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

PRESENT: KORNREICH Justice

PART 54

MERCHANTS SERVICES INC

- v -

BIANCA GRAHAM

INDEX NO. 116457/02

MOTION DATE 8/2/07

MOTION SEQ. NO. 2

MOTION CAL. NO. ____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 26 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

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

Dated: 10/22/07

HON. SHIRLEY WERNER KORNREICH J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

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

----------X

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 that was personally guaranteed by defendant Bianca Graham. By Decision and Order dated June 6, 2007, the court granted MSI's motion for summary judgment on the complaint and ordered the Clerk to enter a money judgment in favor of MSI and against defendants Wee Me and Bianca Graham ("Graham"). By order to show cause issued July 20, 2007, the court (Tingling, J.) ordered MSI to show cause why defendants should not be granted leave to renew and reargue MSI's motion for summary judgment, and the court issued a temporary restraining order staying enforcement of the judgment pending a hearing. By separate order to show cause issued July 24, 2007, the court (Heitler, J.) ordered Wee Me and its Vice-President Theodora Nakos ("Nakos") to show cause why they should not be held in contempt pursuant to CPLR 2308, 5221 and 5251, and Judiciary Law Article 19, and why additional relief

should not be granted. A hearing was held on August 2, 2007 and the court took the matter under submission. For the reasons stated below, defendants' motion for leave to renew and reargue is denied and the temporary restraining order is dissolved; MSI's motion for contempt is denied, its further motion for the deposition of Nakos is construed as a motion to compel and so construed is granted, and its motion for attorney's fees is referred to a Special Referee.

I. ***Statement of Facts***

The court assumes familiarity with the prior decision granting summary judgment. The only new "facts" defendants present in support of renewal and reargument are an affirmation by a customer of Wee Me named Jane Goldman, who is an attorney, and a supplemental affidavit by Nakos. Goldman makes the following statements in her affirmation: (I) she was re-charged for an amount previously credited to her MasterCard account; (ii) Wee Me employee "Lola" told her the charge was put through on her account by MSI; (iii) she participated in a conference call with MSI and Wee Me employees in which MSI's employee approved direct payment by Wee Me to offset the new charge to her account; and (iv) Wee Me made a payment to her by certified check in the amount charged on her account. Statements made by Nakos in her supplemental affidavit are redundant to those made previously in her original affidavit, which the court reviewed in deciding the summary judgment motion.

In a responding affidavit MSI's president Nathan Mumford denies that MSI has the capability to directly charge a customer's credit card account. He explains that if a customer was charged or credited, "it was at the instance of Wee Me using its credit card terminal at the Wee

Me store." Mumford Affid. ¶ 3. He also describes the process contemplated by the parties' agreement,

> The funds from credit card charges to Wee Me customers went directly into Wee Me's bank account, and any credits issued by Wee Me were electronically deducted from Wee Me's bank account. Plaintiff does not, and cannot, touch this money.

Mumford Affid. ¶ 4.

In support of its motion for contempt, attorney's fees, and to depose Nakos, MSI argues that defendants "have refused or wilfully neglected to obey judgment enforcement subpoenas and restraining notices," and that it is entitled to attorney's fees pursuant to the parties' agreement. MSI's attorney affirms that on July 6, 2007 MSI served a restraining notice and judgment enforcement subpoenas on Wee Me and its Vice President Nakos. The subpoenas sought documents and Nakos' deposition. Nakos responds by affidavit that she first learned of the subpoenas on July 10,. 2007, that the date scheduled for her appearance was July 18, 2007, that Wee Me's counsel advised MSI's counsel he was unavailable on the noticed date, and that in any event he would be filing a motion to renew and reargue. The motion was filed on July 20, 2007.

II. *Conclusions of Law*

A. *Defendants' Motion*

The standards to be applied in determining a motion to reargue and renew a prior decided motion are set forth in CPLR 2212(d) and (e), which provide in pertinent part:

(d) A motion for leave to reargue:

1. shall be identified specifically as such;

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and

3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry... .

(e) A motion for leave to renew:

1. shall be identified specifically as such;

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion.

Defendants have failed to meet their burden under either subsection (d) or (e) of CPLR 2212. With respect to the motion to reargue, defendants do not establish that the court "overlooked or misapprehended" any matter of fact or law in deciding MSI's summary judgment motion. The court made the following finding in its decision: "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." The principle defendants cite (without authority), that courts may "generally hold a trial for damages" where damages remain disputed (Soulios Affirm. ¶ 26), is embodied by the summary judgment standard codified in CPLR 3212(b). That standard requires a party opposing the motion to show facts sufficient to require a trial of any issue of fact. *See Zuckerman v. New York*, 49 N.Y.2d 557, 560-563 (1980). Based on the facts offered by Wee Me in response to MSI's summary judgment motion, which are the only facts a court may consider in deciding a motion to reargue [CPLR

2212(d)(2)], defendants failed to come forward with facts opposing summary judgment that were sufficient to require a trial.

