

Thoro-Graph, Inc. v New York Racing Assn., Inc.

2026 NY Slip Op 31502(U)

April 3, 2026

Supreme Court, New York County

Docket Number: Index No. 654901/2022

Judge: Lyle E. Frank

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

THORO-GRAPH, INC.,

Plaintiff,

- v -

THE NEW YORK RACING ASSOCIATION, INC. AND,
NYRABETS, LLC,

Defendant.

INDEX NO. 654901/2022

MOTION DATE 09/05/2025,
09/05/2025

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 166, 168, 169, 170, 171, 172, 173, 174, 175, 184

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 006) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 162, 163, 164, 165, 167, 185

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, motion 005 is granted in part and motion 006 is granted.

Background

These motions for summary judgment arise out of a dispute over horse race gambling. Plaintiff is in the business of providing data and consulting services to customers in and outside of New York State who are looking to place bets on horse races. The New York Racing Association, Inc. ("NYRA") is a not-for-profit corporation organized under state law and operating under a franchise agreement with New York State. NYRabets, LLC (collectively with NYRA, "Defendants") is a Delaware company and subsidiary of NYRA that operates the national betting business for races run by NYRA, who is only permitted to take wagers within New York.

The Agreements and Relevant Terms

In 2017, Plaintiff and Defendants entered into a marketing affiliate agreement (the “2017 Agreement”). This agreement was followed by a successor marketing affiliate agreement (the “2022 Agreement”), with the purpose of both agreements being to direct Plaintiff’s customers to place bets on races run by NYRA. New York residents among Plaintiff’s customers would have their wagers run directly through NYRA, and wagers by out-of-state residents would be processed through NYRABets. Both agreements contained a confidentiality clause regarding the terms of said agreements, as well as a merger clause. Under other relevant provisions, Plaintiff was to receive half of all Net Revenue, a term that was defined as the gross revenue generated from Qualifying Wagers minus the sum of host track fees and other specified fees. This action largely arises from a dispute between the parties over the characterization of monies consisting of a 6.5% fee that NYRABets pays to NYRA in exchange for permission for the out-of-state NYRABets customers to place bets on races run by NYRA (the “Disputed Funds”). Plaintiff argues that the Disputed Funds are Net Revenue and thus they are entitled to half, and Defendants argue that these monies are in fact host fees and therefore not Net Revenue.

The Parties’ Relationship Begins to Break Down

In June of 2022, Jerry Brown, Plaintiff’s president, issued a letter demand for half of the Disputed Funds. This request was denied, and Plaintiff continued to pursue an attempt to collect on the Disputed Funds. At one point, NYRA raised the idea of termination of the parties’ joint venture in response. In December of 2022, NYRA followed through with this and issued a notice of termination for convenience, and the termination became effective in June of 2023. By the terms of the Agreements, any provision that contemplates performance continues in full force after termination, which would include payment and confidentiality obligations.

In December of 2023, the racing website BloodHorse.com published an article written by Dick Downey that covered recent updates in the ongoing litigation between the parties. This article stated that Plaintiff was seeking a 50% share of wager profits. Mr. Brown wrote a letter to the editor in response that included a statement that Plaintiff was entitled to 50% of the net revenue from the parties' joint venture.

Procedural Background

Plaintiff initiated this proceeding in December of 2022. An amended complaint was filed in September of 2023. Plaintiff is asserting four causes of action for breach of contract, declaratory relief, breach of the implied covenant of good faith and fair dealing, and attorneys' fees. Defendants moved to dismiss the cause of action for breach of the covenant of good faith, and this motion was granted in November of 2023. The dismissal was affirmed by the First Department on appeal. Defendants then timely answered the remaining amended complaint, pled ten affirmative defenses, and asserted a counterclaim for breach of contract based on the BloodHorse letter written by Mr. Brown. Discovery has proceeded and the note of issue has been filed.

Standard of Review

Under CPLR § 3212, a party may move for summary judgment and the motion "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR § 3212(b). Once the movant makes a showing of a prima facie entitlement to judgment as a matter of law, the burden then shifts to the opponent to "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 [2016].

The facts must be viewed in the light most favorable to the non-moving party, but conclusory statements are insufficient to defeat summary judgment. *Id.*

Discussion

In motion sequence 005, Defendants move for summary judgment in their favor dismissing the amended complaint entirely, and alternatively, for an order dismissing the amended complaint as against NYRAbets pursuant to CPLR § 3211(a)(7). In motion sequence 006, Plaintiff moves for partial summary judgment on the issue of liability for the claim for breach of contract, and to dismiss the counterclaim. Plaintiff also seeks attorneys' fees pursuant to the agreements, in an amount to be determined at an inquest. For the reasons that follow, Defendants' motion to dismiss the action against NYRAbets is granted, and its motion for summary judgment dismissing the complaint is otherwise denied. Plaintiff's motion for summary judgment as to liability on the breach of contract claim and for dismissal of the counterclaim is granted.

The Disputed Funds

The heart of this action's dispute is the definition of the Disputed Funds in light of the agreement's provisions. As stated above, the Disputed Funds concern wagers that non-New York residents place with NYRAbets on NYRA races after being directed there from Plaintiff. When NYRAbets receives a wager on a particular race from such a customer, they pay a percentage of that wager to NYRA, who is the host track for that race. This is pursuant to the terms of the agreement between NYRAbets and NYRA, which states that such amount is a fee paid by NYRAbets in exchange for the ability to show races run by NYRA. The fee is described as "the host fee rate applicable to wagers on all NYRA races." Defendants argue that the Disputed Funds constitute Host Track Fees as defined in the agreements, or at least are not included in the

revenue. Plaintiff contends that the Disputed Funds are in fact revenue received by NYRA that must be split with Plaintiff. It is clear from the terms of the agreements between the parties that when NYRabets pays the Disputed Funds to NYRA, such a payment is properly deducted from the revenue that NYRabets owes to Plaintiff as a host fee. But the dispute centers on whether that money then becomes part of the handle when it is received by NYRA, or if it is a form of revenue that is not included in the formula that determines how much NYRA owes Plaintiff.

The Disputed Funds Are Not Host Fees as Defined Under the Agreements

This action centers on the differing interpretations of provisions in the 2022 and 2017 Agreements. As a general rule, a “written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.” *Greenfield v. Philles Records*, 98 N.y.2d 562 569 [2002]. The interpretation of an unambiguous contract and the determination of whether a contract is ambiguous is for the court to decide as a matter of law. *Hirsch v. Food Resources, Inc.*, 24 A.D.3d 293, 295 [1st Dept. 2005]. The first interpretation issue is whether the monies NYRA receives are considered Host Fees as defined under the agreements and therefore are to be deducted from monies owed to Plaintiff. That provision in both agreements defines NYRA’s Host Fees as “(a) with respect to NYRA, the total host track fees payable on non-NYRA content.” By the plain language of the agreement, monies received by NYRA for permitting NYRabets to show NYRA content cannot be considered a Host Fee for purposes of a deduction in the Net Revenue calculation under the agreements. It is not a fee payable by NYRA on non-NYRA content. Therefore, the Disputed Funds are not a proper deduction from any revenue under the terms of the agreements.

The 2022 Agreement Definitions Are Not Ambiguous

The analysis then turns to whether the Disputed Funds falls under the agreements' definitions of revenue that is part of the formula for determining Plaintiff's ultimate payment owed. Here, there are slight differences between the formulas. The 2022 Agreement defines Net Revenue as "(a) with respect to NYRA [...] the Gross Revenue generated from Qualifying Wagers less the sum of any Host Track Fees" plus other fees. Qualifying Wagers are defined as "any Account Wager placed by a TG Player [a player referred by Plaintiff]" through the websites operated by NYRA and NYRABets. The wagers that set the Disputed Funds paid to NYRA are unambiguously Qualifying Wagers. Turning to the definition of Gross Revenue, that term is defined as "Handle less cancelled and refunded wagers, multiplied by the applicable Takeout rate." Handle in turn is defined as "the total amount of money wagered on a single race, day or season" through either NYRA or NYRABets' account wagering business. Takeout is defined as "a percentage from the Handle that is withheld by the racetrack."

These definitions are not ambiguous. Because here the Disputed Funds is a percentage of the wagers placed on NYRA bets, it is therefore part of the "total amount of money wagered on a single race." When a qualifying player outside New York State places a qualifying wager on a NYRA race, NYRABets then pays a percentage of that wager to NYRA. Therefore, the Disputed Funds are part of the total amount of money wagered on a NYRA race (Handle), are not Host Fees or Takeout as defined in the 2022 Agreement and should be included in the formula determining Net Revenue.

The 2017 Agreement Does Not Define Handle, but the Term is Not Ambiguous

As stated above, the 2022 Agreement definitions that determine the payout formula are not ambiguous. The 2017 Agreement, however, defines Net Revenue as "(a) with respect to NYRA, [...] the aggregate handle generated from Qualifying Wagers less the sum of any Host

Track fees” and other fees. It does not, however, define the term aggregate handle. While this might lend itself to ambiguity, here the Court does not find that the term aggregate handle is ambiguous. As Defendants themselves point out, under the Racing Law and general industry understanding, handle is “the term for the total dollar amount of pooled bets wagered on any given race or over any given period of time.” This closely tracks with the definition of Handle in the 2022 Agreement.

A contract term “is unambiguous if on its face it is reasonably susceptible of only one meaning.” *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d 61, 66 [1st Dept. 2008]. While the parties have reasonable disputes over whether certain funds could be considered part of a handle, it does not appear that the term ‘handle’ itself is reasonably susceptible to more than one meaning. It is the total dollar amount wagered on any given race or wagered during a specified time. Because neither agreement is ambiguous, the Court is barred from considering extrinsic evidence going to the parties’ intent, pursuant to case law and the explicit merger clause in the agreements. *See, e.g., Fineman Family LLC v. Third Ave. N. LLC*, 90 A.D.3d 549, 551 [1st Dept. 2011] (holding that when a contract is unambiguous, “courts should not consider extrinsic evidence to determine the parties’ intent”).

Handle Under Either Agreement Is Not Limited to New York Residents

For the reasons given above, the Court finds that the Disputed Funds are part of the total money wagered on a NYRA-run race, and therefore it falls under the definition of handle in the 2017 Agreement as well as the 2022 Agreement. Defendants argue that the handle referred to in each of these two provisions refers only to monies collected by NYRA from in-state New York residents, but this argument fails in the face of the plain language of the agreements. The 2022 Agreement defines a Qualifying Wager that would factor into the formula of what NYRA owes

Plaintiff as wagers placed from “usage of the NYRA Websites”, a term that explicitly is defined elsewhere as including NYRAbets.com, and thus out-of-state players. Similarly, the 2017 Agreement likewise defines a Qualifying Wager as including any wager placed by an out-of-state resident through NYRAbets.

If the parties wished to have limited the definition of handle to solely those wagers placed by New York residents for NYRA’s Net Revenue calculations, they were free to do so. That they did not do so does not make the contract ambiguous or permit this Court to read a limitation into the definition of Net Revenue that contradicts the plain terms of the agreements as written. Furthermore, there is no ‘double-dipping’ by Plaintiff here. The Disputed Funds are properly subtracted from the amount that NYRAbets splits with Plaintiff, and under the current practice by Defendants, Plaintiff never receives any portion of those funds. Under Plaintiff’s construction of the agreements, they would only receive half of the Disputed Funds as is contemplated by the Net Revenue provisions. Because the Court finds that the Disputed Funds are unambiguously part of the calculation that should be done to determine Plaintiff’s share of Net Revenue with NYRA, Defendants’ summary judgment motion fails as regards the dismissal of Plaintiff’s claims for breach of contract and declaratory relief. Plaintiff’s motion for summary judgment as to liability on the breach of contract claim succeeds for the same reason. Because Plaintiff has succeeded as to liability on the breach of contract claim, under the provisions of the agreements Plaintiff is also entitled to reasonable attorneys’ fees.

NYRAbets Should Be Dismissed

Defendants are also moving to dismiss the complaint as against NYRAbets for failure to state a claim. They argue that it is not alleged that NYRAbets breached either agreement or that NYRAbets was under any obligation to pay the Disputed Funds to Plaintiff. While Plaintiff

points to the close ties between NYRA and its subsidiary NYRAbets, Plaintiff has not adequately pierced the corporate veil such as would render NYRAbets liable. It is not disputed that when NYRAbets passes on the Disputed Funds to NYRA and then deducts that payment from the Net Revenue that it splits with Plaintiff, it is acting properly under the terms of the various agreements. It was NYRA alone that failed to account for the Disputed Funds in the calculation of Net Revenue, and therefore NYRA alone is the proper party here. Defendants' motion is therefore properly granted as to the dismissal of NYRAbets.

Defendants' Counterclaim

The final issue in these motions is Plaintiff's motion to dismiss Defendants' counterclaim for breach of contract. This counterclaim stems from the BloodHorse letter that Plaintiff's president wrote, revealing the terms of the parties' revenue split from the agreements. Plaintiff is moving to dismiss the counterclaim on the grounds that the prior-published BloodHorse article by Dick Downey had already disclosed that information. Under the terms of the agreements, otherwise confidential information that "is or becomes available to the public other than as a result of a disclosure by or through" one of the parties is no longer confidential. Plaintiff further argues that because the agreements permit disclosure of confidential information to third parties "in furtherance of the purpose of this Agreement", they are permitted to disclose the revenue split in an attempt to enforce the agreements. Finally, they point to how Defendants' filed unsealed copies of the agreements as exhibits to their own papers in this action, and therefore have waived the right to enforce the confidentiality of the agreements' terms.

When the Defendants uploaded unsealed copies of the agreements at issue (which they state was done out of a desire to avoid burdening the court with motion practice), they made the terms of the agreements publicly available. While a desire to avoid burdening a court with

unnecessary motion practice is laudable, here Defendants ran afoul of the plain terms of the agreements. The agreements state that if the agreement terms become “available to the public” other than a result of “a disclosure by or through the receiving Party”, which here, would be Plaintiff, the information loses its confidentiality protection. By the plain terms of the confidentiality provision, any reference to the terms of the agreements made by Plaintiff after the public disclosure of the agreements by Defendants is not a violation of the confidentiality provision. Therefore, the breach of contract counterclaim is properly dismissed for failure to state a claim. Accordingly, it is hereby

ADJUDGED that motion sequence 005 is granted as to the dismissal of the complaint as against NYRAbets, LLC, and is otherwise denied; and it is further

ADJUDGED that motion sequence 006 is granted; and it is further

ORDERED that the counterclaim is dismissed; and it is further

ORDERED that plaintiff Thoro-Graph, Inc., is entitled to summary judgment on liability for their first cause of action as against defendant The New York Racing Association, Inc., with damages and an award of reasonable attorneys’ fees to be determined at trial or other such resolution of this matter.

4/3/2026

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

LYLE E. FRANK, J.S.C.

HON. LYLE E. FRANK