

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

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)

PTA-FLA, Inc.,

) C/A No. 2017-CP-40-06433

)

Plaintiff,

)

)

Versus

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)

TW Telecom Holdings, Inc., a Delaware
corporation; and DOES 1-10, inclusive,

)

)

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Defendants.

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ORDER

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SC Court of Appeals

This matter comes before the Court of Plaintiff's Motion for Default Judgment and Damages.

This Court held two separate hearings on this matter on January 31, 2019 and December 3, 2019. Plaintiff PTA-FLA, Inc. (hereinafter "Plaintiff") was represented by Joshua E. Austin, Esquire and Geoffrey Kelly Chambers, Esquire. Defendant TW Telecom Holdings, Inc. (hereinafter "Defendant") was represented by Robert H. Hood, Jr., Esquire. After hearing the testimony and evidence at the hearings, this Court hereby grants Plaintiff direct damages only as detailed below.

Relevant Facts and Procedural Background

In 2010, Plaintiff entered into a contract with Defendant to provide certain telecommunication services to Plaintiff. Plaintiff filed a Summons and Complaint on March 3, 2015 and served the Defendant on March 16, 2015 via certified mail. Plaintiff's asserted causes of action against the Defendant for (1) Breach of Contract; (2) Breach of Contract Accompanied by Fraudulent Act; (3) Fraud in the Inducement; and (4) Promissory Estoppel.

On May 6, 2015, upon motion of Plaintiff, the clerk filed an entry of default against the Defendant. Upon learning of the existence of the Summons and Complaint and the entry of default, this Defendant filed a Motion to Set Aside Entry of Default, an Affidavit from Ryan McManis, and an Answer to Plaintiff's Complaint, all of which were filed with this Court. By orders dated

July 16, 2015 and August 25, 2015, this Court denied this Defendant's Motion to Set Aside Entry of Default and Motion to Reconsider, respectively.

After being notified that the case was placed on the jury trial roster, on April 1, 2016, counsel for the parties entered into a stipulation striking the case from the docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure (hereinafter the "Stipulation"). Plaintiff filed its Motion to Restore on April 6, 2017. On April 12, 2017, Defendant simultaneously filed an Opposition to the Motion to Restore and a Motion for Summary Judgment, arguing that Plaintiff failed to timely restore the action and, therefore, all claims were barred by the statute of limitations. A hearing was held on these motions on September 6, 2017. By Orders dated December 4, 2017, Judge G. Thomas Cooper, Jr. denied Defendant's Motion for Summary Judgment and granted Plaintiff's Motion to Restore. Plaintiff subsequently filed the present Motion along with a Memorandum and Supplemental Memorandum in Support.

In their Motion, Plaintiff elected to seek a default judgment only as to its cause of action for Breach of Contract Accompanied by Fraudulent Act. Because the Defendant is in default, the allegations of the Complaint are deemed admitted. Therefore, the only question before this Court is whether Plaintiff is entitled to damages. Plaintiff seeks (1) direct damages and (2) delay damages.¹ A hearing was held on this matter on January 31, 2019. After the hearing, this Court issued a Form 4 Order on February 4, 2019 that read as follows:

A hearing for this matter was held on January 31, 2019. At issue was Plaintiff PTA FLA, Inc.'s Motion for Default Judgment and Damages. During witness testimony, it became apparent that informative documentation needed to be produced by

¹ Plaintiff's originally also sought lost profits as an element of damages, however, by concession of Counsel for Plaintiff at the hearing on January 31st, 2019, Plaintiff withdrew any of claim for damages including lost profits. (Hr'g Tr. 4:5-14). Additionally, while plead in its Complaint, Plaintiff has not requested punitive damages in this Motion and did not set forth evidence related to punitive damages at the hearing. Therefore, this Order considers only the request for direct damages and delay damages.

Plaintiff for Defendant TW Telecom Holdings, Inc.'s review. Prior to ruling on the motion, Plaintiff shall produce such documentation within 30 days of this order. Upon receipt of the documentation, Defendant TW Telecom Holdings, Inc. has 30 days to review the documentation. After such review, Defendant TW Telecom Holdings will contact the Court to notify of its need for another hearing or if another hearing is not needed. If a hearing is not required by Defendant TW Telecom Holdings, the Court will create a schedule for the submissions of proposed orders from both parties.

Pursuant to the Form 4 Order, Defendant advised the Court that a second hearing concerning the newly produced documents was required. After working through scheduling conflicts, the second hearing was ultimately held on December 3, 2019.

Law

The trial judge has considerable discretion regarding the amount of actual damages it chooses to award. *See Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 310-311, 594 S.E.2d 867, 873 (Ct. App. 2004). An award of actual damages will be reviewed only for whether there are any errors of law in making the actual damages award. *See Mazloom v. Mazloom*, 382 S.C. 307, 320, 675 S.E.2d 746, 753 (Ct. App. 2009).

While a defaulting defendant has conceded liability, a defaulting defendant does not concede the [a]mount of liability. *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012) (citing *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241-42, 246 S.E.2d 880, 882 (1978)). In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. *Jackson v. Midlands Human Resources Center*, 296 S.C. 526, 529, 374 S.E.2d 505, 506-507 (Ct. App. 1988) (internal citations omitted). While the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted. *Id.* In other words, a judgment for money damages must be warranted by the proof of the party in whose favor it is rendered. *Id.* (citing *Wingard v. Lee*, 287 S.C. 57, 336 S.E. (2d) 498 (Ct.

App. 1985). When there is a breach of contract, the amount of damages should put the non-breaching party in the position he would be in had the contract been performed. *Stiles v. American Gen. Life Ins. Co.*, 335 S.C. 222, 227, 516 S.E.2d 449, 451 (1999).

In contesting the default judgment, it is well-settled in South Carolina that defense counsel's participation in the damages hearing is limited to cross-examination and objection to plaintiff's evidence. *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013).

Findings

A. Direct Damages

Plaintiff seeks \$396,082.42 in direct damages. Plaintiff's direct damages claim is based upon the allegation that Defendant overcharged Plaintiff in violation of the contract. Plaintiff set forth testimony from Eric Steinmann, a part-owner of the Plaintiff who also served as its development manager, who testified this figure represents the total amount Plaintiff claims to have paid the Defendant during the 28-month contract period. There were no documents admitted into evidence to support the claim for direct damages. However, testimony was elicited on both direct and cross-examination concerning a schedule of payments to have been made from the Plaintiff to Defendant.

The schedule of payments was reflected on a letter of intent from April 2010 ("Letter of Intent") and a separate payment schedule dated June 2010 ("Payment Schedule"). Mr. Steinmann testified he believed the only valid portion of his agreement with Defendant was the Letter of Intent. (Jan 31, 2019 Hr'g Tr. 23:5-24:2). The Letter of Intent includes monthly payments totaling \$342,000.00. The monthly payments were later adjusted upwards by \$1,588 per month, by agreement, and reflected in the Payment Schedule. The monthly payments in the Payment

Schedule totaled \$386,864.00. Importantly, Mr. Steinmann admitted he agreed to pay the Defendant \$386,864.00. (Jan 31, 2019 Hr'g Tr. 22:23-26:10).

Therefore, when comparing the agreed upon amount of \$386,864.00 to the amount paid by Plaintiff of \$396,082.42., Plaintiff overpaid by \$9,218.42. (Hr'g Tr. 30:16-22). Therefore, this Court awards Plaintiff \$9,218.42 in direct damages. This amount is sufficient to place Plaintiff in the position it would have been in had the overcharges not occurred.

B. Delay Damages

In addition to its direct damages due to overpayment, Plaintiff also claims in its motion delay damages for a 6-month period from January 2011 to June 2011 (hereinafter "delay period"). In order to establish the numerical basis for the delay damages, Plaintiff relies upon their own internally generated profit and loss summary ("P&L Summary") for the relevant time period. The delay damages are totaled by compiling the alleged losses in various categories as contained on the P&L Summary.

During the first hearing, and upon a timely objection pursuant to the Rule 1006 of the South Carolina Rules of Evidence², Counsel for Defendant requested the supporting documentation used by Plaintiff to create the P&L Summary. This request was granted by the Court to allow the Defendant the opportunity to test the reliability of the figures on the P&L Summary. Counsel for Defendant had an opportunity to inspect and copy the supporting documentation and the parties reconvened for the second hearing on December 3, 2019. Upon further cross-examination of Eric

² "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation, provided the underlying data are admissible into evidence. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court."

Steinmann concerning the supporting documentation, it was evident inconsistencies exist between the numerical figures on the P&L Summary and those in the supporting documentation.

During the second hearing, Mr. Steinmann even conceded that the best source of information for their alleged delay damages is the supporting documentation behind the P&L Summary and not the P&L Summary itself. There were two major categories discussed at the hearing in support of the delay damages: delay period/implementation of the business plan and consulting fees.

i. Delay Period and Plan Implementation

As an initial matter, the Court finds that Plaintiff's allegation in support of the delay damage (the inability to implement an unlimited data plan) was not plead in the Complaint nor coherently supported through evidence or testimony forth during the damages hearings. Because the basis for the alleged delay falls outside the allegations deemed admitted, the Court will not consider it as a basis to support its damages. Yet, even if the basis for the delay damages should be considered, this Court finds that the Plaintiff has not sufficiently proven this element of damages through competent evidence.

There was confusion as to the length of the delay period and the overall impact on the business plan. Mr. Steinmann testified that Defendant's act of switching networks led to a delay in implementing their unlimited data business plan and resulted in damages in the amount of \$1,246,498. On cross-examination, Mr. Steinmann was questioned about paragraph 30 of Plaintiff's Complaint which states the delay was noticed "in or prior to April 2011" (Hr'g Tr. 49:12-50:22). Mr. Steinmann testified that he "assumed" that he noticed the delay prior to April 2011. (Hr'g Tr. 50:3-12).

In addition to the testimony of Mr. Steinmann, Plaintiff also called as a witness a former consultant of the Plaintiff during the delay period named Mr. John Goocher.³ Mr. Goocher testified he was hired to help Plaintiff implement an unlimited talk, text, and data network. (Hr'g Tr. 53:11-54:10). Mr. Goocher testified "[t]he delay by [] [Defendant], from my recollection, ran about seven to eight months from sort of start to finish." (Hr'g Tr. 56:19-23).

Moreover, while the Plaintiff claims a delay in implementing an *unlimited* data plan, Plaintiff admitted that the business plan concerning data with the Defendant *did* include a limit. (Hr'g Tr. 55:9-10) (emphasis added). Counsel for Defendant also objected that the alleged failure to implement an unlimited data plan was not plead in the Complaint (Hr'g Tr. 54:14-17). To counter the objection, Plaintiff's counsel cited to Paragraph 9 of the Complaint which says the agreement provided for unlimited data *up to certain bandwidth limits*. (Hr'g Tr. 54:22-55:1) (emphasis added). Mr. Steinmann also testified in the hearing that he was *never* able to implement his business plan, thereby contradicting the claim for delay entirely. (34:16-19) (emphasis added).

This Court finds that the Plaintiff's arguments regarding the alleged inability to implement its unlimited data business plan falls outside the parameters of what has been deemed admitted by Defendant in the Complaint. Moreover, there is confusing and conflicting testimony as to when the alleged service problems causing the delay started. The Plaintiff's Complaint vaguely claims service problems started in or prior to April 2011, while Mr. Steinmman testified he assumed it was before then. Apparently using that assumption, he has subsequently chosen January 2011 to June 2011 as the alleged delay period. Yet, Plaintiff's consultant Mr. Goocher testified the delay ran about seven to eight months. The confusion and inconsistencies concerning the alleged delay period and basis for the delay undermines the reliability of the alleged delay damages as a whole.

³ Mr. Goocher was not proffered as an expert.

ii. Consulting Fees

The Plaintiff claims consulting fees comprise \$459,399 of its delay damages. They claimed that the bulk of the fees were paid to two individuals named John Goocher and Kevin Corrigan. During the first hearing, Plaintiff testified that it paid John Goocher \$45,000 dollars per month in consulting fees which were included as a lost expense for the delay period. Since the production of the supporting documents, which included detailed general ledger, we know that Mr. Goocher was paid only \$22,500 per month for a total of \$90,000 during the delay period. The ledger also shows that Mr. Corrigan was only paid a total of \$50,000. This is another inconsistency that undermines the reliability of the P&L Summary.

Other inconsistencies between the Plaintiff's P&L Summary and their actual invoices and ledgers were revealed on cross-examination of Mr. Steinman. When viewed as a whole, this Court finds the testimony and evidence used in support of the delay damages contain inconsistencies that undermine the reliability of the claimed damages. The Plaintiff uses the P&L Summary in support of damages, but the reliability of that document has been undermined by its supporting documentation and conflicting testimony. Plaintiff concedes the supporting documentation is the best source of evidence, but Plaintiff has not proven through competent evidence or testimony clearly how the delay damages are justified or reasonably calculated. It is the Plaintiff's burden of proof to prove their damages by the preponderance of the evidence by competent testimony. By relying on an unreliable P&L Summary rather than actual documentation of their alleged damages, the Plaintiff has failed to meet their burden of proof as to their claim for delayed damages.

Conclusion

Therefore, the Court hereby **GRANTS** Plaintiff's Motion for Default Judgment and **AWARDS** damages in the total amount of \$9,218.42 in direct damages. The Court awards no money for the alleged delay damages.

AND IT IS SO ORDERED.

The Honorable Robert E. Hood, Presiding
Judge for the Fifth Judicial Circuit

January ____, 2020
_____, South Carolina



Richland Common Pleas

Case Caption: PTA FLA Inc vs TW Telecom Holdings Inc , defendant, et al
Case Number: 2017CP4006433
Type: Order/Other

So Ordered

s/ R.E. Hood #2164

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