

Cor-lbs, Inc. v Bank Leumi USA
2021 NY Slip Op 31516(U)
May 3, 2021
Supreme Court, New York County
Docket Number: 650350/2019
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART IAS MOTION 59EFM

Justice

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COR-IBS, INC.,

Plaintiff,

- v -

BANK LEUMI USA,

Defendant.

INDEX NO. 650350/2019

MOTION DATE 06/25/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for DISMISS

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant for dismissal is granted only to the extent that that the second cause of action for "specific performance" and the third cause of action for "injunctive relief" are dismissed, but the motion is otherwise denied; and it is further

ORDERED that the cross motion of plaintiff for summary judgment is denied in its entirety; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within thirty (30) days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to post to NYSCEF a proposed preliminary discovery conference order or proposed competing preliminary conference orders on June 25, 2021.

DECISION

Plaintiff cross moves for summary judgment, though no answer to the complaint has yet been served. As issue has not been joined in this action, and the court provided no CPLR 3211(c) notice to counsel that it would convert the papers submitted to motions for summary judgment, such cross motion is denied, as premature. See Primedia Inc. v SBI USA, LLC, 43 AD3d 685, 686 (1st Dept 2007).

To the extent that defendant moves pursuant to CPLR 3211(a) to dismiss the complaint, the court notes that both "specific performance", the second, and "injunctive relief", the third causes of action of the complaint allege types of remedies, which are non-monetary. Each such purported cause of action is, in fact, equitable relief that plaintiff seeks for defendant's alleged breach of contract, the first cause of action stated in plaintiff's complaint. As neither such remedy states a separate cause of action for breach of contract, each is dismissed pursuant to CPLR 3211(a)(7). See Cho v 401-403 57th Street Realty Corp, 300 AD2d 174, 175 (1st Dept 2002). However, the "wherefore" clause of the complaint is not dismissed to the extent that this action will resolve whether or not plaintiff is

entitled to specific performance and other equitable relief, in addition to any monetary damages, should it be determined ultimately that defendant breached the agreements.

To the extent that defendant moves to dismiss plaintiff's claim for breach of certain agreements, defendant contends that the documentary evidence in the form of the automatic renewal clauses of such contracts, which clauses are prohibited under General Obligations Law § 5-903, establish that the agreements were terminated as of March 1, 2019, as set forth in the letter dated October 4, 2018 from defendant to plaintiff.

This court agrees with defendant that the agreements fundamentally are for services to personal property, in this case the installation and maintenance of software that plaintiff provided defendant, and that therefore General Obligations Law § 5-903 pertains. This court disagrees with plaintiff that the services were personal to defendant's employees. However, such documentary evidence does not irrefutably establish that defendant "did not 'knowingly and willingly. . . accept the benefit of the' licensed software beyond the term of the agreement without compensating [plaintiff]". See Healthcare I.Q., LLC v Chao, 118 AD3d 98, 105 (1st Dept 2014). Nor, upon a motion to dismiss pursuant to CPLR 3211(a)(1), may the court consider the affidavit of defendant's in-house counsel. As

defendant has not established by irrefutable documentary evidence that, upon terminating the agreements, it performed its promises thereunder, inter alia, to "hold all Software available for collection by [plaintiff] or its agents", its motion to dismiss shall be denied.

<u>5/3/2021</u> DATE			<u><i>Debra A. James</i></u> DEBRA A. JAMES, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE