

**Quality Tech. Servs. Holding, LLC v
CheckMB, Inc.**

2008 NY Slip Op 32332(U)

August 14, 2008

Supreme Court, New York County

Docket Number: 0603864/2007

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

QUALITY TECHNOLOGY SERVICES HOLDING, LLC,
Plaintiff,

Index No.: 603864/07

- v -

Motion Date: 04/01/08

CHECKM8, INC.,

Motion Seq. No.: 01

Defendant.

Motion Cal. No.: 103

The following papers, numbered 1 to 4 were read on this motion to dismlss.

- Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
- Answering Affidavits - Exhibits _____
- Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1, 2	_____
3	_____

FILED

AUG 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff moves to dismiss defendant's second through sixth counterclaims and defendant's counterclaims for consequential and punitive damages. At oral argument on this motion defendant withdrew the second through fifth counterclaims and the counterclaim for punitive damages. Therefore, the only counterclaims at issue on this motion are the sixth counterclaim for breach of covenant of good faith and fair dealing and the claim for consequential damages sought in connection with the breach of contract (first) counterclaim.

The court shall dismiss defendant's counterclaim for breach

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE

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

of covenant of good faith and fair dealing. Plaintiff argues and the court agrees that the counterclaim should be dismissed because it is duplicative of defendant's counterclaim for breach of contract citing New York University v Continental Ins. Co. (87 NY2d 308, 319 -320 [1995] ["claim based on the alleged breach of the implied covenant of good faith and fair dealing . . . is duplicative of the first cause of action for breach of contract and should have been dismissed"]). As the Court has recently stated, "[t]he dismissal of the cause of action for breach of the covenant of good faith and fair dealing should be upheld on the ground the claim is duplicative of the . . . contract cause of action." Pludeman v Northern Leasing Systems, Inc., 40 AD3d 366, 368, (1st Dept 2007) affd on other grounds 10 NY3d 486 (2008). Here, the counterclaim for breach of good faith dealing is subsumed within the breach of contract counterclaim and does not stand separate and apart. Therefore the court shall dismiss defendant's sixth counterclaim.

With respect to defendant's counterclaim for consequential damages, plaintiff asserts that dismissal is warranted because defendant has failed to assert facts which if proven would allow such damages to be imposed and that in any event the parties' contract expressly bars such damages. Defendant argues however that the law does not allow plaintiff to contractually absolve itself of damages caused by its intentional wrongdoing or gross

negligence citing Sommer v Federal Signal Corp., 79 NY2d 540, 554 (1992). In Sommer, the court held that

It is the public policy of this State, however, that a party may not insulate itself from damages caused by grossly negligent conduct. This applies equally to contract clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum. Gross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must smack of intentional wrongdoing. It is conduct that evinces a reckless indifference to the rights of others.

Id. (citations and internal quotations omitted). The Court of Appeals has recently held that consequential damages may be sought in a breach of contract action where it is alleged that the breach resulted in the collapse of the claimant's business even where there is a contractual clause limiting consequential damages as is alleged here. The Court stated in pertinent part

It is well settled that in breach of contract actions the nonbreaching party may recover general damages which are the natural and probable consequence of the breach. Special, or consequential damages, which do not so directly flow from the breach, are also recoverable in limited circumstances. . . . In order to impose on the defaulting party a further liability than for damages which naturally and directly flow from the breach, i.e., in the ordinary course of things, arising from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting. To determine whether consequential damages were reasonably contemplated by the parties, courts must look to the nature, purpose and particular circumstances of the contract known by the parties as well as what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made. Of course, proof of consequential damages cannot be speculative or conjectural. . . . Consequential damages, designed to

* 4]
compensate a party for reasonably foreseeable damages, must be proximately caused by the breach and must be proven by the party seeking them.

Bi-Economy Market, Inc. v. Harleystown Ins. Co. of New York, 10 NY3d 187, 192-193 (2008) (citations and internal quotations omitted).

Under the standard set forth by the Court of Appeals in Bi-Economy, defendant's counterclaim for consequential damages is sufficiently pled. Defendant asserts in its answer that plaintiff was aware that its failure to perform under the contract by providing sufficient computer "uptime" would render serious damage to its business and therefore defendant's allegations, assumed to be true on this motion, are sufficient to survive dismissal even with the presence of the exculpatory consequential damages clause. Although consequential damages may be sufficient pled here, defendant of course has the burden of establishing the entitlement to such relief if the claim for breach of contract is sustained.

Accordingly, it is

ORDERED that plaintiff's motion is GRANTED to the extent of DISMISSING defendant's second through sixth counterclaims and defendant's counterclaim for punitive damages; and it is further

ORDERED that plaintiff's motion is otherwise DENIED as to the dismissal of consequential damages; and it is further

ORDERED that the parties are directed to attend a preliminary conference on September 16, 2008, at 9:30 A.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: AUG 14 2008

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.
J.S.C.

FILED
AUG 22 2008
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