

Insitro, Inc. v Cellaria, Inc.

2022 NY Slip Op 30902(U)

March 14, 2022

Supreme Court, New York County

Docket Number: Index No. 656029/2021

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

INDEX NO. 656029/2021
MOTION DATE 10/18/2021
MOTION SEQ. NO. 001

INSITRO, INC.,

Plaintiff,

- v -

CELLARIA, INC.,

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, and 9

were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213 is granted, on default and without opposition, based upon the following memorandum decision.

Background

In this action for breach of an amended settlement agreement, plaintiff Insitro, Inc. ("plaintiff"), moves for summary judgment in lieu of complaint based on defendant's failure to make certain payments under the amended settlement agreement and associated late fees. There is no opposition to the motion.

The parties were previously engaged in litigation for breach of certain contracts between them (NYSCEF Doc. No. 4 ¶¶ 3-5). The parties eventually settled the matter in the amount of \$147,820.00 (id., ¶¶ 6-10; NYSCEF Doc. No. 5). The parties later amended the settlement agreement to set up a payment schedule, pursuant to which defendant was to make certain scheduled payments between August 3, 2021, and December 10, 2021 (NYSCEF Doc. No. 6 §

2). Defendant agreed that each missed payment would accrue a \$500 late fee for each day that defendant failed to make payment (*id.*). In addition, for each payment due during or after October 2021 that was not timely made, defendant would accrue an additional payment of 25% of the sum of the missed payment (*id.*). At the time it made the motion on October 18, 2021, plaintiff asserts, defendant had made the first scheduled payment and defaulted on the others (NYSCEF Doc. No. 4 ¶¶ 19-23). Plaintiff calculates that the sum of the missing payments, late fees, and additional payments was \$116,445 as of October 18, 2021, and plaintiff now seeks summary judgment in that amount (*id.* ¶ 24).

Plaintiff commenced this action by filing a summons and notice of motion for summary judgment in lieu of complaint on October 18, 2021 (NYSCEF Doc. Nos. 1-2). An affidavit of service filed on December 7, 2021, attests to service of the summons, notice of motion, supporting papers, and notice of electronic filing on Dave Deems, president of defendant, on November 8, 2021, pursuant to CPLR 311 (NYSCEF Doc. No. 8). To date, defendant has not submitted opposition to the motion or otherwise appeared in this action.

Discussion

A grant of summary judgment under CPLR 3213 is available on “an instrument for the payment of money only or upon any judgment” (CPLR 3213). A plaintiff makes out a *prima facie* case for summary judgment where it can show that the instrument is a valid instrument for the payment of money only and that the defendant has failed to pay (*Nordea Bank Finland PLC v Holten*, 84 AD3d 589 [1st Dept 2011]).

Here, plaintiff has satisfied its burden on the motion by submitting the affidavit of its General Counsel, Duane Valz (NYSCEF Doc. No. 4), the original and amended settlement agreements (NYSCEF Doc. Nos. 5-6), and the affidavit of service demonstrating service of the

summons and notice of motion on defendant (NYSCEF Doc. No. 8). As set forth in the amended settlement agreement, defendant agreed to make certain installment payments to plaintiff in the total amount of \$77,820 (NYSCEF Doc. No. 6 § 2). As set forth in the Valz Affidavit, defendant has failed to make those payments, leading to further charges and late fees of \$38,625 (NYSCEF Doc. No. 4 ¶¶ 19-23), as contemplated by the terms of the amended settlement agreement (NYSCEF Doc. No. 6 § 2). The total outstanding amount is \$116,445.

In addition, plaintiff has satisfied its burden with respect to its costs and reasonable attorneys' fees, which are provided for under the settlement agreement and amended settlement agreement (NYSCEF Doc. No. 5 § 13; NYSCEF Doc. No. 6 § 3). The amount of such costs and fees will be determined by a Judicial Hearing Officer or Special Referee as follows.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment against the Defendant in the principal sum of \$116,445, plus late fees of \$500 per day beginning on August 17, 2021, and running through the date of judgment pursuant to the amended settlement agreement, plus interest accrued thereon at the statutory rate from the dates of August 17, 24, and 31, September 10, and October 10, 2021, the dates of the missed payments as set forth in the amended settlement agreement, and continuing to so accrue until the date of satisfaction of judgment; and it is further

ORDERED that plaintiff is entitled to its reasonable attorneys' fees incurred in this action in an amount to be heard and determined by a Judicial Hearing Officer ("JHO") or Special Referee at inquest; and, therefore, it is

ORDERED that the issue of such fees is severed and a JHO or Special Referee shall be designated to conduct an inquest and determine the amount of paintiff's said fees, which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

<u>3/14/2022</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>		
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/>	REFERENCE