

STATS, LLC v Elevation Inc.

2008 NY Slip Op 32449(U)

September 3, 2008

Supreme Court, New York County

Docket Number: 0601379/2007

Judge: Emily Jane Goodman

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EMILY JANE GOODMAN

PRESENT: _____

PART 17

Index Number : 601379/2007

STATS LLC

INDEX NO. _____

vs

ELEVATION INC

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

PAPERS NUMBERED

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

per attached is decided

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

Dated: 9/3/08

EJG

J.S.C.
EMILY JANE GOODMAN

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
STATS, LLC,

Plaintiff,

-against-

Index № 601379/07

ELEVATION, INC.,

Defendant.

-----X
EMILY JANE GOODMAN, J.:

In this breach of contract action, plaintiff STATS, LLC (STATS) moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor. Defendant opposes the motion.

STATS is a Delaware limited liability company in the business of compiling and marketing sports statistical information. Defendant Elevation, Inc. (Elevation) is a California company in the business of developing and marketing an Internet web site. STATS and Elevation executed a three-year License Agreement (the Agreement), dated February 3, 2006, by which Elevation, as licensee, acquired the right and non-exclusive license to use certain proprietary, golf-related information compiled by STATS (Licensed Information), on Elevation's web site, for which Elevation agreed to pay a "Total License Fee" of \$96,600.00, pursuant to a specific, graduated, monthly payment schedule. Upon execution of the Agreement, Elevation began making timely payments, due the first day of the month, and STATS began providing Elevation with the Licensed Information.

It is undisputed that STATS stopped receiving timely payments from Elevation, in or about December 2006. As a result, by letter, dated January 2, 2007, STATS notified Elevation that, due to its failure to pay the license fee of \$2,000.00, which came due on December 1, 2006,

as well as the license fee of \$2,500.00, which came due on January 1, 2007, it considered the Agreement breached. The letter also informed Elevation that if STATS does not receive the outstanding \$4,500.00 within 14 days, STATS "may discontinue the provision of the Licenced Information and may pursue all available remedies, including, without limitation, accelerating all sums due to STATS under the Agreement." Elevation cured the default on or about January 26, 2007, and Elevation continued to receive STATS' golf-related Licensed Information for use on its (Elevation's) web site. However, by letter, dated February 2, 2007, STATS notified Elevation that it considered the Agreement breached based on Elevation's failure to timely pay the \$2,500.00 February 2007 payment, and again warning Elevation that, in the event it does not make payment within 14 days, STATS "may discontinue the provision of the Licenced Information and may pursue all available remedies, including, without limitation, accelerating all sums due to STATS under the Agreement." It is undisputed that Elevation did not make the payment within the 14-day period and that STATS stopped providing its Licensed Information on February 20, 2007, and accelerated payment, demanding immediate payment of the Total Licensing Fee, which Elevation has refused to pay.

STATS commenced this action, sounding in breach of contract and account stated, by service of a summons and complaint, on or about April 24, 2007. Issue was joined by service of Elevation's answer on or about July 2, 2007. The answer contains a series of general denials, affirmative defenses including set-off, as well as a counterclaim for breach of contract.

The instant motion, dated August 14, 2007, demands summary judgment in the amount of

\$80,100.00,¹ together with interest from December 1, 2006, and attorneys fees. The motion also seeks dismissal of Elevation's answer and counterclaim for \$10,000, based on STATS' claim "the outstanding balance is not subject to any further credit, offset, or adjustment and remains due and owing in full."

STATS asserts that, only after Elevation defaulted, for a third month in a row, by failing to timely pay the monthly license fee which came due on the first of the month, and by failing to cure the default within 14 days thereafter, did it elect to take actions permitted under the Agreement. According to plaintiff, the Agreement authorizes it to, simultaneously, withhold further access to the Licensed Information, terminate the Agreement, and accelerate payment of the Total License Fee. Central to plaintiff's demand is Paragraph 4 of the Agreement, which provides, in relevant part:

[i]n consideration for the right and license to be provided by STATS to Licensee pursuant to paragraph 2(a) of this Agreement, during the Term, Licensee shall pay a Total License Fee to STATS in the amount of Ninety Six Thousand Six Hundred Dollars (\$96,600.00). Notwithstanding the foregoing, the Total License Fee shall be payable . . . in monthly installments. . . upon the first day of each succeeding month during the Term, Licensee hereby agrees to make monthly payments to STATS for each month of the Term (the "Guaranteed Monthly License Fee") as follows:

(a) During Year One of the Term² (months 1 through 12), Licensee shall pay to STATS a Guaranteed Monthly License Fee as follows:

Month Due:	Amount Due:
1-3	\$1,000
4-6	\$1,500.00, with the first Payment due on May 1 st
7-12	\$2,250.00

¹The complaint demands judgment in the amount of \$80,100.00 whereas the affidavit in support of motion for summary judgment states, at ¶ 3, that this is an action to recover the sum of \$75,600.00.

²The Agreement notes that STATS received Guaranteed Monthly License Fees from Elevation for February, March, and April 2006.

(B) During Year Two of the Term (months 13-24), Licensee shall pay to STATS a Guaranteed Monthly License Fee of . . . (\$2,500.00) per month.

(C) During Year Three of the Term (months 25-36), Licensee shall pay to STATS a Guaranteed Monthly License Fee of . . . (\$3,800.00) per month.

STATS asserts that it terminated the Agreement pursuant to Paragraph 10 (b), by sending the requisite written notice advising Elevation of the termination, and of the 14-day cure period. STATS also asserts that Elevation's failure to timely cure entitled STATS to demand payment in accordance with Paragraph 11 (a), which states:

[t]he termination of this Agreement for Licensee's material breach shall not relieve Licensee of its obligations to account for and pay to STATS any and all sums due hereunder, including the Total License Fee.

Relying on Agreement language referenced above, STATS seeks summary judgment in the amount of \$80,100.00.

Elevation opposes the motion on the ground that the Agreement contains terms which are ambiguous and on the ground that STATS' interpretation of certain provisions of the Agreement would permit STATS to accelerate payment and demand the Total License Fee without adequate consideration, rendering those provisions a penal forfeiture, and unenforceable. Elevation also counterclaims for breach of contract, alleging that it encountered unexpected difficulties with STATS's service causing it to sustain damages in the amount of \$10,000.00.

Elevation acknowledges that it made the December 2006 and January 2007 payments on January 26, 2007, as a joint payment of \$4,500.00, and that it then failed to make the February 1, 2007 payment on time or within 14 days thereafter. However, in its defense, Elevation asserts that, in accordance with the Agreement, it made good faith efforts to cure the February default by maintaining contact with STATS, and by advising STATS as to when it could expect payment.

Nevertheless, on or about February 20, 2007, STATS terminated both defendant's access to the Licensed Information and the Agreement itself, and thereafter, STATS refused to accept defendant's telephone calls and refused Elevation's proffered payment in the amount of \$5,000.00.

Paragraph 10

With respect to its argument that the Agreement is ambiguous, Elevation asserts that, while Paragraph 10 of the Agreement sets forth the terms for termination of the Agreement, it does not make clear the circumstances under which STATS would follow subsection (b) rather than subsection (c). Paragraph 10 provides, in relevant part:

[t]his Agreement may be terminated:

(b) by STATS, fourteen (14) days following written notice to the Licensee of Licensee's failure to make any payment hereunder when due and such payment is not made within said 14-day period;

(c) by either party, 30 days following written notice of a breach by the other party of any provision of this Agreement if such breach is not cured within said 30-day period, or if such breach is not susceptible to cure within 30 days, the breaching party fails to make commercially reasonable effort to commence the cure of such breach within said 30-day period and to diligently proceed to cure such breach within 90 days after the written notice;

