5-3-2023

Company.Com, LLC v. Priority Payment Systems, LLC, Order on Motion for Interlocutory Injunction and Motion to Dismiss

John J. Goger
Superior Court of Fulton County, Metro Atlanta Business Case Division

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA
BUSINESS CASE DIVISION

COMPANY.COM, LLC, Plaintiff, v. PRIORITY PAYMENT SYSTEMS, LLC, Defendant.	CIVIL ACTION FILE NO. 2023CV374815

ORDER ON DEFENDANT PRIORITY PAYMENT SYSTEMS, LLC'S MOTION FOR INTERLOCUTORY INJUNCTION AND PLAINTIFF COMPANY.COM, LLC'S MOTION TO DISMISS EQUITABLE COUNTERCLAIMS

This matter comes before the Court on Priority Payment Systems, LLC's ("Priority's") Motion for Interlocutory Injunction, filed February 27, 2023 ("Motion") and Company.com LLC's ("Company.com's") Motion to Dismiss Equitable Counterclaims, filed April 3, 2023. Having reviewed the record including Plaintiff Company.com's Response in Opposition to the Motion ("Response"), filed on April 3, 2023, Priority's Reply Brief in Support of its Motion, filed April 5, 2023 ("Reply") and having conducted an evidentiary hearing on April 6, 2023, the Court enters this order.

1. INTRODUCTION

This dispute involves two related agreements in which Company.com assigned Priority a portfolio of customers that generated a stream of revenue, and Priority agreed to assist in generating a future revenue stream that would ultimately benefit Company.com. Company.com claims it has properly rescinded the agreements based on Priority's alleged failure to comply with its fundamental obligations thereunder. Priority disputes the agreements were properly rescinded. It further contends Company.com is recruiting customers from the portfolio, breaching an anti-solicitation clause found in one of the agreements. Company.com does not dispute it began soliciting these customers after announcing its decision to rescind the Agreements. Priority filed the instant Motion seeking to enjoin the solicitation on an interlocutory basis.

2. BACKGROUND AND FINDINGS OF FACT

2.1 Company.com Formulates Plan to Transfer its Payment Processing Business

Company describes itself as a software company specializing in "communications products and business services." (Compl. ¶ 2.) Company.com previously developed a "significant" group of customers for the processing of credit and/or debit card payments ("Merchant Portfolio") that generated approximately $350,000 per month. (Id. ¶ 21; Ans. ¶ 21; Wade Aff. ¶ 13.) However, in 2019, Company.com contends it decided to focus on its software services and completely

divest its payment processing business which led to the underlying business deal. (Id. ¶¶ 3, 6.)

According to Company.com, it "formulated a plan to sell its [M]erchant [P]ortfolio to a larger payment processing company . . . in exchange for the buyer enrolling and/or introducing its large customer base into Company.com's software services." (Id. ¶ 6.) Company.com further describes this plan as a swap of "payment processing revenue generated by its [M]erchant [P]ortfolio for revenue generated through monthly subscriptions for Company.com's software." (Id.) In order for its plan to be effective, Company.com determined that its counterpart would need to have a large number of customers that could be automatically enrolled in Company.com's software. (Id. ¶ 7.) According to Company.com, one motivation for this plan was to boost its business valuation based on its understanding that "revenue generated from software subscriptions is generally assigned a significantly higher multiple than revenue generated by payment processing" for business valuation purposes. (Id. ¶ 6.)

Priority is a significant player in the electronic payment processing industry. (Moore Testimony).[1] In 2014, it offered to purchase Company.com's Merchant Portfolio for $28.1 million, but the offer was declined. (Wade Aff. ¶ 12.) Some years later, the two agreed to a deal that is the subject of this dispute.

[1] Citations to "Testimony" reflect evidence offered during the April 6, 2023 hearing.

2.2 Company.com Enters Agreements with Priority

In the fall of 2019, Company.com and Priority contemporaneously entered into two agreements: (1) an Assignment and Assumption Agreement (the "Assignment Agreement") and (2) a Licensing and Reseller Services Agreement (the "Licensing Agreement) (collectively the "Agreements").[2] (Compl. ¶ 20; Ans. ¶ 20.) The Agreements cross reference each other, and both expressly state that one serves as consideration for the other. (Lic. Agr. § 1.3(a); Assign. Agr. 1.)

2.2 The Non-Financial Obligations of the Parties under the Agreements

Pursuant to the Assignment Agreement, Company.com transferred its Merchant Portfolio to Priority. (Compl. ¶ 20; Ans. ¶ 20.) While Priority was largely responsible for servicing the Merchant Portfolio, Company.com did pay certain related expenses and perform some related services. (Wade Aff. ¶ 21; Lyons Aff. ¶ 13; Liney Testimony.) Pertinent to this Motion, Company.com agreed not to solicit any members of the Merchant Portfolio for a period of seven years after the transfer. (Assign. Agr. § 6(b).)

