

GLCA Sec., LLC v AGC Networks, Inc.

2020 NY Slip Op 32372(U)

July 20, 2020

Supreme Court, New York County

Docket Number: 650759/2019

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

GLCA SECURITIES, LLC

Plaintiff,

- v -

AGC NETWORKS, INC.,

Defendant.

INDEX NO. 650759/2019

MOTION DATE 8/8/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 96, 97, 99

were read on this motion to/for

JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff GLCA Securities, LLC (motion sequence number 002) for summary judgment is granted in part to the extent that plaintiff shall have judgment on the issue of liability on its cause of action for breach of contract; and it is further

ORDERED that the issue of money damages to be assessed against the defendant AGC Networks, Inc., and the amount of the plaintiff's expenditures for reasonable attorney's fees, are referred to a Special Referee to hear and determine pursuant to CPLR 4317(b); and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, and proof of service, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED and ADJUDGED that pursuant to CPLR 4317(b) the Clerk is directed to enter judgment against in accordance with the report of the aforesaid Special Referee without any further application.

DECISION

In this breach of contract action, plaintiff GLCA Securities, LLC (GLCA) moves for summary judgment on the complaint for breach of contract against defendant AGC Networks, Inc., pursuant to CPLR 3212 (motion sequence number 002).

Background

GLCA is a financial services and investment banking advisory company, incorporated in Delaware as a limited liability corporation and licensed to do business in New York. Defendant AGC Networks, Inc. (AGC) is an information and communications technology services company also incorporated in Delaware. At some point in 2018, AGC became interested in pursuing a business venture to acquire non-party, Texas-based, digital solutions provider Black Box Corporation (Black Box). To that end, on June 13, 2018, AGC executed a contract with GLCA to provide AGC with financial advisory and investment banking services in connection with seeking outside financing for AGC to use in its acquisition of Black Box (the contract). AGC's chief financial officer Deepak Kumar Bansal executed the contract on behalf of AGC, and GLCA's managing director Douglas Lane executed it on behalf of GLCA .

The relevant portions of the contract state as follows:

"1. Scope of Engagement: On the terms and subject to the conditions of this Agreement, *GLCA will provide the following financial and capital market related advisory services:*

(a) to the extent necessary or appropriate, *familiarizing ourselves with [AGC]'s and [Black Box]'s financial condition, operations and business;*

(b) *assisting [AGC] the preparation and review of the Information Memorandum (as defined below), which shall not be made available to or used in*

discussions with prospective investors in the Financing without [AGC]'s prior consent;

(c) *advising and assisting, on a best efforts basis, [AGC] in obtaining, examining, analyzing, structuring and negotiating the financial aspects of any potential or proposed Financing;*

(d) *to the extent necessary or appropriate, coordinating due diligence review;*

(e) *if requested, advising and assisting [AGC] in making presentations to the Board of Directors of [AGC] concerning the Financing; and*

(f) *providing such other financial advisory services as may be agreed in writing between GLCA and [AGC].*

"In rendering its services pursuant to this Agreement, and notwithstanding anything to the contrary herein, GLCA is not assuming any responsibility for any decision to pursue (or not to pursue) any business strategy or to effect (or not to effect) any Financing. GLCA shall not have any obligation or responsibility to provide legal, regulatory, accounting, tax, audit, valuation, or business consultant advice or services hereunder.

"The advisory services and compensation arrangements set forth herein do not encompass other financial advisory services not set forth in this Section 1. If [AGC] and GLCA later determine to expand the scope of services to include other services not otherwise set forth herein, such future agreement will be the subject of a further and separate written agreement of the parties.

"2. Fees and Expenses: *For GLCA's services hereunder, [AGC] agrees to pay to GLCA the following non-refundable fees in cash:*

(a) Financing Fee: *a cash fee equal to 1.75% of the gross amount of Financing Proceeds at the closing (the 'Financing Fee'); provided, however, that for any Financing Proceeds provided by any of the parties listed on Schedule A, as amended from time to time by [AGC] and GLCA, the cash fee shall equal 50bps (0.5%). For purposes of this agreement, the term 'Financing Proceeds' means the sum of any investment in debt, equity, or other capital securities into [AGC] raised in*

any Financing in which GLCA provides Services hereunder (other than funds provided by [AGC] or its parent). The Cash Fee shall be payable in cash in full at the closing of the Financing. GLCA will not receive any fees from any lenders or investors for the Financing.

(b) Expense Reimbursement: GLCA shall, whether or not the Financing is consummated, be entitled to reimbursement, from time to time upon written request and invoice, and upon consummation of the Financing or upon termination of GLCA's services pursuant to this Agreement, from [AGC] of reasonable out-of-pocket expenses incurred in connection with the services to be provided under this Agreement, including, without limitation, travel fees, document productions fees, GLCA's reasonable out-of-pocket fees and expenses for outside legal counsel and other professional advisors incurred in connection with the negotiation and performance of this Agreement and the matters contemplated hereby, and sales, use or similar tax incurred thereon, up to an aggregate maximum amount of \$25,000, or such other amount as agreed in advance by [AGC] and GLCA. In connection with the foregoing, [AGC] shall, upon execution of this Agreement, provide GLCA with an advance retainer in the amount of \$25,000 (the 'Expense Retainer'). The Expense Retainer will be maintained throughout the engagement and returned to [AGC] upon completion of GLCA's services. GLCA reserves the right to apply the Expense Retainer to outstanding statements in the event that [AGC] fails to make monthly payments in accordance with this Section 2 (b), and [AGC] shall replenish the Expense Retainer promptly thereafter, provided that GLCA shall have provided [AGC] with an invoice or other similar documentation with reasonable detail of such expenses.

* * *

"4. Term of Agreement:

"(a) This Agreement may be terminated at any time by GLCA or [AGC] on thirty (30) days' prior written notice to the other. Any termination or expiration of this Agreement shall not affect any provisions that survive the termination hereof,

including, (i) the indemnification, reimbursement, contribution and other obligations set forth in this Agreement, including Schedule I, and (ii) GLCA's right to receive payment of fees earned and expenses incurred by GLCA pursuant to Section 2 hereof, and [AGC] shall immediately pay or cause to be paid all such reasonable fees and expenses due and owing. "(b) Additionally, in the event of any termination of this Agreement by a party hereto (other than GLCA, unless GLCA has terminated the Agreement), GLCA shall be entitled to payment of the Financing Fee referred to in Section 2 (a) if a Financing in which GLCA provides Services hereunder is consummated at any time prior to the expiration of twelve (12) months after the date of this Agreement (the 'Tail Period')" (emphasis added).

GLCA asserts that AGC closed its acquisition of Black Box on January 7, 2019. GLCA also asserts that, despite having fully performed all of the services specified in the contract and having tendered AGC an invoice for them on January 11, 2019, AGC has refused to pay it. AGC responds that GLCA willfully misreads the contract, which actually required GLCA to obtain and deliver financing for the Black Box project in order to be entitled to a fee, and that because GLCA did not do so, it is not entitled to compensation under the contract. AGC does not deny that GLCA performed services, that it submitted an invoice for those services, or that it has refused to pay the invoice.

As a result of its unresolved dispute with AGC, on February 6, 2019 GLCA filed a summons and complaint that alleges a single cause of action for breach of contract. AGC filed an answer on April 12, 2019. Some discovery ensued, and the parties each

submitted orders to show cause permitting them to file certain evidentiary submissions under seal (motion sequence numbers 001 and 003, respectively), which the court granted on August 8, 2019. On that same day, the court held oral argument on GLCA's summary judgment motion (motion sequence number 002).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist (see e.g., Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Sokolow, Dunaud, Mercadier & Carreras v Lacher, 299 AD2d 64, 70 [1st Dept. 2002]). 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 (see e.g., Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Pemberton v New York City Tr. Auth., 304 AD2d 340, 342 [1st Dept 2003]).

Here, the claim on which GLCA moves for summary judgment is breach of contract. Thus, "the burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it" (Eden Temporary Servs. v House of Excellence Inc., 270 AD2d 66, 67 [1st Dept 2000]; quoting Paz v Singer Co., 151 AD2d 234, 235 [1st Dept 1989]). The proponent of a breach of

contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages (see e.g., Gordon v Dino De Laurentiis Corp., 141 AD2d 435 [1st Dept 1988]). However, “on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and . . . circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where . . . the intention of the parties can be gathered from the instrument itself” (Koren Rogers Assoc. Inc. v Standard Microsystems Corp., 79 AD3d 607, 608 [1st Dept 2010]; quoting Maysek & Moran v Warburg & Co., 284 AD2d 203, 204 [1st Dept 2001]).

GLCA contends it has established all of the component elements of its breach of contract claim. There appears to be no dispute regarding several elements of GLCA’s cause of action. The parties agree on “the existence, terms and validity” of the contract, that GLCA rendered services pursuant to the contract, and that GLCA presented AGC with an invoice for those services which AGC has not paid. With respect to the element of damages, GLCA has calculated a figure that purports to include both the “financing fee” and the “expense reimbursement” provided for in Section 2 of the contract. AGC does not dispute the methodology of GLCA’s calculations pursuant to Section 2 of the contract, although it does not accept the specific amounts set forth in

GLCA's damages calculations. Instead, AGC opposes GLCA's summary judgment arguing that GLCA failed to establish the element of breach.

AGC specifically argues that "GLC was required . . . to arrange financing to be entitled to any financing fee." To support this argument, AGC cites the contract's preamble paragraph, which provides that:

"This letter Agreement (this 'Agreement'), entered into as of June 13, 2018 (the 'Effective Date'), confirms the terms of the agreement between [GLCA] and [AGC] . . . , pursuant to which GLCA has been engaged to act as the agent and financial advisor to [AGC] and to provide financial advisory services and investment banking services ('Services') in connection with arranging a financing of capital securities (the 'Financing') for [AGC]'s prospective acquisition of all or part of [Black Box] within twelve (12) months of the date of this Agreement."

AGC contends that the preamble "defines the term 'financing' as 'arranging a financing of capital securities' for the acquisition" of Black Box and asserts that GLCA did not "arrange" the financing that AGC ultimately used in its acquisition of Black Box. On that basis, AGC concludes that GLCA has failed to establish that AGC breached the contract, because GLCA was not entitled to receive any compensation under the contract. GLCA replies that "AGC's alternative 'interpretation' of the unambiguous agreement is not credible."

AGC's reading of the contract asserts that GLCA's contractual duty consisted of "arranging a financing of capital

securities . . . for [AGC]'s prospective acquisition of . . . [Black Box]." However, this reading improperly and inexplicably omits the preceding portion of the preamble sentence that actually describes GLCA's contractual duty as being "to provide financial advisory services and investment banking services . . . in connection with arranging a financing of capital securities." Thus, by the plain meaning of the language, the contract obligated GLCA to "provide services," and not to "arrange financing," as AGC asserts. The significance of this distinction is clear, since section 2 of the contract unquestionably provides that GLCA is entitled to receive payment from AGC of a "financing fee" and an "expense reimbursement" in the event that GLCA performs the "services" that are described in Section 1 of the contract.

AGC premises much of its opposition to GLCA's motion on the argument that Section 4 (b) of the contract governs the parties' dispute, rather than Section 2. By its own terms, Section 4 of the contract only applies in the event that either of the parties acts to "terminate" the contract, and neither of them argues that such a "termination" ever took place. As a result, Section 4 of the contract is inapposite to the parties' dispute, and AGC's reliance on such section misplaced.

In furtherance of its argument opposing summary judgment, AGC cites certain case law, including this court's decision in

PBS Realty Advisors, LLC v Jones Lang LaSalle Ams. Inc. (2011 WL 11075828 [Sup Ct, NY County April 27, 2011], affd 100 AD3d 450 [1st Dept 2012]), for the proposition that GLCA is not entitled to payment of a financing fee because it was not the "procuring cause" of the financing that AGC ultimately used to acquire Black Box. However, such decisions involved parties who had acted as "brokers" retained to obtain financing for business transactions, who later sought to receive payment of "finder's fees," but were not entitled to them because they had not actually obtained the financing that was used. Such case law is inapplicable to the case at bar because the contract states that AGC retained GLCA as a "financial services advisor" and not a "broker."

The court likewise rejects AGC's further argument that "whether GLCA arranged the financing is a question of fact that precludes summary judgment." As discussed above, it is immaterial whether or not GLCA obtained the financing that AGC ultimately used to complete the Black Box acquisition, since GLCA was a duly retained "financial advisor" entitled to compensation for *all of the services* that it rendered, and was not a "search firm" only entitled to a commission in the event that the *results* of its search were used.

The court also rejects AGC's contention that "summary judgment is improper because GLCA has failed to satisfy its

burden of proving that its interpretation of the letter agreement is the only reasonable one." Such argument misconstrues the law ("The interpretation of an unambiguous contract is a question of law for the court . . . , as is the determination of whether contractual language is ambiguous" (Dreisinger v Teglassi, 130 AD3d 524, [1st Dept 2015] [internal citations omitted]; see also Koren Rogers Assoc. Inc. v Standard Microsystems Corp., 79 AD3d at 608 ["on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on"])). Such interpretation of an unambiguous contract by the court does not raise a question of fact to be resolved by the application of burdens of proof but is solely a question of law.

Finally, this court rejects AGC's argument that "summary judgment is improper . . . because GLCA has failed to produce documents and the parties have not yet exchanged any discovery." As discussed, the interpretation of a contract is a legal question to be resolved by the court, not a factual question to be resolved by the weighing of evidence.¹

¹The court does not, nor does it need to, reach the parties' respective arguments concerning the admissibility of the affidavit provided by GLCA's managing director Douglas Lane. Such affidavit merely offer's such witness's interpretation of the contract, and "'circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where . . . the intention of the parties can be

As the parties both agree that GLCA did provide such "services," AGC is obligated to pay GLCA for them, and its refusal to honor a duly tendered invoice for such "services" constitutes a breach of Section 2 of the contract, which has resulted in GLCA sustaining monetary damages. Having established all of the component elements of its breach of contract claim, GLCA is entitled to a grant of partial summary judgment on the issue of liability.

As for damages, while the parties do not dispute the methodology of GLCA's calculation, they have not agreed on a damages amount. As such presents an issue of fact, the court refers the issue of calculating the amount of damages due to GLCA using the methodology set forth in Section 2 of the contract to a Special Referee to hear and determine.

The complaint's prayer for relief includes a request for "prejudgment interest, and all costs and expenses, including legal fees." The court finds that GLCA is entitled to recover these amounts. "Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (Hooper Assoc. v AGS

gathered from the instrument itself.'" (Koren Rogers Assoc. Inc., supra, 79 AD3d at 608).

Computers, 74 NY2d 487, 491 (1989); see also, Sykes v RFD Third Ave. I Assoc., LLC, 39 AD3d 279 (1st Dept 2007). Here, both Sections 7 and Schedule 1 of the contract provide that AGC must indemnify GLCA for its legal fees expenditures in actions that involve litigation of the contract. Thus, GLCA is entitled to recovery of the legal fees that it expended in this action. Further, CPLR 8101 provides that "[t]he party in whose favor a judgment is entered is entitled to costs in the action, unless otherwise provided by statute or unless the court determines that to so allow costs would not be equitable, under all of the circumstances." Thus, GLCA is likewise entitled to court costs that it incurred in this action, which it may recover upon the submission of an appropriate bill of costs to the Clerk, upon filing of the final judgment.

7/20/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: