

Avanza Group, LLC v BFG 102, LLC

2023 NY Slip Op 33839(U)

October 27, 2023

Supreme Court, New York County

Docket Number: Index No. 651927/2023

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

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THE AVANZA GROUP, LLC,

Plaintiff,

INDEX NO. 651927/2023

MOTION DATE 09/07/2023

MOTION SEQ. NO. 006

- v -

BFG 102, LLC, ACH PROCESSING COMPANY, INC,
FRANCESCO SCARSO, RAYMOND GAGNI

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 136, 137, 138, 139, 140, 141, 170, 171, 172, 173, 174, 175, 176, 177, 178, 180

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant ACH Processing Company Inc’s motion to dismiss the complaint is granted.

Background and Facts

Plaintiff the Avanza Group, LLC (“Avanza”) is an “MCA” provider, in the business of selling “merchant cash advances.” Avanza’s business entails entering into agreements with merchants (“Merchant Cash Agreements”), where in exchange for providing the merchant with a lump sum of funds, the merchant sells Avanza a percentage of their business profits moving forward. Defendant BFG 102, LLC (“BFG”) is a “factoring” company that acts as a funding source for MCA companies such as Avanza. In exchange for providing the funding upfront, BFG purchases a right to receive payments from the MCA’s merchant clients. Defendant ACH Processing Company, Inc (“ACHP”) is a processor of electronic fund transfers, which companies such as Avanza and BFG utilize to collect payments from the merchants.

On or about November 15, 2018, Avanza and BFG entered into a contract (“the Master Funding Agreement”). NYSCEF Doc. No. 15. Under this agreement, BFG agreed to give funding to Avanza to finance its merchant cash advances and in exchange Avanza sold the right to receive certain payments from Avanza’s merchant clients, also known as “RTRs.” On January 11, 2021, Avanza and BFG entered into a “Tri-Party Agreement” with ACHP. Under this agreement, ACH was to collect the payments from the bank accounts of Avanza’s merchants. According to ACHP, its role was essentially that of an escrow agent, and thus solely a “middleman.”

In part, the Tri-Party agreement provides,

“Processor and the MCA hereby confirm and agree for the benefit of Factor as follows: (a) Processor will follow all instructions that Factor may from time to time hereafter give to it with respect to amounts payable hereunder to Factor (b) the MCA will not give, and Processor will not honor, any instructions with respect to the amounts referenced above, other than those approved in writing by Factor...”

On May 15, 2022, Avanza and BFG entered into another Master Funding Agreement. NYSCEF Doc. No. 16. A dispute arose in April 2023, when Avanza alleges that despite BFG’s presentation via email that it would allow Avanza to reduce its monthly payments to BFG to \$10,000 per day, BFG changed its mind and requested higher payments. Avanza alleges BFG then sent a letter to Avanza’s merchant customers, stating Avanza was in default, and directing the merchants to send their payments directly to BFG. BFG does not dispute it sent this letter to Avanza’s customers. Rather, BFG alleges it sent the letter as a result of Avanza’s default under their Merchant Funding Agreement.

On August 14, 2023, BFG sent ACHP a letter directing it to transfer the funds it had collected from the merchants into a BFG account. ACH complied, transferring the funds to BFG’s account. ACHP asserts that under the tri-party agreement it was contractually obligated to

follow BFG's instructions and transfer the funds. Avanza alleges that the diversion of these funds by ACHP is the basis of its tort and breach of contract claims against ACHP.

ACHP now moves pursuant to CPLR 3211(a)(1) and (7) to dismiss Avanza's claims in their entirety, arguing that as it followed its contractual obligations, it can not be liable to Avanza. Avanza opposes, arguing that ACHP is liable to Avanza not for breach of contract but for tort claims because ACHP owed a duty to Avanza.

Standard of Review

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83 (1994). With respect to CPLR§3211(a)(1), a motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes a plaintiff's factual allegations, and conclusively establishes a defense as a matter of law. *See Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 327 (2002).

Discussion

As a preliminary matter, the Court addresses Avanza's argument that the Tri-Party agreement dated January 11, 2021, is superseded by the secondary Master Funding Services Agreement entered into by Avanza and BFG on May 15, 2022. Even accepting as true Avanza's assertion that this later Master Services Funding Agreement "superseded all prior agreements between the parties," this would have no effect on the Tri-Party Agreement with ACHP. Avanza has not alleged, nor offered any evidence to indicate, that the later MFSA included as a party, ACHP. Therefore, the May 15, 2022 agreement between Avanza and BFG has no legal effect on

the Tri-Party Agreement. This agreement explicitly requires ACHP to follow the directions of BFG. Avanza does not dispute that ACH followed the directions of BFG as it was directed to in this agreement.

It is well settled that a simple breach of contract action is not considered a tort unless a legal duty independent of the contract itself has been violated. *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382 [1987]. Beyond the action of diverting funds to the bank account directed by BFG, Avanza has not alleged any other conduct by ACH as a basis for its claims. Thus, even assuming all of Avanza's facts as alleged are true, there is no basis for any of its claims against ACHP. It would be against policy and illogical to find that solely by explicitly following the terms of its contract, to which Avanza was a party to, ACHP committed a tort against Avanza.

Accordingly, it is hereby

ORDERED that the motion of defendant ACH PROCESSING COMPANY, INC to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, and the Clerk of the Court is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).

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10/27/2023
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART		
		<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 type="checkbox"/>	REFERENCE