

Cronos Group Ltd. v XcomIP, LLC
2016 NY Slip Op 31568(U)
August 17, 2016
Supreme Court, New York County
Docket Number: 650187/2016
Judge: Barry Ostrager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

_____ X
CRONOS GROUP LIMITED,

Plaintiffs,

INDEX NO. 650187/2016

-against-

Motion Seq. No. 003

XCOMIP, LLC and JAY ADAMS,

Defendants.

_____ X

OSTRAGER, J:

Plaintiff, Cronos Group Limited (“Cronos”), is a provider of various telecommunication services, including generic voice termination services (opposition papers, Levi aff, ¶ 5). Co-defendant, XComIP, LLC (“XComIP”), is a provider of wholesale international telecommunication services that receives and routes phone calls from one network vendor to another so that calls can ultimately terminate at intended International Premium Rate Numbers (IPRNs)¹ (moving papers, Adams aff, ¶ 3). Co-defendant, Jay Adams (“Adams”), is the managing member of XComIP (Adams aff, ¶ 1).

This dispute arises out of an executed Reciprocal Network Carrier Services Agreement (the “Agreement”) dated May 30, 2013 (moving papers, Exh. B). The nature of the parties’ business dealings under the Agreement was that Cronos would direct phone traffic to XComIP’s IPRNs, and Cronos would bill its clients for those phone calls at a later date (Levi aff, ¶ 6-8). Cronos and XComIP would provide these services to one another at pre-determined rates (complaint, ¶ 11).

¹ IPRN numbers are typically used for customer service numbers, adult chat lines, TV or gaming services that usually cost more per minute than normal phone calls (opposition papers, Exh. A).

Article 9 of the Agreement provides:

“Each Party is solely responsible for collecting its charges to its customers for services it offers them utilizing the other Party’s network and for preparing and mailing invoices to these customers. The Parties will indemnify each other from all costs, expenses, claims, or actions arising from allegedly fraudulent calls carried for each other through the Services. Each Party is responsible for payment of the total invoice amount to the other Party regardless of whether its customers pay for those calls or they are allegedly fraudulent calls. However, nothing contained in this Agreement prohibits either Party from immediately taking action to prevent fraudulent calls.” (moving papers, Exh. B at 4).

Article 5 of the Agreement provides:

“Any request for a billing adjustment must be made in good faith and in writing within seven (7) days of receipt of the invoice in question. Any Documentation to be provided shall include detailed documentation to establish the basis for any adjustment... Subject to each Party’s rights under Section 26, the responding Party will determine, in its sole discretion whether any adjustment shall be made and any such adjustments shall be credited against the next periodic invoice. If the responding Party, in its sole discretion, denies the billing dispute, the disputing Party agrees to pay the disputed amount with the next scheduled remittance. A request for adjustment will not be cause for delay or reduction in payment of the undisputed balance due on any current periodic invoice. If a request for billing adjustment or credit is not made in writing within this seven (7) day period, the charges are deemed valid and each Party waives its right to any credits, offsets, or adjustments with regard to them” (*id.* at 3).

According to the complaint, on October 22, 2015, Cronos received notice from one of its clients, a Portuguese telecommunication company, that the client’s network had been hacked. For the period October 21 to 22, 2015 over 14,000 calls were made to numbers allegedly owned by XComIP which terminated in Madagascar and Maldives (complaint, ¶ 20-23). XComIP billed Cronos \$20,251.97 for this usage (complaint, ¶ 22). Cronos executive Mr. Levi claims he notified Adams, XComIP’s managing member, of the hacking incident on October 22, 2015 (complaint, ¶ 24). Mr. Adams allegedly assured the plaintiff that the dispute would be resolved and that Cronos need not compensate XComIP for these fraudulent calls (complaint, ¶ 25).

On December 4, 2015, Cronos again received a notice from a client, this time Vodafone Germany, that the client's network had been hacked (complaint, ¶ 30). For the period November 11 to 18, 2015 nearly 14,000 calls were made to numbers allegedly owned by XComIP which terminated in Guinea Bissau (complaint, ¶ 30-31). XComIP billed Cronos \$34,674.87 for this usage (*id.*). Cronos asserted that it notified Adams of the hacking incident on December 4, 2015, and Adams assured that Cronos need not pay for these fraudulent calls (complaint, ¶ 32, 34).

According to the complaint, Cronos continued to work with XComIP in reliance on Adams's representations, incurring an additional \$50,000 in charges from XComIP, until Cronos terminated the relationship on December 17, 2015 (complaint, ¶ 51). Further, even though XComIP promised Cronos it would not be charged for these calls, XComIP allegedly offset the \$54,926.84 against Cronos's obligations (complaint, ¶ 57).

In its complaint, the plaintiff asserts that the defendants either directly or indirectly hacked into the clients' networks in October and November 2015 to generate traffic on XComIP's IPRNs and thereby augment their earnings. The plaintiff further asserts that XComIP has taken advantage of Cronos's inability to charge their clients for the fraudulent usage (based on industry practice) and, instead of setting aside the \$54,926.84 until the fraud dispute is resolved, XComIP made Cronos absorb the loss (complaint, ¶ 55- 58). The complaint asserts eight (8) causes of action against co-defendants XComIP and Adams: (1) breach of contract, (2) declaratory judgement, (3) account stated, (4) fraud, (5) quantum meruit, (6) conversion, (7) tortious interference, and (8) unjust enrichment. The plaintiff seeks damages in the amount of \$89,085.24, which include the \$54,926.84 billed in connection with the two hacking incidents and additional \$34,158.40 which the plaintiff contends XComIP has unlawfully withheld from Cronos (complaint, ¶ 58, 60-61).

The co-defendants have moved to dismiss the action in its entirety, arguing that Paragraph 9 of the Agreement clearly states that each party is responsible for the payment of alleged fraudulent calls, and that Cronos failed to timely notify XComIP under Paragraph 5 of the Agreement (XComIP MOL in support at 3-8). With respect to the plaintiff's allegations that XComIP assisted or participated in the hacking incidents, the movants argue that such allegations are baseless and lack evidentiary proof (MOL in support at 14-15).

The defendant's CPLR 3211 motion to dismiss is denied for the following reasons.

The Court must deny defendants' motion to dismiss if the factual allegations contained within the four corners of the pleadings, taken as true, state a claim or claims upon which relief can be granted (*Richbell Info Servs. V Juniper Partners*, 309 AD2d 288, 289 [1st Dept 2003], citing *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]).

Here, the plaintiff alleges that two Cronos accounts were hacked by third parties, and pursuant to the Agreement between the parties, the charges for the fraudulent calls should not have been borne by Cronos. The plaintiff has submitted an affidavit from its executive Mr. Levi and emails indicating that a police investigation has been commenced in connection with these incidents (moving papers, Exh. D, F, H). The plaintiff also submitted an excerpt from a Fraud Manual promulgated by the Global Mobile Authority in Telecom which indicates that IPRNs are susceptible to fraud, primarily because of their secrecy and high per-call charges.

Paragraph 9 of the Agreement upon which the movants rely deals directly with the circumstances at issue in this action, i.e. where IPRN fraud is perpetrated. The second sentence of Paragraph 9 of the Agreement suggest that the parties intended to indemnify one another for calls that later proved to be fraudulent. The third sentence in Paragraph 9 suggests the opposite. Paragraph 5 of the Agreement makes provision for billing adjustments. In short, the Agreement

between the parties is susceptible to more than one interpretation and the language of Paragraph 9 does not conclusively bar indemnification as the movants suggest. Consequently, further factual determination through discovery is necessary to resolve the issues raised by the complaint. Finally, the allegations of fraud are plead with sufficient particularity.

For all the foregoing reasons, it is hereby

ORDERED that defendants' motion to dismiss is denied. The parties shall appear in Room 341 for a compliance conference on September 13, 2016, 2016 at 9:30 a.m.

Dated: August 17, 2016



BARRY R. OSTRAGER
JSC

J.S.C.