**National Commerce Exchange of Long Is., Inc. v Cosmopolitan Coach Ltd.**

2012 NY Slip Op 30394(U)

February 7, 2012

Supreme Court, Nassau County

Docket Number: 4420/11

Judge: Jeffrey S. Brown

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN**
**JUSTICE**

**----------X**

**NATIONAL COMMERCE EXCHANGE OF LONG ISLAND, INC.,**

**Plaintiff,**

**-against-**

**COSMOPOLITAN COACH LTD. and FRANK DE LUCA,**

**Defendants.**

**----------X**

**TRIAL/IAS PART 17**

**INDEX # 4420/11**

**Motion Seq. 1**
**Motion Date 10.11.11**
**Submit Date 11.14.11**

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit ..... 2
Reply Affidavit..... 3

Motion pursuant to CPLR 3212 by plaintiff National Commerce Exchange of Long Island, Inc. (NCE) against defendants on an account stated for the amount set forth in the complaint is granted.

BACKGROUND

This action arises from defendants' alleged breach of two membership

applications/trading agreements executed by plaintiff NCE, a barter company[1] which facilitates trade transactions between members for goods and services, and defendants Cosmopolitan Coach Ltd. and its president, Frank DeLuca.

According to plaintiff NCE, defendants originally joined the barter exchange under the business name Extravaganza, Inc. on or about September 16, 1993.[2] On or about August 3, 2005, having changed the corporate name, defendants reaffirmed their membership in the barter exchange in the name of Cosmopolitan Coach, Ltd. Defendant Frank DeLuca signed the membership application as president of Cosmopolitan Coach, Ltd. and the trading procedures, retitled as "trading agreement," as "Frank DeLuca." At that time, defendants' negative trade dollar balance and cash commission balance due was transferred to defendants herein.

By letter dated May 26, 2010, an attorney retained by defendants requested that plaintiff NCE "put all accounts on hold and refer all further inquiries to [his] office." The hold was requested after defendant Frank DeLuca's wife had an incident with a massage therapist she engaged through the barter network. Defendants assert that, although one of plaintiff NCE brokers personally vouched for the reputation and ability of the message therapist, and represented that he was licensed and certified, the individual committed a crime against Mrs.

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[1]The members of plaintiff NCE trade their goods and services with other members of the barter exchange. Plaintiff NCE describes itself as a third party record keeper which acts in a fashion similar to a credit card company.

[2]The original membership application/trading procedures executed on September 16, 1993 lists Extravaganza, Inc. as the applicant and defendant Frank DeLuca as the principal of the corporate applicant.

DeLuca during a therapy session.[3] In fact, the individual was ultimately arrested and prosecuted and, according to defendants, is presently incarcerated in a federal penitentiary.

By letter dated March 2, 2011, plaintiff NCE advised defendant Frank DeLuca that Cosmopolitan Coach Ltd. Account No. 6560, personally guaranteed by said defendant, was terminated effective immediately and that, as of February 2011, $81,549.65 in trade, and $15,759.17 in cash, was due and owing. In accordance with paragraph SEVEN of the NCE trading agreement, signed by defendant Frank DeLuca, payment of the deficient amount was due within ten days of the date of cancellation.[4] When defendants failed to respond to plaintiff's termination letter, this lawsuit was commenced on or about March 24, 2011.

Plaintiff NCE's complaint sets forth six causes of action including breach of contract, account stated, unjust enrichment, a claim for attorney's fees and a claim against the individual defendant based on his personal guaranty. In their answer, defendants have asserted eight affirmative defenses all of which plaintiff claims lack merit.[5]

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[3]On or about December 14, 2010, defendant Frank DeLuca and his wife commenced a personal injury action against plaintiff NCE, pending in this court under Index No. 22822/10, arising from the alleged incident.

[4]Paragraph SEVEN provides that:

> "Any member whose membership is cancelled agrees to spend their trade credit balance with other NCE members within 30 days of the date of cancellation. All cash fees must be paid in advance. Any member indebted to NCE in trade and/or cash at the time of cancellation agrees to pay any deficit amount in cash within 10 days of the date of cancellation. Trade dollars cannot be used to offset cash balances due NCE."

[5]The purported defenses asserted include:

> failure to state a cause of action; failure to make requisite demand; refusal of performance; improper termination of agreement; negligent trading practices; breach of implied covenant of good faith and fair

In support of its motion for summary judgment, plaintiff NCE argues that, at the time defendants' membership was cancelled, defendants were indebted to plaintiff in trade dollars and cash. In a letter to plaintiff NCE dated April 16, 2011, subsequent to commencement of this lawsuit, defendant Frank DeLuca stated that it was never his intent to default on his legal and financial obligations to plaintiff NCE. He acknowledged that monies were owed and expressed a willingness to pay off the incurred trade balance in the amount of $70,232.25 and $12,736.50 in cash, plus the 2010 annual fee of $325. Defendants allege that plaintiff improperly refused defendants' performance.

ANALYSIS

A plaintiff establishes a breach of contract action by demonstrating the existence of a contract between the parties, performance by the plaintiff, breach by the defendant and damages resulting from the breach. (*JP Morgan Chase v J.H. Elec. of New York, Inc.*, 69 AD3d 802, 803 [2nd Dept 2010]). Contract language which is clear and unambiguous must be enforced according to its terms. (*W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

It is well settled that when sophisticated and counseled business persons set down their agreement in a clear, complete document, their writing should be enforced according to its terms. (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [quotation marks and citation omitted]). The court's role is to enforce the parties' agreement, not to create a new contract under the guise of construction. (*NML Capital v Republic of Argentina*, 17 NY3d 250, 259 [2011]).

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dealing; and invalid trading agreement.

An action on an account stated is established by proving that the defendants received and retained bills for services rendered or goods provided to defendants without objection. It is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due. (*Citibank, N.A. v Jones*, 272 AD2d 815 [2nd Dept 2000]). It cannot, however, be used to create liability where none otherwise exists or utilized simply as another means to attempt to collect under a disputed contract. (*Ross v Sherman*, 57 AD3d 758, 759 [2nd Dept 2008]).

Here, it is uncontroverted that a contract existed between the parties and that defendants received the invoices in question and never contested or objected to the charges or amounts due. In fact, they acknowledged their indebtedness in their letter of April 16, 2011. Notwithstanding defendants' assertions to the contrary, the contract language requiring defendants to pay the amounts owed and the individual defendant's personal liability for the debt, is clear and unambiguous.

An account becomes stated in one of two ways: first, where the debtor expressly admits to its being correct, which makes the account binding on both parties; and second, where, instead of an express admission of the correctness of the account, the party receiving it retains the statement and makes no objection to it within a reasonable time. Silence will be construed as assent and the party will be bound by it as if it were a stated account. (*Rodkinson v Haecker*, 248 NY 480, 485 [1928]).

After an account becomes stated, it is conclusive upon the parties, unless fraud, mistake or other equitable considerations are shown. (*Rodkinson v Haecker*, *supra*, at p. 485).

The membership application/trading agreement on which plaintiff sues provides in paragraph TWO that:

> "Members enter into trade transactions on a voluntary basis. The National Commerce Exchange of Long Island, Inc. is not responsible for the quality of goods or services, timely delivery, prices, warranties or any other problem arising from the transaction. All parties to a transaction expressly agree to hold NCE harmless for any liability, claim action or otherwise that might arise from any transaction. Buyers are required to identify themselves to the seller as an NCE member prior to making a purchase."

Inasmuch as it acted merely in the capacity of a bookkeeper for transactions among its members, plaintiff NCE maintains it is contractually absolved of any liability in connection with the alleged incident in accordance with paragraph TWO. Moreover, once it determined that it was in its own best interest to terminate defendants' membership in NCE,[6] plaintiff contends it properly did so in accordance with paragraph SIX of the trading agreement which provides that:

> NCE reserves the right as [sic] its sole discretion to cancel the membership of any member if such cancellation is deemed to be in the best interests of NCE.

Defendants' opposition to plaintiff's motion, predicated on the three pronged contention that: a) discovery is incomplete; b) defendant Frank DeLuca cannot be held personally liable for the debts of the corporate defendant; and c) plaintiff has improperly refused defendants' tender of performance, is unavailing given the plain language of the parties' contract.

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[6]The decision to terminate defendants' membership was based, *inter alia*, on defendants' failure to pay due and owing commissions on over $150,000 in barter services; cancellation of existing reservations for limousine services booked by other members of NCE, failure to remove the "hold" placed on their account for close to one year; and commencement of legal action against plaintiff.

With respect to the purported need for discovery, the record establishes that defendants were served with plaintiff's response to their demand for discovery and inspection on October 25, 2011. In arguing the need for discovery, defendants have failed to specify what facts, if any, necessary to oppose summary judgment, are uniquely in plaintiff's control and possession. (*Kraeling v Leading Edge Elec.*, 2 AD3d 789, 791 [2nd Dept 2003]). In the absence of such a showing, the claimed need for discovery is untenable. This is not a situation in which defendants have shown that plaintiff NCE has knowledge and control of facts which are essential to defendants' opposition to summary judgment. (*Nash v Baumblit Const. Corp.*, 72 AD3d 1037, 1040 [2nd Dept 2010]; *Dempaire v City of New York*, 61 AD3d 816, 817 [2nd Dept 2009]). Mere hope and speculation that additional discovery may uncover relevant evidence does not warrant denial of summary judgment.

The record establishes that defendant Frank DeLuca signed the membership application dated August 3, 2005 as President of defendant Cosmopolitan Coach Ltd. and the trading agreement in his individual capacity. He does not deny that the signature on the document is his signature but claims only that he had "no idea [he] was signing to be personally liable for anything, and it was never made clear to [him] in what capacity [he] was signing." The claim is totally devoid of merit as the signer of a written agreement is, as a general rule, conclusively bound by its terms in the absence of a showing of fraud, duress or some other wrongful act on the part of a party to the contract. (*Pimpinello v Swift*, 253 NY 159, 162 [1930]). He has presented no evidence to show an absence of meaningful choice on his part. Defendant Frank DeLuca's signature on the trading agreement is a sufficient manifestation of his consent to personally guarantee the obligations of the corporate defendant as set forth in paragraph FOUR which

provides that:

> "Purchases by members must be limited to the amount of trade dollars in their account. The individual signing the NCE application and the individual signing the NCE voucher agree to personally guarantee any amount spent in excess of the trade credits in the subject account, as well as any cash service fees that may have occurred as a result. All cash and/or trade credit lines are personally guaranteed by the individual signing the voucher and the individual signing both sides of the application. A member carrying a deficit balance may not refuse to sell to another NCE member."

Plaintiff NCE has met its *prima facie* burden of establishing its entitlement to judgment as a matter of law on the complaint. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). It is undisputed that an outstanding balance remains due and owing on defendants' account with plaintiff NCE. Defendants have not disputed the validity of the balance owed nor denied receipt of monthly statements setting forth amounts owed to which they offered no objection.

Defendants having defaulted on their obligations,[7] and having failed to remove the hold on the defendant corporate account for almost one year, plaintiff was not required to accept their proposed settlement offer.

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[7]Paragraph FIVE of the trading agreement states that:

> "Service fees must be paid within 15 days of the receipt of the monthly statement. Service fees will be automatically charged to the credit card on the NCE application if not paid by 15 days after the receipt of the monthly statement. If the charges are denied or if the card expires, the member must give NCE a new card or expiration date within 5 days. NCE reserves the right to refuse to authorize a transaction if a member owes any fees to NCE or if such a transaction exceeds members credit limit. Members agree to pay interest on any unpaid cash fees at a rate of 1.75 percent per month. Member agrees to pre-pay annual dues for so long as account has any cash or trade balance – positive or negative."

Accordingly, plaintiff NCE's motion for summary judgment against defendant Cosmopolitan Coach, Ltd. and defendant Frank DeLuca, individually for breach of contract and an account stated in the amount demanded in the complaint is **GRANTED**.

A hearing is necessary to determine the amount of counsel fees to be awarded.

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter shall appear on the calendar of **CCP on April 30, 2012 at 9:30 a.m.**

A copy of this Order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing officer or a Court Attorney/Referee as he or she deems appropriate.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Submit judgment on notice after completion of hearing on counsel fees.

Dated: February 7, 2012

ENTER:

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