Cervalis LLC v RBS Holdings, USA, Inc.

2017 NY Slip Op 31973(U)

September 18, 2017

Supreme Court, New York County

Docket Number: 650405/2017

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
--X
CERVALIS LLC,

Index No.: 650405/2017

Plaintiff,

DECISION & ORDER

-against-

RBS HOLDINGS, USA, INC.,

Defendant.
--X
SHIRLEY WERNER KORNREICH, J.:

In this breach of contract action, plaintiff Cervalis LLC (Cervalis) moves to dismiss two of four counterclaims asserted by defendant RBS Holdings, USA, Inc. (RBS) pursuant to CPLR 3211(a)(7). Seq. 002. Defendant opposes. For the reasons that follow, plaintiff's motion is granted.

I. Factual Background & Procedural History

As this is a motion to dismiss defendant's counterclaims, the facts recited are taken from the Answer (Dkt. 13)[1] and the documentary evidence submitted by the parties.

Plaintiff provides computer information technology services, including colocation (rental, housing, and/or maintenance of computer servers), power and cooling, security, compliance, and network services. Answer at 1 ¶ 2. Defendant is a Connecticut-based financial services provider who contracted for plaintiff's services, which were to be used by the global financial markets division of The Royal Bank of Scotland.[2] Answer at 7 ¶¶ 3, 5-6. Plaintiff agreed to host and maintain defendant's computer equipment in its data center facility in Stamford, Connecticut (the

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to those of the e-filed PDF.
[2] At the time of the agreement, RBS was then known as Greenwich Capital Holdings, Inc. Answer at 7 ¶ 4. As used herein, "defendant" refers to both RBS and Greenwich Capital Holdings, Inc.

Data Center). Answer at 7 ¶ 4. The written contracts, executed on or about June 29, 2007, include a renewable, ten-year Master Services Agreement (MSA, Dkt. 20 at 2-6), a Co-Location Addendum (Addendum, Dkt. 20 at 7-9), a Service Level Agreement (SLA, Dkt. 21 at 2-5), a Statement of Work, and a Sublease (Dkt. 20 at 10-27) (collectively, Agreements). The Agreements are governed by New York law. Answer at 7-8 ¶¶ 1, 4; Dkt. 20 at 4-5 (MSA).

Under the SLA, Cervalis agreed to "[m]aintain [the] electrical infrastructure utilizing best industry practices" and "provide electrical supply for [the] entire customer installation" with "99.999% availability (no more than 26 seconds of downtime per month)." Dkt. 21 at 4 (SLA). Section 1.05 of the MSA provides, in relevant part:

> ***Customer may terminate this Agreement and all Transaction Documents if (a) the credits under the SLA for any given month exceed the Monthly Service Fee due from Customer for such month; or (b) Cervalis' failure to perform under the Service Level Agreement constitutes a Catastrophic Failure*** (identified therein) (each a "Termination Event"); provided Customer delivers Cervalis written notice within ten (10) days of learning of such a Termination Event and specifying in such notice a termination date on which date this Agreement and all Transaction Documents shall terminate and which shall be no later than six (6) months from the date of such Termination Event.

Dkt. 20 at 3 (MSA) (emphasis added). The SLA, in turn, "defines the availability and performance standards" for plaintiff's data centers and the circumstances entitling defendant to "credits" for failing to meet those standards. Dkt. 21 (SLA) at 2. The SLA defines "Catastrophic Failure" to include several specific conditions. *Id.* at 2-5. Each Catastrophic Failure condition relates to a single "Service Component", such as air temperature, humidity, or electrical supply for all or a subset of the equipment maintained on behalf of the customer. *Id.* For instance, "Electrical supply for entire customer installation" experiences a Catastrophic Failure when there

is a "Total power loss > 2 consecutive hrs for one or both of the 5,000 square foot Data Center Spaces." Dkt. 21 (SLA) at 3.

The Agreements contain several clauses that purport to limit plaintiff's liability. Section 1.08 of the MSA, titled "Limitation on Liability," includes the following provision:

> Cervalis' aggregate liability for damages to Customer, whether indirect, incidental, special, or consequential in nature and irrespective of the cause or form of action, including negligence, shall in no event exceed an amount equal to the amount of monthly recurring fees (excluding payment for power supply) paid to Cervalis during the thirty (30) month period immediately prior to the events giving rise to such damages … .

Dkt. 20 at 3 (MSA). The Addendum, under which plaintiff agreed to allow defendant to place its equipment into the Data Center, also contains a disclaimer of liability clause in Section 1.07:

> ***Cervalis shall not be liable for any costs, expenses or other damages incurred by customer or any third party as a result of the performance of Cervalis' obligations pursuant to this addendum or otherwise related to the equipment, except as a result of Cervalis' willful misconduct or gross negligence.*** EXCEPT AS EXPRESSLY SET FORTH HEREIN OR IN THE OTHER DOCUMENTS, ***IN NO EVENT WILL CERVALIS BE LIABLE TO CUSTOMER FOR ANY DAMAGES OR LOSSES DUE TO THE FAILURE OR MALFUNCTION OF THE EQUIPMENT LOCATED IN THE FACILITY.*** Notwithstanding the foregoing, and without imposing any duty or obligation on Cervalis, Cervalis will endeavor to protect the Facility and Equipment from damage and will notify Customer promptly of any problems or anticipated problems related thereto and identified by Cervalis. ***TO THE EXTENT CERVALIS IS LIABLE FOR ANY DAMAGE TO CUSTOMER'S EQUIPMENT FOR ANY REASON, SUCH LIABILITY WILL BE LIMITED SOLELY TO THE VALUE OF SUCH EQUIPMENT.***

Dkt. 20 at 8 (Addendum) (emphasis added).

In its Counterclaims (Answer at 6-16), defendant alleges that on November 28, 2015, at approximately 12:50 P.M., plaintiff caused a power outage in the Data Center by failing to

properly return the fire alarm control panel and related systems to normal operation following a test of the fire alarm system. ¶¶ 10-18. Defendant contends that the power outage disrupted its computer systems, which were housed in the Data Center (¶ 19); that plaintiff prolonged the outage by performing unnecessary troubleshooting (¶ 20); that the outage lasted for more than eight hours (¶ 23); and that plaintiff failed to promptly notify defendant of the power outage as it was required to do pursuant to contract. ¶ 25; Dkt. 20 at 8 (Addendum). Moreover, defendant claims that when defendant became aware of the outage, plaintiff refused certain access to defendant personnel, again in violation of contract. ¶ 27; Dkt. 20 at 7 (Addendum). Finally, defendant surmises that to avoid the contractual consequences of a power outage lasting longer than two hours (a "Catastrophic Failure," discussed below), plaintiff attempted to restore power at the Data Center in an abrupt fashion, causing unnecessary damage to defendant's equipment, data, and operations. ¶¶ 21-22. At about 9:15 P.M., normal operations at the Data Center were finally restored. ¶ 23.

Defendant states that on December 4, 2015, it notified plaintiff of its election to terminate the Agreements, effective as of May 27, 2016. ¶ 33. It contends that the parties agreed that defendant would remove certain equipment and leave some behind, and since the contract required the space to be left in "broom clean" condition, defendant would pay $65,149 for the equipment left behind. ¶¶ 35 & 36. Defendant vacated the Data Center (leaving behind the agreed-upon equipment) and stopped making lease payments. ¶ 38. Plaintiff issued a notice of default dated June 21, 2016, demanding that defendant pay overdue lease payments within 45 days. ¶ 40. On June 22, 2016, defendant paid plaintiff $65,149.

Plaintiff filed this action on January 24, 2017, asserting breach of contract, promissory estoppel, and unjust enrichment claims. Dkt. 1 (Summons and Complaint). Defendant filed its

Answer on March 27, 2017, pursuant to a stipulation extending the time to answer or respond to the complaint. Dkt. 6. The Counterclaims allege that defendant terminated the Agreements as of right based upon the November 28, 2015 "total loss of power", which lasted for more than 2 consecutive hours and resulted in a "Catastrophic Failure" under the SLA. Counterclaims ¶ 33. Defendant asserted four counterclaims, numbered here as in the Answer: (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; (3) negligence; and (4) attorneys' fees pursuant to a prevailing party clause.[3] In its prayer for relief, defendant asked that the complaint be dismissed, that the court declare that it had properly exercised its right to terminate the Agreements and owes no money to plaintiff, that it be awarded damages for "its losses caused by Cervalis," and that it be awarded costs and attorney fees. Dkt. 13 (Answer) at 15-16.[4]

Plaintiff now moves to dismiss the second (breach of implied covenant of good faith and fair dealing) and third (negligence) counterclaims as duplicative of the breach of contract claim. Seq. 002. The parties waived oral argument, and the motion was marked fully submitted on June 30, 2017.

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[3] *See* Dkt. 20 (MSA) at 5 ("If any litigation or other legal proceeding shall arise in respect of this Agreement, the SOW, the Co-location Addendum, the Service Level Agreement or the Sublease as a result of a dispute between the parties hereto, the prevailing party shall be entitled to recover (in addition to any other relief awarded or granted) reasonable costs and expenses, including attorneys' fees, incurred in connection with such proceeding.").

[4] Defendant's requests for relief are improper. Dismissal of the Complaint is not warranted by defendant's asserted causes of action. Defendant has also failed to assert a counterclaim for declaratory judgment. Additionally, defendant's request for an award of "damages to RBS to compensate it for its losses caused by Cervalis" is vague as to the nature and extent of those losses, particularly in light of the vague descriptions of damages set forth in the second and third counterclaims. *See* Counterclaims ¶¶ 54-57 (alleging injury to "RBS' right to receive the benefits to which it was entitled under the Agreements); *id.* ¶ 61 (alleging, *inter alia*, "damage to RBS").

II. Discussion

a. Legal Standard – Motion to Dismiss

On a motion to dismiss one or more claims in a pleading, the court must accept as true the facts alleged in the pleading as well as all reasonable inferences that may be gleaned from those facts. *See Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the pleading's merits or factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the pleading states the elements of a legally cognizable cause of action. *See Skillgames*, 1 AD3d at 250, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the pleading may be remedied by affidavits submitted by the party who filed the pleading. *See Amaro*, 60 AD3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where dismissal is sought based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes [the party's] factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002), citing *Leon v Martinez*, 84 NY2d 83, 88 (1994).

b. Breach of Implied Covenant of Good Faith and Fair Dealing (Second Counterclaim)

All contracts interpreted under New York law include an implied covenant of good faith and fair dealing. *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002). The implied covenant "embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *Id.*, quoting *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 (1995). While the covenant does not imply obligations inconsistent with the terms of the contract, it does "encompass 'any promises which a reasonable person in the position of the promisee would be justified in understanding were included.'" *Id.*, quoting *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 (1978). A party cannot maintain a cause of action for breach of the implied covenant "where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract.'" *Hawthorne Grp., LLC v RRE Ventures*, 7 AD3d 320, 323 (1st Dept 2004), quoting *Canstar v J.A. Jones Constr. Co.*, 212 AD2d 452, 453 (1st Dept 1995). Dismissal is also warranted if the breach of contract and the breach of the implied covenant claims "arise from the same facts." *Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 (1st Dept 2009), citing *Cerberus Int'l, Ltd. v BancTec, Inc.*, 16 AD3d 126, 127 (1st Dept 2005).

The Counterclaims assert that four aspects of plaintiff's behavior constituted a breach of the covenant of good faith and fair dealing under the Agreements: (1) failing to use best industry practices to avoid the power outage and to properly restore power to the Data Center (¶ 54); (2) abruptly restoring power to the Data Center in an attempt to avoid a Catastrophic Failure (¶ 55); (3) failing to follow the sequential restart procedure after the system test was concluded (¶ 56); and (4) failing to immediately notify defendant personnel of the power outage (¶ 57).

The Counterclaims also assert many of the above allegations to support the breach of contract (first) counterclaim. There, as in the second counterclaim, defendant asserts that plaintiff breached the Agreements by "causing and failing to correct a total loss of power to the Data Center for more than two hours." ¶ 46. Similarly as in the breach of implied covenant cause of action, defendant alleges that plaintiff breached the Agreements by "failing to use industry best practices in performing the method of procedure to restore normal operations to the Data Center." ¶ 48. Finally, as in the subject counterclaim. plaintiff allegedly breached the Agreements by "failing to immediately notify RBS of the power outage." ¶ 47. In sum, defendant fails to identify a breach of the implied covenant arising under different facts than the alleged breach of contract regarding the power failure. The counterclaim for breach of the implied covenant of good faith and fair dealing, therefore, is dismissed.

c. Negligence Counterclaim (Third Counterclaim)

"[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389 (1987). Additionally, under the so-called economic loss doctrine, "a contracting party seeking only a benefit of the bargain recovery, viz., economic loss under the contract, may not sue in tort ...." *17 Vista Fee Assocs. v Teachers Ins. & Annuity Ass'n of Am.*, 259 AD2d 75, 83 (1st Dept 1999); *see also Sommer v Fed. Signal Corp.*, 79 NY2d 540, 552 (1992) ("[W]here plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory.").[5] However, where a party to a contract breaches a "legal duty

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[5] The economic loss doctrine is also recognized by the law of Connecticut, where the alleged negligence occurred. *See State v Lombardo Bros. Mason Contractors*, 307 Conn. 412, 469 n.41 (2012). As neither party argues that Connecticut law is different from New York law in any relevant aspect, the court will apply New York law to the negligence claim. *See Matter of*

independent of contractual obligations ... imposed by law as an incident to the parties' relationship," that party "may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties." *Sommer*, 79 NY2d at 551.

Defendant asserts that the economic loss rule does not bar their negligence claims for three reasons: plaintiff owed a duty of care to defendant, outside of the contract, as a "self-proclaimed expert provider of professional services and reliable data centers" (Counterclaims ¶ 59);[6] the power outage, as described in the Counterclaims (¶¶ 10-23), was an "abrupt, cataclysmic occurrence";[7] and plaintiff caused physical, noneconomic damage to defendant's equipment (Counterclaims ¶ 61). While plaintiff's negligence caused mostly economic harms to the operation of defendant's business,[8] physical damage to defendant's servers is not a purely economic loss. Further, as bailee, plaintiff owed defendant a duty to exercise reasonable care in the safekeeping of defendant's computer equipment. *See Sommer*, 79 NY2d at 551–52

Allstate Ins. Co. (Stolarz), 81 NY2d 219, 223 (1993) ("The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved.").

[6] While courts have recognized a professional duty for some engineers, *see, e.g.*, *Hydro Inv'rs, Inc. v Trafalgar Power, Inc.*, 227 F.3d 8 (2d Cir. 2000), operating a computing data center does not implicate the same policy concerns as traditional engineering professions. *See Sommer*, 79 NY2d at 551–52 ("In [some] instances, it is policy, not the parties' contract, that gives rise to a duty of due care."); *see also Richard A. Rosenblatt & Co. v Davidge Data Sys. Corp.*, 295 AD2d 168, 169 (1st Dept 2002) ("[T]he courts of this State do not recognize a cause of action for professional malpractice by computer consultants."). Moreover, the Counterclaims do not allege that plaintiff employed engineering professionals or provided professional engineering services.

