

<b>Super PC Sys., Inc. v Kaitryanna Pizza Inc.</b>
2022 NY Slip Op 30218(U)
January 10, 2022
Supreme Court, New York County
Docket Number: Index No. 653246/2019
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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SUPER PC SYSTEMS, INC.,
Plaintiff,

- v -

INDEX NO. 653246/2019
MOTION DATE N/A
MOTION SEQ. NO. 001

KAITRYANNA PIZZA INC. d/b/a NONNA'S BRICKOVEN
PIZZERIA and MUHAMET KABASHI

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for SUMMARY JUDGMENT.

I. INTRODUCTION

In this action seeking damages for breach of contract for the sale of a checkout or "point of sale" system for a restaurant, the defendants move pursuant to CPLR 3212 for summary judgment (i) dismissing the complaint and (ii) granting judgment in their favor on their counterclaims. The plaintiff opposes the motion. The motion is denied.

II. BACKGROUND

A. The Parties and the Contract

The following facts are undisputed unless indicated otherwise.

The plaintiff is a purveyor of a combination of custom hardware and/or software comprising a point of sale (POS) system. Non-party Andrey Belyayev (Belyayev) is the president and owner of the plaintiff. Defendant Kaitryanna Pizza, Inc. (the restaurant), is a

small, family-owned pizza restaurant in Peekskill, New York. Defendant Muhamet Kabashi (the individual defendant) manages the restaurant. Although on certain documents defendant Kabashi states he owns the restaurant, he claims in this action that he is only the husband of the owner, who is not named as a party.

In 2019, the parties executed a contract (the POS contract) pursuant to which the plaintiff would, *inter alia*, install and provide the restaurant with a POS system to consist of six POS terminals. The plaintiff represented to the defendants that this POS system was an upgrade from a POS system that the plaintiff had provided to the restaurant several years earlier. The defendants aver that they contracted with the plaintiff for the new POS system only after verbal assurances from the plaintiff's sales representative that it would not have certain defects allegedly present in the previous POS system. Conversely, the plaintiff alleges that the previous system did not have any operating defects and that it does not provide any guaranties beyond what is stated in the POS contract.

Belyayev, as the plaintiff's principal, was personally involved in crafting the POS contract with his attorney and there were several "iterations before [they] came up with [the final version]." Ultimately, the POS contract provided for payments from the restaurant to the plaintiff of a monthly fee of \$600.00 for use of the system. The contract also provided that the restaurant was to be bound by a separate merchant application and agreement between it and Unified Payments, LLC (Unified), as the "exclusive provider" for credit card processing. Unified is referred to in the POS contract as the plaintiff's "authorized merchant." The POS contract includes a handwritten provision that the restaurant would receive a check in the sum of \$5,000.00 upon the installation of the POS system and the commencement of processing with the authorized merchant.

Pursuant to the POS contract, the plaintiff would “not be responsible for [the] POS not fitting the needs of the [c]ustomer or for any possible errors or omissions etc.” According to Belyayev, this means that the plaintiff’s only obligation in terms of ascertaining the suitability of the POS system for the customer was to ascertain whether the customer was in the food business. The POS contract additionally provides that the plaintiff

warrants that the POS hardware installed . . . is free from substantive defects in workmanship and materials. [The plaintiff’s] liability under the foregoing warranty is limited to replacement of defective parts of repair of defects. No other warranty, express or implied, is made by [the plaintiff] and none shall be imputed or presumed. . . . [The] POS software is warranted under the [l]icense [a]greement of the POS manufacturer. Operating [s]ystem, POS and any other third party software is not warranted by the [plaintiff] to be free of defects and errors and is provided on the “as is” basis only.

At his deposition, Belyayev stated this means that “anything that has to do with freezing of the software, with error on the software cannot be warranted.”

Additionally, the POS contract states that the “POS [system,] including hardware and software licenses shall be property of [the plaintiff]. At the end of [the] term, [the] hardware shall become property of [the] [restaurant]. [The] [s]oftware license shall be registered to [the] [restaurant] for the duration of the contract (and any renewals).” Upon the restaurant’s default, the plaintiff had the right to remove the POS system. At his deposition, Belyayev conceded that the hardware and software remained the property of the plaintiff at the time of the alleged breach and that the restaurant offered to return the hardware but the plaintiff refused.

Belyayev further testified that the plaintiff paid a “set fee” of \$450.00 to Aldelo, the entity through which the plaintiff purchased the software licenses, for each license required to use the software and that the plaintiff is effectively a “re-seller” of the license. Belyayev stated that the plaintiff provided either six or seven Aldelo licenses to the restaurant, per the POS

contract, as well as additional software, Aldelo EDC, at a one-time cost of \$799.00. Thus, per Belyayev, the plaintiff paid between \$3,499.00 – \$4,159.00 for the licensing of its software to the restaurant. The plaintiff further avers that it also incurred “peripheral costs” for such items as printers, customer displays, network cables, and labor.

The POS contract provides for an “early termination fee,” calculated as the total of the monthly fees remaining on the agreement. It further provides for “liquidated damages” in the form of 10 percent of the total amount of the POS contract from the beginning until the end of the term as well as the costs of shipping the POS and its components. The POS contract contains another provision that requires the restaurant to pay the plaintiff for each year of the remainder of the four-year term of the contract either \$250.00 per year or the “processing volume of the highest of [the] last six (6) months processing volume (for which processing exists) multiplied by 100 basis points or 1% multiplied by the remaining number of payments under [the contract], whichever is greater.” Belyayev testified at his deposition that this meant the restaurant “would owe the highest of either \$1,000 or 1 percent of the 28 months of their credit card processing.”

Defendant Kabashi signed the POS contract on behalf of the restaurant, a personal guaranty in his individual capacity, and the merchant application and agreement with Unified and Esquire Bank on behalf of the restaurant. The defendants state that Kabashi signed these documents without reading them or consulting an attorney. The merchant application and agreement is not signed by Unified or Esquire Bank.

#### B. Problems with the POS System and Troubleshooting

Over a four-month period between January 2019 and April 2019, there were 82 calls between the restaurant’s employees and the plaintiff’s technicians. At least three of those calls

document issues relating to the POS system freezing. Others document that the system was, *inter alia*, functioning at a slow pace, was offline, or was suffering from other technical issues that precluded the restaurant from processing credit card transactions. On April 4, 2019, the individual defendant sent an email to the plaintiff's sales representative, in which he stated: "It has been a nightmare every single day[.] And no one knows how to help[.] I really can't take it anymore[.] It's [a]ffecting my employees and my customers[.]"

The defendants contend that the plaintiff's POS system was plagued with systematic software and hardware failures from January 2019 through April 2019. The plaintiff does not dispute that there were software issues but contends that there were no hardware failures reported. The plaintiff's technicians made four on-site visits on January 18, 2019, February 6, 2019, March 14, 2019, and April 11, 2019. Belyayev never personally made an on-site visit, and that the source of his information concerning the POS system failures was the plaintiff's Director of Operations, Vladimir Avakyants (Avakyants). Although the plaintiff does not dispute that Belyayev never himself made a visit to the restaurant, the plaintiff explains that it resolves "99% of all issues with POS remotely."

The plaintiff attributes any failures in the POS system to the unauthorized installation of a second router, which it claims it only discovered upon its third on-site visit and removed during the same visit on March 14, 2019. The plaintiff claims that on its fourth visit, it discovered that the router was reinstalled. According to the plaintiff, this "shows the defendants did not cooperate or follow instructions and instead caused themselves malfunctions by their own actions." Belyayev's account is in tension with other evidence in the record, as more fully described below. In any event, as a result of the problems experienced with the POS system, the defendants stopped making payments.

The plaintiff commenced the instant action, wherein it asserts three causes of action for breach of contract and seeks damages in excess of \$147,337.74. The defendants answered the complaint and assert counterclaims for breach of contract, breach of express/implied warranty, fraud and/or fraud in the inducement, fraudulent concealment, and unjust enrichment.

Upon the completion of discovery, the instant motion ensued.

### III. LEGAL STANDARD

It is well settled that the movant on a summary judgment motion “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The “facts must be viewed in the light most favorable to the non-moving party.” Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id. (citing Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

“The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even ‘arguable.’” De Paris v Women’s Natl. Republican Club, Inc., 148 AD3d 401, 403–04 (1<sup>st</sup> Dept. 2017); see Bronx- Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480 (1<sup>st</sup> Dept. 1990). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law by merely pointing to gaps in the

plaintiff's case. It must affirmatively demonstrate the merit of its defense. See Koulermos v A.O. Smith Water Prods., 137 AD3d 575 (1<sup>st</sup> Dept. 2016); Katz v United Synagogue of Conservative Judaism, 135 AD3d 458 (1<sup>st</sup> Dept. 2016). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." Garcia v J.C. Duggan, Inc., 180 AD2d 579, 580 (1<sup>st</sup> Dept. 1992).

#### IV. DISCUSSION

##### A. First, Second, and Third Causes of Action, and First Counterclaim (Breach of Contract)

The complaint asserts three causes of action sounding in breach of contract, each of which seeks to enforce various provisions of the POS contract. The first cause of action seeks to recover \$29,700.00 in damages pursuant to various subparagraphs of Paragraph 6 of the POS contract, which provides, *inter alia*, that if the restaurant is in default and the plaintiff terminates the agreement early, the restaurant is responsible for an early termination fee and liquidated damages. The second cause of action seeks to recover \$87,637.74 in damages pursuant to Paragraph 6.4 of the POS contract, which purports to provide a liquidated damages provision for recovery under an alleged third-party contract between the restaurant and the plaintiff's credit card processor. The third cause of action seeks to recover contractual attorney's fees and costs in an amount to be determined.

By the first counterclaim, the defendants assert that the plaintiff breached the POS contract by failing to provide a functioning POS system. The defendants contend, *inter alia*, that their contractual obligations were discharged by virtue of the plaintiff's failure to perform and that the liquidated damages provisions in the POS contract are unenforceable. In support of their

motion, the defendant submit, *inter alia*, the pleadings, an attorney's affirmation, the subject POS contract, the subject merchant application and agreement, relevant excerpts of the depositions of the individual defendant, Belyayev, Avakyants, and Yuriy Abramov (Abramov), the plaintiff's call log and calendar entries, email exchanges between the individual defendant and the plaintiff's representatives, the plaintiff's responses to the defendant's interrogatories, and public filings concerning other similar actions brought by the plaintiff.

In response, the plaintiff avers, *inter alia*, that whether the defendants' installation of their own router is what caused problems with the POS software is a triable issue of fact and that the liquidated damages provisions are enforceable. The plaintiff submits, *inter alia*, the affidavits of Belyayev and Mark Gelman (Gelman), a person who claims to have experience in software engineering, and "merchant statements," generated by an entity called "KeyBank," and what appears to be a "snapshot" from the Aldelo software setup, which displays a "license agreement window." In reply, the defendants argue that the evidence upon which the plaintiff relies to raise a triable issue, namely the affidavit of Belyayev, is not based on personal knowledge, is contradicted by the plaintiff's own witness testimony, and is false.

The necessary elements of a breach of contract claim are (1) the existence of a contract, (2) one party's performance under the contract, (3) the other party's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1<sup>st</sup> Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1<sup>st</sup> Dept. 2010). Where one party materially breaches a contract, the other party may be relieved or excused from performance. See Grace v Nappa, 46 NY2d 560 (1979); Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v Robert Christopher Assocs., 257 AD2d 1 (1<sup>st</sup> Dept. 1999) (citations omitted). "A material breach is a failure to do something that is so fundamental to a contract that the failure to perform

that obligation defeats the essential purpose of the contract.” Feldmann v Scepter Grp., Pte. Ltd., 185 AD3d 449 (1<sup>st</sup> Dept. 2020) (citations omitted). “A breach is material if it strongly tends to defeat the object of the parties in making the contract.” Feldmann v Scepter Grp., Pte. Ltd., supra (quoting Babylon Assocs. v Suffolk Cty., 101 AD2d 207 [2<sup>nd</sup> Dept. 1984]).

It is undisputed that the POS contract existed, that the restaurant made three payments pursuant to the POS contract, that the plaintiff installed the POS system, and that there were problems with the POS system. The plaintiff’s breach of contract causes of action are predicated upon its assertion that the plaintiff installed a functioning POS system and the defendants caused the POS system to fail by installing their own router. By contrast, the defendants’ position, and their breach of contract counterclaim, are grounded in their assertion that the plaintiff failed to provide a functioning POS system, as required by the POS contract. Thus, the central issue is which party is responsible for the POS system not functioning properly. If the failure is attributable to the plaintiff, the inquiry is whether the plaintiff’s failure rises to a material breach of the POS contract, such that the defendants were discharged from performance.

The plaintiff’s own evidence reveals that the defendants did not install an unauthorized router. Nor did the defendants otherwise interfere with the POS system or cause it to fail. The plaintiff’s attribution of any failures in the POS system to the unauthorized installation of a second router by the defendants is belied by the record. At his deposition, Avakyants testified that when a customer has its own router, the plaintiff’s installer must make a judgment call about whether to use the customer’s router to connect the POS system to the Internet. Avakyants further stated that when the customer has an existing router, the plaintiff “normally tr[ies] not to [remove] the existing infrastructure . . . unless the customer tells [them to] . . . [b]ecause [they] don’t know if [they] disconnect them what might be the consequence.” In fact, he affirmatively

stated that it was correct that “if the customer had a Netgear router at the time of [the] initial installation, [the plaintiff] would not have removed anything from that router but [] would have potentially hooked up [the plaintiff’s] router to that router.” He also agreed that when the system was initially installed, the installer provided the restaurant with a Linksys router that was hooked up to both the modem and the restaurant’s Netgear router and that the configuration would have been compatible.