The Agreement is not a model of clarity. Paragraph 10 (c) refers to "a breach by the other party of any provision of this Agreement," which, as Elevation notes, could apply to monetary defaults (triggering a longer cure period). However, clauses of a contract should be read together to give each clause meaning and where two seemingly conflicting contract provisions can be reconciled, the court must do so in order to give both clauses effect (see HSBC Bank v National Equity Corp., 279 AD2d 251, 253 [1st Dept 2001]). Further, the specific clause always controls

over the general one (see Muzak Corp. v Hotel Taft Corp., 1 NY2d 42 [1956]). Accordingly, STATS' interpretation, that Paragraph 10 (b) applies to monetary defaults, while Paragraph 10 (c) applies to non-monetary defaults, reconciles two purportedly conflicting cure periods, giving both subsections meaning. Moreover, the fact that Paragraph 10 (c) refers to the breaching party's "commercially reasonable efforts to commence the cure" of breaches not susceptible of cure within 30 days, further supports the construction that Paragraph 10 (c) applies only to non-monetary defaults. Accordingly, contrary to Elevation's position, there is no inherent ambiguity in Paragraphs 10 (b) and (c).

Paragraph 11

Elevation also contends that Paragraph 11 (a) is ambiguous and fails to include language typical of an acceleration clause. Further, Elevation argues if the provision is construed as an acceleration clause, it is an unenforceable penalty. STATS does not address whether Paragraph 11 (a) is an acceleration clause, and instead maintains that the total contract price could have been demanded "up front," and that "Defendant was simply given three (3) years to pay it out." STATS also maintains that the provision is not a liquidated damages clause, pointing out that it is not labeled as such.

Notwithstanding STATS' argument, there is no evidence that the parties agreed to payment of the total contract price "up front." In fact Paragraphs 10, 11 (a), and the fee schedule set forth in Paragraph 4, evidence the parties' intent for the licensee's payment to be received by the licensor on the first day of the month for which the licensed information is to be provided. Moreover, in both the January 2, 2007 and February 2, 2007 letters, STATS referred to its contractual right to "pursue all available remedies, including, without limitation, accelerating all

sums due to STATS under the Agreement” (emphasis added).

As previously noted, Paragraph 11(a) provides “[t]he termination of this Agreement for Licensee’s material breach shall not relieve Licensee of its obligations to account for and pay to STATS any and all sums due hereunder, including the Total License Fee.” By stating that the Licensee is not relieved of obligations to pay “any and all sums due hereunder, including the Total License Fee,” the provision assumes that the Total License Fee is a sum “due” under the Agreement. There is no separate provision in the Agreement indicating the circumstances under which the Total License Fee is due. Although Elevation argues that Paragraph 11(a) is ambiguous, because there is no indication of when the Total License Fee is due, the Court disagrees.

Paragraph 11 is entitled “Obligations Upon Termination” and 11(a) is entitled “Post-Termination Payments.” Accordingly, it is reasonable to construe that the Total License Fee is due upon termination of the Agreement.³ Although no date certain is specified, a reasonable time period would be read into the contract. Accordingly, Elevation has failed to demonstrate that summary judgment must be denied on the grounds that Paragraph 11(a) is ambiguous.

However, the Court agrees that STATS’ may not both terminate the Agreement and

³An ambiguity is created by the fact that Total License Fee is defined as a sum certain-\$96,600.00. If a default occurs in the second month of the contract or any time thereafter (after some payment has already been made), Paragraph 11(a) provides that the Total License Fee is due (not the Total License Fee minus the amounts previously paid). Without citing to any particular provision, STATS states that [d]epending on when the Defendant breached the agreement, the balance due could have been higher or lower, as opposed to a fixed sum.” This is not, however, what the Agreement provides. In any event, this issue need not be addressed because STATS is suing only for the Total License Fee, minus the amounts paid.

demand the Total License Fee. STATS cites to Fifty States Mgmt. Corp. v Pioneer Auto Parks, Inc. (46 NY2d 573 [1979]) as support for its purported right to stop providing the Licensed Information, and to receive the total of all un-earned, future monthly licensee fees. However, that case is of no avail because there, although the landlord was permitted to accelerate monthly rental payments on a 20 year lease, based on a default in payment of two month's rent in the second year, the lease was not also simultaneously terminated by the landlord. This case is more like Benderson v Poss, 142 AD2d 937 [4th Dept 1988]). In that case, the Court held that a landlord could not both accelerate the future monthly rental payments and lock out the tenant because under those circumstances, the acceleration amounted to a penal forfeiture. The Court limited the damages to the past due monthly rental amounts. The Court further held that even if the acceleration clause was viewed as one providing for liquidated damages, it would be an unenforceable penalty.⁴

Similarly here, whether Paragraph 11(a) is viewed as an acceleration clause or a liquidated damages clause, it is not enforceable. Although parties are given great liberty to contract, parties are not free to provide for a penalty for a breach of a contract (see Restatement of the Law, Second, Contracts §356 [American Law Institute 1981]). Contracting parties have

⁴Key Intl. Mfg. v Stillman (103 AD2d 475, 478 [2d Dept 1984], affd as modified on other grounds 66 NY2d 924 [1985]) cited by STATS, is also inapposite. In that case, an individual sold real property to the plaintiff and deferred collection of a portion of the purchase price over a period of time, conditioned on letters of credit securing the debt. As a result of the plaintiff's failure to timely replace an expiring letter of credit, the debt was accelerated. Thus, in that case, unlike here, the consideration (the real property) was already fully furnished (see also Fairfield Lease Corp. v Marsi Dress Corp., 60 Misc 2d 363, 365-366 [Civ Ct, NY County 1969] ["it is plain enough that parties to a contract for the loan of money secured by a note or mortgage may provide for the acceleration of payment of the principal in case of default . . . In such case the consideration has been fully furnished, and the only question is time of the payment]).

the right to agree to liquidated damages clauses (see Mosler Safe Co. v Maiden Lane Safe Deposit Co., 199 NY 479, 485 [1910]) “compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract,” (Truck Rent-A-Ctr. v Puritan Farms 2nd, 41 NY2d 420, 423-424 [1977] [internal citation omitted]).

Liquidated damage provisions are proper when it “would be difficult, if not actually impossible, to calculate the amount of actual damage” but “will not be enforced if it is against public policy to do so and public policy is firmly set against the imposition of penalties or forfeitures for which there is no statutory authority. . . . A clause which provides for an amount plainly disproportionate to real damage is not intended to provide fair compensation but to secure performance by the compulsion of the very disproportion.” (*id.* at 424 [internal citation omitted]). Here, the requirement to pay the Total License Fee, notwithstanding termination of the Agreement, has no purpose other than to guarantee payment grossly disproportionate to the loss sustained by STATS. The Schedule set forth in Paragraph 4 makes the calculation of damages readily ascertainable. Accordingly, no matter how one characterizes Paragraph 11(a), STATS cannot recover more than the past due monthly license fees, plus interest (see 3 Farnsworth, Contracts §12.18, at 304 [3d ed] [where a liquidated damages provision is an unenforceable penalty, “the injured party is remitted to the conventional damage remedy for breach of the agreement”])).

Accordingly, it is

ORDERED that the motion by STATS for summary judgment in the amount of \$80,100.00, plus interest and attorneys’ fees, and for dismissal of Defendant’s counterclaim, is granted to the extent that STATS is entitled to summary judgment in accordance with the terms

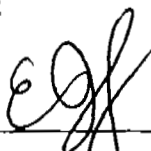
of this Decision and Order⁵ but dismissal of Defendant's counterclaim is denied with leave to renew after completion of discovery;⁶ and it is further

ORDERED that STATS submit a proposed judgment on notice.

This Constitutes the Decision and Order of the Court.

Dated: September 3, 2008

ENTER:



J.S.C.
EMILY JANE GOODMAN

⁵Legal fees are denied because STATS has not indicated that the Agreement provides for payment of legal fees.

⁶The Court cannot consider Plaintiff's statements regarding the counterclaim made for the first time in a Reply Affidavit.