[7] The power outage in the Data Center was not an "abrupt, cataclysmic occurrence" akin to causing a fire to rage out of control. *See Sommer*, 79 NY2d at 553. Plaintiff was contractually obligated to "use its best efforts...in a good and workmanlike manner" and to "use industry best practices." Dkt. 20 at 3 (MSA). If plaintiff failed to do so, defendant is limited to assert a breach of contract claim insofar as it seeks to enforce those contractual obligations. *See Sommer*, 79 NY2d at 552 ("[W]here plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory.")

[8] Considering that "RBS occupied the Data Center with production servers that were used by the global financial markets division of The Royal Bank of Scotland," Counterclaims ¶ 6, one would expect mostly economic damage.

("[B]ailees, for example, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties.").[9] The mere ***existence*** of the Agreements does not, therefore, bar defendant from proceeding on a tort theory as to the damage to its servers.

Section 1.07 of the Addendum, however, disclaims liability for acts or failures to act that fall short of willful misconduct or gross negligence. *See* Dkt. 20 at 8 ("Cervalis shall not be liable for any costs, expenses or other damages incurred by customer or any third party as a result of the performance of Cervalis' obligations pursuant to this addendum or otherwise related to the equipment, except as a result of Cervalis' willful misconduct or gross negligence."). Disclaimers from ordinary negligence are generally enforced by New York law. *See Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 N.Y.2d 821, 823 (1993), citing *Sommer*, 79 NY2d at 553. The broad disclaimer here exempts plaintiff for damages from ordinary negligence resulting from its performance of its "obligations ... related to the equipment";[10] however, as defendant points out, it does not exempt plaintiff from liability for gross negligence.

Nevertheless, the counterclaim at issue is denominated as one for negligence, and does not sufficiently plead gross negligence in a non-conclusory fashion. *See Sommer*, 79 NY2d at

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[9] The Supreme Court of Connecticut similarly noted that a bailee may be both contractually liable and liable in tort for failing to exercise due care for the safekeeping of the bailed property. *See Barnett Motor Transp. Co. v Cummins Diesel Engines of Conn., Inc.*, 162 Conn. 59, 63 (1971). The court noted that pleading both, while permissible, "will rarely serve any useful purpose." *Id.* Here, pleading both breach of contract and negligence may serve a purpose if it is shown that either the duty of care or the remedy is not identical as to both claims. Of course, where claims in tort and contract entitle a party to the same damages, dismissal of one or the other for may be warranted to prevent a double-recovery.

[10] Contrary to defendant's arguments, this phrase plainly exempts plaintiff from liability for allegedly breaching its obligation to exercise due care with respect to the equipment, irrespective of the source of that obligation (e.g., tort or contract).

554 ("Gross negligence ... evinces a reckless indifference to the rights of others.").[11] Defendant alleges only that plaintiff acted "without regard for potential equipment damage," (Counterclaims ¶ 21), but does not allege facts sufficient to support a reasonable inference that plaintiff was grossly, rather than ordinarily, negligent. Consequently, the third counterclaim for negligence is dismissed with leave to replead gross negligence, and the facts to support it, within two weeks. Accordingly, it is

ORDERED that plaintiff's motion to dismiss the second and third counterclaims is granted; and it is further

ORDERED that counsel for the parties shall call Chambers[12] within 10 days of the date of entry of this decision on NYSCEF to discuss scheduling the preliminary conference.

Dated: September 18, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH

[11] *See also 19 Perry St., LLC v Unionville Water Co.*, 294 Conn. 611, 631 n. 11 (2010) (defining gross negligence as "very great or excessive negligence, or as the want of, or failure to exercise, even slight or scant care or slight diligence" (quotation marks omitted)).

[12] Between the hours of 4:00pm and 5:30pm, Monday through Thursday, with counsel for all parties on the line.