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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH J.S.C. PART 54

Index Number : 116451/2006

MERCHANT SERVICES, INC.

VS

GRAHAM, BIANCA

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2-3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/6/07

SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MERCHANT SERVICES, INC.

Index No.: 116451/06

Plaintiff,

-against-

DECISION and ORDER

BIANCA GRAHAM and WEE ME, INC.,

Defendants.

----------X

KORNREICH, SHIRLEY WERNER, J.:

This action arises from the alleged nonpayment of money owed for credit card processing services provided to defendant Wee Me, Inc. ("Wee Me") by plaintiff Merchant Services, Inc. ("MSI") pursuant to an agreement, which was personally guaranteed by defendant Bianca Graham. Plaintiff now moves for summary judgment on the complaint and to dismiss defendants' eight affirmative defenses. Defendants oppose.

I. ***Statement of Facts***

Plaintiff's president, Nathan Mumford, avers the following. MSI provides credit card processing services to its clients, one of which is Wee Me—a children's clothing and toy store. On January 11, 2006, Wee Me entered into a written Merchant Processing Agreement with MSI, which Ms. Graham, Wee Me's owner, personally guaranteed. Pursuant to the agreement, plaintiff provided credit card processing services to Wee Me. The agreement required Wee Me to maintain accounts "with sums sufficient to satisfy [Wee Me's] current and future obligations" as well as to "immediately pay MSI . . . any amount incurred by MSI . . . attributable to this Agreement[.]" Under the agreement, defendants were prohibited from processing store credits or

adjustments that were not related to sales drafts processed by MSI.

The agreement also provided for termination of the agreement for "excessive activity." Such excessive activity occurred when:

> during any monthly period: (i) the dollar amount of charge-backs and/or retrieval requests in excess of 1% of the average monthly dollar amount of your Card transactions; (ii) sales activity that exceeds by 10% of the dollar volume indicated on the Application; or (iii) the dollar amount of returns equals 20% of the average monthly dollar amounts of your Card transactions."

The agreement authorized MSI to "take any action [it] deem[ed] necessary" in the event of such excessive activity. On Wee Me's application, it indicated a "monthly volume" of $15,000, its actual average monthly transactions between January and July 2006 was $23,077.34/month.

Between July 27, 2006 and August 29, 2006, Wee Me processed 26 credits in the total amount of $41,010.87. The funds in its account were insufficient to cover these credits. During this same period, Wee Me had only six sales, totaling $295.95, which left $40,714.92 in credits not covered by the account's funds. Plaintiff repeatedly demanded payment of that uncovered amount from defendants, who failed to pay.

In her affidavit in opposition, Theodora Nakos, Wee Me's vice president, avers that Wee Me held a "summer clearance sale from July to August" of 2006. Thereafter, a number of Wee Me's customers returned products, which they had purchased at the sale and "Wee Me processed approximately $41,000 in credits for these customers." Ms. Nakos does not dispute MSI's claim that the subject account did not contain sufficient funds to cover the credits.

Ms. Nakos claims that some of Wee Me's customers then "complained that plaintiff did not issue them a credit in their monthly credit card statement—or subsequently redebited their

accounts—such that they were being charged for items they already returned." When she attempted to resolve the issue with MSI, Ms. Nakos discovered that MSI had frozen her account on August 30, 2006. Wee Me claims that it then paid approximately $41,000 directly to customers who had returned goods.

II. ***Conclusions of Law***

To prevail on a motion for summary judgment, the movant must establish a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to demonstrate the absence of any material issue of fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). Once a prima facie showing is made, the burden then shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues that require a trial. *Zuckerman v. New York*, 49 N.Y.2d 557, 560 (1980).

Here, plaintiff has demonstrated its entitlement to judgment against defendants. While plaintiff has shown that Wee Me did not maintain sufficient funds in its account—as required by the agreement—to cover the credits it issues, Wee Me has failed to raise a triable issue in response. Wee Me argues that it paid back its customers and, therefore, owes MSI no money. Even if true, this does not change the fact that within the scope of the agreement Wee Me was required to keep sufficient funds in the account, that it failed to do so, and that it was required to immediately pay any amount incurred by MSI attributable to the agreement. Additional discovery, as sought by Ms. Nakos, will not change this result. Even if Ms. Nakos' discovery yields everything she contends it may, the fact that Wee Me breached the contract will remain undisputed. *See Bachrach v. Farbenfabriken Bayer AG*, 36 N.Y.2d 696, 697 (1975) ("Hope alone will not raise a triable issue"). If Wee Me, as it claims, opted to pay its customers out of

pocket and outside the scope of its contract with MSI then it may bring an action to recover such monies if it so desires.

Finally, defendants' claim that MSI violated the covenant of good faith and fair dealing by freezing the account without notice is to no avail. The agreement specifically allowed plaintiff to take such action if Wee Me had "excessive activity." During the subject period, Wee Me's processing of $41,010.87. in credits constituted "excessive activity" as defined by the agreement. Thus, pursuant to the agreement, MSI was entitled to terminate the agreement and stop processing Wee Me's account without prior notice to Wee Me.

Affirmative Defenses

While, in their answer, defendants assert eight affirmative defenses, they only address three of those defenses in their opposition papers, in effect, conceding dismissal of the other five. Thus, the only affirmative defenses at issue are: no causation of damages (fifth defense); no damages (sixth defense); breach of agreement by plaintiff (eighth defense).

These three defenses, however, are without merit. As discussed above, Wee Me has submitted no evidence that plaintiff breached the agreement. Rather, the opposite is true. Further, defendants' conclusory statements that "defendants did not cause damages" and there were "no damages," their fifth and sixth affirmative defenses, will not keep these defenses alive. *See American Mortgage Banking v. Canestro*, 201 A.D.2d 407, 408 (1st Dept. 1994) (proper to dismiss affirmative defense where defendants' unsubstantiated allegations fail to establish defense). Accordingly, it is

ORDERED that he motion is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendants Bianca Graham and Wee Me, Inc. in the amount of

$40,714.92, together with interest at the statutory rate from the date of August 29, 2006, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

ENTER:

Dated: June 6, 2007

J.S.C.