Supreme Court, Kings County

Al-Bawaba.com, Inc., Plaintiff,

against

Nstein Technologies Corp., Defendant.

2008 NY Slip Op 50853(U) [19 Misc 3d 1125(A)]
Decided on April 25, 2008
Index No. 45550/07

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Carolyn E. Demarest, J.

Defendant, Nstein Technologies Corp., moves pursuant to CPLR 3211[a][1], [7] and § 5-701 of the General Obligations Law to dismiss the claims of plaintiff, Al-Bawaba.com, for failure to state a claim upon which relief may be

granted because the contract at issue violates the statute of frauds. For the following reasons defendant's motion is premature and therefore, denied.

BACKGROUND

Plaintiff asserts that in August 2006, Denis Levelle ("Denis") of Nstein and Hani Jabsheh ("Hani") of Al-Bawaba entered into an oral agreement where Nstein agreed to license computer software, known as Nconcep Extractro, Nfinder and Nlikethis, to Al-Bawaba for three years [FN1]. Al-Bawaba was to pay Nstein $2,500 per month for the first year, $3000 per month for the second and third years of the license, and at the end of year three, Al-Bawaba would own the software and pay maintenance fees to Nstein. Defendant does not contest the existence of an oral agreement in their motion to dismiss.

Further communication between the parties regarding the oral agreement were conducted via email. From the information submitted thus far by plaintiff, the communication took place as follows: on September 1, 2006 Denis emailed Hani with a copy of Nstein's Master Software License Agreement ("MSLA") stating that he cannot find his "notes" regarding part of the agreement and that he and Denis would speak in person or over the phone to "finalize these agreements." The MSLA sent to Al-Bawaba identified the software to be licensed, the duration of the license and the price. The MSLA agreement appears to be a standard Nstein MSLA agreement and is unsigned. The series of emails following the September 1, 2006 correspondence seem to be negotiations between the two parties regarding certain clauses in the licensing agreement. Al-Bawaba responded to the MSLA with comments from their attorneys and Denis replied he would run them by Nstein's legal counsel. On November 2, 2006 Denis responded with an offer to discuss a new software application, "software as a service" ("SAS"), for the same price, that would

better meet the needs of both parties. Hani replied that Al-Bawaba would be interested in this product. On January 12, 2007, Denis emailed Hani, "I believe we now have a workable SAS solution for you. Would you please send me a few articles in English - we would like to perform some unitary testing on our side with your content. We will then offer you a 2-weeks free trial before we revise our contractual agreement." The email was signed "Thank you in advance. Denis".

Sometime after the January 12, 2007 correspondence between Denis and Hani, Nstein came under new management and has since declined to provide SAS to Al-Bawaba. On December 13, 2007 Al-Bawaba brought this action against Nstein for breach of contract and specific performance. Defendant brings this motion to dismiss pursuant to CPLR 3211 [a] [1], [7] and §5-701 of the General Obligations Law alleging that plaintiff's action should be dismissed because there was no signed agreement and therefore the alleged contract is in violation of the Statute of Frauds. In opposition to defendant's motion, plaintiff requests discovery to obtain defendant's internal documents explaining the licensing agreement in order to satisfy the Statute of Frauds.

DISCUSSION

Defendant moves for dismissal based on CPLR 3211[a] [1] and [7] which provide for dismissal based on documentary evidence and on the ground that the pleading fails to state a claim, respectively. Defendant asserts plaintiff's cause of action is meritless because the underlying agreement fails to comply with the Statute of Frauds. Under the parties' oral agreement, the licensing contract is to last for three years and, with respect to such an agreement, the Statute of Frauds requires "it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith" if "[b]y its terms

[it] is not to be performed within one year from the making thereof" (General Obligations Law §5-701 [a] [1]). The writing must contain "substantially the whole agreement, and all its material terms and conditions, so that one reading it can understand from it what the agreement is" (*Kobre v Instrument Sys. Corp.*, 54 AD2d 625, 626, [1st Dept 1978], *affd* 43 NY2d 862 [1978], quoting *Mentz v Newwitter*, 122 NY 491[1890]). However, the note or memorandum required by the Statute of Frauds may be pieced together out of separate writings, some signed, and some unsigned, "provided that they clearly refer to the same subject matter or transaction" (*Crabtree v Elizabeth Arden Sales Corp.*, 305 NY 48, 55 [1952]; see also *Klein v. Jamor Purveyors, Inc.*, 108 AD2d 344, 347 [2d Dept 1985]). Plaintiff should be entitled to complete discovery in order to defeat a motion to dismiss pursuant CPLR 3211 [a], and to satisfy the Statute of Frauds by showing that the agreement is evidenced by separate writings (*WPP Group USA, Inc. v Interpublic Group of Companies, Inc.*, 228 AD2d 296, 297 [1st Dept 1996]; *International Trading and Sales, Inc. v Philipp Brothers, Inc.*, 99 AD2d 983 [1st Dept 1984]).

At this time, defendant's motion to dismiss for failure to state a claim is premature, and therefore denied until the plaintiff has had a reasonable opportunity for discovery. CPLR 3211 [d] provides:

Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

"To defeat the motion to dismiss on CPLR 3211 [d] grounds, plaintiff must come forth with something more than mere speculation," thus, it would not be enough for plaintiff to assert that simply because defendant is a company experienced in licensing agreements they must have internal documents with respect to plaintiffs communications (See *Yorktown Square Associates v Union Dime Savings Bank*, 79 AD2d 1040 [2d Dept 1981]; *Klein v Jamor Purveyors, Inc.*, 108 AD2d 344 [2d Dept 1985]). "Plaintiff must, for example, show some conduct or act on defendant's part, other than preparation of proposed draft contracts, which indicates that actual agreement has been reached" (*Yorktown Square Associates* at 1040).

On January 12, 2007, defendant emailed plaintiff stating they had a workable SAS solution for plaintiff and that defendant would offer plaintiff a two-week free trial before "revis[ing] our contractual agreement" and that plaintiff should send over some of his "articles" for testing. This email was signed "Thank you in advance. Denis". In this email, defendant explicitly acknowledges that a "contractual agreement" exists between the parties. Thus, plaintiff has sufficiently shown conduct by the defendant indicating an agreement was reached between the parties. The series of email communications between the parties from September 1, 2006 to January 12, 2007 regarding an agreement to license software that has been provided by plaintiff in response to defendant's motion to dismiss exceeds the threshold of "mere speculation" and suggests that defendant may have internal documents or written communications containing relevant terms of the agreement sufficient to satisfy the Statute of Frauds. Moreover, defendant has not submitted any affidavits or sworn statements unequivocally denying the existence of a written contract or "note or memorandum thereof" (*Fallsview Glatt Kosher Caterers, Inc. v Rosenfeld*, 7 Misc 3d 557, 559 [Sup Ct, Kings County 2005], noting that

because defendant has not submitted a sworn denial of the agreement the court was inclined to hold the CPLR 3211 motion to dismiss in abeyance until the plaintiff had a reasonable opportunity to depose the defendant). Plaintiff is entitled to a reasonable opportunity for disclosure, to conduct depositions and obtain internal documents in defendant's possession that may satisfy the Statute of Frauds (*WPP Group USA, Inc.* at 297; *International Trading and Sales, Inc.*, at 984).

Contrary to movant's contentions, the January 12 email from defendant constitutes a "signed writing" within the meaning of the Statute of Frauds. The Statute of Frauds provides:

> [T]he tangible written text produced by telex, telefacsimile, computer retrieval or other process by which electronic signals are transmitted by telephone or otherwise shall constitute a writing and any symbol executed or adopted by a party with the present intention to authenticate a writing shall constitute a signing (General Obligations Law § 5-701 [b] [4]).

Thus, the sender manifested his intention to authenticate the email for purposes of the Statute of Frauds by typing his name, "Denis," at the bottom of the January 12, 2007 email referencing the parties' "contractual agreement" (*Stevens v Publicis, S.A.*, 2008 NY Slip Op 2880 at 3 [1st Dept 2008]; *Rosenfeld v Zerneck*, 4 Misc 3d 193, 195 [Sup Ct, Kings County 2004]). *Parma Tile Mosaic & Marble Co., Inc. v. Estate of Short*, 87 NY2d 524 [1996], cited by movant, is not to the contrary as, unlike here, in that case the name of the corporate sender was automatically imprinted at the top of each page of a fax transmission, thus lacking the indicia of specific intent to adopt and be bound by the content of the transmission. Such intent is evidenced here by the typed first name of the sender at the conclusion of the message.

CONCLUSION

The defendant's motion to dismiss pursuant to CPLR 3211 [a] [1] and [7] is denied. Defendant shall serve and file its answer within 20 days hereof. The parties are directed to appear for preliminary conference on June 25, 2008 in Commercial Division I.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Footnotes

Footnote 1: At this time the role of Denis Levelle for Nstein Technologies Corp., and of Hani Jabesh for Al-Bawaba.com Inc., is unknown because the parties have failed to describe such roles in the papers submitted to this Court. However, thus far, neither party has raised an issue as to the authority of Denis to act on behalf of Nstein, and of Hani to act on behalf of Al-Bawaba.com.