IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

AT&T CORP.,

Plaintiff,

v.

THE DOUGLAS-HANSON CO., INC,

Defendant.

MEMORANDUM AND ORDER

05-C-266-S

Plaintiff AT&T Corp. commenced this action against defendant The Douglas-Hanson Co., Inc seeking monetary damages. Plaintiff seeks damages pursuant to two theories of liability: Breach of Contract and Unjust Enrichment. Jurisdiction is based on diversity of citizenship, 28 U.S.C. § 1332(a)(1). The matter is presently before the Court on plaintiff's motion for summary judgment on its breach of contract claim. The following facts are those most favorable to defendant.

BACKGROUND

In 2001, defendant The Douglas-Hanson Co., Inc. was in the process of acquiring a facility in Mentor, Ohio. The facilities needed to share data stored in each location's computers. Accordingly, defendant needed a T1 private line service to connect the two facilities. After receiving proposals from various providers it determined plaintiff AT & T Corp. could meet its needs.

On or about March 28, 2001 plaintiff sent defendant contract documentation for its signature. The documentation included: (1) The Master Agreement comprised of a cover letter and three pages of general terms and conditions, (2) a non-disclosure agreement and (3) a copy of the pricing estimate defendant received for private line services which indicated a monthly charge of $3,719.37.

The cover letter of the Master Agreement was the first document in the series. It stated in relevant part:

> This Agreement consists of the attached General Terms and Conditions and all service attachments ("Attachments") attached hereto or subsequently signed by the parties and that reference this Agreement (collectively, this "Agreement"). In the event of a conflict between the General Terms and Conditions and any Attachment, the Attachment shall take precedence.
>
> This Agreement shall become effective when signed by both parties and shall continue in effect for as long as any Attachment remains in effect

The general terms and conditions of the contract were expressed in the Master Agreement itself. Section 2.0 titled Charges and Billing stated in relevant part:

> 2.1 You shall pay AT&T for Your and Users' use of the Services at the rates and charges specified in the Attachments, without deduction, setoff, or delay for any reason. Charges set forth in the Attachments are exclusive of any applicable taxes.

Section 3.0 of the Master Agreement titled Responsibilities of the Parties stated in relevant part:

> 3.1 AT&T agrees to provide Services to You, subject to the availability of the Services, in accordance with the terms and conditions, and at the charges specified in this Agreement, consistent with all applicable laws and regulations.

Finally, General Provisions Section 12.0 related to the Agreement itself. It stated in relevant part:

> 12.1 Any supplement, modification or waiver of any provision of this Agreement must be in writing and signed by authorized representatives of both parties.
>
> 12.9 THIS AGREEMENT CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES WITH RESPECT TO THE SERVICES. . THIS AGREEMENT SUPERSEDES ALL PRIOR AGREEMENTS, PROPOSALS, REPRESENTATIONS, STATEMENTS OR UNDERSTANDINGS, WHETHER WRITTEN OR ORAL, OR THE RIGHTS AND OBLIGATIONS RELATING TO THE SERVICES. THIS AGREEMENT SHALL NOT BE CONTRADICTED, OR SUPPLEMENTED BY ANY WRITTEN OR ORAL STATEMENTS, PROPOSALS, REPRESENTATIONS, ADVERTISEMENTS, SERVICE DESCRIPTIONS OR YOUR PURCHASE ORDER FORMS NOT EXPRESSLY SET FORTH IN THIS AGREEMENT OR AN ATTACHMENT.

Defendant signed the Master Agreement and non-disclosure agreement on April 9, 2001. Plaintiff signed the Master Agreement on April 11, 2001. After defendant signed and returned the Master Agreement plaintiff sent it another document titled AT&T Contract Tariff Service Order Attachment. The cover letter to the Contract Tariff stated in relevant part:

> This Service Order Attachment (including its addenda, if any) is an Attachment to the Master Agreement between Customer and AT&T dated _____ and is an integral part of that Agreement.
>
> The domestic interstate services portion of the CT ordered hereunder has been detariffed, and the contract between the parties shall consist of the Master Agreement and the relevant portions of the

> Contract Tariff ("CT") and referenced AT&T tariffs ("Applicable Tariffs"), as those Applicable Tariffs may be modified from time to time.
>
> The order of priority in the event of inconsistency among terms shall be the CT, then the Master Agreement, and then the Applicable Tariffs.
>
> **CUSTOMER HAS READ AND UNDERSTANDS THE TERMS AND CONDITIONS OF THIS SERVICE ORDER ATTACHMENT AND AGREES TO BE BOUND BY THEM.**

In accordance with the Communications Act of 1934 (as amended) the Contract Tariff applied to AT&T Domestic ACCUNET T1.5 Private Line Services (AT&T Tariff F.C.C. No. 9) and AT&T ACCUNET Terrestrial 1.544 Mbps Local Channel Services (AT&T Tariff F.C.C. No. 11.) The Contract Tariff set forth the rates and applicable discounts for these services. The defendant was to receive the services covered by F.C.C. Tariff No.'s 9 and 11. Defendant placed the Contract Tariff in its file without signing the document.

In June, 2001 defendant began to receive invoices in amounts greater then the $3,719.37 it was quoted. Defendant contacted plaintiff numerous times to attempt a resolve of the discrepancy. However, in the interim it continued to pay the invoices. On November 13, 2002 defendant received an e-mail from plaintiff indicating it was being billed correctly per the contract and applicable tariffs. Defendant continued to pay its invoices in full until May, 2003. At that time defendant concluded it had in effect pre-paid for any invoices it expected to receive for the remainder of the contract term. Plaintiff continued to provide service to defendant through the remainder of the contract term.

MEMORANDUM

Plaintiff argues it is entitled to summary judgment because no genuine factual issues exist and as a matter of law defendant breached the contract when it failed to pay for Local Channel Services according to the proper published tariff rate. Defendant argues summary judgment is not appropriate because genuine issues of fact exist regarding what documents constitute the contract. Defendant also argues as a matter of law plaintiff breached the contract when it continued to increase its rates following detariffing or in the alternative the contract is void because plaintiff fraudulently induced defendant to enter into the contract.

As a preliminary matter, the contract between the parties provides that state law issues concerning construction, interpretation and performance of the Agreement should be governed by New York law. Accordingly, the Court will apply the substantive law of New York for purposes of this motion.

Summary judgment is appropriate where 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. 55(c).

A fact is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). Disputes over

unnecessary or irrelevant facts will not preclude summary judgment. Id. Further, a factual issue is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. Id. A court's role in summary judgment is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249, 106 S.Ct. at 2511.

To determine whether there is a genuine issue for trial courts examine the evidence in the light most favorable to the non-moving party. In re Chateaugay Corp., 10 F.3d 944, 957 (2nd Cir. 1993). Additionally, a court resolves all ambiguities and draws all reasonable inferences in favor of that party. Id. However, the non-movant must set forth specific facts showing there is a genuine issue for trial which requires more than speculation or conjecture. Aetna Cas. and Sur. Co. v. Aniero Concrete Co., Inc., 404 F.3d 566, 574 (2nd Cir. 2005)(citations omitted).

Contract interpretation is governed by the intent of the parties. PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1199 (2nd Cir. 1996)(citations omitted). Accordingly, when the intent of the parties can be determined from the face of the agreement interpretation "is a matter of law." Id. A contract should be construed so as to give full meaning and effect to all of its provisions. Id. Further, when a contract is unambiguous words and phrases are given their plain meaning and courts will enforce the plain meaning of that agreement. Id.

The Court concludes the intent of the parties regarding those documents which constitute the contract can be determined from the face of the agreement. The cover letter to the Master Agreement explicitly states "This Agreement consists of the attached General Terms and Conditions and all service attachments attached hereto or subsequently signed by the parties and that reference this Agreement." Accordingly, the language is unambiguous only documents sent with the Master Agreement or documents signed by both parties were intended to be part of the contract.

When defendant received its contract documentation from plaintiff it received: (1) The Master Agreement with the cover letter and three pages of general terms and conditions, (2) the non-disclosure agreement and (3) a copy of the pricing estimate. The Contract Tariff was not included. Accordingly, it cannot be considered a service attachment attached hereto.

Even though the Contract Tariff was not a service attachment it could have been part of the contract if it was subsequently signed by both parties. However, it is undisputed that defendant never signed the Contract Tariff. It received the document and put it in its file. Additionally, the evidence indicates plaintiff never signed the Contract Tariff before it sent the document to defendant. Accordingly, the contract tariff cannot be considered part of the contract because it was not signed by both parties as required by the Master Agreement.

Plaintiff argues should the Contract Tariff not be a part of the original contract it acted as a counter offer which defendant accepted by using the services without objecting to the document. However, plaintiff's argument is not persuasive. Under New York law, the original offering party which receives a counter-offer may accept that counter-offer by performing under the contract. Ladau v. The Hillier Group, Inc., 2004 WL 691520 at 4 (S.D.N.Y. 2004) *citing* (Int'l Paper Co. v. Suwyn, 966 F.Supp. 246, 254 (S.D.N.Y. 1997)). Plaintiff did not receive a counter-offer from defendant. Defendant signed however the Master Agreement on April 9, 2001 and returned it without making any changes. Plaintiff signed the Master Agreement on April 11, 2001. The evidence indicates defendant received the Contract Tariff sometime after the April 11, 2001 date. Accordingly, plaintiff cannot make a counter-offer to an offer that has already been accepted.

While it could be argued defendant modified the contract by paying invoices that were higher than the rate it was quoted the Court concludes modification did not occur. Under New York law parties can modify a contract "by another agreement, by course of performance, or by conduct amounting to a waiver or estoppel." Dallas Aerospace, Inc. v. CIS Air Corp., 352 F.3 775, 783 (2nd Cir. 2003) *citing* (CT Chems. (U.S.A.) Inc. v. Vinmar Impex, Inc., 81 N.Y.2d 174, 597 N.Y.S.2d 284, 613 N.E.2d 159, 162 (N.Y. 1993)). However, fundamental to the establishment of a contract modification is proof of each element requisite to the formulation

of a contract, including mutual assent to its terms. Id. (citations omitted).

Defendant did not mutually assent to the terms of the Contract Tariff. Defendant began to question plaintiff's invoices in June, 2001. Plaintiff's acknowledgment of defendant's objections is evidenced by the November 13, 2002 e-mail. Accordingly, plaintiff cannot claim defendant assented to pay the higher rates. Further, a party does not demonstrate mutual assent to a higher rate simply because it pays the invoices it receives. Beacon Terminal Corp. v. Chemprene, Inc., 75 A.D.2d 350, 352-355, 429 N.Y.S.2d 715, 717-718 (1980). Accordingly, defendant did not modify the contract by its conduct and the Contract Tariff cannot be considered part of the contract.

However, even though the Contract Tariff itself was not part of the contract defendant was nonetheless required to pay the applicable tariff rates for the services it used from May 8, 2001 through August 1, 2001 because F.C.C. Tariff No.'s 9 and 11 were in effect during that period. Tariffs are not simply contracts they have the force of federal law. Fax Telecommunicaciones Inc. v. AT&T, 138 F.3d 479, 488 (2nd Cir. 1998)(citations omitted). Accordingly, until the tariffs were withdrawn the rates expressed in the Contract Tariff were the legal rates defendant was obligated to pay for the services. Id. The Court cannot question the rates of a filed tariff. It only has the authority to subject the Contract Tariff to the common law rules of contract interpretation

after the tariffs were withdrawn. Frontline Communications Int'l, Inc. v. Sprint Communications Co. L.P., 178 F.Supp.2d 432, 438 (S.D.N.Y. 2001).

Defendant argues it should not be bound by the terms of the tariffs because it had no knowledge of them. However, all customers are "conclusively presumed" to have constructive knowledge of the filed tariffs under which they receive services. Fax Telecommunicaciones Inc. at 489. Further, defendant cannot claim it was falsely induced to enter into the contract because "even if a carrier intentionally misrepresented its rate and a customer relied on the misrepresentation, the carrier could not be held to the promised rate if it conflicted with the published tariff." Frontline Communications Int'l, Inc. at 438 *quoting* (AT&T v. Cent. Office Tel., 524 U.S. 214, 222, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998)). Accordingly, since plaintiff billed defendant correctly during the term of the tariff defendant was obligated to pay the invoices issued during that period.

Defendant ceased payment when it concluded that it had pre-paid in full for services pursuant to the terms of the contract. Accordingly, it is possible defendant did not pay the total amount of its obligation. The F.C.C. tariffs remained in effect from May 8, 2001 through August 1, 2001. The tariff rate was higher than the price quoted in the parties' contract. Accordingly, where defendant was obligated to pay an amount greater than the contract price during the period before the tariffs were

no longer applicable it remains liable for any amount it underpaid. However, as a matter of law the Court cannot conclude the Contract Tariff document itself was part of the contract.

ORDER

IT IS ORDERED that plaintiff's motion for summary judgment is DENIED.

Entered this 21st day of October, 2005.

BY THE COURT:

__s/_____

JOHN C. SHABAZ

District Judge