BestPass, Inc. v Triton Logistics, Inc.
2025 NY Slip Op 35344(U)
February 28, 2025
Supreme Court, Albany County
Docket Number: Index No. 905154-24
Judge: Denise A. Hartman
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

BESTPASS, INC.,

Plaintiff,

-against-

TRITON LOGISTICS, INC.,

Defendant.

DECISION, ORDER & JUDGMENT

Index No. 905154-24

February 28, 2025

HON. DENISE A. HARTMAN, AJSC

APPEARANCES

LAW OFFICE OF M. ANGELO GENOVA
M. Angelo Genova III, Esq.
Attorneys for Plaintiff
485 Madison Avenue, 16th Floor
New York, New York 10022

RUPP PFALZGRAF LLC
Alyson R. Tufillaro, Esq.
Attorneys for Defendant
424 Main Street, Ste. 1600
Buffalo, New York 14202

Hartman, J.

Plaintiff BestPass, Inc. (plaintiff), commenced this action against defendant Triton Logistics, Inc. (defendant) to recover damages for breach of contract, account stated, quantum meruit, and unjust enrichment based on defendant's alleged non-performance under a contract and subsequent modification for services and equipment provided by plaintiff. Plaintiff now moves for summary judgment on its cause of action for account stated in the amount of $275,507.78 plus statutory pre-judgment interest (Motion #1). Defendant opposes the motion. For the reasons that follow, plaintiff's motion is granted.

I. Background

Plaintiff, a New York corporation, provides toll management services, including toll transponders and payment services for trucking businesses. Defendant is an Illinois trucking company. On August 16, 2019, defendant's president, Andrew Voveris (Voveris), executed a service agreement to obtain plaintiff's toll management services and attendant transponder equipment.

Pursuant to the service agreement, the terms of which are not in dispute, defendant authorized plaintiff "to charge the account(s) specified in [the] Agreement for tolling related charges, any qualified third-party service provider (TPSP) fees, and any applicable transponder charges" (NYSCEF Doc No. 2 at 4). Defendant selected the automatic payment option by which plaintiff

would automatically debit funds from defendant's bank account; chose the monthly payment option for transponder costs; and declined the manual replenishment option by which defendant would have been required to manually deposit funds for payment in favor of the four-week automatic replenishment option (*see id.* at 3, 4). The agreement also provided for a surety bond in an amount equal to defendant's three-month toll average, any other postpaid charges, and all other services/charges to be billed by and/or through plaintiff (*see id.* at 5). The surety was designed to mitigate plaintiff's risk by ensuring the availability of funds, which is necessary to plaintiff's business model because toll fees incurred by defendant are advanced/pre-paid by plaintiff and recouped from defendant's account (*see* NYSCEF Doc No. 13 at ¶ 6). The agreement was express that plaintiff reserved the right to review the surety bond at least monthly and, in its sole discretion, require an increase based on defendant's three-month toll average (*see* NYSCEF Doc No. 2 at 5).

By early 2023, defendant fell into arrears on its payment obligations to plaintiff. When a repayment plan was unsuccessful, plaintiff closed defendant's account in January 2024. On March 8, 2024, plaintiff issued a demand letter for payment of defendant's outstanding balance of $275,507.08 and afforded defendant 15 days to cure (*see* NYSCEF Doc No. 5).

After defendant failed to cure, plaintiff commenced the present action by filing a summons and verified complain on May 31, 2024 (*see* NYSCEF Doc No.

1). Plaintiff asserts causes of action for breach of contract, account stated, quantum meruit, and unjust enrichment for defendant's failure to pay its outstanding account balance. Defendant joined issue by filing its verified answer on July 8, 2023 (*see* NYSCEF Doc No. 9). Defendant denied the allegations asserted in the complaint and raised several affirmative defenses.

By notice of motion dated December 5, 2024, plaintiff moves for summary judgment on its cause of action for account stated (*see* NYSCEF Doc No. 10). Plaintiff argues that defendant failed to pay amounts due and owing as set forth in regular invoices for the equipment and services plaintiff provided to defendant and for tolls paid by plaintiff on behalf of defendant in violation of the terms of the service agreement and payment plan. Plaintiff contends that defendant received the invoices, made partial payments, and never objected to the amounts owed on its account.

Defendant opposes the motion, arguing that questions of fact exist as to whether it objected to the amounts stated (*see* NYSCEF Doc No. 27). Defendant also argues that plaintiff's motion is premature because depositions, which have not yet been conducted, are necessary to resolve whether defendant adequately objected to plaintiff's invoices. In addition, defendant contends that triable issues of fact exist as to the amount owed on its account.

II. Analysis

"On a motion for summary judgment, the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact. Only when the movant satisfies its obligation does the burden shift to the nonmovant to present evidence demonstrating the existence of a triable issue of fact" (*Aretakis v Cole's Collision*, 165 AD3d 1458, 1459 [3d Dept 2018] [internal quotation marks and citations omitted]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez*, 68 NY2d at 324 [citation omitted]). And "[o]n such a motion, the facts must be viewed in the light most favorable to the [nonmovant], and every available inference must be drawn in the [nonmovant's] favor" (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016] [citations omitted]).

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due. The agreement may be express or . . . implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances" (*Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869, 869 [3d Dept 1993] [internal citations

omitted], *lv denied* 82 NY2d 660 [1993]; *see Whiteman, Osterman & Hanna, LLP v Oppitz,* 105 AD3d 1162, 1163 [3d Dept 2013]).

A. Plaintiff has established prima facie entitlement to summary judgment on its account stated cause of action.

1. *Plaintiff's documentary submissions establish that it maintained and transmitted defendant's account statements in the regular course of its business.*

Plaintiff has met its prima facie burden on its account stated claim. Plaintiff proffers the affidavit of its Controller, Susan Shields (Shields), whose responsibilities are "overseeing billing, collections, and client accounts, including managing the financial and payment records of [defendant]" (NYSCEF Doc No. 13 at ¶ 1). Attached to Shields' affidavit are various documents relating to defendant's account, which Shields explains were created at or near the time of the events documented and accurately reflect the transactions and data maintained in plaintiff's regular course of business (*see id.* at 2). Shields also references the parties' service agreement, which was included as an attachment to plaintiff's verified complaint.

Plaintiff's submissions establish that it issued defendant monthly billing statements itemizing its charges for tolling services, transponder fees, tolls incurred from various tolling authorities (such as E-Z Pass), and service and hardware fees (*see* NYSCEF Doc No. 13 at ¶ 5). A spreadsheet log evidences that all monthly account statements were sent via email to defendant's

designated agent through October 2024 (*see* NYSCEF Doc No. 16). Also attached to Shields' affidavit are account statements from November 2023 through March 2024, which show defendant's account activity for the period of October 31, 2023, through February 29, 2024, with an ending account balance as of March 6, 2024, of $275,507.78 (*see* NYSCEF Doc No. 14).[1] Shields explains that the account statements were generated using plaintiff's automated billing system and "correspond with the toll usage and payment obligations reflected in the account records" (NYSCEF Doc No. 13 at ¶ 3). Plaintiff further proffers a spreadsheet containing defendant's running balance between August 2019, and February 2024, which shows the ending account balance of $275,507.78 as of February 2024 (*see* NYSCEF Doc No. 17), in addition to its March 8, 2024 demand letter for payment of defendant's outstanding balance of $275,507.08 (*see* NYSCEF Doc No. 5). The record is devoid of any formal or written objections to the account statements or ending balance and defendant does not dispute that it received its account statements.

2. *Plaintiff automatically debited defendant's account pursuant to the service agreement through early January 2023.*

Pointing to a summary of defendant's payments, Shields states that, between September 2019, until January 2023, in accordance with the options

[1] Though Shields' affidavit and plaintiff's memorandum of law indicate that a "Account Statement Notice" is contained in each statement, such a statement is not apparent in the notices plaintiff proffered.

defendant selected in the service agreement, plaintiff automatically deducted from defendant's bank account the payments defendant owed on its account (*see* NYSCEF Doc No. 13 at ¶ 12). The payment summary establishes that such payments were automatically deducted *daily* and ranged between approximately several thousand dollars to the low-twenty-thousand-dollar range, but at times exceeded those amounts (*see* NYSCEF Doc No. 19).[2] These payments represent the amounts plaintiff recouped from defendant for payments plaintiff paid tolling authorities for defendant's toll usage.

3. *The parties agreed to modify defendant's payment method to accommodate its financial hardship, but such modifications did not impact defendant's running account balance.*

In early January 2023, the parties agreed to modify plaintiff's payment method when defendant's account fell into significant arrears (*see* NYSCEF Doc No. 13 at ¶ 8). Also in early January 2023, plaintiff's system automatically re-calculated defendant's required surety amount. Based on the three-month average of defendant's toll usage, replenishment requests of approximately $190,000 and $205,000 were sent to plaintiff's representative on January 3 and 6, 2023, respectively, and subsequently automatically debited from defendant's bank account on January 5 and 10 (*see* NYSCEF Doc No. 15 at 6; *see* NYSCEF Doc No. 13 at ¶ 22; *see also* NYSCEF Doc No. 19 at 2). These replenishment

[2] One payment of over $40,000 on December 24, 2019, was wire transferred by defendant rather than automatically deducted (*see* NYSCEF Doc No. 19 at 23).

requests were significantly higher than defendant's prior surety amount, which prompted several inquiries from defendant's account manager, Sigridi Masaitis (Masaitis), as well as Voveris. Both Masaitis and Voveris raised concern that such large deductions would cause financial hardship to defendant. So, the parties ultimately agreed that Voveris would provide pre-approval for all further automatic deductions, which were then performed on a weekly basis (*see* NYSCEF Doc No. 19). And plaintiff reduced defendant's surety to $25,000, an amount artificially lower than the one automatically computed based on defendant's three-month toll average (*see* NYSCEF Doc No. 15 at 8). The payment summary shows that, as of January 13, 2023, all payments on defendant's account are listed as being made "per Andrew" or "agreed with Andrew" (*see* NYSCEF Doc No. 19 at 1).

Beginning in mid-May 2023, the parties agreed to further modify plaintiff's payment method from automatic debits to a manual, weekly payment schedule. In particular, the parties agreed that defendant would pay $40,000 per week to cover its then-approximately $35,000 weekly toll charges, with the remainder provided to reduce defendant's outstanding balance by approximately $20,000 per month (*see* NYSCEF Doc No. 13 at ¶ 39). Plaintiff submits email correspondence from May and June 2023, in which Voveris acknowledged defendant's obligation to pay $40,000 per week (*see* NYSCEF Doc No. 20 at 1-2). And the payment summary reflects that, as of May 12, 2023,

automatic withdrawals ceased, and all payments were made manually via wire transfer (*see* NYSCEF Doc No. 19 at 1).

But, in a June 14, 2023 email, Shields advised Voveris that, due to "fluctuations in payment timing and with [defendant's toll] usage averaging about $38,000 a week we are not making much headway with your past due balance. I would like to have the weekly payments increased . . ." (*id.* at 2). Voveris did not acknowledge Shields' request to increase defendant's weekly payment, stating only "[y]es, we are making the weekly payments of $40,000 every week and will continue to do so" (*id.* at 1). By July 14, 2023, however, defendant's payments reduced to $20,000, then $15,000, and then stopped without explanation in September 2023 (*see* NYSCEF Doc No. 13 at ¶ 12).

The payment summary corroborates Shield's explanation. It shows that, between May 12, 2023, and June 26, 2023, defendant made weekly payments of $40,000 (NYSCEF Doc No. 19 at 1). But, after June 26, 2023, defendant did not make another payment until July 28, 2023, when it paid $20,000 (*see id.*). Thereafter, defendant paid only $15,000 on August 20 and its last payment on September 1, 2023 (*see id.*).[3]

[3] The payment summary shows that $80,000 was applied to defendant's account on September 20, 2023, but the spreadsheet clarifies that this amount represented wire transfers between July 4 and July 14, 2023 (*see* NYSCEF Doc No. 19 at 1).

Plaintiff continued to attempt to work with defendant throughout 2023, even after its final payment. Shields personally emailed Voveris in October and November 2023, requesting that defendant make payments and for Voveris to respond to her (*see* NYSCEF Doc No. 4). Voveris did not directly respond to Shield's request for payment until December 1, 2023, when he advised only that defendant would "make the payments as soon as the market will get better, I am [not] running away from you. The timing is very difficult for Transportation companies, you are aware about it. I am keep [sic] pushing every week to survive" (*id.* at 1).

4. *Plaintiff's submissions establish that defendant made partial payments on its account balance until defaulting entirely in September 2023.*

Supported by copies of electronic account statements and tables summarizing defendant's running balance and payment history, Shields explains that, between January 13, 2023, and its final payment in September 1, 2023, defendant made 27 payments (unrelated to any specific statement) totaling $972,000, which were applied to defendant's oldest outstanding debt, but that defendant also accrued new charges during that period totaling over $1.2 million (*see* NYSCEF Doc No. 13 at ¶ 35; *see also* NYSCEF Doc Nos. 17, 18, 19). This resulted in the shortfall of $275,507.78 (*see* NYSCEF Doc No. 13 at ¶ 35), which was contained in plaintiff's final account statement and March 2023 demand letter issued to defendant (*see* NYSCEF Doc Nos 5, 14 at 21).

Plaintiff's documentary submissions show that by the end of September 2023, after defendant's last payment, its account was delinquent by $257,979.31 (*see* NYSCEF Doc No. 13 at ¶ 43; NYSCEF Doc No. 17). Defendant continued to accrue additional amounts owed through February 2024, as shown in the March 6, 2024 account statement, when its total obligation became $275,507.78 (*see* NYSCEF Doc No. 14 at 21). Shields points out that, of the $275,507.78 presently owed, approximately 90% consisted of toll fees advanced by plaintiff on behalf of defendant to tolling authorities, while only approximately 10% consisted of plaintiff's hardware and service fees (*see* NYSCEF Doc No. 13 at ¶ 37). For context, plaintiff's documentary submissions show that plaintiff paid over $1.2 million in toll charges incurred by defendant in 2023 alone (*see* NYSCEF Doc Nos. 13 at 2, 21).[4]

The foregoing establishes that plaintiff maintained and transmitted account statements in the regular course of its business; and that defendant made partial payments both under the terms of the service agreement and the subsequent payment agreements, until it defaulted entirely.

5. *Defendant did not raise specific objections to the account statements.*

The record demonstrates, and defendant does not meaningfully dispute, that defendant never sent formal, written objections concerning plaintiff's

[4] The graphic containing the toll expenditures of plaintiff on behalf of defendant is incorrectly labeled "except of emails from ex e of bill of particulars."

account statements. Rather, defendant relies entirely on the transcripts of three phone calls between the parties' representatives in January and June 2023, to demonstrate that it raised oral objections. The concerns raised by defendant's representatives on those calls were not specific objections to defendant's stated account balance.

True, following both of the large replenishment debits in January 2023, Masaitis and Voveris contacted plaintiff's customer service representatives on January 5 and 10, 2023. Both expressed vexation regarding the amounts debited as being much larger than defendant's previous surety amount. For instance, during the January 9, 2023 call, Voveris stated "I don't know why you're charging me $190,000," requested that this amount be refunded, and indicated that he had "never paid those kinds of crazy money" (NYSCEF Doc No. 23 at 13, 22). Masaitis had expressed similar confusion during the January 4, 2023 call, and inquired about how much plaintiff was "charging" defendant for toll usage (*see id.* at 3). But neither Masaitis nor Voveris objected to defendant's monthly account statements in the January 2023 calls, and defendant continued making payments to plaintiff after these calls (*see* NYSCEF Doc No. 19 at 1). Consequently, defendant's January 2023 telephone inquiries about the surety amount are of no moment to plaintiff's account stated claim. In any event, it is uncontroverted that both of the large replenishment debits were ultimately cancelled, the funds restored to

defendant's bank account (*see* NYSCEF Doc No. 19 at 2), and that plaintiff reduced defendant's surety to the artificially low amount of $25,000—despite that defendant's toll usage warranted a surety amount of around $185,000—where it remained until the account was closed in January 2024 (*see* NYSCEF Doc No. 13 at ¶ 20; NYSCEF Doc No. 14 at 11; NYSCEF Doc No. 15 at 8).[5]

Voveris' statements in the transcript of his June 14, 2023 telephone call with plaintiff's customer service representatives are similarly devoid of specific objections. In that call, Voveris expressed incomprehension as to why monthly tolls were not consistent and expressed dismay that its weekly $40,000 payments were not covering defendant's costs when his trucking practices had not drastically changed (NYSCEF Doc No. 23 at 41). In addressing defendant's May 2023 toll charges, plaintiff's customer service representative explained that certain toll violations from prior months and approximately $13,000 in tolls from April had posted to defendant's account in May, and that such amounts were out of plaintiff's control as they were the result of the tolling authorities' lag in posting amounts owed (*see id.* at 43-45).

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[5] Shields explains that the reason for the significant surety increase in January 2023, was that defendant's previously set surety amount of $10,000 lapsed and plaintiff's system automatically generating the correct, updated surety amount of $185,750 (*see* NYSCEF Doc No. 13 at ¶ 22). And Shields explains that, although defendant's actual toll usage over the course of its relationship with plaintiff warranted the higher surety amount, plaintiff had permitted defendant to maintain a lower surety amount as long as its account remained current (*see* NYSCEF Doc No. 13 at ¶ 20).

The Court does not consider the statements of plaintiff's representatives for the truth of the matters asserted therein, as they consist largely of inadmissible hearsay. But the Court does consider the overall conversations to the extent that they establish that defendant's representatives did not lodge specific objections to the account statements, which were included in the invoices sent to defendant. Rather, defendant's representatives merely inquired about the basis for the purportedly higher monthly toll fees, and expressed dismay as to how such higher fees could have been incurred and posted to defendant's account. And, as set forth above, defendant continued making payments after Voveris' June 2023 call.

Based on the foregoing, plaintiff has established prima facie entitlement to summary judgment on its account stated claim. Plaintiff has demonstrated that defendant agreed to the terms of the service agreement and assented to the subsequent payment plan, and that plaintiff sent detailed account statements to defendant for fees incurred under both. Plaintiff has also established that defendant made at least partial payments on its debts until defaulting entirely in September 2023, and that defendant did not raise specific objections to the account statements, which is sufficient to meet its prima facie burden on its account stated claim (*see Lavalle v Coholan Family, LLC*, 167 AD3d 1444, 1444 [4th Dept 2018]; *Costopoulos v DeCoursey*, 151 AD3d 1452, 1453 [3d Dept 2017]; *see also George S. May Intern. Co. v Thirsty*

Moose, Inc., 19 AD3d 721, 722 [3d Dept 2005]; *Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]).

B. Defendant has not raised a question of fact sufficient to defeat plaintiff's prima facie case for account stated.

As addressed in detail above, the January and June 2023 transcripts do not contain specific objections to the account statements. The cherry-picked quotes from the transcripts proffered by defendant in opposition do not warrant a different conclusion.

The Court finds similarly uncompelling defendant's argument, raised for the first time in opposition to summary judgment, that its accounting team revealed that plaintiff overbilled it for toll fees by $47,915.75 and charged excessive service fees. The submissions it relies on in support of these assertions in opposing summary judgment—a chart contained within Voveris' affidavit and statements concerning what defendant's accounting team allegedly determined—are inadmissible hearsay. Such statements and findings of defendant's accounting team are out-of-court statements of which Voveris lacks any personal knowledge. And the chart contained in Voveris' affidavit is uncertified. It is unknown whether such a document was created and maintained in the ordinary course of defendant's business, or whether its creator had personal knowledge of the information contained therein. Such proffers do not constitute competent evidence sufficient to defeat plaintiff's

prima facie case (*cf. Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 538 [1st Dept 2017]; *see Dearden v Tompkins County*, 6 AD3d 783, 785 [3d Dept 2004]; *Greenberg v Manlon Realty, Inc.*, 43 AD2d 968, 969 [2d Dept 1974]). And defendant did not raise such internal accounting documentation as a specific objection to the account at any time prior its opposition to the present motion.

As a final matter, the Court rejects defendant's argument that summary judgment is premature on the ground that depositions are necessary to clarify whether it objected to the account during the January and June 2023 phone calls is speculative. The burden of demonstrating that a motion for summary judgment has been made prematurely rests with the nonmoving party, who must establish that "additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant" (*Burlington Ins. Co. v Casur Corp.*, 123 AD3d 965, 966 [2d Dept 2014], citing CPLR 3212 [f]; *see Bevens v Tarrant Mfg. Co., Inc.*, 48 AD3d 939, 942 [3d Dept 2008] [citations omitted]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*id.*; *see Bevens*, 48 AD3d at 942).

Deposition testimony cannot change the substance of the telephone transcripts. And, as set forth above, the statements contained in those transcripts do not constitute specific objections to defendant's account

sufficient to preclude summary judgment on plaintiff's cause of action for account stated.

The parties' remaining arguments, to the extent not specifically addressed above, have been considered and found to be unpersuasive, without merit, or rendered academic.

III. Conclusion

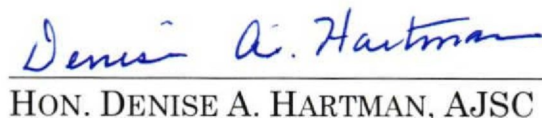
Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment (Motion #1) is **GRANTED;** and it is further

DECREED, ORDERED, AND ADJUDGED that plaintiff shall have judgment against defendant in the amount of $275,507.78 with statutory pre-judgment interest at a rate of 9% from March 7, 2024, through the date of this judgment (*see* CPLR 5001, 5004 [a]).

This constitutes the Decision, Order, and Judgment of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for plaintiff shall promptly serve notice of entry on all other parties entitled to such notice.

Dated: Albany, New York
February 28, 2025



HON. DENISE A. HARTMAN, AJSC

02/28/2025

Papers Considered
NYSCEF Doc Nos. 1-4, 10-30