Cartessa Aesthetics, LLC v Kalenak
2025 NY Slip Op 35415(U)
March 5, 2025
Supreme Court, Nassau County
Docket Number: Index No. 606495/23
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 2

_______________________________________X
CARTESSA AESTHETICS, LLC,

Plaintiffs,

-against-

ALISON KALENAK,

Defendant.
_______________________________________X

Index No.: 606495/23
Motion Sequence...01, 02
Motion Date...12/13/24

Papers Submitted:
Notice of Motion (Seq. 01)..............................x
Memo of Law in Support................................x
Notice of Cross-Motion (Seq. 02)......................x
Memo of Law in Opposition & in Support............x
Reply Memo of Law & in Opposition.................x
Reply Memo of Law....................................x

Upon the foregoing papers, the motion (Seq. 01) by the Defendant, ALISON KALENAK ("Kalenak"), seeking an Order pursuant to CPLR §3212, granting Kalenak summary judgment dismissing the Complaint and granting summary judgment on Kalenak's cross-claims; and the cross-motion (Seq. 02) by the Plaintiff, CARTESSA AESTHETICS, LLC ("Cartessa"), seeking an Order pursuant to CPLR §3212, granting summary judgment in its favor, and pursuant to CPLR §§ 3211 and/or 3212, dismissing Kalenak's cross-claims and affirmative defenses, are consolidated for disposition and decided as provided herein.

Cartessa is a seller and distributor of aesthetic, health, and wellness equipment. In 2022, Kalenak was the owner of a wellness and aesthetics company and med spa located in Jackson, Wyoming, called Remede.

This is an action where Cartessa alleges causes of action for breach of contract and for attorney's fees pursuant to two Customer Purchase Agreements purportedly entered into by the parties on October 1, 2022.

Cartessa alleges that according to the terms of the Customer Purchase Agreements, Kalenak purchased two devices from Cartessa. In or about April 2022, Kalenak had previously purchased three similar devices from Cartessa. The April 2022 purchased devices are not at issue herein.

Kalenak asserts twenty-one affirmative defenses and four counterclaims arguing that the October 2022 Customer Purchase Agreements are not valid contracts in that the parties failed to come to a definitive meeting of the minds, or, in the alternative, that the Customer Purchase Agreements should be invalidated due to the bad acts of Cartessa, or that Kalenak cancelled the Customer Purchase Agreements.

Kalenak moves to dismiss the Complaint and for summary judgment on her cross-claims.

Cartessa moves for summary judgment on its claims and for dismissal of Kalenak's cross-claims and affirmative defenses.

Cartessa submitted copies of the October 2022 Customer Purchase Agreements which have Kalenak's signature and Kalenak does not dispute signing these documents, although she does assert that she signed the documents without reading them.

Kalenak's Affirmative Defenses

"When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Skefalidis v. China Pagoda NY, Inc.*, 210 A.D.3d 925, 926 [2d Dept. 2022]).

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact (*See, Klein v. City of New York*, 89 N.Y.2d 833 [1996]; *Ayotte v. Gervasio*, 81 N.Y.2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]).

First Affirmative Defense: Failure to State a Cause of Action

"[T]o plead a cause of action for breach of contract, a plaintiff usually must allege that: (1) a contract exists; (2) plaintiff performed in accordance with the contract; (3) defendant breached its contractual obligations; and (4) defendant's breach resulted in damages" (*34-06 73, LLC v. Seneca Ins. Co.*, 39 N.Y.3d 44 [2022]).

Here, Cartessa has pled all of the elements of a cause of action for breach of contract, so this affirmative defense is dismissed.

Second Affirmative Defense: Fraudulent Inducement

"To recover damages for fraudulent inducement, a plaintiff must prove (1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury." (*CANBE Properties, LLC v. Curatola*, 227 A.D.3d 654 [2d Dept. 2024]).

In this matter, at her deposition, Kalenak testified that, "[Kalenak] looked [an agent of Cartessa] directly in his eye. He was sitting across the table f[rom] me. He was to my left, Kelsey to my right, and Troy in front of me. I looked him in the eye and I said, is this -- will I be held liable if I sign this? He said no, it is just an intent to purchase." (Kalenak Deposition Transcript at p. 61).

The Cartessa Terms and Conditions of Sale document executed by Kalenak with the Customer Purchase Agreement states (right above Kalenak's signature) that, "[b]y signing below and/or signing the [Customer Purchase Agreement], purchaser is entering into a binding agreement for the purchase of the products and/or services described above and agrees to these Terms and Conditions and the parties expressly disclaim any additional and/or different terms and conditions."

"A party that signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it" (*Guerra v. Astoria Generating Co., L.P.*, 8 A.D.3d 617 [2d Dept. 2004]).

Here, Kalenak has failed to allege facts that establish the third element of justifiable reliance. Kalenak states that she did not read the Customer Purchase Agreement or the Terms and Conditions of Sale documents prior to executing them without any reasonable explanation for not doing so. Every page that Kalenak signed on October 1, 2022 clearly reflected language that contractually bound Kalenak for the purchase of the subject equipment. There is no justification for Kalenak's reliance on any statements to the contrary. As such, the fraudulent inducement affirmative defense is dismissed.

Third Affirmative Defense: No Meeting of the Minds

Kalenak argues that the Customer Purchase Agreements lack material terms including the shipping location, shipping date, financing terms, the down payment amount and timing of the down payment and payments, such that there was no meeting of the minds and consequently no contract.

At her deposition, Kalenak testified as follows:

> A. I did. I said okay -- they had every -- for every no I gave them, they had a yes. And, so, I told him, I said okay I will buy them, but I need the same terms as I did with the previous devices, which is zero down payment, no payments for six months. That is the only way I can buy them. We are in offseason right now, and we will be busy -- our season hits in December, and, you know, by the time that the payments hit, we will be getting close to summer, which is really really busy, so I will do it, but I can't do it without those terms. It is not possible.
>
> Q. And, what did they say to you?
>
> A. They said okay, sign here.

Kalenak's own testimony, as well as the Customer Purchase Agreements and Terms and Conditions of Sale documents she signed, contradict her assertion that there was no meeting of the minds. As such, this affirmative defense is dismissed.

Fourth Affirmative Defense: Duress

"A contract may be voided on the ground of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat which precluded the exercise of its free will" (*Edison Stone Corp. v. 42nd St. Dev. Corp.*, 145 A.D.2d 249 [1st Dept. 1989]).

This Court cannot discern any indication of a threat, wrongful or otherwise, in Kalenak's allegations or testimony. This affirmative defense is therefore dismissed.

Fifth Affirmative Defense: Coercion and Sixth Affirmative Defense: Undue Influence

Likewise, Kalenak's testimony fails to demonstrate any coercive behavior or undue influence on the part of Plaintiff or its agents. Nor do Kalenak's Memorandum of Law or Reply Memorandum of Law contain arguments supporting such affirmative defenses, so they are abandoned (*See U.S. Bank Nat'l Ass'n v. Gonzalez*, 172 A.D.3d 1273 [2d Dept. 2019]). As such, these two affirmative defenses are dismissed.

Seventh Affirmative Defense: Breach of Fiduciary Duty

Kalenak fails to allege any facts supporting a finding of a fiduciary duty which Plaintiff owed her. Nor do Kalenak's Memorandum of Law or Reply Memorandum of Law contain arguments supporting such an affirmative defense, so it is abandoned. This affirmative defense is dismissed.

Eighth Affirmative Defense: Promissory Estoppel

"The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (*Schwartz v. Miltz*, 77 A.D.3d 723 [2d Dept. 2010]).

Kalenak fails to allege facts which support a finding that Cartessa made clear and unambiguous promises or that Kalenak could reasonably and foreseeably rely on any statement in contradiction of the terms of the Customer Purchase Agreement or Terms and Conditions of Sale documents she signed. Nor do Kalenak's Memorandum of Law or Reply Memorandum of Law contain arguments supporting such an affirmative defense, so it is abandoned. This affirmative defense is dismissed.

