

Avanza Group, LLC v BFG 102, LLC
2023 NY Slip Op 33948(U)
November 3, 2023
Supreme Court, New York County
Docket Number: Index No. 651927/2023
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: <u>HON. LYLE E. FRANK</u> <i>Justice</i> -----X	PART 11M INDEX NO. <u>651927/2023</u> MOTION DATE <u>N/A, 09/29/2023</u> MOTION SEQ. NO. <u>004 005</u>
THE AVANZA GROUP, LLC, Plaintiff, - v - BFG 102, LLC, ACH PROCESSING COMPANY, INC, FRANCESCO SCARSO, RAYMOND GAGNI, Defendant. -----X	DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 82, 83, 84, 85, 86, 87, 88, 89, 90, 92, 94, 95, 96, 97, 98, 99, 100, 101, 102, 156

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 165, 166, 167, 181

were read on this motion to/for ORDER OF ATTACHMENT.

Background

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.

On November 15, 2018, Avanza and BFG entered into a factoring 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 May 15, 2022, Avanza and BFG entered into another Master Funding Agreement. NYSCEF Doc. No. 16. According to BFG, Avanza began missing installment payments starting on March 15, 2023, and then again on March 15, 2023, and April 1, 2023.

On April 13, 2023, via email correspondence, the Director of Operations for BFG informed representative for Avanza "we will need to revise your payment plan in order to get your payments back on track. For the rest of this week, we will continue with the daily \$10,000 payments. Starting next week, the week 4/17, we will need to increase daily payments to \$25,000." NYSCEF Doc No. 36. Shortly thereafter, the CEO of BFG, Eyal Levy sent an email to the representative of Avanza stating, "We discussed 10,000 every day for two weeks and then you will tell us what you can do." NYSCEF Doc. No. 37. Avanza asserts that these emails evidence a change in Avanza's contractual obligations, and thus as they had complied with these payment plans at that point, they were not in default. BFG asserts that these emails were not changes to the Master Funding Agreement and were rather attempts to collect from Avanza who was in default.

On April 13, 2023, BFG sent a letter to Avanza's merchant clients in part stating, "please be advised that BFG has purchased Avanza's right, title and interest in and to the Purchased RTR pursuant to a certain Master Funding Agreement between BFG and Avanza ("MFA"), and related agreements (collectively, the "Factoring Agreements"). Avanza has defaulted on its obligations under the Factoring Agreements, including but not limited to, making timely payments to BFG based on the Purchased RTR subject to the Merchant Agreement." The letter instructed the MCA clients to, "we request, however, that you continue to make any payments

required under the Merchant Agreement, as you have done previously. Any attempts to divert such payments on account of the Purchased RTR to another ACH provider or any third-party other than BFG will be viewed as wrongful interference with BFG's contractual rights. If you receive any such requests from Avanza, you should refuse those wrongful instructions and contact the undersigned immediately.” NYSCEF Doc. No. 50. Next, on August 14, 2023, BFG sent a letter to ACHP, the electronic fund transfers company charged with collecting the merchant payments, directing it to transfer the funds it had collected from the merchants into a BFG account. ACHP complied, transferring the funds pursuant to BFG’s request.

As a result, Avanza commenced this action against BFG, alleging that it was wrongful for BFG to contact Avanza’s merchant clients and direct ACH to divert the funds to BFG, on the grounds that Avanza was not in default as according to Avanza. As such, Avanza asserts claims for tortious interference with contract, tortious interference with prospective business advantage, conversion, breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, fraud, and libel per se. In response BFG asserted counter claims against Avanza for conversion and breach of contract.

BFG now moves pursuant to CPLR 3211(a)(1) and (7) to dismiss Avanza First Amended Complaint in its entirety, and further for an order of attachment freezing the assets of Avanza up to \$2,718,224.89 and \$500,000.00 for contractual attorney’s fees.

Standard of Review

On a motion to dismiss the court “merely examines the adequacy of the pleadings”, the court “accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff’s claim.” *Davis v Boenheim*, 24 N.Y.3d 262, 268 (internal citations omitted). “[T]he court was not required to accept factual allegations that are *contradicted* by documentary

evidence, or legal conclusions that are unsupportable in the face of undisputed facts.” *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006].

Discussion

I. Motion to Dismiss

a. Tortious interference with contract and tortious interference with economic advantage

To prevail on a claim for tortious interference with contractual or prospective contractual relations, a party must show that the alleged tortfeasor wrongfully interfered with the contract for the sole purpose of harming the plaintiff, or that he committed independent torts or predatory acts towards the third party. *Lerman b. Medical Association of Woodhull, P.C.* 160 A.D.2d 838 (1990). Furthermore, a claim for tortious interference with prospective business relations does not require a breach of an existing contract, but the party asserting the claim must meet a "more culpable conduct." *Law Offs. Of Ira H. Leibowitz v. Landmark Ventures, Inc.* 131 A.D.3d 583 (2015).

Here, Avanza alleges defendant BFG tortiously interfered with Avanza’s contracts between Avanza and their merchant clients by “intentionally and unjustifiably procur(ing) plaintiff MCA clients to breach Merchant Cash Agreements with Plaintiff...” Moreover, Avanza alleges BFG tortiously interfered with prospective economic advantage as “the timing and narrative of Defendant BFG’s counsels April 14, 2023 letter to the Plaintiff MCA Clients relied upon misrepresentation of material fact...” and further “Defendant BFG counsel’s April 14, 2023 letter to Defendant ACH not only reiterated those particular misrepresentations, it contained additional misrepresentations (e.g. that a previously invalidated Tri-Party Agreement purportedly required the transmission of Plaintiff’s funds to Defendant BFG’s bank account at

IDB when that contract had in fact designated signature back as the Segregated Account Custodian)...” NYSCEF doc no. 45.

BFG asserts Avanza’s tortious interference claims must be dismissed because BFG is the absolute owner of the Purchased RTR and under the Funding Agreements is expressly permitted to communicate to the merchants and collect directly from them pursuant to the 2022 MFA. BFG argues that it retains the right — with or without a default — to collect expressly from the merchants, and, indeed, the 2022 MFA prevents Avanza from instructing anyone otherwise. Moreover, BFG argues that the FAC does not sufficiently allege that BFG’s actions amounted to a crime or independent tort as BFG was exercising its “bargained for contractual rights by reaching out to the merchants to direct collection on RTR that it rightfully purchased.” NYSCEF doc no. 83.

The Court finds Avanza has failed to allege that defendant BFG’s actions letter was for the sole purpose of harming the plaintiff or that BFG committed independent torts or predatory acts. As the Master Funding Agreement between the parties provided defendant BFG was entitled to contact plaintiff’s MCA clients, and further the letter explicitly instructed the MCA merchants to continue with their contractual obligations, Avanza’s allegations do not amount to the required conduct to sustain a tortious interference with contract and/or tortious interference with economic advance claim.

Furthermore, to the extent that Avanza’s claims are based on BFG’s April 14, 2023, letter to ACHP, the Court previously determined in its October 27, 2023, order that the Tri-Party agreement explicitly granted BFG the ability to direct ACHP to act with respect to the funds collected. Additionally, the Court found the Tri-Party agreement was not superseded by the May 15, 2022, Master Funding Agreement as it was only between BFG and Avanza, and not ACHP.

Therefore, with respect to Avanza's claims for tortious interference with contract and tortious interference with prospective business relationships, BFG's motion to dismiss is granted.

b. Conversion

Under New York Law, conversion occurs when "someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Family Health Mgt., LLC v. Rohan Devs., LLC* 207 A.D.3d 136 (2022).

Avanza alleges it was "entitled to legal ownership of and had an immediate superior right of possession to" payments being made by Avanza's MCA clients pursuant to their Merchant Cash Advance Agreements and that "defendants exercised unauthorized dominion" over payments being made by the MCA Clients pursuant to those Merchant Cash Advance Agreements. Avanza further alleges, "Defendant BFG failed to properly reduce the Recognized RTR or Remittance Balance as such terms were defined in the Funding Agreement in order to correspond with the underlying performance of the Merchant Cash Advance Agreements Plaintiff had entered into with the specified third-party merchants."

BFG argues Avanza's claim for conversion must be dismissed because first, pursuant to the 2022 MFA, BFG is the owner of the Purchased RTR and has "legal ownership" and "immediate superior right" to all collections Avanza receives from the Purchased RTR and further because Avanza's allegation that BFG did not properly reduce the Recognized RTR is "vague and unsubstantiated." NYSCEF doc no. 83.

Construing the factual allegations in the light most favorable to plaintiff, these allegations are sufficient to state a plausible claim for breach of contract. While the Master Funding Agreement between Avanza and BFG demonstrates BFG's purchase of the RTRs, here Avanza

has alleged BFG failed to properly reduce the amount owed and thus obtained ownership over funds not within its contractual rights. Thus, there is a question of fact and dismissal is not appropriate at this juncture.

c. Breach of Contract and implied covenant of good faith and fair dealing

To establish a cause of action for a breach of contract, the Plaintiff must demonstrate: (1) the existence of an agreement; (2) adequate performance of the agreement by plaintiff; (3) breach of the agreement by defendant(s); and (4) damages suffered by the Plaintiff based upon the defendants' breach. *Noise in the Attic Productions v. London Records*, 10 A.D.2d 303 [1st Dept. 2004].

Avanza alleges BFG breached the Master Funding Agreement by failing to reduce the Plaintiff's recognized RTR or Remittance Balance in accordance with the corresponding performance of the underlying merchant cash advance agreements that Plaintiff had entered into with the specified third-party merchants. Accepting Avanza's allegations as true for the purposes of the motion to dismiss, the Court finds that Avanza has plead the elements of breach of contract.

Avanza further alleges BFG breached the covenant of good faith and fair dealing by tortiously interfering with Avanza's MCA Clients' contracts and further by its "conversion of monies paid by the Plaintiff MCA Clients had the effect of injuring, if not destroying, Plaintiff's right to receive the fruits of their contracts with the Plaintiff."

Under New York Law, all contracts imply a covenant of good faith and fair dealing in the course of performance, meaning neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *511 W. 232nd Owners Corp. v. Jennifer Realty Co.* 98 N.Y.2d 144 [2002] (internal citations omitted).

Here, it is undisputed that BFG comported with its contractual obligation in paying Avanza monies for its purchase of Avanza's RTRs. Thus, to the extent that Avanza's claim for breach of the implied covenant of good faith and fair dealing is based on Avanza's allegations that BFG failed to reduce the RTR balance and instructed ACHP to divert funds pursuant to the tri-party agreement, the claim is duplicative of Avanza's breach of contract claim and conversion claim. Therefore, with respect to Avanza's breach of contract claim, BFG's motion to dismiss is denied. However, with respect to Avanza's claim for breach of the implied covenant of good faith and fair dealing, BFG's motion to dismiss is granted.

d. Negligence

To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *Solomon v. New York* 66 N.Y.2d 1026 [1985]. "The existence of a legal duty is, of course, an essential element of any negligence claim" *Id.* The court must first, however, determine whether any legal duty exists. In the absence of a duty, as a matter of law, there can be no liability. *Id.*

Here, the Court finds the plaintiff Avanza has failed to articulate any duty which was owed by BFG, and thus its claim for negligence is dismissed. In its First Amended Complaint, Avanza asserts BFG "the Defendants owed various commercial duties to the Plaintiff pursuant to their ongoing professional relationship." Although for the purposes of the motion to dismiss, the Court will look in the light most favorable to the nonmoving party, here Avanza, the duty asserted by Avanza fails on its face as it is vague and unspecified. As such, Avanza's negligence claim is dismissed.

e. Fraud

The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.” *Eurycleia Partners, LP v. Seward & Kissel, LLP* 12 N.Y.3d 553 [2009]. A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b). *Id.*

Avanza’s First Amended Complaint asserts “defendant BFG’s counsel to the Plaintiff MCA Clients as well as Defendant ACH on April 14, 2023, were false at the time they were made.” Here, plaintiff has failed to plead the elements of a claim for fraud, specifically that Avanza relied on a misrepresentation of material fact by BFG. Even assuming that BFG’s statement to the MCA clients was a material misrepresentation of fact and BFG knew of its falsity, there is no claim or documentary evidence to suggest that Avanza relied on this misrepresentation and that there were damages as a result. Plaintiff’s MCA clients may have relied on these facts, but not Avanza. Moreover, as previously explained above, the Court’s May 16, 2023, order held defendant BFG had a contractual right to send such letter. As such, Avanza’s claim for fraud is dismissed.

f. Libel per Se

Libel per se exists when a party’s accusation impeaches the integrity or business methods of the other party’s business. *New York Soc. for Suppression of Vice v. Macfadden Pubs.*, 260 N.Y. 167 [1932]. This includes statements concerning lack of creditworthiness or implying that a business will soon cease to exist. *Exec. Trim Constr., Inc. v. Gross*, 525 F.Supp.3d 357, 369 (N.D.N.Y. 2021).

The Court finds Avanza has failed to plead the elements of libel per se. While on a motion to dismiss the court must accept plaintiff’s factual allegations as true, the court is not required to accept factual allegations that are *contradicted* by documentary evidence, or legal

conclusions that are unsupportable in the face of undisputed facts.” *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006]. Here, there is not evidence that BFG’s letter to the MCA clients impeaches the integrity or business methods of Avanza nor that it “implies the business will soon cease to exist.” As such, Avanza’s claim for Libel per se is dismissed.

Attachment

To obtain an order of attachment under CPLR 6201(3), a plaintiff must demonstrate that: (i) it has stated a claim for a money judgment; (ii) it is probable that it will succeed on the merits of that claim; (iii) the defendant has disposed of, encumbered or secreted property with the intent to defraud his creditors or frustrate the enforcement of a judgment; and (iv) the amount demanded from the defendant exceeds all counterclaims known to the plaintiff. CPLR 6201(3) and 6212(a). The right to an order of attachment is different than a preliminary injunction. CPLR 6201(3).

BFG asserts that it requires the order of attachment to protect its ability to satisfy its judgment, because the assets are disappearing and as security for the misappropriated assets that it owns. Further, BFG argues that without an order of attachment, “it is probable that Avanza will further secrete and dissipate the misappropriated funds.” BFG therefore requests the court issue an order of attachment is served that freezes the assets of Avanza up to \$2,718,224.89 plus at least \$500,000.00 for contractual attorney’s fees.

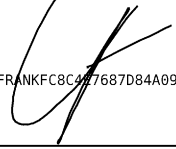
The Court finds that BFG has satisfied all elements to obtain an order of attachment pursuant to CPLR 6201(3), for those funds specifically derived from payments made by merchants to which BFG has purchased RTRs as well as \$250,000 for attorney’s fees. Specifically, the Court finds that BFG has satisfied all elements required for an order of attachment as it has stated a claim for a money judgement, has demonstrated that it is probable it

will succeed on the merits, has made a showing that Avanza has encumbered property out of reach of its creditors, and although the court has not dismissed all of Avanza's claims against BFG, the court finds it is likely the amount requested for an attachment exceeds such claims.

Accordingly it is hereby,

ORDERED and ADJUDGED that the motion to dismissed is granted to the extent that the first, second, fifth, sixth, seventh and eighth causes of action are dismissed, and it is further;

ORDERED that the amount to be secured by the Order of Attachment, which includes those funds specifically derived from payments made by merchants to which BFG has purchased RTRs as well as \$250,000 for attorney's fees, and it is further;

<u>11/3/2023</u> DATE	 20231103171143LFRANKFC8C427687D84A099A05F88D9A5FC1BD LYLE E. FRANK, J.S.C.			
CHECK ONE:	☐	CASE DISPOSED	☒	NON-FINAL DISPOSITION
	☐	GRANTED	☐	DENIED
APPLICATION:	☐	SETTLE ORDER	☒	GRANTED IN PART
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☐	SUBMIT ORDER
			☐	FIDUCIARY APPOINTMENT
			☐	OTHER
			☐	REFERENCE