

BT Supplies W., Inc. v Brookline, LLC

2023 NY Slip Op 33713(U)

October 11, 2023

Supreme Court, New York County

Docket Number: Index No. 651364/2023

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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BT SUPPLIES WEST, INC.

Plaintiff,

- v -

BROOKLINE, LLC d/b/a LILOGY

Defendant.

INDEX NO. 651364/2023

MOTION DATE 05/01/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X
HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for

DISMISSAL

Plaintiff BT Supply West, Inc. commenced this action against defendant Brookline, LLC, d/b/a Lilogy alleging claims for breach of contract, account stated, and recoupment and setoff. Defendant moves pursuant to CPLR(a)(1), (5), and (7) for an order dismissing the complaint on res judicata and collateral estoppel grounds because the matter had been submitted to the Judicial Arbitration and Mediation Services (JAMS) and was heard by an arbitrator, who found in defendant’s favor. The arbitrator issued the Final Award on May 12, 2023. Plaintiff opposes the motion.

For the following reasons, defendant’s motion is granted to the extent of dismissing plaintiff’s third cause of action for a declaratory judgment.

Background

Plaintiff BT Supplies West, Inc. (plaintiff or BT) is a janitorial supplies company that during the COVID pandemic became heavily involved in selling PPE products (¶ 8). Defendant Brookline, LLC, d/b/a Lilogy (defendant or Lilogy) was one of BT’s customers that also provided financing and other assistance to build out supply chains (NYSCEF # 2 – Complaint ¶ 8; NYSCEF # 20 – Final Award at 2).

In the spring of 2020, non-party Anything With Ink West - AZ, LLC, d/b/a Cardinal Sourcing Solutions (Cardinal), a supplier of printing and promotional products, partnered with Lilogy to sell personal protective equipment (PPE) because

of the COVID-19 pandemic (*id.*). In mid-May 2020, BT, Lilogy, and Cardinal entered into a Supply Agreement whereby BT would supply PPE products for W.B. Mason, a big box retailer (*id.*; NYSCEF # 12 – Supply Agreement at 1).

Relevant here, pursuant to Section 3 of the Supply Agreement, BT irrevocably agreed “not to . . . circumvent, avoid, bypass, or obviate Cardinal or Lilogy, directly or indirectly, in respect of any transaction for the supply of goods ordinarily supplied by BT to W.B. Mason or its Affiliates, and other clients referred by parties” (NYSCEF # 12 – Supply Agreement at 2-3). Section 7 of the Supply Agreement then provided that legal suits arising out of or based upon the Supply Agreement should be instituted in front of JAMS (*id.* at 3).

Two purchase orders are relevant in the current motion. In May 2020, Cardinal provided the Purchase Order, CS19250, to BT, which called for BT to supply 5.5 million packages of alcohol wipes for W.B. Mason (the First Purchase Order) (Final Award at 8). The First Purchase Order was issued pursuant to the Supply Agreement between Cardinal, Lilogy and BT to supply PPE to the ultimate purchaser W.B. Mason (*id.*). At BT’s request, Lilogy provided a \$549,965 deposit on the First Purchase Order (*id.*; Complaint ¶ 53). However, in mid-June 2020, W.B. Mason canceled the First Purchase Order because BT could not meet the delivery deadlines (Complaint ¶ 53; Final Award at 8). Lilogy asserted a right to the return of the deposit on the First Purchase Order (Complaint ¶ 53). BT refused this request and instead demanded that Lilogy find a replacement customer for the 5.5 million wipes (Final Award at 9).

On July 1, 2020, Lilogy issued Purchase Order 07012020A to BT as a substitute for the canceled First Purchase Order (the Second Purchase Order) (Complaint ¶ 9; Final Award at 9). The Second Purchase Order required BT to deliver 5.5 million packages of alcohol disinfectant wipes for the price of \$11,495,000 to FarFromBoring, Inc. (FFB), a company that sourced goods for Home Depot (Complaint ¶¶ 9, 11). Different from the First Purchase Order, the Second Purchase Order was between Lilogy and BT, not Cardinal, to supply PPE to the ultimate purchaser FFB (or Home Depot) (*id.*; NYSCEF # 3 – Purchase Order). The Second Purchase Order involved a series of transactions whereby Home Depot would pay FFB, who would then pay Lilogy, who would then pay BT (Final Award at 10). BT accepted the Second Purchase Order and began filling it and issuing invoices to Lilogy (Complaint ¶ 10). BT delivered 1,632,960 packages of wipes to Home Depot through FFB and issued 21 invoices to Lilogy in the total amount of \$1,734,247.44 that was never objected to by Lilogy (Complaint ¶¶ 13-35). Payment delay from FFB to Lilogy occurred as of early August 2020 and Lilogy accordingly fell behind in payments (Final Award at 10; Complaint ¶ 36).

Claims Brought in The Previous Arbitration

BT filed its original Demand for Arbitration on January 14, 2021, and at the direction of the Arbitrator, it provided a more detailed recitation of its claims by filing a Complaint for Arbitration in November 2021 (the Arbitration Complaint) (*id.* at 11). BT's first claim related to Lilogy and Cardinal's breach of the Supply Agreement by failing to pay the monies due under the Supply Agreement (*see* NYSCEF # 13 ¶¶ 7-14). BT's second claim related to Lilogy and Cardinal's breach of the covenant of good faith and fair dealing by failing to pay for the products as due under the Supply Agreement (*see id.* ¶¶ 17-24).

In July 2022, Lilogy filed an Amended Answer to the Arbitration Complaint and asserted counterclaims for breach of contract claiming that in violation of Section 3 of the Supply Agreement BT – the non-circumvention provision, BT bypassed Lilogy by dealing directly with FFB, the ultimate purchaser in the Second Purchase Order, on or after September 1, 2020 (Final Award at 22). Lilogy also asserted an unjust enrichment counterclaim alleging that BT refused to return the deposit of \$549,965 under the First Purchase Order (*id.*).

In October 2022, BT filed a motion for summary disposition to the arbitrator, seeking judgment based on an account stated on its breach of contract claim (NYSCEF # 21 – Order on Pending Motions at 2-4). Under JAMS Rule 10, no new or different claim may be submitted without approval of the arbitrator once the arbitrator is appointed (*id.*). BT acknowledged the application of JAMS Rule 10, but stated that “if the Arbitrator permits, the claim is properly asserted” (*id.* at 4). The Arbitrator decided that BT's solitary statement in a reply brief could not substitute for a request for leave to amend (*id.* at 4). Since BT had been afforded multiple opportunities to provide a legal basis for the account stated claim but failed to do so, the arbitrator rejected this argument (*id.*). Ultimately, the arbitrator denied BT's motion in its entirety (*id.* at 8).

Arbitrator's Decision

A. BT's Breach of Contract Claim

On May 12, 2023, the arbitrator issued the Final Award and discussed whether Cardinal and Lilogy were in breach of the terms of the Supply Agreement. For the First Purchase Order, the arbitrator determined in favor of Cardinal and Lilogy because BT failed to establish a valid excuse for the delay of goods and did not satisfy its burden to establish that the cancellation of the First Purchase Order constitutes a breach of the Supply Agreement (Final Award at 20).

The arbitrator determined that the Second Purchase Order formed “a separate agreement than what is contained in the Supply Agreement” because the

Supply Agreement between BT, Cardinal, and Lilogy does not include FFB or Home Depot (*id.* at 21). The Second Purchase Order was thus not encompassed by BT's breach of contract claim in the Arbitration because the Arbitration Complaint only alleged that Cardinal and Lilogy had breached the Supply Agreement (identified in the Complaint as the "Contract"), by "failing to pay the monies due under the Contract" (*id.*). Following this conclusion, the arbitrator found in favor of Cardinal and Lilogy on BT's sole claim for breach of contract (*id.* at 22).

B. Lilogy's Counterclaims

For Lilogy's claim that BT breached the Supply Agreement's non-circumvention provision in transactions with FFB, the arbitrator did not sustain the claim because the Second Purchase Order was beyond the scope of the Supply Agreement (*id.* at 23-24). The Supply Agreement was intended to govern the procedures used by BT, Cardinal, and Lilogy on the W.B. Mason transactions, while the Second Purchase Order involves BT, Lilogy, FFB or Home Depot, but not Cardinal (*id.* at 23). For Lilogy's unjust enrichment claim seeking restitution of the \$549,965.00 deposit it paid to BT in relation to the First Purchase Order, the arbitrator determined that BT should return the deposit to Lilogy (*id.* at 25).

Legal Standards

CPLR(a) provides for various grounds under which a party may move for judgment dismissing one or more causes of action, including when "a defense is founded upon documentary evidence" (CPLR 3211[a][1]), "arbitration and award, collateral estoppel, or res judicata" applies (CPLR 3211[a][5]), or a pleading "fails to state a cause of action" (CPLR 3211 [a][7]).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff . . . can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). "In those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference" (*Morgenthau & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003]). However, dismissal based on documentary evidence under 3211(a)(1) is warranted "only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it" (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Discussion

BT's complaint advances three causes of action against Lilogy. Specifically, BT alleges that (1) Lilogy breached the Second Purchase Order because Lilogy refused to accept the vast majority of the 5.5 million packages of wipes for no excusable reason and did not pay the balance of the 1,632,960 units of wipes that had been delivered to Home Depot (Count I); (2) Lilogy is responsible for payment of the invoices sent pursuant to the Second Purchase Order under the theory of account stated (Count II); and (3) BT is entitled to keep the \$549,965 deposit provided by Lilogy under the doctrine of recoupment and setoff (Count III).

Lilogy now moves to dismiss (NYSCEF # 9). In its moving papers, Lilogy advances two primary bases for dismissal (NYSCEF # 16 – Deft's MOL at 5-11). *First*, Lilogy argues that the three causes of action are barred by arbitration and award and the doctrine of res judicata and collateral estoppel (*id.* at 5-10). *Second*, Lilogy contends that BT Supplies is not entitled to a declaratory judgment based on recoupment or setoff (*id.* at 11-12). Each of Lilogy's bases for dismissal is addressed below.

1. Res Judicata and Collateral Estoppel

Res Judicata

To apply the doctrine of res judication, or claim preclusion, a party must show: (1) a final judgment on the merits, (2) identity or privity of parties, and (3) identity of claims in the two actions (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 73 [2018]). “The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation” (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). Under New York's transactional analysis approach to res judicata, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy” (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

Lilogy argues that the instant action brought by BT meets all the elements necessary to bar BT's First, Second, and Third Causes of Action because (1) the arbitration results in adjudication on the merits, (2) the arbitration was between BT and Lilogy, the same parties in this lawsuit, and (3) in the prior arbitration, BT sought to recover the same damage it seeks in Counts I and II of this lawsuit, and Lilogy sought the return of its deposit from the First Purchase Order (Count III) (MOL at 7-9). The court disagrees.

As a preliminary matter, the court notes that there is no dispute between the parties that the parties and claims in the arbitration and this lawsuit are the same.

Rather, the key dispute between BT and Lilogy is whether the previous Arbitration resulted in a judgment on merit with regard to the Second Purchase Order.

With respect to Count I – Lilogy’s breach of the Second Purchase Order -- and Count II – account stated -- Lilogy argues that these two claims are barred by res judicata because they were litigated in the Arbitration or could have been properly brought (*id.* at 7). Specifically, Lilogy contends that Count I was precluded due to lack of subject matter jurisdiction and Count II was precluded due to BT’s repeated failure to specify its claims (NYSCEF # 22, MOL in Reply at 9). Meanwhile, Lilogy argues that Count III is barred by res judicata because BT concedes in the complaint that Lilogy won in the Arbitration and is entitled to its \$549,965 deposit (*id.* at 9). Lilogy further avers that BT cannot seek to “vacate” the Arbitration outcome by declaratory action in this court (*id.* at 8).

