

Traditum Group, Inc. v Sungard Kiodex, LLC

2015 NY Slip Op 30094(U)

January 5, 2015

Supreme Court, New York County

Docket Number: 651485/13

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy M. Bannon
Justice

PART 42

TRADITUM GROUP, INC.

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- v -

MOTION DATE 9-17-14

SUNGARD KIODEX, LLC

MOTION SEQ. NO. 02

The following papers were read on this motion for a summary judgment pursuant to CPLR 3212.

Table with 2 columns: Document type and No(s). Rows include Notice of Motion/ Order to Show Cause, Answering Affirmation(s), and Replying Affirmation.

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

In this action to recover damages for breach of an agreement to purchase a software risk management program, the complaint alleged two causes of action. By an order dated February 7, 2014, this court (Scarpulla, J.) granted a motion by the defendant to dismiss the complaint pursuant to CPLR 3211(a)(7) to the extent of dismissing the fraudulent inducement claim.

It is well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985).

Further, an “agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.” Greenfield v Philles Records, Inc., 98 NY2d at 569; see MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640, 645 (2009); Ashwood Capital, Inc. v OTG Management, Inc., 99 AD3d 1 (1st Dept. 2012); 150 Broadway N.Y. Associates, LP v Bodner, 14 AD3d 1 (1st Dept. 2004). “Extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide” by looking within the four corners of the document. Greenfield v Philles Records, Inc., *supra* at 569; see W.W.W. Assocs. v Giancontieri, 77 NY2d 157, 162-163 (1990); Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade, 98 AD3d 403 (1st Dept 2012); Jet Acceptance Corp. v Quest Mexicana S. A., 87 AD3d 850 (1st Dept 2011). The court is concerned “with what the parties intended...only to the extent that they evidenced what they intended by what they wrote.” Akaska Holdings, LLC v Sweet, 115 AD3d 556 (1st Dept. 2014) quoting Ashwood Capital Inc. v OTG Mgt., Inc., 99 AD3d 1, 7 (1st Dept. 2012).

Contrary to the plaintiff’s contention, the contract negotiated and signed by the parties is not clear and unambiguous on its face so as to warrant summary judgment in its favor on the breach of contract claim. The contract contains internal inconsistencies. For instance, Paragraph 5 of the Fee Schedule section, requires the defendant to “meet the functionality” of all 24 listed points during the initial testing period of July 1, 2012, to July 15, 2012, and gives the plaintiff the right to cancel the agreement at its “sole discretion” if the defendant fails to meet those requirements. The plaintiff alleges, and the defendant does not dispute that it met only 22 of the points, even after given an extension on that time period. This supports the plaintiff’s position. The defendant argues, however, that it did not breach the contract since the contract, in Paragraph 6.2 of Terms of Use section, “Limited Warranty”, requires only that it “substantially conform” to the 24 functionality specifications. Indeed, that paragraph supports the defendant’s position that there was no breach.

More specifically, Paragraph 6.2 provides the plaintiff a limited remedy should the defendant not meet the “substantial conformance” standard, *ie.* the plaintiff shall notify the defendant and provide a written report describing the failure so as to allow the defendant to “use commercially reasonable efforts to correct or provide a workaround for such failure.” The paragraph also states that this shall be the plaintiff’s “sole and exclusive remedy” and that “no oral or written information or advice provided by [defendant] will create any warranty or increase the scope of the warranties expressly provided in this agreement.” Paragraph 6.3, “Exclusive Warranty, provides that “the express warranties set forth in [Paragraph 6.2] constitute the only warranties made by [defendant] and [defendant] hereby disclaims all other representations, warranties, covenants or conditions of any kind, whether express or implied with respect to the application or any other subject matter of this agreement.” The paragraph goes on to state further limitations on the defendant’s liability.

In an apparent attempt to resolve the ambiguities in the contract in their favor, each party submits extrinsic evidence, which includes affidavits of Jason O’Reilly, the Chief

Operating Officer of the plaintiff, and Brian Quinn, a former Sales Manager and current Head of Sales for the defendant, as well as email messages and invoices. Discussed therein, *inter alia*, is the contract negotiations concerning the somewhat experimental nature of the use of the program in a proprietary trading firm such as the plaintiff and the attendant price discount, and the parties' subjective understanding of how to determine or measure whether trades were being captured, or showing up, within five seconds, as requested by the plaintiff. Further, O'Reilly alleges that the plaintiff was never able to utilize the program since it never worked properly and that it relied upon its old system throughout, while Quinn maintains that the program functioned as required by the contract and that the plaintiff did in fact use it.

In regard to the affidavits, the court notes that the affidavit of Jason O'Reilly is executed and notarized in the State of Illinois and the affidavit of Brian Quinn is executed and notarized in the State of Texas and that neither includes a certificate of conformity as required by CPLR 2309(c). While such a defect may be cured, *nunc pro tunc*, if the certificate of conformity is included in reply papers (see Ave T MPC Corp. v Amica Mut. Ins. Co. 29 Misc. 3d 136(A) [App Term 2nd, 11th & 13th Jud Dists 2010]), neither party has done so. This deficiency weighs most heavily against the plaintiff, who has the burden of proof in the first instance on this motion.

Neither O'Reilly nor Quinn has been deposed. Indeed, no party has been deposed and no other discovery has taken place. Thus, the defendant is correct in arguing that summary judgment is premature. In light of the conflicting affidavits, it appears that discovery will lead to relevant evidence. See Mason v City of New York, 121 AD3d 468 (2nd Dept. 2014); McGinley v Mystic West Realty Corp., 117 AD3d 504 (1st Dept. 2014).

Even if the defendant's liability were clear, the contract does not necessarily support the plaintiff's claim that it is entitled to the return of all \$157,000, which includes an \$80,000 advance retainer and \$77,000 advance subscription fees, which it had paid to the defendant at the time it terminated the contract on September 14, 2012. While giving the plaintiff termination options at various points in Paragraph 5, it also strictly limits the defendant's liability in Paragraph 6.2, and does not provide for the return of all monies paid upon termination.

Nor does the prior order mandate the granting of the instant motion under the principal of law of the case, as suggested by the plaintiff. While the breach of contract claim may be sufficient to withstand a challenge under the liberal standard of CPLR 3211(a)(7), this does not necessarily warrant summary judgment on the claim under CPLR 3212. In denying the defendant's earlier motion to dismiss the breach of contract claim, the court (Scarpulla, J.) merely determined that the plaintiff stated a cognizable cause of action. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). Here, the movant has a higher burden and must demonstrate, by proof in admissible form, the absence of triable issues of fact. See Alvarez v Prospect Hospital, *supra*; Zuckerman v City of New York, *supra*. Furthermore, while the court in that order expressly rejected the argument that the contract precluded a finding of breach by providing the plaintiff with an early termination option based on

this contingency, the defendant is not no longer asserting that argument. Rather, it argues that it did not breach the contract since it substantially conformed with the 24 functionality requirements, and that is all the contract required.

To maintain an action for a breach of contract the plaintiff must show: (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Morpheus Capital Advisors LLC v UBS AG, 105 AD3d 145 (1st Dept. 2013). Even assuming that the plaintiff had met its burden of proof in the first instance on this motion, the opposing papers raise triable issues as to, *inter alia*, whether there was a breach by the defendant and, if so, the amount of damages due the plaintiff.

For these reasons, the plaintiff's motion for summary judgment is denied, without prejudice to renew upon completion of discovery.

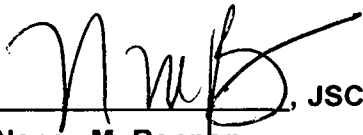
Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment on its cause of action for breach of contract is denied, without prejudice to renew upon completion of discovery, and it is further,

ORDERED that the parties shall appear for a preliminary conference on February 5, 2015, at 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: January 5, 2014


_____, JSC
Nancy M. Bannon

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
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