

AT&T Corp. v Petry Holding, Inc.

2014 NY Slip Op 30291(U)

January 27, 2014

Sup Ct, New York County

Docket Number: 112697/10

Judge: Louis B. York

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 112697/2010

AT&T CORP.

vs
PETRY HOLDING, INC.

Sequence Number : 001

SUMMARY JUDGMENT

PART 2

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 *decided in accordance with the accompanying order and decision.*

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

FILED

FEB 03 2014

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/27/14

Lee, J.S.C.
LOUIS B. YORK
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 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 2

----- X

AT&T CORP.,

Plaintiff,

INDEX NO.
112697/10

-against-

PETRY HOLDING, INC. a/k/a PETRY MEDIA CORP.,

Defendant.

FILED

----- X

FEB 03 2014

LOUIS B. YORK, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff AT&T Corp. ("plaintiff" or "AT&T") moves for an order pursuant to CPLR 3212 granting it summary judgment.

Defendant Petry Holding, Inc. ("defendant" or "Petry") cross-moves for an order pursuant to CPLR 3212 granting it partial summary judgment: (1) dismissing plaintiff's breach of contract claim; (2) dismissing plaintiff's contractual claim for attorneys' fees and costs; (3) dismissing plaintiff's contractual claim for pre-judgment interest; (4) dismissing plaintiff's unjust enrichment claims except for those claims arising out of services used by Petry's Troy Michigan office after April 2009; and, (5) dismissing plaintiff's account stated claim. Defendant also seeks an order compelling plaintiff to comply with its outstanding discovery demands within 20 days.

Plaintiff is in the business of providing telecommunications, long distance telephone, local telephone and internet services. Defendant is in the business of providing advertising, sales and marketing support services to clients including television stations, cable networks and digital publishers.

Plaintiff commenced this action on September 28, 2010, by filing a summons and complaint with the County Clerk. The complaint (exhibit A to April 25, 2013 Bhatt affirmation) alleges that plaintiff and defendant entered into a "Master Agreement" on October 18, 2001, followed by several additional agreements (collectively, the "Contracts") whereby plaintiff agreed to provide telecommunications and related services to defendant (collectively, the "Services"). According to the complaint plaintiff provided the Services and defendant failed to pay for all of them in violation of the Contracts.

The complaint asserts four causes of action. The first two are for breach of contract and respectively seek the alleged unpaid balance of \$122,122.90 and attorneys' fees, interest and costs. The third cause of action is labeled "quantum meruit/unjust enrichment," and the fourth is based on an account stated.

Defendant served its answer (exhibit B to Bhatt affirmation) on January 19, 2011, in which it generally denied the allegations of the complaint and asserted six affirmative defenses. The first two (failure to state a cause of action and statute of limitations) are not relevant herein and the sixth affirmative defense (relating to third-party Blair Television Inc.) has been withdrawn. Petry's third through fifth affirmative defenses allege that plaintiff failed to perform under the Contracts, that plaintiff's claims are barred in whole or in part because the Master Agreement was terminated by defendant "in or about late 2008 or early 2009" and that plaintiff failed to mitigate its damages (*id.*, p 5).

Plaintiff has now moved for summary judgment relying on its exhibits, the supporting affidavit of Michael Netska, AT&T's Premier Client Sales Manager, and the supporting affirmation of its attorney. Plaintiff contends that it is entitled to judgment on its first two causes

of action because it has established the essential elements of a breach of contract claim (existence of a contract, performance by plaintiff, breach by defendant, and damages) and the Master Agreement provides for attorneys' fees. Next, plaintiff argues that it is entitled to summary judgment on its equitable claim of unjust enrichment because defendant received the benefits of plaintiff's services at plaintiff's expense without payment therefor. Plaintiff argues further that it is entitled to summary judgment on its account stated claim based on the unpaid invoices it furnished to defendant on a monthly basis.

Plaintiff then argues that Petry's affirmative defenses are bereft of factual and legal support for the following reasons: failure to state a claim is not properly pleaded as an affirmative defense (curious); defendant breached the Contracts in August 2009 and plaintiff filed its complaint in September 2010, well within the two-year statute of limitations agreed upon by the parties; defendant has failed to establish by its pre-trial discovery responses that plaintiff failed to perform a material term or provision under the Contracts; defendant failed to terminate the Master Contract in writing as required therein and documents provided by defendant during discovery demonstrate that defendant continued to request and accept plaintiff's services until "early 2010," well after late 2008 or early 2009, when defendant asserts the Contracts were terminated, and defendant's contention that plaintiff failed to mitigate damages ^{is} ~~is~~ unsubstantiated.

Defendant's opposition is based on the affidavit of its Vice President and Controller, Wilson Lemon, Jr., and the affirmation of its attorney. Their relevant contentions supported by exhibits are summarized in the immediately succeeding paragraph.

The Contracts expired on or before April 2009,¹ at which time defendant had outstanding invoices totaling \$23, 840.23. All of plaintiff's invoices for Services rendered through April 2009 were paid by defendant in 2009. The only claims at issue in this litigation were incurred after the last of the Contracts expired and after defendant switched its telecommunications business to M5 Networks Inc. Plaintiff kept billing defendant for discontinued lines. The comprehensive service line inventory provided by AT&T to this court in support of its motion is "illegible."² 87 of the 88 service lines at issue belonged to an unrelated third party, Petry Travel Agency Inc. AT&T's own records establish that Petry was being provided with Services only at its Troy, Michigan office after the Contracts expired. Defendant then argues that AT&T must comply with defendant's outstanding discovery demands (served after plaintiff made the instant motion) because defendant lost many of its records when it downsized and restructured its operations and cannot adequately defend this action or pursue any claims it may have against plaintiff for improper billing unless the requested documents are produced.

In his September 3, 2013 reply affidavit (in further support of plaintiff's motion for summary judgment and in opposition to defendant's motion for partial summary judgment) Dominick W. Conductor, an AT&T Sales Executive, disputes defendant's contention that after the Contracts expired it was being provided with Services only at its Troy, Michigan office, and

¹ In its September 16, 2013 memorandum of law in further support of its cross-motion Petry states that the Contract expiration date is December 13, 2008.

² Defendant has provided, as exhibit "H" to the Lemon affidavit, a copy of AT&T's comprehensive inventory of active Petry accounts "that the Court can actually read." Defendant is incorrect. Its exhibit H is also illegible and appears (with the aid of a magnifying glass) to reflect hundreds of invoices sent to Petry Travel Agency, Inc., which is not a party to this litigation.

cites as proof voluminous copies of invoices dated June 1, 2009 for the billing period of May 1, 2009 to May 31, 2009 (exhibits A and B to his affidavit), voluminous copies of invoices for the period between November 2009 and February 2010 (exhibit C) and copies of invoices for the period between February 2009 and April 2009 (exhibit D). The court notes at this point that exhibit A reflects that AT&T's Services were provided to Blair Television, exhibits B and C reflect that the Services were provided to Petry Television, and exhibit D reflects that the Services were provided to Television Blair. In a footnote on page 2 of his affidavit Mr. Concurso states: "[g]iven the length of these invoices, and in an effort to conserve judicial resources, AT&T has not attached full copies of each invoice in dispute on these accounts. However, should the court so desire, AT&T is prepared to produce all of the invoices at issue, in their entirety, for the court's inspection."³

In her September 16, 2013 reply affidavit (in further support of defendant's cross-motion for partial summary judgment) Alexandra Griggs Bishop, Petry's Director of Office Services, states the following. AT&T notified Petry that the last of the Contracts would expire in December 2008. AT&T failed to timely provide a comprehensive office-by-office line census requested by Petry so that Petry could finish moving its telecommunications services to M5 Networks and terminate its relationship with AT&T. When AT&T finally provided the inventory requested by Petry it showed that plaintiff's Services were being provided to only one Petry office, which was located in Troy, Michigan and which "[u]pon information and belief" Petry closed some time between 2000 and 2002. AT&T's monthly bills, which were between 200-300

³ The "partial" invoice copies submitted to the court as exhibits A-D to the Concurso affidavit are virtually incomprehensible and well over an inch thick.

pages long, were undecipherable but appear to be access charges rather than usage charges. The affiant met with AT&T's Dominick Concurso and Michael Netska (whose affidavits are discussed *supra*) on July 30, 2009 for the purpose of discussing and objecting to the bills Petry was receiving from AT&T after Petry switched its telecommunication business to M5 Networks in "early 2009." (The results of the meeting are not disclosed by Ms. Bishop, although she does express her confusion in a July 30, 2009 e-mail to "Michael Madigan" attached as exhibit C to her affidavit.) AT&T has a documented history of overbilling Petry which was exacerbated by "voluminous and impenetrable bills." Ms. Bishop concludes that AT&T's 2009 bills were for services Petry was receiving from M5 Networks at a time that "Petry was barely using the AT&T services and was, in fact, trying to terminate them."

Summary judgment is a drastic remedy which should not be granted if there is any doubt as to the existence of a triable issue (see *Rotuba Extruders Inc. v Ceppos*, 46 NY2d 223, 231 [1978]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], rearg den 3 NY2d 941 [1957]). Issues of credibility cannot be determined at the summary judgment stage (*S.J. Capelin Associates, Inc. v Globe Manufacturing Corp.*, 34 NY2d 338 [1974]).

The court finds that plaintiff's motion is ill advised. Plaintiff has thrown several contracts along with a pile of invoices (billing various entities) at the court in purported support of its claim that it is entitled to summary judgment in the amount of \$122,122.90 plus attorneys' fees of \$40,300.56. Every material assertion made by plaintiff to justify its motion is disputed by defendant.⁴ Neither side has submitted definitive proof that its material assertions are correct, let alone dispositive.

⁴ The parties' numerous disputes (*e.g.*, the Contracts were in effect vs. the Contracts expired) and the issues created thereby are set forth above and need not be reiterated at this point.

On page four of her September 19, 2013 affidavit (discussed *supra*) Petry's Alexandra Griggs Bishop states "[i]n addition to failing to timely disconnect services, AT&T had a history of sloppy billing practices that were exacerbated by AT&T's voluminous and impenetrable bills." After reading the papers herein, the court can sympathize with Ms. Bishop's assertion. In short, neither side knows, at this point, what actually transpired⁵ or how much money, if any, defendant owes plaintiff.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's cross-motion for summary judgment is denied, except to the extent that defendant seeks an order compelling plaintiff to comply with its outstanding discovery demands; and, it is further

ORDERED that plaintiff shall comply with defendant's outstanding discovery demands within 20 days from the filing of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

FILED

DATED: Jan 27, 2014

FEB 03 2014

**NEW YORK
COUNTY CLERK'S OFFICE**

By

J.S.C.

**LOUIS B. YORK
J.S.C.**

⁵ The court has discussed plaintiff's April 25, 2013 memorandum of law in support of its motion. Plaintiff's September 3, 2013 memorandum of law in further support of its motion and defendant's August 12, 2013 and September 16, 2013 memoranda of law contain, as they should, legal arguments supporting their adverse positions. In view of the court's finding that numerous factual issues preclude the granting of summary judgment to either side, those legal arguments need not be further addressed.