Ninth Affirmative Defense: Negligence

"The elements of negligence are (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Abbott v. Johnson*, 152 A.D.3d 730 [2d Dept. 2017]).

Kalenak fails to allege facts which support a finding of a duty owed or that Cartessa breached. Nor do Kalenak's Memorandum of Law or Reply Memorandum of Law contain arguments supporting such an affirmative defense, so it is abandoned. This affirmative defense is dismissed.

Tenth Affirmative Defense: Laches

"The four basic elements of laches are, (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant. All four elements are necessary for the proper invocation of the doctrine, including the essential element delay prejudicial to the opposing party" (*Dwyer by Dwyer v. Mazzola*, 171 A.D.2d 726 [2d Dept. 1991]).

Kalenak fails to allege facts which support a finding of any of the elements of laches. Nor do Kalenak's Memorandum of Law or Reply Memorandum of Law contain arguments supporting such an affirmative defense, so it is abandoned. This affirmative defense is dismissed.

<u>Eleventh Affirmative Defense: Waiver</u>

A valid waiver requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver would have been enforceable. It may arise by either an express agreement or by such conduct or a failure to act as to evince an intent not to claim the purported advantage. A waiver is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence. Rather, there must be proof that there was a voluntary and intentional relinquishment of a known and otherwise enforceable right" (*Golfo v. Kycia Assocs., Inc.*, 45 A.D.3d 531 [2d Dept. 2007]).

Kalenak fails to allege facts which support a finding that Cartessa waived any of its rights. Nor do Kalenak's Memorandum of Law or Reply Memorandum of Law contain arguments supporting such an affirmative defense, so it is abandoned. This affirmative defense is dismissed.

Twelfth Affirmative Defense: Estoppel

"The elements of equitable estoppel are, with respect to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to itself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in its position." (*Wallace v. BSD-M Realty, LLC*, 142 A.D.3d 701 [2d Dept. 2016]).

Kalenak fails to allege facts which support a finding that she lacked knowledge of the true facts of the Customer Purchase Agreement and Terms and Conditions of Sale documents she signed. The fact that she intentionally and without reason chose not to read the agreements cannot be the basis for estoppel. Nor do Kalenak's Memorandum of Law or Reply Memorandum of Law contain arguments supporting such an affirmative defense, so it is abandoned. This affirmative defense is dismissed.

Thirteenth Affirmative Defense: Good Faith and Fair Dealing

"Implicit in every contract is a covenant of good faith and fair dealing which encompasses any promise that a reasonable promisee would understand to be included." *Celauro v. 4C Foods Corp.*, 187 A.D.3d 836 [2d Dept. 2020]).

Kalenak fails to allege facts which detail what reasonable promise Cartessa made or support a finding that Cartessa violated such a promise. Nor do Kalenak's

Memorandum of Law or Reply Memorandum of Law contain arguments supporting such an affirmative defense, so it is abandoned. This affirmative defense is dismissed.

Fourteenth Affirmative Defense: Unclean Hands

"The doctrine of unclean hands applies when the complaining party shows that the offending party is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct." (*Kopsidas v. Krokos*, 294 A.D.2d 406 [2d Dept. 2002]).

Kalenak fails to allege facts which detail Cartessa's alleged immoral, unconscionable conduct. Nor do Kalenak's Memorandum of Law or Reply Memorandum of Law contain arguments supporting such an affirmative defense, so it is abandoned. This affirmative defense is dismissed.

Fifteenth Affirmative Defense: Failure to Mitigate

"[A] party injured by a breach of contract has a duty to mitigate or minimize the damages liable to result from such breach" (*Janowitz Bros. Venture v. 25-30 120th St. Queens Corp.*, 75 A.D.2d 203 [2d Dept. 1980]).

Here, the Plaintiff submitted an Affirmation from Jonathan Banks, the Chief Financial Officer of Cartessa. Mr. Banks testified that as a Lost Volume Seller:

> 23. Cartessa has an unlimited supply of the Products.
>
> 24. Cartessa purchases the Products in bulk from select manufacturers.
>
> 25. Cartessa then stores the Products in its own warehouses.

> 26. As a matter of practice and custom, Cartessa is always replenishing its stock so it is always able to fulfill orders for the Products from its customers.
>
> 27. Therefore, regardless of Defendant's breach, Cartessa intended to and was capable of selling the Products to another purchaser without incurring additional expenses or overhead.

In the Verified Complaint, the Plaintiff asserts that it incurred damages which include costs for storing the devices at issue. *Verified Complaint paragraphs 13 and 27.* In his Affirmation, Mr. Banks further testified that, "Cartessa incurred $3,688.35 representing storage and shipping costs." (*see* Banks Affirmation at ¶31).

Mr. Banks' testimony contradicts this portion of Cartessa's assertion of damages. As such, the branch of Cartessa's motion seeking dismissal of Defendant's fifteenth affirmative defense for failure to mitigate, is denied.

Sixteenth Affirmative Defense: Economic Duress

"A contract may be voided on the ground of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat which precluded the exercise of its free will." (*Sitar v. Sitar*, 61 A.D.3d 739 [2d Dept. 2009]).

Kalenak fails to allege facts which support a finding of a threat by Cartessa or that Kalenak's exercise of free will was precluded. Nor do Kalenak's Memorandum of Law or Reply Memorandum of Law contain arguments supporting such an affirmative defense, so it is abandoned. This affirmative defense is dismissed.

Seventeenth Affirmative Defense: Fraud

"The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury. The plaintiff must show not only that he actually relied on the misrepresentation, but also that such reliance was reasonable." (*Spector v. Wendy*, 63 A.D.3d 820 [2d Dept. 2009]).

Kalenak fails to allege facts which support a finding of a justifiable reliance on alleged statements that the Customer Purchase Agreement and Terms and Conditions of Sale documents she signed were anything other than their plain language stated them to be. This affirmative defense is dismissed.

Eighteenth Affirmative Defense: Comparative Fault

Cartessa asserts four causes of action in the Verified Complaint, two causes of action for breach of contract and two causes of action for attorney's fees pursuant to the breach of contract claims.

"[A]bsent allegations of a breach of duty independent of the contract, causes of action based on negligent or grossly negligent performance of a contract are not cognizable" (*320 West 115 Realty LLC v. All Bldg. Const. Corp.*, 194 A.D.3d 511 [1st Dept. 2021]).

Comparative fault is a consideration of actions sounding in negligence, not breach of contract. Kalenak's affirmative defense of comparative fault is incongruous as a defense to Cartessa's asserted claims. Nor do Kalenak's Memorandum of Law or Reply

Memorandum of Law contain arguments supporting such an affirmative defense, so it is abandoned. This affirmative defense is dismissed.

Nineteenth Affirmative Defense: Subject Matter Jurisdiction

In her Verified Answer with Counter-Claims, Kalenak states that “this court lacks subject matter over Defendant”, without further elaboration. In her Reply Memorandum of Law, Kalenak states that, “This Court has jurisdiction due to a forum selection clause.”

Kalenak fails to argue any meaningful basis to maintain this affirmative defense, and purports to concede subject matter jurisdiction in her reply papers. Thus, this affirmative defense is dismissed.

Twentieth Affirmative Defense: Personal Jurisdiction

In her Verified Answer with Counter-Claims, Kalenak states that “this court lacks personal jurisdiction over Defendant”, without further elaboration. Nor do Kalenak’s Memorandum of Law or Reply Memorandum of Law contain arguments supporting such an affirmative defense, so it is abandoned. This affirmative defense is dismissed.

Twenty-first Affirmative Defense: Right to Amend Answer

Reserving the right to amend an answer is not a valid defense to a breach of contract cause of action. This affirmative defense is dismissed. Any rights Kalenak maintains to amend her pleading would be pursuant to the CPLR.

Kalenak's Counterclaims

Kalenak's First Counterclaim: Fraud in the Inducement

For the exact same reasons that Kalenak's second affirmative defense of fraudulent inducement was dismissed, so too is Kalenak's first counterclaim. There is no justification for Kalenak's reliance on any purported statements contrary to the plain language of the Customer Purchase Agreements and the Terms and Conditions of Sale documents. Kalenak's assertion that she chose not to read those documents prior to executing them is of no import. Additionally, Kalenak's deposition testimony as to the back and forth haggling by the parties immediately prior to the execution of the contracts establishes that there is no reasonable justification for Kalenak to assert that she was fraudulently induced to execute the contracts. This counterclaim is dismissed.

Kalenak's Second Counterclaim: Rescission

Kalenak's second counterclaim alleges that, "Because Defendant was fraudulently induced to sign the 'First Contract', the 'First Customer Purchase Agreement', the 'Second Contract' and the 'Second Customer Purchase Agreement', the 'First Contract', the 'First Customer Purchase Agreement', the 'Second Contract' and the 'Second Customer Purchase Agreement' should be rescinded and declared to be null and void."

As the Court has already determined that Kalenak fails to assert facts supporting a finding that she could justifiably rely on any purported statements by Cartessa contrary to the plain language of the Customer Purchase Agreements and the Terms and

Conditions of Sale documents, there is no basis for this claim. As such, this counterclaim is dismissed.

Kalenak's Third Counterclaim: Negligence/Gross Negligence

Kalenak's third counterclaim asserts that, "As a result of Plaintiff's negligent and grossly negligent hiring and/or supervision of Sadler, Montgomery and Sharick were able to induce Defendant to sign the 'Second Contract' and the 'Second Customer Purchase Agreement', the 'First Contract', the 'First Customer Purchase Agreement', the 'Second Contract' and the 'Second Customer Purchase Agreement'".

Cartessa argues that such a cross-claim, "based on negligent hiring, retention, supervision, and training of an employee, a plaintiff must demonstrate that the employer knew or should have known that the employee had a propensity for the conduct which caused the plaintiff's injury" (*Olsen v Butler*, 227 AD3d 916 [2d Dept. 2024]) and that Kalenak fails to assert any facts supporting such a determination.

Nor do Kalenak's Memorandum of Law or Reply Memorandum of Law contain arguments supporting such a cross-claim, so it is abandoned. This counterclaim is therefore dismissed.

Kalenak's Fourth Counterclaim: Deceptive Business Practices

Kalenak's fourth counterclaim is pursuant to General Business Law 349(h).

"Parties claiming the benefit of General Business Law § 349 (h) must, at the threshold, charge conduct that is consumer oriented. Private contract disputes, unique to the parties . . . do not fall within the ambit of the statute… [the] defendant's acts or practices must have a broad impact on consumers at large" (*N. State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5 [2d Dept. 2012]).

Here, this counterclaim must be dismissed as the facts asserted by both parties demonstrates that GBL 349 is inapplicable in this action.

Cartessa's Causes of Action

As an initial matter, to the extent that Kalenak challenges the timeliness of Cartessa's cross-motion, this Court will consider the cross-motion because it is made on nearly identical grounds as Kalenak's motion (*See Wittenberg v Long Is. Power Auth.*, 225 AD3d 730 [2d Dept 2024]).

"A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." (*U.C.C. 2-204*)

Here, the Court finds that Kalenak and Cartessa executed the Customer Purchase Agreement and Terms and Conditions of Sale documents subsequent to negotiating and agreeing to terms explicitly modeled after Kalenak's previous equipment purchase six months prior.

However, both parties submitted portions of text communications between the parties from prior to, and continuing for at least six months after, the execution of the Customer Purchase Agreement and Terms and Conditions documents. These text message conversations present three issues for the Court.

First, it is not clear to the Court that the text communications submitted represent the entirety of the text communications between the parties. Second, even if the text communications represent the entirety of the conversation between the parties, several text conversations end with one party inviting the other party to continue the conversation via telephone call, such that it is clear the text portion of the communication does not encompass the entirety of the conversation between the parties. Lastly, and the reason the prior two issues are important, is that there is a question of whether these communications modified the terms of the Customer Purchase Agreement and Terms and Conditions of Sale documents or if Kalenak availed herself of canceling the sale(s) and whether Cartessa gave written authorization to cancel the sale(s) pursuant to paragraph 11 of the Terms and Conditions of Sale document.

A text discussion which occurred on March 28, 2023, is most problematic for the granting of summary judgment in Plaintiff's favor at this juncture:

> Cartessa: Happy Monday! I think [I can] meet your expectations on the [devices at issue from October 2022]. Can we move forward on the financing for the devices?
>
> Kalenak: Hey Troy, when I went to the Cartessa event I thought I was going for education. I didn't realize the intent was for me to purchase another 2 devices. I'm over all of that, but you need to understand that I have 3 devices I'm trying to get up and running. This purchase could put me into major debt.
>
> Cartessa: There was no intent. No worries whatsoever, should we take the equipment back then that is in storage in Jackson? I just need to update my corporate team.
>
> Kalenak: What are the terms? I told you and Barry $0 down with 6 mo $0 payments. That was the deal. Are you able to make that happen? No hard pulls on my credit either. I don't know what to tell you. I'm confused as to why the equipment was ever shipped in the first place. I specifically had a conversation with a rep telling them not to ship. Maybe call me when you have time.

> Cartessa: I am able to make that happen, yes. Of course I'll call you, this was a show special pricing opportunity. And this will round out your…

To the extent that Cartessa argues that its agent who engaged in the March 28, 2023 text conversation was not authorized to provide the written authorization described in paragraph 11 of the Terms and Conditions of Sale document, Kalenak refers to the February 12, 2024 testimony of Jonathan Banks, the Chief Financial Officer of Cartessa, who testified that Troy Montgomery, the agent in question, was authorized to bind Cartessa to agreements with customers (*see* Banks EBT page 40). The Court notes that Kalenak testified that Troy Montgomery was the agent who initially proposed the purchase of the equipment to Kalenak prior to the October 2022 conference, and who initiated the purchase discussion at the conference (*see* Kalenak EBT pages 55-56). The fact that two other agents of Cartessa were present at the conference when Mr. Montgomery sought to bind Cartessa to a contract with Kalenak would reasonably indicate to Kalenak that Mr. Montgomery had the authority to negotiate, execute, and authorize the cancellation of contracts (*Lisi v New York Ctr. for Rehabilitation and Nursing*, 225 AD3d 590 [2d Dept 2024]).

This Court finds that the parties did enter into a binding contract pursuant to the execution of the Customer Purchase Agreement(s) and Terms and Conditions of Sale document(s). However, the six months of communications between the parties subsequent thereto precludes the granting of summary judgment at this juncture as there are questions of whether the Agreements were modified, and if so, how, and whether Kalenak cancelled the purchase and Cartessa provided written authorization such that Kalenak would only be responsible for the charges and fees incurred following a cancellation. Also remaining is Kalenak's fifteenth affirmative defense alleging a failure to mitigate.

Accordingly, it is hereby

ORDERED, that Defendant's motion (Seq. 01) for summary judgment to dismiss the Complaint and for summary Judgment on Kalenak's counterclaims, is **DENIED**, in its entirety; and it is further

ORDERED, that the branch of Plaintiff's cross-motion (Seq. 02) for summary judgment on its causes of action is **DENIED**; and it is further

ORDERED, that the branch of Plaintiff's cross-motion (Seq. 02) seeking dismissal of Defendant's four counterclaims, is **GRANTED**, and said claims are **DISMISSED**; and it is further

ORDERED, that the branch of Plaintiff's cross-motion (Seq. 02) seeking dismissal of Defendant's fifteenth affirmative defense alleging a failure to mitigate, is **DENIED**, and is **GRANTED** as to the remaining twenty affirmative defenses and such affirmative defenses are hereby **DISMISSED**.

All matters not specifically addressed herein are **DENIED**.

This constitutes the decision and order of this Court.

DATED: Mineola, New York
March 5, 2025

Randy Sue Marber

Hon. Randy Sue Marber, J.S.C.

ENTERED
Mar 07 2025
NASSAU COUNTY
COUNTY CLERK'S OFFICE