

Danka Off. Imaging Co. v PCI Group, Inc.

2011 NY Slip Op 30686(U)

March 14, 2011

Supreme Court, Suffolk County

Docket Number: 40909-2008

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 40909-2008

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
 J. S. C.

Original Motion Date: 12-21-2010
 Motion Submit Date: 01-04-2011
 Motion Sequence No.: 001 MOTD
 002 MD

[] FINAL
 [x] NON FINAL

_____ X
DANKA OFFICE IMAGING COMPANY,

Plaintiff,

-against-

PCI GROUP, INC., and PCI IMAGING, INC.,

Defendant.
 _____ X

Attorney for Plaintiff
 Cohen & Krassner, Esq.
 450 Seventh Avenue, Suite 1608
 New York, New York 10123

Attorney for Defendants
 Russo, Karl, Widmaier & Cordano, PC
 400 Townline Road
 Hauppauge, New York 11788

ORDERED, that the motion (motion sequence number 002) by defendant pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's complaint is denied; and it is further

ORDERED, that the unopposed motion (motion sequence number 001) by plaintiff pursuant to CPLR 3025 for leave to serve an amended complaint is granted to the extent that, pursuant to CPLR 1018, Konica Minolta Business Solutions U.S.A., Inc. is hereby substituted for Danka Office Imaging Company, as plaintiff; and it is further

ORDERED that the caption of this action shall be amended as follows:

X

KONICA MINOLTA BUSINESS SOLUTIONS U.S.A., INC.,

Plaintiff,

-against-

PCI GROUP, INC. and PCI IMAGING, INC.,

Defendants.

X

Factual and Procedural Background

In this action, plaintiff Danka Office Imaging Company (“Danka”) seeks to recover \$282,480.43 from defendants PCI Group, Inc. and PCI Imaging, Inc. (collectively referred to as “PCI”) for PCI’s alleged breach of a service and maintenance agreement. PCI has asserted counterclaims against Danka for breach of the implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, breach of express warranty, breach of contract, and negligence.

The following undisputed facts are gleaned from the parties’ respective Statements of Material Facts submitted pursuant to Commercial Division Rule 19-a. On September 13, 2006, PCI purchased two printers from Danka for use in its direct mailing business. The cost of the printers was \$303,669. On that same date, Danka and PCI entered into a service and maintenance agreement (the “Agreement”) pursuant to which Danka agreed to service and maintain the printers for a monthly fee of \$6,247 for a term of five years. The Agreement provided, in relevant part:

Maintenance Terms - Digital Advantage

1) Digital Advantage Service . . . Basic Maintenance is that level of maintenance necessary to maintain Equipment in normal operating condition including parts, replacement, cleaning and preventative maintenance. Basic consumable supplies (*excluding* paper and staples) are included.

* * *

b) Consumable Supply Usage. In the event Customer’s actual consumable Supply

usage exceeds the manufacturer recommended yields for the applicable unit, Danka may bill Customer for excess consumable Supplies at the then current rate for such Supplies.

c) Early Termination. In the event Customer elects a multi-year term agreement and Customer terminates prior to the term expiration without cause or in the event Danka terminates the Maintenance agreement prior to the end of the agreed term due to Customer's uncured material breach, Danka will bill and Customer will be responsible to pay an early termination charge as liquidated damages, and not as a penalty. Early termination charges will be calculated in the following manner: i) Danka will average the three (3) most recent billing periods of Danka maintenance to arrive at an average Maintenance figure, then ii) multiply that figure by the number of remaining billing periods in the remaining unexpired term, and then iii) divide that number by two (2).

Danka agreed to service the printers for two shifts each day for five days of the week. Between September 2006 and November 2007, PCI made numerous calls to Danka requesting service. Danka stopped servicing and maintaining the printers on November 20, 2007. Prior to November 20, 2007, there were service interruptions where Danka refused to service the printers. PCI claims that it notified Danka that Danka's refusal to service the printers constituted a breach of the Agreement. Danka claims that it notified PCI that the failure to make payments constituted a breach of the Agreement and that, as a result, Danka terminated the Agreement. Danka claims that pursuant to the Agreement, PCI is obligated to pay liquidated damages in the amount of \$164,400.28. Additionally, Danka claims that PCI owes it approximately \$89,404 for PCI's alleged excessive drum usage. Prior to the termination of the Agreement, Danka never billed PCI for any excessive drum usage and first sent an invoice in the amount of \$89,404 for alleged excessive drum usage after the Agreement was terminated. PCI paid Danka \$117,930 under the Agreement. It is undisputed that Danka's service technicians did not have prior experience in servicing the type of printer at issue.

PCI now moves for summary judgment dismissing plaintiff's complaint. In support of the motion PCI submits, among other things, an affirmation from counsel, the pleadings, Plaintiff's Answers to Defendants' First Set of Interrogatories, invoices from plaintiff, the Agreement, and an affidavit from Christian Kropac, Jr., President of defendant PCI Group, Inc. Initially, Mr. Kropac states that defendant PCI Imaging, Inc. merged into defendant PCI Group, Inc. in 2008, and that now only PCI Group, Inc. remains. Kropac decided to enter into a maintenance agreement for the printers with Danka because he trusted them, believed he was getting a guarantee from Danka that the printers would be up and running a certain percentage of time, and Danka utilized a company authorized by the manufacturer, Anacomp, to perform service and maintenance. Kropac states that the Agreement with Danka included all consumables, including drums, toner, and other supplies, except color supplies. According to Kropac, approximately three months into the term of the Agreement Danka stopped using Anacomp and began

using their own in-house technicians to service and maintain the printers. Kropac claims that such a switch was done without notice to PCI and was contrary to representations Danka made to PCI. Kropac claims that Danka's technicians were inexperienced and unqualified, were unable to keep the printers up and running, and that Danka was unable to supply consumables, such as drums for the printers, in a timely manner. Kropac states that from October 2006 until November 2007, PCI made 221 calls to Danka for service. Kropac claims that as a result of Danka's inability to properly service and maintain the printers, they were "down more often than they were up". During the 13-month time period that Danka attempted to service and maintain the printers Kropac claims that there were a multitude of problems including software issues, problems with the color developer station, Danka's inability to supply drums, and blown up CPU boards. In all, Kropac states that the printers were "down" more than 50% of the time.

PCI claims that it constantly complained about Danka's service and provides a copy of a proposal from Danka dated November 2, 2007, to replace the printers with other equipment to meet PCI's "application requirements in terms of machine uptime and output quality". It also provides copies of e-mails from Danka purportedly demonstrating that Danka attempted to get another company to take over the service and maintenance of the printers and that the Agreement was not profitable for Danka. Kropac claims that after PCI informed Danka that replacement of the printers was not an acceptable solution, Danka simply stopped performing service and maintenance in November 2007. Kropac contends that Danka's refusal to continue to service the printers constituted a breach of its obligations under the Agreement and that Danka was notified of its breach through counsel. As a result, PCI was forced to obtain a new service provider. After the Agreement was terminated, Danka separately billed PCI \$89,404.00 for excessive drum usage and \$164,400.28 as an early termination charge.

In support of its motion for summary judgment, PCI argues (1) that the liquidated damages provision of the Agreement is an unenforceable penalty because it bears no reasonable relationship to Danka's actual damages and, therefore, renders the Agreement unconscionable, (2) that Danka breached the Agreement thereby rendering it null and void and relieving PCI of any further obligations thereunder, and (3) that Danka's complaint fails to state a cause of action for breach of contract because a copy of the Agreement is not attached to the complaint and it fails to reference the terms of the Agreement.

In opposition to PCI's motion for summary judgment, Danka submits, among other things, an affidavit from Daniel Rapelje, Danka Field Service Manager responsible for managing and monitoring the technicians that serviced PCI's printers. Rapelje states that the printers purchased by PCI were different from other printers in that the customer, PCI was responsible for certain maintenance items, such as drums and chargers. Rapelje asserts that prior to the installation of the printers, he advised PCI that Anacomp was to service the printers for the first 90 days and that Danka would take over thereafter.

Rapelje admits that prior to the Agreement with PCI, his technicians did not have experience servicing the type of printer at issue, but that three of Danka's technicians subsequently attended training and became certified to service the printers. After Danka took over servicing the printers from Anacom, it received requests for service calls from PCI for problems caused by mistakes made by PCI employees in operating the printers, including using paper with incorrect dimensions which caused jams, failing to "re-spool the job to another paper drawer" which caused jams, and installing and removing drums incorrectly causing downtime. Rapelje states that from October 2006 through August 2007, PCI used 175 drums for the printers, which amount exceeded the manufacturer's recommended yield of 60 drums, and that the manufacturer could not keep up with PCI's demand for drums. According to Rapelje, the printers were never down for weeks at a time. Rather, he claims that Danka's technicians provided expert service and that the printers operated with approximately 87% uptime, as reflected in Danka's Account Service Performance Summary. In November 2007, Rapelje was told to stop servicing PCI's printers due to non-payment by PCI of the monthly fee under the Agreement. Danka sent PCI a letter dated November 13, 2007, advising PCI that its account was past due and that PCI had materially breached the Agreement.

Danka argues (1) that the liquidated damages provision in the Agreement is valid and enforceable because it reasonably reflects the damages incurred by Danka as a result of PCI's breach of the Agreement by failing to make payments, (2) that PCI has failed to demonstrate that the Agreement is unconscionable, and (3) that PCI breached the Agreement by failing to make payments, thereby relieving Danka from any further obligation to service the printers, and (4) that the complaint adequately states a cause of action for breach of contract.

Discussion

Initially, it is noted that pursuant to a stipulation dated February 4, 2011, the parties have waived their right under paragraph 8 of the Agreement entitled "Dispute Waiver/Resolution", as well as that portion of paragraph 7 of the Agreement regarding Choice of Law, and have agreed to the application of New York law in this action.

PCI's contention that the liquidated damages provision in the Agreement is an unenforceable penalty is without merit. As recently observed by the Appellate Division, Second Department in *United Title Agency, LLC v. Surfside-3 Marina, Inc.* (65 AD3d 1134, 1135 [2d Dept 2009]):

Whether a contractual provision represents an enforceable liquidated damages provision or an unenforceable penalty is a question of law. The party challenging a liquidated damages clause must establish either that actual damages were readily ascertainable at the time the contract was entered into or that the liquidated damages were conspicuously disproportionate to foreseeable or probable losses (citations omitted).

Here, PCI failed to make a prima facie showing that the liquidated damages provision at issue is an unenforceable penalty. PCI failed to submit any evidentiary proof demonstrating that Danka's actual damages were readily ascertainable at the time the Agreement was entered into or that the liquidated damages formula in the Agreement was conspicuously disproportionate to foreseeable or probable losses. While PCI acknowledges that the liquidated damages clause purports to allow Danka to recover 50% of the total average monthly payments remaining under the Agreement, it fails to even address Danka's foreseeable or probable losses and thus fails to demonstrate how such an amount is conspicuously disproportionate thereto. PCI's assertion that the liquidated damages clause is "egregiously over-valued" is unsubstantiated and conclusory. Therefore, that branch of PCI's motion which is for summary judgment determining that the liquidated damages provision in the Agreement is an unenforceable penalty as a matter of law is denied (*see, United Title Agency, LLC v. Surfside-3 Marina, Inc.*, supra at 1135).

Similarly, PCI has failed to make a prima facie showing that the Agreement is unconscionable.

A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable *when made*-i.e., "some showing of an 'absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party' (*Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449)." (*Matter of State of New York v. Avco Fin. Serv.*, 50 N.Y.2d 383, 389, 429 N.Y.S.2d 181, 406 N.E.2d 1075; *see also, Jones v. Star Credit Corp.*, 59 Misc.2d 189, 192, 298 N.Y.S.2d 264).

(*Gillman v. Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10 [1988] [emphasis added]).

The Appellate Division, Second Department explained the differences between procedural and substantive unconscionability in *Industrialease Automated & Scientific Equip. Corp.* (58 AD2d 482, 489 at fn. 4 [2d Dept 1977]):

Procedural unconscionability in general is involved with the contract formation process, and focuses on high pressures exerted on the parties, fine print of the contract, misrepresentation, or unequal bargaining position. Substantive unconscionability, on the other hand, is involved with the content of the terms of the contract per se, such as inflated prices, unfair disclaimers or termination clauses (*see Nu Dimension Figure Salons v. Becerra*, 73 Misc.2d 140, 143, 340 N.Y.S.2d 268, 272).

Here, although PCI claims that the Agreement was both procedurally and substantively unconscionable, it has failed to present any evidence demonstrating that *when the Agreement was made*

it did not have a meaningful choice and that the contract terms unreasonably favored Danka. There is no evidence that Danka exerted any pressure on PCI, that the Agreement contained any fine print or that PCI was in an unequal bargaining position relative to Danka. No evidence has been submitted by PCI detailing Danka's "sales tactics" that purportedly render the Agreement unconscionable. Although PCI claims that Danka misrepresented that Anacomp was the entity that would service and maintain the printers under the Agreement, the Agreement does not contain such a representation. Rather, the Agreement states that Danka would provide service and maintenance. Moreover, although PCI claims that the Agreement called for "egregious prices" it fails to demonstrate that the monthly charge for service and maintenance called for in the Agreement was excessive. The Early Termination charge is not a price called for in the Agreement. It is a charge imposed as liquidated damages in the event that PCI terminated the Agreement without cause or Danka terminated the Agreement due to PCI's breach. Therefore, that branch of PCI's motion which is for summary judgment dismissing the complaint on the ground that the Agreement is unconscionable and void is denied.

With regard to PCI's contention that Danka's material breach of the Agreement excused PCI, as the nonbreaching party, from any further obligation of performance under the Agreement, the Court finds that the evidentiary submissions demonstrate the existence of issues of fact as to which entity breached the Agreement. Specifically, PCI claims that Danka failed to properly service and maintain the printers and keep them up and running. Danka claims that the problems with the printers were primarily caused by PCI's own employees, that Danka's technicians provided expert service, that the printers operated with approximately 87% uptime, and that PCI breached the Agreement by failing to make payments. Based upon these conflicting factual assertions, that branch of PCI's motion which is for summary judgment dismissing the complaint on the ground that Danka breached the Agreement is denied.

Finally, that branch of PCI's motion which seeks dismissal of Danka's complaint on the ground that it fails to state a cause of action is also denied.

It is well settled that a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) "must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'" (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152, 746 N.Y.S.2d 131, 773 N.E.2d 496, quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17). "[T]he court must accept as true the facts alleged in the pleading and submissions in opposition to the motion, and accord the plaintiff the benefit of every possible favorable inference" (*Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co.*, 5 A.D.3d 352, 774 N.Y.S.2d 56; see *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, *supra* at 152, 746 N.Y.S.2d 131, 773 N.E.2d 496). Additionally, the court may consider any affidavits submitted by the plaintiff to remedy any defects in the complaint (see *Well v. Yeshiva Rambam*, 300 A.D.2d 580, 753 N.Y.S.2d

512; *Auguston v. Spry*, 282 A.D.2d 489, 723 N.Y.S.2d 103).

(*Maldonado v. Olympia Mechanical Piping & Heating Corp.*, 8 AD3d 348, 349-50 [2d Dept 2004]).

As correctly recognized by PCI:

In order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based (citation omitted). The pleadings must be “sufficiently particular to give the court and [the] parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved’ as well as ‘the material elements of each cause of action or defense’” (*DiMauro v. Metropolitan Bus*, 105 AD2d 236, 239, 483 N.Y.S.2d 383; quoting CPLR 3013).

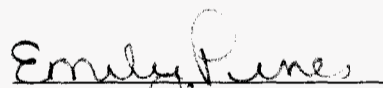
(*Atkinson v. Mobil Oil Corp.*, 205 AD2d 719, 720 [2d Dept 1994]).

Here, the Court finds that the complaint adequately states a cause of action for breach of contract as it specifically alleges that Danka and PCI entered into an agreement pursuant to which Danka agreed to provide maintenance services and supplies to PCI for an agreed upon fee, that Danka provided the maintenance services and supplies, and that PCI failed to pay Danka the sum of \$282,480.43, and thereby breached the agreement damaging Danka in the amount of \$282,480.43. These allegations are sufficiently specific as to give PCI notice of the transactions and occurrences intended to be proved as well as the material elements of the cause of action for breach of contract. Accordingly, that branch of PCI’s motion which is to dismiss the complaint for failure to state a cause of action is denied.

Finally, inasmuch as Danka merged with, and is now known as, Konica Minolta Business Solutions, U.S.A., Inc., Danka’s unopposed motion for leave to serve an amended complaint is granted to the extent set forth above.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: March 14, 2011
Riverhead, New York


EMILY PINES
J. S. C.

FINAL
 NON FINAL