

**complete Packaging & Shipping Supplies, Inc. v
First Data Servs., LLC**

2011 NY Slip Op 33652(U)

October 5, 2011

Supreme Court, Nassau County

Docket Number: 7720-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**COMPLETE PACKAGING AND SHIPPING
SUPPLIES, INC.,**

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

**Index No: 7720-11
Motion Seq. No. 1**

-against-

Submission Date: 8/19/11

**FIRST DATA SERVICES, LLC as successor in
interest to CHASE MERCHANT SERVICES, LLC,**

Defendants.

-----x

The following papers having been read on this motion:

- Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits...x**
- Affirmation in Opposition, Affidavit in Opposition and Exhibits.....x**
- Affirmation in Further Support, Affidavit in Further Support and Exhibits.....x**

This matter is before the Court for decision on the motion filed by Defendant First Data Services, LLC, as successor in interest to Chase Merchant Services, LLC ("FDS" or "Defendant") on June 30, 2011 and submitted on August 19, 2011. For the reasons set forth below, the Court grants the motion and dismisses the Amended Complaint.

BACKGROUND

A. Relief Sought

Defendant moves for an Order, pursuant to CPLR §§ 3211(a)(1), (5) and (7), dismissing the Amended Verified Complaint ("Amended Complaint").¹

Plaintiff Complete Packaging and Shipping Supplies, Inc. ("Complete" or "Plaintiff") opposes Defendant's motion.

¹ As discussed *infra*, after the instant motion was filed, Plaintiff filed an Amended Verified Complaint which the Court addresses in this decision.

B. The Parties' History

The initial Complaint (Ex. A to Lieberman Aff. in Supp.), filed May 25, 2011, alleges as follows:

First Data's business includes the processing of merchant credit card transactions. On or about August 18, 2000, Chase Merchant Services, LLC ("CMS"), a merchant credit card processing company, entered into an agreement ("Agreement") with Complete pursuant to which CMS would provide account processing services for credit cards for Complete. In November of 2008, First Data became the successor in interest to CMS and assumed its rights and interests under the Agreement. As successor in interest to CMS and pursuant to the Agreement, First Data would collect and receive amounts charged by customers of Complete, and remit payment to Complete.

The Complaint contains three (3) causes of action. In the first cause of action, Complete, alleges that on or about May 24, 2004 through June 2, 2004, charges totaling \$245,761.98 were processed through CMS/First Data on behalf of Complete. CMS/First Data collected that amount on or about July 1, 2004 but failed to remit payment of that amount to Complete until on or about July 15, 2010. Complete alleges that CMS/First Data's failure to remit payment to Complete for over six (6) years constitutes a breach of the Agreement, entitling Complete to interest and damages believed to be in excess of \$221,000.00.

In the second cause of action, Complete again alleges that CMS/First Data's delay in remitting payment constituted a breach of the Agreement, entitling Complete to damages believed to be in excess of \$221,000.00. In the third cause of action, Complete alleges that, as a result of CMS/First Data's delay in remitting payment, CMS/First Data has been unjustly enriched, entitling Complete to damages believed to be in excess of \$221,000.00.

Following the filing of the instant motion, Plaintiff filed an Amended Verified Complaint ("Amended Complaint") (Ex. A to Pollack Aff. in Opp.). With the agreement of counsel for the parties, the arguments raised by Defendant in its moving papers will be applied to the Amended Complaint, and Defendant has addressed the new cause of action for conversion in its reply papers. The Amended Complaint contains the same first through third causes of action as the initial Complaint, and also contains a fourth cause of action alleging conversion by CMS/First Data in exercising rights of ownership over the \$245,761.98, which rightfully belonged to Complete, from 2004 to 2010.

In his Affidavit in Support, Vashti Ramdeen ("Ramdeen"), a Senior Legal Analyst employed by First Data, affirms that he is familiar with Complete by virtue of his job

responsibilities which include the review and investigation of merchant disputes. Ramdeen provides a copy of the Agreement (Ex. B to Ramdeen Aff. in Supp.), and affirms that, pursuant to the Agreement, Complete agreed to be bound by the provisions set forth in the CMS Program Guide (*id.*).

