

**Fundamental Funding, LLC v USA Wine Imports,
Inc.**

2017 NY Slip Op 32247(U)

October 23, 2017

Supreme Court, New York County

Docket Number: 653056/2014

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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FUNDAMENTAL FUNDING, LLC

Plaintiff,

- v -

USA WINE IMPORTS, INC.,

Defendant.

INDEX NO. 653056/2014

MOTION DATE 9/21/2016

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this application to/for SUMMARY JUDGMENT (AFTER JOINDER)

HON. SALIANN SCARPULLA:

In this action for payment on assignments, plaintiff Fundamental Funding, LLC (“Fundamental”) moves for summary judgment on the complaint in its favor. Defendant USA Wine Imports, Inc. (“USA Wine”) cross-moves for summary dismissal of the complaint.

Background

Fundamental is a Delaware limited liability company that provides receivables financing to businesses, *i.e.*, factoring. USA Wine is a Georgia corporation with New York headquarters, and it provides wine import and distribution services. Non-party

Global Wine Logistics, Inc. (“Global”) is an out of business freight forwarding company that provided services to USA Wine.

On September 6, 2011, Global and Fundamental entered into a Purchase of Accounts and Security Agreement (“Factoring Agreement”), in which Fundamental agreed to provide Global with financing in exchange for the assignment of Global’s accounts receivable.¹ Fundamental submits an affidavit from its Senior Vice President of Operation and Finance who attests that, from September 6, 2011 to May 15, 2014, Fundamental acquired all of Global’s accounts receivable due from USA Wine (“Acquired Invoices”). Fundamental attests that it notified USA Wine of its Acquired Invoices by email on September 6, 2011, and by letter on September 14, 2011 and November 21, 2011. Submitted copies of the notifications demonstrate that Fundamental instructed USA Wine to remit all future payments of the Acquired Invoices to it, and not Global, pursuant to the Factoring Agreement which assigned all current and future Acquired Invoices to Fundamental.

Fundamental attests that USA Wine paid the Acquired Invoices directly to Fundamental until January 2012 and thereafter, misdirected payments to Global.² USA Wine submits documentary evidence, dated March 14, 2012, demonstrating that Global represented to USA Wine that it was excluded from the Factoring Agreement, and USA

¹ Fundamental and Global subsequently entered into three amendments of the Factoring Agreement.

² Fundamental attests that “Global periodically forwarded [Fundamental] remittances on the USA Wine [Acquired] [I]nvoices.”

Wine alleges that it relied on Global's representation when it started to misdirect payments to Global instead of Fundamental.

On October 31, 2012, Fundamental sent another assignment notification, to which USA Wine responded that it "do[es] not accept factoring and will have to continue to remit payment to [Global]." On December 13, 2012, Global also notified USA Wine that it should remit payment to Fundamental, not Global. On December 14, 2012, Fundamental further explained that payments misdirected to Global do not release USA Wine of its payment obligations on the Acquired Invoices. Fundamental attests that it sent the last two of seven assignment notifications on September 12, 2013 and June 18, 2014. USA Wine asserts that it disputed each assignment notification with Global.

USA Wine paid all invoices from January 2012 to June 2014 directly to Global, and none of the Acquired Invoices remain outstanding. USA Wine alleges that Fundamental knew USA Wine misdirected payments to Global and nevertheless continued to offer Global financing.

Fundamental moves for summary judgment seeking payment on the Acquired Invoices for which USA Wine misdirected payment to Global, in the total amount of \$605,222.97. USA Wine opposes and cross-moves, arguing that Fundamental does not have a private right of action against USA Wine and that the equitable defenses of waiver and laches require that I dismiss the complaint.³

³ USA Wine contends that Fundamental is precluded from maintaining this action, pursuant to N.Y. LLC § 802, because it failed to comply with the publication requirement to conduct business in New York state as a foreign Limited Liability Company.

Discussion

A party moving for summary judgment is required to make a *prima facie* showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Grob v Kings Realty Assoc.*, 4 A.D.3d 394, 395 (2d Dep't 2004). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980).

Fundamental asserts causes of action for breach of contract and an account stated against USA Wine, arguing that USA Wine, as an account debtor, never discharged its obligations to Fundamental, as an assignee, pursuant to New York's Uniform Commercial Code § 9-406. USA Wine argues that New York's Uniform Commercial Code § 9-406 provides Fundamental with no private right of action against USA Wine. Based on the the Factoring Agreement and the Acquired Invoices issued to USA Wine, Fundamental has established that it may sue as an assignee, thus I deny dismissal for failure to state a claim.⁴

Fundamental has demonstrated its compliance by submitting a certified copy of its certificate of publication; therefore, I consider the cross-motions on the merits.

⁴ To the extent that USA Wine disputes that Fundamental purchased certain Acquired Invoices or that certain Acquired Invoices were issued to a company other than USA Wine, that raises an issue of fact as to the amount of damages, if any, to be determined at trial.

“Under New York's Uniform Commercial Code § 9–406(a), an account debtor may discharge an obligation ‘by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee’ *IIIG Capital LLC v Archipelago, L.L.C.*, 36 A.D.3d 401, 402 (1st Dep’t 2007).

Subsection (c) of New York's Uniform Commercial Code § 9–406 further provides that if the account debtor requests proof of assignment, the assignee must provide it, otherwise, the notification in subsection (a) has no effect.

Here, Fundamental attests that it provided assignment notifications on (1) September 6, 2011; (2) September 14, 2011; (3) November 21, 2011; (4) October 31, 2012; (5) December 14, 2012; (6) September 12, 2013; and (7) June 18, 2014. USA Wine only specifically disputes receipt of the September 12, 2013 notification and argues that with respect to all other notifications, subsection (c)’s safe harbor applies because USA Wine disputed each notification with Global.

USA Wine’s argument is misplaced. Subsection (c) states that “if requested by the account debtor, *an assignee* shall seasonably furnish reasonable proof that the assignment has been made”. N.Y. U.C.C. § 9–406(c) (emphasis added). To the extent that USA Wine challenged the assignment to Fundamental and relied on Global’s representations, it failed properly to inform Fundamental of its request for proof of assignment, as required by subsection (c)’s safe harbor.

Further, contrary to USA Wine’s assertion, its response to Fundamental’s October 31, 2012 and December 14, 2012 assignment notifications, *i.e.*, that USA Wine does not

accept factoring, is not a request for proof of assignment but rather a disregard of the notification. See N.Y. U.C.C. § 9-406 cmt. 3 (“If an account debtor has doubt as to the adequacy of a notification, it may not be safe in disregarding the notification unless it notifies the assignee with reasonable promptness as to the respects in which the account debtor considers the notification defective.”).

Nevertheless, factual questions exist regarding whether Fundamental waived the right to receive direct payment from USA Wine for the Acquired Invoices. In *Gen. Motors Acceptance Corp. v Clifton-Fine Cent. School Dist.*, 85 N.Y.2d 232 (1995), the Court of Appeals found that “issues of fact exist as to whether plaintiff waived its rights under the assignment” when the account debtor directly paid the assignor on a prior occasion, and the assignee failed “to protest or direct that payment be made to it.” *Id.* at 236; see also *Abrams & Co., Inc. v ITS Equip. and Leasing Corp.*, 216 A.D.2d 503, 504 (2d Dep’t 1995) (finding a “triable issue of fact with respect to the defendant’s claim that the plaintiff waived the direct payment requirement under the assignment by permitting the defendant to remit payments directly to the assignor over this eight-month period”).

Similarly, here, despite knowing that USA Wine misdirected payments to Global based on periodic payments Fundamental admits it received from Global, Fundamental continued to advance funding to Global in exchange for additional Acquired Invoices. Therefore, an issue of fact exists as whether Fundamental’s conduct constitutes waiver, precluding summary judgment on the complaint in Fundamental’s favor.

In opposition, Fundamental argues that waiver does not apply to New York’s Uniform Commercial Code § 9-406 and to the extent *Gen. Motors Acceptance Corp. v*

Clifton-Fine Cent. School Dist., 85 N.Y.2d 232 (1995) suggests otherwise, that decision dates to the former Section 9-318. The official comment, however, provides that “[n]o change in meaning from former Section 9-318 is intended.” U.C.C. § 9-406 cmt. 2. Therefore, waiver equally applies to New York's Uniform Commercial Code § 9-406(a) as it did to the former Section 9-318(3), and *Gen. Motors Acceptance Corp. v Clifton-Fine Cent. School Dist.*, 85 N.Y.2d 232 (1995) is still controlling. To the extent that Fundamental contends that its assignment notifications demonstrate conduct contrary to acquiescence, that is an issue of fact to be resolved at trial, precluding summary judgment on either of USA Wine's equitable defenses of waiver or laches.

In accordance with the foregoing, I deny summary judgment on the complaint in favor of either Fundamental or USA Wine. Further, for this same reason, I deny summary judgment to USA Wine on its affirmative defenses.

In accordance with the foregoing, it is

ORDERED that plaintiff Fundamental Funding, LLC's motion for summary judgment on the complaint is denied; and it is further

ORDERED that defendant USA Wine Imports, Inc.'s cross-motion for summary judgment dismissing the complaint is denied, and the motion is also denied as to defendant USA Wine Imports, Inc.'s first, second, and third affirmative defenses; and it is further

ORDERED that plaintiff Fundamental Funding, LLC's request to amend the caption to reflect the plaintiff's correct name is granted without opposition; and it is further

ORDERED that the new caption of the complaint shall be:

FUNDAMENTAL FUNDING LLC

Plaintiff,

- v -

USA WINE IMPORTS, INC.,

Defendant.

The parties are directed to serve a copy of this decision and order on the Clerk of the Trial Support Office and, upon such service, the Clerk is directed to amend the caption of this action accordingly.

This constitutes the decision and order of the Court.

10/23/17
DATE

Saliann Scarpulla
SALIANN SCARFULLA, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: