

**920 Fifth Ave. Corp. v Zoomtion Fitness, LLC**

2021 NY Slip Op 32452(U)

November 19, 2021

Supreme Court, New York County

Docket Number: Index 651326/2017

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

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920 FIFTH AVENUE CORPORATION,

Plaintiff

Index No. 651326/2017

-against-

DECISION AND ORDER

ZOOMTION FITNESS, LLC, EARL ROGERS  
a/k/a EARL RODGERS, and JOSHUA HOLLAND,

Defendants

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LUCY BILLINGS, J.S.C.:

Plaintiff sues to recover damages for breach of a contract and fraudulent misrepresentation arising from a contract that the parties entered for defendant Zoomtion Fitness, LLC, to deliver and install fitness equipment for plaintiff. Plaintiff moves for summary judgment on both the breach of contract and the fraud claims, C.P.L.R. § 3212(b) and (e), and dismissing defendants' affirmative defenses and their counterclaim for breach of the contract. C.P.L.R. §§ 3211(b), 3212(b). Plaintiff also moves to sever and continue its fifth cause of action for attorneys' fees. For the reasons explained below, the court grants plaintiff's motion in part.

I. BREACH OF THE CONTRACT

Plaintiff presents authenticated copies of checks from it to Zoomtion Fitness for the purchase of fitness equipment; plaintiff's Assistant Secretary Anthony Milstein's affidavit that

plaintiff never received the equipment for which plaintiff paid; and defendant Rogers's authenticated emails admitting that Zoomtion Fitness repeatedly missed its promised delivery dates. This admissible evidence establishes Zoomtion Fitness' liability. Alloy Advisory, LLC v. 503 W. 33rd St. Assocs., Inc., 195 A.D.3d 436, 436 (1st Dep't 2021); Belle Light, LLC v. Artisan Constr. Partners LLC, 178 A.D.3d 605, 606 (1st Dep't 2019); Reiter Resources, Inc. v. Gilmartin, 176 A.D.3d 617, 618 (1st Dep't 2019); Gordon v. Schaeffer, 176 A.D.3d 431, 431 (1st Dep't 2019).

In opposition, Zoomtion Fitness fails to present a defense to plaintiff's breach of contract claim. Defendants do not attest that they delivered or installed any of the equipment pursuant to the contract; in fact, Rogers concedes that Zoomtion Fitness did not deliver the fitness equipment "as we had initially anticipated." Aff. of Earl Rogers ¶ 3. Although defendants attribute Zoomtion Fitness' nonperformance to the actions of their supplier, Technogym USA, a nonparty's delay does not excuse an obligation to perform unless the contract so provides, see Dinallo Constr. Corp. v. Phoenix RMA Constr. Servs., LLC, 193 A.D.3d 407, 407 (1st Dep't 2021), and defendants fail to identify a contract provision that excused Zoomtion Fitness' promise to deliver the equipment by January 3, 2017. Technogym USA's prompt delivery of the same fitness equipment ordered from defendants, moreover, after plaintiff ordered the

equipment directly from Technogym USA, belies defendants' excuse.

Since defendants failed to deliver and install the fitness equipment by January 3, 2017, and do not rebut plaintiff's payments to Zoomtion Fitness, the court grants plaintiff summary judgment against Zoomtion Fitness for \$71,604.83. The court denies plaintiff summary judgment on the breach of contract claim against defendants Rogers and Holland, however, because neither of them signed the contract in a way that suggests an intention to be personally bound by the contract. Wormser, Kiely, Galef & Jacobs, LLP v. Frumkin, 125 A.D.3d 516, 517 (1st Dep't 2015); Shugrue v. Stahl, 117 A.D.3d 527, 528 (1st Dep't 2014); Georgia Malone & Co. v. Rieder, 86 A.D.3d 406, 408 (1st Dep't 2011), aff'd, 19 N.Y.3d 511 (2012). Rogers simply signed his name above "ZOOMTION FITNESS" on the contract, Aff. Of Anthony Milstein Ex. 2, at 7, and underneath "ZOOMTION" on the "Rider to Agreement." Id. at 11. Holland signed neither document.

The court further grants plaintiff summary judgment dismissing defendants' counterclaim that plaintiff breached the contract by purchasing directly from Technogym USA the fitness equipment previously ordered from defendants. Defendants' failure to deliver the fitness equipment by January 3, 2017, entitled plaintiff to cover defendants' nondelivery by purchasing fitness equipment from another supplier, including Technogym USA, despite the previous contract between Zoomtion Fitness and

plaintiff. N.Y.U.C.C. §§ 2-711(1)(a), 2-712(1); Fertico Belgium v. Phosphate Chems. Export Assn., 70 N.Y.2d 76, 81-82 (1987); Toto We're Home v. Beaverhome.Com, 301 A.D.2d 643, 644 (2d Dep't 2003); Del's Maraschino Cherries Co., Inc. v. Shoreline Fruit Growers, Inc., 887 F. Supp. 2d 459, 480 (E.D.N.Y. 2012). See Medinol Ltd. v. Boston Scientific Corp., 346 F. Supp. 2d 575, 594-95 (S.D.N.Y. 2004).

Finally, defendants seek to offset plaintiff's damages for Zoomtion Fitness' breach of the contract by the value of a substitute piece of equipment, a Technogym USA "Kinesis personal training machine," that defendants claim they delivered to plaintiff. Aff. of William R. Mait Ex. 9, at 98. See id. at 99; Reply Aff. of William R. Mait Ex. 2, at 106. Defendants may not maintain any such counterclaim or affirmative defense, however, since they never raised it in their answer. SH575 Holdings LLC v. Reliable Abstract Co., 195 A.D.3d 429, 429 (1st Dep't 2021); Demetriades v. Royal Abstract Deferred, LLC, 159 A.D.3d 501, 503 (1st Dep't 2018); American Std., Inc. v. Oakfabco, Inc., 58 A.D.3d 485, 487 (1st Dep't 2009).

## II. FRAUD

To establish a prima facie claim of fraud, plaintiff must demonstrate: (1) a material misrepresentation of fact, (2) defendants' knowledge of its falsity, (3) their intent to induce reliance, (4) justifiable reliance, and (5) damages. Ambac

Assur. Corp. v. Countrywide Home Loans, Inc., 31 N.Y.3d 569, 578-79 (2018); Pasternack v. Laboratory Corp. of Am. Holdings, 27 N.Y.3d 817, 827 (2016); Genger v. Genger, 152 A.D.3d 444, 445 (1st Dep't 2017); MP Cool Invs. Ltd. v. Forkosh, 142 A.D.3d 286, 290-91 (1st Dep't 2016). Plaintiff insists it contracted with Zoomtion Fitness because defendants misrepresented in the Rider to Agreement that Zoomtion Fitness was just a name by which Technogym USA was doing business, and plaintiff thus believed it was contracting with Technogym USA. Plaintiff presents no deposition testimony, affidavit, or verified pleading, however, that plaintiff actually relied on defendants' alleged misrepresentation that Zoomtion Fitness was just a name by which Technogym USA was doing business and that plaintiff thus was contracting with Technogym USA, not Zoomtion Fitness.

Plaintiff maintains that defendants also engaged in fraud because, in accepting plaintiff's payments, defendants represented that they would use those payments for plaintiff's fitness equipment, yet they never purchased it from Technogym USA. Plaintiff's only evidence of defendants' alleged nonpayment, however, is hearsay from Technogym USA. The fact that defendants never delivered the equipment does not establish that they never paid for it.

In rebuttal, moreover, Rogers testified at his deposition that Zoomtion Fitness paid Technogym USA for plaintiff's fitness

equipment. Although he also authenticated a copy of a check from Zoomtion Fitness to Technogym USA for \$29,140.38, this check does not correspond in time or amount with plaintiff's checks to Zoomtion Fitness, nor do defendants otherwise establish that the \$29,140.38 was to purchase the equipment plaintiff ordered. Nevertheless, Rogers's testimony regarding full payment defeats summary judgment in plaintiff's favor on its claim that defendants fraudulently withheld payment from Technogym USA. Therefore the court denies plaintiff summary judgment on both bases for the fraud claim.

### III. AFFIRMATIVE DEFENSES

The court grants plaintiff summary judgment dismissing defendants' first, second, fourth, and fifth affirmative defenses. Defendants waived their first two affirmative defenses, inadequate service of the summons and complaint and lack of personal jurisdiction on that basis, when defendants failed to move to dismiss the complaint on these grounds within 60 days after answering. C.P.L.R. § 3211(e); Anderson Kill, P.C. v. Board of Mgrs. of Honto 88 Condominium, 192 A.D.3d 551, 551 (1st Dep't 2021); Clermont v. Abdelrehim, 151 A.D.3d 495, 495 (1st Dep't 2017); Luver Plumbing & Heating, Inc. v. Mo's Plumbing & heating, 144 A.D.3d 587, 588 (1st Dep't 2016); Tannenaum Helpern Syracuse & Hirschtritt LLP v. DeHeng Law Offs., 127 A.D.3d 564, 565 (1st Dep't 2015). Defendants' fourth and fifth

affirmative defenses, plaintiff's breach of the contract and its culpable conduct, are based on plaintiff purchasing the equipment directly from Technogym USA. Therefore the court dismisses these defenses on the same grounds on which the court dismisses defendants' counterclaim: their nondelivery entitled plaintiff to cover that breach by purchasing the equipment from another supplier. N.Y.U.C.C. §§ 2-711(1)(a), 2-712(1).

The court denies plaintiff summary judgment dismissing defendants' third affirmative defense, however, claiming that the individual defendants are not personally liable. Factual questions remain whether the contract bound Rogers or Holland personally and whether plaintiff justifiably relied on the alleged misrepresentations in which Rogers or Holland personally participated and for which the participant therefore may be personally liable. Pludeman v. Northern Leasing Sys., Inc., 10 N.Y.3d 486, 491 (2008); Polonetsky v. Better Homes Depot, 97 N.Y.2d 46, 55 (2001); People v. Northern Leasing Systems, Inc., 193 A.D.3d 67, 76 (1st Dep't 2021); People v. Orbital Publ. Group, Inc., 169 A.D.3d 564, 566 (1st Dep't 2019).

#### IV. CONCLUSION

For the reasons explained above, the court grants plaintiff's motion for summary judgment on its breach of contract claim against defendant Zoomtion Fitness LLC and severs that claim from the remainder of the action. The Clerk shall enter a

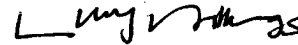
judgment in favor of plaintiff and against Zoomtion Fitness LLC for \$71,604.83, with interest to be calculated by the Clerk at 9% per year from January 25, 2017, as sought in the complaint.

C.P.L.R. §§ 5001, 5004. The court also grants plaintiff's motion for summary judgment dismissing defendants' first, second, fourth, and fifth affirmative defenses and defendants' counterclaim for breach of the parties' contract. C.P.L.R. § 3212(b) and (e).

In light of this determination, plaintiff's claim for fraud against Zoomtion Fitness is academic. Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 810-11 (2003); Admiral Ins. Co. v. Joy Contrs., Inc., 190 A.D.3d 630, 630-31 (1st Dep't 2021). Since the complaint seeks the same \$71,604.83 with interest from January 25, 2017, on the fraud claim as already awarded on plaintiff's claim for breach of the contract against Zoomtion Fitness, the fraud claim is duplicative, Amon v. Drohan, 188 A.D.3d 404, 405 (1st Dep't 2020); MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC, 165 A.D.3d 108, 114 (1st Dep't 2018); Cronos Group Ltd. v. XComIP, LLC, 54, 64 (1st Dep't 2017), and its determination would "have no practical effect on the parties." Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d at 811. See Santiago v. Berlin, 111 A.D.3d 487, 487 (1st Dep't 2013); Eve & Mike Pharm., Inc. v. Greenwich Pooh, LLC, 107 A.D.3d 505, 505 (1st Dep't 2013).

The court denies plaintiff's motion for summary judgment on its claim for fraud against defendants Rogers and Holland. Plaintiff's fifth cause of action for attorneys' fees against defendants remains unaffected and may proceed to trial with the remaining claims.

DATED: November 19, 2021



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C