Ramdeen explains that a settlement account (“Settlement Account”) is the bank account designated by the merchant as the account for credits and debits related to the credit card transactions processed by the processor. Monies due the merchant from a transaction are credited to its Settlement Account, and monies due from the merchant are debited from its Settlement Account. Ramdeen cites ¶ 18.8 of the Program Guide which required Complete to notify CMS/First Data in writing, within 45 days after any disputed debit or credit, if Complete believed any adjustments should have been made with respect to its Settlement Account. Ramdeen also makes reference to ¶ 20.3 of the Program Guide which relieves CMS/First Data of any liability “regardless of whether such damages were foreseeable or whether any party or any entity has been advised of the possibility of such damages.” And ¶ 20.4 of the Program Guide limits CMS/First Data’s liability to \$50,000, or the amount of fees received by CMS/First Data pursuant to the Contract for services performed in the immediately preceding 12 months, whichever is less. ¶ 24.2 of the Program Guide provides that CMS/First Data will hold any Reserve Account for the greater of ten (10) months after termination, “or for such longer period of time as is consistent with our liability for Card transactions in accordance with Association Rules.”

Ramdeen affirms that, following the execution of the Agreement, Complete began to process from multiple locations. In May and June of 2004, Complete’s processing volume exceeded the limits in the Agreement. As a result, monies from those credit card transactions were diverted and held pursuant to the Agreement. Complete never requested a return of these funds. Complete stopped processing through CMS/First Data in 2007, and its account was terminated in February of 2008. At the time of the termination, the money was still being held in a Reserve Account.

Ramdeen explains CMS/First Data’s procedure for unclaimed monies. Prior to the unclaimed monies being escheated to the merchant’s home state, CMS/First Data attempts to contact the merchant at its last known address, advise the merchant of the monies and provide the merchant with the opportunity to retrieve the monies. By letter dated July 6, 2010 (Ex. C to Ramdeen Aff. in Supp.) (“Release of Funds Form”), which contains the subject line “RE: NOTICE OF RELEASE OF FUNDS,” CMS/First Data notified Complete that it had monies

which Complete could re-claim by completing and returning the Release of Funds Form. The Form advised Complete that 1) the amount to be returned was \$245,761.98; 2) the relevant account had been closed or inactive for an extended period of time; 3) the monies could be re-claimed by signing and returning the Release of Funds Form; 4) by signing the Release of Funds Form, Complete was certifying that the information provided was correct; and 5) if Complete disagreed with the balance, it was to “provide an explanation of the discrepancy together with all supporting documentation.” Complete signed and returned the Release of Funds Form to CMS/First Data, provided no indication of its disagreement with the balance set forth on the Form, and did not supply any supporting documentation. Moreover, during the more than six (6) years that the monies were being held in reserve, both before and after the termination of the Agreement, Complete never requested that the monies be relieved from reserve, or made any other demand for a return of the funds. The monies remained in a reserve account until July 15, 2010, at which time they were released to Complete.

In opposition, Jeffrey Berkowitz (“Berkowitz”), the President of Complete, concedes that he received and executed the Release of Funds Form, affirming that “[o]f course I wanted my money and simply signed and returned the notification letter” (Berkowitz Aff. in Opp. at ¶ 3). Berkowitz affirms, however, that he relied on Defendant’s “honesty, integrity and accuracy” in handling Complete’s account (*id.* at ¶ 4), and, while he was aware of the existence of retention periods, he relied on Defendant to remit payment at the expiration of the retention period. Berkowitz affirms that he subsequently spoke with counsel and determined that Defendant should have delivered the funds to Complete on or about July 1, 2004, and instead wrongfully diverted those funds for its own use for six (6) years.

In reply, Ramdeen submits that Complete was “well aware” (Ramdeen Aff. in Further Supp. at ¶ 2) that a Reserve Account was funded in 2004 “to secure any contingent or actual obligations related to the Complete merchant accounts” (*id.*). Ramdeen affirms that Complete 1) received monthly statements of its credit card activity; and 2) was required to retain all sales and credit drafts related to transactions. Thus, a comparison of the statements to the actual transactions and bank account statements would reveal that monies were being diverted to the Reserve Account. Moreover, even if Complete was not actually aware of the Reserve Account, it was obligated, pursuant to ¶ 18.8 of the Program Guide, to reconcile its account and notify CMS/First Data of any discrepancies, which it failed to do.

Ramdeen also submits that Complete has provided an inaccurate explanation of credit card transactions. First Data does not collect money from a customer or remit money to a

merchant; rather, it is a facilitator between banks that acquire sales drafts from merchants (“Acquirers”) and banks that issue credit cards (“Issuers”). This procedure is explained in the Preface of the Program Guide. (*See* Lieberman Aff. in Further Supp. at p. 2). In addition, monies in a Reserve Account are not loaned to third parties, or applied to other accounts, as asserted by Complete in its opposition.

C. The Parties’ Positions

Defendant submits that, pursuant to the Agreement, Complete agreed that 1) pursuant to ¶ 18.8 of the Program Guide, Complete was required to notify FDS/CMS of any adjustments it believed should be made to its Settlement Account, within 45 days after the affected credit; 2) pursuant to ¶ 24.2 of the Program Guide, FDS/CMS was permitted to retain monies held in a reserve account for at least ten (10) months after the Agreement was terminated; 3) pursuant to ¶ 20.3 of the Program Guide, FDS/CMS would not be responsible for any lost profits, lost revenues, lost business opportunities, exemplary, punitive, special incidental, indirect or consequential damages; and 4) pursuant to Program Guide ¶ 20.4, FDS/CMS’ liability would be limited to the lesser of \$50,000 or the amount of fees that FDS/CMS received for services in the immediately preceding 12 months.

Moreover, as outlined in the Ramdeen Affidavit, 1) the Agreement was terminated in February of 2008, and FDS/CMS had not processed credit card transactions for Complete since 2007; 2) in 2004, proceeds of credit card transactions submitted for processing by Complete were diverted and held pursuant to the terms of the Agreement, and monies were still being retained at the time of the termination of the Agreement in 2008; 3) Complete never questioned the FDS/CMS’ retention of funds; and 4) Complete signed and returned the Release of Funds Form, and never disputed the amount set forth therein.

In light of the foregoing, Defendant submits that 1) the Complaint is barred by the statute of limitations, in light of Complete’s allegation that FDS collected and received the charges totaling \$245,761.98 on or about July 1, 2004 (Compl. at ¶¶ 10-12), which would be the date of accrual of Plaintiff’s breach of contract and unjust enrichment causes of action; 2) the Complaint is barred by documentary evidence, specifically the Release of Funds Form and the Agreement; 3) in light of the limitation of liability clause set forth in ¶ 20.4 of the Program Guide, and the fact that FDS/CMS had not processed any transactions for Complete for more than 12 months before Complete made its claim and therefore had not received any fees for services, FDS/CMS has no liability to Complete under the Agreement; 4) the first cause of action for breach of contract is not viable in light of Complete’s acknowledgment that it received payment in the sum

of \$245,761.98; 5) the second cause of action, also for breach of contract, contains no specific allegations and should be dismissed as duplicative of the first cause of action; 6) the doctrine of equitable estoppel is inapplicable given Complete's failure to allege how Defendant's actions caused the delay in Plaintiff filing its action; and 7) no cause of action for conversion ever accrued, in light of the fact that a) Complete does not allege that it demanded the monies in the Reserve Account; b) even if the Return of Funds Form constitutes such a demand, FDS/CMS returned the funds to Plaintiff; and c) FDS/CMS never disposed of the funds in the Reserve Account, except to return them to Plaintiff.

Plaintiff opposes Defendant's motion, submitting that a) Defendant did not have the authority to withhold funds, in light of the language in ¶ 16.1 of the Program Guide stating "We will only be required to settle Card transactions for Cards specified in your application. Promptly after presentment of Sales Drafts pursuant to the Operating Procedures, we will initiate transfer of the applicable settlement funds to you;" 2) the limitation of liability clause is void as against public policy; 3) Plaintiff has been damaged by the loss of use of the funds at issue, and is entitled to interest on those funds; 4) the action is not time-barred as the statute of limitations began to run when Defendant notified Plaintiff, in July of 2010, that it was holding the funds in the Reserve Account; 5) Plaintiff's execution of the Return of Funds Form did not constitute an acknowledgment that no other monies were owed, or a release of claims; and 6) Defendant should be precluded from asserting the statute of limitations as a defense in light of the fact that it was Defendant's misconduct that resulted in the delay in the filing of this action.

RULING OF THE COURT

A. Standards of Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When

entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

Pursuant to CPLR § 3211(a)(5), a party may move to dismiss a complaint on the ground that it is foreclosed by the applicable statute of limitations.

B. Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d.

A conversion takes place when defendant, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *Colavito v. Organ Donor Network*, 8 N.Y.3d 43, 49-50 (2006). The two key elements of conversion are 1) plaintiff's possessory right or interest in the property, and 2) defendant's dominion over the property or interference with it, in derogation of plaintiff's

rights. *Id* at 50.

C. Relevant Contract Principles

Agreements are to be construed in accordance with the parties' intent. When parties set down their agreement in a clear complete document, their writing should be enforced according to its terms. *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004), quoting *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). Where the parties' intent is discernible from the plain meaning of the language of the contract, there is no need to look further. *Evan v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004).

D. Estoppel

The elements of estoppel are, with respect to the party estopped: 1) conduct that 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 himself: 1) lack of knowledge of the true facts, 2) reliance upon the conduct of the party, and 3) a prejudicial change in his position. *Id.* at 577, citing *Airco Alloys Div. V. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 81-82 (4th Department 1980). See *Springside Land Company, LLC v. Board of Managers of Springside Condominium I*, 56 A.D.3d 654 (2d Dept. 2008) (defendant entitled to dismissal of cause of action based on equitable estoppel where both parties knew of true facts).

E. Limitation of Liability Provisions

It is settled that a contractual provision that limits damages will be enforced unless a special relationship exists between the parties, or a statute or public policy imposes liability despite the restrictions set forth in the contract. *Duane Reade v. 405 Lexington, L.L.C.*, 22 A.D.3d 108, 111 (1st Dept. 2005), citing, *inter alia*, *Peluso v. Tauscher Cronacher Professional Engrs.*, 270 A.D.2d 325 (2d Dept. 2000).

F. Application of these Principles to the Instant Action

The Court dismisses the second cause of action in the Amended Complaint, alleging breach of contract, based on the Court's conclusion that it is duplicative of the first cause of action. The Court dismisses the third cause of action in the Amended Complaint, based on unjust enrichment, based on the Court's determination that this cause of action is not viable in light of the existence of the Agreement.

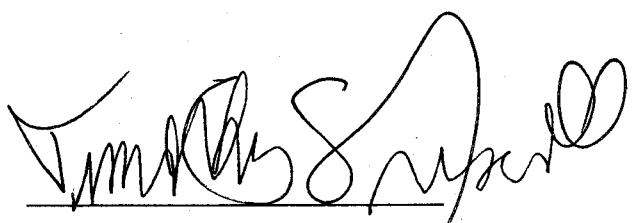
The Court dismisses the first and fourth causes of action in the Amended Complaint, alleging breach of contract and conversion, pursuant to CPLR § 3211(a)(1), based on the Court's conclusion that those causes of action are barred by documentary evidence, specifically the Agreement and Release of Funds Form, which are clear and complete documents that should be enforced according to their terms. That documentary evidence establishes that 1) Defendant was authorized, pursuant to the Agreement, to maintain certain of Plaintiff's monies in a separate account; 2) Plaintiff, by executing and returning the Release of Funds Form and accepting the funds forwarded to him by Defendant, acknowledged that the funds remitted to him were appropriate; and 3) Defendant has permissibly restricted its liability by inserting relevant language in the Agreement and, pursuant to that language, Defendant has no liability to Plaintiff under these circumstances.

In light of the Court's determination that the action is barred by documentary evidence, the Court will not address the issue of whether the action is time-barred. The Court notes, however, that there appears to be no basis for Plaintiff's claim that, if the action were time-barred, the doctrine of equitable estoppel would be applicable and would foreclose the assertion of such a defense by Defendant.

The Amended Complaint is hereby dismissed.
 All matters not decided herein are hereby denied.
 This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
 October 5, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
 OCT 12 2011
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE