At an IAS Term, Part Commercial 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of October, 2013

P R E S E N T:

HON. ANN T. PFAU,

Justice.

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TANDEM TRANSIT, LLC,

Index No. 501729/2013

Plaintiff,

- against -

DECISION AND ORDER

SIGNAL POINT CORP, BLITZ ORGANIZATION, LLC and BLITZ TELECOM LLC,

Defendants.

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The following papers were read on motion sequences 1 - 3:

Electronically filed documents numbered 8 - 31

Plaintiff moved by order to show cause for a temporary restraining order, and seeks a preliminary injunction pursuant to CPLR 6301. Defendants cross-moved to dismiss under CPLR 3211(a)(1) and CPLR 7503(a), on the grounds that plaintiff's claim is governed by a written contract that has a mandatory arbitration clause and a venue selection clause, both of which compel dismissal of this action. Plaintiff withdrew its motion. The TRO hereby is vacated and defendants' cross-motions are granted as follows.

Plaintiff is in the business of providing voice over internet protocol (VOIP) services. In particular, it provides wholesale Direct Inbound Dial (DID) services to customers, which allows customers to have inbound voice calls directed to their telephones over the internet, which is said to be less expensive than traditional telephone service. To provide this service, plaintiff contracts with "aggregators", who bundle DID lines into a "trunk". Plaintiff entered into a contract with an aggregator named RNK Inc., d/b/a RNK Communications, dated July 6, 2010 (RNK Contract, Aff. Of Michael Steinmetz, Esq., Ex. A). As relevant, the RNK Contract incorporates the terms of a Master Service Agreement (MSA). The MSA provides that a dispute arising under it shall be submitted to expedited arbitration in the State of Massachusetts, and shall be governed by the laws of Massachusetts (MSA, Aff. of Timothy Valliere, Esq., Ex. C, §§ 7.1 and 8.7).

RNK went into bankruptcy, and its assets (including its contract with plaintiff) were purchases by defendant Signal Point Corp. Signal Point sought to assign plaintiff's contract to co-defendant Blitz Organization LLC, and notified plaintiff of this intent. As relevant here, the notice, dated February 25, 2013, required plaintiff to approve the assignment or its DID services would be terminated on March 27, 2013. The parties dispute whether Signal Point's action was in accordance with the terms of the MSA. Plaintiff did not send in a timely consent (its consent is dated March 25, 2013), and termination of its services was threatened. Plaintiff commenced this action to forestall termination of its DID services from Signal Point. The complaint alleges breach of contract and tortious interference with contract, and seeks declaratory judgment and a permanent injunction.

When counsel were called into court to discuss the proposed order to show cause, it was agreed that plaintiff's DID services would not be terminated, and that plaintiff would be permitted to move its DID business to another aggregator. Plaintiff's motion for a preliminary injunction was withdrawn.

In opposing the cross-motions, plaintiff argues that it cannot be required to arbitrate against both defendants, as only one of them is the present owner of plaintiff's contract originally made with RNK. Plaintiff contends that it has a claim against whichever defendant is not the DID aggregator (e.g., if Signal Point assigned its rights to Blitz, Signal Point is no longer a party to the MSA). However, plaintiff's claim arises from the MSA, which provides that claims arising under it must be arbitrated in Massachusetts. Plaintiff has no claim against a defendant that is not subject to the MSA.

Plaintiff's argument that it might have a claim for tortious interference with contract against whichever defendant is not a party to the MSA also fails. "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 N.Y.2d 413, 424 [1996]). "To impose liability, a defendant must induce or intentionally procure a third-party's breach of its contract with the plaintiff and not merely have knowledge of its existence" (*id.* at 425). Even accepting the allegations of the complaint as true, it does not state a claim for tortious interference with contract. There are no facts alleged to support the contention that the assignment of plaintiff's DID services or

threatened termination were induced or intentionally procured. The only alleged damage is from the breach of contract itself, which claim must be arbitrated in Massachusetts. Plaintiff's invitation to have parallel proceedings in the Massachusetts arbitration forum and here to determine whether there was a breach of the MSA, and what damages are appropriately awarded, if any, is respectfully declined by the Court.

A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only if the documentary evidence submitted by the defendant utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*Granada Condominium III Assn v Palomino*, 78 AD3d 996, 997 [2d Dept 2010], *citing Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]). Defendants have established that plaintiff's claim arises from the MSA, and that all claims arising from the MSA are subject to a mandatory arbitration clause. Moreover, the MSA provides that Massachusetts is the venue of choice (§ 8.7).

"A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court. Absent a strong showing that it should be set aside, a forum selection agreement will control" (*Pratik Apparels, Ltd v Shintex Apparel Group, Inc.*, 96 AD3d 922, 923 [2d Dept 2012] [citations omitted]). Plaintiff has not met its burden to show enforcement of the forum selection clause is unreasonable, unjust or in any other manner improper. Accordingly, it shall be enforced, and it hereby is

ORDERED that the motion by plaintiff for a preliminary injunction was withdrawn, and the TRO issued in the order to show cause is vacated; and it further is

ORDERED that the cross-motions by defendants to dismiss are granted, and the complaint is dismissed with costs and disbursements to the moving defendants as taxed, and the Clerk shall enter judgment accordingly.

ENTER,

J. S. C.

HON. ANN T. PFAU