, pursuant to paragraphs 1.10 and 2.15, it was plaintiff who was solely liable for monies owed to any sub-agents, and any person or entity hired by plaintiff to carry out the terms of the Sales Agreement was the sole responsibility of the plaintiff.

Therefore, this Court finds as a matter of law that plaintiff

did not breach the Sales Agreement.

Plaintiff, however, argues that defendant breached the Sales Agreement by failing to pay plaintiff the commissions that were earned under the contract. Pursuant to paragraphs 2.15 and 4.10, all commissions that were earned under the Sales Agreement were to be paid to plaintiff. Despite the fact that defendant maintains that it was worried that if sub-agents were not paid their commissions those sub-agents would not sell or service defendant's customers, under the terms of the Sales Agreement, which was drawn up by defendant, those commissions belonged to plaintiff.

Therefore, the direct payment of those commissions to any sub-agent other than Greene/MAAPS was a breach of the Sales Agreement.

As to Greene/MAAPS, the March 1, 2007 email made clear that defendant could work directly with MAAPS without the intervention of plaintiff after the March 1, 2007 date, and defendant was free to pay MAAPS directly for its work. This email does not include any direction regarding commissions that were owed as the result of Greene/MAAPS' placement of business with defendant.

Therefore, as to Greene/MAAPS, there are material questions of fact for trial as to the intention of the parties regarding the

commissions owed on business prior to March 1, 2007.

Damages

Defendant next contends that, despite any breach of the Sales Agreement that may have occurred as the result of it directly paying commissions to plaintiff's sub-agents, there were no damages. Defendant maintains that 100% of the commission was to be distributed to the sub-agents, and plaintiff did not suffer damages by being excluded from the chain of distribution. However, defendant has not denied plaintiff's assertion that "administrative fees" were regularly deducted by plaintiff prior to giving the sub-agents their commissions.

While those "administrative fees" may be hard to measure, plaintiff may still be able to prove nominal damages, which are available in a breach of contract cause of action. *See Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 (1993); *see also 24/7 Records, Inc. v Sony Music Entertainment, Inc.*, 566 F Supp 2d 305, 320 (SDNY 2008).

Waiver

Finally, defendant asserts that plaintiff waived its breach of contract claim by first sending the March 9, 2007 email to its sub-agents, and then remaining silent for several months.

A provision of a contract can be waived if "the conduct of the parties demonstrates an indisputable mutual departure from the written agreement and the changes were clearly requested by plaintiff and executed by defendant." *Austin v Barber*, 227 AD2d 826, 828 (3d Dept 1996).

The fact that plaintiff stated that the sub-agents might "end up signing with" defendant did not change the sub-agent's relationship to plaintiff. In fact, plaintiff notified the sub-agents in the same email that it intended to find replacement carriers, instead of defendant. Plaintiff has proferred evidence that it did not intend to abandon the Sales Agreement, and that it was defendant that sought a "business divorce," while no evidence has been submitted that plaintiff intended to waive its rights as respects the commissions earned under the Sales Agreement.

Therefore, this Court holds, as a matter of law, that plaintiff did not waive its rights under the Sales Agreement.

Conclusion

Accordingly, plaintiff's motion is granted only to the extent of granting summary judgment on liability as to the first, second and fifth causes of action for breach of contract, as respects all commissions owed for sales made by plaintiff or its sub-agents,

except those post- March 1, 2007 commissions owed to nonparty Marc Greene or MAAPS Group, and is otherwise denied; and defendant's cross-motion for summary judgment dismissing plaintiff's third, fourth, and sixth causes of action for unjust enrichment, quantum meruit, and tortious interference with contract is granted as indicated, supra.

Counsel for the parties shall appear for a conference in IA Part 39, 60 Centre Street, Room 208 on October 30, 2013 to discuss how to proceed with the remaining issues in the case.

This constitutes the decision and order of the Court.

Dated: September 19, 2013

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.