

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECEIT

PART 60

603469/2006

NFL Enterprises LLC

vs  
Comcast Cable  
Seq. 002

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

Summary Judgment

his motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**  
MAY 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

MAY 08 2007

Dated: 5/4/07

*Bernard J. Fried*

**BERNARD J. FRIED** <sup>S.C.</sup>

Check one:  FINAL DISPOSITION <sup>1</sup>  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

*(Wiser) 1/1/11*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 60

-----X  
NFL ENTERPRISES LLC,

Plaintiff,

-against-

COMCAST CABLE COMMUNICATIONS, LLC,

Defendants.  
-----X

Index No. 603469/06

**FILED**  
MAY 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**Appearances**

**For Plaintiffs**

Covington & Burling LLP  
1330 Avenue of the Americas  
New York, New York 10019  
(C. William Phillips)

**For Defendants**

Davis Polk & Wardwell  
450 Lexington Avenue  
New York, New York 10017  
(Michael P. Carroll)

**FRIED, J.:**

In this declaratory judgment action, defendant Comcast Cable Communications, LLC (Comcast) moves for summary judgment. Plaintiff NFL Enterprises LLC (NFL) cross-moves for the same relief.

This action involves the right to broadcast National Football League (League) games on cable television. The League owns the right to broadcast live, regular season professional football games on television. The League licenses these rights to NFL, a wholly-owned subsidiary of the League. NFL is the owner of the NFL Network, while Comcast is the nation's largest cable television operator.

In 2004, the NFL Network was relatively new, and consisted mostly of sports commentary and features. NFL, in search of a cable system to distribute the NFL Network, approached Comcast in 2004 with an offer which culminated in two letter agreements, both entered on August 11, 2004, dealing with both the distribution of the NFL Network by Comcast, and Comcast's potential rights to negotiate to acquire telecast rights to live football games.

The two agreements are labeled the "Out-of-Market Package Letter of Understanding" (the Negotiation Agreement) and the "NFL Network Affiliation Agreement" (the Affiliation Agreement). According to the parties, the operative words in the Negotiation Agreement are: "[t]he points below reflect our understanding of the terms and conditions governing negotiation of the carriage of (a) a package of live, out-of-market, NFL games (Out-of-Market Package) and (b) a package of live, nationally-telecast NFL games (Additional Cable Package) by Comcast Communications ... ." The Negotiation Agreement (Carroll Aff., Ex 3) states that "defined terms shall have their meanings as set forth in the Affiliation Agreement," and also provides that negotiations relating to carriage of the two types of games packages during the 2006 and subsequent seasons would be made "in good faith." *Id.*

The disputed provision in the Affiliation Agreement (*id.*, Ex. 4) is found in Paragraph 3 (a) of Ex. A to that agreement (Paragraph 3). This paragraph reads:

[i]n the event that [Comcast] or a Comcast Company does not reach an agreement with [NFL] or an NFL Company concerning carriage of (i) any package of live, out-of-market regular season NFL games (each such package, an "Out-of-Market Package") or (ii) any package of live, nationally-telecast NFL games (each such package, an "Additional Cable Package") on or before July 31, 2006, then:

(a) [Comcast] shall not be obligated to distribute the [NFL Network] on D2 (or any higher-penetrating level of service) on any System, and may distribute [the NFL Network] on any System as part of any tier, package, or level of service (including a Sports Tier) ... .

According to Comcast, the NFL Network had, at the time of the two agreements, “limited commercial appeal.” Comcast Brief, at 8. However, the opportunity to telecast packages of live NFL games was extremely valuable, as only broadcasters (i.e., ABC, CBS and Fox), ESPN and DirecTV, owned such rights. Comcast maintains that the Affiliation Agreement was intended to allow Comcast into the “NFL club” in exchange for Comcast’s help in “launching” the NFL Network. *Id.*

As set forth above, Comcast’s obligation to place the NFL Network at the highest possible level of service (the “D2” level), where it would reach the greatest number of people, was limited. Should the parties fail to reach the agreement contemplated in Paragraph 3 by July 31, 2006, Comcast would be free to distribute the NFL Network on a “sports tier,” which would reach far fewer customers. Placing the NFL Network on a sports tier would be detrimental to the NFL Network because, on a sports tier, the NFL Network would only be available to those customers willing to pay more to receive the programming, instead of being available to Comcast’s full range of customers.

After the execution of the two letter agreements, Comcast and the NFL commenced negotiations to permit Comcast’s cable channel, the Outdoor Life Network (OLN), to telecast nationally a package of live, regular season, NFL games. However, the deal failed to reach fruition. In fact, in January 2006, NFL licensed the games package to its own NFL Network.

On June 15, 2006, the NFL sent Comcast a letter (the June 2006 Offer) (Carroll Aff., Ex. 6) stating as follows:

[t]his letter constitutes an Offer from [NFL] to [Comcast] to distribute, as part of [the NFL Network] on a surcharge basis, [NFL's] live regular season NFL games package to be telecast by [NFL] (the "Games Programming"). This Offer is made in accordance with paragraph 5 of Exhibit A of the Affiliation Agreement. Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Affiliation Agreement.

The terms of this Offer are as follows: Beginning with the 2006 NFL season, [NFL] will make the Games Programming available to [Comcast] for distribution on the [NFL Network]. In consideration for inclusion of the Games Programming in [Comcast's] distribution of the [NFL Network], [Comcast] will pay to [NFL] the License Payment plus the surcharge of Fifty-Five cents (\$.55) per subscriber receiving the [NFL Network] for each month of the twelve (12) month period commencing with the first month of each NFL regular season in which the Games Programming is carried by [Comcast] as part of the [NFL Network].

From and after the date that [Comcast] accepts this Offer in writing, the Affiliation Agreement shall be deemed to be amended, and shall be automatically amended, to include the terms hereof. Further to the Affiliation Agreement, this offer must be accepted, in writing, within thirty (30) days after receipt of this letter or it will be deemed rejected.

Paragraph 5 of Exhibit A to the Affiliation Agreement (Paragraph 5), to which the above letter refers, provides, in pertinent part, that:

[i]f [NFL] obtains rights to distribute live regular season NFL games on the [NFL Network], [NFL] may offer (an "Offer") to [Comcast], on a surcharge basis, packages of such live regular season NFL games (Additional Programming), and [NFL] shall offer to [Comcast] any Additional Programming made available to any distributor as part of, or in connection with, the [NFL Network]. The Offer will set forth the Additional Programming to be offered and a related surcharge that will not exceed the lesser of (i) Fifty-Five Cents (\$.55) per [NFL Network] Subscriber per month for all NFL games on the [NFL Network] during such month (regardless of whether such games are made available to [Comcast] in one Offer or more than one Offer), or (ii) the surcharge per [NFL Network] subscriber paid by any other distributor for such Additional Programming (the "Surcharge").

Carroll Aff., Ex. 4.

Comcast requested an extension of time in which to respond to the June 2006 Offer. An extension was granted, in a letter from NFL dated July 14, 2006, giving Comcast until 5:00 P.M. on July 28, 2006 to accept the June 2006 Offer. This letter reiterated that the June 2006 Offer was made pursuant to Paragraph 5, and, purportedly in response to concerns expressed by Comcast, stated that “[a]ll terms, conditions and definitions in the Affiliation Agreement and the June 1, 2006 Offer letter remain in effect.” Carroll Aff., Ex. 7.

By a letter dated July 28, 2006 (*id.*, Ex. 8), Comcast accepted NFL’s Offer. The July 28, 2006 letter concluded, “[a]s stated in your July 14, 2006 letter, and as we discussed on July 26th and July 27th, all terms, conditions, and definitions included in the Affiliation Agreement (including the surcharge MFN provisions set forth in Section 5 of Exhibit A of the Affiliation Agreement, and [Comcast’s] right to distribute the [NFL Network] as part of any tier, package, or level of service) remain in full force and effect.” In a letter dated July 28, 2006, NFL thanked Comcast for its acceptance of the June 2006 Offer, and stated that Comcast’s acceptance of the June 2006 Offer did not “otherwise amend any of the terms and conditions of the Affiliation Agreement ... as those terms and conditions exist as of the date of the Offer.” Carroll Aff., Ex. 9.

In late September, Comcast informed NFL that Comcast would be launching the NFL network on a sports tier on “recently acquired cable systems.” Comcast Brief, at 14. Although NFL did not initially express any discontent, it has refused to give Comcast the technical support Comcast needs in order to allow it to place the NFL Network on the sports tiers.

NFL has made it clear that it does not intend to allow Comcast to distribute the NFL Network on a sports tier. It is NFL's position that the agreement which the parties reached on July 28, 2006 did not trigger the exception in Paragraph 3 which would allow Comcast to tier. Comcast, on the other hand, insists that the parties never reached an agreement as to the carriage of an "Additional Cable Package," as that term is defined in both the Negotiation and Affiliation Agreements, by July 31, 2006, leaving alive Comcast's right to offer the NFL Network on a sports tier.

Comcast's basic argument is that the offer which was made to it in the June 2006 letter was not for an "Additional Cable package" under Paragraph 3, but was explicitly for a package of "Additional Programming" to be telecast on the NFL Network pursuant to Paragraph 5. As such, the acceptance of the June 2006 Offer did not affect Comcast's right to offer the NFL Network on a sports tier. Comcast maintains that the subject matter of the two provisions is different, in that they discuss the carriage of two different types of games packages, and that Paragraph 5 deals with the carriage of programming specifically on the NFL Channel, while Paragraph 3 does not. They point out, in fact, that Paragraph 3 contains no reference at all to the NFL Network.

Comcast insists that the Negotiation Agreement and the Affiliation Agreement are, as a matter of law, to be read as one, comprehensive, agreement, having been executed on the same day, concerning the same subject matter: negotiation of Comcast's right to telecast certain, discrete types of packages of NFL games on a Comcast-owned network, rather than on the NFL Network. It points out that the Negotiation Agreement, and its agreement to negotiate in good faith for a package of Additional Cable Programming, makes no mention

of the NFL Network at all, and that, in fact, NFL did not have the right, at the time when the Negotiation Agreement was entered, to telecast games on the NFL Network. Paragraph 5 specifically states that it is provisioned on NFL gaining that right in the future.

Comcast emphasizes the fact that the two games packages are described and defined differently in each of the two paragraphs, and argues that “live regular season NFL games” is not the same thing as “live, nationally-telecast games.” Comcast does not believe that the term “nationally-telecast,” as found in Paragraph 3, can be read to mean nationally-telecast by the NFL on its own channel (such as in the agreement that was reached), when, under Paragraph 3, it was Comcast which was meant to obtain the right to nationally telecast the games on its own channel.

Other variations in the two provisions are raised to support Comcast’s position. Comcast refers to the terms of Paragraph 5, which calls for distribution of a package of games on the NFL Network on a capped per-subscriber surcharge basis, as being wholly different in scope and purpose from the terms of Paragraph 3, but as matching the terms of the June 2006 Offer. It also differentiates the provisions by stressing that, under Paragraph 5, no “negotiation” was required for the parties to reach agreement, while negotiation was a prerequisite under the Negotiation and Affiliate Agreements. Rather, Paragraph 5 requires a simple offer and acceptance procedure, to be accepted within a prescribed amount of time. Again, as Comcast points out, NFL tracked those procedures when it made the June 2006 Offer.

Finally, Comcast offers parol evidence as to the events surrounding the negotiations concerning the 2004 agreements, as well as for the negotiations of the July 28, 2006



agreement, in the event that the court finds ambiguity in the various agreements.

The crux of the NFL's argument is that there is "no distinction of substance" between the games packages set forth in Paragraph 3 and that described in Paragraph 5 (NFL Brief, at 13), and that, most importantly, Paragraph 3 does not limit its scope to agreements to telecast NFL games on a Comcast-owned network. NFL agrees that the Negotiation Agreement, in section (b)<sup>1</sup>, required it to negotiate for the rights to telecast a package of live, nationally-telecast NFL games, i.e, an "Additional Cable Package," with Comcast on a Comcast-owned Network, such as OLN. NFL Brief, at 5. It claims, however, that "Additional Cable Programming," as defined in Paragraph 3, is broad enough to encompass, and was meant to encompass, "Additional Programming" under Paragraph 5, and specifically, and necessarily, encompassed any agreement to carry live NFL games on the NFL Network. NFL, in its Reply Brief, reiterates its stance that the Negotiation Agreement is of "historical interest" only. Reply Brief, at 3. Therefore, apparently, the words "by Comcast", which might imply that the Affiliation Agreement must involve the carriage of games packages on a Comcast network, do not apply to the Affiliation Agreement. The Affiliation Agreement, claims NFL, contains no such restriction.

NFL's reasoning follows, it explains, from the inclusion of the words "with Network" (i.e., NFL) in Paragraph 3. NFL argues that the only thing that this language "*could* have contemplated [emphasis in original]," was "an agreement between Comcast and the *NFL Network* for the distribution of live NFL games on the NFL Network [emphasis supplied],"

---

<sup>1</sup>

Neither side argues that an agreement under Paragraph 3 (a) was contemplated by the parties.

such as the package in Paragraph 5. NFL Brief, at 12. This is because, according to NFL, NFL did not have the right in 2004 to distribute games anywhere but on its own network, and could not have negotiated with Comcast for the right to broadcast over a Comcast network.

*Id.* According to NFL's Vice President of International Media, Charles White:

[t]he NFL Network does not have authority to sublicense the live regular season NFL games it has obtained via license from the League. As Comcast has been told and understands, only the League has such rights. The phrase "Network or an NFL Company" in Paragraph 3 demonstrates that Paragraph 3 cannot support the interpretation that Comcast advances; the only kind of agreement for an Additional Cable Package between Comcast and "Network" would be one that would allow Comcast the right to carry games *on the NFL Network*; if paragraph 3 were limited to contracts affording Comcast the right to carry games on one of its own networks, there would have been no reason to include the word "Network" [emphasis in original].

White Aff., ¶ 16. NFL maintains that "the purpose of including "with Network" in Paragraph 3 must have been to *confirm* that agreements made pursuant to Paragraph 5 were within its scope [emphasis in original]." NFL Brief, at 12. NFL also argues that the words "NFL Company" in Paragraph 3 could "encompass" the NFL Network (NFL Brief, at 12), so as to bring an agreement under Paragraph 5 into Paragraph 3. *Id.*

In its Reply Brief, NFL also states that there is essentially no difference between the two games packages because a package under Paragraph 5 necessarily is "nationally-telecast," despite the failure of the provision to say so. Reply Brief, at 2. NFL explains that the words "*any* package of live, nationally-telecast NFL games [emphasis in original]," as set forth in Paragraph 3 (Reply Brief, at 5), can mean a "live regular season" games package, such as is defined in Paragraph 5. According to NFL, all regular season NFL games are "nationally-televised"; that is, they may be "aired nationwide without limitation based on geographic region or local market, and are telecast in time periods (called "national windows") when no

other NFL games are scheduled.” *Id.*, at 10; White Aff., ¶ 13.

In sum, according to NFL nothing in Paragraph 3 requires that an agreement be reached giving Comcast the right to broadcast on its own network before the exception to tiering is defeated, and that Paragraph 3 applies to the agreement which was reached, defeating Comcast’s right to tier.

Each side in this suit seeks a summary judgment, granting it a declaratory judgment that it is in the right as to its interpretation of the various agreements in the context of the final July 28, 2006 agreement for distribution of the NFL Network.

It is established that the proponent of a summary judgment motion must “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to eliminate any material issues of fact.” *Epstein, Levinsohn, Bodine, Hurwitz & Weinstein, LLP v Shakedown Records, Ltd.*, 8 AD3d 34, 35 (1st Dept 2004); see *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Upon submission of such evidence, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to raise a material issue of fact.” *Lewis v Safety Disposal System of Pennsylvania, Inc.*, 12 AD3d 324, 325 (1<sup>st</sup> Dept 2004); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

As the parties recognize, the Court of Appeals has “long adhered to the sound rule in the construction of contracts, that where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language [interior quotation marks and citation omitted].” *R/S Associates v New York Job Development Authority*, 98 NY2d 29, 32 (2002). “[W]hen parties set down their agreement in a clear, complete document, their writing should

as a rule be enforced according to its terms.” *Id.*, quoting *Reiss v Financial Performance Corporation*, 97 NY2d 195, 198 (2001); *see also Walters v Great American Indemnity Company*, 12 NY2d 967 (1963).

I do not find any ambiguity in the various agreements. As Comcast contends, the Negotiation Agreement and the Affiliation Agreement must be read as one agreement, as having been executed at the same time, as part of the same understanding. *See Nau v Vulcan Rail & Construction Company*, 286 NY 188 (1941); *PT. Bank Mizuho Indonesia v PT. Indah Kiat Pulp & Paper*, 25 AD3d 470 (1st Dept 2006); *BWA Corp. v Alltrans Express U.S.A., Inc.*, 112 AD2d 850 (1st Dept 1985). Therefore, by inclusion of the words “by Comcast Cable Communications, LLC or any other entity controlling, controlled by, or under common control with Comcast Cable Communications, LLC (individually and collectively, “Affiliate),” in the Negotiation Agreement, these words are incorporated into the Affiliation Agreement, so as to provide that the negotiation for the telecast of “any package of live, nationally-telecast NFL games” would be for telecast “by Comcast,” i.e., on a Comcast-owned network. NFL’s claim that it had no right to negotiate for the carriage of games on a Comcast-owned network when it entered the two agreements is not well taken, in light of the fact that NFL did just that for months, when it negotiated with Comcast for the carriage of games on OLN.

If that were not enough, it is easily determined that an agreement under Paragraph 5 is a distinct agreement from an agreement under Paragraph 3. First, the parties used different terms to describe the two types of games packages. When parties use different terms in a contract, it is assumed they do so to ascribe different meanings for those terms. *See Frank B.*

*Hall & Co. of New York, Inc. v Orient Overseas Associates*, 48 NY2d 958 (1979). The terms package of “live, nationally-telecast NFL games” (Additional Cable Package) is not the same as a package of “live regular season NFL games” (Additional Programming), because, assuming that “nationally-telecast” can be read into Paragraph 5, this type of telecast is limited by the terms of the provision to games which can be telecast by the NFL Network, not by a Comcast-owned network. As a result, there is nothing to indicate that Paragraph 3 is meant to incorporate agreement under Paragraph 5.

Further, NFL explicitly indicated in its letter to Comcast that the June 2006 Offer was made under Paragraph 5, and incorporated the terms of that provision, such as the capped per-subscriber surcharge, and the 30-day period for acceptance of a straight-forward, non-negotiable offer. Because of this, there is nothing to indicate that this offer was anything but an offer under Paragraph 5.

NFL’s argument that “only ‘agreement with Network’ that *could* have been contemplated [emphasis in original], NFL Brief, at 12)” by the inclusion of the word “Network” in Paragraph 3 “was an agreement between Comcast and the NFL network for the distribution of live NFL games on the NFL Network” is curious. The word “Network” is defined in paragraph 3 as “NFL Enterprises LLC,” that is, plaintiff. It does not mean “NFL Network.” The only party Comcast was negotiating with was NFL, so it is not particularly noteworthy that the words “with Network” (i.e., NFL) appear in the provision. Nor does the provision discuss or refer to the distribution of live NFL games on the NFL Network. This argument does not clinch NFL’s case.

As a result of the foregoing, the exception to tiering in Paragraph 3 never occurred, and Comcast is free to distribute the NFL Network on a sports tier. There is no need to consider parol evidence in order to reach this determination.

Accordingly, it is

ORDERED that the motion for summary judgment brought by defendant Comcast Cable Communications, LLC is granted; and it is further

ORDERED that the cross motion brought by NFL Enterprises LLC is denied; and it is further

ADJUDGED and DECLARED that defendant Comcast Cable Communications, LLC is entitled to distribute the NFL Network on a sports tier, under the agreements between the parties.

Dated: 5/4/07

ENTER:



J.S.C.

**BERNARD J. FRIED**  
J.S.C.

**FILED**

MAY 08 2007

NEW YORK  
COUNTY CLERK'S OFFICE