



ARBITRATION COURT OF THE SARATOV REGION

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In the name of the Russian Federation

DECISION

Saratov city

09 October 2014

Case No. A57-9276 / 2014

The operative part of the decision was announced on September 30, 2014. The full text of the decision was made on October 07, 2014.

The Arbitration Court of the Saratov Region, composed of Judge Sh.B. Kulakhmetov, while taking the minutes of the court session by the assistant judge M.A. Tsaruk, having considered in open court the case on the claim of the ALS and TEK Company Limited Liability Company, Saratov , OGRN 1026402661108 to the closed joint stock company firm "SMUR", Voronezh, OGRN 1023601610878 for the recovery of a penalty in the amount of 328,042 rubles. 37 kopecks, with participation in the court session: from the plaintiff - Lednev V.A. (power of attorney dated 18.11.2013 No. 1434, passport was examined), from the defendant - V.S. Zhukov. (power of attorney dated 05/22/2014, passport was reviewed),

found:

Limited Liability Company ALS and TEK filed a claim to the Arbitration Court of the Saratov Region against the closed joint-stock company firm SMUR to recover penalties for late payment under the agreement dated 04.09.2012 No. 3 / 12-12 in the amount of 328,042 rubles ... 37 kopecks.

The case is considered in the order of Articles 153-166 of the Arbitration Procedure Code of the Russian Federation. There were no applications in accordance with Articles 24, 47, 48 of the Arbitration Procedure Code of the Russian Federation.

The plaintiff's representative at the hearing supported the claim in full and gave his explanations.

The defendant objects to the satisfaction of the claims on the grounds set out in the response to the claim. Submitted a counter-calculation of interest under the contract.

In accordance with Article 163 of the Arbitration Procedure Code of the Russian Federation, at the hearing scheduled for September 25, 2014, a break was announced until September 30, 2014 until 10:00. 45 minutes, about which the protocol definition was made.

After examining the case materials, hearing the representative of the plaintiff and the defendant, checking the arguments set out in the statement of claim, withdrawing the claim, examining the written evidence, guided by the adversarial principle of the parties, enshrined in Article 9 of the Arbitration Procedure Code of the Russian Federation, as well as Article 123 of the Constitution of the Russian Federation, the court came to the conclusion that the claim are subject to satisfaction in part on the following grounds.

As follows from the materials of the case, on September 4, 2012 between the plaintiff and the defendant, a contract for the sale and purchase of optical fibers and a share in the right of common

shared ownership in a fiber-optic communication line in the Voronezh and Saratov regions No. 7-17), according to which the buyer undertakes to pay and take ownership, and the Seller undertakes to transfer the following Property to the ownership of the Buyer after payment:

1.1.1 four OV of G.652 and 4/72 (four seventy-second) stakes in the right of common shared ownership of the sheath, protective and power elements of an optical cable (OC), couplings, crosses in the Borisoglebsk-Rogachevka FOCL in the section from the M2A coupling Regional Broadcasting Center in Tellermanovsky settlement, Gribanovsky District, Voronezh Region, up to the MI clutch at the automatic telephone exchange of OJSC

Rostelecom Borisoglebsk, st. K. Marx, 76 with a total length of 6.8 km (six kilometers eight hundred meters).

1.1.2. four OVs of the G.652 standard and 4/64 (four sixty-fourth) shares in the right of common share ownership of the shell, protective and power elements of an optical cable (OC), couplings, crosses in the Saratov-Ozinki FOCL with a total length of 345.078 km (Three hundred forty-five kilometers seventy-eight meters).

1.1.3. The individualizing signs of the transferred Property, as well as the route of passage of the FOC, the list of sections of the OV, the contractual price of the OV are indicated in the Statement of the transferred property (Appendix No. 1 to this Agreement).

The total length of the OC, which includes the transmitted OM, is 351.878 km (Three hundred and fifty-one kilometers, eight hundred and seventy-eight meters).

In Section 2, the parties have agreed on the rights and obligations of the parties.

In Section 3, the parties agreed on the value of the contract, the procedure for settlements and transfer of property for use and ownership.

3.5. The total cost of the Property and the Share transferred from the Seller to the Buyer under this agreement is 18,520,211 rubles. 79 kopecks, plus VAT 18% - 3 333 638 rubles. 12 kopecks

3.7. Payments and transfer of the Property first for temporary use, and then the property is made in stages in the following order:

3.7.1. The first payment in the amount of 25 (twenty five) percent of the value of the Property, amounting to 4 630 052.95 (four million six hundred thirty thousand fifty two) rubles 95 kopecks, plus 18% VAT in the amount of 833 409 rubles. 53 kopecks (Eight hundred thirty-three thousand four hundred and nine) rubles 53 kopecks, the buyer makes within a period not later than 10 days after receiving the invoice issued by the Seller. The Seller undertakes to issue an invoice within 3 calendar days after signing the Agreement by both Parties.

3.7.2. After the Buyer makes the first payment, the Seller, within 10 (Ten) calendar days, carries out the procedure for the acceptance and transfer of property for temporary use to the Buyer of 4 (Four) optical fibers in the FOCL Saratov - Ozinki and FOCL ORTPTS - Borisoglebsk, specified in the Statement of the transferred property for temporary use (Appendix No. 1 to this Agreement) and the Parties sign the Act of acceptance and transfer of property for temporary use (Appendix No. 2 to this Agreement) of 4 (four) optical fibers in FOCL Saratov - Ozinki and FOCL ORTPTS - Borisoglebsk.

3.7.3. After the Seller has provided 4 (Four) optical fibers and the Parties have signed the Transfer and Acceptance Certificate of 4 (Four) optical fibers in the Saratov-Ozinki FOCL and ORTPTS-Borisoglebsk for temporary use, the Buyer within 10 (Ten) calendar days after signing the specified Transfer and Acceptance Certificate for temporary use makes payment of the second payment in the amount of 25 (twenty five) percent of the value of the Property, amounting to 4 630 052 rubles. 95 kopecks (Four million six hundred thirty thousand fifty two) rubles 95 kopecks, plus 18% VAT in the amount of 833 409 rubles. 53 kopecks (Eight hundred thirty-three thousand four hundred and nine) rubles 53 kopecks. If the second payment is not made within the specified period, the temporary use of 4 (four) optical fibers in the Saratov-Ozinki FOCL and ORTPTS-Borisoglebsk FOCL shall be terminated until the second payment is made.

After the Buyer makes the second payment, the Seller, within 30 (thirty) calendar days, carries out the procedure for transferring to the Buyer's ownership of 4 (four) optical fibers in the Borisoglebsk-Rogachevka FOCL in the section from the M2A clutch of the ORTPTS settlement of Tsllsmanovsky, Gribanovsky district, Voronezh region to the MI ATS OJSC

Rostelecom Borisoglebsk, st. K. Marx, 76 and 4 (four) optical fibers in the fiber-optic communication line Saratov - Ozinki on the Ozinki-Ershov Section, indicated in the Statement of the transferred Property in ownership according to the I stage (Appendix No. 3 to this Agreement) and the

Parties sign the Act of acceptance and transfer of property to property under stage I (Appendix No. 4 to this Agreement) 4 (four) optical fibers in the Borisoglebsk-Rogachevka FOCL in the section from the M2A coupling of the ORTPTS. Tellermanovskiy, Gribovskiy District, Voronezh Region, up to the M1 ATS coupling of OJSC Rostelecom Borisoglebsk, st. K. Marx, 76 and 4 (four) optical fibers in FOCL Saratov - Ozinki on the Ozinki - Ershov section.

3.7.4. The third payment in the amount of 50 (Fifty) percent of the value of the Property, amounting to 9 260 105 rubles. 90 kopecks. (Nine million two hundred sixty thousand one hundred and five) rubles 90 kopecks, plus 18% VAT in the amount of 1 666 819 rubles. 06 kopecks (One million six hundred sixty six thousand eight hundred nineteen) rubles 06 kopecks is paid by the Buyer within one calendar year from the date of signing the contract, after the first and second payments are made.

3.7.5. After the Buyer makes the third payment (clause 3.7.5.), The Seller, within 30 (Thirty) calendar days, performs the procedure for transferring and accepting 4 (Four) optical fibers into the ownership of the Buyer in the Saratov-Ozinki FOCL on the Ershov-Saratov section, specified in the Vedomosti of the transferred Property into ownership under Stage II (Appendix No. 5 to this Agreement) and the Parties sign the Act of Acceptance and Transfer of Property into Ownership under Stage II (Appendix No. 6 to this Agreement) 4 (four) optical fibers in the Saratov-Ozinki FOCL on the Ershov section - Saratov. If the third payment is not made within the specified period, the temporary use of 4 (Four) optical fibers in the FOCL on the Ershov-Saratov section is terminated until the third payment is made.

In Section 4 the parties agree on the responsibilities of the parties.

In section 5, the parties agreed on the procedure for resolving disputes.

5.2. If a mutually acceptable solution is not reached within 30 calendar days from the date of sending the claim, the disputed issue is subject to consideration in the Arbitration Court at the location of the plaintiff in accordance with the current legislation of the Russian Federation.

The agreement was signed by the parties and sealed.

By signing this agreement, the parties agreed on all the essential conditions necessary for this type of agreement.

Within the framework of the concluded agreement, after receiving the first payment, the plaintiff in accordance with clause 3.7.2. of the contract transferred the property to the defendant for temporary use, which is confirmed by the act of acceptance and transfer of 10.10.2012. A copy of this act is attached to the case file (Id 56-58).

The factual circumstances of the case indicate that the parties entered into a sale and purchase agreement, relations under which are governed by the provisions of Chapter 30 of the Civil Code of the Russian Federation.

In accordance with article 454 of the Civil Code of the Russian Federation, under a sale and purchase agreement, one party (the seller) undertakes to transfer the thing (goods) to the ownership of the other party (the buyer), and the buyer undertakes to accept the goods and pay a certain amount of money (price) for it.

In accordance with part 1 of Article 486 of the Civil Code of the Russian Federation, the buyer is obliged to pay for the goods immediately before or after the seller transfers the goods to him, unless otherwise provided by the Civil Code of the Russian Federation, other law, other legal acts or the contract of sale and does not follow from the essence of the obligation ...

According to article 8 of the Civil Code of the Russian Federation, civil rights and obligations arise from the grounds provided for by law and other acts, as well as from the actions of citizens and legal entities, which, although not provided for by law or such acts, but by virtue of general principles and the meaning of civil legislation give rise to civil rights and obligations. In accordance with this, civil rights and obligations arise, in particular, from contracts and other transactions provided for by law, as well as from contracts and other transactions, although not provided for by law, but not contradicting it.

By virtue of the provisions of Articles 309, 310 of the Civil Code of the Russian Federation, obligations must be fulfilled properly in accordance with the terms of the obligation and the requirements of the law, other legal acts, and in the absence of such conditions and requirements, in accordance with the customs of business or other usually presented requirements. Unilateral refusal to

fulfill an obligation and unilateral change of its conditions are not allowed, except in cases provided by law. The creditor has the right to demand that the debtor fulfill his obligation (Article 307 of the Civil Code of the Russian Federation).

In violation of the above provisions of the law, the buyer did not properly fulfill the obligations under the contract.

The second payment by the defendant was made in violation of the terms of payment provided for in clause 3.7.3. contract.

The plaintiff charged the defendant a penalty for violation of the payment terms for the period from 20.10.2012 to 28.12.2012 in the amount of 328,042 rubles. 37 kopecks.

The plaintiff sent the defendant a claim No. 1833 of 12/30/2013 with a proposal to voluntarily transfer the fine in the amount of RUB 328,042 within 3 working days from the date of receipt of the claim. 37 kopecks. to the bank account of the plaintiff. This claim was left by CJSC "SMUR" without proper consideration and response.

According to clause 4.3. of the contract in case of delay by the Buyer of payment, the Seller has the right to decide to collect a penalty from the Buyer in the amount of 0.1% of the amount overdue in payment for each day of delay, while the total amount of the penalty cannot exceed 10% of the amount overdue in payment.

In accordance with Article 329 of the Civil Code of the Russian Federation, the fulfillment of an obligation may be secured by a forfeit.

A forfeit is a sum of money determined by a law or an agreement, which the debtor is obliged to pay to the creditor in the event of non-fulfillment or improper fulfillment of the obligation (Part 1 of Article 330 of the Civil Code of the Russian Federation).

As evidenced by the materials of the case, between the parties there was a relationship of obligation, regulated by the relevant norms of civil law.

The fact of delay in payment for the property is confirmed by the written materials of the case and the defendant is not contested.

The defendant does not agree with the start and end date of the delay period, presented a counter-calculation of penalties, according to which he considers that the delay period is from 21.10.2012 to 27.12.2012, the amount of the penalty is 319,315 rubles. 29 kopecks

At the hearing, the plaintiff explained that he did not object and agreed with the counter-calculation of penalties presented by the plaintiff, which is reflected in the audio recording of the hearing on September 30, 2014.

In accordance with the provisions of Article 333 of the Civil Code of the Russian Federation, the court has the right to reduce the penalty if the penalty is clearly disproportionate to the consequences of the violation of the obligation.

Clause 42 of the Resolution dated 01.07.1996 of the Plenum of the Supreme Court of the Russian Federation No. 6 and the Plenum of the Supreme Arbitration Court of the Russian Federation No. 8 "On some issues related to the application of part one of the Civil Code of the Russian Federation" explains that when deciding on the reduction of the penalty, in view of that the amount of the forfeit may be reduced by the court only if the forfeit payable is clearly disproportionate to the consequences of the violation of the obligation.

The criteria for establishing disproportion in each specific case can be: excessively high percentage of the penalty; the amount of the penalty significantly exceeds the amount of possible losses caused by the breach of obligations; duration of default and others.

It is within the jurisdiction of the court to establish a clear disproportionate effect on the consequences of a breach of obligations.

The legislator's imposition on the courts of deciding the issue of reducing the amount of the penalty, when it is clearly disproportionate to the consequences of the violation of obligations, follow from the constitutional prerogatives of justice, which in its essence can be recognized as such only if it meets the requirements of justice (Article 14 of the International Covenant on Civil and Political Rights).

In this regard, the Constitutional Court of the Russian Federation has repeatedly indicated that the application of paragraph 1 of Article 333 of the Civil Code of the Russian Federation is not a right, but an obligation of the court in order to establish a balance between the measure of liability applied to the violator and the assessment of the actual amount of damage (Definitions of the

Constitutional Court of the Russian Federation dated December 21, 2000 No. 263-O, dated October 14, 2004 No. 293-O).

In accordance with clause 1 of Resolution No. 81 of the Plenum of the Supreme Arbitration Court of the Russian Federation "On Certain Issues of Application of Article 333 of the Civil Code of the Russian Federation" of December 22, 2011, when applying to the court with a claim to recover a penalty, the creditor must prove non-fulfillment or improper fulfillment of the obligation by the debtor, which according to the law or agreement of the parties, it entails the emergence of the obligation of the debtor to pay the creditor the corresponding amount of money as a penalty (paragraph 1 of Article 330 of the Civil Code of the Russian Federation). The proportionality of the penalty to the consequences of the violation of the obligation is assumed.

Proceeding from the principle of exercising civil rights by one's own will and in one's own interest (Article 1 of the Civil Code of the Russian Federation), a penalty can be reduced by a court on the basis of Article 333 of the Code only if there is a corresponding statement from the defendant.

In this case, the defendant must provide evidence that the penalty is clearly disproportionate to the consequences of the violation of the obligation, in particular, that the possible amount of the creditor's losses that could arise as a result of the violation of the obligation is significantly lower than the calculated penalty. To refute such a statement, the creditor has the right to submit arguments confirming the proportionality of the penalty to the consequences of the violation of the obligation. Since, by virtue of paragraph 1 of Article 330 of the Civil Code of the Russian Federation, upon a claim for payment of a penalty, the creditor is not obliged to prove the damage caused to him, he may, in refutation of the defendant's statement on the reduction of the penalty, provide evidence showing what consequences such violations of obligations have for the creditor acting in civil circulation reasonably and prudently under comparable circumstances, including those based on average market indicators (change in interest rates on loans or market prices for certain types of goods in the relevant period, fluctuations in exchange rates, etc.).

According to clause 2 of Resolution No. 81 of the Plenum of the Supreme Arbitration Court of the Russian Federation of 22.12.2011 "On some issues of application of Article 333 of the Civil Code of the Russian Federation", when considering the need to reduce the penalty at the request of the defendant on the basis of Article 333 of the Civil Code of the Russian Federation, the courts should proceed from the fact that non-fulfillment or improper fulfillment by the debtor of a monetary obligation allows him to unlawfully use other people's money. Since no one has the right to take advantage of their illegal behavior, the conditions for such use cannot be more beneficial for the debtor than the conditions for using the funds received by the participants in the turnover lawfully (for example, under credit agreements).

When considering a specific case, the court comes to the conclusion that there are grounds for reducing the amount of the penalty in each specific case.

In the absence of the defendant's motion and evidence of the disproportionate penalty to the consequences of the breached obligation, the court, proceeding from the principle of uniformity of law enforcement practice, taking into account the above legal position, in accordance with the materials available in the case, considers that the claimed penalty is proportional to the consequences of the breach of the obligation.

Due to the fact that the defendant voluntarily did not pay off the amount of the penalty, the dispute was not resolved pre-trial, the plaintiff was forced to go to court with this claim.

According to Part 1 of Article 4 of the Arbitration Procedure Code of the Russian Federation, an interested person has the right to apply to an arbitration court for the protection of his violated or disputed rights and legitimate interests in the manner prescribed by this Code.

Article 11 of the Civil Code of the Russian Federation provides for judicial protection of violated or disputed rights and legitimate interests. Protection of civil rights is carried out by the methods listed in Article 12 of the Civil Code of the Russian Federation.

In accordance with article 401 of the Civil Code of the Russian Federation, a person who has not fulfilled his obligations or has performed it improperly is liable in the presence of guilt (intent or negligence), unless other grounds for liability are provided for by law or agreement. A person shall be deemed innocent if, with the degree of care and discretion that was required of him by the nature of the obligation and the terms of circulation, he took all measures for the proper performance of the obligation. Unless otherwise provided by law or contract, a person who has not fulfilled or improperly

fulfilled an obligation in the course of entrepreneurial activity shall be liable if he does not prove that proper performance was impossible due to force majeure, that is, extraordinary and unavoidable circumstances under these conditions. Such circumstances do not include, in particular, violation of obligations by the counterparties of the debtor, the lack of the necessary goods on the market, the lack of the necessary funds from the debtor.

By virtue of Part 1 of Article 65 of the Arbitration Procedure Code of the Russian Federation, each person participating in the case must prove the circumstances to which he refers as the basis for his claims and objections.

The arbitration court is presented with evidence that meets the requirements of Articles 67, 68, 75 of the Arbitration Procedure Code of the Russian Federation.

In accordance with Part 1 of Article 71 of the Arbitration Procedure Code of the Russian Federation, the arbitration court evaluates evidence according to its internal conviction based on a comprehensive, complete, objective and direct examination of the evidence in the case.

Taking into account the foregoing, the court considers that the claims of the limited liability company "Company" ALS and TEK "against the closed joint-stock company firm "SMUR" are subject to satisfaction in terms of the collection of penalties in the amount of 319,315 rubles. 29 kopecks., The rest of the claim should be denied.

By virtue of Part 2 of Article 168 of the Arbitration Procedure Code of the Russian Federation, when making a decision, the arbitration court decides on the distribution of court costs.

In accordance with paragraph 1 of Art. 110 of the Arbitration Procedure Code of the Russian Federation, if the claim is satisfied in part, the court costs are attributed to the persons participating in the case, in proportion to the amount of the satisfied claims.

The plaintiff, when filing a statement of claim, paid a state fee in the amount of 9,560 rubles. 84 kopecks, which is confirmed by payment order No. 599 dated 07.02.2014. in the amount of 5,961 rubles. and payment order No. 265 dated May 14, 2014. in the amount of 3,599 rubles. 84 kopecks

The amount to be reimbursed for the state fee is 9,306 rubles. 50 kopecks

State fee in the amount of 254 rubles. 34 kopecks attributable to the plaintiff.

Guided by Articles 110, 167-170, 176, 180, 181 of the Arbitration Procedure Code of the Russian Federation, the arbitration court

found:

meet requirements in part.

To collect from the closed joint-stock company of the firm "SMUR", Voronezh, OGRN 1023601610878 in favor of the limited liability company "Company" ALS and TEK ", Saratov, OGRN 1026402661108 penalties in the amount of 319 315 rubles. 29 kopecks and the cost of paying the state fee in the amount of 9 306 RUB. 50 kopecks

In satisfying the claims for the recovery from the closed joint-stock company of the firm "SMUR", Voronezh, OGRN 1023601610878 in favor of the limited liability company "Company" ALS and TEK ", Saratov, OGRN 1026402661108 penalties in the amount of 8,727 rubles. 08 kopecks and the cost of paying the state fee in the amount of 254 rubles. 34 kopecks refuse.

Issue a writ of execution after the entry into force of the decision.

The decision of the arbitration court shall enter into legal force upon the expiration of one month from the date of its adoption, unless an appeal is filed.

The decision of the Arbitration Court of the Saratov Region may be appealed to the Twelfth Arbitration Court of Appeal within a month from the date of the full text of the decision through the Arbitration Court of the Saratov Region.

Send copies of the decision of the arbitration court to the persons participating in the case, in accordance with the requirements of Article 177 of the Arbitration Procedure Code of the Russian Federation.

It is explained to the persons participating in the case that information about the judicial acts adopted in the case is posted on the official website of the Arbitration Court of the Saratov Region

- <http://www.saratov.arbitr.ru> and in information kiosks located in the building of the arbitration court.

Arbitration Court Judge
Saratov region Sh.B. Kulakhmetov

