Kuenster v Castino Corp.
2023 NY Slip Op 35256(U)
April 18, 2023
Supreme Court, Columbia County
Docket Number: Index No. E012022018193
Judge: Richard L. Mott
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RECEIVED NYSCEF: 04/18/2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA
--X
KEVIN KUENSTER,

Plaintiff,

-against-

CASTINO CORP., d/b/a LEISURE TECH and
MICHAEL MARTINO,[1]

Defendants.
--X

DECISION/ORDER

Index No. E012022018193
Richard Mott, J.S.C.

Motion Return Date: February 24, 2023

APPEARANCES:

Plaintiff: Robert L. Arleo, Esq.
Robert L. Arleo, Esq. PC
1345 Avenue of the Americas, 33rd Floor
New York, New York 10105

Defendant: Dean McGee, Esq.
McCabe Coleman Ventosa & Patterson, PLLC
42 Catharine Street
Poughkeepsie, New York 12601
For: Castino Corp., d/b/a Leisure Tech (Defendant)

Mott, J.

Defendant moves for summary judgment granting its counterclaim for breach of contract, awarding liquidated damages and dismissing Plaintiff's sole cause of action for breach of General Business Law (GBL) § 349 alleging deceptive consumer-oriented practices in a consumer transaction. Plaintiff opposes.

Background

On October 20, 2021 Plaintiff and Defendant Castino Corp d/b/a Leisure Tech, (Defendant) entered into a contract for a pool installation on Plaintiff's property for

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[1] This action was dismissed as to Defendant Michael Martino (Martino), who is the sole shareholder of Defendant, on October 11, 2022 by stipulation. See NYSEF Doc. #21.

$68,950.00.[2] Plaintiff paid a $13,190.00 deposit the date the contract was executed, although it lacks a commencement or completion date. Plaintiff cancelled same in early Spring 2022.[3] Defendant failed to respond to Plaintiff's inquiries regarding the return of his deposit, whereupon Plaintiff commenced this action and Defendant counterclaimed for liquidated damages.

Parties' Contentions – Counterclaim for Breach of Contract

Defendants claim that the contract was written by their independent contractor, Karl Charter, (Charter) and tailored to Plaintiff's premises after discussion with him. They note that Charter, who signed on behalf of Defendant, states that he followed routine procedure in explaining the contract terms, read the front to Plaintiff, showed him that there was "stuff on the back"[4] and allowed for any questions. It notes that Plaintiff stated in his deposition that he read and understood the cancellation provision on the contract's face, below which his signature appears. Same states that,

> "You may cancel this transaction without any penalty or obligation, within three business days from the above date. If you cancel .... any payments made ... will be returned within 10 business days following receipt by the seller of your cancellation notice and any security interest arising out of the transaction will be cancelled."

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[2] The face of the contract has a handwritten notation that the "Price is $65,950". Below there is a handwritten price inserted that could be read as $65,950.00 or $68,950.00. However, the itemized downpayment, deliver, start, liner, install and completion payments noted sum $65,950.00 making clear that Defendant's statement of facts is incorrect insofar as it quotes a contract price of $68,950.00.

[3] Defendants' memorandum of law and Martino's affidavit assert that Plaintiff cancelled the contract 6 months after signing. However, Defendant's Statement of Material facts asserts that the contract was signed on October 20, 2021 and cancelled on January 5, 2022. Notwithstanding, as Plaintiff agrees that it was cancelled in early Spring 2022, the cancellation is deemed, for purposes of this motion to have occurred on an undefined date in early Spring 2022, although there is evidence in the record of an oral cancellation in January 2022.

[4] Defendant's statement of facts asserts that customers are "physically" shown the additional terms on the back of the contract.

Further, the contract provides that notice of cancellation must be by mail or delivery of the said notice signed or any other written notice by mail or telegram, but not orally, within 3 business days of the contract date, or no later than midnight on October 23, 2021. Further, they cite § C(f) on the reverse of the signature page, which provides that,

> "[O]wners agree that if at any time before the above described project is completed the Owners should decide to cancel or become unable for any reason to perform the contract...the Owners will pay the Company a sum equal to the total of the cost to the Company of labor and material already provided, if any plus 30 percent of the agreed contract amount, for liquidated damages and forfeit any deposit given to the Company, at the option of the Company.

Finally, they cite § C(n) permitting recovery of attorney's fees to collect an unpaid balance or liquidated damages. Defendant alleges that the Plaintiff was informed of these terms and that he read them before signing. Defendant seeks liquidated damages of $20,685.00, retention of the deposit and attorney's fees. Defendant avers that liquidated damages are appropriate given the difficulty, per Martino's affidavit, of precisely estimating its losses consisting of lost time to pursue other contracts and lost business opportunities generally.

Plaintiff notes that since the admonition to "see reverse for conditions" is in 6-point type Defendant may not proffer same as evidence, per CPLR § 4544. He states that as a graphic designer, with years of experience in the art of typography and its readability, he used a professional tool to measure same and found it to be set in 6-point type. Further, he claims that the liquidated damages provision is an unenforceable penalty as it is grossly disproportionate to any potential actual damages as it amount to half the total contract price, as it includes retention of his deposit, and attorney's fees in addition thereto. He notes that prior to his cancellation, no materials were purchased/delivered; no construction had commenced; that the intervening months were not conducive to pool construction; and, Defendant was aware that Plaintiff first had to obtain an excavation

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contractor but failed to cooperate in that effort. Finally, he denies that the terms on the reverse were explained to him and asserts that although he looked at the reverse side, he did not see the liquidated damages clause and would not have signed the contract if he had read and understood same. He maintains that while Defendant may be entitled to remuneration for time spent following the deposit and before cancellation, he notes that Martino also failed to respond to his request for return of his deposit until this action was filed and, then, for the first time, claimed liquidated damages.

Discussion/Summary Judgment

To prevail on summary judgment, the moving party must establish *prima facie* entitlement to judgment as a matter of law "by adducing sufficient competent evidence to show that there are no issues of material fact." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]. "Only when the movant bears this burden and the nonmoving party fails to demonstrate the existence of any material issue of fact will the motion be properly granted." *Staunton v Brooks*, 129 AD3d 1371 [3d Dept. 2015].

Breach of Contract/Liquidated Damages

A cause of action for breach of contract requires an existing contract, plaintiff's performance and defendant's breach of the contract obligations and damages resulting therefrom. *A.E. Rosen Elec. Co. v. Plank, LLC,* 181 A.D.3d 1080, 1081 [3d Dept 2020]. Summary judgment is appropriate where the language of a written agreement is unambiguous or where the resolution of a contractual ambiguity does not depend upon extrinsic evidence. *Currier, McCabe & Assoc., Inc. v Maher*, 75 AD3d 889, 891 (3d Dept 2010) (words should not be considered in isolation, but rather "in light of the obligation as a whole and the intention of the parties as manifested thereby [such that] [f]orm should not prevail over substance and a sensible meaning of words should be sought."). Further, ambiguous provisions allow recourse to parole evidence. *Van Etten Oil Co., Inc. v Aero Star Petroleum, Inc.*, 131 AD3d 740, 741 (3d Dept 2015) ("to determine whether the terms of an agreement are ambiguous, a court must examine the entire contract and consider the relation of the parties and the circumstances under which it was executed"). Finally, per CPLR § 4544 any portion of a printed contract which is less than 8 points in depth for lower case type "may not be received in evidence ... on behalf of the party who printed or prepare such contract or agreement....". *Lonner v Simon Prop. Group, Inc.*, 57 AD3d 100, 107 [2d Dept 2008] (the underlying purpose of CPLR § 4544 "is to prevent draftsmen of small, illegibly printed clauses from enforcing them.").

Fact issues on the element of damages preclude summary judgment for Defendant on his breach of contract counterclaim for Plaintiff's late cancellation, to wit: whether the contract's admonition to see the reverse for conditions is in 6-point type and, if so whether consideration of the terms on the reverse is precluded thereby; and, whether the cancellation deadline is ambiguous as the contract omits commencement or completion dates, despite such dates being contemplated as a fill-in item on the form contract. See, e.g., *People by Koppell v Empyre Inground Pools Inc.*, 227 AD2d 731, 733 [3d Dept 1996] and GBL § 771(1)(b) (regarding home improvement contracts). This ambiguity as to a commencement or termination date is exacerbated by Defendant's awareness of Plaintiff's need to first obtain an excavation contractor before pool installation could commence. Indeed, the liquidated damages provision states that it applies to cancellation "any time before the above-described project is completed" which can only be interpreted to mean that the project first must have commenced. Further, although the burden of proof is on the party seeking to avoid liquidated damages, such provision will be considered an unenforceable penalty where the "damages fixed are plainly disproportionate to the injury." *J.R. Stevenson Corp. v Westchester County*, 113 AD2d 918, 920 [2d Dept 1985]; *Truck Rent-A-Ctr., Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 425 [1977] (where the liquidated damages provision "is plainly or grossly disproportionate to the probable loss, [it...] calls for a penalty and will not be enforced.). In such circumstances, the appropriate recovery is the amount of actual damages. *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005].

Here, issues of fact persist as to whether the liquidated damages provision is disproportionate to any concept of fair compensation, given that no site work was performed, materials purchased or delivered and no other basis for such extraordinary anticipated damages are recited or can be implied from the language of this contract for labor and materials. *Van Etten Oil Co., Inc. v Aero Star Petroleum, Inc.*, 131 AD3d 740. Further, Defendant has failed to detail its contention that damages from cancellation of this materials/labor contract were unascertainable where no start or termination date was specified. Thus, summary judgment is unavailing on Defendant's claim for liquidated damages, which include retention of the downpayment at Defendant's sole option, upon its breach of contract counterclaim.

Parties' Contentions - GBL § 349

Defendant claims that the alleged deceptive conduct was not consumer-oriented as this single transaction tailored to Plaintiff's needs does not affect the public-at-large. Further, it maintains that Plaintiff was not misled as Charter referred him to the reverse and Plaintiff admits he read same. Moreover, it avers a lack of cognizable damages arising therefrom, noting that contract rescission and return of a purchase price normally are not considered remedies for this statutory violation. Finally, Defendant insists that no text in the contract is too small to be considered and that Plaintiff has failed to rebut its material fact statement.[5]

Plaintiff contends that the 6-point type referring to conditions on the reverse is inadmissible and clearly designed to conceal the one-sided liquidated damages clause in small print on the back, rather than drawing attention to it, thereby violating GBL § 349. Plaintiff avers that he is damaged by the total loss of his downpayment at Defendant's sole option, where little or no work was performed and had he realized the extent of his exposure upon a late cancellation, he would not have signed the contract.

Discussion/GBL § 349

GBL § 349 prohibits "Deceptive acts or practices in the conduct of any business, ... or in the furnishing of any service..." and provides for a private right of action. To establish such practice a plaintiff must show that: (1) the defendant's conduct was consumer-oriented; (2) the act or practice was deceptive or misleading in a material way; and, (3) plaintiff suffered an injury as a result thereof. GBL § 349(h); *Plavin v Group Health Inc.*, 35 NY3d 1, 10 (2020). Although a pattern of deceptive behavior need not be shown the acts or practices must have a "broader impact on consumers at large" by representations or omissions likely to mislead a reasonable consumer acting reasonably under similar circumstances. *Lussoro v Ocean Fin. Fed. Credit Union*, 456 F Supp 3d 474, 490 [EDNY

[5] Although Plaintiff failed to respond to Defendant's statement of material facts, to the extent facts are disputed, they are either incorrect, as noted above, or of ambiguous import. Plaintiff states he was aware of the signature page cancellation provision and read the back of the contract, he also states that he "he glossed over" the reverse, "looked at the callouts" and denies having read/understood the liquidated damages provision given its presentation.

2020];[6] *Oswego Laborers' Local 214 Pension Fund v Mar. Midland Bank, N.A.*, 85 NY2d 20, 25 [1995] (actual harm, even if not pecuniary, must be shown). Further, reliance upon the materially misleading practice is not required. *Stutman v Chem. Bank*, 95 NY2d 24, 29 [2000].

The cancellation notice on the face of the contract does not address the consequences of a failure to cancel after 3 days. Further, the notation to see the reverse is included in parenthesis at the end of a paragraph which has no relation to cancellation. Instead it refers to quality of work, change orders, financing contingencies and conditions such as weather, materials availability or labor stoppages as beyond Defendant's control and its disclaimer as to responsibility to move gas, electrical, plumbing or telephone wires/installation. In addition to being in what appears to be 8-point type[7] the liquidated damages clause is under letter (f) of a list from a to r, under the title "Company Warranty" which does not preview obligations of Plaintiff. Further, the face of the contract, although fillable as to price, pool location and payment schedule, is a form contract containing Defendant's logo and potentially affects all the public with which it transacts business, rendering it consumer-oriented. Moreover, Defendant's statement of facts asserts that the reverse of the contract is routinely merely shown physically to a customer, and Charter makes clear that although available for questions, he referred to same as "stuff on the back." Thus, issues of fact exist as to whether the clause permitting forfeiture of a downpayment for late cancellation at Defendant's sole option and/or the liquidated

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[6] In *Lussoro* the misleading practice was that "the contract ... trick[s] a consumer, *even if unintentionally*, into believing they will only be assessed an overdraft fee at the time of [transaction] authorization, when, in fact, Defendant also imposes overdraft fees at ... settlement, even as to previously authorized ... transactions." Id.
[7] The Court is unable to definitively determine the size of the different typeface used on the contract, as the copy provided was photocopied, converted to PDF and uploaded NYSEF, potentially distorting same.

damages provision as a whole, constitute misleading practices. *Orlander v Staples, Inc.*, 802 F3d 289, 301 [2d Cir 2015] (damages shown due to misleading practice where purchase would not have been made had plaintiff known of limiting condition). Thus, summary judgment for Defendant on Plaintiff's GBL § 349 claim is unavailing.

Accordingly, the motions are denied.

This constitutes the Decision and Order of this Court. The Court is Efiling this Decision and Order, but that does not relieve Plaintiff from compliance with the provisions of CPLR §2220 with regard to filing and entry thereof.

Dated: Hudson, New York
April 18, 2023

RICHARD MOTT, J.S.C.

Papers Considered:

1. Notice of Motion, Statement of Material Facts, Memorandum of Law and Affirmation of Dean McGee, Esq., dated February 2, 2023 with Exhibits A-E and Affidavit of Michael Martino, dated January 31, 2023 with Exhibit A;
2. Opposition Memorandum of Law of Robert L. Arleo, Esq., and Affidavit of Kevin Kuenster, with Exhibit 1, dated February 16, 2023;
3. Reply Memorandum of Law of Dean McGee, Esq., dated February 23, 2023.