

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D54274  
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Argued - October 23, 2017

MARK C. DILLON, J.P.  
JOHN M. LEVENTHAL  
SYLVIA O. HINDS-RADIX  
HECTOR D. LASALLE, JJ.

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2016-04991

DECISION & ORDER

Total Telcom Group Corp., appellant, v Kendal on Hudson,  
respondent.

(Index No. 34817/12)

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The Coffinas Law Firm, PLLC, New City, NY (George G. Coffinas of counsel), for  
appellant.

Hancock Estabrook, LLP, Syracuse, NY (Janet D. Callahan of counsel), for  
respondent.

In an action to recover damages for breach of contract, the plaintiff appeals from an  
order of the Supreme Court, Rockland County (Berliner, J.), dated April 18, 2016, which granted the  
defendant's motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiff commenced this action to recover damages for breach of contract. The  
complaint alleged that the plaintiff and the defendant entered into a contract in which the defendant  
agreed to purchase satellite television equipment from the plaintiff. The defendant, which operates  
a senior continuing care residence facility in Sleepy Hollow, moved for summary judgment  
dismissing the complaint, arguing that the contract was indefinite as to a material term and  
constituted an unenforceable agreement to agree. The Supreme Court granted the motion, and the  
plaintiff appeals.

“To create a binding contract, there must be a manifestation of mutual assent  
sufficiently definite to assure that the parties are truly in agreement with respect to all material terms”  
(*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589; *see*

*Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109). “[A] court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to” (*Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91). Accordingly, “[i]f an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract” (*Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482; see *Carione v Hickey*, 133 AD3d 811, 811). “While there are some instances where a party may agree to be bound to a contract even where a material term is left open . . . there must be sufficient evidence that both parties intended that arrangement” (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d at 590 [citation omitted]). “[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable” (*Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d at 109; see *New York Military Academy v NewOpen Group*, 142 AD3d 489, 490; *Northern Stamping, Inc. v Monomoy Capital Partners, L.P.*, 129 AD3d 448, 449; *Kolchins v Evolution Mkts. Inc.*, 128 AD3d 47, 61), unless “a methodology for determining the material terms can be found within the four corners of the agreement or the agreement refers to an objective extrinsic event, condition, or standard by which the material terms may be determined” (*Carmon v Soleh Boneh Ltd.*, 206 AD2d 450, 450; see *Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d at 481-483).

Here, the defendant demonstrated its prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting evidence establishing that the contract lacked a material term regarding the price or fees to be paid to the plaintiff for Internet-related service, and therefore constituted an unenforceable agreement to agree (see *DirectTV Latin Am., LLC v RCTV Intl. Corp.*, 115 AD3d 539, 540; *Parkway Group v Modell’s Sporting Goods*, 254 AD2d 338). In opposition, the plaintiff failed to raise a triable issue of fact.

The defendant’s remaining contention is without merit.

Accordingly, the Supreme Court properly granted the defendant’s motion for summary judgment dismissing the complaint.

DILLON, J.P., LEVENTHAL, HINDS-RADIX and LASALLE, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court