

Tigrent Group, Inc. v Cynergy Holdings, LLC

2014 NY Slip Op 31746(U)

May 15, 2014

Sup Ct, Queens County

Docket Number: 703951/2013

Judge: Marguerite A. Grays

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

ORIGINAL

TIGRENT GROUP, INC.,
RICH DAD EDUCATION, LLC, and
TIGRENT ENTERPRISES, INC.,

Index
Number 703951 2013

Plaintiff(s)

Motion
Date December 18, 2013

-against-

CYNERGY HOLDINGS, LLC.
BANK OF AMERICA, N.A.,
BA MERCHANT SERVICES, LLC,
BMO HARRIS BANK, N.A., and
MONERIS SOLUTIONS, INC.,

Motion
Cal. Number 173

Motion Seq. No. 1 FILED

MAY 28 2014

COUNTY CLERK
QUEENS COUNTY

Defendant(s)

The following papers numbered 1 to 7 read on this motion by defendant Cynergy Holdings, LLC (New Cynergy), defendant BMO Harris Bank, N.A. (Harris Bank) and defendant Moneris Solutions, Inc., (Moneris) for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint against them.

Table with 2 columns: Papers, Numbered. Rows include Notice of Motion - Affidavits - Exhibits (1-3), Answering Affidavits - Exhibits (4), and Memoranda of Law (5-7).

Upon the foregoing papers it is ordered that: The branch of the motion by defendant New Cynergy which is for an order pursuant to CPLR 3211(a)(1) dismissing the first cause of action asserted against it is granted. The branch of the motion by defendant New Cynergy which is for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the second cause of action asserted against it is granted to the extent that the second cause of action is dismissed with regard to transactions occurring before October, 2009. Those branches of the motion by defendant Harris Bank and defendant Moneris which are for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the second cause of action are denied. Those branches of the motion which are for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the third

cause of action are denied. Those branches of the motion which are for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the fourth cause of action are granted.

I. The Facts:

Plaintiff Tigrent Group, Inc., formerly known as Whitney Education Group, Inc, is a subsidiary of Tigrent, Inc., and the companies are engaged in providing financial education.

In early 2007, Process America successfully solicited plaintiff Tigrent Group, Inc. to enter into agreements with Cynergy Data, LLC (Old Cynergy) for the purpose of receiving credit card processing services. Old Cynergy provided credit card processing services to merchants who opened bank accounts for the deposit of credit card proceeds paid by customers, and Old Cynergy had hired Process America to make solicitations for it. The merchants connected themselves electronically to Old Cynergy and its sponsoring bank so that customers could use their debit or credit cards to make purchases.

The agreements (known as Merchant Processing Agreements or MPA's), to which the merchants, Old Cynergy, and the sponsoring bank were parties (but not Process America), gave Old Cynergy and its sponsoring bank the right to deduct a certain percentage of the funds deposited into Tigrent's bank account by credit card companies. Part of the deduction went to Process America to pay its commission for enlisting Old Cynergy and part of the deduction went to Old Cynergy and the bank as their fees for processing and banking services. The percentage of the funds taken to compensate Process America, Old Cynergy, and the bank was known as the discount rate, and the discount rate was a matter negotiated between Tigrent and Process America. The MPA's expressly incorporated into their terms the rules and operating regulations of Master Card and Visa.

Tigrent alleges that in or about March, 2007, Process America induced it to agree to a higher deduction upon the representation that the money would be used to establish a reserve account to pay for losses arising when consumers cancelled credit card and debit card transactions. On or about March 19, 2007, Tigrent signed a Merchant Reserve Acknowledgment form prepared by Process America which gave Process America the authority to establish a reserve account which would be funded by withholding 5% from each gross deposit. However, Process America did not establish a reserve account, but instead submitted unauthorized documents to Old Cynergy and Bank of America which instructed them to transfer reserve funds to Process America. Old Cynergy and Bank of America complied with Process America's instructions. The rules of the credit card companies incorporated into the MPA's did not authorize such payments. Moreover, during the period from March, 2007 through October, 2008, Old Cynergy and Bank of America did not inform Tigrent that they were making payments to Process America that violated the rules.