Additionally, Abramov, a technician who made three of the four visits to the restaurant, testified that it was not unusual for a customer to have their own router in the configuration. Abramov acknowledged that when he first arrived to the restaurant he saw “[the plaintiff’s] Linksys router . . . a Netgear router and then [the plaintiff’s] switch, basically to connect all the hardwired connection from the POSs, the credit card machine[,] and the kitchen printers.” Thus, Abramov suggests that the plaintiff was aware of the Netgear router as of at least February 6, 2019, the date of Abramov’s first visit. Abramov further testified that on his April 11, 2019, visit to the restaurant, at Avakyants’ direction, he removed “the Netgear router completely, to bypass it, and directly connect [the plaintiff’s] Linksys router to the network, to the service provider, to the modem.” He stated that when he removed the Netgear router, he also found other settings that were improperly configured and those were not a product of the defendants’ interference, but resulted from the removal of the Netgear router. Abramov also confirmed that the Netgear router he removed that day was the same router he had previously seen and that it was configured in the same manner as he had seen it previously configured. Despite this, Belyayev, in his affidavit, states that “[a] Netgear router was reinstalled by [the] [defendants].”

The defendant correctly argues that the plaintiff’s introduced the affidavit of Belyayev appears to be an attempt to manufacture a triable issue of fact as to whether the defendants

caused the POS system to not function properly is without merit. The affidavit is “a self-serving affidavit offered to contradict deposition testimony [and thus] does not raise a *bona fide* question of fact and will be disregarded.” Lupinsky v Windham Const. Corp., 293 AD2d 317 (1<sup>st</sup> Dept. 2002) (citations omitted); Phillips v Bronx Lebanon Hosp., 268 AD2d 318 (1<sup>st</sup> Dept. 2000) (citing Glick & Dolleck, Inc. v Tri-Pac Exp. Corp., 22 NY2d 439 [1968]). Further, the defendants correctly contend that the purported “expert affidavit” of Gelman, in which he opines that, based upon his review of the relevant documents and specifications, the problems with the POS system were caused by the restaurant’s alterations to the network, assumes facts not supported by the evidence and is therefore speculative. See Dalder v Inc. Vill. of Rockville Ctr., 116 AD3d 908 (2<sup>nd</sup> Dept. 2014); Fenty v Seven Meadows Farms, Inc., 108 AD3d 588 (2<sup>nd</sup> Dept. 2013) (citations omitted); Air Servs. LLC v CMA Design Studio, P.C., 86 AD3d 511 (1<sup>st</sup> Dept. 2011) (citations omitted); Cillo v Resjefal Corp., 16 AD3d 339 (1<sup>st</sup> Dept. 2005). Indeed, the Gelman affidavit is plainly at odds with the plaintiff’s own evidence. Notably, Gelman only generally describes his “25 years of experience in software engineering” without further detail, raising questions of his expertise. Thus, even assuming that the affidavit does include all the information necessary to demonstrate that the affiant is, in fact, an expert, the affidavit is insufficient to raise a triable issue of fact as to which party the defect is attributable to. See generally Romano v Stanley, 90 NY2d 444 (1997); Matott v Ward, 48 NY2d 455 (1979); Dalder v Inc. Vill. of Rockville Ctr., *supra*; Fenty v Seven Meadows Farms, Inc., *supra*; Air Servs. LLC v CMA Design Studio, P.C., *supra*; Cillo v Resjefal Corp., *supra*.

Even assuming that the defendants established in that the new POS system was faulty, the plaintiff’s submissions raise a triable issue of fact as to whether the malfunctions constituted a material breach under the terms of the POS contract, such that the defendants would be excused

from performance. At his deposition, Belyayev testified that the POS system “is not, absolutely not expected to work 100 percent of the time. It is not by design expected. As a matter of fact . . . I’m confirming to you that” the restaurant has had technical issues. He further testified that, in his opinion, “it would not be considered unreasonable” for the POS system to freeze five times per day. The parties’ competing contentions regarding the extent to which the POS system was faulty, and the extent to which it was required to operate, is a triable issue that precludes summary judgment. Indeed, whether there has been a material breach is often an issue of fact, ill-suited for resolution on summary judgment. See S.E.M. Sec. Sys., Inc. v Earl Lorence Enterprises, 120 AD3d 1211 (2<sup>nd</sup> Dept. 2014); Schutty v Speiser Krause P.C., 86 AD3d 484 (1<sup>st</sup> Dept. 2011); Wiljeff, LLC v United Realty Mgmt. Corp., 82 AD3d 1616 (4<sup>th</sup> Dept. 2011); Germain v Staten Island Boat Sales, Inc., 248 AD2d 507 (2<sup>nd</sup> Dept. 1998); Productive Recycling, Inc. v Town of Smithtown, 222 AD2d 663 (2<sup>nd</sup> Dept. 1995).

Moreover, the defendants have not met their burden in demonstrating that the liquidated damages provisions are unenforceable penalties. See JMD Holding Corp. v Congress Financial Corp., 4 NY3d 373 (2005). That is, with respect to the first cause of action, the defendants have not established, *prima facie*, that the early termination fee is “grossly disproportionate to the probable loss” (JMD Holding Corp. v Congress Financial Corp., *supra* at 385). Nor have they established, in regard to the second cause of action, *prima facie*, that the damages provided for by the POS contract in connection with the merchant application and agreement constitute an unenforceable penalty. See JMD Holding Corp. v Congress Financial Corp., *supra*; 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc., 24 NY3d 528 (2014).

Therefore, the branch of the defendants' motion seeking summary judgment dismissing the plaintiff's first, second, and third causes of action, and on the defendants' first counterclaim is denied.

B. Second Counterclaim (Breach of Warranties)

The defendants' second counterclaim seeks to recover for the plaintiff's alleged failure to meet the express warranties set forth in the POS contract as well as the implied warranties of fitness and merchantability. The plaintiff, in opposition, contends that Article 2 of the Uniform Commercial Code (UCC) does not apply because, according to the plaintiff, there was no sale and "a license agreement is not governed by the UCC." The plaintiff cites to no binding authority in support of these positions. The plaintiff further avers that regardless of the applicability of the UCC, the POS contract contains a disclaimer that shields the plaintiff from liability here. In reply, the defendants submit, *inter alia*, that any such disclaimer is deceptively obscured, thereby rendering it ineffective pursuant to UCC § 2-316.

As a threshold matter, the defendants are correct that the subject agreement falls within the scope of the UCC. See Ferratella Bros., LLC v Sacco, 121 AD3d 1467 (3<sup>rd</sup> Dept. 2014) (citing Sears, Roebuck & Co. v Galloway, 195 AD2d 825 (3<sup>rd</sup> Dept. 1993]) (agreement involving sale of point of sale system to restaurant was one primarily for the sale of goods); Richard A. Rosenblatt & Co. Inc. v Davidge Data Sys. Corp., 295 AD2d 168 (1<sup>st</sup> Dept. 2002) (contract for computer hardware and software user rights was deemed a contract for the sale of goods); Communications Groups, Inc. v Warner Communications, Inc., 138 Misc 2d 80 (NY City Civ Ct 1988) ("[i]t seems clear that computer software, generally, is considered by the courts to be a tangible and movable item, not merely an intangible idea or thought and therefore qualifies as a 'good' under Article 2 of the UCC"). Indeed, the Appellate Division, First Department "has

noted, contracts for the sale of sophisticated equipment frequently provide for [services, including] some initial supervision, testing and instruction from the manufacturer.” Richard A. Rosenblatt & Co. Inc. v Davidge Data Sys. Corp., supra (internal quotation marks omitted).

When a contract provides for both services and goods, courts must look at the main objective sought to be accomplished by the contracting parties to determine the nature of the contract. See Triangle Underwriters, Inc. v Honeywell, Inc., 604 F2d 737 (2d Cir. 1979). Here, as in Triangle Underwriters, Inc. v Honeywell, Inc., the record supports that the essence of the contract is “not the service of running a computer system for the [restaurant],” (Richard A. Rosenblatt & Co., Inc v Davidge Data Systems Corp., No. 601065/01, 2001 WL 36157545 [NY Sup. Ct. Sep. 10, 2001], aff’d, 295 AD2d 168 [citing Triangle Underwriters, Inc. v Honeywell, Inc., supra]), but rather the installation and delivery of a POS system.

The plaintiff’s argument that “custom software is not a ‘good,’ but rather a ‘service,’” is belied by the terms of the POS contract. For example, the opening paragraph of the contract states that the agreement is made “for the long term use by the [restaurant] of goods provided by the [plaintiff] to the [restaurant] and for purchase of goods and services by the [restaurant] from the [plaintiff].” Paragraph 3 of the POC contract is labelled, in bold, “goods and services.” Paragraph 3.1, wherein the plaintiff “agrees to customize (only once before the installation), deliver and install at the premises of the [restaurant] and only for [its] sole and exclusive use . . . the POS involving hardware, software, wiring and/or other initial services/components. . . ,” further confirms that the plaintiff contemplated the provision of a product. Likewise, Paragraph 3.6 of the POS contract states that “POS including hardware and software licenses shall be property of [the plaintiff]” and [a]t the end of the term, hardware shall become property of the

[restaurant],” again indicating that the UCC is applicable. See Uniflex, Inc. v Olivetti Corp. of Am., 86 AD2d 538 (1<sup>st</sup> Dept. 1982).

To the extent that the plaintiff argues that licensing agreements are categorically outside the scope of the UCC, it is incorrect. In fact, courts have interpreted licensure agreements as akin to lease agreements, covered by the UCC. See, e.g., Schrodgers, Inc. v Hogan Sys., Inc., 137 Misc 2d 738, (Sup Ct NY Co 1987) (software licensing agreement fell “within the purview of Article 2 of the [UCC]”); Communications Groups, Inc. v Warner Communications, Inc., supra. In determining whether the UCC applies in the context of a licensing agreement, courts look to the terms of the agreement, the duration of the license, whether the software needs to be returned at the end of the license period, and who retains title to the software. Robert L. Haig, Commercial Litigation in New York State Courts § 141:22 (5th ed 4F NY Prac Series 2021) (citing Communications Groups, Inc. v Warner Communications, Inc., supra). Further, “[e]ven when the seller retains title, a licensing agreement is a sale of goods, where a contract provides for a price comparable with a sales price, and lacks a specified term or appears to be a ‘perpetual license.’” Richard A. Rosenblatt & Co., Inc v Davidge Data Systems Corp., supra (citing Uniflex, Inc. v Olivetti Corp. of Am., supra; Communications Groups, Inc. v Warner Communications, Inc., supra); see Schrodgers, Inc. v Hogan Sys., Inc., supra (agreement for licensure of computer software system could form basis for action alleging breach of implied warranty of merchantability).

As explained above, the main objective of the parties here was to provide a system that the defendants could use to, *inter alia*, accept credit card payments. The services provided to install such a system are “ancillary and incidental” to heart of the contract, which is for the sale of the POS system, including what is essentially the leasing of software. Thus, the UCC

governs. Cf. Shionogi Inc. v Andrx Labs, LLC, 187 AD3d 422 (1<sup>st</sup> Dept. 2020) (it was “doubtful that the UCC would apply to the licensing agreement because the licensing agreement [was] fundamentally an intellectual property licensing and transfer agreement”); Architectronics v Control Sys., Inc., 935 F.Supp. 425 (SDNY 1996) (UCC did not apply to license agreement where “predominant feature” of agreement was transfer of intellectual property rights).

As the UCC is applicable, the court next considers whether the defendants have met their *prima facie* burden on their counterclaims for breach of the implied warranties of merchantability and fitness for a particular purpose. The court concludes that they have not.

UCC § 2-314 provides that, unless excluded or modified, “a warranty that the good shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” UCC § 2-315 provides that “[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the good shall be fit for such purpose.”

UCC § 2-316(2) provides, in relevant part, that in order for parties to a sale of goods contract to

exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”

UCC § 2-316(3)(a) specifies that notwithstanding UCC § 2-316(2), “unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like ‘as is’, ‘with all

faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.”

UCC § 1-201(10) defines “conspicuous” to include any term so “written, displayed, or presented that a reasonable person against which it is sought to operate ought to have noticed it.” UCC § 1-201(10) further provides that conspicuous terms include “heading[s] in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size,” (UCC § 1-201[10[A]), and “language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language,” (UCC § 1-201[10[B]).

The question of “[w]hether a term is conspicuous or not is a decision for the court.” See also Carbo Indus. Inc. v Becker Chevrolet Inc., 112 AD2d 336 (2<sup>nd</sup> Dept. 1985) (citations omitted). While Paragraph 10 of the POS contract attempts to disclaim all implied warranties, the court concludes that the warranties were not sufficiently disclaimed to warrant denial of the motion. Although the language included is sufficient to comply with UCC § 2-316, at least with respect to the implied warranty of fitness for a particular purpose, it cannot be said it is conspicuous as a matter of law. As the defendants correctly contend, the purported disclaimers are “buried in language indistinguishable from every other provision of the eight-page” contract. The provisions purporting to disclaim warranties, and all provisions of the contract, for that matter, are obscured in single-spaced, fine print that is blurred to such an extent that it is barely legible, at least in the copy provided. Further, the purported disclaiming provisions are indistinguishable from the remainder of the contract, the print is no longer than any other print in the contract, and it cannot be said to be presented in such a manner that a reasonable person

would have noticed it. See Mill Printing & Lithographing Corp. v Solid Waste Mgmt. Sys., Inc., 65 AD2d 590 (2<sup>nd</sup> Dept. 1978) (“disclaimer, not being printed in different, larger or contrasting type or color, was not conspicuous”); Nassau Suffolk White Trucks, Inc. v Twin Cty. Transit Mix Corp., 62 AD2d 982 (2<sup>nd</sup> Dept. 1978). Cf. W. 63 Empire Assocs., LLC v Walker & Zanger, Inc., 107 AD3d 586 (1<sup>st</sup> Dept. 2013) (disclaimer effective where “printed in all-capital letters, and dominates the conditions of sale set forth at the bottom of the invoice”); Sky Acres Aviation Servs., Inc. v Styles Aviation, Inc., 210 AD2d 393 (2<sup>nd</sup> Dept. 1994) (“disclaimer, in bold type and readily noticeable” was effective). Moreover, the purported disclaimer does not specifically mention term “merchantability.” See UCC § 2-316(2); Bimini Boat Sales, Inc. v Luhrs Corp., 69 AD3d 782 (2<sup>nd</sup> Dept. 2010); Carbo Indus. Inc. v Becker Chevrolet Inc., 112 AD2d 336 (2<sup>nd</sup> Dept. 1985) (“implied warranty of merchantability [] may only be disclaimed by use of language mentioning the word ‘merchantability’”). For these reasons, the purported disclaimers contained within the POS contract are ineffective.

However, the court finds that the defendants are not entitled to summary judgment on their second counterclaim for breach of warranty. The submissions raise triable issues of fact as to whether the implied warranties were, in fact, breached in the first instance. Put differently, whether the extent to which the POS system did not properly function rose to the level of a breach of each of the implied warranties is an issue for the finder of fact. See Glockenberg v Costco Wholesale Corp., 110 AD3d 952 (2<sup>nd</sup> Dept. 2013) (issue of fact as to whether “product was merchantable or of an unacceptable quality for the use [the merchant] knew [the customer] intended to make of the product”); Lindenthaler v Dairy Concepts Inc., 291 AD2d 776 (3<sup>rd</sup> Dept. 2002) (issue of fact as to where there was breach of implied warranties of merchantability and fitness for a particular purpose of in regard to quality of the product precluded summary

judgment). Furthermore, the defendants present no argument in support of their claim for breach of an express warranty. Thus, the motion is denied as to the second counterclaim.

C. Third and Fourth Counterclaims (Fraud and Fraudulent Concealment)

The defendants' third counterclaim seeks to recover for fraud, alleging that the plaintiff repeatedly misrepresented and omitted material facts in its communications with the defendants and in connection with attempted repairs of the POS system. The defendants aver that the plaintiff misrepresented that the POS system functioned properly and that the plaintiff knowingly and intentionally did not disclose the deficiencies of the POS system to the defendants for the purpose of inducing the defendants' reliance. They further contend that they reasonably and justifiably relied on the plaintiff's misrepresentations and omissions and incurred damages as a result. The defendants' fourth counterclaim similarly seeks to recover for fraudulent concealment, alleging that the plaintiff repeatedly omitted material facts to the defendants concerning the POS system prior to and after providing it to the defendants. The defendants claim that the plaintiff had a duty to disclose certain material facts because the plaintiff possessed superior knowledge regarding the deficiencies, that they justifiably relied on the material omissions of fact to their detriment, and that they thereby suffered damages.

Initially, the plaintiff contends that the counterclaims sounding in fraud are duplicative of the breach of contract counterclaim. The defendants respond that the plaintiff's misrepresentation that the new POS system was an upgrade that would not suffer the same failures as the earlier model is a misrepresentation collateral or extraneous to the contract and is thus not duplicative. The defendants further urge that the existence of 24 other lawsuits filed by the plaintiff and predicated on nearly identical fact patterns, none of which have been resolved

on the merits, compels the conclusion that the plaintiff knew that the POS system was inadequate and/or not an upgrade, contrary to its representations to the defendants.

To recover for fraud, the defendants “must prove a misrepresentation or a material omission of fact which was false and known to be false by [the plaintiff], made for the purpose of inducing the [defendants] to rely upon it, justifiable reliance of the [defendants] on the misrepresentation or material omission, and injury.” Lama Holding Co. v Smith Barney Inc., 88 NY2d 413 (1996) (citations omitted). However, “[i]t is well settled that a cause of action for fraud will not arise when the only fraud charged relates to a breach of contract.” Gordon v Dino De Laurentiis Corp., 141 AD2d 435 (1<sup>st</sup> Dept. 1988). “In the context of a contract case, [there] must [be] misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim.” Wyle Inc. v ITT Corp., 130 AD3d 438 (1<sup>st</sup> Dept. 2015) (citation omitted). The misrepresentations of present fact must be “collateral to the contract and [must have] induced the allegedly defrauded party to enter into the contract.” Orix Credit All., Inc. v R.E. Hable Co., 256 AD2d 114 (1<sup>st</sup> Dept. 1998). “Thus, as a general rule, there must be a breach of a duty separate from or in addition to the contractual duty.” Wyle Inc. v ITT Corp., *supra* (citing J.E. Morgan Knitting Mills v Reeves Bros., 243 AD2d 422 [1<sup>st</sup> Dept 1997]). “A misrepresentation of presents facts is collateral to the contract (though it may have induced the [defendants] to sign the contract) and therefore involves a separate breach of duty.” Wyle Inc. v ITT Corp., *supra* (citing Deerfield Communications Corp. v Chesebrough-Ponds, Inc., 68 NY2d 954 [1986]).

“The elements of a fraudulent concealment claim [are] concealment of a material fact which defendant was duty-bound to disclose, scienter, justifiable reliance, and injury.” Mitschele v Schultz, 36 A.D.3d 249 (1<sup>st</sup> Dept. 2006). In other words, the defendants must prove

the elements of fraud, plus that the plaintiff had a duty to disclose material information and failed to do so. See P.T. Bank Cent. Asia v ABN AMRO Bank N.V., 301 AD2d 373 (1<sup>st</sup> Dept. 2003).

Under the “special facts” doctrine, “a duty to disclose arises ‘where one party’s superior knowledge of essential facts renders a transaction without disclosure inherently unfair.’”

P.T. Bank Cent. Asia v ABN AMRO Bank N.V., supra (quoting Chiarella v United States, 445 U.S. 222 [1980]).

Although the defendants demonstrate that their fraud counterclaims are not duplicative of their breach of contract counterclaim, the defendants fail to meet their burden on summary judgment. The proof submitted does not establish, *prima facie*, that the plaintiff made material misrepresentations and omissions, and if so, whether the plaintiff did so with the requisite fraudulent intent. See, e.g., Summit Dev. Corp. v Interstate Masonry Corp., 140 AD3d 1152 (2<sup>nd</sup> Dept. 2016); Graubard Mollen Dannett & Horowitz v Moskovitz, 204 AD2d 218 (1<sup>st</sup> Dept. 1994), aff’d, 86 NY2d 112 (1995). While the plaintiff’s litigation history may suggest that the plaintiff had knowledge of the deficiencies of the POS system, it does not establish, as a matter of law, that the plaintiff knowingly misrepresented or omitted material facts. Thus, the motion must be denied to the extent it seeks summary judgment on the third and fourth counterclaims.

#### D. Fifth Counterclaim (Unjust Enrichment)

The defendants’ fifth counterclaim seeks to recover for unjust enrichment, asserting that the plaintiff was unjustly enriched by the restaurant’s three payments made pursuant to the POS contract because the plaintiff did not and could not provide the restaurant with a functioning POS system. However, where, as here, there is an express contract, no cause of action lies for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty,

Inc. v Sartiano, 93 AD3d 410 (1<sup>st</sup> Dept. 2012); SAA-A v Morgan Stanley Dean Witter & Co., 281 AD2d 201 (1<sup>st</sup> Dept. 2001). Therefore, the branch of the defendants' motion seeking summary judgment on their fifth counterclaim is denied.

V. CONCLUSION

For the reasons stated above, the defendants' motion pursuant to CPLR 3212 for summary judgment is denied in its entirety. The parties are encouraged to explore settlement.

Accordingly, it is

ORDERED that the defendants' motion pursuant to CPLR 3212 for summary judgment is denied in its entirety.

This constitutes the Decision and Order of the court.

DATED: January 10, 2022

  
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NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**