

Timber Lake Corp. v Xenex Merchant Servs.
2007 NY Slip Op 33287(U)
September 28, 2007
Supreme Court, Nassau County
Docket Number: 6063-06/
Judge: Karen Veronica Murphy
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 25 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____x

**TIMBER LAKE CORPORATION, TYLER HILL
CORPORATION, TIMBER LAKE WEST
CORPORATION, NORTH SHORE CAMP, LLC
and NORTH SHORE SCHOLASTIC
ASSOCIATION, INC.,**

Index No. 6063/06

**Motion Dated: 7/09/07
Motion Submitted: 8/01/07
Motion Sequence: 001**

Plaintiffs,

-against-

XENEX MERCHANT SERVICES,

Defendant.

_____x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Motion by Defendant for summary judgment dismissing the complaint and for attorney's fees is denied.

This is an action to recover alleged overcharges for credit card processing services. Plaintiffs are affiliated companies that operate summer camps for children and a private pre-school. Although Plaintiffs accept Visa and Mastercard in payment of their tuition fees, they do not "swipe" the card as would a merchant who was completing a retail sale. When parents pay the tuition by credit card, they mail their credit card number to the camp or

school, presumably with the registration materials. Plaintiffs then enter, or “key,” the number into a credit card processing machine.

Defendant Xenex Merchants Services is a credit card processing company. Xenex supplies credit card machines to merchants and processes their credit card transactions. When a merchant makes a sale to a customer, Xenex electronically charges the customer’s credit card account and credits the bank account of the merchant. Xenex charges the merchant a fee for this service and deducts the fee from the proceeds of the sale.

The processing fee that Xenex charges ordinarily varies with the type of credit card transaction. For example, if a sale is completed with a consumer credit card which is “swiped” through the machine, the sale is referred to as a “qualified transaction,” and a fee of 1.95% of the amount of the sale is typically charged. If, rather than swiping the credit card, the purchaser’s credit card number is manually entered, the sale is referred to as a “mid-qualified transaction,” and a higher fee is charged. A sale that does not fall into either of these categories is referred to as a “non-qualified transaction,” requiring an even higher fee. For example, if the purchaser uses a corporate credit card or the sale is completed by mail or over the telephone, the sale is a non-qualified transaction.

Plaintiffs allege that in October 2004, Michael Sclafani, Xenex’s National Sales Director, made a telephone call to David Wong, Plaintiffs’ Chief Financial Officer, soliciting Wong to switch Plaintiffs’ credit card processing business to Defendant. While Wong realized that a “mail order” business ordinarily pays a higher credit card rate, he was interested in obtaining a better rate than what Plaintiffs were currently paying. According to Wong, Sclafani stated that Xenex would charge Plaintiffs a flat rate of 1.95% for all transactions. Nevertheless, Sclafani subsequently faxed to Wong Xenex’s “standard” credit card processing application.

On the top of page 2 of Xenex’s “Merchant Application” form, there is a 4" square box entitled, “Mail/telephone/internet rates & level II retail.” Inside the box in approximately 8 point type, are listed “discount rates” for different types of credit cards as well as various other fees for performing credit card services. The application form sent to Wong showed a “discount rate” of 2.95%, as well as certain fees, including a “bankcard transaction fee” of .25 per item and a “batch fee” of .35 per batch.

Immediately below the box showing the rates was “fine print” about half the size of the printing contained in the box. This language provided that the “discount rate” would be

charged "on all electronically authorized and swiped bankcard transactions that are in batches closed daily (qualified rate.)" However, a "mid-qualified rate of up to 1.39% + \$.10" would be charged for: (a) "key entered" transactions where the card and the card holder were "present at point of sale," the cardholder's signature was obtained, the card holder's address was verified with a "full match of billing zip code," and the transaction was settled within 3 days of authorization, or (b) "single authorization" transactions where the credit card was not produced at the point of sale, but the cardholder's address was verified, and the transaction settled within two days. Defendant interprets this language as providing that the rate for a mid-qualified transaction could be *increased* by this amount over the rate for a qualified transaction. Thus, the rate for a mid-qualified transaction could be as high as 1.95+1.39 or 3.34% plus 10 cents. Finally, a "non-qualified rate" of up to "1.95% + .10 higher than the qualified rate" would be charged for all transactions not meeting these requirements.

After receiving the fax, Wong changed the discount rate to 1.95% and the bankcard and batch fees to .14, leaving all but one of the other fees shown in the box unchanged. Wong made no marks on the section of the application containing the mid-qualified and non-qualified rates. After making the changes, Wong faxed the corrected merchant application back to Sclafani. With the corrected application, Wong faxed Sclafani back his own cover letter with the handwritten note, "Please see my notations on rate sheet and advise if I am correct." Although application forms were subsequently executed for all five plaintiffs, it appears that the application which Sclafani originally faxed to Wong, and that Wong hand-corrected, pertained to plaintiff Timber Lake Corporation. The "1.95%" entered in the rate box for Timber Lake Corporation is in a different handwriting from the "1.95%" in the other applications. Additionally, unlike the other applications, the "Visa/Mastercard sales profile" in plaintiffs' copy of the Timber Lake application is blank.

After returning the application, Wong prepared a "credit card payment analysis," showing Plaintiffs' net sales for the period October 2003 through October 2004. In the analysis, plaintiffs' sales were broken down by Tyler Hill, Timber Lake, Timber Lake West, and North Shore. The sales pertaining to North Shore's camp and pre-school operations were apparently aggregated. The analysis also showed the monthly credit card rates and fees that Plaintiffs were charged during that period. In the analysis, Wong calculated a projected cost savings of \$26,400 based upon a processing rate of 1.95%.

Wong forwarded the credit card payment analysis to Sclafani on October 21, 2004. On November 1, 2004, Sclafani sent Wong a fax stating "Your new rate is 1.95% (no additional charges for manual keyed entries). Transaction fee .14 cents."

On November 9, 2004, Sclafani met with Wong at Plaintiffs' office and presented him with application forms for all of the Plaintiffs, showing a 1.95% discount rate. The Court notes that the forms all indicated that 100% of the applicant's credit card sales were conducted by "mail/telephone order." The Timber Lake Corporation application did not originally contain this information. Plaintiffs' President Jay Jacobs signed the application for Timber Lake Corporation on November 9, 2004 and the remainder of the applications on the following day.

For ten months after the applications were signed, Xenex performed credit card processing services for Plaintiffs, charging rates on at least some transactions in excess of 1.95%. Defendant does not fully explain the actual rates that were charged. At the end of each month, Xenex sent each plaintiff a "merchant statement," detailing the company's daily sales and net deposits. The monthly statements also showed the company's receipts broken down by credit card issuer and the corresponding monthly fees that defendant charged. Defendant has submitted two monthly merchant statements for the school operated by plaintiff North Shore Scholastic Association. These merchant statements show a "discount rate" of 2.03% as well as an item rate of .05. It is unclear whether this rate was applied to North Shore consistently throughout the period and whether it was also applied to the other plaintiffs. However, according to the deposition of David Wong, it appears that Xenex applied a lower credit card rate to refunds than it applied when the tuition charges were originally made. Because Plaintiffs gave substantial refunds to their customers during the month of December, the lower rate for refunds resulted in a significant increase in the rate based upon net sales and the credit card fees that were actually paid.

According to Plaintiffs, the "overall rates" that Defendants charged for the period December 2004 through August 2005 were 3.2% for Timber Lake, 3.4% for Timber Lake West, 3.35% for Tyler Hill, 3.25% for North Shore, and 2.64% for North Shore Scholastic. Plaintiffs estimate the "overall rate" for all operations to be 3.23%. Plaintiffs claim that the rates that were charged were in violation of their credit card processing agreements, and the amount of the overcharges is \$64,557.00. Plaintiffs assert that they did not discover the discrepancy in rates until September 2005 when the merchant statements were audited in preparation for the close of the fiscal year.

Nevertheless, North Shore Scholastic continued to use Xenex's services through the end of March 2006.

Plaintiffs commenced this action, asserting a claim for breach of contract, on April 10, 2006. Defendant counterclaimed for legal fees on the theory that the Merchant Application provides that the merchant will be liable for attorney's fees incurred "in the enforcement of this agreement." Defendant now moves for summary judgment, claiming that all credit card processing fees were in compliance with the terms of the contract. Alternatively, Defendant argues that Plaintiffs "ratified" the contracts by accepting credit services provided by defendant.

The language in Xenex's Merchant Application pertaining to the mid-qualified rate is somewhat misleading because it does not make clear that the 1.39% is a surcharge to be added to the "discount rate." Moreover, a less sophisticated merchant might overlook the fine print completely and sign the application on the assumption that it was receiving the discount rate. However, in the present case, the parties stood on equal footing in negotiation of the credit card processing agreement. While a smaller merchant may have been less free to negotiate with Xenex, in the case at bar there is no reason to question the integrity of the contract formation process.

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 the material terms (*Matter of Express Indus. & Term. Corp. v. New York State Dept. of Transp.*, 93 N.Y.2d 584, 589, 715 N.E.2d 1050, 693 N.Y.S.2d 857 [1999]). This requirement assures that the judiciary can enforce the parties' mutually agreed terms and conditions when one party seeks to uphold them against the other. Generally, Courts look to the basic elements of offer and acceptance to determine whether there was an "objective meeting of the minds" sufficient to give rise to a binding and enforceable contract (*Id.*). The first step is to determine whether there was a sufficiently definite offer such that its unequivocal acceptance will give rise to an enforceable contract (*Id.* at 589-90). An acceptance, in order to be effective, must be positive and unambiguous (*Id.* at 591). An acceptance that requests a change or addition to the terms of the offer is not thereby invalidated, unless the acceptance is made to depend upon an assent to the changed or added terms (*Id.*).

When Sclafani faxed Xenex's Merchant Application to Wong, several material terms, the discount rate, the bankcard fee, and the batch fee, varied from those that were originally discussed. Nevertheless, the Merchant Application may have been effective as an offer, if

its provisions concerning those terms were definite and unambiguous. By changing the rates and returning the application to Sclafani, Wong clearly requested a change or addition to the terms of the offer. However, since Wong requested that Sclafani advise whether he was “correct,” Wong’s returning of the application was equivocal and did not operate as an acceptance. While Jacobs purported to accept Xenex’s “offer” by signing the applications, his acceptance was clearly dependent on assent to the rates which Wong had previously requested. In order to determine whether a contract was formed, the Court must consider whether the Merchant Application, as altered by the parties, was definite and unambiguous.

A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion (*Greenfield v. Philles Records*, 98 N.Y.2d 562, 569, 780 N.E.2d 166, 750 N.Y.S.2d 565 [2002]). Whether an agreement is ambiguous is an issue of law for the court to decide (*Id.*). However, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of equity and fairness (*Id.* at 569-70).

The Court has already noted the ambiguity in the language concerning Xenex’s mid-qualified rate. That ambiguity would not be fatal to the formation of a contract if, as Plaintiffs argue, the application clearly provided that Plaintiffs were in all circumstances to receive the discount rate. However, the Court concludes that the application is ambiguous because, having been designed for a retail merchant, it does not clearly specify the rate which would apply to “mail order” transactions effected by the Plaintiffs. When the language of a contract is ambiguous, its construction presents a question of fact which may not be resolved by the court on a motion for summary judgment. (*DiLorenzo v. Estate Motors, Inc.*, 22 A.D.3d 630, 802 N.Y.S.2d 516 [2d Dept., 2005]). Defendant’s motion for summary judgment on the breach of contract cause of action is denied.

The attorney fee provision in the merchant application provides:

Merchant will be liable for and will indemnify and reimburse MSI, Global, and Bank for all attorney’s fees and other costs and expenses paid or incurred by MSI, Global, and Bank or their agents in the enforcement of this agreement, or in collecting any amounts due from merchant or resulting from any breach by merchant of this agreement.

This Court finds the language of this attorney fee provision ambiguous. It is not clear if it applies to enforcement as between these parties or defendant and individual credit card holders. That branch of Defendant's motion for summary judgment on its Counterclaim for attorneys fees is also denied.

The foregoing constitutes the Order of this Court.

Dated: September 28, 2007
Mineola, N.Y.

Loren V. Murphy
ENTERED

OCT 12 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE