[* 1]

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x TRIAL TERM PART: 48

P.I. SPORT N.Y., INC.,

INDEX NO.: 13744/05

Plaintiff,

MOTION DATE:2-15-08
SUBMIT DATE:3-10-08
SEQ. NUMBER - 001 & 002

-against-

CHASE MERCHANT SERVICES, LLC,
JP MORGAN CHASE BANK and FIRST DATA
MERCHANT SERVICES CORPORATION,

Defendants.

----------x

The following papers have been read on this motion:

Notice of Motion, dated 12-3-07.....1
Notice of Cross Motion, dated 2-6-08.....2
Affidavit in Opposition, dated 2-14-08.....3
Affirmation in Further Support of Cross Motion,
Dated 3-5-08.....4

Plaintiff's motion for summary judgment pursuant to CPLR §3212 is denied, defendant's cross motion for the same relief is granted and the complaint is dismissed.

Plaintiff, a wholesale purveyor of garments which are sold by means of internet, fax or telephone orders, and at all relevant times operated by one Bekas, a college graduate, experienced business person, decided as a new policy that it should accept payment for goods by credit cards and to that end, contacted its banker who made introductions to

defendant Chase Merchant Services, LLC (Chase) a credit card processor for Visa and Mastercard. In November 2004, plaintiff, Chase and defendant JP Morgan Chase Bank, (Morgan) entered into two agreements (the Agreement) pursuant to which Chase agreed to process credit card transactions and payment of credit card charges. Morgan was merely a clearing bank which would provide provisional payment for credit card transactions but did not have any decisional rights with respect to the Agreement. Defendant First Data entered into an equipment lease with plaintiff which, for a small monthly fee, granted plaintiff the use of one item of undescribed equipment.

The Agreement consists of four pages of cover sheets filled in by hand and signed by both parties that incorporates by reference directly above where Bekas signed a second part called the Program Guide. Although Bekas acknowledges signing, he denies, in conclusory fashion, having received the Program Guide or in fact even reading what he signed. The Agreement also provides that the parties are bound by the rules and regulations of Mastercard and Visa.

The Program Guide is referenced on all four signed pages of the application annexed to plaintiff's moving papers and the first page states that plaintiff acknowledges receipt of the Program Guide.

The application portion of the Agreement recites that most sales would be pursuant to orders where the actual credit card would not be presented but only the card number given. As to these sales, the Agreement makes special provisions applicable and passes the risk of a chargeback to the merchant, *i.e.* plaintiff. A chargeback occurs when a credit card holder

disputes a charge and requires the merchant to provide documentary support for the charge or the credit to the merchant will be reversed. A merchant is also required to obtain an authorization for a credit card transaction, however the Agreement provides that an authorization merely tells the merchant that there is enough available credit on the account and no more. Such a charge is nevertheless still subject to dispute. Multiple attempts to obtain authorization after an authorization is denied, are prohibited. The Agreement may be terminated by Chase for a variety of reasons, including excessive chargebacks. When an Agreement is terminated, that fact is recorded in a file of terminated Agreements which is maintained by Masterard and Visa.

Based on the chargeback policies, four transactions totaling $9, 975.00 out of eleven total transactions were charged back to plaintiff. This does not mean that plaintiff was considered to be part of a fraud but merely that pursuant to the Agreement, the charge was reversed and plaintiff did not get paid. A number of these transactions were sales to an Ivory Coast purchaser that used credit card numbers in connection with fictitious names.

Chase soon terminated the Agreement based on an excessive chargeback rates and that circumstance was entered in the Mastercard and Visa database of terminated accounts.

Plaintiff commenced this action in August 2005 alleging that defendants breached the Agreement thereby causing damages of $25,000.00 and for account stated in the same amount. Following discovery, these motions ensued. Although plaintiff includes a cause of action for an account stated there is nothing in these facts that would support such a claim and summary judgment is granted to defendants as to that cause of action. *LaFramboise Well Drilling Inc., v. R.J. Dooley & Associates, Inc.*, 207 WL 430285 (S.D.N.Y.)

Plaintiff's motion is supported by an affidavit from Bekas and an affirmation from his attorney which incorporate by reference the pleadings, Bekas' examination before trial, the cover portion of the Agreement and plaintiff's answers to interrogatories, the latter containing numerous pages of exhibits relating to the chargeback transactions.

Defendants cross motion is supported affidavits from officers of Chase, an attorney affirmation and other documents.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief (*Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's

affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.,* 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.,* 21

AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

Essentially, it is plaintiff's claim that Chase did not disclose authorization requirements for sales that resulted in chargebacks and misrepresentation with respect to what plaintiff was informed as to approval requisites. Although misrepresentation is claimed in the interrogatories, such claim is neither appropriately pleaded nor supported by the facts.

Defendant claims that all of the requirements of the contract are spelled out in the Agreement the Program Guide portion of which is incorporated by reference in what plaintiff admits to signing. Moreover, plaintiff has not claimed that he ever made any inquiry about,

requested or was denied a copy of the portion of the Program Guide part of the Agreement which he claims not to have received. Plaintiff has failed to make a *prima facie* showing of entitlement to relief and hence on plaintiff's motion, there is no burden placed upon defendants to demonstrate the presence of any triable issue of fact. Thus, plaintiff's motion for summary judgment is denied.

Defendants have made a *prima facie* showing of entitlement to relief thus shifting the burden to plaintiff to provide evidence supporting the existence of triable factual issues. In this regard plaintiff's response to the clear, unequivocal and unambiguous terms of the Agreement is that Bekas, the signer, didn't receive the Program Guide and did not read what he signed. These claims are not supported by any evidence other than the conclusory statement of Bekas and even if true, are insufficient to create any factual issue.

The parole evidence rule bars admission of extrinsic evidence to contradict or vary the terms of a written contract intended to embody an agreement between parties. *Cole v. Macklowe*, 40 AD3d 396 (1st Dept. 2007). Hence, the Court is bound to interpret the Agreement in accordance with its terms.

The signer of a written agreement is conclusively bound by its terms unless there is a showing, absent here, of fraud, duress or some other wrongful act. *Columbus Trust Co v. Campolo*, 170 AD2d 275, 279 (1st Dept. 1991). A person is presumed to have read what he or she signs and cannot rely on contrary oral representations. *Lejkowski v. Petrou*, 178 AD2d 465 (2d Dept. 1991). A party will not be excused from an agreement by a failure or even a claimed inability to read it and there is no claim that defendants knew or should have known

of a misunderstanding on the part of the signer. *Huang v. Cheng*, 182 AD2d 598 (1st Dept. 1992). Thus, the law presumes that one who is capable of reading something has read the document which she/he executed, and is conclusively bound by the terms thereof. *Marine Midland Bank, N.A., v. Embassy East, Inc.*, 160 AD2d 420 (1st Dept. 1990); See also *Sofio v. Hughes*, 162 AD2d 518 (2d Dept. 1990).

When a contract is straight forward and unambiguous its interpretation presents a question of law for the Court to be made without resort to extrinsic evidence. Thus, mere assertion by a party that contract terms mean some thing where the meaning is otherwise clear, unequivocal and understandable in the context of the entire contract, is not enough to raise an issue of fact. That plaintiff contends he was never given the Program Guide referenced in the portion of the Agreement that plaintiff admits to having signed, does not, even if true, relieve plaintiff of the obligation to be bound by its terms. Under the rubric that absent some wrongful act, a party who signs a contract is conclusively presumed to know its contents and to assent to them, substantial and important terms of a contract may be incorporated by reference, *Matter of Level Export Corp.*, 305 NY 82 (1953); *Liberty Management & Construction, Ltd v. Fifth Avenue & Sixty Sixth Street Corporation*, 208 AD2d 73 (1st Dept. 1995); *Nardi v. Povich*, 12 Misc 3d 1188A (sup. Ct. NY Cty. 2006).

Here plaintiff signed several pages of the Agreement which made specific reference to the Program Guide which plaintiff claims not to have received. Plaintiff makes no claim that he requested or was denied the right to see it or that he was pressured or induced to sign without having read what he claims was missing. Finally, plaintiff does not claim that he was

provided with inducements that were inconsistent with the terms of the Program Guide. Hence, the court finds that plaintiff is chargeable with knowledge of the terms of the Program Guide which were incorporated by reference, whether or not plaintiff actually received it and that the Agreement should be interpreted giving full effect to all of its terms including the portion plaintiff claims not to have received, *see W.W.W. Associates, Inc., v. Giancontieri*, 77 NY2d 157 (1990) and *J & J Structures, Inc. v. Callanan Industries, Inc.*, 215 AD2d 890 (3rd Dept. 1990).

There is lacking here any support for the contention that Chase did not act in good faith or deal fairly with plaintiff since the evidence discloses that plaintiff was advised in writing or verbally on numerous occasions of the steps it should take in accepting credit cards for payment. *Cf 1-10 Industry Associates, v. Trim Corporation of America,* 297 AD2d 630 (2d Dept. 2002); *Components Direct, Inc., v. European American Bank*, 175 AD2d 227 (2d Dept. 1991).

Thus, defendants have by submission of the documentary evidence demonstrated that plaintiff entered into the Agreement, that the Agreement was valid and binding upon the plaintiff in accordance with its terms, that the circumstances which led to the termination thereof were created by the failure of plaintiff to abide by its terms and that defendant was justified in effecting its termination.

Defendants are awarded summary judgment pursuant to CPLR §3212 and the action is dismissed. In view of the foregoing all other requests for relief made by defendants including their requests for sanctions and costs are denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: March 27, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: **David J. Gold, P.C.**
Attorney for Plaintiff
116 John Street, Ste. 3110
New York, NY 10038

Markotsis & Lieberman, Esqs.
Douglas M. Lieberman, Esq.
Attorneys for Defendants
183 Broadway, Ste. 210
Hicksville, NY 11801