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

PRESENT: Cahn Justice PART 49

Index Number : 600756/2007

IIG CAPITAL LLC

VS.

MORGAN STANLEY & CO. INCORPORATED

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 600756-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

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 ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

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

Dated: February 21, 2008

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

IIG CAPITAL LLC,

Plaintiff,

-against-

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

Index No. 600756/07

Herman Cahn, J.

Defendant Morgan Stanley & Co. Incorporated moves to dismiss the complaint based on documentary evidence and for failure to state a claim, CPLR 3211(a)(1) and (7), stating that the parties entered into an accord and satisfaction.

BACKGROUND

Plaintiff IIG Capital LLC purchased the accounts of MarketXT Inc., a registered broker-dealer, pursuant to a Factoring and Security Agreement executed on July 16, 2002, including its accounts with Morgan Stanley. Pursuant to the agreement, MarketXT agreed to sell, and IIG Capital agreed to purchase and make advances against all accounts arising out of MarketXT's execution of trades on NASDAQ.

MarketXT served as an Electronic Communications Network ("ECN"), executing stock transactions in the NASDAQ electronic marketplace by matching customers' buy and sell orders directly through a computer. In 2002, MarketXT received liability orders from direct subscribers and through NASDAQ's Small Order Execution System ("SuperSOES"). MarketXT charged access fees for trades it effectuated through its ECN.

MarketXT had invoiced Morgan Stanley for access fees claimed to be due as a result of defendant's alleged trades through MarketXT. Morgan Stanley, however, disputes having any contract with MarketXT, stating it was not a subscriber to MarketXT's Lightspeed ECN. Morgan Stanley alleges that, because SuperSOES was a completely automated system, it had no control over whether an order it entered into SuperSOES would automatically execute against a Lightspeed order.

On August 1, 2002, plaintiff invoiced Morgan Stanley for access fees in the amount of $606,037.27 associated with trades MarketXT claimed to have executed on Morgan Stanley's behalf between February 1, 2002 and July 31, 2002. In addition, plaintiff advised defendant that MarketXT had assigned its present and future accounts to IIG Capital and that all payments should be made to the address listed: IIG Capital LLC, P.O. Box 18907, Newark, NJ 07191-8907. This address apparently was a lockbox, used to collect remittances sent to plaintiff.

On August 15, 2002, Morgan Stanley responded by letter, sent to IIG Capital's post office box. In the letter, Morgan Stanley stated that it did not have a contract with plaintiff and that it never asked plaintiff to execute any stock transactions. Defendant acknowledged that the orders it placed through SuperSOES may have been routed to MarketXT's Lightspeed ECN even though Morgan Stanley never directed such orders to MarketXT, because SuperSOES automatically assigned and delivered executions to SuperSOES participants.

In addition to the letter, Morgan Stanley enclosed a check in the amount of $183,943.05 to settle the invoices sent by plaintiff. The letter also indicated that acceptance by plaintiff would constitute "full satisfaction of any purported payment obligation." (Silverstein Aff, Ex B at 2.)

The check was deposited on August 26, 2002. Plaintiff alleges that its bank collected all

the remittances made into the lockbox and deposited them into IIG Capital's account, without plaintiff's knowledge of the individual checks deposited.

Defendant alleges that after the check was cashed, it was never informed that plaintiff protested the check or the amount sent in full satisfaction of the invoice, until five years later when this action was commenced.

DISCUSSION

Morgan Stanley moves to dismiss the Complaint, arguing that it is barred by accord and satisfaction.

On a motion to dismiss under CPLR 3211, the pleading is given a liberal construction and the facts alleged are accepted as true. *Leon v Martinez*, 84 NY2d 83, 87 (1994). The motion to dismiss will only be granted if, upon giving the non-moving party every favorable inference, the facts do not fit within any cognizable legal theory. *Id.* at 87–88. CPLR 3211(a)(1) allows for a dismissal when documentary evidence is presented that indicates plaintiff's claim must fail.

In order to have an accord and satisfaction, there must be a dispute as to the amount due and the party tendering partial payment must manifest its intent that the tender is offered in full satisfaction of the disputed payment obligation. *Pothos v Arverne Houses, Inc.*, 269 AD2d 377, 378 (2d Dep't 2000).

Defendant argues that when it made the $183,943.05 payment to plaintiff on August 15, 2002 to settle a disputed $606,037.27 invoice, its payment was specifically conditioned on being in "full satisfaction of any purported payment obligation." (Silverstein Aff, Ex B at 2.) Defendant contends that when the check was accepted and deposited by plaintiff, it agreed to the terms that it would be in full satisfaction. Defendant contends that if plaintiff wanted to preserve

its rights for additional payments, it needed to do so either before or contemporaneously with accepting payment in order to avoid accord and satisfaction. *Sarbin v Southwest Media Corp.*, 179 AD2d 567, 572 (1st Dep't 1992).

Plaintiff argues that the circumstances did not operate as an accord and satisfaction. IIG Capital contends, first, that it had no knowledge that the account with Morgan Stanley was disputed and, second, that Morgan Stanley's attempt to settle the dispute by sending a letter and enclosing a check to IIG Capital's lockbox does not qualify as an accord and satisfaction.

The check deposited in partial payment by plaintiff constituted an accord and satisfaction. First, there was a dispute as to the amount due, as evidenced by the letter Morgan Stanley sent with the check, detailing its belief that it did not owe plaintiff any money. That letter was sufficient to place IIG Capital on notice of the dispute. Second, the letter clearly denoted that it was being offered in full satisfaction of the debt.

When partial payment is offered in full satisfaction of a disputed amount and the partial payment is deposited, the parties are deemed to have reached an accord and satisfaction, unless the party accepting the payment explicitly reserves the right to pursue the outstanding balance. *Horn Waterproofing Corp. v Bushwick Iron & Steel Co.*, 66 NY2d 321, 327 (1985). Here, the documentary evidence establishes that there was an accord and satisfaction. Plaintiff deposited the partial payment check without reserving any right to recover the remainder.

IIG Capital contends that since it had no control over the lockbox and its bank automatically deposited any checks that were sent to the lockbox, it cannot be deemed to have accepted Morgan Stanley's partial payment. However, Morgan Stanley sent its offer of partial payment to the address listed in the August 1, 2002 letter sent by plaintiff.

IIG Capital directed Morgan Stanley to remit payment to the post office box. In sending the check to the post office box, Morgan Stanley did nothing other than follow the directions given to it by plaintiff. It was IIG Capital that made arrangements for payments received to be directly deposited into its bank account. Morgan Stanley should not be disadvantaged by such an arrangement, when it enclosed a letter clearly indicating its intent and sent a check in partial payment of the full obligation to the address given by IIG Capital.

Additionally, regardless of whether IIG Capital was on notice of the check at the time it was deposited, it certainly was on notice at the time the credit was posted to its account, which it never sought to return or dispute within a reasonable time. Therefore, IIG Capital is not entitled to now seek the remainder of the claim. *Corporate Plaza Assocs., LLC v Interactive Video Techs, Inc.*, 2002 WL 424308, at *2–3 (SDNY, Mar. 19, 2002).

Accordingly, it is

ORDERED that the Complaint is dismissed; and it is further

ORDERED that the clerk enter judgment in favor of defendant against plaintiff dismissing the Complaint, together with the costs and disbursements of this action.

Dated: February 21, 2008

ENTER:

J.S.C.