# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: [redacted] Justice PART 45

ATARI, INC.

-v-

CARLYLE TRADING CORP.

INDEX NO. 652157/2011

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendant for partial summary judgment is GRANTED in part and Denied in part, per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: June 21, 2012

[redacted], J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

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| ATARI, INC., | | |
| Plaintiff, | : | Index No. 652157/2011 |
| -against- | : | DECISION AND ORDER |
| CARLYLE TRADING CORP., | : | Sequence No. 001 |
| Defendant. | : | |

**MELVIN L. SCHWEITZER, J.:**

**Background**

This matter arises out of a contract dispute between defendant Carlyle Trading Corp. (Carlyle) and plaintiff Atari, Inc. (Atari). Carlyle moves for partial summary judgment.

Carlyle is a New York corporation engaged in the barter trade business. Carlyle operates its business by purchasing excess inventory from customers in exchange for a media trade credit, which Carlyle's customers redeem by selecting advertising that Carlyle will buy for them. Carlyle typically grants a credit for the full wholesale value of the inventory. Carlyle then remarkets the client's inventory to, among others, dollar stores, close-out stores, and auctions.

On January 29, 2010, Atari entered a written contract with Carlyle. Atari sold Carlyle 157,431 units of inventory in exchange for a media trade credit of $800,000. The contract provided that Atari could redeem its credit by having Carlyle place advertising on Atari's behalf, whose price would be charged against Atari's trade credit balance. In section 4(c) of the contract, Carlyle promised to use "reasonable good faith efforts to provide such media" to Atari by creating media plans based on Atari's advertising goals.

Atari alleges that after the contract was executed and it had delivered the inventory, Carlyle became unresponsive and for the first time began to raise a series of claims regarding trade credit usage limitations, including demanding a cash outlay in order to redeem its credits.

Unwilling to make a cash outlay, Atari initiated this suit. Atari alleges that Carlyle has breached its obligations to Atari and Atari should recover no less than $800,000 in damages. Atari maintains two claims for relief: breach of contract and, in the alternative, *quantum meruit*.

Carlyle denies any breach and contends as a partial defense that the contract explicitly limits damages Atari can recover in the event of breach. Contract section 8(i) provides, "You [Atari] agree that in the event of any dispute between us [Atari and Carlyle], the maximum amount you [Atari] can recover is the amount of our 'remarketing proceeds', regardless of the claims asserted or the actual damages."

Carlyle now moves pursuant to CPLR 3212 for partial summary judgment, on the grounds that the damages limitation clause limits Atari's recovery to the amount Carlyle received upon remarketing Atari's inventory. Carlyle claims this amount is less than $140,000.

For the reasons stated herein, Carlyle's partial summary judgment motion is denied with respect to Atari's breach of contract claim and granted with respect to Atari's *quantum meruit* claim.

**Discussion**

Among other things, CPLR 3212 requires that a motion for summary judgment "shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." The movant on a motion for summary judgment must set forth "sufficient evidence to demonstrate the absence of any material issues of fact." *JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 373, 384 (3d Dept 2005). "The court's role on a motion for summary judgment is to determine

whether there is a material factual issue to be tried, not to resolve it." *Sommer v Fed. Signal Corp.*, 79 NY2d 540, 554 (1992). The court on a summary judgment motion "should draw all reasonable inferences in favor of the nonmoving party." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989). "Summary judgment is a drastic remedy which deprives the litigant of his day in court and therefore should only be employed when there is no doubt as to the absence of triable issues." *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997) (internal quotation marks and citation omitted). CPLR 3212 (f) provides that if it appears that "facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had."

Atari's *quantum meruit* claim must be dismissed and Carlyle's motion for partial summary judgment in that regard is granted. Atari acknowledges that the "existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987). Atari's claim clearly arises "out of the same subject matter" as its contract with Carlyle, *id.*, because Atari seeks damages not for some unrelated tort but for what Atari claims is Carlyle's breach of the contract.

Atari argues, however, that Carlyle's contract with it is not "valid and enforceable," and so the contract cannot govern the dispute. *Id.* In particular, Atari alleges that Carlyle's promised consideration was illusory.

A "contract is unenforceable if the promise of either party is illusory," because "the promises of both parties to a bilateral contract must be supported by consideration," and a promise is illusory and lacking in consideration if it obligates the promisor "to nothing." *Curtis Properties Corp. v Greif Companies*, 212 AD2d 259, 265 (1995).

A party's obligation to perform in good faith is sufficient consideration to create a contract even where that party could terminate the agreement if he or she determined market conditions were unfavorable. *See Richard Bruce & Co. v J. Simpson & Co.*, 40 Misc 2d 501, 504 (Sup Ct 1963).

Here, Atari argues that even though Carlyle promised to use reasonable good faith efforts to provide media advertising to Atari, nonetheless the damages limitation clause in its contract renders this promise illusory. Indeed, Atari's bargained for consideration was the $800,000 trade credit, which the damages limitation clause in effect allows Carlyle to deny and presumably pay nothing but "our [Carlyle's] 'remarketing proceeds.'" Nonetheless, while these damages are not equivalent to the trade credit, it is incorrect to say that the contract obligates Carlyle "to nothing." *Curtis Properties Corp.*, 212 AD2d 259, 265 (1st Dept 1995). Carlyle is obligated to pay Atari the proceeds from remarketing Atari's inventory, a sum which Carlyle states to be not much less than $140,000. As Carlyle is obligated to do something, this court finds that its promise was not illusory.

Because the parties' promises are not illusory, the contract does not fail for lack of mutual consideration, and Atari's *quantum meruit* claim is thus precluded by the contract.

Atari next argues to defeat Carlyle's summary judgment motion that the damages limitation clause of Carlyle's contract with it is unenforceable because the clause is ambiguous.

"Whether or not a contract provision is ambiguous is a question of law to be resolved by a court." *Van Wagner Adver. Corp. v S & M Enterprises*, 67 NY2d 186, 191 (1986). "A contract is ambiguous if on its face it is reasonably susceptible of more than one interpretation." *Telerep, LLC v U.S. Int'l Media, LLC*, 74 AD3d 401, 402 (1st Dept 2010) (internal quotation marks and citation omitted). "Although ambiguities are to be construed against the drafter,

particularly when found in an exclusionary clause . . . when the meaning of a contract is plain and clear it is entitled to be enforced according to its terms and not to be subverted by straining to find an ambiguity which otherwise might not be thought to exist." *Uribe v Merchants Bank of New York*, 91 NY2d 336, 341 (1998) (internal quotation marks and citations omitted). "[M]atters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument." *Helmsley-Spear, Inc. v New York Blood Ctr., Inc.*, 257 AD2d 64, 68 (1st Dept 1999) (internal citation omitted). Courts "may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 (2004) (internal quotation marks and citation omitted).

Here, Atari argues that the damages limitation clause is ambiguous because it is "reasonably susceptible of more than one interpretation." *Telerep*, 74 AD3d at 402 (internal quotation marks and citation omitted). Specifically, Atari maintains that its understanding of 'remarketing proceeds' always included the $800,000 trade credit Carlyle provided *in addition to* any proceeds from Carlyle's reselling of the inventory. By interpreting "our 'remarketing proceeds'" to include the $800,000 trade credit plus any proceeds, Atari is asking this court to "add . . . terms" and thus "distort the meaning of those used." *Vermont Teddy Bear*, 1 NY3d at 475 (internal quotation marks and citation omitted). Without the word "plus" or the phrase "in addition to" having been inserted, the meaning is left as it was in the contract, that is, simply as the remarketing proceeds.

Atari's subjective interpretation of the contract is "extrinsic to the agreement" and "may not be considered" here where "the intent of the parties can be gleaned from the face of the instrument." *Helmsley-Spear*, 257 AD2d at 68 (internal citation omitted). It is true that the

contract nowhere defines "remarketing proceeds," and also that the contract uses quotation marks around the term, making it appear to be a term of art, one that Atari alleges has no commonly understood trade usage. Nonetheless, Atari has failed to show that the clause is "reasonably susceptible of more than one interpretation." *Telerep*, 74 AD3d at 402 (internal quotation marks and citation omitted). This court will not "[strain] to find an ambiguity which otherwise might not be thought to exist." *Uribe*, 91 NY2d at 341 (internal quotation marks and citations omitted).

As such, this court finds as a matter of law that the damages limitation clause is not ambiguous.

Finally, Atari argues that Carlyle's summary judgment motion should be denied in that the damages limitation clause is unenforceable because Atari alleges Carlyle breached the contract willfully.

"[A]n exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith." *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 (1983).

Carlyle counters Atari's argument by relying on *Metro. Life Ins. Co. v Noble Lowndes Int'l, Inc.*, a New York Court of Appeals decision which interpreted a damages limitation clause. That clause exempted consequential damages for both parties, though not for a willful breach. There, the defendant chose to breach its contract and stop producing software for the plaintiff when the project turned out to be more expensive than it had anticipated. The plaintiff sued for consequential damages, arguing that the breach was willful and thus not exempted by the

contract. The Court found otherwise, stating that "the parties intended to narrowly exclude from protection truly culpable, harmful conduct, not merely intentional nonperformance of the Agreement motivated by financial self-interest." *Metro. Life Ins. Co. v Noble Lowndes Int'l, Inc.*, 84 NY2d 430, 438 (1994).

Interpreting *Noble Lowndes*, Carlyle argues in its brief: "A refusal to perform a contractual obligation that is 'motivated exclusively by [the non-performing party's] own economic self-interest' is not conduct that will vitiate an agreed-upon limitation of liability." While Carlyle does not provide a citation for this interpretation, it actually comes word-for-word from a dissent in a later New York case, *Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, which itself interpreted *Noble Lowndes*.

*Solow Bldg.* involved a landlord who tried to charge its tenant a $6 million fee for having considered alterations it was contractually bound to consider in good faith. It refused to consider any additional alterations until the tenant agreed to pay the $6 million fee. The language Carlyle repeated in its brief which comes from the *Solow Bldg.* dissent drew from *Noble Lowndes* to state that "a refusal to perform a contractual obligation that is 'motivated exclusively by [the non-performing party's] own economic self-interest' is not conduct that will vitiate an agreed-upon limitation of liability. *Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239 (1st Dept 2007) (dissenting opinion). In response to this view, the majority held differently:

> The issue on this appeal is not, as the dissenters simplistically portray it, whether such additional payment might inure to [the defendant's] economic self-interest; the pertinent inquiry is whether the 'fee' sought from [the plaintiff] is a matter of [the defendant's] *legitimate* economic self-interest or, alternatively, whether it evinces the intent to inflict economic harm. *Id.* at 250 (emphasis in original).

The court denied summary judgment to the defendant, finding that the damages limitation clause might turn out to be "unenforceable as a matter of public policy" as the fee

"might reasonably be perceived by a trier of fact as an intention to inflict monetary harm." *Id.* at 250. The court noted that "withholding performance unless the other party agrees to some further demand . . . is a classic attempt at economic duress." *Id.* at 249 (internal quotation marks and citation omitted). The defendant's failure in *Solow Bldg.* to successfully extort the $6 million payment did not "constitute an affirmative demonstration of good faith." *Id.* at 249.

Carlyle, in reading the dissent, has missed the true holding of *Solow Bldg.*, requiring not merely economic self-interest, but *legitimate* economic self-interest to uphold a damages limitation clause in the face of willful breach.

The court finds that Atari has brought forth sufficient evidence to raise a material issue of fact as to whether or not Carlyle's allegedly willful breach was in pursuit of its legitimate economic self-interest.

Atari has offered emails showing that before they executed the contract, Carlyle represented that "**All TV is available for Media Trade Credit usage**" (emphasis in original), while after the contract was executed and Atari had shipped its inventory, Carlyle informed Atari that trade credits could not be utilized with any television network from which Atari had made a cash purchase of advertising in the prior year.

What is more, Atari has shown evidence that Carlyle refused to allow Atari to redeem its credits unless it paid part cash for the advertising program. Atari maintains that the contract never required Atari to make cash outlays in order to redeem its credits. Carlyle has made no attempt to show how these limitations were imposed in good faith through any understanding of the contract. The court is of the view that a trier of fact could find that when Carlyle "withheld performance unless [Atari agreed] to" make a cash outlay in order to redeem its trade credits, it qualified as "a classic attempt at economic duress." *Solow Bldg.*, 47 AD3d at 249 (internal

quotation marks and citation omitted). Just as in *Solow Bldg.*, the fact that Atari did not agree to the cash outlay, while potentially negating an actual duress claim, does not affect whether Carlyle made an *attempt* at economic duress.

Additionally, Atari has cast doubt on the way Carlyle has disposed of the inventory, thereby suggesting further bad faith and precluding a partial summary judgment decision in Carlyle's favor with respect to the enforceability of the damages limitation clause.

For instance, Atari points out that the first invoice submitted by Carlyle was dated March 7, 2012, the same day Carlyle's motion for partial summary judgment was filed, and over two years after the Carlyle first received the inventory. Atari alleges that this timing is highly suspect on its face. Carlyle explains this as a result of printing a copy from a Microsoft Word file in which the date automatically updated to the current date. However, the "court's role on a motion for summary judgment is to determine whether there is a material factual issue to be tried, not to resolve it." *Sommer*, 79 NY2d at 554.

Atari has additional reason to doubt Carlyle's disposition of the inventory because it was valued at approximately $800,000, a valuation Atari claims was audited by Deloitte, while Carlyle claims it only sold it for under $140,000, which is less than 20 cents on the dollar. This amount, Carlyle admits, does not even account for all inventory provided by Atari. Additionally, Carlyle sent Atari emails saying that Atari had a then "current trade credit of $550,000," which Atari interprets to mean that Carlyle then had raised $550,000 from the sale of Atari's inventory. Carlyle insists the number represents a percentage of the inventory that had been liquidated. Again, the "court's role on a motion for summary judgment is to determine whether there is a material factual issue to be tried, not to resolve it." *Sommer*, 79 NY2d at 554.

Thus, the court finds there is a material issue of fact regarding the amount Carlyle has made from remarketing the inventory. It is true that Carlyle is not asking this court to hold that the amount of damages is limited to under $140,000, but rather is asking to limit the damages to whatever amount the trier of fact determines is Carlyle's remarketing proceeds. Nonetheless, if it turns out that Carlyle made significantly more than what it now claims it made, then drawing "all reasonable inferences in favor of" Atari, *Ropog Cab Corp.*, 153 AD2d at 521, this evidence casts doubt on whether Carlyle dealt in bad faith with Atari such that the damages limitation clause should be held unenforceable.

To further support its allegation that Carlyle willfully, in bad faith, breached its contract, Atari cited Carlyle's President's litigation history with his previous company Tradewell. *Berk v Tradewell* involved a lawsuit alleging that Tradewell and Carlyle's President, then founder and owner of Tradewell, would "understate sale prices, overstate brokers' fees, and manipulate dates of payment in order to reduce commissions due to the sales staff." *Berk v Tradewell, Inc.*, 2003 WL 21664679 (SDNY July 16, 2003).

Carlyle argues that the evidence is inadmissible. Indeed, in general "it is improper to prove that a person did an act on a particular occasion by showing that he did a similar act on a different, unrelated occasion." *Matter of Brandon's Estate*, 55 NY2d 206, 210-11 (1982). However where "an unlawful intent is in issue, evidence of other similar acts is admissible to negate the existence of an innocent state of mind." *Id.* at 211.

Pre-discovery, it is not clear whether *Berk v Tradewell* is similar enough to the present case to admit it as evidence to support a claim of bad faith breach, but neither is it clear that the case is inadmissible before Atari has been allowed discovery. CPLR 3212 (f) provides that when "facts essential to justify opposition may exist but cannot then be stated, the court may deny the

motion or may order a continuance to permit affidavits to be obtained or disclosure to be had." Indeed, even if *Berk v Tradewell* proves to be inadmissible upon completion of discovery, Atari may yet discover other past history that is more akin to the present case that would be admissible to "negate the existence of an innocent state of mind" and support its allegations of bad faith. *Matter of Brandon's Estate*, 55 NY2d at 211.

Atari thus has raised enough evidence before discovery so that a trier of fact could find that Carlyle's behavior under the contract "smacks of intentional wrongdoing." *Kalisch-Jarcho*, 58 NY2d at 385. Drawing "all reasonable inferences in favor of" Atari, *Ropog Cab Corp.*, 153 AD2d at 521, and recognizing that "[s]ummary judgment is a drastic remedy which deprives the litigant of his day in court and therefore should only be employed when there is no doubt as to the absence of triable issues," *Briggs*, 235 AD2d at 196 (internal quotation marks and citation omitted), there indeed is a material issue of fact as to whether Carlyle's alleged willful breach of the contract was "a matter of [Carlyle's] *legitimate* economic self-interest," *Solow Bldg.*, 47 AD3d at 250 (emphasis in original), or whether it instead evinced bad faith and malice.

Accordingly, it is

ORDERED that Carlyle's motion for partial summary judgment is denied with respect to Atari's breach of contract claim; and it is further

ORDERED that Carlyle's motion for partial summary judgment is granted with respect to Atari's *quantum meruit* claim.

Dated: June 21, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.