SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 38

S3 LLC, d/b/a S3 BUSINESS SOLUTIONS,	:	Index No. 652810/2019
Plaintiff,	:	DECISION AND ORDER (Motion Seq. No. 001)
-against-	:	
DE LAGE LANDEN FINANCIAL SERVICES, INC.,	:	
Defendant.	:	

LOUIS L. NOCK, J.

Defendant – De Lage Landen Financial Services, Inc. ("DLL") – moves to dismiss the complaint under CPLR 3211(a)(1), (7). For the reasons set forth herein, the motion is denied.

BACKGROUND

The S3 Program Agreement:

On or about August 21, 2012, plaintiff S3 LLC, d/b/a S3 Business Solutions ("S3"), and DLL entered into an agreement relating to the leasing, maintenance, and service of printing equipment and related business equipment provided to S3's customers (the "Agreement"). Compl. ¶ 5. Under the Agreement, S3 agreed to offer DLL the opportunity to enter into lease agreements with S3's customers, and DLL agreed to enter into such lease agreements in S3's name and to service the lease agreements in S3's name, while S3 itself would maintain and service DLL's leased equipment. *Id.* ¶ 7. Under the Agreement, DLL agreed to act as S3's "attorney in fact," with full power to execute leases in S3's name and to "lawfully ask, require, demand, receive, compound and give acquittance for any and all" lease payments and other monetary claims arising under third party lease agreements covered by the Agreement. *Id.* ¶ 8. The Agreement expressly provides:

> For any Contract assigned to DLL, Vendor [i.e., S3] hereby constitutes DLL its true and lawful attorney in fact with full power in the name of Vendor to execute Leases to be assigned to DLL, to lawfully ask, require, demand, receive, compound and give acquittance for any and all Contract payments and claims for money due or to become due under any contract or any related guarantee, to endorse any checks or other instruments delivered to the lockbox or otherwise received by DLL and constituting Contract payments or other sums legally due DLL under this Agreement and to bill and collect from Lessee/Customer applicable use and property tax.

(Agreement ¶ 6.)

Under the Agreement, DLL agreed that no third-party lease agreements would be subject to early termination or cancellation, except as pursuant to DLL's then-current early termination policies and procedures. Compl. ¶ 9; Agreement ¶ 18. Under the Agreement, DLL agreed that all customer payments would be allocated pro rata among: (i) the "equipment" portion of the monthly lease payments ("Equipment"); (ii) any adjustment, administrative and collection fees ("Fees"); (iii) the "service" portion of the monthly lease payments ("Service"); and (iv) any additional copy charges ("Copy Charges") owed under the third party lease agreements. Compl. ¶ 10; Agreement ¶ 9(f)(4)(K).

In the event of short payments and/or a payment default by the third-party lessee, DLL was obligated to take "all reasonable steps" to collect what was owed, including initiating formal collection proceedings. Compl. ¶¶ 11-12; Agreement ¶ 9(f)(4)(K), (L). As the complaint alleges, DLL was obligated to undertake such efforts not only on its own behalf but also as S3's attorney-in-fact. Compl. ¶ 12; *see*, Agreement ¶ 6. All payments received from the lessee through such collection efforts were to be allocated pro rata as described above, i.e., to Equipment, Service, Fees and Copy Charges. *See* Agreement ¶ 9(f)(4)(M) ("In the event DLL initiates collection proceedings . . . payments received from the Lessee/Customer shall be applied as set forth in paragraph [K] above").

Consistent with DLL's role as attorney-in-fact for DLL, the Agreement authorizes DLL

to "negotiate claims in order to collect the Monthly Minimum Payments or Base Monthly Rental Payments" and further provides, as the complaint alleges, that S3 would accept the risk of short payments on its share of the total amount owed, i.e., the Service and Copy Charges. Agreement ¶ 9(f)(4)(M). In other words, as attorney-in-fact, DLL had the authority to enter into third party lease agreements with S3's customers, to receive the full amount of each monthly payment and, as alleged in the complaint, to pay over to S3 the Service and Copy Charges portions, to undertake collection efforts including formal legal proceedings in the event of a customer's payment default, and to settle those claims on behalf of S3 and itself. As alleged in the complaint, S3, for its part, would accept the risk of short payments by the customer and would not look to DLL to make up the difference. Thus, as alleged in the complaint, pursuant to the plain import of the Agreement's language, if DLL settled a claim for fifty cents on the dollar, all money received from that settlement would be allocated pro rata between Equipment, Service, Fees and Copy Charges as required under subparagraph (K) of the Agreement. In the event of a 50% recovery, DLL would pay itself half of the Equipment Charges and Fees owed, and remit to S3 half of the Service and Copy Charges, as alleged in the complaint.

The HJC Lease Agreement:

On or about November 4, 2013, DLL entered into a 60-month lease agreement (the "HJC Lease") with Henry J. Carter Specialty Hospital & Nursing Facility ("HJC Hospital"), a facility owned and operated by the New York City Health and Hospitals Corporation ("HHC"), a New York public benefit corporation. Compl. ¶¶ 13-15. Pursuant to the HJC Lease, DLL leased a number of printers to HJC Hospital, subject to sixty monthly lease payments of $8,911.84 per month, which payments included an "equipment" portion and a "service" portion, as well as per-

print charges. *See* Compl. ¶¶ 16-17, 21. In the event of a default, the HJC Lease provided a number of remedies, including: (a) acceleration of all remaining lease payments; (b) commencing a legal proceeding to recover all unpaid and/or accelerated lease payments plus the fair market value of the leased equipment; (c) default interest of 18% per year; and (d) reimbursement of collection costs and expenses, including reasonable attorneys' fees. *See id.* ¶ 18.

DLL's Alleged Breach of its Obligations:

In or around November 2016, HJC Hospital defaulted on its obligations under the HJC Lease. Compl. ¶ 27. DLL immediately engaged in enforcement and collection efforts, including but not limited to, in-house efforts, and ultimately retaining outside counsel. *Id.* ¶ 28. Accelerating the remaining monthly payments under the HJC Lease, DLL calculated lease buyouts based on the monthly lease payment of $8,911.84 per month and initially requested that HJC Hospital pay the full amount. *Id.* ¶ 29. According to DLL's own calculations, S3's share of the lease buyouts, i.e., the "service" portion, amounted to $74,441.20 not including applicable 18% contractual default interest. *Id.* ¶¶ 30-32. As alleged, DLL failed to instruct its collection personnel and its outside counsel to ensure that the "service" portion of the accelerated lease payments would be paid at all, and instead focused solely on obtaining payment of the "equipment" portion, and ultimately settled with HJC Hospital by accepting payment equivalent to the "equipment" portion of the accelerated lease payments, minus the "service" portion. Compl. ¶¶ 33-34.

Based on two buyout quotes provided by DLL (NYSCEF Doc. Nos. 4, 5), DLL recovered essentially 74% of the total amount owed, as follows:

Quote No.	Total Quoted	Service (S3)	Equipment (DLL)	% Recovery
7510784	$241,415.01	$62,737.20	$178,677.81	74.0%
7510785	$45,304.84	$11,704.00	$33,600.84	74.2%
Totals	**$286,719.85**	**$74,441.20**	**$212,278.65**	**74.0%**

It is alleged that, after settling with HJC Hospital, DLL failed and refused to remit any part of the settlement proceeds to S3. Compl. ¶ 35. It is alleged that such failure and refusal has caused S3 to suffer monetary damages which would include the dollar amount of the "service" portion of the lease buyouts, i.e., the accelerated monthly lease payments owed under the HJC Leasing Agreement, plus applicable contractual and/or statutory interest, and attorneys' fees and expenses. *Id.* ¶¶ 36-37.

DISCUSSION

When considering a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference, and must determine whether the facts as alleged fit within any cognizable legal theory. *Leon v Martinez*, 84 NY2d 83 (1994); *Phillips v City of New York*, 66 AD3d 170, 174 (1st Dept 2009). "When documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff stated a cause of action to whether it has one.'" *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 (1st Dept 2014). Pursuant to CPLR § 3211(a)(1), dismissal may be "granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co.*, 98 NY2d 314, 326 (2002).

The Breach of Contract Claim:

DLL had a contractual obligation to remit to S3 a pro rata portion of any and all monies recovered from HJC Hospital. DLL argues that S3's breach of contract claim should be

dismissed because DLL had "an absolute discretionary right to settle with HJC Hospital for payment of the equipment portion only." This assertion is incorrect. Under the terms of the Agreement, DLL served as S3's attorney-in-fact and, in the event of a customer's default, DLL had the authority to initiate formal collection proceedings on behalf of S3 and itself. In such event, DLL also had the authority to negotiate and settle with the customer. Intrinsic to DLL's authority as attorney-in-fact, and in exchange for DLL agreeing to act as attorney-in-fact, S3 agreed to accept the risk of short payments, subject to DLL's contractual obligation to allocate all incoming money, whether from a settlement or otherwise, toward the unpaid Equipment, Service, and Copy Charges, together with any fees.

A subsection (L) within the Agreement, applicable to customer defaults, reads as follows:

> In the event a Lessee/Customer defaults under the terms and conditions of a Meter Agreement, payments received from the Lessee/Customer will be applied as set forth in paragraph (K) above.[1] Vendor will accept all risk of short payments on the Base Service Payment that has not been funded by DLL and on additional copy charges. DLL may notify the Vendor of Lessees that are thirty (30) days past due and recommend that service be withheld, and DLL will take all reasonable steps to collect the additional payments from the Lessee/Customer.

(Agreement ¶ 9[f][4][L].)

A subsection (M) within the Agreement, applicable to collection proceedings, reads as follows:

> In the event DLL initiates collection proceedings against the Lessee/Customer (legal or otherwise) payments received from the Lessee/Customer shall be applied as set forth in paragraph (K) above. Vendor will accept all risks of short payments on the Base Service Payment that has not been funded by DLL and additional copy charges. In the case of a dispute with a Lessee/Customer, DLL reserves the right to negotiate claims in order to collect the Monthly Minimum Payments or Base Monthly Rental Payments. DLL will provide notice to the Vendor of such cases within ten (10) days of settlement.

(Agreement ¶ 9[f][4][M].)

[1] Noted hereinabove in "Background" and quoted in full hereinbelow.

Subsection (K) within the Agreement, referred to in the above-quoted contract provisions, which applies to all payments received from customers, reads as follows:

> The Monthly Minimum Payments or Base Monthly Rental Payments received from the Lessee/Customer shall be applied to the Base Equipment Payment and the Base Service Payment (after deducting the Adjustment Fees and Administrative Fees). In the event a monthly payment received from a Lessee/Customer is less than the Monthly Minimum Payment or Base Monthly Rental Payment, the payment shall be applied: (i) to the Equipment portion of the Monthly Minimum Payment or Base Monthly Rental Payment, including all applicable sales and/or use taxes, (ii) to Adjustment Fees, Administrative Fees and Collection Fees (as defined below), (iii) to the service portion of the Monthly Minimum Payment or Base Monthly Rental Payment, and (iv) to the additional copy charges. After the obligations specified in sub-paragraphs (i) through (iv) above which are due and payable have been satisfied, the payment shall be applied to the remaining payment obligations specified in the terms and conditions of the Meter Agreement which are due and payable. Vendor will accept all risks of short payments on the Base Service Payment that has not been funded by DLL and additional copy charges, and DLL will take all reasonable steps to collect the additional payments from the Lessee/Customer.

(Agreement at ¶ 9[f][4][K].)

Nothing in the Agreement gives DLL absolute discretion to settle any and all claims against a customer and then pocket all the proceeds. To the contrary, as the Agreement itself characterizes DLL, it was S3's attorney in fact and collection agent, and was required and authorized to undertake any and all lawful collection activities, but only if they were "reasonable." Subject to this requirement of reasonableness, DLL was granted discretion to settle any customer disputes. Upon settlement or other recovery, DLL was required to distribute any and all money received, to itself and to S3, as instructed under aforesaid subsection (K). Correspondingly, S3 accepted the risk of short payment, i.e., that DLL's reasonable collection efforts might not result in a 100% recovery.

The basic principles of contract interpretation are well settled. "Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading

the contract as a whole." *Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 (2014). A contract may be deemed unambiguous "if the language it uses has a 'definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.'" *Georgia Malone & Co., Inc. v E&M Assocs.*, 163 AD3d 176, 185 (1st Dept 2018) (brackets in original). "On the other hand, a contract is ambiguous if 'on its face [it] is reasonably susceptible of more than one interpretation.'" *China Privatization Fund (Del), L.P. v Galaxy Entertainment Group Ltd.*, 95 AD3d 769, 770 (1st Dept 2012) (brackets in original) (quoting *Chimart Assocs. v Paul*, 66 NY2d 570, 573 [1986]). Moreover, "any ambiguities in a contract are to be interpreted 'most strongly against the draftsman,' as long as the particular interpretation would not lead to an absurd result." *William A. White/Tishman East, Inc. v Banko*, 171 AD2d 401, 402 (1st Dept), *lv denied* 78 NY2d 857 (1991). In this case, the Agreement was on a DLL prepared form, as is plainly evident from its face (NYSCEF Doc. No. 2). And significantly, "[a] contract should not be interpreted to produce a result that is absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties." *Lipper Holdings, LLC v Trident Holdings, LLC*, 1 AD3d 170, 171 (1st Dep't 2003). "It is a longstanding principle of New York law that a construction of a contract that would give one party an unfair and unreasonable advantage over the other, or that would place one party at the mercy of the other, should, if at all possible, be avoided." *Luver Plumbing & Heating, Inc. v Mo's Plumbing & Heating*, 144 AD3d 587, 588-89 (1st Dept 2016). *See also Metropolitan Life Ins. Co. v Noble Lowndes Int'l*, 84 NY2d 430, 438 (same), *rehearing denied* 84 NY2d 1008 (1994).

In this case, DLL contends that it was contractually entitled to settle the dispute with

HJC Hospital, whereby DLL would receive 100% of the settlement payment and S3 would receive zero. Trying to support that contention, DLL focuses exclusively on a single phrase, i.e., that S3 "will accept the risk of short payments" (*see*, subsections K, L, M, quoted above); but overlooks other illuminating provisions which define the nature of the parties' business relationship: that at all times, DLL was acting as S3's attorney-in-fact; that S3 authorized DLL to engage in collection efforts, including formal legal proceedings, on its behalf; and that the Agreement expressly provides that all incoming payments from customers, including regular payments, catch-up payments, and settlement payments, would be divided between S3 and DLL. In other words, that S3 would receive the Service portion of the monthly lease payments plus the additional copy charges, and DLL would receive the Equipment portion plus any applicable administrative, adjustment, and collection fees. Construing the Agreement as a whole, and in light of the parties' business relationship embodied therein, the "risk of short payments" clause clearly refers to the risk of a customer's uncollectable payment obligation or to the practical realities of compromise and settlement. "Risk of short payments" cannot reasonably be construed to mean the risk that DLL would keep all settlement proceeds for itself, to the detriment of its principal, S3.

DLL's contrary interpretation strains the very import of the Agreement, which plainly designates DLL as S3's attorney-in-fact; requires DLL to undertake reasonable collection efforts in order to recover all lease payments from S3's customers; and authorizes DLL to settle such disputes on S3's behalf. It is untenable to assert that DLL was contractually entitled to engage in purely self-beneficial action, to the exclusion of its principal – S3 – by keeping all collection proceeds for itself. "Even where one has an apparently unlimited right under a contract, that right may not be exercised solely for personal gain in such a way as to deprive the other party of

the fruits of the contract." *Richbell Information Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 302 (1st Dept 2003).

In sum, DLL has failed to submit evidence that establishes a defense as a matter of law. The documentary evidence submitted by DLL on this motion – the Agreement itself – cannot be said to demonstrate DLL's position that it was authorized to negotiate and collect on defaulting S3 customers purely for its own gain and to the exclusion of its principal, S3. Consequently, S3's breach of contract claim should not, and will not, be dismissed.

The Breach of Fiduciary Duty Claim:

DLL explicitly agreed to serve as S3's attorney-in-fact. While it is true that, ordinarily, an arm's-length transaction between business entities does not generally give rise to a fiduciary relationship, in this case DLL expressly agreed to act as S3's attorney-in-fact with respect to S3's customers, including HJC Hospital. As the Agreement provides:

> For any Contract assigned to DLL, Vendor [i.e., S3] hereby constitutes DLL ***its true and lawful attorney in fact*** with full power in the name of Vendor to execute Leases to be assigned to DLL, to lawfully ask, require, demand, receive, compound and give acquittance for any and all Contract payments and claims for money due or to become due under any Contract or any related guarantee, to endorse any checks or other instruments delivered to the lockbox or otherwise received by DLL and constituting Contract payments or other sums legally due DLL under this Agreement, and to bill and collect from Lessee/Customer applicable use and property tax.

(Agreement ¶ 6 [emphasis added].)

Under this provision DLL was expressly designated as S3's attorney-in-fact with authority to act in S3's name and as S3's agent, with "full power" to act in S3's name in order to sign leases and to demand, collect and account for any and all customer payments. This attorney-in-fact designation is what gives context to DLL's obligation to undertake reasonable collection efforts on behalf of S3 and itself, to negotiate and settle all customer disputes, and to remit to S3 its portion of all incoming payments. As the Court of Appeals declared:

> A power of attorney is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal. Because the relationship of an attorney-in-fact to his principal is that of agent and principal, the attorney-in-fact must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing.

(*Matter of Estate of Ferrara*, 7 NY3d 244, 254 [2006]).

In this case, DLL, as S3's expressly designated attorney-in-fact, was authorized and obligated to act in S3's name and as S3's agent in order to sign, demand, collect, and account for any and all customer payments, and to undertake reasonable collection efforts on S3's behalf, to negotiate and settle all customer disputes, and to remit to S3 its due portion of all incoming payments. The Agreement also allocates unto DLL its fair share. But it does not shut DLL's principal – S3 – out of remittances otherwise allocable to S3.

DLL argues that the breach of fiduciary duty claim is not adequately pleaded in terms of detail. The court disagrees. The elements of breach of fiduciary duty are "the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct." *Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014). S3 has amply satisfied these requirements at the pleading level. S3's factual allegations, grounded in the Agreement, cover each and every element necessary for a cause of action sounding in breach of fiduciary duty (*see*, Complaint ¶¶ 8, 11-12, 27-28, 34-36, 46-48).

DLL finally asserts that the breach of fiduciary duty claim should be dismissed as duplicative of the breach of contract claim. The court disagrees. While it is generally true that a cause of action for breach of fiduciary duty that is merely duplicative of a breach of contract claim can be subject to dismissal (*see, Granirer v Bakery, Inc.*, 54 AD3d 269, 272 [1st Dept 2008]), it is also true that "the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by

contract but which is independent of the contract itself" (*Mandelblatt v Devon Stores*, 132 AD2d 162, 167-68 [1st Dept 1987] [emphasis added]). Analytically speaking, as S3's contractually identified attorney-in-fact, DLL would have owed fiduciary duties to S3 independent of what might have been expressly provided for in the Agreement – although, as discussed above, the court sees S3's position as supported by the reasonable construction of the Agreement set forth at length hereinabove. Thus, while DLL contends that the contractual language should be construed to entitle it to keep all of the settlement proceeds for itself, that would not end the inquiry given DLL's contractually stated status as S3's attorney-in-fact which would have required DLL to act with "the utmost good faith" and "in accordance with the highest principles of morality, fidelity, loyalty and fair dealing" (*Matter of Estate of Ferrara, supra,* 7 NY3d at 254. *See also, Richbell, supra,* 309 AD2d at 302). This analysis is especially valid in light of the CPLR's allowance for alternative pleading of causes of action (CPLR 3014).

Consequently, S3's breach of fiduciary duty claim should not, and will not, be dismissed.

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is denied.

This will constitute the decision and order of the court.

Dated: New York, New York
August 13, 2020

ENTER:

Hon. Louis L. Nock, J.S.C.