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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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OORAH, INC. d/b/a CUCUMBER COMMUNICATIONS,

Plaintiff,

-against-

Index No. 652316/2011
Motion Seq. No. 006
Motion Date: 7/29/2016

COVISTA COMMUNICATIONS, INC. and BIRCH TELECOM, INC. d/b/a BIRCH COMMUNICATIONS,

Defendants.

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COVISTA COMMUNICATIONS, INC.,

Counterclaim-Plaintiff,

-against-

OORAH, INC. d/b/a CUCUMBER COMMUNICATIONS,

Counterclaim-Defendant.

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BRANSTEN, J.:

In this action, Plaintiff/Counterclaim-Defendant Oorah, Inc. ("Oorah") and Defendant/Counterclaim-Plaintiff Covista Communications, Inc. ("Covista") each assert breach of contract claims, alleging failure to make payments due under the parties' agreements. Oorah likewise asserts that Covista breached its fiduciary duties by reclassifying customers so to deprive Oorah of commissions. Both parties have filed cross-motions for summary judgment, and Oorah separately seeks spoliation sanctions.

For the reasons that follow, Oorah and Covista's motions for summary judgment are granted in part and denied in part, while Oorah's motion for sanctions is granted.

I. Background[1]

Covista was a competitive local exchange carrier that provided telecommunication services to customers. In turn, Oorah purchased and sold telecommunication services to end users. *See* Covista Rule 19-a St. ¶¶ 3, 5.

A. *Reseller Agreement*

Oorah executed a reseller agreement with non-party Capsule Communications, Inc. ("Capsule") on November 1, 2001 (the "Reseller Agreement"). *See* Affirmation of Casey J. Hail ("Hail Affirm.") Ex. A. Under the Reseller Agreement, Oorah agreed to market telecommunications services provided by Capsule in exchange for commissions and other consideration. *See* Reseller Agreement at ¶ 7(c). Oorah was required to meet certain revenue commitments or be obligated to pay a shortfall. *Id.* at ¶ 4. Specifically, Paragraph Four of the Reseller Agreement provides:

> Throughout the term of the agreement, [Oorah's] revenue commitment will be eighty (80) percent of the previous month's billing with a minimum qualifying usage commitment of $150,000 upon a six month ramp. If after the six month ramp, [Oorah's] net charges…for the services are less than the Minimum Commitment, [Oorah] shall pay [Capsule] the shortfall.

(Reseller Agreement at ¶ 4.)

[1] The facts cited in this section are unopposed, unless otherwise noted.

Covista acquired Capsule in 2002 and is the successor in interest to Capsule and its obligations under the Reseller Agreement. *See* Hail Affirm. Ex. C at ¶ 11.

B. *Agency Agreement*

On June 6, 2004, the parties entered into the Independent Authorized Master Agency Agreement (the "Agency Agreement"). *Id.* Ex. D. Pursuant to the Agency Agreement, Oorah was authorized to act as Covista's agent in the solicitation of customers for the Services. *Id.* ¶ 2. In return, Oorah received a monthly commission. *Id.* ¶ 3. Notably, the Agency Agreement contained the following merger clause:

> This Agreement … constitutes the entire agreement between the parties relating to the subject matter hereunder, and supersedes any and all oral and/or written statements, discussions, representations and agreements made by either party to the other…

(Agency Agreement ¶ 6(a).) The parties dispute the scope of this clause.

C. *Instant Dispute*

Around May 2009, Covista ceased paying full monthly commissions to Oorah under the Agency Agreement. *See* Hail Affirm. Ex. H at Req. No. 9. After settlement talks between the parties failed, Oorah filed the instant action on August 19, 2011. Covista then interposed counterclaims, stemming from Oorah's alleged failure to make the shortfall payments due under Paragraph Four of the Reseller Agreement. Both sides

filed motions to dismiss, which were denied by this Court. *See* Decision and Order on Motion Sequence 001.

There are two sets of claims currently pending: (1) Oorah's claims for breach of contract and breach of fiduciary duty; and, (2) Covista's counterclaims for breach of contract and declaratory judgment.

II. Discussion

Oorah and Covista now cross-move for summary judgment. In addition, Oorah seeks spoliation sanctions in response to Covista's destruction of computer servers after the commencement of this litigation. Each request will be addressed in turn.

A. *Cross-Motions for Summary Judgment*

It is well-understood that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007).

However, mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 N.Y.2d at 562.

B. *Oorah's Breach of Contract Claim*

Oorah first asserts that Covista breached the Agency Agreement by failing to pay the commissions due thereunder, starting in May 2009. Covista concedes liability. *See* Covista Opp. Br. at 1 ("Covista does not dispute liability for commissions."); *see also* Hail Affirm. Ex. H at Req. No. 9. Accordingly, Oorah's motion for summary judgment on this claim is granted as to liability.

The only remaining issue is the specific amount of damages due to Oorah. As Oorah admits in its briefing, this issue has not been established through the papers on this motion and therefore must be resolved at trial. *See* Oorah Reply Br. at 6.

C. *Oorah's Breach of Fiduciary Duty Claim*

In support of its breach of fiduciary duty claim, Oorah alleges that Covista secretly reclassified certain customers to remove them from the roster of customers for which Oorah was entitled to receive commissions. Oorah offers no specific arguments in its briefing as to the breach of fiduciary duty claim and therefore does not establish the requisite elements of the claims or the absence of disputed material issues of fact required for summary judgment. As a result, Oorah's motion for summary judgment is denied.

Since Covista likewise fails to make any arguments as to this breach of fiduciary duty claim, Covista's cross-motion for summary judgment is denied.

D. *Covista's Breach of Contract Counterclaim*

Covista's breach of contract counterclaim asserts a breach of the shortfall provision of the Reseller Agreement. Paragraph Four of the Reseller Agreement provided Oorah with six months to generate revenue of $150,000, after which Oorah was obligated to generate at least 80% of the previous month's revenue or pay Covista the difference, or shortfall. Oorah purportedly failed to pay this shortfall between May 2009 and June 2011.

Oorah maintains that this claim must be dismissed, since the Reseller Agreement was superseded by the Agency Agreement in June 2004, extinguishing any payment obligations under the Reseller Agreement after that date. In support of this argument, Oorah points to the merger clause in the Agency Agreement, which states that the Agency Agreement "constitutes the entire agreement between the parties *relating to the subject matter hereunder*, and supersedes any and all oral and/or written statements, discussions, representations and agreements made by either party to the other…" (Agency Agreement ¶ 6(a)) (emphasis added).

Oorah raised the same argument in its motion to dismiss, which the Court denied. In its decision, the Court explained:

> Under New York law, a merger clause in one agreement will not be construed to extinguish a party's claim for breach of an earlier agreement unless there is definitive language indicating that the parties intended that the earlier agreement be superseded. *Globe Food Services Corp. v. Consolidated Edison Co.*, 184 A.D.2d 278, 821 (1st Dep't 1992). Here, the Agency Agreement unequivocally supersedes any and all agreements relating to its same subject matter. *See* Agency Agreement § 6(a). It does not, however, unequivocally state that it supersedes any and all agreements between the parties relating to any subject matter.

(Decision and Order on Motion Sequence 001 at 12.)

Oorah has offered no basis for the Court to abandon this reasoning now. While Oorah cites to an internal Covista memorandum and a draft agreement between the parties to support its view that the parties considered the Agency Agreement to have replaced the Reseller Agreement, Oorah does not maintain that the merger clause is ambiguous. Therefore, this extrinsic evidence cannot be considered. *See, e.g., Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002) ("Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide.").

Thus, in the absence of clear language in the Agency Agreement unequivocally stating that that it supersedes any and all agreements between the parties on any subject matter, the Court declines to interpret the Reseller Agreement, and Oorah's obligations thereunder, as extinguished. Since this was the only argument offered by Oorah in support of summary judgment dismissing the claim, Oorah's motion is denied.

In support of its affirmative motion for summary judgment on this claim, Covista has established the existence of a valid contract, Covista's performance thereunder,

Oorah's breach, and resulting damages. *See Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). As addressed above, the Reseller Agreement is a valid contract that was not terminated by the Agency Agreement. Oorah does not dispute that Covista performed thereunder. As to damages, Covista submits invoices establishing the shortfall amount due under Paragraph Four of the Reseller Agreement for May 2009 through September 2011 and January 2012 through September 2012, totaling $1,797,131.58. *See* Affidavit of Ronald Kuzon Ex. C. Oorah offers no opposition to the amount of damages, aside from the bare denial that the invoices "constitute actual sums owed by Oorah." (Oorah's Rule 19-a Counterst. ¶ 5.) Such a bare denial is insufficient to defeat summary judgment. *See, e.g., Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dep't 1994) ("[it] is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists ...") (citations omitted).

Accordingly, Covista's motion for summary judgment on its breach of contract claim is granted.

E. *Declaratory Judgment*

Covista's counterclaim for declaratory judgment seeks a declaration that "the Reseller Agreement is enforceable in accordance with its terms." (Second Am. Counterclaims ¶ 6.) As in the breach of contract counterclaim, this claim seeks a

determination that the Reseller Agreement is not extinguished by the Agency Agreement. This counterclaim therefore is dismissed as "unnecessary and inappropriate," since Covista "has an adequate, alternative remedy in another form of action, such as breach of contract." *Ithilien Realty Corp. v. 180 Ludlow Development LLC*, 140 A.D.3d 621, 621 (1st Dep't 2016). Oorah's summary judgment motion is granted.

F. *Spoliation*

As an adjunct to its summary judgment motion, Oorah requests that the Court sanction Covista for the destruction of electronically stored information ("ESI") contained on computer servers sold by Covista to former party Birch Communications ("Birch") during the pendency of this litigation. Oorah contends that the destruction of this ESI has deprived it of the ability to prove its claim for breach of fiduciary duty, as well as its claim for breach of contract damages.

1. Background

Oorah served its first set of document requests and interrogatories on Covista on February 16, 2012. Among the documents requested were those: (1) identifying all commission payments made to Oorah under the Agency Agreement; (2) concerning any schedule of commission payments owed to Oorah by Covista; and, (3) concerning any rate and/or commission sheets setting forth actual rates payable to Oorah under the Agency Agreement. *See* Hail Affirm. Ex. P. Covista served its responses to these

requests on January 11, 2013 – nearly one year later. *Id.* Ex. Z. With those responses, Covista produced four documents in response to Oorah's request for all documents identifying commission payments or schedules of such payments made to Oorah under the Agency Agreement. *Id.* Ex. Z at Request Nos. 6, 11. No documents were produced in response to Oorah's request for rate or commission sheets. Instead, Covista represented that it "continues to search for documents responsive to [this request] and will produce such documents if or when they are located." *Id.* Ex. Z at Request No. 12.

Weeks thereafter – on March 26, 2013 – Covista sold its assets to former party Birch. In connection with that sale, Covista's servers, on which all of its ESI was stored, were rendered non-operational. *See* Covista's Response to Oorah's Rule 19-a St. ¶ 65.

Covista did not disclose the sale of the servers containing its ESI until nearly six months later, in response to the Court's granting of Oorah's motion to compel the production of documents responsive to, *inter alia*, the February 16, 2012 document requests. *See* Hail Affirm. Ex. JJ at 24:17-19; *See* Covista's Resp. to Oorah's 19-a St. ¶ 64. Covista submitted an affidavit from one its accountants, dated September 18, 2013, stating that "Covista's servers have not been operational since March 2013 when Birch purchased Covista's assets." (Hail Affirm. Ex. FF ¶ 7.) The affidavit does not describe any efforts to search the servers for documents responsive to Oorah's requests or to preserve the data therein, except to say that Covista previously produced 123 documents to Oorah. *Id.* Ex. FF ¶ 3. Covista later disclosed that it was Birch's standard protocol to erase any servers it received. *See* Covista's Resp. to Oorah's 19-a St. ¶ 74.

2. Spoliation Overview

Oorah seeks spoliation sanctions against Covista pursuant to CPLR § 3216, which provides that "[i]f any party … refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed, pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: … 3. an order striking out pleadings or parts thereof … or dismissing the action or any part thereof…" Oorah contends it has been been irreparably harmed by Covista's sale of its computer servers to Birch during the pendency of this litigation.

A party seeking sanctions based on spoliation of evidence must demonstrate that "(1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 45 (1st Dep't 2012); *see also Ahroner v. Israel Discount Bank of N.Y.* 79 A.D.3d 481, 482 (1st Dep't 2010).

The elements of the spoliation analysis are not at issue here, since Covista makes no argument in its briefing that it lacked an obligation to preserve its ESI or a "culpable state of mind." Indeed, Covista could make no such argument in light of the undisputed record. Over eighteen months after the commencement of this litigation – and over a year after the receipt of document requests seeking production of its ESI – Covista not

only failed to institute a litigation hold but sold its servers to a third-party whose "standard protocol" was to erase the servers' content. The obligation to preserve ESI attaches "[o]nce a party reasonably anticipates litigation." *See, e.g., VOOM HD Holdings LLC,* 93 A.D.3d at 41. Here, Covista should have anticipated litigation – in fact, litigation had long since commenced. The transfer of the servers without a litigation hold in this context clearly was done with a "culpable state of mind," since this element is satisfied by a showing of mere "ordinary negligence" – a threshold that Covista's actions clears easily. *See, e.g., Ahroner*, 79 A.D.3d at 482. In fact, Covista's actions here were "grossly negligent, if not intentional." *VOOM HD Holdings LLC*, 93 A.D.3d at 46. Covista was aware – or at a minimum, should have been aware – of its preservation obligations and of the problems associated with its sale of the servers to a third-party that wiped them clean.

Accordingly, the relevance of the evidence is presumed and need not be demonstrated by Oorah. *VOOM HD Holdings LLC*, 93 A.D.3d at 46 ("Since EchoStar acted in bad faith or with gross negligence in destroying the evidence, the relevance of the evidence is presumed and need not have been demonstrated by Voom.").

3. Appropriate Sanction

The sole argument advanced by Covista in opposition to Oorah's motion is that it produced "more than 500 documents" in this litigation, all of which are relevant to the claims advanced by Oorah. *See* Covista's Opp. Br. at 15-16. Covista maintains that it

has produced documents in "all of the categories" sought by Oorah and that, as a result, Oorah cannot show that it has been prejudiced by the destruction of the servers. *See* Covista's Opp. Br. at 17.

Nonetheless, Covista's satisfaction with Oorah's ability to prosecute its claims is insufficient to rebut the presumption of relevance. While Oorah may be able to use the 500 already-produced documents to support its claim for breach of fiduciary duty, as well as damages stemming from Covista's breach of the Agency Agreement, there are an unknown number of documents previously stored on Covista's server that also appear to bear on Oorah's claims. As Covista stated to the Court in support of its April 20, 2012 motion to dismiss, the "overwhelming majority of documents … pertaining to this action" were stored in its Tennessee office, which is where the servers resided. *See* Hail Affirm. Ex. W at 3. These documents related to the "provisioning, billing and management of accounts that are the subject of the Agreements," "payments made by customers," and "correspondence between the parties pertaining to the Agreements." . *See* Hail Affirm. Ex. W at 3. Covista does not dispute that documents related to these topics were located on the servers and destroyed. Instead, it simply argues that Oorah should be able to prove its case with the limited universe of documents it received from the categories it requested.

As a general matter, "dismissal of the complaint is warranted only where the spoliated evidence constitutes the sole means by which the [aggrieved party] can establish its [case], or where the [case] was otherwise fatally compromised, or [the

aggrieved party] is rendered prejudicially bereft of its ability to [prosecute its claims] as a result of the spoliation." *Arbor Realty Funding, LLC v. Herrick, Feinstein LLP*, 140 A.D.3d 607, at *2 (1st Dep't Jun. 28, 2016).

The record does not support such a finding here. Oorah received some documents from Covista and has its own documents regarding the work it performed. Therefore, Oorah has not been left "prejudicially bereft" or without the "sole means" necessary to establish its breach of contract damages and breach of fiduciary duty claim. Accordingly, the imposition of an adverse inference is the appropriate sanction under the circumstances. *See, e.g., VOOM HD Holdings LLC*, 93 A.D.3d at 47 (deeming adverse inference appropriate sanction where "court appropriately inferred that the destroyed e-mails would have been relevant to Voom's claims, and that EchoStar's conduct merited a presumption of prejudice, it also recognized that Voom had other available evidence to prove its case.")

III. Conclusion

Accordingly it is

ORDERED that Oorah's motion for summary judgment is granted as to liability for its breach of contract claim and as to Covista's counterclaim for declaratory judgment and is otherwise denied; and it is further

ORDERED that Covista's summary judgment motion is granted as to its breach of contract counterclaim and is otherwise denied and the Clerk is directed to enter judgment

in favor of Covista and against Oorah in the amount of $1,797,131.58, together with interest at the statutory rate from August 8, 2011 until the date of this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that Oorah's motion for spoliation sanctions against Covista is granted insofar as Oorah requests an adverse inference instruction to be read at trial in connection with Oorah's claims for breach of fiduciary duty and damages for breach of contract; and it is further

ORDERED that the action shall continue as to damages on Oorah's breach of contract claim and as to liability and damages on Oorah's breach of fiduciary duty claim; and it is further

ORDERED that counsel are directed to appear for a pretrial conference in Room 442 on October 25, 2016 at 10 am.

Dated: New York, New York
August 23, 2016

ENTER

Hon. Eileen Bransten, J.S.C.