Under the Licensing Agreement, Priority agreed to enroll and/or seek to enroll its customers in various software subscriptions offered by Company.com.

[2] The Assignment Agreement and the Licensing Agreement were introduced at the April 6, 2023 hearing as Exhibits 1 and 2, respectively.

(Lic. Agr. §§ 2.3(b), 2.8, Ex. B-C, F.) Company.com agreed to establish a platform and provide software services to those customers Priority would enroll. (Id. § 2.2.)

The Licensing Agreement identifies two subsets of software subscriptions: (1) products where a Priority customer would automatically be enrolled or "auto enrolled" into a subscription and (2) products where a Priority customer could voluntarily elect to enroll in a subscription. (Id. §§ 2.3-2.4.) The parties sometimes refer to these offerings respectively as "opt out" or "opt in" products. (Id. § 2.1, Ex. D; Wade Aff. ¶ 6.) According to the Licensing Agreement, the software products offered for enrollment would be detailed on "Subscription Schedules." (Id. § 2.2(d).) While additional Subscription Schedules were contemplated, the original Licensing Agreement included two, Exhibits B and D. (Id.)

Exhibit B addressed one "opt out" product subject to auto enrollment – specifically a "Business Suite" that included various components such as tax advice, IT support, marketing, and communication services. As further detailed in the Licensing Agreement, auto enrollments would begin with a Priority customer receiving an initial 30-day free trial of the product and then being notified when the trial period was lapsing, triggering their option to cancel or opt out of the subscription. (Id. ¶ 2.3(b); Wade Aff. ¶ 7.) Exhibit D's Subscription Schedule lists a number of opt in products where the customer's decision to purchase the subscription was entirely voluntary.

The Licensing Agreement is not particularly clear in outlining Priority's duties to assist with its customers' auto enrollments. Section 2.8 incorporates Exhibit F which outlines Priority's "Marketing Commitment." In pertinent part, Priority agreed:

> - Auto Enrollment program subject to rollout schedule defined in Exhibits B and C.
>
> - Existing and new direct line of business customers of [Priority] (**"Direct Customers"**) shall be enrolled into the [Company.com's] Products in two initial tranches;
>
> - The first batch of Direct Customers will be enrolled in the Exhibit B program [promptly after execution of the Licensing Agreement]
>
> - [Priority] will phase in additional enrollments into the Exhibit B or Exhibit C products in phases thereafter.

(parenthetical emphasis found in original; other emphasis added.)[3]

The other key provision of the Licensing Agreement regarding Priority's auto enrollment obligations is Exhibit C titled "Auto Enrolled Products Subscription Schedule." Exhibit C contemplates the deadlines by which Priority would be required to complete its initial "batch" auto enrollment, the minimum amount of subscribers targeted for that initial enrollment, and the minimum number of subscribers Priority would be expected to auto enroll each month thereafter. Every

[3] Section 2.3(b) of the Licensing Agreement allowed Priority certain discretion in the enrollment process. Specifically, Priority was permitted to "offer" some of its customers "the opportunity to elect not to enroll" in the 30-day trial of an auto enrollment product. No evidence was presented that Priority offered any of its Direct Customers the opportunity to decline auto enrollment pursuant to this provision.

key indicator on Exhibit C – including the deadline for the initial enrollment and the minimum number of subscribers for the initial or continuing auto enrollment efforts -- was marked "TBD." As the evidence presently stands, no agreement was ever reached on the unresolved terms of Exhibit C.[4]

"Parol evidence may not be considered unless the written instrument is ambiguous . . . A contract is ambiguous if the words used therein leave the intent of the parties in question -- i.e., that intent is uncertain, unclear, or is open to various interpretations." Doxey v. Crissey, 355 Ga. App. 891, 893 (2020)(citations omitted). The Court finds it appropriate to consider parol evidence in order to understand these "TBD" references.

Company.com offered evidence explaining why Exhibit C's terms were left open which Priority did not contest. Afshin Yazdian, Priority's former president who negotiated the Agreements, requested the minimum number of auto-enrollment subscribers and schedule for their enrollment would be left open because he needed to investigate the process for auto enrolling certain groups of Priority's customers. Specifically, he informed Company.com, "Priority's Direct Customers were comprised of many acquired portfolios and purchased companies" governed by different contractual provisions which would require Priority's review before

[4] On July 20, 2021, the parties entered into the First Amendment to the Licensing and Reseller Agreement which "amended Exhibit C to incorporate" a new 'Security Bundle' product which included services such as identify theft, phishing, and virus protections. (Hearing Ex. 3.) There were no targets for enrollments concerning this Security Bundle. (Id.; Walker Aff. Ex. L.) Based on its language and the undisputed evidence offered by Company.com, this amendment appears to constitute an addition to Exhibit C, not its replacement. (Id.; Wade Aff. ¶ 50.)

specific deadlines and minimum enrollment targets could be set. (Wade Aff. ¶ 31.) Based upon these representations, the key portions of Exhibit C were left to be decided.

As to the number of auto enrollments to be scheduled on Exhibit C, the parol evidence reflects the parties contemplated Priority would "auto-enroll all of its 30,000+ Direct Customers" into Company.com's opt out products with some minor exceptions.[5] (Id. ¶¶ 6-7, 27, 31.) On February 5, 2020, a few months after the Agreements were signed, Company.com's CEO contacted Yazdian to formulate a plan Priority's auto enrollment efforts. (Id. ¶ 46, Ex. I.) In response, Yazdian stated, "I recall the totals I committed for the revenue replacement opt out program being in the 30,000 range." (Id. Ex. I.)

2.3 The Revenue-Sharing Provisions of the Agreements

2.3.1 Priority's Obligation to Share Revenues Generated by the Merchant Portfolio During the Minimum Payment Term

Generally stated, for three years after the Merchant Portfolio was transferred to Priority, it would keep 10% of the revenue it generated, providing Company.com with the other 90%. (Licen. Agr. §§ 1.1, 1.3; Priority Mot. to Dismiss n. 3.) The parties agreed to a detailed payment plan about how that 90% would be paid. At the outset, the parties projected the amount of revenue the Merchant Portfolio would

[5] During the April 6, 2023 hearing, reference was made that Yazdian, who had negotiated the Agreements, had parted ways with Priority. Allon Moore, a Priority Vice President who was Priority's key witness, testified he was unfamiliar with the "Direct Customer" terminology employed in the Licensing Agreement. (Moore Testimony). He believed the Direct Customer contemplated in the Licensing Agreement was akin to what he described as "house accounts." (Id.) He further testified Priority had approximately 4,000 house accounts at the time the Agreements were executed. (Id.)

likely generate during the three-year term ("Minimum Payment Term"), and the Licensing Agreement established a specific payment Priority would owe each quarter. (Id. §§ 1.1, 1.3, Ex. A.) All together, those quarterly payments totaled almost $11.5 million including a $500,000 platform fee owed to Company.com for providing the software services. (Id. Ex. A.) The Licensing Agreement also provided for a "True Up" where the parties would reconcile discrepancies between the actual revenue generated by the Merchant Portfolio and the projected revenues on which Priority's quarterly payments were based. (Lic. Agr. §§ 1.1, 1.3.)

With regard to the revenue generated by Priority customers' software subscriptions, during the Minimum Payment Term, Priority was generally allowed to keep it and, in most instances, use that revenue as a credit towards its quarterly payments. (Id. §§ 1.4(a), 3.1, Ex. B.)

2.3.2 Priority's Revenue-Sharing Obligations at the End of the Minimum Payment Term

O September 30, 2022, when the three-year Minimum Payment Term ended, Priority could keep 100% of the revenue generated by the Merchant Portfolio and also earn a varying percentage of revenues generated by any Priority customer enrolled in Company.com's software subscriptions; however the bulk of the revenue generated by the software subscriptions would then flow to Company.com. (Lic. Agr. § 1.5, Ex. A; Compl. ¶ 29.)

2.3.4 The Parties' Intent Regarding the Agreements' Revenue Sharing Provisions

Priority's pleadings, its briefing, and the oral argument it offered in support of its Motion were notably silent on the intended purpose of the Agreements. Rather, Priority's Motion focuses on the transfer of the Merchant Portfolio and the payments it owed during the Minimum Payment Term. However, with their complicated provisions and Exhibits, the Agreements obviously contemplated something more. Again, the Court finds the consideration of parol evidence to be appropriate in determining the parties' intent. Doxey at 893; see also Wallis v. B & A Const. Co., Inc., 273 Ga. App. 68, 70 (2005)("a court should construe an [ambiguous] contract in its entirety and not merely by examining isolated clauses and provisions thereof.") Company.com contends it was led to enter the Agreements based on Priority's representations about its customer base, including: (1) Priority at least 30,000 Direct Customers that were subject to auto-enrollment by Priority and (2) Priority had an additional customer base of approximately 160,000 additional indirect customers for which Priority would provide assistance in marketing Company.com's opt in software. (Wade Aff. ¶ 6-7, 27, 37.) Based on these representations regarding the number of Priority's Direct Customers, the parties forecasted subscription revenue generated from Priority's customer enrollments would eventually approximate that of the Merchant Portfolio. The Minimum Payment Term was envisioned as a "ramp up" period. During that time, Priority would forward the bulk of revenue generated

by the Merchant Portfolio to Company.com while Priority would build the software subscription revenue stream, keeping most of those revenue it generated and use it as credit towards the payments it owed Company.com At the conclusion of the Minimum Payment Term, the two revenue streams would then be swapped. (Id. ¶ 7.) The Agreements contain no representations as to the number of Priority's Direct Customers nor do they guarantee a particular amount of revenue would be generate from the sale of software subscriptions. However, Priority indisputably understood that the intended goal of these Agreements was to swap roughly equivalent revenue streams. Priority acknowledges its representative Yazdian made the following statement on September 3, 2019, just prior to entering into the Agreements:

> [Priority is] very excited about this transaction, as we believe it is a true 'win-win' for both companies. It allows Company.com the ability to not only retain revenue, but to 'swap' it for revenue that carries with it a much higher valuation and enterprise value. Furthermore, it allows our companies to now work together and push the Company.com platform to a base of over 200,000 merchants which will also create increased value to your company [and] ours.

(Compl. ¶ 9; Ans. ¶ 9; see also Wade Aff. ¶ 38.)[6]

2.4 Issues Arise Concerning Priority's Enrollment Efforts

As a result of the transaction, Priority invested significant resources integrating the Merchant Portfolio onto its platform and enhancing its customer service division to accommodate these new customers. (Moore Aff. ¶ 4; Liney Aff.

[6] Parol evidence further suggests the credits Priority could accrue in relation to its subscription enrollments were purposefully structured in such a way as to incentivize Priority to diligently pursue its enrollment efforts. (Id. ¶ 33.)

¶ 7; Liney Testimony). There appears to be no dispute that Priority made the quarterly payments it owed during the course of the Minimum Payment Term.

However, during the Minimum Payment Term, concerns arose regarding Priority's lack of progress in enrolling subscription customers for Company.com, particularly the auto enrollment of Priority's Direct Customers. This was the subject of consistent communication between the parties as Company.com was concerned that Priority was not creating the anticipated revenue stream that would approximate that of the Merchant Portfolio once the Minimum Payment Term ended. (Wade Aff. ¶¶ 48-49, 54-56, Ex. J, N, O.) In response to Priority's request, Company.com created "two customized suites of software services" targeted towards Priority's customers in order to help galvanize Priority's enrollment efforts. (Id. ¶ 50; Kramer Aff. ¶¶ 13-15.) During late 2021 and in 2022, in response to Company.com's concerns, Priority made various representations that it would be auto-enrolling significant numbers of customers. (Id. ¶¶ 57-63; Kramer Aff. ¶¶ 6-10.) These promises of significant enrollments came to naught.

2.5 Company.com's January 12, 2022 Letter Claiming Priority Payment had Failed to Perform Under the Agreements

On January 12, 2022, Company.com sent Priority a formal letter from counsel alleging Priority had breached its obligations under the Agreements.[7] (Countercl. ¶ 34, Ex. A.) The letter references ongoing discussions between the parties and

[7] A copy of the January 12, 2022 letter is attached to Priority's Counterclaim as Exhibit A and was admitted as Exhibit 5 during the April 6, 2023 hearing.

accuses Priority's representatives of making "excuses" to justify its contractual failures. (Id. Ex. A 1.) The letter further stated,

> [a]t this juncture, the parties must seek a quick and certain remedy to avoid a disastrous result for both parties. A mutually agreed rescission or cancellation of the assignment may be the best avenue to adequately protect Company.com. Without a satisfactory negotiated resolution, Company.com will have no choice but to seek [such] relief . . .

(Id. Ex. A. 2.) The record does not clearly indicate what communications this letter may have spurred between the parties. On February 17, 2022, Priority represented to Company.com it had 6,700 merchants to enroll in the "Business Bundle Program" which appears to reference the auto enrollment of the Business Suite described in the Licensing Agreement. (Wade Aff. ¶ 62, Ex. S; Lic. Agr. Ex. B.) However, there was no "mutually agreed recission" after this January 2022 letter, and Company.com made no immediate effort to unilaterally rescind the Agreements subsequent thereto. Priority continued making its quarterly payments to Company.com for the remainder of the Minimum Payment Term.

On October 10, 2022, shortly after the Minimum Payment Term had ended, Priority again represented it was working to enroll a significant number of merchants, approximately 3,000, into Company.com software. (Wade Aff. ¶ 66, Ex. V.)

2.6 The Minimum Payment Term Ends and Company.com Rescinds the Agreement

During the last year of the Minimum Payment Term, the Merchant Portfolio was generating "stable" revenues of approximately $265,000 per month. (Wade Aff. ¶ 14.) By contrast, in the first month after the Minimum Payment Term concluded, Company.com was entitled to receive $28,713 in subscription revenue generated by Priority's enrollment efforts which Company.com calculates was approximately 10.8% of the revenue generated by the Merchant Portfolio.[8] (Id. ¶¶ 15-16.)

On October 14, 2022, two weeks after the Minimum Payment Term ended, Company.com sent Priority a notice it was rescinding the Agreements (the "Rescission Notice").[9] (Compl. ¶ 34; Ans. ¶ 34.) As the primary reason for the recission, Company.com stated:

> [g]iven the de minimis revenue Priority generated though software enrollment, Priority's material breach and nonperformance has been so substantial and fundamental as to defeat the object of the Agreements . . . [T]herefore, Company.com is exercising its right to unilaterally rescind the Agreements for non-performance in accordance with O.C.G.A. § 13-4-62 . . . .

(Resciss. Not. 3.) Rescission under this statute requires both parties be "restored to the condition in which they were before the contract was made." O.C.G.A. § 13-4-62. In its Rescission Notice, Company.com demanded the return of the Merchant

[8] During the April 6, 2023 hearing, Moore testified Priority had auto-enrolled approximately 7,500-8,000 customers in Company.com's software. Company.com contends the number of Priority's auto enrollments was 3,234. (Kramer Aff. ¶ 5.)

[9] The Rescission Notice is attached to Company.com's Complaint as Exhibit A and was admitted as Exhibit 4 during the April 6, 2023 hearing.

Portfolio. (Id. 3.) It also offered an analysis of what Company.com considered was necessary to restore Priority to its condition at the time the Agreements took effect. (Id. 3-4.) After balancing the $500,000 platform fee paid by Priority and the revenue Priority was permitted to keep during the Minimum Payment Term -- including the 10% of revenue generated by the Merchant Portfolio and the revenue generated by its customers' software subscriptions -- Company.com concluded no tender was necessary. (Id. 4.) "Indeed," it reasoned, "even after returning the [Merchant Portfolio] to Company.com, Priority will be in a better position than it was at execution of the Agreements." (Id.) Nevertheless, Company.com offered to pay any additional compensation Priority might be owed after a "complete accounting." (Id.)

Priority rejected Company.com's demand to return the Merchant Portfolio.

2.7 Priority Discovers Company.com is Soliciting Members of the Merchant Portfolio

Priority claims that it first began "receiv[ing] regular reports" that Company.com was soliciting members of the Merchant Portfolio in September or October of 2022. (Liney Aff. ¶ 11.) During the April 6, 2023 hearing, Company.com's counsel admitted such solicitation had been occurring but claimed it only began after the October 14, 2022 Rescission Notice. (See also Wade Aff. ¶ 78.)

3. PROCEDURAL POSTURE

On October 18, 2022, four days after issuing the Rescission Notice, Company.com commenced this action by filing a Complaint for Restitution in Georgia's State-wide Business Court. It raised the single restitution claim seeking to be restored "to its pe-contract position" with the return of its payment processing Merchant Portfolio.[10] (Compl. ¶ 52.)

Priority objected to the case proceeding in the State-wide Business Court pursuant to O.C.G.A. § 15-5A-4(a)(1), and the parties submitted a joint stipulation agreeing the matter should be transferred to the Superior Court of Fulton County and, upon such transfer, both jointly agreed to seek a transfer to the Metro Atlanta Business Case Division ("MABCD"). The parties further stipulated that once the case was docketed in the Superior Court of Fulton County, Priority's responsive pleadings would not be due until 21 days after the matter was either assigned to the MABCD or the MABCD declined to accept the case. The matter was docketed in this Court on January 9, 2023 and ultimately transferred to the MABCD on February 8, 2023.

On February 27, 2023, Priority filed its Answer to Plaintiff's Complaint, Affirmative Defenses, and Counterclaims, the instant Motion, as well as a Motion to Dismiss or, in the Alternative, Motion for Judgment on the Pleadings (the "Dismissal Motion"). This Motion seeks to enjoin Company.com from soliciting

[10] It also made a derivative request to recover its litigation expenses under O.C.G.A. § 13-6-11. (Compl. ¶ 53.)

those customers who were part of the Merchant Portfolio during the pendency of this case. The Court scheduled a hearing on the Motion for April 6, 2023.

On April 3, 2023, Company.com filed a Motion to Dismiss Equitable Counterclaims, including its claim for injunctive relief, based on Priority's failure to properly verify its pleadings.

On the afternoon of April 5, 2023, the day prior to the hearing, Priority filed a Motion for Enlargement of Time to File Supplemental/Rebuttal Affidavits pursuant to O.C.G.A.§ 9-11-6(d). Specifically, it sought to present the Second Affidavit of Allon Moore and the Second Affidavit of Tom Liney in support of its Motion. At the onset of the April 6, 2023 hearing, the motion seeking the Court to consider the late-filed affidavits was denied. However, during the course of the hearing, those two witnesses offered extensive testimony and were cross examined by Company.com.

4. COMPANY.COM'S MOTION TO DISMISS EQUITABLE COUNTERCLAIMS

"Petitions for . . . injunction . . . or other extraordinary equitable relief shall be verified positively by the petitioner or satisfied by other satisfactory proofs." O.C.G.A § 9-10-110. Those "satisfactory proofs" include "affidavit, deposition, or oral testimony. (Punctuation and citation omitted.)" Parnell v. Sherman & Hemstreet, Inc., 364 Ga. App. 205, 211 (2022) Based upon the live testimony offered by Priority's witnesses during the April 6, 2023 hearing, the Court finds the

statutory requirements of O.C.G.A § 9-10-110 have been satisfied, and, accordingly, Company.com's Motion to Dismiss Equitable Counterclaims is denied.

5. STANDARD OF REVIEW

"Whether an interlocutory injunction is warranted is a matter committed to the discretion of the trial court." TMX Fin. Holdings, Inc. v. Drummond Fin. Serv., LLC, 300 Ga. 835, 836 (2017). In exercising that discretion, a court should balance the following four factors:

> (1) whether there exists a substantial threat that a moving party will suffer irreparable injury if the injunction is not granted; (2) whether the threatened injury to the moving party outweighs the threat and harm that the injunction may do to the party being enjoined; (3) whether there is a substantial likelihood that the moving party will prevail on the merits at trial; and (4) whether granting the interlocutory injunction will not disserve the public interest.

Id. All four of these factors need not be demonstrated in order to secure an interlocutory injunction; however, "a trial court must keep in mind that an interlocutory injunction is an extraordinary remedy, and the power to grant it must be prudently and cautiously exercised." Id. at 836-837. O.C.G.A. § 9-5-8 further provides injunctive relief should not be granted "except in clear and urgent cases."

6. ANALYSIS

6.1 Substantial Likelihood of Prevailing on the Merits

The Court finds it best to begin with an analysis of the substantial likelihood that Priority will prevail on the merits of its claim that the Agreements -- which establish its rights to the Merchant Portfolio and Company.com's non-solicitation

obligations -- remain valid. Specifically, Priority contends Company.com's Rescission Notice was insufficient to invoke an immediate recission. The outcome of this factor will impact how the Court evaluates the threat of irreparable harm faced by Priority and also how it balances the harms between the parties should an injunction issue or not issue.

6.1.1 Rescission at Law and Equitable Rescission

Georgia law recognizes two types of rescission claims. First, in rescission at law, the complaining party "rescinds the contract himself by restoring or making a bona fide offer to restore, to the defendants the fruits of the contract" and "the tender itself effectuates the rescission." Thor Gallery at South DeKalb, LLC v. Monger, 338 Ga. App. 235, 237 (2016). The complaining party "may then bring an action at law for money damages (more accurately termed restitution) or for the recovery of the property which was retained by [the other party] under the rescinded contract." Brown v. Techdata Corp., Inc., 238 Ga. 622, 626-627 (1977)(parenthetical in original). Second, in equitable rescission, the complaining party "seeks to invoke the affirmative powers of a court of equity to rescind, or *undo* the contractual transaction." Thor Gallery at 237 (emphasis in original).

Company.com has pursued the former path, seeking recission at law and claiming the recission occurred at the time of its Rescission Notice so that the Agreements are no longer in effect. (Compl. ¶¶ 34, 45.) As discussed in Brown, Company.com has filed this action seeking restitution, not rescission, because

Company.com contends the rescission has already occurred. Brown at 626-627. By contrast, Priority contends Company.com's October 14, 2022 Rescission Notice was ineffective such that the Agreements remain viable until such a time as the Court enters an order allowing their equitable rescission. (Reply 2.) Specifically, Priority argues Company.com's attempted rescission at law failed due to its lack of an appropriate tender. (Id.)

6.1.2 *Rescission Pursuant to O.C.G.A. § 13-4-62*

O.C.G.A. § 13-4-62 provides, "[a] party may rescind a contract without consent of the opposite party on the ground of nonperformance by that party but only when both parties can be restored to the condition in which they were before the contract was made." Not every contract breach would permit rescission under this statute. Radio Perry, Inc. v. Cox Commc'ns, Inc., 323 Ga. App. 604, 609 (2013) explains, "[t]he remedy of recission for nonperformance is appropriate when the breach is so substantial and fundamental as to defeat the object of the contract. (Citation and punctuation omitted)." As for the statute's tender requirement, Priority claims Company.com should have returned the "millions of dollars" that Priority had paid Company.com over the Minimum Payment Term. (Reply 2.) Based on the current record, the Court disagrees.

Radio Perry, Inc. describes the application of the tender requirement that is a prerequisite to rescission under O.G.C.A. § 13-4-62:

> [t]he rule that he who desires to rescind a contract must restore whatever he has received under it is one of justice and equity and must be reasonably construed and applied. The object of the rule is theoretically to place the parties in status quo; but the rule is equitable, not technical, and does not require more than that such restoration be made as is reasonably possible and such as the merits of the case demand. (Citation omitted).

Id. at 609.

In essence, Priority interprets its quarterly and true up payments as if they were the purchase price for acquiring the Merchant Portfolio. For purposes of this Motion, based on the parol evidence outlined above, the Court is persuaded that the primary purpose of these two Agreements was not to structure a direct sale of the Merchant Portfolio. Indeed, the uncontested evidence suggests its value may have far exceeded the amount of the Priority's payments. (See Wade Aff. ¶ 12.) Rather, the purpose of the Agreements was to enable Priority, over a three-year period, to create a subscription revenue stream for the ultimate benefit of Company.com that could approximate Company.com's existing Merchant Portfolio revenue stream. Notably, Priority focuses solely on payments it made under the Agreements and makes virtually no mention of its other contractual duties to help create that revenue stream which was the key benefit of Company.com's bargain in striking these Agreements.

Applying the precepts of Radio Perry, Inc., the Court finds it would be inequitable to allow Priority to keep all the revenues generated by the Merchant Portfolio during the three-year period of the Agreements when the current record

reflects it fundamentally failed to fulfill its enrollment obligations under those same Agreements.

In its October 14, 2022 Rescission Notice, Company.com outlined the reasoning supporting its tender decision which allowed Priority to keep certain revenues generated by the Merchant Portfolio and Priority's enrollment efforts during the three-year Minimum Payment Term.[11] (Resciss. Not. 4.) In support of this Motion, Company.com has offered evidence supporting its calculation that this tender offer actually puts Priority in a better position than it was when the Agreements were entered in October of 2019. (Wade Aff. ¶¶ 20-21.) Priority offered no persuasive evidence to contest that reckoning.

For purposes of this Motion, the Court finds the tender outlined in Company.com's Rescission Notice complied with the requirements of O.C.G.A. § 13-4-62 in restoring Priority to its pre-contract position and was itself sufficient to "effectuate[] the rescission" without the need for court approval. Thor at 237.

6.1.3 Waiver of the Right to Rescind

Priority also objects to the validity of Company.com's rescission based on waiver. It argues Company.com did not rescind promptly after becoming aware of Priority's enrollment lapses and that it continued to accept Priority's payments with the knowledge of those lapses.[12] (Mot. 16; Mot. to Dismiss 14-19.) It relies largely

[11] Company.com Rescission Notice also indicated that it stands willing to provide additional compensation based on the results of a "more complete accounting." (Rescission Notice 4.)

[12] The Court notes that contract recission claims often arise in the context of fraudulent inducement which is governed by an entirely different statute. O.C.G.A. § 13-4-60 provides that in order to rescind a contract on the basis of fraud,

on the January 12, 2022 letter where Company.com first threatened rescission to claim the October 14, 2022 Rescission Notice was unacceptably late.

As addressed above, not every contract breach will provide grounds for rescission under O.C.G.A. § 13-4-62. In order to rescind for nonperformance, the breach must be "so substantial and fundamental as to defeat the object of the contract." Radio Perry, Inc. at 609. While Company.com was clearly concerned about Priority's enrollment efforts, the record reflects Priority made repeated promises about its intent to increase its auto enrollments. More importantly, Company.com had no formal contractual yardstick to adjudge Priority's enrollment progress. The Agreements contained no set auto enrollment schedule – at Priority's request the terms of the intended schedule were intentionally left "TBD." (Wade. Aff. ¶ 31.) The only definite benchmark for measuring Priority's performance under the Agreements was September 30, 2022, the end of the three-year Minimum Payment Term when the intended revenue swap was set to occur. (Lic. Agr. Ex. B.) It was only then, under the Agreements' express terms, that Company.com could definitively evaluate the extent of the breach. Its Rescission Notice followed shortly thereafter. While Priority claims the rescission was belated, it is conceivable that an

"the defrauded party must promptly, upon discovery of the fraud, restore or offer to restore to the other party whatever he has received by virtue of the contract if it is of any value." By contrast, O.C.G.A. § 13-4-62 contains no statutory requirement on the timeliness of a rescission effort.

earlier effort for Company.com to rescind under the strict requirements of O.C.G.A. §13-4-62 would have been attacked as premature.[13]

Based on the foregoing, at this stage of the proceeding, the Court is unable to conclude that Priority is likely to prevail on the merits of its claim that Company.com's rescission efforts failed such that Agreements remain in effect.

6.2 Substantial Threat of an Irreparable Injury

In the Assignment Agreement, the parties expressly agreed that any breach of the non-solicitation covenant would cause Priority "irreparable injury for which there is no adequate remedy at law," thus entitling Priority to injunctive relief. (Assign. Agr. § 6(b); see also § 8(j).) Priority argues the irreparable harm element of the injunctive relief analysis is satisfied by this contractual provision.[14] (Mot. 10.) Based on the Court's determination above that Priority is unlikely to prevail on its claim that the Agreements remain viable, this contract-based argument about irreparable harm holds little sway.

[13] The record suggests there were a number of events that would inform the waiver argument – the pandemic that occurred early during the Minimum Payment Term and could have delayed the start of the enrollment efforts, the change in Priority's leadership which created apparent confusion as to Priority's obligations under the Agreements (see n. 5, supra), the various communications between the parties about Priority's enrollment efforts, Company.com's creation of new products that would assist in Priority's enrollment efforts, etc. Accordingly, based on the limited record at this stage of the proceedings, the Court is unable to meaningfully adjudge the waiver argument. See generally Catrett v. Landmark Dodge, Inc., 253 Ga. App. 639, 641-642 (2002)(in a fraudulent inducement case, "[t]he question as to what is a reasonable or proper time within which to rescind a contract depends upon the facts of the particular case and is ordinarily a question for the jury.")

[14] See Rash v. Toccoa Clinic Med. Assocs., 253 Ga. 322, 326 (1984) (appellate court considered the contractual acknowledgment that breach of covenant "would work harm" in affirming the trial court's entry of an injunction); Bijou Salon & Spa, LLC v. Kensington Enters., Inc., 283 Ga. App. 857, 862 (2007)(appellate court considered the contractual provision acknowledging parties' entitlement to seek injunctive relief in finding the trial court did not abuse its discretion in granting a temporary injunction).

Additionally, Priority contends it learned of Company.com's solicitation efforts as early as September of 2022 and no later than October of 2022, yet it did not file this Motion until the end of February in 2023. (Liney Aff. ¶ 11.) Priority's delay in pursuing this injunctive relief belies its claim that it faces the prospect of irreparable harm should an injunction not issue. See O.C.G.A. § 9-5-8 (injunctive relief reserved for "urgent" matters).

6.3 Balancing of the Harms

Priority contends it would suffer significant injury with regard to the loss of the Merchant Portfolio customers it received by virtue of Company.com's assignment. (Mot. 12; Assign. Agr. ¶ 9.) Again, based on the Court's determination regarding Company.com's recission, Priority's argument about the harm it faces which is rooted in these Agreements, is not persuasive.

6.4 Public Interest

Based on the unusual nature of the Agreements and these peculiar facts, the public interest factor does not play a meaningful role in the Court's analysis as to whether to grant injunctive relief.

6.5 Equitable Nature of Injunctive Relief

In addition to the traditional four factors discussed above, the Court also notes that injunctive relief is equitable in nature. See generally Patel v. State, 289 Ga. 479, 482 (2011)("What is at stake in an interlocutory injunction . . . is the application of equitable principles for the protection of the parties."); Spinner v. City of Dallas,

292 Ga. App. 251, 252 (2008) ("Injunction is distinctly an equitable remedy . . .") Based on the record currently before the Court, Company.com has raised compelling questions about Priority's compliance with its basic contractual obligations under the Agreements which Priority's Motion and argument have failed to address. The Court is not convinced that equitable principles support Priority's requested injunction.

7. CONCLUSION

In light of all the foregoing, the Court **ORDERS:**

a. Company.com LLC's Motion to Dismiss Equitable Counterclaims is **DENIED**.

b. Priority Payment Systems, LLC's ("Priority's) Motion for Interlocutory Injunction be **DENIED.**

So ordered this 3rd day of May, 2023.

/s/ John J. Goger
JOHN J. GOGER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit
Metro Atlanta Business Case Division

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