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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0355**

Appliance Recycling Centers of America, Inc.,
Appellant,

vs.

Skybridge Americas, Inc.,
Respondent.

**Filed March 4, 2019
Affirmed in part, reversed in part, and remanded
Worke, Judge**

Hennepin County District Court
File No. 27-CV-17-1038

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(for respondent)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Bjorkman,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the district court erred in dismissing its claim for breach of
contract pertaining to respondent's use of a Canadian call center. Appellant also argues that

the district court erred in granting respondent summary judgment on the parties' cross-claims for breach of contract relating to respondent's termination of services due to nonpayment. By notice of related appeal (NORA), respondent argues that the district court erred in awarding it interest at a rate lower than that provided by the parties' contract. We affirm in part, reverse in part, and remand.

FACTS

Appellant Appliance Recycling Centers of America, Inc. (ARCA) administers appliance recycling and replacement programs, and sells new appliances. Respondent Skybridge Americas, Inc. provides call-center and related services. Beginning in November 2014, the parties entered into contracts under which Skybridge agreed to provide call-center services to ARCA.

On November 22, 2014, the parties executed a Master Services Agreement (MSA), which provides the general framework governing the parties' relationship. The MSA includes a Pilot Program Statement of Work (SOW), which provides the specific metrics for Skybridge's call-center services. Effective January 1, 2015, the parties replaced the Pilot Program SOW with a Full Program SOW.

Under the terms of the Full Program SOW, Skybridge agreed to provide call-center support under a series of performance rubrics called Service Level Agreements (SLA). The SLAs provide that, among other things, Skybridge will answer 80% of calls within 30 seconds, with an abandonment rate of less than or equal to 5%. If call volume exceeds ARCA's projections by 10% on either a daily or monthly basis, then Skybridge is released from the SLA requirements for that period.

Section 4 of the Full Program SOW states that Skybridge will use a Minnesota call center as its “primary facility[,]” and a Canadian facility for “backup/overflow to the Minnesota office[.]”

Section 3.2 of the MSA provides that Skybridge will invoice ARCA on a monthly basis. Payment is due 30 days after receipt, and outstanding invoices begin to accrue interest at 1.5% per month after 30 days. All invoices must be paid within 60 days or Skybridge is entitled to terminate services without further notice. The Full Program SOW adds a payment term not included in the Pilot Program SOW to the service rate section, which reads: “[a]ll invoices will be due on a net-45 day basis.”

Skybridge frequently failed to meet the required customer service levels, but the parties dispute whether this was due to ARCA’s failure to properly forecast average call volumes, or Skybridge’s failure to adequately perform its contractual agreements. In e-mail correspondence from March through June 2015, ARCA raised concerns about Skybridge’s customer service levels. ARCA never sought to terminate the contracts.

Issues began to arise in March 2016 regarding the timeliness of ARCA’s invoice payments. When the September invoice remained unpaid after 45 days, Skybridge provided ARCA notice on November 21, 2016, that it was terminating its services in five days due to ARCA’s failure to pay. In response, ARCA moved all of its customer service call-handling in-house four days after Skybridge’s termination notice.

ARCA sued Skybridge for breach of contract and breach of the implied covenant of good faith and fair dealing.¹ Skybridge counterclaimed for breach of contract and moved to dismiss ARCA's complaint. On March 29, 2017, the district court granted Skybridge's motion to dismiss on the basis that ARCA failed to state a claim for breach of contract and breach of the implied covenant of good faith and fair dealing due to Skybridge's use of the Canadian facility, but the district court denied the motion as to ARCA's claim for breach for early termination due to an ambiguity in the contracts' payment provisions.

The parties subsequently filed cross-motions for summary judgment. On January 4, 2018, the district court denied ARCA's motion, granted Skybridge's motion, dismissed ARCA's claims, and entered judgment in favor of Skybridge. The district court rejected ARCA's argument that it was entitled to withhold payments due to Skybridge's failure to meet SLA thresholds on the basis that ARCA failed to give the contractually required notice of service deficiencies. The district court also determined that ARCA's payments were unambiguously due within 45 days; that ARCA did not pay several invoices within 45 days; and that Skybridge properly terminated services on the basis of ARCA's late payments.

The district court determined that ARCA wrongly withheld payments totaling \$469,157.62, and entered judgment against ARCA on January 8, 2018 for that amount plus interest, costs, and attorney fees related to collection. On February 28, 2018, the district court entered an amended judgment of \$613,566.32 after granting Skybridge's application

¹ ARCA does not raise on appeal the district court's dismissal of its claims for breach of the implied covenant of good faith and fair dealing.

for interest (\$27,719.02), costs (\$2,822.18), and contract-based attorney fees (\$113,867.50). In awarding Skybridge interest, the district court determined the contractual interest rate of 1.5% per month was unreasonable, and awarded interest at the rate of .5% per month. These appeals followed.

D E C I S I O N

Use of Canadian Call Center

ARCA appeals the district court's dismissal pursuant to Minn. R. Civ. P. 12.02(e) of its claim for breach of contract pertaining to Skybridge's use of its Canadian facility as a call center.

When a case is dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim for which relief can be granted, we review the legal sufficiency of the claim de novo to determine whether the complaint sets forth a legally sufficient claim for relief. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). "We accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). "[A] pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (quotation omitted).

According to the Full Program SOW, "[b]eginning on or about January 1, 2015 [Skybridge] will develop a program at [Skybridge's] Greenfield facility in Minnesota as the primary facility and to use the Winnipeg office as backup/overflow to the Minnesota office to: (a) recruit and train qualified Brand Agents; (b) handle inbound volume

associated with ARCA’s contact center initiatives.” ARCA alleged that “[c]ontrary to this requirement and representation, Skybridge repeatedly and systematically routed calls to the Winnipeg facility, outside of the United States.”

The district court determined that ARCA failed to state a claim for breach of contract related to the location of Skybridge’s call center, because section 4 of the Full Program SOW allowed for the use of the Canadian facility. The district court concluded that there was no requirement in the Full Program SOW that Skybridge must perform a particular amount of call center services at any particular location.

ARCA asserts the district court’s determination that the Full Program SOW is silent on allocation of calls between the two centers is erroneous, because the provision at issue provides that the Minnesota location is the “primary facility” and refers to use of the Canadian facility as “backup/overflow to the Minnesota office[.]” Relying on the plain ordinary meaning of the words “primary²” and “backup³,” ARCA maintains it stated a claim for breach of contract when it alleged in its complaint that Skybridge “repeatedly and systematically” routed calls to the Canadian facility.

All that is required to state a claim under a notice-pleading standard is an allegation that Skybridge breached the Full Program SOW by handling calls at its Canadian call center without first exhausting the capacity of its Minnesota location, such that Minnesota did not serve as the primary location. *See Walsh*, 851 N.W.2d at 604-05 (“Minnesota is a

² “adj. 1. First or highest in rank or importance; principal.” *The American Heritage Dictionary of the English Language* 1398-99 (5th ed. 2011) (defining primary).

³ “n. 1a. A reserve or substitute ... 2a. Support or backing.” *The American Heritage Dictionary of the English Language* 132 (5th ed. 2011) (defining backup).

notice-pleading state and does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it.” (quotation omitted)). Taking the allegations as true, and construing all reasonable inferences in ARCA’s favor, the complaint alleges that Skybridge breached the Full Program SOW by “repeatedly and systematically” routing calls to the Canadian facility.

The district court’s dismissal of this claim was improper due to its failure to reasonably infer that the “systematic” use of the Canadian facility implies an allegation that Skybridge used it as the “primary” call center. Under rule 12.02(e), “a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.” *Bahr*, 788 N.W.2d at 80. ARCA could certainly introduce facts that support the contention that Skybridge breached the Full Program SOW by using its Canadian call center as the primary facility and the Minnesota call center as backup by systematically routing calls to Canada, contrary to the terms of the Full Program SOW. Because the district court failed to reasonably construe the inference that “systematic” implies “primary” in favor of ARCA, this portion of the district court’s order granting in part Skybridge’s motion to dismiss is reversed and remanded.

Ambiguity in the contracts’ conflicting payment provisions

ARCA argues that under the combined terms of the MSA and Full Program SOW, final payment on an invoice is due within 60 days. Therefore, when Skybridge provided notice on November 21, 2016 of its intent to terminate services for nonpayment of the September invoice 47 days after its receipt, either final payment was not due and it was not

in breach, or in the alternative, the payment provisions in the MSA and Full Program SOW create an ambiguity as to when payment is due, preventing an award of summary judgment in either party's favor.

“We review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). “We view the evidence in the light most favorable to the party against whom summary judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002) (citations omitted).

“Absent ambiguity, the interpretation of a contract is a question of law.” *Roemhildt v. Kristall Dev., Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011), *review denied* (Minn. July 19, 2011). “Whether language in a contract is plain or ambiguous is a question of law that we review de novo.” *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016). “The language of a contract is ambiguous if it is susceptible to two or more reasonable interpretations.” *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). “[W]he[n] [contract] language is ambiguous, resort may be had to extrinsic evidence, and construction then becomes a question of fact for the jury, unless such evidence is conclusive.” *Bari v. Control Data Corp.*, 439 N.W.2d 44, 47 (Minn. App. 1989), *review denied* (Minn. July 12, 1989).

The MSA, effective November 22, 2014, sets forth the general terms of the parties' relationship. The MSA defines the interrelationship between its terms and the terms of any subsequent SOW. Under section 2.1 of the MSA,

ARCA and [Skybridge] may agree that [Skybridge] shall provide additional Services which shall be described in an amended or new SOW . . . Any such new or amended SOW shall be signed by both parties and when executed shall become part of this Agreement and subject to the terms and conditions set forth herein . . . If the terms of any SOW conflict, the most recent version shall prevail unless the terms violate any law or cause this Agreement to be terminated.

The MSA also provides in section 9.10 that “[SOW] . . . shall be understood to incorporate the terms and conditions of this Agreement and read together [sic]. The SOW . . . shall prevail when in direct conflict with any term of this Agreement.”

Section 3.2 of the MSA provides for the following payment terms:

[Skybridge] will invoice ARCA for Services covered by a SOW which are due hereunder on a monthly basis. Payment will be due and payable thirty days (30) days [sic] after receipt unless otherwise specified. Amounts outstanding after thirty (30) days shall bear interest at 1.5% per month or part thereof. All amounts must be paid, including interest, within sixty (60) days. In the event ARCA fails to pay any amounts when due, [Skybridge] may terminate services without further notice[.]

Section 9 of the Full Program SOW, effective January 1, 2015, adds the following additional payment term within a section setting forth service rates: “[a]ll invoices will be due on a net-45 day basis.”

Neither the MSA nor the Full Program SOW define the term “net.” ARCA maintains that in business, and as used by the parties, the term “net” refers to the period before which interest begins to accrue, based upon the definition of “net” as: “*adj.* 1.

Business a. Remaining after all deductions have been made, as for expenses: *net profit*.” *The American Heritage Dictionary of the English Language* 1183 (5th ed. 2011) (defining net). Skybridge contends that “net” refers to the deadline by which final payment is due, based upon the definition of “net” as “2. Ultimate; final: *the net result*.” *Id.*

Based upon these differing definitions of the word “net,” Skybridge argues the net-45-day payment term replaces both the 30-day initial payment deadline and the 60-day final payment deadline contained in the MSA. ARCA contends the net-45-day term replaced only the 30-day initial payment deadline, after which interest began to accrue, leaving the 60-day final payment deadline in effect.

The district court initially found the payment terms in the MSA and Full Program SOW to be in direct conflict, and denied Skybridge’s motion to dismiss due to the ambiguity. However, in ruling on the parties’ cross-motions for summary judgment, the district court decided, without citation to any authority, that “[t]here can be no dispute that ‘net-45’ has a specific meaning in business and in law. It means simply that payment is due in full in 45 days from the date the services are provided.” On this basis, the district court deemed Skybridge was entitled to terminate services due to nonpayment and granted Skybridge’s motion for summary judgment.

As the district court initially determined, the direct conflict between the payment provisions contained in the MSA and Full Program SOW create two reasonable interpretations of what the parties intended by the net-45 payment term contained in the Full Program SOW. One reasonable interpretation, as proffered by ARCA, is that the net-45 payment term amended only the 30 day initial payment deadline in the MSA beyond

which interest began to accrue. Another reasonable interpretation, as proffered by Skybridge, is that the net-45 payment term amended both the 30 and 60 day deadlines in the MSA, such that complete and final payment is now due within 45 days, beyond which Skybridge is entitled to terminate services for nonpayment.

Taking recourse to the meaning of the word “net” does not resolve the resulting ambiguity. As quoted above, the dictionary definition encompasses both understandings of the word. Additionally, both parties cite to the online Investor Dictionary definition of “net-30,” which provides: “[l]egally speaking Net 30 means that the buyer will pay seller in full on or before the 30th calendar day . . . Net 30 payment terms typically have an interest penalty for not meeting these terms and they begin accruing on the 31st day after dispatch.” <http://investordictionary.com/definition/net-30>. The first half of this definition supports Skybridge’s interpretation, the second half supports ARCA’s.

Under sections 2.1 and 9.10 of the MSA, a SOW both incorporates the terms and conditions of the MSA, and prevails over those same terms and conditions when in “direct conflict.” Because both parties’ interpretations of the undefined “net-45” payment term are reasonable, an ambiguity exists as to whether the original 60-day final payment deadline was incorporated in the Final Program SOW or superseded by it. Therefore, summary judgment is reversed and the claim remanded so that extrinsic evidence can be presented to the trier-of-fact to resolve the ambiguity in the conflicting payment provisions of the two contracts.

ARCA's related claim for breach for early termination

In granting Skybridge summary judgment on its counterclaim for nonpayment, the district court, applying the same analysis, also granted Skybridge summary judgment on ARCA's claim that Skybridge breached both the MSA and Full Program SOW by terminating services for nonpayment prior to the 60 day final payment deadline. The analysis of this issue is the same as that for Skybridge's claim for nonpayment, and the district court's grant of summary judgment to Skybridge on the premature-termination issue is reversed and ARCA's claim for breach for early termination remanded to resolve the ambiguity in the inconsistent payment provisions of the MSA and Full Program SOW.

ARCA failed to provide formal notice within 30 days of alleged breach

The district court also granted Skybridge summary judgment on ARCA's claim for breach of contract due to Skybridge's failure to meet the agreed-upon service levels. The district court determined that the undisputed facts establish that ARCA failed to comply with the exclusive remedy provisions of the MSA, and therefore ARCA could not bring a claim for breach of contract for Skybridge's failure to meet contractual service levels.

Section 5 of the Full Program SOW sets forth the SLAs that govern Skybridge's performance in handling ARCA's customer service calls. The parties refer to this as the 80/30/5 standard, meaning Skybridge agrees to answer 80% of calls within 30 seconds, with a 5% abandonment rate. ARCA claims Skybridge breached the Full Program SOW by routinely failing to meet these SLAs.

Section 8.1 of the MSA provides the warranty and exclusive remedy for deliverables—i.e. SLAs—detailed in the Full Program SOW.

In the event that any deliverable described in a SOW fails to substantially conform to the specifications for such deliverable set forth in the SOW, and provided ARCA has given [Skybridge] written notice of such non-conformity within thirty (30) days after delivery of the deliverable, as the exclusive remedy, [Skybridge] shall within a reasonable period of time, and without further payment with respect to such deliverable, correct the non-conformance. Any liability for breach by [Skybridge] shall be limited to the Exclusive Remedies defined herein.

The MSA also contains a limitation of liability provision, section 7.1, which waives both Skybridge and ARCA's liability for incidental, consequential, special, punitive, and exemplary damages, lost profits, and lost opportunities, and also limits Skybridge's total liability to the lesser of either \$5,000 or the amount of fees it received under the agreement. Finally, the MSA also contains a separate exclusive remedy provision, section 7.3, which further states the remedies provided for by the MSA are exclusive of all other potential remedies.

ARCA argues it provided notice of non-conformity to Skybridge contrary to the district court's determination. While the e-mails relied upon by ARCA do contain references to poor SLA performance, even when viewed in the light most favorable to ARCA, none can reasonably be construed to constitute formal notice, as defined by the MSA, to Skybridge of nonconformity and ARCA's intent to invoke its limited remedy of cure for breach of the SLA standards.

On March 4, 2015, ARCA's Director of IT and Business Operation Services e-mailed Skybridge's Key Account Manager and asked, "[w]hen do you expect SLA's to get above 80 again?" This is merely a question, and makes no reference to a specific failure,

or an intent to provide written notice that ARCA is pursuing its remedies under the MSA. Similarly, on March 18, 2015, the ARCA IT Director e-mailed and asked “[a]ny idea on why our SLA are still suffering so much when we are running so close to forecast?” Following up, on March 19, 2015, the IT Director wrote: “[w]e have some customers that are getting very impatient and are seeking a more concrete timeframe. Any idea?” Again, this is a question and makes no reference to a specific deliverable deficiency within the prior 30 days with a request to cure.

Continuing this same e-mail exchange, the ARCA IT Director e-mailed Skybridge’s Chief Sales and Marketing Officer on March 19, 2015, and stated: “[j]ust want to keep you in the loop but we have a pretty serious matter going on in meeting service levels – clients are starting to complain and call us on our poor statistics. ... P.S. ... I know everyone is giving it their all but we do need to find a quick remedy soon.” The request “to find a quick remedy soon” is the closest these e-mails come to providing notice of nonconformity. However, there is still no reference to a specific failure to meet a specific deliverable within the last 30 days, or that ARCA is invoking its remedies under the MSA. The e-mail is phrased as an informal attempt to keep Skybridge’s Chief Sales and Marketing Officer “in the loop” regarding “a pretty serious matter going on in meeting service levels[,]” not an official notice from ARCA to Skybridge of a failure to comply with a specific contractual obligation.

The final entry in this chain on March 26, 2015 states, “I really haven’t heard anything on your commitment for Monday. SLA are still horrible and can almost guarantee next Monday will be a disaster again.” This too is a generalized complaint about SLA

performance, with no reference to a specific failure within the previous 30 days, or that ARCA is providing formal notice of noncompliance.

The remaining e-mails from ARCA employees to Skybridge employees are of a similar character to those set forth above. On April 30, 2015, an ARCA e-mail asked “[h]ow do you see us getting back to our SLA? This creates many red flags to our clients and am getting nervous that we will start seeing complaints again.” In a follow up e-mail ARCA wrote:

I understand your challenges but we need to get the SLA numbers as close as possible as I’m fielding a lot of challenges from our clients . . . I know we are making great progress so please don’t read me wrong but I’m concerned that we are reading into these numbers as though they are going to be equally shared throughout the week/month and that just will never happen.

The last e-mail provided by ARCA in opposition to Skybridge’s motion is a July 14, 2016 e-mail from ARCA’s Director of Call Center Operations, in which ARCA approves overtime to meet the 80% service level, presumably implying that Skybridge was not meeting that level.

As determined by the district court, none of these e-mails show that ARCA provided Skybridge with formal written notice of noncompliance of a contractual SLA within 30 days of a failure for a deliverable to substantially conform to specifications as required by section 8.1 of the MSA.

Furthermore, section 9.4 of the MSA sets forth the procedures by which the parties to the agreement are to provide one another with “notice.” Under that provision,

[a]ll notices under this Agreement shall be in writing and delivered to the addresses set forth as follows . . . and deemed effectively given (a) when delivered, if personally delivered; (b) on the date of delivery if mailed certified or registered mail, return receipt requested; or (c) when received by the party if given by confirmed facsimile transaction.

Section 9.4 does not provide for notice by e-mail. Therefore, there is no dispute of material fact that ARCA failed to provide notice in accordance with sections 8.1 and 9.4 of the MSA of Skybridge's failure to conform to SLA standards. Having failed to avail itself of its exclusive remedy under the terms of the parties' agreement, there is no basis to assert the exclusive remedy failed of its essential purpose. The district court's award of summary judgment to Skybridge dismissing ARCA's claim for breach of contract for failure to meet SLA requirements is therefore affirmed.

District court's award of interest is moot

By NORA, Skybridge appeals the district court's award of interest at a rate less than that set forth in section 3.2 of the MSA. Because we reverse and remand for trial both parties' claims for breach of contract stemming from Skybridge's termination of services due to non-payment, Skybridge's appeal is moot. The underlying judgment upon which the interest award is predicated is vacated, and we do not reach the merits⁴ of Skybridge's appeal.

Affirmed in part, reversed in part, and remanded.

⁴ While we do not reach the merits of Skybridge's related appeal, we reaffirm our supreme court's clear guidance: "[w]e have consistently stated that when a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004) (citations omitted).