Nor did the court misconstrue the legal principle of unjust enrichment when it found that defendants owed MSI $41,010.87, the amount of credits that exceeded funds in defendants' account, and that defendants could bring a separate action to recover any monies it allegedly paid its customers out of pocket. The undisputed facts considered by the court showed that after a customer charged a purchase, funds were deposited into Wee Me's account for which Wee Me then became liable to MSI. The parties' agreement specifically provided that the deposit of such funds constituted a "provisional credit" and that Wee Me was obligated to "pay on demand the value of all chargebacks." (Agreement, Terms and Conditions ¶ 4.) The alleged fact that Wee Me paid back some customers directly for returned items does not discharge the debt owed to MSI. Indeed, it is the customer who would arguably be unjustly enriched by receiving both a credit on his/her account *and* direct re-payment by Wee Me.

Nor does the allegedly "new" affirmation of a customer named Jane Goldman (an attorney) produced by defendants at this late date meet the standard for a renewed consideration of the summary judgment motion. At the outset, even though Ms. Goldman's affirmation was signed on July 19, 2007, defendants have not shown that the information it contains is "new," as required by CPLR 2212(e). To the contrary, the facts attested to by Goldman in her affirmation were previously set forth in Nakos' first affidavit opposing MSI's summary judgment motion, and reflected in Goldman's credit card statement that was attached as an Exhibit to defendants' opposition. This information is old wine now presented in a new bottle–the Goldman affirmation--and as such is not "new."

Nor would Goldman's affirmation "change the prior determination." CPLR 2212(e)(2). *See Pulgram v. Reisner,* 2007 NY Slip Op 7898; 2007 N.Y. App. Div. LEXIS 10811 (1st Dept. 2007) (denial of motion to renew was provident exercise of discretion where plaintiff offered no explanation for failure to submit evidence in opposition to summary judgment, and evidence was insufficient). Defendants argue that Goldman's affirmation shows the parties "modified" their agreement. Yet the agreement contained an integration clause, so the parol evidence rule precludes defendants from referring to external evidence to vary the terms of the agreement. *W.W.W. Assoc., Inc. v. Giancontieri*, 77 N.Y.2d 157, 163 (1990). Further, Goldman describes events that allegedly occurred after Wee Me's breach and after MSI exercised its contractual right to stop providing Wee Me with credit card processing services. The subsequent charge to Goldman's credit card account that she describes is unrelated to the parties' agreement and this lawsuit. *See Freund v Washington Sq. Press*, 34 N.Y.2d 379, 382 (1974). As the Court of Appeals stated in the *Freund* case, "It is axiomatic that . . . the law awards damages for breach of contract to compensate for injury caused by the breach--injury which was foreseeable, i.e., reasonably within the contemplation of the parties, at the time the contract was entered into."

Finally, Goldman attests to an uncorroborated statement by Wee Me's employee that MSI re-charged Goldman's account. Yet defendants do not provide any explanation of how this employee named "Lola," whom the evidence suggests is actually Nakos using a different name, knew that MSI had re-charged Goldman's account. Nor could defendants have provided a reasonable explanation. As MSI's President Nathan Mumford explains in opposition, MSI did not process any charges or credits involving Wee Me customers after MSI terminated processing

services on August 30, 2006. The motion to reargue and renew the prior motion for summary judgment is denied.

B. *MSI's Motion*

MSI has not established the requisite elements of contempt. Although subpoenas in aid of enforcing the judgment were apparently issued and served on Wee Me, there is no evidence that Wee Me "wilfully" resisted or disobeyed the "lawful mandate" of the court. Judiciary Law § 750(A). At best the evidence shows that Wee Me delayed compliance due to the instant motion to reargue or renew the summary judgment motion. Further, the subpoenas are not returnable in a court, and thus the appropriate remedy for a failure to comply is a motion to compel compliance. CPLR 2308(b). The motion for an order of contempt is denied.

The court construes the motion for an "immediate deposition of Nakos" as a motion to compel and so construed grants the motion. The parties are directed to confer and agree upon a reasonable timetable for compliance. The motion for attorney's fees is referred to a Special Referee as ordered below. Accordingly, it is

ORDERED that defendants' motion to reargue and renew the previously decided motion for summary judgment is denied; and it is further

ORDERED that plaintiff's motion for contempt is denied; and it is further

ORDERED that plaintiff's motion for a deposition of Nakos is construed as a motion to compel, and so construed is granted; and it is further

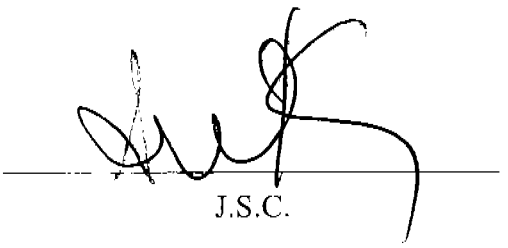
ORDERED that the issue of reasonable attorneys' fees is referred to a Special Referee to hear and determine; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk shall notify all relevant parties of the date of the hearing.

The foregoing constitutes the decision and order of the Court.

Date: October 23, 2007



J.S.C.