

**Lion Point Capital, LP v Burgerfi Intl., Inc**

2023 NY Slip Op 33740(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 653099/2022

Judge: Margaret A. Chan

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  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

-----X	
LION POINT CAPITAL, LP	INDEX NO. <u>653099/2022</u>
Plaintiff,	MOTION DATE <u>04/13/2023</u>
- v -	MOTION SEQ. NO. <u>002</u>
BURGERFI INTERNATIONAL, INC.	
Defendant.	<b>DECISION + ORDER ON MOTION</b>
-----X	

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33

were read on this motion to/for

JUDGMENT - SUMMARY

Plaintiff Lion Point Capital, LP (Lion Point) brings this action against defendant Burgerfi International, Inc. (BFI) seeking monetary damages on its single cause of action for breach of contract related to BFI's alleged failure to timely register its shares with the United States Securities and Exchange Commission (SEC) (NYSCEF # 23 – Amended Compl). BFI, in its amended answer, raises eight affirmative defenses (NYSCEF # 24 – Amended Answer). Lion Point now seeks summary judgment as to BFI's liability and to dismiss BFI's affirmative defenses pursuant to CPLR 3212 and CPLR 3211 (b). BFI opposes.

For the following reasons, Lion Point's motion is granted.

### Background<sup>1</sup>

Plaintiff Lion Point is an investment firm located in New York City (NYSCEF # 17 – joint rule 19-a statement, ¶ 1). In February 2018, Lion Point entered into a forward purchase agreement (the FPA) with BFI's corporate predecessor, OPES Acquisition Corp. (OPES) (*id.* ¶ 3). OPES was a public company with no operating business, and its sole purpose was to find and merge with a private operating company, thereby taking the private company public (*id.*). Under the FPA, Lion Point agreed to purchase \$20,000,000 of stock in the combined OPES-target company should OPES successfully merge with a private company (*id.* ¶ 4). Under

<sup>1</sup> The following facts are drawn from the parties' joint rule 19-a statement of undisputed material facts and are undisputed unless otherwise noted (NYSCEF # 17).

the FPA, Lion Point and the combined company must enter into a Registration Rights Agreement when the merger closed (*id.* ¶ 5).

On December 16, 2020, OPES merged with a private fast-food restaurant company—BurgerFi International, LLC (the Merger); the combined company is BFI, the defendant (*id.* ¶ 7). Upon the closing of the Merger, Lion Point purchased BFI shares and warrants worth of \$20,000,000, and therefore owned 2,745,938 shares of BFI's common stock plus warrants exercisable into an additional 2,083,438 shares of common stock (collectively, the Shares) (*id.* ¶¶ 8, 9).

Contemporaneous with the Merger and as required by the FPA, Lion Point and BFI executed a Registration Rights Agreement (RRA) on December 16, 2020 (NYSCEF # 17, ¶ 10; NYSCEF # 20 – the RRA). The RRA obligated BFI to register the Shares with the SEC using SEC Form S-1 (NYSCEF # 20, § 2.1.1). Without this registration, the Shares would be restricted securities or control securities and could not be freely traded in the open market without a material discount to the market price (Securities Act Rule 114 [a] [3], [b]-[d]).

Specifically, the RRA provided that on or before “each Filing Date, [BFI] shall prepare and file with the [SEC] a Registration Statement covering the resale of all BFI common stocks and warrants to the extent “permitted by SEC Guidance” (NYSCEF # 20, § 2.1.1). “Filing Date” means “the 30th calendar day following the Closing Date” of the Merger with respect to the initial registration statement (*id.* § 1). Under the RRA, BFI was obligated to file the initial registration statement with the SEC for the Shares by January 15, 2021, 30 days after the closing on December 16, 2020. The RRA permits a holder of BFI's shares, such as Lion Point, to “protect and enforce its rights by suit in equity or action at law” if BFI breached the RRA (*id.* § 6.10). For a party to waive its right under the RRA, there must be a written waiver signed by the waiving party (*id.* § 6.9). New York law is the governing law of the RRA (*id.* § 6.11).<sup>2</sup>

BFI failed to file the initial registration statement for the Shares with the SEC by January 15, 2021 (NYSCEF # 17, ¶ 11). On Thursday, February 11, 2021, a Lion Point employee emailed BFI and copying Irshad Karim, Lion Point's General Counsel and Chief Compliance Officer, inquiring as to when Lion Point will get the draft registration statement and noted that “Monday will be 30 days since it was due to be filed per our agreement” (NYSCEF # 31, Karim aff ¶¶ 4, 5 ; NYSCEF # 32, email). The following Tuesday, February 16, 2021, Lion Point brought this failure to file to BFI's Executive Chairman of the board of directors, Ophir Sternberg, noting that “you were legally obligated to file a registration statement so that Lion Point's shares could be registered within 30 days of the Initial Business Combination[ ]” and urged BFI to “honor your legal obligations to [Lion Point]” pointing out that “this [was] the fourth or fifth time we've made this request” (NYSCEF # 31, ¶ 5; NYSCEF # 33, email). On March 9, 2021, Lion Point wrote to BFI's Chief Legal

---

<sup>2</sup> Lion Point and BFI have stipulated to the authenticity and completeness of the RRA (NYSCEF # 17, ¶ 10).

Officer and Corporate Secretary, Ross A. Goldstein, asserting that BFI, in failing to register the Shares with the SEC by January 15, 2021, had violated the RRA and caused “significant harm to Lion Point,” because it could not trade its BFI shares in the public market (NYSCEF # 21 at 1). Lion Point ended this letter by demanding that BFI “remedy its breach of the [RRA] immediately” (*id.* at 2).

Ultimately, BFI filed the initial registration statement with the SEC on April 30, 2021, and on May 10, 2021, the SEC declared the registration statement effective (NYSCEF # 17, ¶ 12). As of May 10, 2021, BFI’s stock was trading at \$11.45 per share, below the trading price of \$13.39 per share on January 15, 2021, the latest date permissible under the RRA for BFI to make the initial filing (NYSCEF # 11, ¶ 45; NYSCEF # 12, ¶ 45).

In the instant motion for summary judgment on liability (NYSCEF # 25 – Pltf’s MOL), Lion Point argues that the RRA is unambiguous in obligating BFI to make the initial filing with the SEC by January 15, 2021 (*id.* at 9-10), and BFI’s filing delay is a breach of the RRA, which “restricted Lion Point from selling its shares when it would have been advantageous to do so” (*id.* at 8-9). Lion Point posits that BFI’s interpretation of the RRA as only requiring BFI to exercise best efforts in filing would render the RRA meaningless (*id.* at 10-13). To wit, the mandate that BFI “shall prepare and file with the [SEC] a Registration Statement” is clear and not to be confused with the language requiring BFI to “use its commercially reasonable efforts” to account for outside factors (*id.* at 11-12). Lion Point claims damages in the amount to be determined at trial but no less than \$26,800,000, plus pre-judgment interest (NYSCEF # 11 at 9). Lion Point also seeks an order dismissing all eight of BFI’s affirmative defenses,<sup>3</sup> contending that BFI’s allegations for its affirmative defenses “do no more than state legal conclusions” (NYSCEF # 25 at 15-18).

In opposition, BFI does not agree that any breach of the RRA had occurred or that it is liable to Lion Point for any alleged damages (*see* NYSCEF # 22, pre-suit letter from BFI’s counsel to Lion Point’s counsel). BFI makes clear that Lion Point was well aware of the delay, and Lion Point had not realized any losses (NYSCEF # 22). Specifically, BFI contends that Gregory Mann, who was designated a seat on BFI’s board of directors by Lion Point, represented to BFI that “Lion Point was aware of the delay . . . and had no intention to sell” the Shares (NYSCEF # 28, Schnoop aff ¶¶ 3-6). BFI points out that Lion Point has no showing to support its claim that it wanted to or tried to sell its shares (NYSCEF # 29 – Deft’s MOL at 8). And because Lion Point knew of and acquiesced to the delay, Lion Point waived its right to the relief it now seeks (*id.* at 6).

---

<sup>3</sup> BFI’s affirmative defenses are: (i) failure to state a claim; (ii) unclean hands; (iii) failure to mitigate damages; (iv) intervening causes; (v) no causation; (vi) the alleged harm was caused by the acts or omissions of others outside BFI’s control; (vii) laches; and (viii) estoppel (NYSCEF #s 5, 12).

As to its delay in filing the registration statement, BFI asserts that its delay can be excused because outside factors – namely, the transfer agent – beyond BFI’s control caused the unforeseen delay (*id.* at 7). BFI adds that there is no breach of contract when Lion Point cannot and does not show that it sustained any damages (*id.* at 7-8). And in any event, the damages, if any, are not from BFI’s delay but from the time the SEC declared the registration statement effective (*id.* at 9-10). According to the RRA, BFI was only required to use “commercially reasonable efforts” to get the registration statement declared effective, which it did (*id.* at 10). BFI concludes that Lion Point’s motion for summary judgment should be denied in its entirety. Notably, BFI does not address Lion Point’s challenge to its affirmative defenses (NYSCEF # 29).

### Discussion

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once that showing is made, the burden shifts to the opposing party to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]).

On a motion for summary judgment, evidence presented must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017]). But “facts appearing in the movant’s papers, which the opposing party does not controvert, may be deemed to be admitted” (*John William Costello Assoc., Inc. v Std. Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984]). Although summary judgment is “considered a drastic remedy,” “when there is no genuine issue to be resolved at trial, the case should be summarily decided” (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In this regard, the court’s task at this juncture “is issue finding, not issue determination” (*Lebedev v Blavatnik*, 193 AD3d 175, 184 [1st Dept 2021]).

A prima facie case on a breach of contract claim requires “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Belle Light, LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019]). For the damages element, “[n]ominal damages are always available in breach of contract action[s]” (*Schleifer v Yellen*, 158 AD3d 512, 513 [1st Dept 2018], citing *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993]). In addition to nominal damages, courts may award general damages that are “the natural and probable consequences of defendant’s breach” (*Mazursky Group, Inc. v 953 Realty Corp.*, 166 AD3d 432, 433 [1st Dept 2018]). In this regard, a plaintiff’s damages must “ordinarily and naturally flow from the non-performance” of defendant (*Fruition, Inc. v Rhoda Lee, Inc.*, 1 AD3d 124, 125 [1st Dept 2003]; *Cushman & Wakefield of Connecticut, Inc. v Access Private Duty Services at HJDOI, Inc.*, 154 AD3d 447, 448 [1st Dept 2017] [awarding “proximate and certain damages that flowed directly from defendants’ breach”]).

Here, Lions Point asserts that it has presented a prima facie entitlement to summary judgment as to liability in that the RRA is clear on BFI's obligation to timely file the initial registration with the SEC. And BFI's breach of that obligation is just as clear. As to BFI's waiver by acquiescence argument based on Lion Point's knowledge of the delay and alleged lack of interest to sell its shares, Lion Point references the RRA, which requires any waiver to be in signed writing (*id.* at 2-4). As for its showing of damages, Lion Point maintains that it is at least entitled to recover nominal damages, and the damages it sustained—the inability to freely trade on the Shares and any financial loss—flow directly and naturally from BFI's breach can be determined (NYSCEF # 30 at 6-9). Lastly, Lion Point asserts that BFI has waived the affirmative defense of impracticality by not raising it in BFI's amended answer. But even if this defense was timely asserted, it would not apply here because BFI's transfer agent's delays were foreseeable and did not excuse BFI's obligation under the RRA (*id.* at 4-6).

The court concludes that Lion Point has established a prima facie case on BFI's liability for breach of contract. Rule 19-a of the Commercial Division (22 NYCRR 202.70) allows motion courts to deem facts in a statement of undisputed material facts as admitted (*Abreu v Barkin and Assoc. Realty, Inc.*, 69 AD3d 420, 421 [1st Dept 2010]). And on a summary judgment motion, “[f]ailure to contradict facts is an admission” (*Cast Iron Co., LLC v Cast Iron Corp.*, 2018 WL 3743901 [Sup Ct, New York County 2018], *affd*, 177 AD3d 492 [1st Dept 2019]). Here, Lion Point and BFI have stipulated to the authenticity and completeness of the RRA in their joint rule 19-a statement (NYSCEF # 17, ¶ 10). BFI does not contest Lion Point's performance under the RRA (NYSCEF #'s 12, 28, 29). And BFI concedes its failure to make an initial filing with the SEC by January 15, 2021 (NYSCEF # 17, ¶ 11). Given the admitted facts, Lion Point has established that it performed under a valid contract, which BFI breached.

BFI has failed to raise a triable issue of fact as to whether Lion Point has waived its rights under the RRA by acquiescence. BFI posits that Lion Point acquiesced to the delay in BFI's initial registration because Lion Point knew of such delay and represented that it had no intention to sell the Shares (NYSCEF # 29 at 6). However, Lion Point could not, by acquiescence, waive its contractual right to have the Shares timely registered, as the RRA requires such a waiver to be written and signed (NYSCEF # 3, § 6.9). Further, the RRA is governed by New York law (NYSCEF # 3, § 6.11), under which “[w]aiver . . . should not be lightly presumed” absent evidence of a clear manifestation of intent to relinquish contractual rights (*Homapour v Harounian*, 200 AD3d 575 [1st Dept 2021] [internal citation omitted]). BFI has submitted no evidence of a written waiver or other evidence clearly showing an intent to waive. Conversely, Lion Point provides its letters to BFI on February 11, February 16, and March 9, 2021, all urging BFI to register the shares with the SEC, manifesting Lion Point's intent to enforce its contractual right (NYSCEF #'s 21, 32, 33). Thus, the record indicates that Lion Point has not waived its rights under the RRA.

In terms of damages, Lion Point argues that it sustained “damages equivalent to the lost profits resulting from BFI’s breach” (NYSCEF # 25 at 8). Lion Point asserts that when the Shares finally became freely tradable on May 10, 2021, its price per share had decreased to \$11.45, from \$13.39 per share on January 15, 2021, the latest registration date permitted by the RRA (NYSCEF # 11, ¶ 45). BFI admits this price decrease (NYSCEF # 12, ¶ 45). But BFI claims that Lion Point is not damaged by its breach because Lion Point provides no evidence that it “actually desired or would have attempted to sell” the Shares before May 10, 2021 (NYSCEF # 29 at 2, 8). The record, however, shows otherwise. Between February and March 2021, Lion Point had written to BFI at least three times regarding BFI’s delay in registering the shares, expressly stating that the delay “imped[ed] Lion Point’s ability to trade these securities,” manifesting an intent to trade (NYSCEF # 21 at 1; NYSCEF #s 32, 33).

In any event, Lion Point’s summary judgment motion as to liability is appropriate because Lion Point is at least entitled to nominal damages to vindicate its contractual rights (*Gordon v Schaeffer*, 176 AD3d 431 [1st Dept 2019] [granting plaintiff’s summary judgment motion as to liability although plaintiff had yet to demonstrate damages]; *Schleifer*, 158 AD3d at 513 [“[a]s for . . . respondents’ argument that petitioners were not injured by the delay in providing the financial statement, nominal damages are always available in breach of contract action”]). As such, the court rejects BFI’s contention that Lion Point’s motion for summary judgment fails for lack of damages (*Northway Mall Assoc. v Bernlee Realty Corp.*, 90 AD2d 739 [1st Dept 1982] [the “possibility [that plaintiff is unable to prove any damages] is not a reason for denying a motion for summary judgment on issues of liability”]).

BFI’s contention that Lion Point’s damages, if any, are not “proximately caused by [BFI]’s alleged omissions” because Lion Point’s “ability to sell its shares does not hinge *solely* on [BFI], but also depends on the SEC declaring a registration statement effective” (NYSCEF # 29 at 5, 10 [emphasis added]) conflates proximate cause with sole or exclusive cause. In fact, while a plaintiff must prove a defendant’s breach to be the proximate cause of its damages (*Fruition, Inc.*, 1 AD3d at 125), it “is not necessary that the breaches be ‘the exclusive cause’ or the ‘sole cause’ of the damages” (*Fed. Hous. Fin. Agency for Fed. Home Loan Mtge. Corp. v Morgan Stanley ABS Capital I Inc.*, 59 Misc 3d 754, 784 [Sup Ct, New York County 2018] [emphasis in original]). Here, even if BFI’s untimely filing is not the only factor affecting the Shares’ tradability, Lion Point’s inability to freely trade on the Shares until May 10, 2021, and any resulting financial loss remain a natural and probable consequence of BFI’s omission to file until April 30, 2021 (NYSCEF # 11, ¶ 45; NYSCEF # 12, ¶ 45; NYSCEF # 17, ¶ 12). Therefore, any damages of Lion Point flow naturally and directly from BFI’s breach. In sum, Lion Point has demonstrated prima facie entitlement to summary judgment as to liability.

BFI’s attempt to belatedly raise a new affirmative defense of impracticality is similarly unavailing. Impracticability or impossibility is an affirmative defense that

“would be ‘deemed waived if not raised in the pleadings’ ” (*Butler v Catinella*, 58 AD3d 145, 150 [2d Dept 2008]; see *Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536, 537 [1st Dept 2022] [finding impossibility to be an affirmative defense]). In its amended answer, BFI did not plead impossibility as an affirmative defense, and has therefore waived it. Even assuming *arguendo* that this defense was timely raised, it should be dismissed as inapplicable. “The defense of impossibility or impracticability of performance is applied narrowly such that performance is excused only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible” (*Reed Found., Inc. v Franklin D. Roosevelt Four Freedoms Park, LLC*, 108 AD3d 1, 7 [1st Dept 2013]). Here, BFI offers no evidence that either the subject matter of the RRA or BFI’s means of performance was destroyed so as to render BFI’s registration with the SEC objectively impossible. As such, the defense of impossibility, even if not waived, is inapplicable to excuse BFI’s failure to perform (*Knickerbocker Retail LLC*, 204 AD3d at 537 [finding the defense of impossibility as inapplicable where the performance was not objectively impossible]).

As to the branch of Lion Point’s motion to dismiss BFI’s affirmative defenses, it is granted as BFI has not opposed this branch of Lion Point’s motion (see *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [stating that a claim is deemed abandoned if a party did not oppose to the opposing side’s motion for summary judgment dismissing the claim]). In any event, the eight affirmative defenses should be dismissed for only “plead[ing] conclusions of law without supporting facts” (*170 W. Vil. Assoc. v G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *Bd. of Managers of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569, 569 [1st Dept 2019] [“affirmative defenses were correctly dismissed on the ground that they were pleaded conclusorily”]).

**Conclusion**

In view of the above, it is

ORDERED that plaintiff Lion Point Capital, LP’s motion for summary judgment as to defendant Burgerfi International, Inc.’s liability for breach of contract is granted; and it is further

ORDERED that defendant’s affirmative defenses in its amended answer (NYSCEF # 12) are dismissed as abandoned.



10/12/2023  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	