SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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GALAXE.HEALTHCARE SOLUTIONS, INC.,

Plaintiff,

- v -

RXSENSE, LLC,

Defendant.

INDEX NO. 654114/2019

MOTION DATE N/A, N/A

MOTION SEQ. NO. 011 012

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 288, 289, 290

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The plaintiff's motion (Mtn. Seq. No. 011) for summary judgment must be denied. As discussed more completely on the record (5.23.23), the fully developed record before the Court firmly establishes that the parties worked iteratively on the development of the code and that the plaintiff unilaterally demanded "immediate payment" of a June 25, 2019 invoice (the **June Invoice**) and then walked off the job – neither of which it was not entitled to do under the Information Technology Services Agreement (the **ITSA**; NYSCEF Doc. No. 137), dated June 7, 2018. Putting aside that the record establishes a course of dealing pursuant to which invoices were paid over time and within a reasonable period of time, the idea of "on demand" and "immediate termination" are antithetical to the course of conduct and the express provisions of

the ITSA which only permitted the plaintiff to suspend services after 45 days following non-payment had elapsed which in fact it did not (*see* Section 6.3 of the ITSA).

On the record before the Court, the plaintiff was paid over $6 million for a product that had substantial bugs and required fixing and which the ITSA obligates the plaintiff to fix at its cost (*see* Section 3.4[b] of the ITSA).

Pursuant to Section 1.1(a) of the ITSA, the parties agreed that they would agree in writing as to the specification of services that the plaintiff would provide. This the parties defined as "Work Orders" and the definition of Work Orders includes both time and materials invoices and fixed priced invoices (*see* Section 1.5 of the ITSA). In either case, pursuant to Section 3.1 of the ITSA, the parties agreed that a Completion Notice was to be sent by the plaintiff with deliverables. Indisputably this was not sent. Thus, having not sent the predicate notice triggering the defendant's obligation to send a Non-Acceptance Notice, the plaintiff is not entitled to summary judgment for payment of its June Invoice based on the defendant's failure to send such notice. Indeed, as discussed above, the record reflects a course of dealing between the parties that was different than as set forth in the ITSA including payments of invoices from the defendant without requiring any such Completion Notice in the past, and significant external and internal plaintiff communications (*e.g.*, NYSCEF Doc. No. 218) reflecting bugs in the code.

Ultimately, the plaintiff demanded immediate payment for the June Invoice which was different than the parties' course of dealings where payment had been made in the ordinary course and over time, a complete suspension of services when the unilateral demand was not acceded to

given issues surrounding such June Invoice (including whether the June Invoice was for new code or for fixing existing code for which the plaintiff was not permitted to charge pursuant to Section 3.4 of the ITSA) and a potential shake-down by the plaintiff for an additional $7.5 million payment from the defendant in exchange for a $200,000 credit for the issues the defendant raised with the quality of the plaintiff's work and also with the alleged inappropriate billing (NYSCEF Doc. No. 233). Thus, the plaintiff 's motion must be denied.

The defendant's motion (Mtn. Seq. No. 011) for partial summary judgment, by contrast, must be granted. Pursuant to Section 4.4 of the ITSA, the defendant owns the code that was delivered to it. For completeness, on the record (5.23.23) the plaintiff conceded as much but merely indicated that they could not have the code without paying for it. As discussed above, the record unequivocally establishes that the plaintiff delivered code that did not work properly and contained substantial bugs which required remedy. Inasmuch as it is also clear from the deposition testimony and the invoices that the plaintiff did not separate the time it billed for creating new code from the time spent remedying mistakes (for which they are responsible), they also breached the ITSA by not fixing previously delivered code at their cost pursuant to Section 3.4(b) of the ITSA. The invoices reflect only charges for estimated services and services actually incurred with a credit provided for any overestimates without any further detail. What is not clear is the amount of overlap between that which was billed for new code and that which was billed for repairing old code (for which billing was improper). This is the sole issue for trial. The defendant is also entitled to dismissal of the plaintiff's anticipatory repudiation claim because there is no evidence that the defendant did not intend to pay the June Invoice. They may well have paid it in the ordinary course as they had paid over $6 million of prior invoices. No

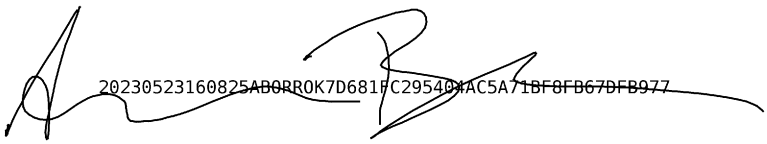
one is identified who allegedly specifically disavowed the June Invoice indicating that they would not pay it and, as such, there is no issue for trial.

The Court has considered the plaintiff's remaining arguments and finds them unavailing.

It is hereby ORDERED that the plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the defendant's motion for summary judgment is granted; and it is further

ORDERED that the parties shall appear for a pre-trial conference on July 13, 2023, at 11:30am.



5/23/2023
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE