

**Direct Capital Corp. v Popular Brokerage Corp.**

2015 NY Slip Op 31440(U)

July 30, 2015

Supreme Court, New York County

Docket Number: 652710/2014

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 37

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DIRECT CAPITAL CORPORATION,

Index No.: 652710/2014

Plaintiff,

Motion Seq. No.: 001

- against -

Decision and Order

POPULAR BROKERAGE CORP. and MIGUEL  
PERIBANEZ a/k/a, MIGUEL J. PERIBANEZ,

Defendants.  
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Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on plaintiff's motion, pursuant to CPLR 3211, to strike defendants' affirmative defenses, and, pursuant to CPLR 3212, for summary judgment:

Papers Numbered:

Notice of Motion - Affirmation - Exhibits .....	1
Affirmation in Opposition - Affidavits in Opposition - Exhibits .....	2
Reply Affirmation - Exhibits .....	3

Upon the foregoing papers, plaintiff's motion is granted in part.

Background

In this action, plaintiff Direct Capital Corporation ("plaintiff") seeks to recover damages resulting from defendants Popular Brokerage Corp. ("Popular Brokerage") and Miguel Peribanez a/k/a Miguel J. Peribanez's ("Peribanez") alleged default and breach of two Master Lease Agreements ("Master Agreements"). The parties executed Master Agreement 1 on or about November 28, 2012, and Master Agreement 2 on or about December 27, 2012.

Plaintiff now moves, pursuant to CPLR §3211 and CPLR §3212, to strike the affirmative defenses and for summary judgment. For the reasons set forth herein, (1) plaintiff's motion for summary judgment on the issue of liability against defendant is granted, (2) plaintiff's motion to strike the affirmative defenses is granted, and (3) plaintiff's motion for summary judgment on damages is denied, and plaintiff may proceed to an inquest on damages.

The Master Agreements are between plaintiff and Popular Brokerage, and guaranteed by Peribanez. The Master Agreements are identical and contain the

same terms and conditions that govern the relationship between the parties; the only exceptions being the dates of the Master Agreements and the amount of equipment involved in each. The Equipment Schedules ("Schedules") executed for and attached to each Master Agreement also contain the same terms and conditions.

Pursuant to the Equipment Schedule to Master Agreement 1 ("Schedule 1"), plaintiff agreed to lease defendants certain equipment and defendants agreed to pay to plaintiff \$120,976.92, payable in 36 consecutive monthly installments, each installment in the amount of \$3,360.47. On or before November 28, 2012, the equipment was delivered to defendants, and defendants confirmed delivery and commenced making monthly payments, which they continued through June of 2014. Thereafter, defendants defaulted and breached Master Agreement 1 by failing to make the monthly payment due on July 25, 2014 and only made one other payment in September of 2014.

The Equipment Schedule to Master Lease Agreement 2 ("Schedule 2") included the same terms as Schedule 1, but for different equipment, worth \$38,093.76, payable in 36 consecutive monthly installments, each installment in the amount of \$1,058.16. On or before December 27, 2012, the equipment was delivered to defendants. Defendants commenced and continued to make monthly payments through March of 2014, but thereafter defaulted and breached Master Agreement 2 and Schedule 2 by failing to make the monthly payment which became due on April 25, 2014, and failing to make subsequent monthly payments.

The Master Guaranty clause, signed by Peribanez, provides that "If the Lessee defaults, You will immediately pay in accordance with the default provision of the Lease all sums due under the terms of the Lease and will perform all the Lessee obligations." Paragraph 15 of the Master Agreements, the "accelerations clause," provides that "[i]f You are ever in Default, We, with or without notice to You, may retain Your security deposit; terminate or cancel this Lease or any of Our obligations to You, require that You pay the unpaid rental payments (discounted at 4% annum)...."

Defendants argue that plaintiff inflated its damages claim. However, the invoices defendants attach are "pre-acceleration" invoices and do not include the future amounts to become due under Schedule 1 and Schedule 2. Defendants also contend that they were not in default because they had a credit balance of \$2,008.18, and rely on selected pages from their credit card and bank statements as evidence thereof. However, these pages fail to show that seven of the payments listed by defendants were stopped or were not authorized. On the other hand, plaintiff has provided copies of change reports to show that seven of the payments were stopped, and thus defendants did not have a credit balance, but, rather, have been in arrears.

Defendants claim that they did not receive all of the equipment from plaintiff. They claim that, according to their expert On Site Technology Inc. which inspected the

premises in November 2014, (1) equipment was missing, (2) charges for installation services that were not performed, and (3) the premises were not fit to have certain equipment installed. However, defendants expressly acknowledged that they had received all of the equipment when they executed two Delivery and Acceptance Certificates in 2012.

Finally, defendants provide as evidence plaintiff's response to a Better Business Bureau complaint filed by defendants against plaintiff, in which plaintiff stated that defendants were still "active pay customers" with two open leases and no issues. However, plaintiff contends that this response was with respect to two still-open payments with defendants and that this was not an adequate representation of defendants' compliance with its financial obligations under the Master Agreements.

### Discussion

#### *A. Summary Judgment: Liability*

"It is well established that once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Nel Taxi Corp. v Eppinger, 203 AD2d 438, 438 (2<sup>nd</sup> Dept 1994).

Here, plaintiff has made a prima facie showing that defendants breached the Master Agreements. The essential elements of a breach of contract claim are, "the existence of a contract, plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." JP Morgan Chase v J.H. Elec. of N.Y., Inc., 69 AD3d 802, 803 (2<sup>nd</sup> Dept 2010). Plaintiff has submitted evidence to demonstrate, and defendants do not dispute, that defendants were parties to the Master Agreements; plaintiff performed its obligations by delivering the equipment in accordance with the Master Agreements and the Schedules; Peribanez signed the two Delivery and Acceptance Certificates; and defendants failed to perform on the contract price.

Indeed, defendants do not deny that they have defaulted on their payments to the Master Agreements. Rather, defendants argue that they had a credit balance of \$2,008.18 and thus were not in default. However, they do not contest that they failed to make the payments for which plaintiff seeks compensation.

As a result of defendants' breach plaintiff claims it has suffered monetary damages in the sums of, (1) \$59,169.29, plus interest on this amount at the rate of 24.99% per annum from July 25, 2014, (2) \$19,634.78, plus interest on this amount at the rate of 24.99% per annum from April 25, 2014, (3) \$1,988.38 in late fees, (4) \$758 for termination fees, (5) \$11,797.39 for the residual value of the equipment, (6) \$8,040.88 for taxes, (7) \$1,152.07 for an unreturned security deposit, (8) \$270.62 for insurance fees, and (9) \$250.00 for collection fees, plus reasonable attorneys' fees, all pursuant to the contract.

## B. *Dismissal of Affirmative Defenses*

Plaintiff has demonstrated that defendants' affirmative defenses are without merit.

### a. *Failure to State a Cause of Action*

Defendant's first affirmative defense, which claims that the complaint fails to state a cause of action for which relief can be granted, is without merit. Plaintiff pleaded that a contract existed between the parties and that defendants defaulted on their payment Schedules and breached the Master Agreements.

### b. *Unclean Hands*

Defendants' second affirmative defense, which states that unclean hands and bad faith bar plaintiff's claims, is without merit. The doctrine of unclean hands "is never used unless the plaintiff is guilty of immoral, unconscionable conduct...." National Distillers & Chemical Corp. v Seyopp Corp., 17 NY2d 12, 14 (1966). "The person seeking to invoke the doctrine of unclean hands has the initial burden of showing, prima facie, that the elements of the doctrine have been satisfied." Fade v Pugliani, 8 AD3d 612, 614 (2<sup>nd</sup> Dept 2004). Here, defendants have failed to show that plaintiff engaged in any immoral or unconscionable behavior.

Additionally, "[t]he doctrine of unclean hands is an equitable defense that is unavailable in an action exclusively for damages." Manshion Ioho Ctr. Co., Ltd. v Manshion Ioho Ctr., Inc., 24 AD3d 189, 190 (1<sup>st</sup> Dept 2005).

### c. *Waiver and Doctrine of Laches*

Defendants third affirmative defense, which states that waiver and the doctrine of laches bar plaintiff's claims, is without merit. Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party....[t]he mere lapse of time, without a showing of prejudice, is insufficient to sustain a defense of laches." Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 816 (2003).

Defendants defaulted under the Master Agreements on July 25, 2014. Plaintiff commenced this action on September 5, 2014. The lapse of time was not significant. Further, "[p]rejudice may be established by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay." Skrodelis v Norbergs, 272 AD2d 316, 316-317 (2<sup>nd</sup> Dept 2000). Defendants have failed to show any significant harm caused by reason of plaintiff's commencement of this action less than two months following defendants' breach. Additionally, the defense of laches "has been applied in equitable actions and declaratory judgment actions...where the defendant shows prejudicial delay even though the limitations period was met." Saratoga, supra, 100 NY2d at 816. Plaintiff's action is exclusively for damages, and laches does not apply.

### d. *Mitigation of Damages*

Defendants' fourth affirmative defense, which claims that plaintiff failed to mitigate its damages, is unsupported by any facts. Plaintiff's only means to mitigate its

damages was to lease the equipment to another party. However, defendants never made the equipment available to plaintiff after defendants' default of the Master Agreements.

*e. Plaintiff's Own Conduct*

Defendants' fifth affirmative defense, which claims that any damages suffered by plaintiff are a result of its own conduct, is without merit. Defendants do not provide any factual evidence as to any alleged conduct by plaintiff that caused the damages.

*f. Inflated Damages and Accounting*

Defendants' sixth affirmative defense, which states that plaintiff's damages are grossly inflated and demanding an accounting of damages is dismissed because plaintiff has an alternative remedy at law, to wit, an inquest on damages. Where a party has a remedy at law, an accounting is not appropriate. Ehrlich v Jack Mills, Inc., 215 AD 116 (1<sup>st</sup> Dept 1926). And even if an accounting would be necessary to ascertain the damages, there must also "exist some trust or fiduciary relation between the parties to justify a court of equity in exercising its powers by decreeing an accounting." Moore v Coyne & Delaney Mfg. Co., 113 AD 52, 54 (1<sup>st</sup> Dept 1906). This is not an action seeking remedies in equity, and there exists no fiduciary duty between the parties.

*g. Undue Influence*

Defendants' seventh affirmative defense, which states that plaintiff's claims are barred by the doctrine of undue influence, is unsupported. CPLR 3016(b) requires that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." CPLR 3016. Proof of undue influence requires "establishing motive, opportunity, and the actual exercise of that undue influence." Matter of Fellows, 16 AD3d 995, 996 (3<sup>rd</sup> Dept 2005). Here defendants have failed to state any instance of undue influence, much less in detail.

*h. Unjust Enrichment*

Defendants' eighth affirmative defense, which alleges unjust enrichment, is not supported by any facts.

*i. Unconscionability*

Defendants' ninth affirmative defense, which alleges that the doctrine of unconscionability bars plaintiff's claims, is without merit. An unconscionable contract is one which "is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforcible [*sic*] according to its literal terms." Mandel v Liebman, 303 NY 88, 94 (1951). "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made." Gillman v Chase Manhattan Bank, 73 NY2d 1, 10 (1988). Unconscionability is usually established by examining the "setting of the transaction...whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the

experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power.” *Id.* at 11. Here, defendants’ have failed to demonstrate unconscionability.

*C. Defendants Failed to Meet Their Burden  
of Proof Opposing Summary Judgment*

“It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial.” Di Sabato v Soffes, 9 AD2d 297, 301 (1<sup>st</sup> Dept 1959).

