Anexia, Inc. v Horizon Data Solutions Ctr., LLC
2020 NY Slip Op 32167(U)
June 29, 2020
Supreme Court, New York County
Docket Number: 657444/2019
Judge: O. Peter Sherwood
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INDEX NO. 657444/2019
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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ANEXIA, INC.,

Plaintiff,

-against-

HORIZON DATA SOLUTIONS CENTER, LLC d/b/a VAZATA,

Defendant.

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DECISION AND ORDER
Index No.: 657444/2019

Motion Seq. No.: 001

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, the following facts are taken from the Amended Complaint (Complaint, NYSCEF Doc. No. 3) and are presumed to be true.

Plaintiff Anexia, Inc (Anexia), is in the business of providing "Infrastructure-as-a-Service, cloud services, outsourced services, including networking, managed hosting, colocation, and IP Transit to global businesses" (Complaint, ¶ 13). Defendant Horizon Data Solutions Center LLC d/b/a Vazata (Vazata) provides "managed hosting, Infrastructure-as-a-Service, and cloud managed" services (*id.*, ¶14).

Anexia provided some of these services at a data center located in Manassas, Virginia which it leased from non-party Corporate Office Property Trust (COPT) in June 2017[1]. Anexia leased only part of the data center, including Suite 201/202 (the Suite). In the transaction in which Anexia leased the Suite, Anexia also acquired certain customers from COPT, who were using the Suite, including the Federal Deposit Insurance Company (FDIC). The FDIC was

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[1] In 2010, Vazata leased the Suite through its wholly-owned-subsidiary, Horizon Data Center Solutions II (HDCS II) from the company that built the Data Center, PowerLoft. Vazata guaranteed the lease payments from HDCS II to PowerLoft, and frequently had to make payments. PowerLoft sold the Data Center to COPT in 2010. Vazata then sold HDCS II to Day1 Solutions, Inc (Day1). Day1 was substituted into the lease of the Suite and Vazata's contract with FDIC. Day1 defaulted and that lease was terminated in December 2015. Just before COPT issued the notice of default to Day1, Day1 gave Vazata a below-market lease for a space in the Suite to sub-sub-lease to customers and entered an agreement for Vazata to act as collection agent for six contracts, in exchange for 20% of the revenues from those contracts. Day1 also assigned Vazata the right to collect a portion of lease payments from subcontractors.

In April 2016, Day1 and COPT entered into a Settlement Agreement to resolve the default. Day1 assigned all rights in customer contracts to COPT, including the Vazata sub-sub-lease and the agreements between Day1 and Vazata described above. COPT then sought a new tenant to lease the Suite and perform the obligations for clients it inherited from Vazata/Day1, and brought in Anexia.

originally Vazata's customer, but that contract had been transferred first to Day1 in 2015, then to COPT, and then to Anexia. However, the FDIC refused to consent to the assignment to Anexia. As a result, in December 2017, Anexia had to agree to a management services agreement with Vazata (the MSA) under which Vazata would continue to provide certain management services for FDIC, transfer 80% of revenues received from the FDIC to Anexia, and sublease portions of the Suite (*id.*, ¶ 4).

Anexia complains that Vazata appropriated some of its customers, including FDIC, the biggest customer in the Suite, and transferred the services Vazata provided FDIC to Vazata's data center in Dallas, Texas (the Dallas Data Center). After the move, Vazata has not paid Anexia its claimed 80% of the revenues from the FDIC account. Anexia also claims Vazata failed to pay for additional power and power outlets for its customers, and by failing to pay for Anexia's consulting services or provide access to books and records. Vazata maintains the agreement with Anexia is limited to the Manassas Data Center and that Anexia is not entitled to share revenue derived from services it provided to FDIC at other locations.

Anexia asserts the following causes of action:

1- Breach of Contract, including breach of the implied covenant of good faith and fair dealing;
2- Declaratory Judgement that defendant is obligated to turn over 80% of revenue received from the FDIC;
3- Theft of Services, for installing extra power connections and not paying for electricity use;
4- Violation of Va. Code Section 18.2-187.1- for theft of electricity and communication services; and
5- Unjust Enrichment- by keeping payments made by the FDIC.

II. DISCUSSION

A. Standards on a motion to dismiss

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60

AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85). Here, the documentary evidence is the contracts (the MSA, the FDIC Contract, and the contracts regarding the transfer of the Data Center sublease). While plaintiff has quibbled with excerpts of those documents being filed, plaintiff does not dispute the authenticity of those documents, and they are proper documentary evidence.

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

B. Claim 1- Breach of Contract

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

Vazata seeks dismissal of only that portion of the first cause of action that relates to the FDIC contract (*see* Doc. No. 3, ¶ 46 [a] and [b]). Although it seeks dismissal pursuant to CPLR 3211 (a)(7), Vazata does not argue that the complaint fails to state a cause of action. Instead, it argues that there has been no breach of the MSA in connection with the FDIC contract.

The MSA is an agreement to make agreements (the work statements or customer orders). Under the MSA, Anexia agreed to provide services (providing physical space, electrical outlets, etc.) to Vazata and Vazata would pay money. Section 3(C) of the October 1, 2017, Statement of Work attached to the MSA provides that:

> "Anexia shall provide Customer [Vazata] the services described in Schedule A regarding the FDIC Cage. Customer shall maintain the Customer relationship with FDIC indefinitely, including responsibility for the billing and collection for the Services from FDIC. Customer agrees to remit eighty (80%) percent of the revenue collected from FDIC, commencing with the invoice for October 2017, during the term of the agreement with FDIC, without additional deduction or offset against the payments received by Customer from FDIC"

Exhibit A to MSA, NYSCEF Doc. No. 24 at 18). It is clear, both from the Complaint and from the Statement of Work, that the FDIC contract is with Vazata, and not Anexia. The Statement of Work does not specify a termination date for the rental of the FDIC Cage, but the MSA has a

five-year term (MSA 13.131). No one argues that the MSA, or any portion of it, was terminated when Vazata moved the FDIC's data and services to the Dallas Data Center.

Vazata's main argument is that it is only required to remit 80% of revenues received from the FDIC for the portion of work it does from the Manassas Data Center. It points to a number of places in the parties' agreements which it argues shows an intention to limit the scope of the agreements to the Manassas Data Center (*see, e.g.*, introductory paragraphs to Statement of Work; Recitals in Schedule ([Doc. No. 24]). However, the references do not "utterly refute" the breach of contract alleged. Section 3C of the MSA provides: "[c]ustomer agrees to remit eighty (80%) percent of the revenue collected from FDIC. . . during the term of the agreement with FDIC". Neither the Statement of Work nor the MSA expressly limits the remittance obligation to apply to only to work to performed at the Manassas location. Moreover, the term "agreement" is not defined, and the MSA does not clarify whether the time is limited by the term of the Basic Operating Agreement (BOA) between the FDIC and Vazata[2] or the agreements made between Vazata and the FDIC pursuant to the BOA. In any event, the MSA does not state expressly where services to the FDIC would be provided. This aspect of the motion must be denied.

C. Claim 2- Declaratory Judgement

"The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR 3001). A court "may decline to hear the matter if there are other adequate remedies available" (*Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983]). As the amount of potential damages is not known (80% of future revenues from the FDIC relationship until the end of the MSA contract period being an unknown number), there is not another adequate remedy currently available. This claim will survive.

D. Claim 3- Theft of Services

The Complaint poses this claim as theft of services for installing extra power connections and not paying for electricity use. In its opposition, Anexia clarified this claim as the "common law tort of conversion of electricity" (Opp at 11, citing *Potomac Elec. Power Co. v Mon Paris Rest., Inc.*, 12 Va Cir 74 [Va Cir Ct 1987]). "Conversion is the wrongful assumption or exercise

[2] The BOA is not a contract for services. Rather, it is an agreement that provides a framework for making future agreements.

of the right of ownership over goods or chattels belonging to another in denial of or inconsistent with the owner's rights" (*State of Maine v Adams*, 277 Va 230, 243 [2009] quoting *Economopoulos v Kolaitis*, 259 Va 806, 814 [2000]).

A plaintiff need only allege and prove that the defendant interfered with plaintiff's right to possess the property. The defendant does not have to have taken the property or benefitted from it (*see Hillcrest Homes, LLC v Albion Mobile Homes, Inc.*, 117 NYS2d 755 (4th Dept 2014). A conversion claim may not be maintained where damages are sought merely for a breach of contract (*see Sutton Park Dev. Trading Corp. v Guerin & Guerin*, 297 AD 2d 430, 432 [3d Dept 2002]).

Anexia first alleges "Vazata . . . established secret electrical power connections beneath the floor of its space in the DC-6 Center in violation of the express limits on those connections expressed in the MSA and applicable SOWs" (Complaint, ¶ 55). This is expressed as a breach of contract, and the allegation does not allege Vazata exercised the right of ownership over goods or chattels belonging to Anexia. This is not a claim of either conversion or theft of services.

Anexia also alleges "Vazata has failed and refused to reimburse Anexia for the stolen power that it has been misappropriating for over two years" (*id.*, ¶ 56). Giving Anexia the benefit of every inference, Anexia seems to be alleging Vazata used more power than was allotted to it under the MSA and applicable SOWs, resulting in Anexia having to pay COPT more money for electricity.

The MSA provides at § 5.1 that:

> "Except as otherwise set forth in an applicable Work Statement, Anexia will furnish all . . . resources necessary to accomplish the provision of services and will bear all associated expenses"

Anexia contends that the electric power allowed Vazata is limited by § 2C of the Statement of Work which provides: "Anexia shall provide [Vazata] with the 'I-Sight Cage' . . . which contains 540 square feet, inclusive of *11L6-30a/20S v a/b power pairs*" (Doc. No. 24). (Statement of Work, attached to MSA, NYSCEF Doc. No. 24 at section 2[C]) (emphasis added). This is not limiting language and the claim fails.

Plaintiff also states it billed defendants for the excess of electricity, but defendant failed to pay (Opp at 12). This issue is covered by the contract between the parties and is within the contract claim in this action.

Also, "an action for conversion can be maintained only by the person having a property interest in and entitled to the immediate possession of the item alleged to have been wrongfully converted" (*Economopoulos v Kolaitis*, 259 Va 806, 814 [2000]). In *Potomac Elec. Power Co. v Mon Paris Rest., Inc.*, (12 Va Cir 74 [Va Cir Ct 1987]), relied upon by the plaintiff, the power company sued landlords and their tenant for conversion of electricity, where the line running power to the building was alleged to be unauthorized and the power used by the tenant was never paid for. That case suggests at the time defendant used the power it was owned by the utility company, not plaintiff, so this claim would also fail for that reason.

E. Claim 4- Violation of Va. Code Section 18.2-187.1.

Plaintiff also seeks to invoke a Virginia penal statute concerning theft of electricity and communication services. Virginia Code § 18.2 – 187.1 provides:

> "A. It shall be unlawful for any person knowingly, with the intent to defraud, to obtain or attempt to obtain, for himself or for another, oil, electric, gas, water, telephone, telegraph, cable television or electronic communication service by the use of any false information, or in any case where such service has been disconnected by the supplier and notice of disconnection has been given.
> B. It shall be unlawful for any person to obtain or attempt to obtain oil, electric, gas, water, telephone, telegraph, cable television or electronic communication service by the use of any scheme, device, means or method, or by a false application for service with intent to avoid payment of lawful charges therefor"

(Va Code Ann § 18.2-187.1). The parties dispute whether plaintiff has standing to sue under this law as it is not a "party providing oil, electric, gas, water, telephone, telegraph, cable television or electronic communication service who is aggrieved by a violation of this section" (*id.* at § E). The leading case is *Sky Cable, LLC v Coley (*5:11CV00048, 2013 WL 3517337 [WD Va July 11, 2013]). In that case, plaintiff Sky Cable was an affiliate dealer for broadcast satellite system operator Direct TV. Direct TV assigned Sky Cable an account which Sky Cable was supposed to service, and for which Sky Cable was to receive commissions *(id.* at *5). The account holder connected more end users to the account than were allowed under terms of the account's contract with Direct TV (among other issues). Sky Cable sued the account holder and Direct TV (*id.* at *6-7). The United States District Court held that Sky Cable was not a party "providing . . . cable television or electronic communication service" as "[i]t was not Sky Cable's cable television or electronic communication service that was pirated. It was Direct TV's," so Sky Cable lacked standing to make the claim (*id.* at *13). Here, Anexia claims to be the provider of electricity to

the defendant, similar to Direct TV in the *Sky Cable* case, and so argues it has standing under this statute (Opp at 14). However, unlike Direct TV, plaintiff does not allege doing anything to create, process, or provide power. Anexia merely bills defendant for the service and pays someone else. Anexia is more like Sky Cable, the middleman, than Direct TV. Accordingly, this claim also fails for lack of standing.

F. Claim 5- Unjust Enrichment- by keeping payments made by the FDIC.

"Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). There is an agreement between the parties here, and the MSA states what portion, if any, of the FDIC revenue stream defendant is obligated to pay plaintiff. This claim too must be dismissed.

Accordingly, it is hereby

ORDERED that the motion to dismiss (Motion Sequence Number 001) of defendant Horizon Data Solutions Center, LLC d/b/a Vazata, is GRANTED to the extent that the third ("theft of services"); fourth (Violation of Virginia Code § 18.2 – 187.1); and fifth (unjust enrichment) causes of action are hereby dismissed and is otherwise DENIED; and it is further

ORDERED that defendant shall answer the Complaint as to the remaining causes of action within twenty (20) days of service of this Order with notice of entry; and it is further

ORDERED that counsel shall appear for a preliminary conference on Tuesday, September 29, 2020 at 10:00 AM in the event the courthouse is open to in-person appearances and otherwise counsel shall contact the court to schedule an appearance by video.

This constitutes the decision and order of the court.

DATED: June 29, 2020

ENTER,

O. PETER SHERWOOD J.S.C.