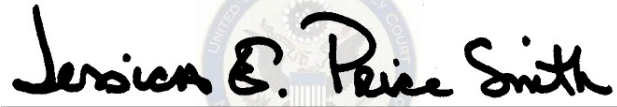


IT IS SO ORDERED.

Dated: 27 May, 2014 03:14 PM



JESSICA E. PRICE SMITH
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
Eastern Division

In Re:

In Proceedings Under Chapter 11

INFOTELECOM, LLC,
Debtor.

Case No.: 11-18945

JOHN PIDCOCK, Infotelecom
Liquidation Trustee of the Infotelecom
Liquidation Trust

Adv. Proc. No. 13-1241

Plaintiff,

v.

JUDGE JESSICA E. PRICE SMITH

XO COMMUNICATIONS, LLC,
Defendant.

MEMORANDUM OF OPINION AND ORDER

The matter before this Court is the Defendant, XO Communications', Motion for Summary Judgment on the Plaintiff's complaint to recover alleged preferential transfers pursuant to 11 U.S.C. §§ 547 and 550. Plaintiff, the Infotelecom Liquidation Trustee of the Infotelecom Liquidation Trust ("Liquidation Trustee"), opposes the Motion. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 of this District. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and (O). For the reasons set forth below, the Motion for Summary Judgment is granted.

Plaintiff seeks to recover \$307,089.48 in payments made by the Debtor to XO Communications in the 90 days preceding the petition filing.¹ XO Communications alleges that the payments are not recoverable because the Master Services Agreement under which the payments were made was assumed and assigned pursuant to 11 U.S.C. § 365 as part of the sale of the Debtor's assets. The Liquidation Trustee, in his opposition, alleges that there are disputed issues of fact regarding whether the Master Services Agreement was actually assumed, whether there were changes to the Master Services Agreement that would defeat a valid assumption and whether the payments were made pursuant to the Master Services Agreement or for other business between the Debtor and XO Communications.² Based on the arguments of counsel at the hearing on the motion for summary judgment, the only issue in this matter is whether the assumption of the Master Service Agreement, as part of the confirmed plan, should be enforced.

The Master Services Agreement with XO Communications was identified by the Debtor as a contract that would be assumed and assigned. (Doc. No. 499). This Court confirmed the Debtor's Second Amended Plan on June 6, 2012 (Doc. No. 388). The confirmation order approved the sale of substantially all of the Debtor's assets to The Broadvox Holding Company, LLC. The confirmation order also stated that the plan was filed in good faith and that the treatment of executory contracts "complies fully with Section 365 of the Bankruptcy Code and

¹ The payments were made with Debtor's American Express card and the Liquidation Trustee has recovered at least some portion of those payments from American Express. The Court inquired as to the amount at the initial pretrial in this matter, and requested the amount a second time at the oral argument on summary judgment. Pursuant to the supplement filed by the Liquidation Trustee, the amount recovered from American Express that represents payments made to XO Communications is unknown.

² At the hearing on the matter, the Liquidation Trustee conceded that the payments made were for services provided under the Master Services Agreement.

other applicable law.” (Doc. No. 388 ¶ GG). There has been no challenge to this Court’s order confirming the Debtor’s Second Amended Plan.

The arguments raised by the Liquidation Trustee in the opposition to the Motion for Summary Judgment challenge the propriety of the assumption of the executory contract. That is a collateral attack on the confirmation order. The trustee’s reliance on *City of Covington v. Covington Landing Limited Partnership*, 71 F.3d 1221 (6th Cir. 1995), is misplaced as it is not factually analogous to this case, and does not provide a basis for invalidating the executive contracts assumed pursuant to the sale agreement and in the confirmation order. As this Court previously held, the assumption of the XO Communications Master Services Agreement was appropriate pursuant to 11 U.S.C. § 365. That assumption is a defense to the Liquidation Trustee’s preference action. XO Communications’ Motion for Summary Judgment is granted. The Liquidation Trustee’s opposition is overruled. The adversary proceeding is dismissed. Each party is to bear its respective costs.

IT IS SO ORDERED.