On or about November 4, 2008, Harris Bank and Moneris replaced Bank of America and BA Merchants Services, LLC (BAMS), a subsidiary of Bank of America. On or about September, 2009, New Cynergy replaced Old Cynergy. Old Cynergy went into bankruptcy, and New Cynergy purchased its assets in October, 2009. The sale of assets included a set of MPA's between Tigrent (then doing business as Whitney Education Group, Inc.) and Old Cynergy, and its sponsoring bank, initially defendant Bank of America, and, after October, 2008, defendant Harris Bank.

The Bankruptcy Court declared that New Cynergy was not Old Cynergy's successor in interest and that New Cynergy's purchases were "free and clear" of any merchant liabilities arising before the sale. Paragraph 13 of the bankruptcy order provided in relevant part: "[With exceptions not relevant here], the Purchaser shall not have any liability or other obligation of the Debtors arising under or relating to the Transferred Assets and shall not be liable for any Claims against the Debtors *** and shall have no successor or vicarious liabilities of any kind, character or nature whatsoever ***."

Tigrent alleges that from 2007 through 2011, Process America fraudulently obtained more than \$8,300,000 from its accounts. Tigrent further alleges that by no later than July, 2009, New Cynergy, Harris Bank and Moneris knew about the wrongful conduct of Process America but failed to inform Tigrent. Process America has filed for bankruptcy protection, and the plaintiffs seek to recover their losses from Bank of America, New Cynergy, Moneris, and Harris Bank.

II. The First Cause of Action (Breach of Contract):

Tigrent's first cause of action alleges that Old Cynergy breached its credit-card processing agreements with Tigrent by deducting amounts from Tigrent's account before October, 2008 that were not authorized by the agreements. (The first cause of action is asserted against New Cynergy and is not asserted against defendant Harris and defendant Moneris.)

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence***." (*See, Galvan v. 9519 Third Avenue Restaurant Corp.*, 74 AD3d 743.) In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim***." (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700,702; *see, Galvan v. 9519 Third Avenue Restaurant Corp., supra; Vanderminden v. Vanderminden*, 226 AD2d 1037.) In the case at bar, The Bankruptcy Court declared that

New Cynergy was not Old Cynergy's successor in interest and that New Cynergy's purchases were "free and clear" of any merchant liabilities arising before the sale. The order of the Bankruptcy Court is dispositive of the plaintiff's first cause of action. (*See, Doktor v. Werner Co.*, 762 F.Supp.2d 494.) The plaintiff's attempt to collaterally attack the validity of the bankruptcy order in this court is futile.

III. The Second Cause of Action:

The second cause of action alleges that in October, 2008 defendant Harris Bank and defendant Moneris assumed the rights and obligations of defendant Bank of America and defendant BAMS under MPA's entered into by the plaintiff with Old Cynergy. In October, 2009, New Cynergy assumed all the rights and obligations under the MPA's entered into by Old Cynergy. The plaintiff alleges that New Cynergy, Harris Bank, and Moneris breached the MPA's by allowing unauthorized transfers to Process America in an amount greater than \$3,600,000.

The bankruptcy order requires the dismissal of the second cause of action to the extent that it asserts breach of contract against defendant New Cynergy for allegedly unauthorized transfers which occurred before October, 2009. New Cynergy is not entitled to the dismissal of the second cause of action to any further extent.

The second cause of action alleges in relevant part: "Defendants Cynergy, Harris Bank, and Moneris breached their obligations under the written MPA's. In particular, Cynergy, Harris Bank, and Moneris either processed or allowed unauthorized payment of plaintiff's funds to Process America in an amount greater than \$3.6 million." The second cause of action, as amplified by the submissions of the plaintiffs on this motion, adequately alleges that defendant New Cynergy, defendant Harris, and defendant Moneris breached the MPA's by transferring funds that belonged to Tigrent to Process America. According to the plaintiff, the defendants honored the instructions of Process America despite provisions in the initial MPA and the incorporated rules which did not authorize such payments. The plaintiff alleges that the rules expressly forbid entities such as Process America from receiving reserve payments.

The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage. (*McCormick v. Favreau*, 82 AD3d 1537; *Clearmont Prop., LLC v. Eisner*, 58 AD3d 1052.) The plaintiffs second cause of action is adequately stated. The plaintiffs adequately alleged that the defendants breached their contractual duties when they complied with requests made by Process America to transfer reserve funds to it despite provisions in the MPA's and the incorporated rules which prohibited such transfers. Contrary to the argument

made by the defendants, they may be liable for breach of contract even though they did not deduct from Tigrent's account more than the percentage allowed by the MPA's.

IV. The Third Cause of Action:

The plaintiffs allege that New Cynergy, Harris Bank, and Moneris committed fraud when they failed to disclose what they learned no later than July, 2009— that Process America was misappropriating funds and had not established a reserve account. The cause of action for fraud is not duplicative of the cause of action for breach of contract. (*See, Kosowsky v. Willard Mountain, Inc.*, 90 AD3d 1127.) The plaintiffs have adequately alleged that the defendants violated duties which they had independent of contractual ones.

“A cause of action sounding in fraud must allege that the defendant knowingly misrepresented or concealed a material fact for the purpose of inducing another party to rely upon it, and that the other party justifiably relied upon such misrepresentation or concealment to his or her own detriment ***.” (*Schwatka v. Super Millwork, Inc.*, 106 AD3d 897, 900.) “A cause of action to recover damages for fraudulent concealment requires, in addition to allegations of scienter, reliance, and damages, an allegation that the defendant had a duty to disclose material information and that it failed to do so ***.” (*High Tides, LLC v. DeMichele*, 88 AD3d, 954, 957; *Schwatka v. Super Millwork, Inc.*, *supra.*) The plaintiffs have adequately alleged that the defendants were under a duty to disclose any misappropriation of funds by Process America. “ ‘[W]here one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge’, there is a duty to disclose that information ***.” (*Stevenson Equipment, Inc. v. Chemig Const. Corp.*, 170 AD2d 769, 771, quoting *Aaron, Ferer & Sons v. Chase Manhattan Bank, Natl. Assn.*, 731 F2d 112, 123.) A plaintiff may assert a cause of action to recover damages for fraudulent concealment where the party to be charged has superior knowledge (or means of knowledge) and the transaction without disclosure is inherently unfair. (*Miele v. American Tobacco Co.*, 2 AD3d 799.) The plaintiffs have adequately alleged that pursuant to the defendants’ supervisory role over Process America, the defendants learned of the misappropriations by Process America but withheld that information from the plaintiffs so that they could continue to profit from their relationship with the plaintiffs.

V. The Fourth Cause of Action:

The fourth cause of action seeks to hold the defendants liable to the plaintiffs on an agency theory. The plaintiffs allege that “Process America converted those funds by acting with apparent authority on behalf of defendants Cynergy, BofA, BAMS, Harris Bank, and Moneris.” The complaint fails to adequately set forth facts supporting the plaintiff's

conclusory allegations that Process America acted with actual or apparent authority conferred upon it by each of the defendants in converting the plaintiffs' funds. (*See, Kolbeck v. LIT America, Inc.*, 923 F.Supp. 557.) Moreover, the plaintiffs allege that they suffered injury when the defendants honored Process America's requests to transmit the plaintiffs' funds to it, and the fourth cause of action does not adequately allege that an apparent agency had a connection with the transmittals. Finally, the fourth cause of action does not adequately allege facts supporting the conclusory allegation that the defendants were negligent in "monitoring" the activities of Process America.

Dated: May 15, 2014



J.S.C.