SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. *Justice* **PART** 35

Index Number : 158869/2012
DATALOT, INC.
vs.
WINUM ENTERPRISES, LLC D/B/A
SEQUENCE NUMBER : 004
DECLARATORY JUDGMENT

INDEX NO. _____
MOTION DATE 2/19/16
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

In this action for, *inter alia*, breach of contract and account stated, plaintiff Datalot, Inc. ("Datalot") moves for an Order: (1) prohibiting defendant/counterclaim plaintiff Winum Enterprises, LLC d/b/a Leads 2 Profits ("Winum") from recovering any special or consequential damages including, but not limited to, lost profits, for Datalot's breach of the parties' agreement on November 16, 2012 (the "November 2012 breach"); and (2) limiting the scope of any potential damages Winum may recover a result of Datalot's November 2012 breach to two (2) days as a result of Winum's termination of the parties' agreement on November 18, 2012, and "capped" at $5,000 per said agreement.

Factual Background

This action arises out of a "Datalot Lead Sales Agreement" dated August 8, 2012 between Datalot, an internet advertising company, and Winum, and a "Datalot Insertion Order" ("IO"), also dated August 8, 2012 (collectively, the "Agreement"). Under the Agreement, Datalot was to "generate and collect" data records (*i.e.*, a "Lead") and transfer to Winum such Leads that match Winum's criteria (see 1. Lead Generation Services). Datalot provided leads to Winum until invoices were not paid by defendant. Thus, Datalot commenced this action for, *inter alia*, breach of contract and account stated. In response, Winum counterclaimed for breach of contract for damages resulting from the loss of Winum's customers when Datalot ceased providing leads.

By order dated May 8, 2013, this Court denied Datalot's pre-Answer motion to dismiss Winum's breach of contract counterclaim, finding that the Warranty/Limitation of Liability

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

Dated: _____ _____, **J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

provision (paragraph 10 of the Agreement) "is ambiguous as to whether the clause is limited to a breach of warranty . . . . The clause is arguably ambiguous as to whether the limitation of plaintiff's liability for "any cause of action" is limited to causes of action arising from a breach of warranty or the quality of the leads. Therefore, it cannot be said, at this juncture, that this clause limits or precludes claims arising from a breach based on the improper demand of payment or premature cessation of leads" (Decision page 5). The Court, however, granted Datalot's motion for summary judgment on its account stated claim for $18,126.00, and reserved the issue of damages for trial.

By subsequent order dated September 24, 2013, this Court granted Winum summary judgment on its breach of contract counterclaim on the issue of liability, based on Datalot's premature conditioning its provision of further leads upon Winum's payment of previous leads, and refusal, on November 16, 2012, to send leads (Decision pages 11-12).[1]

In support of Datalot's motion, Datalot contends that Winum cannot recover special or consequential damages or loss profit, as these damages were not contemplated by the parties, and speculative. Further, the Warranty/Limitation of Liability provision addresses two separate elements, *i.e.*, warranties, and limitations of Datalot's general liability, and such provision expressly precludes Winum from recovering such damages. In any event, such provision limits all damages to the amounts Winum paid to Datalot, *to wit*: $5,000.00.

In opposition, Winum argues that this Court previously held that the damages Winum seeks are not speculative, and that the Warranty/Limitation of Liability provision was ambiguous. Winum's principal averred that the Warranty/Limitation of Liability provision pertains only to damages arising out of a breach of warranty. And, any "cap" of damages Winum is not $5000.00, but $23,126.00, which includes the amount for which Winum is liable to Datalot on Datalot's account stated claim. The damages caused by Datalot's breach were reasonably foreseeable at the time the Agreement was made, and neither caselaw nor any court has limited Winan's claims for damages or loss profits to two days. Winum can recover damages from the date of Datalot's breach (November 16, 2012) for future loss profits for the period of time the Agreement was likely to remain in force in the absence of a breach by either party. Discovery is required to determine the proper measure of damages.

In reply, Datalot argues that the Court did not hold the limitation on damages portion of the Warranty/Limitation of Liability provision ambiguous, and any suggestion in the Court's decision to the purported ambiguity was limited to the pre-answer stage of the litigation. Winum presents no evidence in support of special damages or lost profits. Also, Winum cannot inflate the cap on damages by including sums it has yet to pay; the Agreement caps damages to the amount paid by Winum to Datalot, which is $5,000.00.

Discussion

A "written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Beinstein v. Navani*, 131 A.D.3d 401, 14 N.Y.S.3d 362 [1st Dept 2015]). "It is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*150 Broadway N.Y. Assoc., L.P. v*

[1] The Court's September 24, 2013 decision was affirmed on appeal.

Bodner, 14 AD3d 1, 6 [1st Dept 2004]; *see also Alf Naman Real Estate Advisors, LLC v. Cape Sag Developers, LLC*, 113 A.D.3d 525, 978 N.Y.S.2d 844 [1st Dept 2014]).

Whether a contract is ambiguous is, of course, a question of law for a court (*Richard Feiner and Co. Inc. v. Paramount Pictures Corp.*, 95 A.D.3d 232, 941 N.Y.S.2d 157 [1st Dept 2012]). A contract is ambiguous only if "on its face [it] is reasonably susceptible of more than one interpretation" (*Telerep, LLC v. U.S. Intern. Media, LLC*, 74 A.D.3d 401, 903 N.Y.S.2d 14 [1st Dept 2010] *citing Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 573, 498 N.Y.S.2d 344, 489 N.E.2d 231 [1986]). When a contract is found to be ambiguous, a court may look to extrinsic evidence to resolve the ambiguity (*Chen v. Yan*, 109 A.D.3d 727, 971 N.Y.S.2d 519 [1st Dept 2013]). In other words, "A contract is ambiguous 'if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings'" (*Feldman v National Westminster Bank,* 303 AD2d 271 [1st Dept 2003], *lv denied* 100 NY2d 505 [2003]). However, mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 [1st Dept 1995]; *see also Rotter v. Ripka*, 110 A.D.3d 603, 973 N.Y.S.2d 211 [1st Dept 2013]).

As relevant herein, the Agreement provides as follows:

10. Warranty/Limitation of Liability. THE SERVICES AND LEADS PROVIDED BY DATALOT UNDER THE AGREEMENT ARE SUPPLIED ON AN "AS IS" AND "AS AVAILABLE" BASIS. TO THE FULLEST EXTENT OF THE LAW, DATALOT MAKES NO WARRANTIES (INCLUDING IMPLIED WARRANTIES OF PURPOSE AND NON-INFRINGEMENT), GUARANTEES, REPRESENTATIONS, EXPRESS, IMPLIED, ORAL OR OTHERWISE, OTHER THAN THOSE EXPRESSLY SET FORTH HEREIN. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, DATALOT DOES NOT WARRANT OR GUARANTY LEADS AND/OR RESPONSE RATES. THE SERVICES AND/OR LEADS MAY CONTAIN BUGS, ERRORS, PROBLEMS OR OTHER LIMITATIONS. DATALOT HAS NO LIABILITY, WHATSOEVER, TO PURCHASER OR ANY THIRD- PARTY, FOR ANY OTHER PARTY'S SECURITY METHODS OR PRIVACY PROTECTION PROCEDURES AND DATALOT DISCLAIMS ANY AND ALL WARRANTIES, EXPRESS AND IMPLIED, ASSOCIATED WITH SAME. DATALOT HAS NO LIABILITY FOR PURCHASER'S USE OF, OR INABILITY TO USE, THE LEADS AND DATALOT DISCLAIMS ANY AND ALL WARRANTIES, EXPRESS AND/OR IMPLIED, THAT PURCHASER'S USE OF THE LEADS WILL BE UNINTERRUPTED OR ERROR-FREE. IN NO EVENT SHALL DATALOT BE RESPONSIBLE FOR ANY CONSEQUENTIAL, SPECIAL, PUNITIVE OR OTHER INDIRECT DAMAGES INCLUDING, WITHOUT LIMITATION, LOST REVENUE OR PROFITS, EVEN IF DATALOT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, DATALOT'S LIABILITY UNDER ANY CAUSE OF ACTION SHALL BE LIMITED

TO THE AMOUNTS PAID TO DATALOT BY PURCHASER PURSUANT TO THE AGREEMENT. DATALOT SHALL NOT BE HELD LIABLE OR RESPONSIBLE FOR ANY ACTIONS OR INACTIONS OF ITS SUB-LICENSEES.

Datalot failed to establish, as a matter of law, that the parties did not contemplate Winum's ability to recover special damages, including lost profits. "To recover such [lost profit] damages in a breach of contract claim, a plaintiff must establish that such damages were actually caused by the breach, that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made' and that the alleged loss is capable of proof with reasonable certainty" (*Awards.com v. Kinko's Inc.*, 42 AD3d 178, 178 [2007] *citing Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986] [citations omitted]). Here, the Agreement expressly mentions "lost profits" albeit in the context of a disclaimer of warranties, and thus, it cannot be said the Agreement is wholly silent on the issue of lost profits *(cf. Revelations Perfume & Cosmetics v. Nelson*, 2011 N.Y. Misc. LEXIS 6473 (N.Y. Sup. Ct. Aug. 3, 2011)). Given that the Agreement ambiguous as to whether the exclusion of lost profits applies solely to claims relating to the quality of the leads, it cannot be said that lost profits was intended to be excluded from claims other those arising from the quality of the leads. Further, the case *Awards.com v Kinko's Inc.* (42 AD3d 178 [1st Dept 2007]), upon which Winum relies, does not warrant a different result. In *Awards.com*, the found that the parties agreement failed to reflect that the parties contemplated lost profits in the event of a breach, and noted that it was "unreasonable to infer an intent to assume the risk of lost profits in what was to be a start-up venture . . . ." The "speculative" nature of the lost profits sought underscored the "unreasonableness of such an inference.' (42 AD3d at 183-184). Here, lost profits is mentioned in the Agreement, in the context of the Warranty/Limitation provision, which scope is not established thus far, and the Court previously noted that the damages sought by Winum were potentially "calculable based on data from [Winum's] experience with Datalot" (May 8, 2014 Decision, p. 5). Even if the Court were to consider Datalot's affidavit that it did not intend to pay Winum consequential damages in the event of a breach, Winum submits a contrary affidavit indicating that it understood that the Warranty/Limitation provision was limited to damages arising from a breach *of warranty*.

And, as this Court previously held, the damages sought are calculable based on "data" from Winum's experience with Datalot. In particular, the Court had before it the affidavit of Winum's principal, who explained the revenues generated from the leads provided and as such, damages are +quantifiable. The relationship between the parties may be established by orders and payments made, albeit for a short period of time. Although the Agreement was terminable at will, the Agreement was for one-year, and automatically renewable on an annual basis. The assumptions outlined by Datalot in an attempt to demonstrate the damages as speculative are insufficient to overcome the showing plaintiff of the calculable nature of the damages sought.

Further, Datalot's reliance on the heading of and language contained in the Warranty/Limitation provision as a bar to special or consequential damages, and lost profits is unavailing in light of the Court's explanation above, and the explanation provided in the Court's May 8, 2013 decision.

And, given that Datalot's motion to limit Winum's damages to two days, and to the amount paid, *i.e.*, $5000.00 is premised upon the Warranty/Limitation provision, and the

ambiguity of such provision as to whether it applies to the specific breach of the Agreement by Datalot herein cannot be resolved on this motion, Datalot's request in this regard is denied.[2]

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for an Order: (1) prohibiting defendant/counterclaim plaintiff from recovering any special or consequential damages including, but not limited to, lost profits, for plaintiff's breach of the parties' agreement on November 16, 2012; and (2) limiting the scope of any potential damages defendant/counterclaim plaintiff may recover a result of plaintiff's November 2012 breach to two (2) days and "capped" at $5,000 per said agreement, is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within 20 days of entry; and it is further

ORDERED that the parties shall appear for a discovery conference on May 2, 2016, 2:30 p.m.

This constitutes the decision and order of the Court.

[2] Notwithstanding the ambiguity as to whether the Warranty/Limitation provision limits damages to breaches of the Agreement other than breach of warranty, Winum's argument that the "cap" on damages includes the amount for which it would be liable does not appear to be supported by the language of Warranty/Limitation provision.

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DATED: 3-11-2016

J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

1. CHECK ONE :
2. CHECK AS APPROPRIATE :
3. CHECK IF APPROPRIATE :

☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE