

many carriers that were not approved by Computrex. In the summer of 1999, shortly after Tyco International, Inc. (“Tyco”), acquired Central, Central informed Computrex that it planned to cease using Computrex’s services. (Def. Answer and Countercl. ¶165.) The parties unsuccessfully attempted to resolve their differences about their respective obligations under the Contract, and the instant litigation ensued.

Plaintiff brings three counts against Defendant. Count I requests declaratory judgment that the Contract is a non-exclusive agreement, and that Plaintiff may terminate the Contract at its discretion. Counts II and III seek declaratory judgment and monetary damages for material breach of contract.

Defendant, in its Counterclaim, brings two counts against Plaintiff. In Count I, Defendant asserts a breach of contract claim based on its contention that the Contract is an exclusive agreement. In Count II, Defendant brings a claim for anticipatory repudiation.

Plaintiff filed the instant Motion on June 21, 2000, seeking Declaratory Judgment on Count I of its Complaint and Summary Judgment on Defendant’s Counterclaims. On June 22, 2000, Defendant filed a Motion for Partial Summary Judgment seeking to dismiss Plaintiff’s Count I. These Motions are now fully briefed and ready for decision.

II. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately

supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. Id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-movant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir.1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir.1992).

III. Discussion

In support of summary judgment on Count I of the Complaint, Plaintiff argues that the plain and unambiguous language of the Contract provides that the Contract is a non-exclusive agreement. Conversely, Defendant contends that it is entitled to summary judgment on Count I, because the Contract's express language makes it an exclusive agreement.

Additionally, Plaintiff also seeks summary judgment on Defendant's Counterclaim. Plaintiff argues that both counts of the Counterclaim stem from Defendant's incorrect assertion that the Contract is exclusive. By contrast, Defendant opposes Plaintiff's Motion by reiterating its arguments for the exclusivity of the agreement.

In order to decide these Motions, the Court will first review applicable principles of

Kentucky¹ contract interpretation. The Court will then apply these principles to the instant Motions.

A. Principles of Contract Interpretation

Under Kentucky law, when the inquiry before the court involves contract construction, the issue is treated as a question of law. Ram Const. Co. v. American States Ins. Co., 749 F.2d 1049, 1052 (3d Cir. 1984) (applying Kentucky law to a question of contract construction). Courts give the words in a contract their “ordinary meaning as persons with the ordinary and usual understanding would construe them.” City of Louisville v. McDonald, 819 S.W.2d 319, 320 (Ky. Ct. App. 1991).

To ascertain if ambiguity exists in a contract, the court must first determine that the contract provision is susceptible to inconsistent interpretations. Transport Ins. Co. v. Ford, 886 S.W.2d 901, 905 (Ky. Ct. App. 1994). However, a contract is not ambiguous merely because the parties disagree as to the proper construction or their intent in signing it. Landrum v. Board of Regents of E. Ky. Univ., No. CIV.A. 09-475, 1992 WL 174618, at *10 (E.D. Ky. Feb. 26, 1992) (citation omitted). Furthermore, absent ambiguity, courts cannot put upon a contract any interpretation contrary to that which the words signify. Louisville & N.R. Co. v. David J. Joseph Co., 183 S.W.2d 953, 955 (Ky. 1944).

“In the absence of ambiguity a written instrument will be enforced strictly according to its terms.” O’Bryan v. Massey-Ferguson, Inc., 413 S.W.2d 891, 893 (Ky. 1966); see also Landrum, 1992 WL 174618, at *10 (stating that in construing a contract, it is fundamental that a written instrument will be strictly enforced according to its own terms, absent ambiguity); Codell Const. Co.

¹The Contract between Central and Computrex contains a choice of law provision stating that the Contract shall be “governed by and construed and interpreted in accordance with the internal laws of the Commonwealth of Kentucky.” (Contract ¶11.6.) Therefore, the Court will apply Kentucky law.

v. Commonwealth of Ky., 566 S.W.2d 161, 164 (Ky. Ct. App. 1977) (stating that it is well settled in Kentucky that, in the absence of ambiguity, a contract will be enforced according to its terms); Mutual Ben. Life Ins. Co. of Newark, N.J. v. First Nat. Bank of Louisville, 74 S.W. 1066, 1069 (Ky. 1903) (stating that if case is free from fraud or mistake, and if the contract language is plain and susceptible of but one meaning, that meaning must control).

The terms of an unambiguous contract cannot be varied by extrinsic evidence. O.P. Link Handle Co. v. Wright, 429 S.W.2d 842 (Ky.1968). Thus, a court may not consider parol evidence when interpreting a contract unless the contract is ambiguous. Schachner v. Blue Cross and Blue Shield of Ohio, 77 F.3d 889, 893 (6th Cir.1996). The ambiguity must be patent and apparent on the face of the contract. Id. at 893.

A court, however, is not required to read a contract in a vacuum: "A contract is to be construed as a whole so as to ascertain and give effect to the true intent of the parties, and the circumstances under which the contract was executed and the conduct of the parties thereafter can be considered by the Court in determining what their intention was, without it becoming a violation of the parol evidence rule." Rudd-Melikian, Inc. v. Merritt, 282 F.2d 924, 928 (6th Cir.1960). Nevertheless, before a court may consider extrinsic evidence of the parties' intent, "it must find an ambiguity on the face of the contract." Schachner, 77 F.3d at 893.

B. Cross Motions As to the Exclusivity of the Contract

The Contract does not include the words "exclusive" or "non-exclusive" in referring to Defendant's position as provider of logistical services. However, both parties argue that the Contract cannot be considered ambiguous on this issue because of the inclusion of the "Use or Pay" provision. This provision states:

In the event that routings and carriers selected by Computrex and approved by Central are not used by Central's facilities, Computrex will advise Central of such freight penalties incurred, so long as Central does not have a reasonable service issue objection. Beginning 60 days after implementation of new routings, Computrex will invoice Central for our normal percent of savings that would have resulted if the recommended carriers were used.

(Contract Exhibit "A": Fee Structure .) This provision explicitly provides that Central may use routings and carriers other than those recommended by Computrex, but must pay a savings allowance to Computrex each time it chooses to do so.² However, for Central to choose a carrier not selected by Computrex, it would have to first receive an alternate recommendation. This recommendation could either come from an internal source within Central, or from a logistics company other than Computrex. Thus, although the "Use or Pay" provision may be an attempt to discourage Central from using the services of entities other than Computrex, the plain, unambiguous meaning of the clause is that Plaintiff is not constrained to use only the services of Computrex.

Defendant cites four additional provisions of the Contract to support its conclusion that the Contract is exclusive. The Court will examine each of these provisions in turn.

Paragraph 2.1 of the Contract states:

For the compensation set forth in the "Fee Structure" portion of . . . "Exhibit A" . . . Computrex shall perform for Central during the term of this Agreement all of the logistics services and consultation described in said Exhibit A, both domestic and international.

(Contract ¶2.1.) Defendant argues that the word "all" in Paragraph 2.1 signifies that Computrex, and Computrex alone, was to provide the services listed in Exhibit A of the Contract. However, the word "all" in this clause merely signifies that Computrex was to provide all those services listed in the

²Plaintiff further contends that Defendant has waived its right to enforce the "Use or Pay" provision. However, the Court need not reach this issue to decide the instant Motions.

Contract. Thus, this clause quantifies the service necessary under the Contract in order for Computrex to earn the structured compensation provided by the Contract. The ordinary meaning of the word “all” in this context does not mean that Computrex was to be the exclusive provider of those services. To construe the word “all” in Paragraph 2.1 as yielding exclusivity would be an unwarranted out of context treatment. Thus, this provision does not support Defendant’s assertion that the Contract is exclusive.

Paragraph 9.1 of the Contract states:

Inasmuch as the services to be performed by Computrex shall require several months of work prior to Computrex invoicing for its services, the term of this Agreement for the purposes of Computrex receiving payment for the services performed during the Service term shall continue for three full calendar years commencing with the date of the first invoice submitted by Computrex to Central hereunder (the “Payment Term”).

(Contract ¶9.1.) Defendant contends that the “existence of a time term in the Agreement manifested the intention of the parties that each be bound to the other for a fixed period, during which time each was to have contractual obligations which it could not abandon in the absence of a breach of contract by the other.” (Def. Mem. at 7.) The Court agrees that the existence of a time term signifies that the parties intended to be bound by the Contract for a fixed period. However, this clause is silent on whether Defendant was to be the exclusive provider during that time, and therefore it does not support Defendant’s argument for exclusivity.

Paragraph 9.4 of the Contract states:

If after one year from the contract date, Computrex’s performance has not produced improved pricing levels, either party may terminate this Agreement by providing written notice to the other party between the dates of May 14, 1999, and June 14, 1999.

(Contract ¶9.4.) Defendant argues that had this not been an exclusive Contract, Paragraph 9.4 would have been “superfluous.” (Def. Mem. at 7-8.) The Court, however, reads this provision as nothing more than a one-time mutual escape clause. This provision also is silent on exclusivity, and nothing about that issue should be inferred.

The Contract contains a provision on program length which states:

The Computrex Program to reduce your transportation costs through carrier negotiations and contracting is an ongoing process and will require constant monitoring and modification. To attain the projected savings goals Computrex requires a minimum program of three years.

(Contract Exhibit “A”: Fee Structure.) Defendant asserts that the “clear message” of the above provision is that “Computrex, and Computrex alone, was to be given three years to put its program into place” and that “[a]ny reduction in that time, and any interference with the Computrex program by the retention of some other logistics and freight payment provider, would impede the stated goal and the recognized time it would take to achieve it.” (Def. Mem. at 8.) The Court does not agree that the above clause sends a “clear message” of exclusivity. Rather, the express language of this provision does not support Defendant’s contention.

The Court concludes that the Contract is unambiguous and susceptible of only one fair and reasonable construction on the issue of exclusivity.³ Therefore, the Court will grant summary judgment in favor of Plaintiff as to the non-exclusivity of the Contract. Plaintiff further asserts in Count I, “[b]ecause the Contract is non-exclusive, plaintiff may terminate the Contract at its

³Central filed a Motion to Exclude the Affidavit of William J. Pardue on July 21, 2000. Computrex submitted the Affidavit of Mr. Pardue, a former executive at Central, with its Motion for Partial Summary Judgement. (Def. Ex. F.). Because the language of the Contract is unambiguous, the Court’s analysis regarding the exclusivity of the Contract focused only on the provisions found in the Contract. Therefore, Central’s Motion to Exclude the Affidavit is moot.

discretion.” (Compl. ¶26.) The Court does not conclude that a non-exclusive contract may be terminated at the discretion of one of the parties. Furthermore, Count I states that “the terms of the Contract are applicable only when plaintiff, at its discretion, elects to utilize the services of Computrex.” (Compl. Count I.) As discussed above, the “Use or Pay” clause provides that Central may elect to use carriers recommended by entities other than Computrex. Thus, the Contract states that Central may elect not to use Computrex’s recommendations. But in arguing that Central need not use Computrex’s services, Central argues, in essence, that it need not allow Computrex to make logistical recommendations. The Court finds no support in the text of the Contract for this conclusion. Therefore, in finding that the Contract may not be terminated on a discretionary basis, the Court will grant summary judgment as to this issue in favor of Defendant.

B. Plaintiff’s Motion for Summary Judgment on Defendant’s Counterclaim

Plaintiff argues that because the Contract is non-exclusive, and both counts of Defendant’s Counterclaim are based on the conclusion that the Contract is exclusive, then Defendant’s Counterclaim should be dismissed. Defendant does not dispute that these counts are premised on exclusivity, but argues that Plaintiff’s Motion should be denied because the Contract is exclusive.

Count I, a breach of contract claim, states:

¶67. Pursuant to the Agreement, Computrex was the exclusive provider to Central of logistics and freight payment services for a period of three years.

¶68. Central’s failure to require its distribution sites to conform to the list of approved carriers provided by Computrex constitutes a material breach of the Agreement.

¶69. Central’s refusal to use Computrex’s logistics and freight payment services following Tyco’s acquisition of Central constitutes a material breach of the Agreement.

¶70. Central’s use of Tyco’s logistics and freight payment services during the term of the Agreement constitutes a material breach of the

Agreement.

¶71. As a result of such breaches by Central, Computrex has lost revenues in excess of \$500,000.

Count II, a claim for anticipatory repudiation, states:

¶73. During the term of the Agreement, Central notified Computrex that Central would no longer use Computrex's logistics or freight payment services.

¶74. Central's actions constitute an absolute and unequivocal refusal to perform Central's obligations under the Agreement.

¶75. Central's actions constituted an anticipatory repudiation of the contract.

¶76. As a result of such breaches by Central, Computrex has lost revenues in excess of \$500,000.

Having found the instant Contract non-exclusive, the Court agrees with Plaintiff that these counts should be dismissed to the extent that they are grounded in the conclusion that the Contract is exclusive.⁴ Count I is entirely premised on exclusivity, and therefore the Court will grant Plaintiff's Motion as to this count. However, Count II states claims that are independent of exclusivity. Count II concerns Central's complete abrogation of all of its obligations under the Agreement. Because Count II is based on Computrex's contention that Central may not unilaterally abrogate the Contract, the Court will not grant summary judgment in favor of Plaintiff on this count.

IV. Conclusion

For the foregoing reasons, the Court will grant in part and deny in part Plaintiff's and Defendant's cross motions for summary judgment as to Count I of Plaintiff's Complaint. The Court also will grant in part and deny in part Plaintiff's Motion as to Defendant's Counterclaim.

An appropriate Order follows.

⁴The Court notes that it does not read the Counterclaim to state a claim for breach under the "Use or Pay" provision, but only for breach and anticipatory repudiation through the non-use of Defendant's services.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CENTRAL SPRINKLER CORP.,)
)
 Plaintiff,)
)
 vs.)
)
 COMPUTREX LOGISTICS,)
)
 Defendant.)

CIVIL ACTION No. 99-5549

ORDER

AND NOW, this day of August, 2000, upon consideration of the parties' cross motions for summary judgment, and briefing thereof, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion for Partial Summary Judgment (docket no. 15) is **GRANTED** in part and **DENIED** in part;
2. Defendant's Motion for Partial Summary Judgment (docket no. 16) is **GRANTED** in part and **DENIED** in part;
3. **JUDGMENT** is entered in favor of Plaintiff and against Defendant on Count I of Plaintiff's Complaint in that the Court declares that the Contract is non-exclusive;
4. **JUDGMENT** is entered in favor of Defendant and against Plaintiff on Count I of Plaintiff's Complaint in that the Court declares that Plaintiff may not terminate the Contract at its discretion;
5. **JUDGMENT** is entered in favor of Plaintiff and against Defendant on Count I of Defendant's Counterclaim.

6. Plaintiff's Motion is **DENIED** with respect to Count II of Defendant's Counterclaim.

BY THE COURT:

John R. Padova