

Thoro-Graph, Inc. v New York Racing Assn., Inc.

2023 NY Slip Op 34297(U)

November 30, 2023

Supreme Court, New York County

Docket Number: Index No. 654901/2022

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

-----X

THORO-GRAPH, INC.,

Plaintiff,

- v -

THE NEW YORK RACING ASSOCIATION, INC. AND,
NYRABETS, LLC,

Defendant.

-----X

INDEX NO. 654901/2022

MOTION DATE 11/29/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 41, 43, 44

were read on this motion to/for DISMISS

Based upon the foregoing documents, Defendants' motion to dismiss Plaintiff's third cause of action in its first amended complaint is granted. This action arises out of an alleged breach of contract between Plaintiff, Thoro-Graph, Inc., and Defendants, The New York Racing Association, Inc. and NYRAbets, LLC. Plaintiff alleges that Defendants breached the implied covenant of good faith and fair dealing. Defendants now move under CPLR §§ 3211(a)(1) and 3211(a)(7) to dismiss Plaintiff's third cause of action in its first amended complaint.

Pursuant to CPLR § 3211(a)(1), a party may move to dismiss "one or more causes of action asserted against him on the ground that a defense is founded upon documentary evidence." Under CPLR § 3211(a)(7), a party may move to dismiss a cause of action asserted against them if "the pleading fails to state a cause of action." When looking at a motion to dismiss a cause of action, the "Court may consider those facts alleged in the complaint, documents attached as an exhibit therefor or incorporated by reference." Dragonetti Bros.

1 The Court would like to thank Madison Huberman for her assistance in this matter.

Landscaping Nursery & Florist, Inc. v. Verizon N.Y., Inc., 71 Misc. 3d 1214(A), 144 N.Y.S.3d 333 (N.Y. Sup. Ct. NY Co. 2021), *aff'd*, 208 A.D.3d 1125 (2022).

Additionally, the written agreement controls and dictates the dismissal of a claim. *150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 A.D.3d 1, 5 (1st Dep't 2004) (reversing and dismissing breach of contract claim based on underlying contract); *see also Century-Maxim Const. Corp. v. One Bryant Park, L.L.C.*, 2009 N.Y. Slip Op.-50858(U), 2009 WL 1218895, at *4 (Westchester Cnty. Sup. Ct. Apr. 7, 2009) (dismissing breach of contract claims where alleged breaches were “contradicted by the plain language of the contract”).

In support of its motion to dismiss, Defendants contend that the “Termination for Convenience” provision of the 2022 agreement between the parties unconditionally permitted the Defendants to terminate the 2022 agreement at will. Therefore, Plaintiff’s third cause of action is barred as a matter of law based upon the “Termination for Convenience” Provision.

Additionally, Defendants contend that Plaintiff admits Defendants conducted themselves within their rights under the “Termination of Convenience” provision and Plaintiff itself has acknowledged the provision of the 2022 agreement that permitted Defendants to terminate the agreement at any time and for any reason.

In opposition, Plaintiff contends that the Court has already considered and determined that Plaintiff has adequately pled a cause of action for breach of the implied covenant of good faith and fair dealing. Plaintiff’s position stems from the Honorable Lyle Frank’s order granting Plaintiff’s motion to amend the Complaint to include a claim for breach of the implied covenant of good faith and fair dealing. Additionally, Plaintiff contends that they have sufficiently pled a cause of action for breach of the implied covenant of good faith and fair dealing. Plaintiff alleges that while there was no *per se* breach of the 2022 Agreement with respect to its termination, the

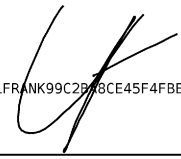
Defendants exercised its contractual right to terminate in bad faith to deprive Plaintiff of payments it was rightfully owed under the Agreements, which are the elements of a breach of the implied covenant of good faith and fair dealing claim.

Defendants counters that this motion is not improper, as Plaintiff suggests, as “motions for leave to amend – which are to be ‘freely granted’ per § CPLR 3025 – should not be subject to the same scrutiny that would be applied in the context of a motion to dismiss. *Olam Corp. v. Thayer*, No. 652764/2018, 2021 WL 408232, at *1 (N.Y. Sup. Ct. Feb. 05, 2021) This Court agrees.

Here, the “Termination for Convenience” provision prevents Plaintiff from bringing a cause of action for breach of the implied covenant of good faith and fair dealing. *See Cambridge Invs. L.L.C. v. Prophecy Asset Mgt., LP*, 188 A.D.3d 521, 522 (1st Dep’t 2020) (affirming dismissal under CPLR 3211(a)(1) and (a)(7) and stating “Defendant cannot breach the covenant of good faith and fair dealing if the contract gives it sole and complete discretion”); *Transit Funding Assoc., L.L.C. v. Capital One Equip. Fin. Corp.*, 149 A.D.3d 23, 29 (1st Dep’t 2017) (“Where a contract allows one party to terminate the contract in ‘its sole discretion’ and for ‘any reason whatsoever,’ the covenant of good faith and fair dealing cannot serve to negate that provision”). The written agreement between the parties explicitly states that “Any Party may terminate this Agreement upon providing the other Party(ies) hereto one hundred eighty (180) days prior written notice.” Therefore, Plaintiff cannot bring a cause of action for breach of the implied covenant of good faith and fair dealing. Accordingly, it is hereby

ORDERED that Defendants’ motion to dismiss Plaintiff’s third cause of action in its first amended complaint is granted; and it is further

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11/30/2023

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE