

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

JOHN M. FLOYD & ASSOCIATES

v.

C.A. No. 10-248-ML

COVENTRY CREDIT UNION

MEMORANDUM AND ORDER

The plaintiff in this case, John M. Floyd & Associates ("JMFA"), is a Texas corporation which provides consulting services to financial institutions for the purpose of increasing the institutions' earnings from non-interest income. The defendant, Coventry Credit Union ("CCU"), is a financial institution organized under the laws of Rhode Island. JMFA seeks payment for CCU's implementation of JFMA's Overdraft Privilege Program pursuant to a consulting agreement between the parties. CCU takes the position that no payment is owed therefor. The matter is before the Court on the parties' cross motions for summary judgment.

I. Factual Background¹

By letter dated July 14, 2005, after conducting a preliminary analysis of CCU's banking operations, JMFA submitted a proposal to

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The factual summary is based on the parties' respective statements of undisputed facts and JFMA's second amended complaint (Docket # 39), to the extent the allegations therein are admitted by CCU. Specific objections by the parties are noted.

CCU, offering to provide CCU with certain services designed to increase CCU's revenue. (Exhibit 1 to original complaint, Docket # 2-1). CCU accepted and both parties signed the proposal, rendering it the operative agreement between the parties (the "Contract") on or about September 16, 2005. Second Amended Complaint Page 8. The objective of the Contract was to install JMFA's OVERDRAFT PRIVILEGE™ program in CCU's banking operations. Id. at ¶ 5. According to the Contract, installation of the Overdraft Program would enable CCU to provide a "competitive and popular service for [its] account holders" and would result in "a significant increase in non-interest income without a significant increase in non-interest expenses." JMFA projected an estimated increase in CCU's earnings ranging from \$521,300 to \$678,500 for the first year. Id. at page 1. Because JMFA was confident such increase was achievable, it offered its services on a contingency basis. Id.

The services JMFA agreed to provide under the Contract included, *inter alia*, performing "a comprehensive analysis of the demand deposit account holder base to establish Overdraft Privilege limits"; performing an analysis of CCU's NSF [non-sufficient funds] and overdraft processing; and assisting CCU in making the necessary changes for an effective Overdraft Privilege Program. JMFA also agreed to provide all necessary operational and systems/procedures training and materials and to assist CCU in the installation of the automated management and collection system that functions with

JMFA's core application processing system. Id. at Page 2.

JMFA's compensation under the Contract was to be calculated "using the monthly quantified net increase in non-interest income and expenses related to NSF and overdraft income" resulting from the recommendations made by JMFA and implemented by CCU. Id. at Page 3. CCU agreed to a three year engagement, during which it would pay to JMFA 15% of the monthly increase in such income. Id.

On or about October 19, 2005, JMFA made a number of recommendations to CCU both in writing and in a formal presentation titled "JMFA's Overdraft Program Study." Second Amended Complaint ¶ 8. JMFA's presentation to CCU included "Recommendation 1.32," which was described as follows:

RECOMMENDATION 1.32

"Modify the parameters of the core processing system (system) to recognize the Overdraft privilege for all accounts as previously identified. ... Allow debit items to pay and charge up to the recommended [Overdraft Privilege] limits for the following processing channels:

Inclearing

ACH²

Over the counter

Interactive Voice Response (IVR) system

Interactive Bill Pay System

ATM

Point of Sale (POS)

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As JMFA explained, "Inclearing" refers to checks written and deposited at other institutions, and "ACH" [Automatic Clearing House] refers to debits processed through an electronic banking network. Although "Inclearing," and "Over the counter" may involve presentation of physical checks, all forms of banking listed in Recommendation 1.32 are categorized as "E-channels." Sosnicki Dep. 16:19 - 17:6.

In January 2006, CCU announced the Overdraft Privilege ("ODP") program to its customers. According to JMFA, the ODP program implemented by CCU in February 2006 specifically excluded JMFA's "Recommendation 1.32" related to E Channels, *i.e.*, CCU did not add ODP limits to available balances for authorizing ATM [automated teller machines] and POS [point of sale]/Debit Card transactions. Amended Complaint ¶ 14. In other words, the ODP program was available to all checking account holders but not available for Debit Card transactions. JMFA's Statement of Undisputed Facts ¶ 59.

The parties agree that CCU sought to implement three of the services within Recommendation 1.32 regarding the ODP program for its members related to (1) Inclearing, (2) ACH, and (3) POS debit card authorizations. JMFA's Statement of Undisputed Facts ¶39. However, CCU states it "encountered significant difficulty in maintaining the ODP Process for Debit Card Point of Sale and other lines during a core system conversion project, essentially switching the entire Coventry Credit Union from one operating system to another, which was completed in January 2009." Id. ¶ 40. According to Ginny Sosnicki ("Sosnicki"), CCU's Chief Technology Officer and Senior Vice President, CCU was undergoing a "Core Processing Selection Project," switching between core processing vendors. Id. ¶ 43. Sosnicki explained that implementation of the ODP was an issue during the conversion process and that core

processing finally took effect in January 2009. Sosnicki Dep. 44:9-46:21. Prior to February 2009, the ODP program was "really not fully functional." Sosnicki Dep. 88:2-18. Sosnicki also agreed that, "if the program had been working as it had been required in March of '08," the debit fees paid to CCU would have been "much more closer to what they were in '09 than they were '08," and that this was "true of all other months with similar transactions." Id. 92:4-11.

JMFA asserts that it made another formal presentation to CCU on December 2 and 3, 2008, in which it further urged the implementation of Recommendation 1.32. JMFA's SUF ¶ 66. JMFA's follow-up review notes reflect that CCU was exploring POS and Debit Cards in "Test Mode." Id.

After CCU "successfully activated the E Channel portion of Recommendation 1.32 effective February 1, 2009," id. ¶ 21, it "substantially increased its non interest income," id. ¶ 22, and paid JMFA for the increased E-Channel income attributable to the implementation of Recommendation 1.32." Id. ¶ 24. Although CCU disputes the second part of this assertion, it generally admits that CCU made payments to JMFA in February and March 2009. Answer ¶¶ 22, 24. CCU also does not dispute that, although it had the same number of debit card transactions in November 2006 as in February 2009, the income to CCU for Debit Card fees was four times higher in February 2009 than in November 2006. JMFA's SUF ¶ 49.

The undisputed figures asserted by JMFA reflect that CCU's annual debit fee income from overdrafts increased from \$144,617 in 2008 to \$587,350 in 2009, showing, according to JMFA, "the ultimate successful implementation by CCU of the Overdraft Privilege Program for Point of Sale authorized transactions using debit cards." Id. ¶ 47. CCU further concedes that, if Recommendation 1.32 for Debit Cards had been fully in place in November 2006 - as it was in February 2009 - the Debit Card fees for November 2006 would have been substantially higher. Id. ¶ 50.

JMFA projects that it is owed approximately \$208,436 in contingency fees for CCU's increased revenue from the implementation of Recommendation 1.32. Id. ¶ 25. JMFA's claim is based on the contention that, by implementing Recommendation 1.32 in February 2009, the billing cycle under the Contract was extended to January 30, 2012. Id. ¶ 23.

II. Procedural History

On June 9, 2010, JMFA filed a complaint and an amended complaint against CCU in this Court, asserting jurisdiction based on diversity. (Docket # 2). The parties engaged in discovery, during the course of which JMFA sought to compel CCU to produce certain documents and provide responses to interrogatories (Docket # 10 and #12). On December 10, 2010, Magistrate Judge Martin issued an order partially granting JMFA's motion. (Docket # 14). The order notes that "there is a substantial question whether

[CCU's] obligation to [JMFA] extends beyond the three year period which ended in April 2009." Order 3. Based on this recognition, the order only required CCU to produce documents and information up to, at the latest, the end of 2009. Id. at 2 n. 1. On December 17, 2010, CCU filed an appeal (Docket #17) to the Magistrate Judge's order, which this Court denied and dismissed on January 7, 2011. (Docket # 20).

Following an unsuccessful attempt to resolve the case by settlement, the parties continued with discovery. JMFA sought to compel CCU to provide additional information following a deposition of Sosnicki; JMFA's motion was granted. (Docket # 37). JMFA also sought to compel CCU to provide discovery beyond the December 2009 period (Docket #32), which the Magistrate Judge again denied, for the same reasons previously asserted. (Docket # 36).

On December 20, 2011, JMFA filed a motion (Docket # 38) to amend/correct the Amended Complaint in order to clarify the time line and certain factual allegations asserted therein and to add an alternative claim of *quantum meruit*. The motion was granted on January 27, 2012 (Text Order); JMFA filed a Second Amended Complaint on January 28, 2012 (Docket # 39), to which CCU responded on February 6, 2012. JMFA asserts (Count One) Breach of Contract and (Count Two) Breach of the Covenant of Good Faith. In Count Three, JMFA seeks a declaration from this Court that the "Delayed Implementation Provision" in the Contract "applies to any JMFA

recommendation made and implemented by CCU during the thirty-six month engagement and for an additional 24 months thereafter.” Second Amended Complaint ¶ 33. The newly added Count Four asserts that, “[i]f no express contract exists between JMFA and CCU regarding the February 2009 implementation of Recommendation 1.32 by CCU,” then, without additional compensation from CCU, “CCU is unjustly enriched at the expense of JMFA.” Id. at ¶ 35.

On February 18, 2012, CCU filed a motion for summary judgment (Docket # 41), together with a 10-paragraph Statement of Undisputed Facts (#42). On February 24, JMFA responded with an objection (Docket # 43) and its own motion for summary judgment³ (Docket # 33). JMFA also submitted a 65-paragraph Statement of Undisputed Facts (Docket # 45), the majority of which are determinately contested by CCU in its objection. (Docket # 46). JMFA filed a reply to CCU’s objection on March 19, 2012 (Docket # 47).

III. Standard of Review

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is

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The Court notes that JMFA has requested oral argument on its motion. In light of the parties’ thorough briefings and numerous exhibits in support of their respective positions, the Court believes that this matter is suitable for determination on the written submissions. See Fed. R. Civ. P. 78; Delgado-Biaggi v. Air Transport Local 501, 112 F.3d 565, 567 n. 4 (1st Cir. 1997 (noting that Rule 56(c) “does not require oral argument in connection with the motion”).

entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). When confronted with a motion for summary judgment, the Court’s “task is not `to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.’” Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

A fact is material if it “might affect the outcome of the suit under the governing law.” Anderson v. Liberty Lobby, Inc., 477 U.S. at 248, 106 S.Ct. 2505, 91 L.Ed.2d 202. An issue is genuine where the evidence with respect to the material fact in dispute “is such that a reasonable jury could return a verdict for the nonmoving party.” Id.

The Court must “view the record in the light most favorable to the nonmoving party, and [] draw all reasonable inferences in the nonmoving party’s favor.” Leblanc v. Great American Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993).

Moreover, “[c]ross-motions for summary judgment do not alter the basic Rule 56 standard, but rather simply require [the Court] to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed.” Adria Group v. Ferre Dev., Inc., 241 F.3d 103, 107 (1st Cir. 2001); Mandel v. Boston Phoenix, Inc., 456 F.3d 198, 205 (1st Cir. 2006) (“The presence of cross-motions for summary judgment neither dilutes nor

distorts this standard of review.").

IV. The Parties' Positions

(A) JMFA's Motion for Summary Judgment

JMFA asserts that, after entering a three year contractual relationship with CCU, JMFA made multiple recommendations to CCU which, if properly implemented, were designed to increase CCU's non-interest based income significantly. CCU implemented some of those recommendations and achieved an increase of \$381,251 in the first year, which was less than the projected income of \$523,300 to \$678,500. JMFA attributes the lower than anticipated income to CCU's failure to implement Recommendation 1.32 related to the Overdraft Privilege Program for E-channel transactions. According to JMFA, CCU encountered difficulties in implementing that recommendation because it was in the process of converting its core system, which was not completed until January 2009. Once CCU fully implemented Recommendation 1.32 in February 2009, CCU's income attributable to the ODP program quadrupled, bringing CCU's non-interest income to \$587,350 for 2009.

In essence, JMFA argues that the delayed implementation of Recommendation 1.32 in February 2009 triggers a clause in the Contract which provides that delayed implementation of an approved recommendation will be included in JMFA's fee calculation. JMFA further suggests that the phrase "within 24 months of the initial engagement" in that provision refers to the original 36 months

contract period, rather than to the six to eight calendar weeks during which JMFA would provide certain services to CCU to start the income generating process. JMFA states that, in effect, CCU's late implementation of a previously approved recommendation extends the billable period for an additional 24 months. In other words, JMFA argues that CCU's failure to benefit from Recommendation 1.32 before February 2009 is the result of difficulties CCU had with its core system conversion. CCU, however, had already accepted and approved the recommendation and, once it correctly implemented it, reaped considerable benefits, a portion of which JMFA rightfully expected to be paid.

(B) CCU's Motion for Summary Judgment

CCU takes the position that "the language of the contract of September 2005 is unambiguous when the contract is read in its entirety," CCU Mem. 5, and that the so-called "Delayed Implementation Provision" in the Contract is dispositive of JMFA's claim. Although the term "initial engagement" is not specifically defined in the Contract, the Contract does provide in another section that "[t]he initial engagement will require approximately six to eight calendar weeks to complete." Therefore, CCU asserts that the term "initial engagement" solely refers to the period between signing the Contract in September 2005 and the time the ODP program went live with CCU members in January 2006. CCU also maintains that it implemented Point of Sales Debit Card

transactions along with the remainder of JMFA's recommendations in January 2006. CCU denies that it implemented the ODP program for the first time in February 2009 and suggests that, even if that proposition were true, such implementation would fall outside of the "Delayed Implementation Provision" in the Contract.

In other words, CCU asserts that because (1) Recommendation 1.32 was implemented in January 2006, the "Delayed Implementation Provision" in the Contract was not triggered; and (2) the 24 month period - during which such provision could have been triggered by a delayed implementation - began several weeks after the Contract was signed and not at the end of the 36 months Contract period. By the time Recommendation 1.32 was fully implemented, the 24 month period had passed and, therefore, CCU should not have to compensate JMFA for the additional revenue it earned from that Recommendation.

V. Discussion

(A) Applicable Law

The interpretation of contracts "presents, in the first place, a question of law, and is therefore the court's responsibility." Fashion House, Inc. v. Kmart Corp., 892 F.2d 1076, 1083 (1st Cir. 1989) ("Determining whether or not a contract is ambiguous is . . . a matter for the court"); Fleet Nat. Bank v. Anchor Media Television, Inc., 45 F.3d 546, 556 (1st Cir. 1995) ("[T]he question whether a provision can *reasonably* support a proffered interpretation is a legal one, to be decided by the court.").

However, "the actual meaning of a contractual provision which can reasonably accommodate two or more interpretations should be left to the jury." Id.

Under Rhode Island law⁴, the Court's "primary task, of course, is to attempt to ascertain the intent of the parties.'" Colonial Penn Ins. Co. v. Mendozzi, 488 A.2d 734, 736 (R.I. 1985) (quoting Woonsocket Teachers' Guild, Local 951 v. Sch. Comm. of Woonsocket, 117 R.I. 373, 376, 367 A.2d 203, 205 (1976)). To determine the parties' intent, the Court must "look at the instrument as a whole and not at some detached portion thereof.'" Id.

If the terms of a contract are determined to be "clear and unambiguous, the task of judicial construction is at an end and the agreement must be applied as written." W.P. Assoc. v. Forcier, Inc., 637 A.2d 353, 356 (R.I. 1994); Aetna Cas. & Sur. Co. v. Graziano, 587 A.2d 916, 917 (R.I. 1991) (When a contract is "clear and unambiguous on its face, the role of the Court is to enforce the contract as written"). To make such a determination, "the document must be viewed in its entirety and its language must be

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In their memoranda, both parties argue their respective positions pursuant to Rhode Island law. Where the parties are in agreement regarding the choice of law, the Court "is free to forego an independent analysis and accept the parties' agreement.'" Hershey v. Donaldson, Lufkin & Jenrette Sec. Corp., 317 F.3d 16, 20 (1st Cir. 2003) (quoting Borden v. Paul Revere Life Ins. Co., 935 F.2d 370, 375 (1st Cir. 1991)).

given its plain, ordinary and usual meaning." Id. (citing Antone v. Vickers, 610 A.2d 120, 123 (R.I. 1992)). An agreement is considered ambiguous when it "'is reasonably and clearly susceptible to more than one interpretation.'" W.P. Assoc. v. Forcier, Inc., 637 A.2d at 356 (citing Gustafson v. Max Fish Plumbing & Heating Co., 622 A.2d 450, 452 (R.I. 1993)).

Even in the absence of an ambiguity, the Court "will nonetheless consider the situation of the parties and the accompanying circumstances at the time the contract was entered into, not for the purpose of modifying or enlarging or curtailing its terms, but to aid in the interpretive process and to assist in determining its meaning." Hill v. M.S. Alper & Son, Inc., 106 R.I. 38, 47, 256 A.2d 10, 15 (1969). "Accordingly, this Court may 'consider extrinsic evidence where relevant to prove a meaning to which the language of the instrument is reasonably susceptible.'" Haffenreffer v. Haffenreffer, 994 A.2d 1226, 1233 (R.I. 2010) (quoting Harrigan v. Mason & Winograd, Inc., 121 R.I. 209, 213, 397 A.2d 514, 516 (1979)).

(B) The Contract

The Contract contains the following provision:

If a recommendation is not approved it will not be included in the fee calculation. However, if any recommendation, within 24 months of the initial engagement, is installed or approved or approved as modified, or initially declined and later approved as recommended or as subsequently modified, it will be included in the fee calculation.

Initial engagement is not a defined term in the Contract. However, under a separate heading titled **Conduct of the Engagement**, Contract at Page 2, the Contract states that “[t]he initial engagement will require approximately six to eight calendar weeks to complete, with quarterly on-site follow-up lasting for the contracted engagement period.” Id.

Under the rubric **Cost of the Engagement**, Contract at Page 3, a pricing table suggests a fee of “19.8% of monthly increase in NSF/OD income for a Two Year Engagement,” and a 15% fee for a Three Year Engagement, which option has been marked as “OK” and initialed by the signatory for CCU. The paragraph also states that “[f]ollow-up of the engagement may be extended in twelve-months increments and includes quarterly on-site visits as an extension of the initial contractual period for continuance of our PRIVILEGE MANAGER CRM™ software maintenance support and the compliance warranty.” Id. Further, the Contract provides that fees to JMFA “will commence not less than sixty (60) days following the first full month after the installation of recommendations and will continue throughout the contracted engagement period.” Id.

Under **“Quantification of Earnings,”** Contract at Page 4, the contract provides that tracking of the increases in earnings as a result of the implementation of JMFA’s recommendations will commence “at the beginning of the month that occurs not less than 60 days after program implementation.” Id. Further, “[a]ll earnings

will be tracked on a line item, by line time basis, utilizing the baseline established from the twelve month analysis performed during the initial engagement period." Id. The section also provides that CCU "agrees to furnish at the beginning of the initial engagement a list of NSF related areas [CCU] wishes to exclude from this engagement." Id.

The Contract in this case was converted into the binding agreement between the parties from a JMFA proposal letter. Although the letter describes the proffered services in some detail, sets out a time line for the project, and explains the compensation calculation and payment schedule, it lacks the formality of a form contract. As such, it does not contain either a definition section, nor are the various terms explicitly defined or explained therein. When looking at the Contract "as a whole and not at some detached portion thereof," Hill v. M.S. Alper & Son, Inc., 106 R.I. at 47, 256 A.2d at 15, in order to discern the parties' intentions, it is apparent that the Contract is not unambiguous. Particularly the critical term "initial engagement" appears inconsistently employed. While the Contract refers to the "initial engagement" as requiring only six to eight calendar weeks, see Contract page 2, it also states that the "initial contractual period" may be extended in twelve-month increments, see id. at page 3, which arguably refers not to the six to eight weeks time period, but to the contractual period overall. As such, the Delayed

Implementation Provision is reasonably susceptible to two different interpretations and the parties' intent at the formation of the Contract cannot clearly be inferred therefrom. JMFA offers a reasonable explanation for its interpretation of the Delayed Implementation Provision by asserting that the provision is intended to preclude a client from implementing one of JMFA's recommendations immediately after the contractual period has expired, thus depriving JMFA of the fee calculated on the resulting increase in revenue. CCU does not offer a corresponding rationale for its interpretation of the same provision; rather, it relies on the fact that the term "initial engagement" is described in a separate provision as requiring six to eight calendar weeks. It is unclear what function the Delayed Implementation Provision would have under such an interpretation, since any recommendation made in the entire 36 month period of the Contract would result in a fee for JMFA.

Moreover, according to Paragraph 26 of JMFA's Statement of Undisputed Facts - to which CCU has filed no corresponding objection - "[t]he specific dispute in this case is when and under what circumstances CCU modified its core processing system to recognize the Overdraft Privilege (ODP) limits for Point of Sale (POS) authorization for CCU customers using Debit Cards." JMFA's SUF ¶ 26. Throughout the litigation, the parties have disagreed whether, as CCU asserts, it implemented all aspects of

Recommendation 1.32 in early 2006, or whether, as JMFA asserts, CCU's difficulties during modification of its core processing system precluded CCU from implementing the ODP Process for Debit Card Point of Sale until February 2009. It is undisputed, however, that JMFA made a specific recommendation early in the 36 month contractual period which, when implemented, yielded the projected additional income to CCU beginning in February 2009. CCU also appears to acknowledge that, had that recommendation been implemented earlier, its non-interest income would have increased prior to February 2009. Nor does CCU allege that JMFA was either responsible for implementing the recommendation or that it failed to do so. Rather, CCU's refusal to pay JMFA's fee based on CCU's additional income is solely based on CCU's interpretation of the Contract.

Under those circumstances, and in view of the Court's determination that the Contract language is ambiguous, the substance of the parties' agreement becomes a fact question for the jury and cannot be decided on summary judgment. See, e.g., Fashion House, Inc. v. K mart Corp., 892 F.2d at 1083. Regarding the timing of CCU's implementation of the ODP Process for Debit Card Point of Sale, *i.e.*, whether it implemented JMFA's recommendation fully in 2006 and the implementation simply did not result in the expected increase in income or whether the implementation was not successful until February 2009, which would explain the sudden

increase in CCU's income, that question is one of fact. In light of the robust dispute between the parties regarding that question, the issue is likewise not suitable for a resolution by summary judgment.

Conclusion

For the foregoing reasons, JMFA's motion for summary judgment is DENIED and CCU's motion for summary judgment is DENIED.

SO ORDERED.

/s/ Mary M. Lisi

Mary M. Lisi
Chief United States District Judge
May 31, 2012