Fintegra LLC v Busability Corp.
2025 NY Slip Op 35498(U)
February 7, 2025
Supreme Court, Nassau County
Docket Number: Index No. 601950/2024
Judge: Lisa A. Cairo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
PRESENT: HON. LISA A. CAIRO, J.S.C.

TRIAL/IAS PART 22

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FINTEGRA LLC,

Plaintiff,

-against-

BUSABILITY CORPORATION D/B/A BUSABILITY, TERENCE TALERMAN AND CLAUDIO ALVAREZ,

Defendants.

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DECISION AND ORDER ON MOTION

INDEX No. 601950/2024
MOTION Seq. No. 001

XXX

The following papers were read on this motion	DOCS NUMBERED
Notice of Motion, Affidavits, Affirmations, Exhibits, Memos....................	6-17
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Plaintiff Fintegra LLC moves by notice of motion pursuant to CPLR 3212 for an order granting summary judgment in favor of the Plaintiff on the claims set forth in its complaint. Defendants Busability Corporation d/b/a Busability, Terence Talerman and Claudio Alvarez oppose the motion.

BACKGROUND

The parties herein entered into a "Merchant Agreement" whereby the business Defendant sold to Plaintiff future receivables having a value of $234,500.00 for the purchase price of $175,000.00, to be collected at a rate of 7% of Defendants' receivables, until the purchase amount was recovered in full. The weekly remittance to approximate that percentage was $5,453,49. At the same time, individual Defendants Terence Talerman and Claudio Alvarez executed a personal guaranty of performance of the business Defendant.

Plaintiff commenced this action seeking to recover damages for breach of contract, alleging that Defendants breached the Agreement by preventing Plaintiff from receiving the specified percentage of receivables. Defendants submitted an answer denying much of the complaint but asserting no affirmative defenses.

In support of its motion, Plaintiff submits the affidavit of Jeanne Canigiani, Manager of Fintegra LLC[1]. She states that the Plaintiff performed under the agreement but the company Defendant defaulted as of January 18, 2024 after remitting receivables totaling $110,069.80, leaving a balance of $124,430.20. Plaintiff asserts that it is entitled to the additional sums of $2500.00 as a default fee, $420.00 NSF/rejected ACH Fees at $35.00 each, $53,327.23 as liquidated damages and $390.00 to cover Plaintiff's costs for filing a UCC-1. Accordingly, Plaintiff seeks judgement in the amount of $181,067.43 plus interest at 9% per annum from January 18, 2024.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Upon a prima facie showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Alvarez*, 68 NY2d at 324). Significantly, "[t]he facts must be viewed in the light most favorable to the non-moving party [but] bald, conclusory assertions or speculation and a shadowy semblance of an issue are insufficient to defeat summary judgment." (*Stonehill Capital Management, LLC v. Bank of the West*, 28 NY3d 439 [2016] [internal quotations omitted]; *see also Fairlane Financial Corp. v. Longspaugh*, 144 AD3d 858 [2d Dept 2016]; *Phillip v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]).

In an action for breach of contract, a plaintiff moving for summary judgment must demonstrate the existence of the agreement, performance by the plaintiff, breach by the Defendant, and damages resulting from the breach. (*JP Morgan Chase v. JH Elec. Of New York, Inc.*, 69 AD3d 802,803 [2d Dept 2010]; *Key Bank of Maine v. Lisi*, 225 AD2d 669 [2d Dept 1996]).

Upon the supporting documents, including the Merchant Agreement and the affidavit of Jeanne Canigiani, the court finds that the Plaintiff has established a prima facie entitlement to judgment as a matter of law by demonstrating the existence of the agreement and a breach thereof. It is incumbent upon Defendants to submit competent evidence demonstrating the existence of a material issue of fact.

In opposition, Defendants assert that the contract is an unconscionable contract of adhesion that cannot be enforced. As explained by Defendants own case law "[u]nder the doctrine of 'adhesion', contracts may be invalidated if one party, who is in an inferior bargaining position, is required to sign a contract to waive his legal rights in order to obtain [a] needed service from the party in [a] superior bargaining position." (*Miner v. Walden*, 101 Misc.2d 814, 816 [Sup. Ct. Queens County 1979] [quotations omitted]). However, Defendants supply no affirmation or affidavit detailing the circumstances of the agreement demonstrating unequal bargaining power,

[1] The court notes that the Canigiani affidavit is signed and notarized in Florida without an accompanying certificated of conformity in compliance with CPLR 2309(c). As this issue was not raised by the Defendants in opposition and is not fatal absent prejudice of a substantive right, the court considers the affidavit. (*See Moore v. L Peterson Trust, et al.*, 172 AD3d 1058 [2d Dept 2019]).

disparity in consideration, lack of choice or other indicia of unconscionability. The arguments of counsel in a memorandum of law are without evidentiary weight. (*Trombetta v. Cathone*, 59 AD3d 526 [2d Dept 2009]; *see also Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980] ["[O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient."]).

As to claimed "liquidated damages" in the amount of $53,327.23, however, the Plaintiff points to no provision in the contract allowing for such a recovery. The closest item of recovery provided for in the contract is found in paragraph 36, which provides in relevant part:

> Upon the occurrence of an Event of Default under this Agreement, Merchant shall be obliged to immediately deliver to FINTEGRA (i) the entire unpaid portion of the Receivables Purchased Amount; (ii) the Default Fee in the amount of $2,500.00, pursuant to Section 1, above; (iii) applicable NSF/Rejected ACH Fees, pursuant to Section 1, above; and (iii) as additional damages, reasonable costs and expenses in connection with FINTEGRA recovering the monies due to FINTEGRA from Merchant pursuant to this Agreement, including without limitation reasonable attorneys' fees and disbursements (with such additional damages collectively referred to as "Reasonable Damages"). The parties agree that FINTEGRA shall not be required to itemize or prove its Reasonable Damages and that the fair value of the Reasonable Damages shall be calculated as thirty percent (30%) of the undelivered portion of the Receivables Purchased Amount upon the occurrence of an Event of Default, or five thousand dollars ($5,000.00), whichever is greater.

The amount calculation as liquidated damages, however, exceeds the 30% identified in paragraph 36 of the Agreement as "Reasonable Damages." The amount sought represents nearly 43% of the undelivered portion of receivables and is, on its face, unreasonable. (*See Central Irrigation Supply v. Putnam County Club Assoc., LLC*, 57 AD3d 934 [2d Dept 2008] ["If . . . the amount of actual damages though 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."]). Accordingly, liquidated damages are disallowed. Defendants have not established that the remaining default fees are unreasonable or an unenforceable penalty. Accordingly, Plaintiff is entitled to judgment in the amount of the unpaid sum of $124,430.20, $2500.00 default fee, $420.00 in NSF/Rejected ACH Fees and $390.00 for UCC-1 fees for a total of $127,740.20 together with interest at a rate of 9% per annum from January 18, 2024.

For the foregoing reasons, it is hereby

ORDERED, that Plaintiff's motion for summary judgment on the causes of action set forth in the complaint is **granted**; and it is further

ORDERED, that Plaintiff shall submit to the Judgment Clerk for review a judgment in the amount of $127,740.20 together with interest at a rate of 9% per annum from January 18, 2024, plus costs and disbursements of the proceeding.

The foregoing constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, NY
February 7, 2025

ENTER:

HON. LISA A. CAIRO, J. S. C.

ENTERED
Feb 18 2025
NASSAU COUNTY
COUNTY CLERK'S OFFICE