Defendants contend that plaintiff failed to perform under the terms of the Master Agreements, because all of the equipment was not on the premises of the defendants, based on the inspection conducted on November 17, 2014 by On Site Technology, Inc. However, Peribanez signed two Equipment Delivery and Acceptance Certificates set forth on the Schedules annexed to the Master Agreements upon delivery of the equipment. Now, pursuant to an inspection conducted more than two years after the delivery and acceptance of the equipment, defendant alleges that plaintiff is charging defendants more than \$25,000.00 for equipment that the plaintiff never supplied or delivered.

In Northside Sav. Bank v Sokol, 183 AD2d 816, 816 (2<sup>nd</sup> Dept 1992), “[a]lthough the defendants opposed [plaintiff’s] motion [for summary judgment] by claiming that they had never received the leased equipment, the defendants’ unsupported allegations were contradicted by evidence that they signed a receipt acknowledging delivery of the subject equipment...and that they made 11 payments under the lease for the subject equipment.” The court granted the motion.

“It is incumbent on the court, therefore, to search the proof, if any, as proffered by affidavits or otherwise, to ascertain whether it discloses a real issue, rather than a formal, perfunctory, or shadowy one.” Di Sabato, supra, 9 AD2d at 300. Here, defendants’ claim as to the missing equipment is completely unsubstantiated. The inspection was made two years after the delivery, and defendants’ delay makes it difficult to prove that the absence of the Equipment was due to plaintiff’s lack of performance.

Additionally, UCC §2A-407 states “[i]n the case of a finance lease that is not a consumer lease the lessee’s promises under the lease contract become irrevocable and independent upon the lessee’s acceptance of the goods.” Defendants’ promises to plaintiff under the Master Agreements became irrevocable upon their acceptance of the goods. Also, waiver and estoppel would appear to defeat defendants’ argument.

Defendants also contend that they did not default because they had a credit balance of \$2,008.18. The Master Agreements do not provide that defendants can default on a payment based on a balance. Additionally, defendants’ monthly dues under both

Master Agreements at the time of the default totaled around \$5,000.00. Even if defendants had a credit balance of \$2,008.18 balance, it would have been insufficient to cover a monthly payment and thus the defendant would have defaulted regardless. Additionally, defendant does not provide any evidence showing the credit balance of \$2,008.18 in order to create an actual issue of material fact.

Defendants failed to meet their burden of proof with regards to their liability for breach of contract in response the plaintiff's summary judgment motion.

*D. Summary Judgment: Damages*

However, plaintiff failed to meet its burden of proving the amount of its damages. There are errors within plaintiff's complaint as to the amounts owed by defendants. Specifically, Paragraph 15 establishes plaintiff's right to "the unpaid rental payments (discounted at 4% per annum)," but the numbers within plaintiff's complaint are inconsistent or inscrutable. The unpaid rental payments under Master Agreement 1 total \$50,407.05. This amount, discounted at 4% annum should total \$48,390.77, but plaintiff is seeking \$49,087.

Additionally, Paragraph 11 of the Master Agreement states: "A late payment charge of 15% of amount due will be assessed on any payment not paid within 3 days of due date." Plaintiff seeks damages in the amount of \$1,988.38 for six late payments by defendant. However, plaintiff fails to provide any evidence of the alleged late payments.

Further, plaintiff seeks \$11,797.39 for the residual value of the equipment, recoverable pursuant to UCC §2A-532 and Paragraph 15 of the Master Agreements. However, plaintiff failed to establish by competent proof in admissible form the residual value of the equipment.

Thus, plaintiff is entitled to summary judgment for liability but not damages. Therefore, an inquest is necessary to determine plaintiff's damages.

Conclusion

Plaintiff's motion to strike defendants' affirmative defenses is granted. Plaintiff's motion for summary judgment is granted as to liability, *only*, and plaintiff may proceed to an inquest on damages upon filing a copy of this decision, a notice of inquest, and the payment of any necessary fees.

Dated: July 30, 2015




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Arthur F. Engoron, J.S.C.