Yonkers Ave. Dodge, Inc. v BZ Results, LLC
2011 NY Slip Op 34064(U)
July 6, 2011
Supreme Court, Bronx County
Docket Number: 309545/08
Judge: Mary Ann Brigantti-Hughes
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7-21-11

SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

JUL 20 2011

PRESENT: Honorable Mary Ann Brigantti-Hughes

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YONKERS AVENUE DODGE, INC.,

Plaintiff,

-against-

BZ RESULTS, LLC.,

Defendant.

---X

DECISION / ORDER
Index No. 309545/08

The following papers numbered 1 to read on the below motions noticed on **March 16, 2011** and duly submitted on the Part IA15 Motion calendar o f :

Papers Submitted	Numbered
Def.'s Affirmation in support of motion, exhibits	1,2

In an action for damages arising out of a breach of contract claim, Defendant ADP, Inc., sued herein as BZ Results, LLC (hereinafter "Defendant")seeks an Order granting summary judgment pursuant to CPLR § 3211 and/or CPLR § 3212 dismissing plaintiff, Yonkers Avenue Dodge, Inc.'s (hereinafter "Plaintiff") verified complaint. Defendant also seeks an Order granting summary judgment pursuant to CPLR § 3212 granting summary judgment on its First and Second Counterclaims. Defendant's motion is unopposed.

I. Factual and Procedural History

On or about March 12, 2008, Plaintiff and Defendant entered into a written service agreement (the "Service Agreement") wherein Plaintiff agreed to acquire from the Defendant a software license for a digital marketing system and related services. Pursuant to the service agreement Defendant was contracted to create design and update a customized website and train Plaintiff's employees.

Paragraph three (3) of the service agreement states that pricing and payment terms between the parties. It states as follows:

3. Pricing and Payment Terms.

> Client (Plaintiff) agrees to pay BZ
> (Defendant) the Total System Control Price...in monthly
> installments payable within 30 days from the date of each BZ invoice...
>
> b. This Agreement and the License granted hereunder shall be
> non-cancelable for the term set forth in any applicable Price
> agreement.
>
> The initial term shall be for 36 months commencing upon acceptance...
> with a total monthly payment of $3,450 as set forth above.

According to the affidavit of William J. Reilly, vice president of operations of Defendant. the first monthly payment was due June 10, 2008. Mr. Reilly alleges that Plaintiff failed to make that initial payment which constituted a default of the Service Agreement. Paragraph four (4) of the Service Agreement defines "payment default" and what Defendant is entitled to do if such a default occurs. It states as follows:

4. Payment Default.

> Failure to make any monthly installment payment...pursuant to Paragraph 3 shall constitute a payment default....[i]f Client (Plaintiff) fails to make the full payment due within the 30-day cure period, BZ (Defendant) may without further notice to Client (plaintiff) cancel or terminate this Agreement pursuant to Paragraph 6...

Paragraph five (5) of the service agreement between the parties sets forth the term and the method, manner and consequences of termination of the Service Agreement. It states as follows:

5. Term.

> The term of this agreement shall be for the period
> commencing the date this Agreement has been signed by an
> authorized representative of both BZ (Defendant) and Client
> (Plaintiff) and continuing until all Price Agreements hereto
> have completely terminated. The term of each Price Agreement
> shall be for the period indicated therein and shall continue
> thereafter on a month-to-month basis until terminated by either
> party on at least thirty (30) days written notice. Client (Plaintiff)
> and BZ's (Defendant) continuing obligations under this Agreement

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> and the Price Agreements hereto shall survive the termination of this Agreement and the Price Agreement hereto.

Paragraph six (6) of the service agreement between the parties sets forth the terms in which Defendant may terminate the system and the repercussions that arises from the termination of the system. It states as follows:

> **6. Termination of System.**
>
> Client (plaintiff) agrees that BZ (Defendant) may terminate the System without liability or any damages suffered by Client (plaintiff) upon the following:(I) client (Plaintiff) shall be in default of any terms hereunder...[u]pon such termination all unpaid balances obligations or indebtedness shall become immediately due and payable.

Consequently, by letter dated June 4, 2008 Zanetti Chrysler Jeep Dodge (purportedly on behalf of the Plaintiff) sent a termination letter seeking to terminate the service agreement effective July 4, 2008.

Plaintiff's summons and complaint lists three causes of action. Plaintiff's first cause of action seeks to recover monetary damages for breach of the service agreement between the parties due to Defendant's alleged failure to provide services to Plaintiff in a good, workmanlike and professional manner. Plaintiff's second cause of action sounding in fraud alleges that defendant's representations were false and made with the intention to deceive and defraud the plaintiff to induce him to sign the service agreement. Plaintiff's third cause of action sounding in public policy alleges that the damages provision of paragraph five (5) of the service agreement is void against public policy.

Defendant's counterclaims lists three causes of action. The first counterclaim alleges that Plaintiff defaulted pursuant to the damages provision of paragraph five (5) of the service agreement. The second counterclaims alleges that due to plaintiff's default the defendant is entitled to recover reasonable attorney fees and court costs. The third counterclaim alleges that plaintiff's default of the service agreement has led to it being unjustly enriched.

It should be noted that the Defendant's motion is denominated as one for summary judgment dismissing the Plaintiff's complaint and therefore the Court will treat that branch of the

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motion as such. Defendant's moving papers expressly indicate that they are "charting a summary judgment course". *See Mihlovan v. Grozavu*, 72 N.Y.2d 506, 508(1988); *see also Clervil v Bellevue*, 77 A.D.3d 697 (2nd Dept. 2010).

II. Standard of Review

The movant for summary judgment has the burden of establishing the absence of any factual issues to entitle it to judgment as a matter of law. See, Applewhite v Accuhealth, Inc, 2010 NY Slip Op 9570 (1st Dept. 2010), see also Pirrelli v. Long Island R.R., 226 A.D.2d 166 (1st Dept. 1996). If the movant meets his aforementioned burden, the party opposing the motion must "show facts sufficient to require a trial of any issue of fact." Zuckerman v City of New York, 49 NY2d 557, 562 (1980) quoting CPLR § 3212 subd [b]; see also People v Grasso, 50 AD3d 535 (1st Dept. 2008). "In considering a summary judgment motion, evidence should be viewed in the 'light most favorable to the opponent of the motion.' Bandler v JP Morgan Chase Bank, N.A. 2010 NY Slip Op 51309(U) (NY Sup. Ct. New York County 2010) quoting People v Grasso, 50 AD3d 535, 544 (1st Dept. 2008), [citations omitted]. "The function of the court is one of issue finding, not issue determination". Bandler citing Ferrante v American Lung Assn., 90 NY2d 623 (1997).

III. Analysis

(A) Count One of Plaintiff's Complaint

Plaintiff's first cause of action seeks to recover monetary damages for breach of the Service Agreement. Plaintiff alleges in paragraph seven (7) of its complaint that the "[D]efendant breached the Service Agreement by failing to provide services to plaintiff in a good, workmanlike and professional manner in accordance with the terms of the Service Agreement.". In the instant motion defendant now seeks to dismiss Plaintiff's first cause of action.

Defendant, pursuant to the affidavit of William J, Reilly, states that Defendant performed under the service agreement by "among other things, providing a customizable web product that enabled (Defendant) to select and combine designs to create and deliver a unique

website-developing, including a Spanish website and providing training to (defendant's) personal." Mr. Reilly continues by stating that although Plaintiff "utilized the provided website, products and services–as evidenced by (Defendant's) log-in access, (Plaintiff) failed to pay Defendant as agreed". It should be noted that although the defendant states that they have complied with their obligations pursuant to the service agreement, short of Mr. Reilly's affidavit, no other evidence has been provided in defendant's moving papers verifying his claim.

"The question of whether there has been substantial performance--or a breach--is to be determined, whenever there is any doubt, by the trier of fact and only 'if the inferences are certain, by the judges of the law'. *F. Garofalo Elec. Co. v. N.Y. Univ.*, 300 A.D.2d 186, 189 (1st Dept. 2002) *citing Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 243 (1921); *J.C. Drywall & Acoustical Contractors, Inc. v. West Shore Partners*, 187 A.D.2d 564 (2nd Dept. 1992). In the case at bar, Defendant has provided competent evidence through the Reilly Affidavit that Defendant complied with their obligation pursuant to the Service Agreement. Besides this self-serving Affidavit, however, there is no other evidence to indicate substantial performance as a matter of law. A review of the motion papers indicates that Plaintiff terminated their agreement with Defendant via letter dated June 4, 2008 "based on your inability to fulfill all the obligations under the Agreement, including dealership promotion, marketing, and customer relations management." Therefore, there exists a factual dispute as to whether a breach occurred and summary judgment cannot be granted on this issue. *See F. Garofalo Elec. Co. v. N.Y. Univ.*, at 189. Accordingly, Defendant's motion as to Count One of the verified complaint is denied.

(B) Count Two of Plaintiff's Complaint

Plaintiff's second cause of action seeks to recover monetary damages due to Defendant's alleged false representations made with the intention to deceive and defraud the Plaintiff and to induce him to sign the Service Agreement. Defendant seeks dismissal of this cause of action via summary judgment.

A fraud claim must be dismissed as redundant if it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract. *Gordon v. Dino DeLaurentiis Corp.*, 141 A.D.2d 435, 436 (1st Dept.

1988). By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract. *Non-Linear Trading Co. v. Braddis Assoc.*, 243 A.D.2d 107, 118 (1st Dept. 1998). For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has started a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim. *RKB Enters. v. Ersnt & Young,* 182 A.D.2d 971, 972-73 (3rd Dept. 1992). Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty. *Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954, 956 (1986), *First Bank of the Americas v. Motor Car Funding*, Inc., 257 A.D.2d 287, 291, 292 (1st Dept. 1999).

Here, Plaintiff alleges in paragraph twelve (12) and thirteen (13) of its' complaint that:

> 12. At the time defendant made the [alleged false] representations, they were known by the defendant and its agents and representatives to be false and were made with the intention to deceive and defraud the plaintiff to sign the Service Agreement.
>
> 13. Plaintiff did not know that the representations were untrue and believed and relied upon defendant and was induced thereby to sign the Service Agreement.

Plaintiff failed to allege a breach of a duty separate from breach of contract, and they seek to recover the exact same damages as under the breach of contract claim", i.e. $50,600. Plaintiff does not allege that "defendant's alleged fraudulent intent related to an additional oral assurance not embodied in the [service agreement] that was allegedly breached, nor [does] the plaintiff[] allege that such intent was evidenced by defendant's conduct shortly after entering into the agreement." *Id. citing Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112 (1995); *Gotham Boxing, Inc. v. Finkel*, 18 Misc. 3d 1114[A] (N.Y. Sup. Ct. , New York County 2008). . In addition, "the essential elements of a cause of action for fraud are 'representation of a material existing fact, falsity, scienter, deception and injury...[g]eneral allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim". *New*

York Univ. v. Cont'l Ins. Co., 87 N.Y.2d 308, 318 (1995) [citations omitted]. Plaintiff's claims here were not pleaded with particularity, were "bare-bones," and did not refer to specific places and dates of the alleged misrepresentations. *See Fariello v Checkmate Holdings*, 82 A.D.3d 437 (1st Dept. 2011). Therefore, plaintiff's second cause of action for fraud is dismissed.

(C) Count Three of Plaintiff's Complaint and Defendant's Counterclaims

Plaintiff's third cause of action alleges that the terms of paragraph five (5) of the Service Agreement constitute a penalty and therefore should be voided as against public policy. Defendant's seek summary judgment dismissing this count. Defendant also seeks summary judgment on its counterclaim for sums due under the Service Agreement and on its counterclaim for reasonable costs and attorney fees, as well as dismissal of all affirmative defenses.

Zanetti Chrysler Jeep Dodge sent a termination letter dated June 4, 2008 seeking to terminate the aforementioned Service Agreement effective July 4, 2008. Paragraph five (5) of the service agreement states that "the term of each Price Agreement shall be for the period indicated therein and shall continue thereafter on a month-to-month basis until terminated by either party on at least thirty (30) days written notice. Client (plaintiff)and BZ's (defendant) continuing obligations under this Agreement and the Price Agreements hereto shall survive the termination of this Agreement and the Price Agreement hereto."

There is a long-standing policy of refusing to assist in the enforcement of agreements that are injurious to the public". *Abright v. Shapiro*, 214 A.D.2d 496 (1st Dept. 1995). "The court will vacate an award enforcing an illegal agreement or one violative of public policy". *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 357 (1976) *citing Associated Teachers of Huntington v Board of Educ.*, 33 NY2d 229, (1973), *Western Union Tel. Co. v. American Communications Ass'n, C. I. O.*, 299 N.Y. 177 (1949), *East India Trading Co. v. Dada Haji Ebrahim Halari*, 280 A.D. 420 (1952). Still, in interpreting contractual language, express or implied, 'generally it would be sufficient to find that plaintiff intended to conclude the matter and that he did not specifically reserve a challenge to the clause's validity." *Denburg v. Chapin*, 82 N.Y.2d 375, 383,(1993), *see also Matter of Olympic Tower Assocs. v. City of New York*, 81 N.Y.2d 961 (1993). Accordingly,

an agreement is valid and enforceable as long as, 'a party [has] a good-faith belief in the merit of its position. That the party's view of the law might ultimately prove meritless does not undermine the validity of the agreement." *Denburg* at 383 (citing to R2d Contracts § 74, comment b.)." *Velasquez v St. Barnabas Hosp.* 25 Misc. 3d 1206A (NY Sup. Ct. Bronx County 2007).

In this matter, there is nothing in paragraph five (5) of the Service Agreement that is violative of public policy. Accordingly, Defendant's motion seeking dismissal of this count is granted.

With respect to Defendant's counterclaims, paragraph five (5) specifically states that Plaintiff's and Defendant's "continuing obligations under this Agreement and the Price Agreements hereto shall survive the termination of this Agreement and the Price Agreement hereto." The aforementioned differs from paragraph four (4) and six (6) of the service agreement which states that the defendant may terminate the agreement and its' obligations under the agreement due to plaintiff's default of any terms under the service agreement. Therefore, as Plaintiff alleges in paragraph 18 of its' summons and verified complaint paragraph five (5) of the service agreement seems to be inconsistent and "ambiguous".

Whether an agreement is ambiguous is a question of law for the courts. *Kass v. Kass*, 91 N.Y.2d 554 (1998). A court must ask whether "[r]easonable minds could differ as to which interpretation" is the correct one. *Caravousanos v. Kings County Hosp.*, 74 A.D.3d 716 (2nd Dept. 2010)(internal citations omitted). In so deciding, the court "should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. *Id.* Where the provision in question is susceptible to two different interpretations, the resolution of this ambiguity is for the trier of fact. *Id.*, citing *Weiss v. Weinreb & Weinreb*, 17 A.D.3d 353, 354 (2nd Dept. 2005).

A reading of the entire Service Agreement gives two differing interpretations as to Defendant's obligations upon termination. Thus, even if Plaintiff defaulted pursuant to paragraph four (4), and Defendant terminated the system and all of Plaintiff's unpaid balances became immediately due and payable, paragraph five (5) of the Service Agreement states that the parties' "continuing obligations under this Agreement and the Price Agreements ...shall survive the termination of this Agreement and the Price Agreement." Thus, pursuant to the ambiguity

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within the Service Agreement and whether Defendant himself complied with his continuing obligations, granting summary judgment on Defendant's counterclaims would be a drastic measure. *See Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that defendant BZ Results, LLC.'s ("Defendant") motion for summary judgment is hereby GRANTED IN PART and DENIED IN PART, and it is further,

ORDERED, that Defendant's motion for summary judgment with respect to count one of the plaintiff's, Yonkers Avenue Dodge, Inc. ("Plaintiff") complaint is hereby DENIED, and it is further,

ORDERED, that Defendant's motion for summary judgment with respect to count two of the Plaintiff's complaint is hereby GRANTED, and count two of Plaintiff's complaint is hereby dismissed with prejudice, and it is further,

ORDERED, that Defendant's motion for summary judgment with respect to count three of the Plaintiff's complaint is hereby GRANTED, and count three of Plaintiff's complaint is hereby dismissed with prejudice, and it is further,

ORDERED, that Defendant's motion for summary judgment with respect to its counterclaims is hereby DENIED.

This constitutes the Decision and Order of this Court.

Dated: July 6, 2011

Hon. Mary Ann Brigantti-Hughes, J.S.C.