

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LANDS' END, INC.,

Plaintiff,

v.

GENESYS SOFTWARE SYSTEMS, INC.,

Defendant.

OPINION AND ORDER

13-cv-38-bbc

Plaintiff Lands' End filed this civil action to obtain a declaratory judgment interpreting a software licensing agreement it entered into with defendant Genesys Software Systems, Inc., on January 19, 1993. Under the agreement, plaintiff received the "right to use" defendant's software system for a term of twenty years.

Plaintiff contends that its "right to use" the software will not expire until on or around October 17, 2013, 20 years after the first date it employed the software at its full capacity. Defendant says that plaintiff's right to use the software expired on January 19, 2013, 20 years after the contract's effective date. Defendant has filed counterclaims for breach of contract, injunctive relief, conversion and misappropriation of trade secrets.

Now before the court is defendant's motion for partial summary judgment on the sole issue of the contract term's interpretation. Dkt. #14. Jurisdiction is present under 28 U.S.C. § 1332 because more than \$75,000 is in controversy and the parties are completely diverse. Plaintiff is a Delaware corporation with its principal place of business in Dodgeville,

Wisconsin. Defendant is a Massachusetts corporation with its principal place of business in Meuthen, Massachusetts.

I conclude that plaintiff's "right to use" defendant's software began on the contract's effective date. This is the clear intent of the parties and nothing in the contract requires a different interpretation.

From the parties' proposed findings of fact and the contract evidence in the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. Plaintiff's Software License Agreement with Defendant

In January 1993, plaintiff Lands' End, Inc. and defendant Genesys Software Systems, Inc. entered into a contract under which defendant licensed its human resources and payroll systems software to plaintiff. The contract stated that its "effective date" would be January 19, 1993. Specifically, it stated that:

The terms, conditions, and prices are offered by GENESYS provided the Client signs and returns the License Agreement to GENESYS on or before January 19, 1993 which shall be the effective date of this Agreement.

Dkt. #1-1 at 1. The contract stated that the defendant, as licensor,

grants Client [Lands' End] a non-exclusive and non-transferable right to use the software described in the Agreement for a term of twenty years. The system will be used to maintain information exclusively for employees of the Client. The software for production purposes will reside on a computer(s) at a single site which may be located at one of the following: One Lands' End Lane (Bldg. One), or Five Lands' End Lane (Bldg. 5), Dodgeville, WI. This agreement contains the entire terms and conditions between the parties, and no[] verbal representations not contained herein shall be valid or binding.

Id. at 3. The contract gave plaintiff the option of using defendant to provide “training, installation, and professional services as selected in this Agreement.” Id. at 4.

Under the agreement, defendant had 60 days from the effective date to deliver the software to plaintiff. Id. The agreement included a chart illustrating a 28-week project schedule for defendant to install the software, culminating in a July 23, 1993 “live operation” date. Id. at 9. The agreement also contained a provision stating that “[i]f the completion is beyond July 31, 1993, due to GENESYS delay, GENESYS will provide an unlimited GenLink Site License to Lands’ End at no charge . . .” Id. at 8.

B. Implementing Defendant’s Software

On or about January 18, 1993, defendant’s representatives began to implement the software at plaintiff’s place of business. Small Decl., dkt. #22, at ¶¶ 2-3. The implementation took about ten months, from mid-January 1993 to mid-October 1993. Id. During this time, plaintiff and defendant worked together to identify system needs and modify the software so that the software could be implemented successfully. Id. at ¶¶ 2-7. Defendant also converted data from plaintiff’s processor system and conducted training for the system’s end users at plaintiff’s place of business. Id. In June 1993, defendant was still writing code so that the software could properly function for plaintiff. Id. at ¶ 5, Exhs. A and B.

The first pay period in which plaintiff used defendant’s software was the pay period running from October 17, 1993 through October 28, 1993. Id. at ¶¶ 8-10, Exhs. C and D.

On October 28, 1993, plaintiff issued its first checks using defendant's software. Id.

C. Ending the Licensing Agreement

In 2010, plaintiff's information technology department began to evaluate its human resources and payroll software needs in an effort to modernize its systems. Grayson Decl., dkt. #23, at ¶ 4. It considered new software offered by several vendors, including defendant. Id.

On or about January 7, 2011, Richard Hauptle, a vice president of defendant's parent company, received a telephone call from Jeffery Grayson, plaintiff's senior information technology manager. Hauptle Aff., dkt. #17, at ¶ 2. In subsequent conversations and emails, the parties agreed to an on-site meeting at plaintiff's place of business to discuss upgrading to one of defendant's other software products. Id. at ¶ 4. Ultimately, plaintiff decided to proceed with a different vendor. Grayson Decl., dkt. #23, at ¶ 9.

On or about August 12, 2011, plaintiff called defendant to discuss the possibility of extending the term of their original license, so that plaintiff could be assured the uninterrupted use of defendant's software while it continued its search for a new software system. Hauptle Aff., dkt. #17, at ¶ 9. On August 17, 2011, defendant made a proposal to plaintiff under which plaintiff would be able to purchase a three-year license extension from defendant. Id. at ¶ 10. In early December, 2012, plaintiff determined that the new system it obtained from a different vendor would not be operational until sometime in 2013. Id. at ¶ 16.

On January 14, 2013, defendant's legal counsel wrote plaintiff to remind it that the software license would expire on January 19, 2013 and that plaintiff must cease and desist from using the software by that date. Dkt. #1-3. Counsel added that if plaintiff did not comply with defendant's demands, defendant would seek a temporary restraining order and other appropriate injunctive relief. Id.

On January 17, 2013, plaintiff filed the complaint in this case, asking the court to issue a declaratory judgment to interpret the licensing agreement. Cpt., dkt. #1. On February 11, 2013, defendant filed an answer and asserted a counterclaim for breach of contract, conversion and misappropriation of trade secrets. Ans. and Counterclaim. Dkt. #5. In March 2013, plaintiff stopped using defendant's software program. Small Decl., dkt. #22, at ¶ 11.

OPINION

The question before the court is whether plaintiff's right to use defendant's software for 20 years started to run on January 19, 1993 or on some later date. Contract interpretation is a question of law. Deminsky v. Arlington Plastics Machinery, 2003 WI 15, ¶ 15; 293 Wis. 2d 411, 418, 657 N.W.2d 411, 418. Because neither party raised a conflict-of-law issue, I will apply Wisconsin's contract interpretation law. RLI Insurance Co. v. Conseco, Inc., 543 F.3d 384, 390 (7th Cir. 2008) ("When neither party raises a conflict of law issue in a diversity case, the applicable law is that of the state in which the federal court sits.").

Under Wisconsin law, the primary purpose of interpreting a contract is to determine the parties' intent. Huml v. Vlasny, 2006 WI 87, ¶ 52, 293 Wis. 2d 169, 196, 716 N.W.2d 807, 820 (citation omitted). Courts should give contract terms "their plain and ordinary meaning," and should rely primarily on the contract itself to interpret its meaning. Id. at ¶ 52. The court should use evidence outside the four corners of the contract only if the terms of agreement are "reasonably susceptible to more than one meaning." Columbia Propane, L.P. v. Wisconsin Gas Co., 2003 WI 38, ¶ 25, 261 Wis. 2d 70, 661 N.W.2d 776. Such extrinsic evidence may include "the conduct of the parties and negotiations which took place, both before and after the execution of the documents, and . . . all related documents of the parties." Smith v. Osborne, 66 Wis. 2d 264, 272, 223 N.W.2d 913, 917 (1974).

Applying these principles to the present dispute, I conclude that the license agreement is unambiguous. Under the plain terms of the contract, plaintiff had the right to use defendant's software system for a term of 20 years. The first page of the contract states that "January 19, 1993 [] shall be the effective date of this Agreement." Dkt. #1-1. Nothing in the contract gives the license a different effective date from the rest of the contract or provides a specific date upon which plaintiff's license will terminate, other than "twenty years" after defendant granted the license. No other dates in the contract relate expressly to the license provision or modify the license grant in any way.

The absence of a date on a contractual provision does not mean that there is an ambiguity in the effective date of the contractual provision. It is well known in contract law that absent language to the contrary, all of a contract's provisions become binding on the

contract's effective date. Erickson v. Mid-Century Insurance Co., 63 Wis. 2d 746, 752, 218 N.W.2d 497, 501 (1974) (holding that any interpretation beyond the usual and clear meaning of "effective date" *creates* ambiguity).

Plaintiff argues that when read the contract is read as a whole, it implies unambiguously that the "right to use" defendant's software began when plaintiff could actually use the software at its full capacity, but no language in the license entitles plaintiff to the immediate benefit of the full software product starting on the first day on which the contract was executed. Accepting plaintiff's interpretation of the contract would require the court to look past the contract's effective date and create an indeterminate ending date for the license, thereby creating ambiguity by subverting the usual and clear meaning of the contract's effective date.

Plaintiff makes several alternative arguments, all of which rest on the assumption that the contract's license provision is ambiguous. Because I conclude that no ambiguity exists, these arguments necessarily fail. Even if I were to consider them, plaintiff's interpretation of the license provision is not persuasive. Plaintiff contends that if the contract is reasonably susceptible to more than one meaning, the court should construe any ambiguities in the contract against defendant, because defendant drafted the contract. In support of this contention, plaintiff cites Walters v. National Properties, L.L.C., 2005 WI 87, ¶ 13, 282 Wis. 2d 176, 699 N.W.2d 71, in which the court stated that it is a "universally accepted legal maxim that any ambiguities in a document are to be construed unfavorably to the drafter." However, Walters makes it clear that this "universally accepted legal maxim" is

most apt in situations in which the drafting party has superior bargaining power and exerts it over the non-drafting party. Id. at ¶ 14. The contract in dispute is not a standard form contract between parties of unequal bargaining power. Plaintiff may be the non-drafting party in this case, but it is a sophisticated corporation. This is in sharp contrast to the situation in Walters, in which the a landlord and his tenant were disputing the effect of an eviction notice. Id. at ¶¶ 1-5. In this case, plaintiff has presented no evidence that defendant offered the contract on a take it or leave it basis or that it was not in the position to negotiate the contract's terms.

Next, plaintiff turns to extrinsic evidence, arguing that a dictionary definition of the word “use” indicates that the license provision defines an open-ended, 20-year period that began on the first day plaintiff actually used the software in its full capacity. The Oxford American Dictionary defines “use” as “take, hold, or deploy (something) as a means of accomplishing a purpose of achieving a result; employ[.]” Oxford American Dictionary 1853 (2d ed., 2005). This definition implies that the individual or group “using” an item receives some benefit from that item at an indeterminate time. Great American Indemnity Co. of New York v. Saltzman, 213 F.2d 743, 746-47 (8th Cir. 1954).

This dictionary definition does not help plaintiff. In the contract, defendant granted plaintiff the right to employ the software as a means of managing its human resources and payroll data. The parties agreed that defendant began implementing the software on or around January 18, 1993, the day before the contract took effect. At this time, plaintiff was “using” the software, insofar as it was using defendant's professional services to prepare the

software for its intended purpose. The dictionary definition does not confine the word “use” to the use of something in its full capacity.

Plaintiff also cites extrinsic evidence relating to defendant’s lengthy software implementation as a reason that the court should interpret the licensing provision to grant twenty years of actual use. However, the license provision is separate from the optional provisions regarding training and installation. The contract clearly states that defendant provided plaintiff with “the *option* of training, installation, and professional services” “[t]o ensure that [plaintiff’s] management and staff may secure maximum benefit from the System.” Dkt. #1-1, at 4 (emphasis added). Plaintiff was not required under the contract to use defendant’s professional services to maximize the software’s effectiveness. Instead, plaintiff exercised its option to “hire” defendant to implement the software, knowing that the implementation would take several months.

Certainly, if plaintiff had hired a third party to perform defendant’s implementation and support services, plaintiff could not argue that the beginning or duration of the licensing provision was contingent upon this third party’s implementation schedule. Indeed, plaintiff would be “using” the software through an agent to set up its payroll and human resources database. If plaintiff did proffer such a claim, it would be analogous to a consumer claiming that she was not actually using her email account while she was customizing the account’s settings. Though the consumer is not actively composing an email or reading a message, she is still using her email account to maximize its effectiveness. Any time limitations on the consumer’s use of her email account would not be lengthened by her management activities.

Finally, plaintiff asks the court to consider the conversations, meetings and billing activity between plaintiff and defendant from 2010-13 as extrinsic evidence in interpreting the license provision. I decline to do so. Even if it were appropriate to do so in order to interpret the contract, it is unlikely that the undisputed facts would shed light on the parties' intent when they entered into the contract more than two decades ago. Since there is no ambiguity in the licensing agreement, I will not consider this evidence.

ORDER

Therefore, IT IS ORDERED that defendant Genesys Software Systems, Inc.'s motion for partial summary judgment, dkt. #14, is GRANTED.

Entered this 3d day of July, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge