SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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MARRIOTT INTERNATIONAL, INC., as manager of NEW YORK MARRIOTT MARQUIS,

Plaintiff,

- v -

NATIONAL SUPERMARKET ASSOCIATION, INC.,

Defendant.

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INDEX NO. 655627/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff's motion for summary judgment is granted in part as described below.

Background

Plaintiff contends that defendant held its annual gala in November 2019 at a Marriott Marquis hotel owned by plaintiff and that defendant never paid the final invoice. The issue in this case involves defendant's attempt to make that payment in March 2020. Plaintiff alleges that it reached out to defendant on multiple occasions following the gala to pay the invoice (which amounted to $188,306.61) but defendant refused to timely pay what it owned. It insists that the final invoice permitted defendant to pay the amount by check or wire and included the relevant information for the wire transfer (the bank, the account number, routing number and ACH number).

After months of communications, plaintiff asserts that defendant claimed it needed board approval for the payment in early March 2020. Plaintiff alleges that on the evening of March 11,

2020 it was told payment would be made shortly and plaintiff insisted that it be sent a confirmation after the money was wired. When plaintiff did not receive the wire confirmation, it reached out to defendant. After more communications over the next few days, defendant claimed that it had, in fact, paid the money owed while plaintiff insisted it never received the money.

Plaintiff claims that Mr. Goico (the general secretary of defendant) subsequently sent an email in early April 2020 in which he claimed that defendant's first attempt to send the wire transfer on March 12, 2020 was unsuccessful due to the omission of a single number for the bank account but that the wire was ultimately successful on March 16, 2020. Plaintiff claims that its director of accounting, Mr. Rigoli responded by noting that he did not recognize the account to which defendant sent the money and emphasized that the final invoice had the correct account number.

After more discussion, the parties eventually realized that defendant was defrauded; an imposter had sent an email impersonating an employee for plaintiff by using "rn" in its email address instead of "m" for "marriott." The fraudster sent alternative bank account information and induced defendant to send the money to a different account at a different bank. In other words, defendant eventually paid the money, but did not pay it to plaintiff.

Plaintiff moves for summary judgment to recover the amount from the unpaid invoice. Defendant does not deny that plaintiff never received the payment; instead, it blames plaintiff for the fraud at issue. Defendant's central argument is that the imposter rule under the UCC should compel the Court to deny the instant motion. This rule, according to defendant, applies to wire transfers and places the responsibility for the fraud on the party in the best position to prevent the fraud. Defendant argues that such a conclusion necessarily involves a factual determination which is not permissible on a motion for summary judgment.

Plaintiff insists that the UCC rule cited by defendant is inapplicable because it only applies to negotiable instruments and not wire transfers. It claims that even if the Court were to apply this rule, defendant was in the best position to discover the fraud. Plaintiff emphasizes that the wire instructions from the fraudsters included a different bank, a different account number, and were the result of emails that contained numerous grammatical errors. It argues that these factors put defendant in the best position to suspect fraud whereas plaintiff had no idea the fraudulent emails were sent until well after the money was transferred to the imposters.

Discussion

"The provisions of article 3 of the Uniform Commercial Code relating to check fraud have as their purpose ensuring the ready negotiability of commercial paper and advancing the important policy of assigning loss based upon the relative responsibility of the parties. Article 3 accomplishes these ends by establishing commercially sound rules designed to place the risk of loss attributable to fraud such as forged indorsements with the party best able to prevent them" (*Getty Petroleum Corp. v Am. Exp. Travel Related Services Co., Inc.*, 90 NY2d 322, 326, 660 N.Y.S.2d 689 [1997]).

The preliminary issue on this motion is whether the above provisions apply here. The parties agree that New York has not adopted the imposter rule in the context of wire transfers. Plaintiff points to a federal case in the Southern District of New York, which held that wire transfers were not covered under these provisions of UCC as they are not negotiable instruments (*Bank Brussels Lambert v Credit Lyonnais*, 40 UCC Rep Serv 2d 1217 [SD NY 2000]). And defendant points to a case from the Sixth Circuit which it claims shows that wire transfers should be covered under this part of the UCC.

The Court declines to expand the reach of the UCC under these facts. There is no dispute that a wire transfer is not a negotiable instrument, like a check. It may be that other institutions, such as the legislature, decide to expand the scope of this rule but this Court hesitates to expand a rule initially designed for a specific type of financial instrument. Numerous questions would arise, including the scope of this expansion, that are better suited for a determination by an entity like the legislature.

Even if the Court were to attempt to apply the rule, the Court would still grant plaintiff summary judgment. The standard, as stated above, requires the Court to look at which party is in the best position to prevent the fraud. The record here shows that defendant delayed making the payment for months (*see e.g.*, NYSCEF Doc. No. 63); this entire dispute may have been avoided if defendant had simply paid the bill on time.

But the key factor for this Court is that plaintiff (when defendant finally agreed to pay the bill) sent an email to defendant on March 11, 2020 in which it requested that a confirmation for the wire transfer be sent to plaintiff (NYSCEF Doc. No. 63 at 100 of 126). Defendant responded that it would do so (*id*.). But defendant never followed through and made plaintiff follow up again (*id*.).

In other words, on this record, the Court finds that only defendant was in any position to stop or discover the fraud. There is no dispute that the final invoice (NYSCEF Doc. No. 62) contained detailed information about the wire transfer, including that the money be wired to a specific account at Bank of America. And the fraudsters, posing as plaintiff, demanded the money be sent to a different account at Wells Fargo. That could be characterized as a red flag about fraud, but only defendant could have known about this discrepancy. There is no testimony

that defendant ever reached out to plaintiff to confirm the changes in banks or account information.

And there is no evidence that any of plaintiff's employees were included in the communications between defendant and the fraudsters, meaning that they had no chance to step in and raise questions about what was happening. That is, defendant never wrote to plaintiff to question anything. Put another way, the record shows that plaintiff was simply waiting (for months) to get paid and defendant paid the money to account without cross-referencing the updated information with the final invoice.

The Court recognizes that this occurred during the initial outbreak of the COVID-19 pandemic and that could certainly have influenced what happened here. Many entities were short-staffed and it is conceivable that there was a greater chance to make mistakes. But the pandemic does not suggest that plaintiff was in a better position to discover the fraud. As noted above, defendant never reached out to plaintiff with the wire transfer confirmation or called about the discrepancy between the banks or account numbers. That is not to say that defendant should have clearly known it was being defrauded—by all accounts, this seems to have been a sophisticated scheme. It merely shows that plaintiff was not in a position to discover the fraud.

Moreover, defendant did not show any evidence that the fraudsters obtained information about the invoice by infiltrating plaintiff's network and that plaintiff knew about such an intrusion (which could theoretically raise an issue about whether they were in a position to discover the fraud and warn defendant not to pay to the wrong bank). Defendant merely speculates that the fraudsters must have hacked plaintiff's network. Even if that happened, that does not put plaintiff in a better position to stop the fraud.

Legal Fees

There is no dispute that the parties' agreement provides that: "The parties agree that, in the event litigation relating to this Agreement is filed by either party, the non-prevailing party in such litigation will pay the prevailing party's costs resulting from the litigation, including reasonable attorneys' fees" (NYSCEF Doc. No. 61 at 10).

As plaintiff is the prevailing party, it is therefore entitled to reasonable legal fees. However, the Court cannot award the more than $75,000 sought by plaintiff on a motion alone. "An award of an attorney's fee pursuant to a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered. . . . While a hearing is not required in all circumstances, the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered" (*Citicorp Tr. Bank, FSB v Vidaurre*, 155 AD3d 934, 935, 65 NYS3d 237 [2d Dept 2017] [internal quotations and citations omitted]).

Here, the Court finds that a hearing is required to assess the reasonable value of the work performed; simply put, $75,000 is a substantial sum to award without a hearing. And while the Court recognizes that plaintiff and its firm have a contingency fee agreement regarding legal fees, defendant is not a party to that agreement and is therefore not bound by it. Defendant's only obligation is to pay reasonable legal fees.

The Court observes that defendant contends that the legal fees clause is unfair. Unfortunately, that is not a basis upon which the Court could find this provision unenforceable. Defendant, a sophisticated entity, held a gala at a hotel in Manhattan and signed a clear and unambiguous contract. It is therefore bound by those terms.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $188,306.61 plus interest at the contractual rate of 18% from February 13, 2020 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the issue of reasonable legal fees is severed and shall be determined at a virtual hearing on November 15, 2023 at 10 a.m. (an invitation to this Microsoft Teams meeting will be sent by the part clerk). The Court observes that the parties may endeavor to reach an agreement about reasonable legal fees and obviate the need for the hearing. Any exhibits that either party plans to use at the hearing must be uploaded to NYSCEF by November 9, 2023.

10/30/2023
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE