| **Trifecta Mktg. Group, LLC v American Credit Card Processing Corp.** |
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| 2012 NY Slip Op 31601(U) |
| June 4, 2012 |
| Supreme Court, Nassau County |
| Docket Number: 5221-12 |
| 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

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TRIFECTA MARKETING GROUP, LLC,

Plaintiff,

- against -

AMERICAN CREDIT CARD PROCESSING CORPORATION, AMERICAN CREDIT CARD PROCESSING CORPORATION II, AMERICAN CREDIT CARD PROCESSING CORPORATION III and MERRICK BANK, N.A.,

Defendants.

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TRIAL/IAS PART: 16
NASSAU COUNTY

Index No: 5221-12
Motion Seq. No. 1
Submission Date: 5/21/12

**The following papers have been read on this Order to Show Cause**

**Order to Show Cause, Affirmation in Support, Affidavit in Support and Exhibits.....x**
**Affidavit in Opposition and Exhibits.....x**
**Affirmation in Opposition and Exhibit.....x**

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiff Trifecta Marketing Group, LLC ("Trifecta" or "Plaintiff") on April 24, 2012 and submitted on May 21, 2012. [1] For the reasons set forth below, the Court denies Plaintiff's Order to Show Cause in its entirety and vacates the temporary restraining order issued on April 24, 2012 and

[1] Pursuant to a so-ordered stipulation dated April 30, 2012 ("Stipulation") (Ex. B to Murray Aff. in Opp.), the caption was amended to change the Plaintiff's name from Trifecta Marketing Group, Inc. to Trifecta Marketing Group, LLC. In addition, pursuant to the Stipulation, Plaintiff discontinued this action, without prejudice, against Defendants American Credit Card Processing Corporation II and American Credit Card Processing Corporation III.

amended on April 30, 2012.

## BACKGROUND

A. Relief Sought

Plaintiff moves for an Order directing Defendants to 1) retract the 1099 forms for tax year 2011 issued to Plaintiffs or distribute the income set forth therein; 2) provide to Plaintiff an accounting of all monies received on its behalf; and 3) cease and desist from charging consumers, without authorization on behalf of Plaintiff, that once did business with Plaintiff.

The Stipulation, which amended the temporary restraining order issued by the Court on April 24, 2012, also provides that Defendants may process credit card transactions on behalf of Plaintiff, but may not debit the Plaintiff in any way other than from the Plaintiff's funds that Defendants currently acknowledge holding ("TRO").

Defendants oppose Plaintiff's Order to Show Cause

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to Sklavos Aff. in Supp.) alleges as follows: [2]

Defendant American Credit Card Processing Corporation ("ACCPC") is engaged in business as a merchant account holder. In or about June of 2011, Plaintiff hired ACCPC to act as a merchant account receiving credit card payments on behalf of Plaintiff. Pursuant to that arrangement, the credit card payments were received by ACCPC on Plaintiff's behalf. ACCPC received the money as the Plaintiff's agent and agreed to remit it to Plaintiff, after deducting fees related to credit card processing. ACCPC currently holds approximately $200,000 in credit card payments belonging to Plaintiff and refuses to release those funds to Plaintiff despite Plaintiff's request. In the first cause of action, Plaintiff alleges that Defendants have converted those funds. In the second cause of action, Plaintiff alleges that Defendants have breached their contract with Plaintiff. [3]

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[2] In light of the discontinuance of the action against ACCPC II and ACCPC III, the Court has not outlined the allegations in the Complaint against those entities.

[3] The Complaint does not specify which allegations are asserted against ACCPC and which are asserted against Defendant Merrick Bank, N.A. ("Merrick Bank") and refers to "Defendant(s)" in all of the allegations in the Complaint.

In support of the motion, counsel for Plaintiff ("Plaintiff's Counsel") affirms that Defendant entered into a contract with Plaintiff to process the credit card purchases by Plaintiff's customers, and to credit Plaintiff's account with the proceeds. Plaintiff has clients who authorized Plaintiff to charge their credit cards for various sums in exchange for providing services, specifically monthly memberships to a discount club and other ventures. The clients' credit cards were charged but the clients' money was never provided to Plaintiff. Instead, after ACCPC processed the credit card charges, Defendants wrongfully kept those funds although it was the clients' intent to give those funds to Plaintiffs. Plaintiff's Counsel affirms further that, through its agent ACCPC, Merrick Bank was the bank handling the banking transactions at issue.

Plaintiff's Counsel suggests that Defendants will argue that there were certain "chargebacks" (Sklavos Aff. in Supp. at ¶ 6). A chargeback occurs when a credit charge is reversed after it has been processed as a valid charge. Generally, if a consumer makes a complaint or disputes a charge, he is issued a credit. Plaintiff's Counsel affirms that Defendant has advised Plaintiff's Counsel of its position regarding the chargebacks, specifically that Defendants are permitted to withhold payments from Plaintiff due to excessive chargeback activity. Plaintiff's Counsel affirms, however, that Plaintiff ceased using the services of ACCPC as of September of 2011. Plaintiff's Counsel affirms, further, that Plaintiff has learned that the chargebacks to which ACCPC refers were "the result of their own ill-advised activity" (Sklavos Aff. in Supp. at ¶ 8). Instead of providing Plaintiff's customers with refunds after a chargeback occurred, ACCPC, without Plaintiff's authorization, continues to charge Plaintiff's customers for purchases that they do not want.

Plaintiff's Counsel notes that Defendants have access to Plaintiff's bank accounts, and affirms that disputed chargebacks have not been deducted from the monies held by the Defendants, but rather have been deducted directly from Plaintiff's individual bank account. Plaintiff's Counsel submits that if Defendants continue to charge Plaintiff's customers in this fashion, Plaintiff will go out of business.

Plaintiff's Counsel avers, further, that no funds have been released to Plaintiff since September of 2011. Plaintiff's Counsel submits that the requested injunctive relief is appropriate to ensure that Defendants do not charge any additional clients of Plaintiff, particularly in light of

the fact that Plaintiff has terminated its relationship with ACCPC.

Plaintiff's Counsel affirms that in February of 2012, Merrick Bank issued 1099 forms to the Plaintiff totaling $272,209.00 (Ex. E to Sklavos Aff. in Supp.). Plaintiff's Counsel argues that Defendants have advised the Internal Revenue Service and New York State that it has distributed those funds when, in fact, they have not.

Alois R. Rubenbauer ("Rubenbauer"), a principal of Plaintiff, affirms the truth of the affirmations in the Affirmation in Support of Plaintiff's Counsel. He affirms that Defendants, as Plaintiff's agent, have accepted payments from Plaintiff's clients but have refused to provide Plaintiff with an accounting regarding those payments. With respect to Defendants' claims that they are holding the funds due to certain chargebacks, Rubenbauer notes that Defendants have not deducted funds from the funds they are holding, but rather from Plaintiff's own operating account. Rubenbauer affirms that these funds are crucial to the continued viability of Plaintiff.

In opposition, Michael Murray ("Murray"), a manager of ACCPC, affirms that the Court should deny Plaintiff's application on several grounds. ACCPC is a credit card processor for Visa and MasterCard. On June 15, 2011, Plaintiff entered into three (3) credit card Visa and MasterCard processing agreements ("Agreements") with ACCPC (Ex. A to Murray Aff. in Opp.). Almost immediately, ACCPC received chargeback claims in which Plaintiff's customers claimed that their credit card transactions with the Plaintiff were fraudulent, or that the services that they purchased had not been provided. Under ACCPC's Agreement with Visa and MasterCard, ACCPC is required to investigate those claims and, if ACCPC is not satisfied with the documentation supplied by the Plaintiff, ACCPC must return the funds to the customers.

Murray affirms that the chargebacks continued to increase and, within a few months, totaled 91, all of which resulted in full refunds to the customers. Murray describes this as an "exorbitant" number of claims (Murray Aff. in Opp. at ¶ 3(c)). Accordingly, Murray spoke with a representative of Plaintiff and advised him that ACCPC would have to maintain a reserve to protect ACCPC, Visa and MasterCard, and referred Plaintiff's representative to paragraphs 12 and 20 in the Agreements. Pursuant to those provisions, if ACCPC receives excessive retrieval requests or chargebacks, then a reserve account will be held for 6 to 12 months, or as long as a chargeback is possible in an amount that ACCPC determines is reasonable. ACCPC is currently

holding $103,000.

Paragraph 20 of the Agreement, titled "Reserve Account," provides as follows:

> ACCPC may establish (with or without notice to merchant) and merchant unconditionally agrees to fund a reserve account to be held by ACCPC intended to secure merchant's obligation and protect ACCPC against potentially fraudulent card transactions, potentially disputed transactions subject to potential chargebacks, anticipated chargebacks or against potential failure to meet merchant obligations. The reserve shall be held for 6-12 months, or as long as a chargeback is possible and the amounts determined reasonably by ACCPC. Events occurring in paragraph 9 [Events of Default] shall also allow a reserve to be established by ACCPC.

In addition to the 91 chargebacks initially received, ACCPC subsequently received an additional 130 chargebacks for the same reasons, all of which resulted in refunds to Plaintiff's customers. Moreover, in addition to the 221 chargebacks initiated by Plaintiff's customers due to alleged fraud, ACCPC received requests from the Plaintiff to issue refunds from the reserve to an additional 874 customers. Murray affirms that this represents approximately 25% of the sales and "is a red flag in our business" (Murray Aff. in Opp. at n. 1).

In response to every chargeback claim, and due to the large number of chargeback complaints, ACCPC refused to process further Visa or Mastercard charges for Plaintiff. In addition, ACCPC specifically demanded, pursuant to paragraph 20 of the Agreement, that Plaintiff supply ACCPC with its invoices, order forms and proof of delivery of their products or services to their customers for all transactions that ACCPC processed, so that ACCPC could ensure that there would not be further chargebacks. To date, Plaintiff has refused to respond to those requests, which refusal also constitutes a breach of Plaintiff's obligations under paragraph 12 of the Agreement.

Murray affirms that ACCPC, as processor for Visa and MasterCard, is contractually responsible for the chargebacks, and any potential further chargebacks or claims, and must protect itself, as well as Visa and MasterCard. Murray believes that Plaintiff is no longer in business and that all future chargebacks will be the responsibility of ACCPC. Murray submits that, in light of the fact that the Agreement specifically authorizes ACCPC to hold funds for between 6 and 12 months, and given Plaintiff's failure to provide proof of sales as requested, it is clear that Plaintiff has breached the Agreement and will not succeed in this action. Thus,

injunctive relief is not appropriate.

In further opposition to Plaintiff's application, counsel for Merrick Bank submits that Plaintiff, in filing this action, has ignored the plain language of the Agreement, more particularly paragraph 19 of the Agreement which authorizes ACCPC to establish a reserve account. Counsel submits that, given the high volume of chargebacks and disputed transactions involving Plaintiff's merchant accounts, Defendants are "fully within their rights to hold the funds Plaintiff presently demands" (Regan Aff. in Opp. at ¶ 4). Counsel submits that Plaintiff have not alleged any facts demonstrating that Defendants are improperly or unreasonably withholding funds.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to the requested injunctive relief by 1) establishing a likelihood of success on the merits by demonstrating that Defendants are improperly withholding payments from Plaintiff, and establishing that Defendants' reliance on the chargebacks is misplaced in light of the fact that Plaintiff ceased using Defendants' services in September of 2011, which was over 6 months prior to the date of Plaintiff's Order to Show Cause; 2) demonstrating that Plaintiff will suffer irreparable harm without the requested injunctive relief because Plaintiff will be unable to remain in business; and 3) demonstrating the a balancing of the equities favors Plaintiff because Defendants have acted improperly, Defendants will incur no harm if the Court grants injunctive relief, and Plaintiff's business will be adversely affected without the requested injunctive relief.

Defendants ACCPC and Merrick Bank oppose Plaintiff's application, submitting that the clear language of the Agreement authorizes Defendants to establish a reserve account, which Defendants have done properly in light of the numerous number of chargebacks on Plaintiff's account, allegedly due to fraud and customer dissatisfaction. Thus, Defendants argue, Plaintiff cannot demonstrate a likelihood of success on the merits and is not entitled to injunctive relief.

RULING OF THE COURT

A. Preliminary Injunction Standards

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the

injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Application of these Principles to the Instant Action

The Court denies Plaintiff's Order to Show Cause in its entirety, and vacates the TRO.as issued on April 30, 2012 and amended in the Stipulation. In light of the language in the Agreement, which clearly authorizes the establishment of the reserve account at issue, the number of chargebacks on Plaintiff's merchant account for alleged fraud and customer dissatisfaction, Plaintiff's alleged failure to provide supporting documentation to Defendants as requested, and the lack of evidence that Defendants have acted improperly with respect to the establishment of the reserve account, Plaintiff has not demonstrated a likelihood of success on the merits.

In light of the foregoing, the Court denies Plaintiff's Order to Show Cause in its entirety and vacates the TRO as issued on April 30, 2012 and amended in the Stipulation.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel for the parties are reminded of their required appearance before the Court for a Preliminary Conference on September 6, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY

June 4, 2012

HON. TIMOTHY S. DRISCOLL

J.S.C.