SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

- X

MONITRONICS INTERNATIONAL, INC.,

Plaintiff,

-against-

NORTHSTAR ALARM SERVICES, LLC,

Defendant.

- X

DECISION AND ORDER
Index No.: 654792/2017

Motion Seq. Nos.: 008-009

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion for summary judgment, these facts are taken from the parties' Rule 19-a statements of material facts (NYSCEF Docs No. 114, 135, 167, 187, and 192).

The parties to this lawsuit are competitors in the business of monitoring alarms. On January 7, 2015, plaintiff Monitronics International, Inc. (Monitronics), along with its subsidiary, Security Networks, entered into a settlement agreement with defendant NorthStar Alarm Services, LLC (NorthStar) (*see* Settlement Agreement, NYSCEF Doc. No. 119), which included an Alarm Monitoring Purchase Agreement ("AMPA") (*see* AMPA) (NYSCEF Doc. No. 120). The Settlement Agreement and AMPA required NorthStar to offer Monitronics 13,000 accounts for sale in 2015-2016. The AMPA could only be amended in writing. Exhibit F of the AMPA contained the criteria used to evaluate the contracts, but the parties dispute what the criteria were for considering the contract to satisfy the requirements of AMPA or for Monitronics to purchase the contract. Part of that process included Monitronics "due diligence process" by which a team at Monitronics fed data into a computer system, which determined whether the submitted contracts met the qualifying criteria.

During the relevant period, NorthStar offered Monitronics 14,582 contracts. The Settlement Agreement required NorthStar to offer 7,000 qualifying contracts in 2015. NorthStar offered 7,558 accounts. It is disputed whether Monitronics accepted 92.2 or 94% of the offered accounts. The Settlement Agreement required NorthStar to offer 6,000 qualifying accounts in 2016. NorthStar offered 7,024 accounts. The parties dispute how many Monitronics accepted. The parties also dispute whether all of the contracts offered met Monitronics' purchase criteria and

what the standard was for determining whether the offered contracts satisfied NorthStar's obligations.

On August 2, 2016, Barb Holliday, of Monitronics, emailed Dan Noble, of NorthStar, to explain that Monitronics rejected 947 contracts offered in 2016 because Monitronics did not want to buy contracts in states where Vision Security LLC (which previously sold 8,000 contracts, some of which are at issue here, to NorthStar) had entered into an Assurance of Voluntary Compliance settlement agreement ("AVCs") with state Attorneys General, or other prosecutorial agencies. Those AVCs could affect the contract. The states Monitronics identified included Florida, Maryland, Wisconsin, Ohio, Utah, Idaho, Pennsylvania, and Missouri. The parties dispute whether offering contracts from those states met the requirements of the Settlement Agreement and whether NorthStar offered a sufficient number of compliant contracts to fulfil its obligations under that agreement.

Once Monitronics purchased a contract pursuant to the AMPA, it could charge it back to NorthStar within one year, if the contract became a "Bad Contract." It was deemed a Bad Contract if it had an encumbrance, if the subscriber had contracted with another monitoring company, does not pay an invoice for 75 days, is terminated or notrenewed by the subscriber, among other conditions. On March 1, 2017, Monitronics imposed a "Cost Recovery Fee" on all of the contracts purchased from NorthStar. The parties dispute how long the Cost Recovery Fee was imposed. NorthStar contends Monitronics improperly charged 610 contracts back to NorthStar after adding the fee and changing the pricing terms, which caused $1,254,122 in damages to NorthStar.

In this suit, Monitronics asserts three causes of action: breach of the Settlement Agreement by failing to offer sufficient contracts, breach of the Settlement Agreement's non-solicitation provision, and breach of the AMPA by failing to replace Bad Contracts or maintain sufficient holdback funds. In its amended answer (NYSCEF Doc. No. 26), NorthStar asserts counterclaims for breach of contract and breach of the AMPA's implied covenant of good faith and fair dealing based on Monitronics' imposition of the Cost Recovery Fee, Tortious Interference with a Contract between NorthStar and its customers, breach of the AMPA and breach of the implied covenant of good faith and fair dealing by initiating improper chargebacks, and breach of the AMPA implied covenant for rejecting or refusing to purchase contracts which satisfied the requirements of the AMPA.

II. NorthStar's Motion for Partial Summary Judgment (008)

NorthStar moves for summary judgment to dismiss Monitronics' breach of contract claims because NorthStar performed its obligations to Monitronics and on its breach of contract counterclaims because of improper charge backs by Monitronics (NYSCEF Doc. No. 117).

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver,* 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id*. at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

The parties agree the Settlement Agreement and AMPA are valid, enforceable, unambiguous, and require NorthStar to offer 13,000 accounts to Monitronics, but the parties disagree on the meaning of certain sections of those agreements. Essentially, NorthStar contends it fulfilled its obligations by offering more than the required number of accounts which satisfied the contractual criteria, regardless of Monitronics' decision not to purchase them. Further, NorthStar asserts that Monitronics' attempts to charge back what it deemed Bad Contracts were barred because Monitronics changed the terms of those contracts.

Monitronics argues the list of criteria on Exhibit F of the AMPA are not the only criteria for determining whether an offered contract satisfies NorthStar's obligation and that such an interpretation would be unreasonable, as there were other criteria even listed in the AMPA (008 Opp, NYSCEF Doc. No. 186, at 5, citing the AMPA Article 3.14 [requiring NorthStar to make 24 representations and warranties about each contract offered). According to Monitronics, the Settlement Agreement gave it discretion to determine whether a contract satisfied its due diligence criteria (*id.* at 4, citing Settlement Agreement sections 2.1 and 2.1.4 [iii]). Nor did Monitronics' agreement that NorthStar shall not have liability for Vision's actions preclude Monitronics from determining contracts from states where Vision had engaged in deceptive trade practices failed to satisfy Monitronics' due diligence criteria (*id.* at 9-10). Further, Monitronics contends the Cost Recovery Fee it imposed on certain contracts did not

eliminate its right to return Bad Contracts, and NorthStar has not alleged damages from the return of any contracts *(id*. at 12).

The Settlement Agreement provides NorthStar shall "originate and offer for sale" a total of 1300 contracts "pursuant to the terms of the NorthStar AMPA" (Settlement Agreement, sections 2.1.1-2.1.2). Additionally, the Settlement Agreement requires NorthStar to represent and warrant that each offered contract

> "(i) was originated by Northstar in a geographic area as set forth on Exhibit F to the Northstar AMPA;
> (ii) is reasonably comparable in quality to either the Qualified Alarm Accounts sold to Security Networks by Vision to meet its 2014 minimum account production requirement, or all alarm accounts generated by Northstar in the particular calendar year in which such Contract was generated as to credit score, percentage of automatic withdrawal and length of initial term; and
> (iii) satisfies Monitronics' due diligence criteria"

It also provides that

> "Northstar's obligations under Section 2.1 will have been met if Northstar offers the required number of Contracts which meet Monitronics' criteria and procedures for sale and transfer of accounts and pass the Monitronics due diligence process, regardless of whether or not Monitronics elects to purchase such contracts"

(Settlement Agreement, section 2.1). The Settlement Agreement does not specify what that due diligence process is or what the criteria are but has several references to "Monitronics' then-current due diligence requirements" (*id.* section 2.4, 2.5, 2.7). The Monitronics due diligence process is not defined or explained in either the Settlement Agreement or the AMPA. NorthStar points to Exhibit F of the AMPA as the requirements it had to satisfy for the contracts offered to Monitronics (Memo at 4). Exhibit F is titled "Purchase Terms" and provides terms for the contemplated transactions and requirements for offered contracts. Monitronics' "due diligence" is not mentioned. Accordingly, the contract is ambiguous as to what constitutes a satisfactory contract to be offered by NorthStar. The requirements and standards of Monitronics' due diligence process at the relevant time is a question of disputed fact.

NorthStar argues that some contracts were improperly rejected because Monitronics decided to deem all contracts from certain states as unacceptable, even though those states were listed as suitable on Exhibit F, and so those contracts should be counted towards NorthStar's obligations. NorthStar points out that Monitronics knew Vision had been subject to regulatory inquiry in those states before the Settlement Agreement and AMPA were

signed and Monitronics has admitted to making it a policy not to purchase contracts from states where "Vision had Attorney General problems" (Monitronics' Rule 19-a Response, NYSCEF Doc. No. 187, ¶ 24). NorthStar further interprets the provision of the Settlement Agreement "that NorthStar shall not have any liability or responsibility to Monitronics for the actions or inactions of Vision prior to the acquisition of Visions assets by NorthStar" (Settlement Agreement at ¶ 2.3) as prohibiting Monitronics from declining contracts from those states. That is not what the Settlement Agreement says. The Settlement Agreement does not require Monitronics to ignore potential liability attached to those contracts. Even if the contracts from those states were to fit Monitronics' due diligence criteria, NorthStar notes Monitronics "purchased approximately 11,850" contracts from NorthStar (Memo at 2). "947 [contracts] were rejected, and considered unqualified under the Settlement Agreement, because the accounts were located in states in which Vision was the subject of a regulatory inquiry" (*id.*). If those contracts actually fit Monitronics' due diligence requirements, that only gets NorthStar to 12,797 contracts, which still falls short of the requirement that NorthStar offer 13,000 contracts.

Accordingly, NorthStar has not established there are no triable issues of fact that it performed its obligations under the Settlement Agreement and AMPA. Its motion for summary judgment is denied.

III. Monitronics' Motion for Summary Judgment (009)-

Monitronics moves for summary judgment on its three causes of action (breaches of the Settlement Agreement, the non-solicitation provision, and the AMPA) and on NorthStar's first six counterclaims (for breach of the AMPA by imposing the cost recovery fee, breach of the implied covenant of good faith and fair dealing under the AMPA by imposing the cost recovery fee, tortious interference with contract, breach of the AMPA [related to the chargebacks], breach of the AMPA's implied covenant of good faith and fair dealing [related to the chargebacks], and breach of the AMPA for rejecting offered contracts without good reason).

In its first claim, Monitronics argues NorthStar breached the Settlement Agreement by failing to offer the required number of contracts meeting Monitronics' due diligence requirements. As discussed above, there are disputed issues of material fact about what the requirements were and whether the offered contracts satisfied those requirements. Accordingly, summary judgment must be denied on this cause of action.

The second claim asserts that NorthStar violated the non-solicitation clause, section 2.4 of the Settlement Agreement, by soliciting and taking 20 alarm-monitoring customers from Monitronics and its subsidiary, Security Networks. Monitronics contends NorthStar was then obligated to either supply alternate contracts or pay liquidated damages, both of which NorthStar refused to do (009 Memo, NYSCEF Doc. No. 115, at 9). NorthStar argues that this part of the motion should fail because Monitronics has failed to provide admissible evidence to support the allegations. NorthStar contends, and Monitronics disputes, the letter from NorthStar's counsel provided as evidence by Monitronics is inadmissible as a settlement offer (009 Opp, NYSCEF Doc. No. 168, at 18, NorthStar's Rule 19-a Response, NYSCEF Doc. No. 167, ¶ 33). Monitronics has also provided the affidavit of David Verret, who states, "based on [his] personal knowledge" that NorthStar solicited and converted 20 alarm-monitoring customers of Monitronics and/or Security whose contract was acquired from Vision" (NYSCEF Doc. No. 105, at 1 and ¶ 18). However, according to section 2.4 of the Settlement Agreement, and as acknowledged by Monitronics, it is not NorthStar's acquisition of a contract which constitutes a breach, but the alleged refusal to provide the remedies specified in that section of the Settlement Agreement, either alternate contracts or liquidated damages. The letter from NorthStar's counsel, provided by Monitronics, although of disputed admissibility, shows an offer of alternate contracts (Counsel Letter, NYSCEF Doc. No. 96). Accordingly, summary judgment on this claim shall be denied.

Monitronics' third claim is for breach of contract based on NorthStar's alleged failure to pay amounts owed for return of Bad Contracts on demand. NorthStar argues Monitronics improperly attempted to charge back more than four hundred contracts after Monitronics instituted the Cost Recovery Fee, and for reasons which were not allowed by the AMPA (009 Opp at 19-21). Further, NorthStar contends the motion should be denied because Monitronics has not provided evidence to support the bald statements in the Verret affidavit that Monitronics charged back 1,835 contracts, or that those contracts were Bad Contracts. Monitronics counters that the agreements allowed a contract to be returned after the imposition of a Cost Recovery Fee, as long as there was no default under the contract (009 Reply at 7-8).

Section 2.01(b) of the AMPA defines a Bad Contract, provides a process for Monitronics to identify Bad Contracts to NorthStar, and requires NorthStar to "elect either (i) to direct [Monitronics] to reduce the Holdback Purchase Price or refund the Purchase Price as set forth in Section 2.01(e), or (ii) to tender to [Monitronics] a "Substitute Contract . . .". Monitronics merely claims it returned Bad Contracts (which is disputed) and that the holdback funds were insufficient to provide a refund. Monitronics does not provide evidence of NorthStar's election pursuant to section 2.01. Accordingly, Monitronics has failed to make a prima facie case, and this portion of the motion for summary judgment is denied.

Monitronics also moves for summary judgment dismissing NorthStar's first six counterclaims. As to the first counterclaim, for breach of the AMPA by imposing the cost recovery fee, NorthStar's Answer and Counterclaims (NYSCEF Doc. No. 26) fails to specify a section of the AMPA which Monitronics allegedly violated by imposing the fee. NorthStar's opposition papers clarify that the conduct to which they object was the presentation of those contracts back to NorthStar as Bad Contracts, after Monitronics' imposition of the Cost Recovery Fee (009 Opp at 21-22). Merely imposing the Cost Recovery Fee is not a violation of the AMPA. Accordingly, the first counterclaim is dismissed.

NorthStar's second counterclaim is for breach of implied covenant of good faith and fair dealing under the AMPA by imposing the Cost Recovery Fee. Within every contract is an implied covenant of good faith and fair dealing (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). The implied covenant "embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*511 W. 232nd Owners Corp.*, 98 NY2d at 153 [internal quotation marks omitted]; *see also 6243 Jericho Realty Corp. v AutoZone, Inc.*, 71 AD3d 983, 984 [2d Dept 2010]; *Moran v Erk*, 11 NY3d 452, 457 [2008]). A breach of the covenant is a breach of the contract itself (*see Boscoral Operating, LLC v Nautica Apparel, Inc.*, 298 AD2d 330, 331 [1st Dept 2002]). The covenant of good faith and fair dealing is breached when a party acts in a manner that, although not expressly forbidden by the contractual provision, would deprive the other party of the benefits of the agreement (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]).

The covenant encompasses any promises that a reasonable person in the position of the promisee would be justified in understanding were included (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Ochal v Tel. Tech. Corp.*, 26 AD3d 575, 576 [3d Dept 2006]). However, the obligations imposed by an implied covenant of good faith and fair dealing are limited to obligations in aid and furtherance of the explicit terms of the parties' agreement (*see Trump on Ocean, LLC v State*, 79 AD3d 1325, 1326 [3d Dept 2010]). The covenant cannot be construed so broadly as to nullify the express terms of a contract, or to create independent contractual rights (*see Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]; *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, [1st Dept 2004]; *SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 355 [1st Dept 2004]; *Fesseha v TD Waterhouse Inv. Servs., Inc.*, 305 AD2d 268, [1st Dept 2003]). To establish a breach of the implied covenant, the Plaintiff must allege facts that tend to show that the Defendants sought to prevent performance of the contract or to withhold its benefits from the Plaintiff (*see Aventine Inv. Mgmt., Inc. v Can. Imperial Bank of Communications Inc.*, 265 AD2d 513, 514 [2d Dept 1999]).

Monitronics argues the counterclaim should be dismissed as duplicative of the first counterclaim (009 Memo at 13-14). However, as discussed above, imposition of the Cost Recovery Fee is not a breach of the AMPA. Similarly, imposition of the Cost Recovery Fee does not work to prevent performance of the contract or withhold its benefits from the plaintiff, and the objectionable conduct is not the imposition of the fee, but presentation of those contracts as Bad Contracts. Accordingly, this counterclaim is also dismissed.

NorthStar's third counterclaim is for tortious interference with contract, based on Monitronics' imposition of the Cost Recovery Fee. To prove a claim for tortious interference with contract, the plaintiff must show: (1) the existence of a valid contract; (2) defendant's knowledge of the contract; (3) defendants' intentional procurement of the third-party's breach without justification; (4) actual breach of the contract; and (5) damages caused by breach of the contract (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]); *Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993]). The contract at issue must be between the plaintiff and a third party (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]). At the time Monitronics imposed the Cost Recovery Fee, the contract was between the third party/customer and Monitronics, not NorthStar, who asserts the counterclaim. NorthStar argues that return of those contracts to NorthStar as Bad Contracts rescues this claim (009 Opp at 7, 22). There is no allegation or

evidence Monitronics interfered with the contracts or took any relevant action after the contracts were trasferred to NorthStar. Nor does NorthStar allege those contracts were breached. Accordingly, this counterclaim also fails.

NorthStar's fourth counterclaim is for breach of the AMPA due to Monitronics' initiating improper chargebacks to NorthStar and for inflating the amounts charged back. Monitronics argues it was allowed to charge back Bad Contracts, even when it had imposed the Cost Recovery Fee to those contracts, as permitted by section 2.01(b) of the AMPA. To disallow a chargeback, not only would Monitronics have to have changed the pricing term of the contract, it would also have to be in default on the contract. Changing the price alone, according to Monitronics, is not a default. Further, Monitronics states, as supported by the Verret affidavit (¶ 31), that the amounts charged back were only the purchase cost of the Bad Contracts, and no more. Section 2.01(b) provides that if the customer (the Subscriber) in a contract purchased by Monitronics terminates the contract, or fails to pay or renew, Monitronics may obtain a refund of the purchase price or a replacement contract if, for the returns at issue here, Monitronics "is not in default under the Contract and has not changed any of the terms and conditions therein or pricing thereof." While Monitronics argues this means chargebacks would only be prohibited if both elements were true, that is the unambiguous meaning of that phrase. The refund is only available if both conditions are met. Accordingly, changing the terms and conditions or pricing of a contract precludes Monitronics' getting a refund if the Subscriber cancels or fails to renew the contract, regardless of whether Monitronics was in default. As to the question of the amounts charged, Monitronics relies on the Verret affidavit, which states only "[t]he only amounts that Monitronics seeks to recover in this lawsuit for "Bad Contracts" that it charged back are the purchase prices it paid for those Bad Contracts" (¶ 31). As vague and conclusory as that statement is, it is silent about the amounts sought by Monitronics in chargebacks during the time at issue. Accordingly, Monitronics has failed to make its prima facie case for summary judgment on this claim and the claim survives the motion.

NorthStar's fifth counterclaim is for breach of the implied covenant of good faith and fair dealing under the AMPA by seeking to chargeback contracts improperly and inflating the cost of the chargebacks. Monitronics argues this counterclaim should be dismissed as duplicative of the fourth counterclaim for breach of contract, as it alleges the same conduct. A "claim that defendants breached the implied covenant of good faith and fair dealing [may be] properly dismissed as

duplicative of the breach of contract claim [when] both claims arise from the same facts" (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). This claim is duplicative of the fifth claim, for breach of the AMPA for the same conduct. Accordingly, this claim is dismissed.

NorthStar's sixth and final counterclaim is for breach of the implied covenant of good faith and fair dealing under the AMPA by rejecting or refusing to purchase offered contracts without good reason. Monitronics argues it had complete discretion under the AMPA to determine the elements of its due diligence, was not obligated to purchase any contracts, NorthStar received the benefits of the AMPA, and that Monitronics' decision not to purchase certain contracts did not cause NorthStar any damages (009 Memo at 17-20). NorthStar concedes Monitronics did not have an obligation to purchase contracts, but contends that "Monitronics' attempt to interpret the AMPA to give it unfettered, unilateral authority, to reject contracts and alter the unambiguous terms of the Settlement Agreement is contrary to New York law and has resulted in significant damage to NorthStar" (009 Opp at 24). According to the AMPA, NorthStar is required to offer qualifying contracts. To establish a breach of the implied covenant, the plaintiff must allege facts that tend to show that the defendants sought to prevent performance of the contract or to withhold its benefits from the plaintiff (*see Aventine Inv. Mgmt., Inc. v Can. Imperial Bank of Communications Inc.*, 265 AD2d 513, 514 [2d Dept 1999]). As discussed above, there is an issue of material fact as to what the Monitronics due diligence requirements at the applicable time were, and this claim raises the question of whether they were drawn so as to prevent NorthStar from performing its obligations. This claim survives the motion for summary judgement.

Accordingly, it is hereby

ORDERED that the motion for partial summary judgment of defendant NorthStar Alarm Services, LLC (Motion Sequence Number 008) is DENIED; and it is further

ORDERED that the motion for summary judgment of plaintiff Monitronics International, Inc.to dismiss NorthStar's counterclaims (Motion Sequence Number 009) is GRANTED as to first, second, third, and fifth counterclaims, and otherwise DENIED; and it is further

ORDERED that counsel for the parties are to appear by video at a pretrial conference at Part 49, on Tuesday, October 20, 2020 at 11:30 AM. The clerk of Part 49 will issue invitations.

This constitutes the decision and order of the court.

DATED: September 30, 2020

E N T E R,

O. P. Sherwood

O. PETER SHERWOOD, J.S.C.