Bizfund LLC v Amtrust Ins. Group Inc
2025 NY Slip Op 35235(U)
September 18, 2025
Supreme Court, Monroe County
Docket Number: Index No. E2025008998
Judge: Daniel J. Doyle
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STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

BIZFUND LLC DBA SURFSIDE CAPITAL,

Plaintiff, Index # E2025008998

-vs-

AMTRUST INSURANCE GROUP INC DBA AMTRUST INSURANCE GROUP, and DOMINGO CANO,

Defendants.

Special Term
August 26, 2025

Appearances on Submission

Phillip Spinella, Esq., Murray Legal, PLLC- for Plaintiff
Dominick Dale, Esq.- for Defendants

DECISION

Doyle, J.

This is a merchant advance agreement case. Pending before the Court are two motions filed by Defendants: (1) to dismiss pursuant to CPLR 3211(a)(7) and for an extension of time to answer; and (2) for change of venue.

For the reasons set forth herein, the motion to dismiss is **GRANTED in part** and **DENIED in part**, and the motion to change venue is **DENIED**.

LAWSUIT FACTS

On August 14, 2024, Corporate Defendant entered into a Sales Agreement with Plaintiff whereby for the sum of $225,000.00 Plaintiff agreed to buy the future receivables of Corporate Defendant in the sum of $315,000.00.

It is alleged that Corporate Defendant defaulted under the terms of the Agreement by breaching its representations and warranties. Additionally, Corporate Defendants has purportedly refused to make all payments due under the Agreement despite due demand. Plaintiff alleges that the balance due is $85,912.00. Plaintiff also seeks NFS Fees in the amount $100.00, a Default Fee of $17,182.40 and interest.

The Individual Defendant allegedly signed a performance guaranty in the event the Corporate Defendant failed to perform as required.

LEGAL ANALYSIS

Motion to Dismiss

"On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), '[w]e accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137, 141 (2017) (citation omitted). "At the same time, however, 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.'" Simkin v. Blank, 19 N.Y.3d 46, 52 (2012) (citation omitted). "Dismissal of the complaint is warranted if the plaintiff fails to

assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." Connaughton, 29 N.Y.3d at 142.

"'When ruling on a motion to dismiss pursuant to CPLR 3211(a)(7), it is well settled that 'the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one.'" Wilczak v. City of Niagara Falls, 174 A.D.3d 1446, 1447 (4th Dept. 2019) (citation omitted). "'Thus, [a]ffidavits and other evidentiary material may be considered to establish conclusively that [the] plaintiff has no cause of action.'" Id. (citation omitted).

"It is well settled that the elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." Bridge Funding Cap LLC v. SimonExpress Pizza, LLC, 240 A.D.3d 1186, 1189 (4th Dept. 2025) (internal quotation marks and citation omitted).

The Complaint in this action is sufficiently particular to give Defendants notice of the transactions and occurrences alleged. There is no basis to dismiss the Complaint as a whole.

With respect to the Default Fee, the Court notes that "[a] contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation." Truck Rent-A-Ctr., Inc. v. Puritan Farms 2nd, Inc., 41 N.Y.2d 420, 425 (1977). "If, however, the amount of actual damages that would be suffered upon a

breach is readily ascertainable when the contract is entered, or the amount fixed as liquidated damages is conspicuously disproportionate to the foreseeable losses, the liquidated damages provision is unenforceable as a penalty." Cent. Irr. Supply v. Putnam Country Club Assocs., LLC, 57 A.D.3d 934, 935 (2nd Dept. 2008). "Where, however, a liquidated damages provision is found to be an unenforceable penalty, the recovery is limited to actual damages proven." Id.

Appendix A to the parties' Agreement provides the following on the Default Fee:

i. Default Fee	**20% of the balance or $5,000 whichever is greater**	In addition to other fees that may be applied, when Merchant changes, closes or blocks the Specified Account for more than ten (10) Business Days without authorization from Purchaser, or upon any breach of the Agreement. On a monthly basis, the merchant will be charged $299 as an account maintenance fee during the term of the Agreement.

(NYSCEF Doc. #2). Here, Plaintiff seeks a Default Fee in the sun of $17,182.40. As notes supra, the prayer for a Default Fee does not fit within a cognizable legal theory and must be dismissed. The Default Fee is an unenforceable penalty.

The motion to dismiss is accordingly **DENIED in part** and **GRANTED in part**.

Venue

Defendants also move to change venue of this action to Kings County. The parties' agreement provides, in relevant part:

> Any controversy or claim arising out of or relating to this Agreement or any Ancillary Document or the transactions contemplated hereby or thereby, or any breach hereof or thereof or default hereunder or thereunder, shall be submitted for resolution to a State or federal court sitting in any city or county in the State of New York, which courts shall have exclusive jurisdiction with respect to any such controversy or claim. Each of the Parties agrees not to assert in any forum that

> such courts are not a convenient forum, or that there is a more convenient forum, for the resolution of any such controversy or claim, and waives any and all objections to jurisdiction or venue.

Id. at §9.4.

Here, the parties included a forum selection clause in the agreement. "[U]nder New York law, a forum selection clause is prima facie valid and enforceable unless shown to be 'unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court.'" Buffalo Naval Park Comm., Inc. v. Water Quality Ins. Syndicate, 238 A.D.3d 1469, 1470 (4th Dept. 2025) (citation omitted). "In determining whether forum selection clauses are unreasonable or unjust, courts will consider: '(1) if their incorporation into the agreement was the result of fraud or overreaching . . . ; (2) if the complaining party will for all practical purposes be deprived of [its] day in court, due to the grave inconvenience or unfairness of the selected forum . . . ; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy . . . ; or (4) if the clauses contravene a strong public policy of the forum state.'" Id. (citation omitted).

The parties' agreement allows suit to be brought in any New York court. Defendants have not proven to this Court that the parties' agreement in that regard runs afoul of public policy.

The motion to change venue is **DENIED**.

ORDER

Based upon the foregoing, and the papers submitted at NYSCEF Docs. #4-6, 15-18, 21-22, it is hereby

ORDERED that Defendants' motion to dismiss is **GRANTED IN PART** and **DENIED IN PART** as set forth in the Court's Decision; and

ORDERED that Defendants' motion to change venue is **DENIED**; and

ORDERED that Defendants must file an Answer within 45 days of the notice of entry of this Decision and Order.

Signed at Rochester, New York on September 18, 2025

HONORABLE DANIEL J. DOYLE
Supreme Court Justice