

Bank of Am., N.A. v Dollar Phone Corp.

2022 NY Slip Op 30986(U)

March 28, 2022

Supreme Court, Kings County

Docket Number: Index No. 518380/2021

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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BANK OF AMERICA, N.A.,

Plaintiff, Decision and order

- against -

Index No. 518380/2021

DOLLAR PHONE CORP., MOSES GREENFIELD,
DOLLAR PHONE ENTERPRISE, INC., GLOBAL
SWITCHING, INC., DPE LABEL HOLDING CORP.,
DOLLAR PHONE SERVICES, INC. and
PINMONSTER, INC.,

Defendants, March 28, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff moves pursuant to CPLR §3211 seeking to dismiss counterclaims filed by the defendants. The defendants oppose the motion arguing that the counterclaims have merit. Papers were submitted by all parties and arguments held. After reviewing the arguments of all parties this court now makes the following determination.

Background

According to the amended complaint, on June 2013 the plaintiff extended a line of credit to the defendants in the amount of \$2,000,000. Pursuant to the loan agreement executed in connection with the line of credit, the line expired on June 30, 2014 when all principal and interest had to be paid. On April 22, 2014 an amended agreement was executed between the parties and the line of credit was increased by a further one million dollars and the line was extended to June 30, 2015. Further amendments extended the terms of the loan and finally the loan

was extended to September 28, 2020. On October 8, 2020 the plaintiff declared the defendants in default based upon non-payment and other defaults. This action was commenced and the amended complaint seeks recovery of \$2,254,572.07 consisting of the principal amount of \$2,200,000.00, plus interest in the amount of \$54,572.07 that remains outstanding. The defendants answered and asserted counterclaims alleging the plaintiff breached the implied covenant of good faith and fair dealing and breach of contract. The plaintiff has now moved seeking to dismiss those counterclaims.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the counterclaims as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations contained within the counterclaims are deemed true and all reasonable inferences may be drawn in favor of the party that has alleged such counterclaims (Weiss v. Lowenberg, 95 AD3d 405, 944 NYS2d 27 [1st Dept., 2012]). Whether the counterclaims will later survive a motion for summary judgment, or whether the party will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to

dismiss (see, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

The implied covenant of good faith and fair dealing is premised upon parties to a contract exercising good faith while performing the terms of an agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]). The defendants essentially assert that the plaintiff should have been more receptive to the defendant's business setbacks as a result of COVID-19. Further, the defendants argue the plaintiff changed the availability of Automated Clearing House (ACH) receipts from immediate availability to a three to five day wait and that such change made it impossible for the defendant to remain in business. Although not contained in the actual counterclaim itself, the defendants argue such conduct amounted to tortious interference with clients and prospective clients.

The Loan Agreement states that "in addition to any rights and remedies of the Bank provided by law, upon the occurrence and during the continuance of any event of default under this Agreement, the Bank is authorized, at any time, to set off and apply any and all Deposits of the Borrower or any Obligor held by the Bank or its affiliates against any and all Obligations owing to the Bank" (see, Loan Agreement, ¶9.9(a)). There is no dispute the defendants still owed substantial sums when the payment date

of September 21, 2021 arrived. Thus, there is no dispute an event of default occurred. Thus, pursuant to the loan agreement, the plaintiff was permitted to off-set any funds received by the defendants to pay any outstanding balances. The plaintiff, however, merely held any remittances for three to five days. There is no way that a mere hold on funds received could be a breach of any covenant when the plaintiff could have taken the more drastic action of off-setting the amounts completely. Thus, the plaintiff had a clear right to decline immediate ACH availability. Furthermore, there can be no arguments that such change to the immediate availability of any funds amounted to any tortious interference. It is well settled that the elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages (Anethsia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center, 59 AD3d 473, 873 NYS2d 679 [2d Dept., 2009]). Further, the party must specifically allege that 'but for' the other party's conduct there would have been no breach of the contract (White Knight of Flatbush, LLC v. Deacons of Dutch Congregations of Flatbush, 159 AD3d 939, 72 NYS3d 551 [2d Dept., 2018]). In this case, plaintiff's denial of immediate ACH availability did

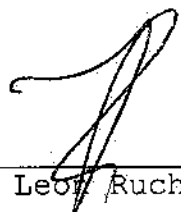
not intentionally incur any third party to breach any agreements at all. Therefore, the motion seeking to dismiss the first counterclaim is granted.

The second counterclaim alleges the plaintiff improperly deducted \$88,597.79 from the defendant's account without any prior notice or authorization and thus breached a contract. First, the counterclaim does not explain which contract was breached nor does it provide any information as to when this occurred. The party making this claim has the initial burden of demonstrating sufficient facts supporting the claim. In the interest of judicial economy if the defendant seeks to pursue this claim they must provide sufficient facts to apprise the plaintiff of the claim. The motion to dismiss this counterclaim is held in abeyance pending supplemental information.

So ordered.

ENTER:

DATED: March 28, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC