

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
BIG STONE GAP DIVISION**

<b>INTERNATIONAL NETWORK, LTD.,</b>	)	
	)	
Plaintiff,	)	Case No. 2:01CV00019
	)	
v.	)	<b>OPINION</b>
	)	
<b>ADELPHIA COMMUNICATIONS CORPORATION, ET AL.,</b>	)	By: James P. Jones
	)	United States District Judge
	)	
Defendants.	)	

*Frederick W. Adkins, Cline, Adkins & Cline, Norton, Virginia, for Plaintiff;  
Tracy L. Taylor, McKay Law Offices, Charlottesville, Virginia, for Defendants.*

In this diversity action for breach of contract, the defendants have filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 as to the plaintiff’s contract claim and as to the defendants’ contract counterclaim. The defendants have briefed the issues, the parties presented oral argument and the motion is now ripe for decision. For the following reasons, the motion will be granted.

This action was first filed in the Circuit Court of Wise County, Virginia, by “Jack Still d/b/a International Network, LTD.,” asserting that the defendants had

breached a 1992 oral agreement relating to the continuation of the plaintiff's "local access" television programming on the defendants' cable television system. In the suit papers, the plaintiff is alleged to be the "owner and operator of and d/b/a International Network, LTD." (Mot. J. ¶ 1.) The action was timely removed to this court based on diversity of citizenship and amount in controversy, as well as the existence of a federal question. Thereafter, this court entered an order allowing the substitution of a corporation, International Network, Ltd. ("INTV"), as the plaintiff in the place of Jack Still.

One of the defendants, Century Virginia Corporation ("Century Virginia"), filed a counterclaim asserting breach by the plaintiff of a 1999 written agreement between the parties for on-air programming production.

## II

The essential facts of the case, either undisputed or, where disputed, recited in the light most favorable to the nonmovant on the summary judgment record,<sup>1</sup> are as follows.

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<sup>1</sup> The defendants have filed the transcript of a deposition of the plaintiff under Federal Rule of Civil Procedure 30(b)(5), as well as affidavits. The plaintiff has not made any counter filing.

On October 5, 1992, Coeburn Cable Company requested permission from the Town Council of Coeburn, Virginia, to transfer its television cable franchise to Century Mountain Corporation (“Century Mountain”). The Town Council approved the transfer, but expressed concern over the fate of a local access channel, Channel 4, which was produced by Jack Still Sr. and Jack Still Jr. While the Town Council admitted that it had no authority to grant franchises or access to cable systems, it noted that Century Mountain had agreed to have discussions with the Stills regarding continuation of the local access channel.

Thereafter, INTV and Century Mountain entered into an oral agreement under which Century Mountain would give INTV access to its cable system and would pay INTV \$2000 per month to produce local programming.<sup>2</sup> The term for this agreement was ten years. INTV performed under this agreement and spent \$250,000 producing and developing local television through 1999.

In 1999 the Adelphia Communications Corporation obtained control of the cable system through merger. New negotiations were held regarding INTV’s access to the cable system, in which the parties were represented by counsel. On June 15, 1999, Jack Still Jr. signed a written contract, as president of INTV, between INTV and

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<sup>2</sup> At some point, Century Mountain began paying INTV only \$1995 per month. (INTV Dep. at 25.)

Century Virginia, the corporate successor to Century Mountain, concerning production of programming on Channel 37 of the cable system.<sup>3</sup> Under this agreement, which extended from July 1, 1999, through July 1, 2004, instead of being paid for its production of cable content, INTV was to pay the cable operator for access to the system.<sup>4</sup> Still sent the signed contract to Century Virginia with a cover letter stating that INTV had not anticipated a change in the agreement between the parties, that INTV had unsuccessfully attempted to have Century Virginia accept a counter-offer “with more favorable terms,” and concluded that “[n]onetheless, we accept your offer to continue our association into the 21st Century under the contractual terms offered last month.” (INTV Dep., Ex. 12.)

The plaintiff was granted access to the defendants’ cable system from July 1999 through March 2000, but did not pay any of the monthly contract fees, which amounted to \$6000.

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<sup>3</sup> By this time, INTV had moved its programming from Channel 4 to Channel 37. (Mot. J. ¶ 4.)

<sup>4</sup> INTV was to pay Century Virginia \$2000 per month between January 1, 2000, and July 1, 2000. The contract also provided that INTV pay \$2500 per month between July 1, 2000, and January 1, 2001, and \$3000 per month between January 1, 2001, and July 1, 2004. However, Century Virginia terminated the agreement on March 27, 2000, due to INTV’s failure to pay any of the amounts due.

### III

Summary judgment is appropriate when there is “no genuine issue of material fact,” given the parties’ burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Rule 56 “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not “a disfavored procedural shortcut,” but an important mechanism for weeding out “claims and defenses [that] have no factual basis.” *Id.* at 327.

The defendants’ first argument in support of the motion for summary judgment against the plaintiff’s breach of contract claim is that the plaintiff rescinded the oral agreement when it signed the written agreement in 1999. If the parties rescind a contract, neither party may then maintain an action for damages under that contract.

*See Juniper Lumber Co. v. John M. Nelson, Jr., Inc.*, 112 S.E. 564, 567-68 (Va. 1922).<sup>5</sup>

The 1999 written contract provides that “[t]his Agreement contains the entire understanding of the parties whether written or oral relating to the subject matter hereof.” (1999 Agreement at ¶ 10.) Thus, if the 1999 agreement was a valid contract, then the 1992 oral agreement was superseded or rescinded by the 1999 agreement. *See Centech Group, Inc. v. Getronicswang Co.*, No. CIV00-1555-A, 2001 WL 694543, at \*2 (E.D. Va. Feb. 22, 2001).

It is clear from the facts here that the 1999 agreement is a valid contract. The parties negotiated the terms of the agreement while represented by counsel and the plaintiff signed the agreement.<sup>6</sup> Although the plaintiff may now feel that the deal it struck is unsatisfactory, there is no evidence of duress or any other defenses to the formation of a valid contract. Accordingly, I find that the 1999 agreement is valid and

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<sup>5</sup> A federal court exercising diversity jurisdiction must apply the law of the state in which it sits, *see Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938), including that state's choice of law rules, *see Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 496 (1941). The contracts at issue here were made in Virginia and thus Virginia law applies. *See John Deere Constr. Equip. Co. v. Wright Equip. Co.*, 118 F. Supp. 2d 689, 692-93 (W.D. Va. 2000).

<sup>6</sup> Century Virginia did not sign the copy of the 1999 agreement that is contained in the record. However, the plaintiff has not raised this issue and only the party against whom a contract is to be enforced need sign the agreement. *See* Va. Code Ann. § 11-2 (Michie 1999); *Reynolds v. Dixon*, 46 S.E.2d 6, 8 (Va. 1948).

superseded any previous contract between the parties concerning programming production on the cable system.

The defendants' second argument is that the oral agreement for a ten-year period between INTV and Century Mountain is barred by the Virginia Statute of Frauds, which provides as follows: "Unless a . . . contract . . . is in writing and signed by the party to be charged . . . no action shall be brought . . . [u]pon any agreement that is not to be performed within a year." Va. Code Ann. § 11-2(8) (Michie 1999).

The plaintiff alleges that it entered into a verbal agreement with Century Mountain for programming production of a local cable channel for a term of ten years, for which Century Mountain would pay the plaintiff \$2000 per month. (Mot. J. ¶ 4.) Clearly, this agreement cannot be performed within a year. "When it appears by the whole tenor of an agreement not in writing that it is to be performed after the first year, then the contract is within the statute and must be in writing." *Silverman v. Bernot*, 239 S.E.2d 118, 121 (Va. 1977). The plaintiff has not produced any writings that would satisfy the requirement of the statute of frauds. Therefore, the 1992 oral agreement is barred.<sup>7</sup>

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<sup>7</sup> The plaintiff's suit papers allege that Century Virginia is a successor corporation to Century Mountain. (Mot. J. ¶ 3.) Century Mountain is not a party to this action. The defendants contended in their brief and at oral argument that in fact Century Virginia is not a successor corporation to Century Mountain and that both corporations still exist as separate sister entities. However, the defendants have not offered any proof of this assertion and do not rely on it as a ground for summary

Because I find that summary judgment is appropriate for the plaintiff's contract claim for the reasons stated above, there is no need to address the defendants' remaining arguments concerning damages or access to cable systems under federal law.<sup>8</sup>

#### IV

The defendants also argue that they are entitled to summary judgment on their counterclaim against the plaintiff based on the 1999 written contract. As stated above, I find that the 1999 agreement was a valid contract. The plaintiff has offered no opposition to the defendants' claim that the plaintiff has not paid for access to the defendants' cable system as provided in the 1999 agreement. The contract specified that the plaintiff was to pay \$2000 per month to the defendants for the period from

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judgment. If it were true, the plaintiff has sued the wrong party and under the scheduling order in this case, it is too late to add an additional party. (Scheduling Order ¶ 8.) For the purposes of the pending motion for summary judgment, I will assume that the plaintiff's allegations are correct. In any event, the plaintiff would be barred by the doctrine of res judicata or claim preclusion from bringing a future action against Century Mountain based on the 1992 oral contract, since Century Virginia and Century Mountain, even if separate corporations, are likely in privity. *See State Water Control Bd. v. Smithfield Foods, Inc.*, 542 S.E.2d 766, 769 (Va. 2001) ("The touchstone of privity for purposes of *res judicata* is that a party's interest is so identical with another that representation by one party is representation of the other's legal right.").

<sup>8</sup> The defendants also filed a supplemental motion for summary judgment based on the failure of the plaintiff to respond to the defendants' motion. "[A] failure to respond to a motion for summary judgment, in violation of the scheduling order, may itself justify the granting of the motion, under certain circumstances." *Greene v. Boddie-Noell Enter., Inc.*, 966 F. Supp. 416, 418 n.4 (W.D. Va. 1997) (citation omitted). However, here, as in *Greene*, I decide this motion on the merits.

January 1, 2000, through July 1, 2000. The plaintiff did receive access to the defendants' cable system from January to March, 2000. Accordingly, I will grant the defendants' motion for summary judgment for their contract counterclaim and award the defendants \$6000 as damages.

A final judgment will be entered.

DATED: November 5, 2001

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United States District Judge

**IN THE UNITED STATES DISTRICT COURT  
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BIG STONE GAP DIVISION**

<b>INTERNATIONAL NETWORK, LTD.,</b>	)	
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Plaintiff,	)	Case No. 2:01CV00019
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v.	)	<b>FINAL JUDGMENT</b>
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<b>ADELPHIA COMMUNICATIONS</b>	)	By: James P. Jones
<b>CORPORATION, ET AL.,</b>	)	United States District Judge
	)	
Defendants.	)	

For the reasons stated in the opinion accompanying this final judgment, it is **ADJUDGED AND ORDERED** that the motion for summary judgment by the defendants is granted and final judgment on the merits is entered in favor of the defendants on the plaintiff's action and judgment is hereby entered in favor of the defendant Century Virginia Corporation against the plaintiff International Network, Ltd., in the amount of Six Thousand Dollars (\$6000.00).

The clerk is directed to close the case.

ENTER: November 5, 2001

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United States District Judge