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Summary Judgment Order (MICROBILT CORPORATION)

Elizabeth E. Long
Superior Court of Fulton County

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JAN 17 2007 ^{MS}

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Deputy Clerk Superior Court
Fulton County, Georgia

MICROBILT CORPORATION,

Plaintiff,

v.

FIDELITY NATIONAL FINANCIAL INC.,
et al.

Defendants,

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Civil Action No. 2003-CV-79446
(Business Division Two—EL)

SUMMARY JUDGMENT ORDER

The above-styled case is before the Court on Defendants' Motion for Summary Judgment and Motion to Reconsider and Clarification of Law.

Defendants' Motion ~~for Summary Judgment~~ was originally considered by Judge Lane of the Fulton County Superior Court. Judge Lane issued an order for partial summary judgment ("Judge Lane's Order") on October 14, 2005. In response to the order, Defendants filed a Motion to Reconsider and Clarification of Law on November 16, 2005. ~~No further action was taken until~~

November, 2006, when the case was transferred to the Business Case Division of Fulton County Superior Court and assigned to Judge Long. In light of the length of time in which the motions had been pending, the unresolved issues of summary judgment, and the new assignment of the case, this Court held oral argument regarding all summary judgment issues and finds as follows:

Plaintiff and Defendants' predecessor, Credit Data Reporting Services, Inc., ("CDRS") entered into a software licensing agreement in March, 1995, and executed a second agreement in May, 1995 (the "Contract"). Under the Contract, Plaintiff agreed to provide the software platform for the customers of a division of CDRS called the National Merging Center ("NMC") so that these customers could access single and merged credit reports. References to CDRS and

NMC in the Contract have lead to disagreements as to whether or not the Contract encompasses the entire business of CDRS or just the business of NMC. The Contract established a sliding pay-scale based upon the type of report and whether or not Plaintiff or another vendor was used to access the report. The parties disagree about the proper amount owed to Plaintiff under the Contract, the scope of the Contract, and the termination of the Contract.

Summary judgment is appropriate only where there is “no genuine issue of material fact”. O.C.G.A. § 9-11-56(c). In deciding a motion for summary judgment, the Court must construe the evidence in the light most favorable to the non-moving party. Stephens v. Gwinnett County, 175 Ga. App. 379, 382 (1985). “The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact and if the trial court is presented with a choice of inferences to be drawn from the facts, all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion.” Id.

During the oral argument before this Court on December 20, 2006, the parties presented arguments regarding the meaning of Section 1.2 of the Contract which was the subject of Judge Lane’s Order. After this oral argument, Plaintiff filed a Supplemental Brief in Opposition to Defendants’ Motion to Reconsider and Clarification of Law. In this brief Plaintiff contends that Defendants’ Motion to Reconsider, filed November 16, 2005, was filed after the end of the September-October court term during which Judge Lane’s Order had been issued and therefore the trial court no longer had jurisdiction over Judge Lane’s Order.

Georgia case law restricts the authority of trial courts to modify, review, or revoke judgments to the term of the court in which the judgment is made. Cherry v. Moreton Rolleston, Jr. Living Trust, 273 Ga. App. 876, 879 (2005); Masters v. Clark, 269 Ga. App. 537, 539 (2004);

Bridgestone/Firestone N. Am. Tire, LLC v. Jenkins, 261 Ga. App. 20 (2003). Such restriction, however, is limited to final judgments or rulings. “The rule limiting the power of courts over their judgments to the term at which they were rendered applies only to final judgments. An interlocutory decree does not pass out of control of the court with the end of the term.” Union Circulation Co., Inc. v. Trust Co. Bank, 143 Ga. App. 715, 717 (1977), rev’d on other grounds by 241 Ga. 343 (1978), remanded to 146 Ga. App. 612 (1978) (remanding the case to the trial court to reevaluate the motion for partial summary judgment based on evidence that had not been considered); see also Culwell v. Lomas & Nettleton Co., 242 Ga. 242 (1978). Similarly, in Wade v. Whalen, 232 Ga. App. 765, 769 (1998), the Georgia Court of Appeals affirmed a trial court’s grant of summary judgment where another judge had previously denied summary judgment on the same issue in a previous term of court. Id. (“Summary judgment orders which do not dispose of the entire case are considered interlocutory and remain within the breast of the court until final judgment is entered.”); see also Glover v. J.C. Penny Casualty Ins. Co., 181 Ga. App. 753, 754 (1987) (holding that a partial summary judgment was interlocutory and subject to revision by the trial court at any time prior to final judgment). Accordingly, while this Court agrees with Plaintiff that final judgments may only be reconsidered on motions filed within the same term in which the judgment is made, Judge Lane’s Order was an interlocutory order and thus the rule to which Plaintiff cites does not apply and the Court shall reconsider the all issues ruled upon in Judge Lane’s Order.

I. Secondary Vendor Fees

The parties disagree as to the meaning of Section 1.2 of the Contract. Section 1.2 of the Contract reads:

1.2 Access by Secondary Vendors. TTY delivery system access by the vendors, including but not limited to those listed below* and/or their subsidiaries, ("Secondary Vendors") will be allowed with payment by NMC to MicroBilt of three cents (\$.03) per access to NMC.

Key Communications, Inc.	New Albany, IN
Data Rental & Sales	Van Nuys, CA
I.Que, Inc. (Smart.Alex Software)	Los Angeles, CA
RJE, Inc.	Sunnyvale, CA
TCI, Inc.	Long Island, NY
Profit Systems, Inc.	Portland, OR
Synergistic Software	Spokane, WA
Digital Matrix Systems	Dallas, TX
TL Data Systems	Houston, TX

*Any provider of TTY access systems active in the credit industry through December 31, 1997.

Defendants contend that the meaning of the language provided by the asterisk limits the secondary vendor fees to be paid to Plaintiff for reports accessed through secondary vendors on or before December 31, 1997. On the other hand, Plaintiff contends that the Contract is an exclusive provider contract and that Section 1.2 provides an exception to the exclusivity requirement. Plaintiff contends that Section 1.2 allows NMC to access credit reports through secondary vendors in exchange for a fee to be paid to Plaintiff. Plaintiff asserts that the meaning of the inclusion of the date "December 31, 1997" only acted to close the class of secondary vendors by which NMC could access the reports without violating the exclusivity terms of the Contract. Alternatively, Plaintiff argues that the provision is ambiguous and thus creates a jury question.

Judge Lane's Order found the language of Section 1.2 to be unambiguous. Judge Lane held that the plain meaning of the asterisk and the date of December 31, 1997, was a limitation on the class of secondary vendors whom Defendants could access without violating the

exclusivity requirement and by paying a fee to Plaintiff, not a limitation on the duration of the provision.

Construction of a contract is a three-step question of law for the courts to determine. The first step of the analysis is to determine whether the language of the contract is ambiguous or clear. Holcim (US), Inc., v. AMDG, Inc., 265 Ga. App. 818, 820 (2004). Ambiguity is defined as “duplicity, indistinctness, an uncertainty of meaning or expression used in a written instruction...open to various interpretations.” Id., citing Early v. Kent, 215 Ga. 49, 50(1) (1959).

After careful consideration of Judge Lane’s Order, the briefs submitted by both parties, and the arguments made by counsel, this Court finds the language of Section 1.2 of the Contract to be ambiguous. The placement of the phrase “through December 31, 1997,” makes the meaning of the section unclear. Had the sentence been structured or punctuated differently then one or the other party’s interpretation might have been clear. The Contract as written, however, simply has no plain meaning on its face.

Once an ambiguity is found, the second step of contract construction is for the court to apply the rules of contract construction found in O.C.G.A. § 13-2-2. Hibbard v. P.G.A., Inc., 251 Ga. App. 68 (2001). Section 13-2-2 establishes construction rules such as the role of parol or extrinsic evidence, how to interpret language, the preference for upholding the contract as a whole, and the presumption of interpretation against the drafting party. Additionally, section 13-2-3 establishes the cardinal rule of contract construction which is to “ascertain the intention of the parties”. O.C.G.A. § 13-2-3.

The evidence in the record establishes that Plaintiff drafted the Contract. Section 13-2-2(5) states that a contract shall be construed “most strongly against the party executing the

instrument.” Additionally, both parties presented deposition and affidavit testimony, but the testimony is conflicting. Accordingly, this Court hereby denies Defendants’ request for summary judgment relating to the meaning of Section 1.2 of the Contract and finds that this question should be submitted to the jury.

In connection with the parties’ arguments regarding Section 1.2, Defendants contend that Plaintiff’s interpretation of the provision renders it an unenforceable covenant under O.C.G.A. § 13-8-2(a)(2) because it contained no time or geographical limitations upon the restriction. The secondary vendor fee was tied to the exclusivity terms of the Contract. Plaintiff argued that the terms of the Contract are analogous to those of a supply agreement, which are enforceable. This Court agrees. Regardless of the ultimate determination of the meaning of the Section 1.2, neither the interpretation proffered by Plaintiff nor the Defendants renders the provision an unenforceable restrictive covenant.

II. Controlling Agreement

Defendants contend that the version of the Contract executed in March, 1995, is the valid agreement because the second version signed in May, 1995, has no additional consideration to support it. This Court finds, as did Judge Lane, that the continuing mutual obligations constitute sufficient consideration to modify an existing, executory agreement. J.R. Mitchell & Son v. La Fayette Inv. Realty Co., 30 Ga. App. 696 (1923). Thus the May agreement is the Contract that governs the parties’ legal obligations.

III. Termination Date

There is no dispute that CDRS wrote Plaintiff in a letter dated June 27, 2002, a notice of termination of the Contract at the end of the current term. Section 10 of the Contract required

notice of termination at least ninety days prior to the end of the term. The record is clear and undisputed that Plaintiff acknowledged receipt of the letter and failed to object to the fact that the notice was delivered via regular, not certified, mail as required in the Contract. As such, Plaintiff waived the non-conforming notice and is now barred from raising the form of delivery as failure to provide adequate notice of termination. See Goldman v. Vinson, 244 Ga. App. 815 (2000).

This Court hereby finds, as did Judge Lane, that Defendants' June 27, 2002, letter constituted sufficient notice of termination of the Contract.

Clerical mistakes or non-substantive errors in judgments and orders may be corrected by any court at any time. O.C.G.A. § 9-11-60(g); see also Cherry v. Moreton Rolleston, Jr. Living Trust, 273 Ga. App. 876, 879 (2005). Judge Lane's Order set March 20, 2003, as the termination date for the Contract although the current term of the Contract would have ended on May 9, 2003. Additionally, the parties are in agreement that if the May, 1995, Contract governs the relationship and if CDRS's June 27, 2002, letter was sufficient notice of termination, then the termination date of the Contract was May 9, 2003. Misstating the termination date to be March 20th is a clerical error within the scope of O.C.G.A. § 9-11-60(g). Cherry, 273 Ga. App. 876. This Court hereby finds that the termination date of the Contract was May 9, 2003.

IV. Scope of the Agreement

Plaintiffs and Defendants disagree as to the scope of the Contract and whether or not it encompassed credit reports as a part of CDRS's retail business, reports obtained through Plaintiff's Internet-hosted software site, or reports accessed via a direct CPU-to-CPU connection.

A. Wholesale/Retail Distinction:

Plaintiff contends that the Contract is between CDRS and Plaintiff and therefore applies

to all credit reports accessed by CDRS, not just those accessed by NMC. In interpreting the Contract the introductory paragraph of the Contract identifies CDRS as a party and then states that it is doing business as NMC. The only other reference to CDRS within the Contract is on the signature line. Every other reference within the Contract is to NMC only. Thus the Court finds the language to be ambiguous and must look to the rules of contract construction found in O.C.G.A. § 13-2-2 to reconcile the ambiguities. Id.

Reviewing the contract as a whole and adopting the interpretation that upholds the entire contract and renders no portion of the contract language meaningless is required under O.C.G.A. § 13-2-2(4). See RLI Ins. Co. v. Highlands on Ponce, LLC, 280 Ga. App. 798 (2006); White v. Kaminsky, 271 Ga. App. 719, 722 (2005) (stating that a “contract must be interpreted to give the greatest effect possible to all provisions rather than to leave any part of the contract unreasonable or having no effect”). In viewing the Contract as whole, it is clear that the Contract obligations and rights are placed on NMC only and that the Contract applies to the reports accessed through NMC only. Additionally, to find otherwise would render the thirty-two references to NMC ~~within the Contract meaningless.~~ This Court finds that the Contract applies only to those credit reports accessed through NMC.

B. Internet Accessed Credit Reports:

As stated above, contract construction is a question of law initially left to the court to determine. Section 1.3 of the Contract clearly establishes an obligation upon NMC to pay Plaintiff “per Merged Credit Report accessed via any Credit Verification Product... .” Credit Verification Products are defined as “certain proprietary computer software and hardware products now or hereafter used to access credit verification reports... .” The Court agrees with

Plaintiff that the Contract defines Credit Verification Products as the original software/hardware as well as future developments of such software/hardware. Such definition could include an internet-hosted version of Plaintiff's original software if that was the intent of the parties. Whether or not the parties intended the Contract to include credit reports accessed via the Internet is a question for the jury.

C. CPU-to-CPU Connections:

Under the Contract, Plaintiff was obligated to provide NMC access to various computer software and hardware products ("Credit Verification Products") used to access credit verification reports in exchange for primary vendor status and fees paid by NMC. The Contract establishes the scope of the Contract and limits it to credit reports accessed via Plaintiff's Credit Verification Products. The question is whether or not a CPU-to-CPU connection is within the scope of the definition of Credit Verification Products under the Contract. The Contract does not answer this question, nor do the rules of construction. This also is a question for the jury to determine.

V. Defendant Recoupment Claims

Defendants allege that NMC erroneously paid Plaintiff over \$70,000 for credit reports outside of the scope of the Contract and seek to deduct the \$70,000 overpayment from any damages proved by Plaintiff. Plaintiff asserts that such recoupment and setoff claims are compulsory counterclaims and had to be raised in Defendants' original answer.

O.C.G.A. §§ 13-7-2 and 3 define recoupment as the right of a defendant to have a deduction from a plaintiff's damages from claims arising from the same transaction. O.C.G.A. § 13-7-12 states that recoupment "lies for overpayment by the defendant..." Recoupment and

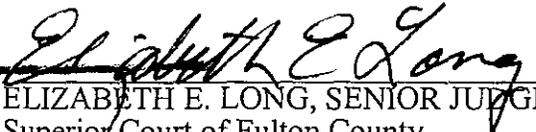
setoff claims are traditionally treated as counterclaims if they assert a defendant's affirmative right to payment. Such categorization of recoupment and setoff as counterclaims, however, is neither absolute nor determinative of the claim. For example, the Georgia Court of Appeals citing Moore's Federal Practice when discussing whether a recoupment claim was properly categorized as a counterclaim or a defense said "when a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." Gwinnett Commercial Bank v. Flake, 151 Ga. App. 578, 580 (1979). Ultimately the court found no distinction or error in the treatment of a recoupment/setoff defense as a counterclaim. Id.

Defendants asserted recoupment and setoff as its ninth defense in its originally filed answer. Thus, Plaintiff's argument that such claims are improper because not raised in Defendants' original answer is without basis. Additionally, because the categorization of the claim as either a defense or a counterclaim is not determinative of its treatment by the court, there is no reason why Defendants should be precluded from raising the alleged overpayment on the issue of damages.

To recap, this Court hereby finds that the May, 1995, Contract governs the parties' legal obligations and that the Contract was terminated, effective May 9, 2003. Additionally, this Court finds that the Contract applies to credit reports accessed by NMC only. This Court also finds the meaning of Section 1.2 of the Contract to be ambiguous and thus reserves it as a question for the jury along with questions of whether the Contract applies to internet-accessed and CPU-to-CPU

credit reports. Finally, NMC's overpayment may be deducted from any damages owed to Plaintiff.

SO ORDERED this 17th day of January, 2007.


ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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