

Customer Satisfaction First v ESA Services
2004 NY Slip Op 30000(U)
June 7, 2004
Supreme Court, New York County
Docket Number: 0600348
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

0600348/2003

CUSTOMER SATISFACTION FIRST
vs
ESA SERVICES

SEQ C21

EX NO. _____

FILED DATE 2/24/04

FILED SEQ. NO. _____

FILED CAL. NO. _____

The remaining papers submitted on to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 16 2004
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

HON. RICHARD B. LOWE, III

Dated: 6/7/04

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X

CUSTOMER SATISFACTION FIRST, INC.,

Plaintiff,

Index No. 600348/03

-against-

ESA SERVICES, INC.,
d/b/a EXTENDED STAY AMERICA,

Defendant.

-----X

RICHARD B. LOWE, III, J.:

In this action, plaintiff seeks recovery of \$153,726.24 for telephone reservation services performed pursuant to a service agreement, but allegedly not paid for by defendant. The complaint asserts causes of action for breach of contract and attorneys' fees. Defendant asserts counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent misrepresentation, negligence and attorneys' fees, seeking damages in the amount of \$1,554,000.

Plaintiff now moves for summary judgment on the complaint, and for summary judgment dismissing defendant's counterclaims. Defendant cross-moves for summary judgment on its counterclaims, and for summary judgment dismissing the complaint.

Facts

On February 25, 2001, CallCenter Services division of The Order People Company (Callcenter Services) entered into a service agreement (Service Agreement) with defendant ESA Services, Inc. (ESA). Pursuant to the Service Agreement, Callcenter Services provided telephone response services to ESA.

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In a letter dated October 31, 2001, plaintiff Customer Satisfaction First, Inc.'s (CSF) chief executive officer, Gordon McKenna (McKenna), notified **ESA** that, beginning November 1, 2001, CSF would take over CallCenter's obligations under the Service Agreement. In that letter, McKenna represented himself as a "well-respected national figure in the customer care industry," and stated that CSF's "primary concern" was "uninterrupted continuation of excellent service * * * ." *ESA Opp.*, Ex. H. McKenna also represented that "CSF will retain the talented and dedicated staff currently in place," and that **ESA** "can expect increased service quality," because CSF "will bring a new level of expertise to the call center's operations." *Id.*

On November 1, 2001, the Service Agreement was assigned from CallCenter Services to CSF. At the same time, non-party **ESA Management, Inc.** assigned its rights in the Service Agreement to **ESA**.¹

Under the Service Agreement, CSF agreed to maintain a dedicated group to handle 80% of **ESA**'s calls, and to provide services pursuant to a defined "Performance Standard." Service Agreement, App. A, § A, and App. C. Pursuant to the Performance Standard, the "Abandon Rate" of telephone calls was not to exceed an average of **4%** weekly, where the Abandon Rate is defined as the number of "uncompleted" calls received by CSF divided by the total number of calls received. *Id.*, App. C. The Performance Standard also required CSF to answer calls in an average of 15 seconds or less. *Id.*

Paragraph D of the Service Agreement required CSF to staff **ESA**'s "work with sufficient

¹ This is the first and only time that **ESA Management, Inc.** is mentioned by the parties in connection with the Service Agreement. Based upon the papers before the court, **ESA** was the original party to the Service Agreement, not **ESA Management, Inc.**

competent personnel to ensure the highest degree of professionalism in order to perform [its] duties.” Appendix A of the Service Agreement required CSF to “train and instruct its personnel and * * * develop and/or implement computer and/or manual systems * * * to provide the telephone response services hereunder in a professional and appropriate manner.” Service Agreement, App. A, § A, ¶ 4.

The Service Agreement was terminable by either party upon 90 days written notice, and provides that, if it is terminated by ESA, ESA “shall pay to [CSF] only those fees and charges which accrue up to such early termination date, and [ESA] shall have no further obligation to pay any fees or charges whatsoever * * * .” McKenna Aff., Ex. D, ¶ K. The Service Agreement also contains a provision stating that CSF “shall not be liable except with respect to any negligent act or omission * * * for any indirect, incidental, consequential or special damages arising out of the services provided by [CSF] or in any other way arising out of this Agreement, including but not limited to, business interruption * * * .” *Id.*, ¶ F.

ESA claims that CSF failed to perform pursuant to the Performance Standard, thereby breaching the Service Agreement. Consequently, in a letter dated February 12, 2002 (Termination Letter) from Jeremy Hart (Hart), ESA’s director of revenue management, ESA notified CSF “of its intention to terminate the [Service Agreement] effective ninety (90) days from this date, or May 13, 2002 * * * . Further pursuant to Section K of the Agreement, [ESA] is obligated to pay only those fees and charges which accrue up to the Termination Date.” McKenna Aff., Ex. I² (emphasis in original).

CSF submits copies of invoices sent to ESA for work performed during the 90-day period after ESA sent the Termination Letter. The parties dispute whether **ESA** objected to those

invoices.

ESA claims that, upon receiving the Termination Letter, CSF abandoned its obligations under the Service Agreement, replacing experienced account representatives with inexperienced representatives, and understaffing the account, thereby exacerbating CSF's alleged prior breaches. **ESA** submits CSF's performance reports (Performance Reports) for February, March and April 2002, which reflect that, during that period, CSF failed to meet its ~~4%~~ Abandoned Rate and its 15 second call answer target. The reports also reflect that CSF failed to meet its 80% service level. Def. Opp., **Ex. A**, and Ex. D, ¶ 9. CSF does not dispute ESA's contention that the Performance Reports were prepared and maintained by CSF in its regular course of business. Harrison Aff., ¶ 9. **ESA** also submits the affidavits of Dennis Harrison (Harrison), a former ESA senior manager, and Karen Miller (Miller), a current employee who oversaw CSF's performance and reviewed CSF's invoices, both of which state that CSF failed to comply with the Performance Standard.

ESA's motion for summary judgment dismissing the complaint is based upon its contention that CSF **lacks** standing. In support of this contention, **ESA** submits the deposition testimony of McKenna, and two CSF invoices. McKenna testified, on behalf of CSF as CSF's CEO, that CSF employed the use of factors to finance receivables, that CSF's rights to outstanding account receivables have been transferred to its factor at a discounted rate of 80% of the invoice due, and acknowledged that any outstanding invoices that are due are now the property of the factor. Def. Opp., **Ex. B**. During McKenna's deposition, counsel requested production of contracts between CSF and CSF's factors. It is undisputed that CSF failed to produce those contracts.

One of the invoices submitted contains a “NOTICE,” stating that “[t]his account has been sold, assigned and is payable * * * to: GOODMAN FACTORS, INC. * * * Remittance to other than Goodman Factors, Inc. does not constitute payment of this invoice.” *Id.*, Ex. C. The other invoice states that “[a]ll proceeds of this invoice have been assigned to and are property of Advance Payroll Funding, Limited * * * A UCC-1 financing statement has been filed in your state to perfect this secured interest.” *Id.*

ESA demands relief on all of its counterclaims “[i]n the event the Complaint is not dismissed * * *.” McKenna Aff., Ex. B.

Discussion

To prevail on a motion for summary judgment, the moving party must “establish [its] cause of action * * * sufficiently to warrant the court as a matter of law in directing judgment in [its] favor * * *.” *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980) (internal quotation marks and citation omitted). In order to defeat the motion, the opposing party “must show facts sufficient to require a trial of any issue of fact * * *.” *Id.* (internal quotation marks and citation omitted).

ESA argues that CSF lacks standing to bring this action, because CSF is not the owner of the account receivables. In opposition, CSF argues that its arrangement with its factor “is entirely between [CSF] and the factor.” Weissman Reply Aff., ¶ 2.

UCC 9-318 (a) provides that “[a] debtor that has sold an account * * * [or] payment intangible * * * does not retain a legal or equitable interest in the collateral sold.” The Official Comment (2) to UCC 9-318 states that “a seller of an account * * * retains no interest whatsoever in the property to the extent that it has been sold.”

CSF does not dispute **ESA's** contention that CSF transferred its account receivables to a factor, that CSF is not the owner of the account receivables, and that CSF has no rights to any outstanding account receivable. Moreover, the evidence, including McKenna's testimony and CSF invoices, demonstrates that CSF has no interest in the account receivables that are the subject of this action. Def. **Opp.**, Exs. B and C. Thus, any outstanding invoices are the property of CSF's factor. Because CSF has no right to the account receivables, CSF lacks standing to bring this action. *Parker v Simon*, 231 NY 503 (1921); *Subotsky v Rosenberg*, 87 AD2d 759 (1st Dept 1982); *see also* UCC 9-318 (a). Accordingly, **ESA's** cross motion to dismiss the complaint is granted.

As discussed *supra*, defendant's counterclaims are asserted "[i]n the event the Complaint is not dismissed * * * ." McKenna Aff., **Ex. B**. Thus, because the complaint is dismissed, defendant's counterclaims are dismissed without prejudice. The court makes no determination on the merits of defendant's counterclaims.

Accordingly, it is hereby


ORDERED that plaintiff's motion is granted to the extent that defendant's counterclaims are dismissed without prejudice to commencement of a separate action, and the motion is otherwise denied; and it is further

ORDERED that defendant's cross motion is granted to the extent that the complaint is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: June 7, 2004

ENTER:



J.S.C.

HON. RICHARD B. LOWE, III

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JUN 16 2004
NEW YORK
COUNTY CLERK'S OFFICE