The issue relevant to Count I is whether a dismissal of a complaint for lack of jurisdiction is a judgment on merit. “Under res judicata, a valid final judgment bars future actions between the same parties on the same cause of action” (*Simmons v Trans Express, Inc.* 37 NY3d 107, 111 [2021]; *see also Denehy v St. John’s Queens Hosp.*, 114 AD2d 991, 992 [2d Dept 1985] [“The dismissal of the prior action by the Federal District Court for lack of subject matter jurisdiction does not require that the present action be dismissed on the ground of res judicata”]). Here, despite Lilogy’s assertion that BT actually tried Count I in the Arbitration or could have properly brought the claims, the arbitrator determined that “BT has not brought a claim for breach of the separate agreement contained within Purchase Order 07012020A (the Second Purchase Order)” because the Second Purchase Order “formed a separate agreement than what is contained in the Supply Agreement” (Final Award at 21-22). The Second Purchase Order is thus not within BT’s breach of contract claim in the Arbitration Complaint because the Arbitration Complaint is limited to the Supply Agreement (Final Award at 21). Put differently, the arbitrator concluded that JAMS had no jurisdiction over the Second Purchase Order based on the arbitration clause in Section 7 of the Supply Agreement. Given this conclusion, the arbitrator had no occasion to address the merits of BT’s breach of contract claim arising under the Second Purchase Order. Therefore, the arbitrator’s decision was not a final adjudication on the merits (*see Baltimore Mail S. S. Co., v Fawcett*, 269 NY 379, 390 [1936]). Since BT’s Count I in the current lawsuit is only about the Second Purchase Order, Count I is not precluded by the doctrine of res judicata.

The court reaches a similar conclusion with respect to Count II for account stated. The issue relevant to Count II is whether the grant of summary judgment is a judgment on merit. The grant of summary judgment usually results in a final judgment only if the grant resolves all issues for all parties (*Burke v Crosson*, 85 NY2d 10, 15 [1995] [“an order or judgment that disposes of some but not all of the substantive and monetary disputes between the same parties is, in most cases, nonfinal.”]). Here, BT’s Count II is same as the account stated claim in its Motion

for Summary Disposition of the Arbitration. The arbitrator did not recognize this claim because BT brought this claim after the arbitrator was appointed and did not request for leave to amend (Order on Pending Motions at 4).¹ However, because a summary judgment should resolve all issues for all parties to be a judgment on merit, and the Order on Pending Motions left the issues unresolved,² the arbitrator's summary judgment is not a judgment on merit (*Burke*, 85 NY2d at 15; *Marna Const. Corp. v Town of Huntington*, 31 NY2d 854, 855 [1972] [In an action by a contractor to recover from town for work performed and materials furnished under a construction contract, the interlocutory judgment was not final because the plaintiff asserted a recovery of money claim, but the judgment left open amount of recovery]). Therefore, whatever the arbitrator's decision on the account stated claim, BT's Count II is not precluded by the doctrine of res judicata.

For Count III, the declaratory judgment cause of action, Lilogy relies on *White Rock Ins. Co. PCC Ltd. v Lloyd's Syndicate 4242* (202 AD3d 563 [1st Dept 2022]) for the proposition that the dismissal of the lawsuit following arbitration is barred by res judicata (*id.* at 564). Lilogy's reliance on *White Rock* is misplaced. In *White Rock*, the dispute in the arbitration related to a reinsurance contract, under which the plaintiff agreed to provide reinsurance to the defendant for one year, while the lawsuit filed in court related to a trust agreement governing a trust account, which secured the plaintiff's obligations as part of the reinsurance program (*id.* at 563). The arbitrators considered the trust agreement as part of the same transaction as the claims in the arbitration (*id.* at 565). When the plaintiff raised the provisions of the trust agreement as a defense to liability under the reinsurance contract and submitted evidence regarding the trust agreement, the arbitrator decided that the agreement did not limit the plaintiff's liability under the reinsurance contract to the amount in the trust account (*id.*).

Here, unlike in *White Rock*, despite the parties' arguments and evidence about the Second Purchase Order, the arbitrator did not consider the Second Purchase Order when deciding the liability of the parties under the Supply Agreement and determined that the Second Purchase Order is "not encompassed within the Supply Agreement" (Final Award at 21). Accordingly, despite the arbitrator's determination in favor of Lilogy regarding the \$549,965 deposit, there is no judgment on the merit regarding the Second Purchase Order in the Arbitration. Since BT avers its right to keep the deposit as a setoff or recoupment for the amounts not paid for the Second Purchase Order, which is not determined in the arbitration, BT's Count III is not precluded by the doctrine of res judicata.

¹ BT's account stated claim was foreclosed by JAMS Comprehensive Arbitration Rules 10. JAMS Rule 10 provides that once the arbitrator is appointed, no new or different claim may be submitted without approval of the arbitrator (Order on Pending Motions at 3).

² The unsolved issues include BT's claim for breach of contract and Lilogy's counterclaims for breach of contract and unjust enrichment (Final Award at 2).

In sum, none of PT's claims are precluded by the doctrine of res judicata.

Collateral Estoppel

“Collateral estoppel, or issue preclusion, ‘precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party... whether or not the tribunals or causes of action are the same’” (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999], quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Issue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) the issue was necessary to support a valid and final judgment on the merits (*Rojas*, 186 AD3d at 108-109). Notably, the doctrine is “a flexible one and the enumeration of these elements is intended merely as a framework, not a substitute, for case-by-case analysis of the facts and realities” (*Buechel v Bain*, 97 NY2d 295, 303-304 [2001]).

Here, the question before the court is whether BT's three claims regarding the Second Purchase Order were actually litigated and necessarily decided. Lilogy argues that the arbitrator necessarily decided issues related to the First Purchase Order about Lilogy's deposit and the Second Purchase Order about the Home Depot transactions because the arbitrator heard all the evidence related to each cause of action asserted by BT in this lawsuit (Deft's MOL at 10). Lilogy also cites the Second Restatement of Judgments § 27, which provides that a “determination” of an issue “may be based on a failure of pleading” such as a motion to dismiss (NYSCEF # 22 – MOL in Reply at 11). Lilogy argues that the arbitrator denied BT's breach of contract and account stated claims in its motion for summary judgment because the two claims had simply not been brought properly (Deft's MOL at 9-10). BT responds that its claims concerning the Second Purchase Order were not necessarily decided, or even decided at all, because the arbitrator determined that he did not have the authority to hear them in the arbitration (MOL in Reply at 11).

As discussed above, there was no final judgment as to any of BT's three claims advanced in this litigation, let alone a determination of any issues. Specifically, because the three claims arose out of the Second Purchase Order, a separate agreement from the Supply Agreement, the arbitrator declined to address these issues (Final Award at 22). As a result, BT's three claims were not necessarily decided in the Arbitration (*Color by Pergament, Inc. v O'Henry's Film Works, Inc.*, 278 AD2d 92, 94 [2000] [for an issue to have been actually litigated, it must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding]). For Count II, the arbitrator did not recognize BT's account stated claim when resolving BT's motion for summary judgment because BT failed to state the claim properly (Order on Pending Motions at 4). Even if the arbitrator recognize the account stated claim, the arbitrator refused to decide

this claim because the claim is about the Second Purchase Order and JAMS had no jurisdiction over this purchase order based on the arbitration clause in the Supply Agreement. Therefore, the doctrine of collateral estoppel precludes none of the three claims brought by BT.

2. Plaintiff's Declaratory Judgment Claim For Recoupment and Setoff

Plaintiff's third cause of action for a declaratory judgment is dismissed for the following reasons:

In seeking dismissal of BT's recoupment and setoff claim, Lilogy argues that the doctrines of recoupment and setoff are either defenses or counterclaims and cannot serve as an independent claim for affirmative relief (Deft's MOL at 11). Relying on *Enrico & Sons Contr., Inc. v Bridgemarket Assoc.*, 252 AD2d 429, 430 [1st Dept 1998], quoting *Enrico & Sons*, Lilogy asserts that "[r]ecoupment is an equitable doctrine It is really a defense, as it denies the validity of plaintiff's claim in the amount claimed because it denies the validity of plaintiff's claim in the amount claimed, and does not entitle defendants to any affirmative relief or any amounts in excess of the amount demanded by plaintiff.' (cleaned up)" (NYSCEF # 16 at 11 quoting *Enrico & Sons*, 252 AD2d at 430). In response, BT argues that declaratory judgment is the flipside of an affirmative defense, even if recoupment and setoff are defensive in nature (Pltf's MOL in Opp at 11).

The doctrine of recoupment "permits a defendant to seek equitable recoupment in an otherwise untimely defense or counterclaim, if it arises from the transactions, occurrences, or series of transactions or occurrences alleged in the complaint" (*California Capital Equity, LLC v IJKG, LLC*, 151 AD3d 650 [1st Dept 2017]). "The counterclaims or defenses must arise from or relate to the 'same' transactions or series of transactions" (*id.*). Recoupment is defensive in nature because "it denies the validity of plaintiff's claim in the amount claimed, and does not entitle defendants to any affirmative relief or any amounts in excess of the amount demanded by plaintiff" (*Enrico & Sons Contr., Inc. v Bridgemarket Assoc.*, 252 AD2d 429, 430 [1st Dept 1998]).

As to a setoff, Lilogy's argument lumps setoff with recoupment, the case it cites in support, *Enrico & Sons*, speaks to recoupment only (*id.* at 429-430). In any event, "a set-off is a money demand independent of and unconnected with the plaintiff's cause of action" which may be pled as a defense or a counterclaim (*Otto v Lincoln Sav. Bank of Brooklyn*, 268 AD 400, 402 [2d Dept 1944]). And a setoff is allowed if "mutual debts or mutual credits" are involved; "debts and credits are mutual when they are 'due to and from the same person in the same capacity'" and need not arise from the same transaction (*Matter of Midland Ins. Co.*, 79 NY2d 253, 259 [1992]).

Here, BT, as a plaintiff, cannot maintain its declaratory judgment because recoupment is defensive in nature and a right of the defendant. Furthermore, the doctrine of recoupment requires debts arise from the same transactions. The debt in BT's recoupment claim arises from the Second Purchase Order, whereas \$549,965 deposit to be recouped arises from the First Purchase Order, a purchase order under the constraint of the Supply Agreement. Since the arbitrator decided that the Second Purchase Order is a "separate and distinct" transaction from the Supply Agreement, the debts arise from different transactions, rather the same transaction. Therefore, BT cannot bring the declaratory judgment claim under the doctrine of recoupment.

Similarly, although the doctrine of setoff does not require the debts arising from the same transactions, it is also defensive in nature and a right of the defendant, not a right of the plaintiff. Therefore, BT, as a plaintiff, cannot bring the declaratory judgment claim under the doctrine of setoff.

Finally, Lilogy correctly argues that because BT has an adequate remedy under its breach of contract and account stated claims causes of action, the declaratory judgment cause of action for recoupment and setoff are unnecessary and inappropriate (*id.* at 12). As BT's breach of contract claims is proceeding, this claim for declaratory judgment is duplicative and should be dismissed (*see Ithilien Realty Corp. v 180 Ludlow Dev. LLC*, 140 AD3d 621, 622 [1st Dept 2016]).

Conclusion


For the foregoing reasons, it is hereby

ORDERED that defendant's motion to dismiss is granted to the extent that the third cause of action for a declaratory judgment is dismissed; and it is further

ORDERED that within 30 days of entry of this order, defendant shall file an answer to the complaint.

This constitutes the Decision and Order of the court.

10/11/2023
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE