

**Direct Cabinet Sales, Inc. v A-1 Technology, Inc.**

2013 NY Slip Op 32102(U)

September 5, 2013

Sup Ct, New York County

Docket Number: 653483/2011

Judge: Anil Singh

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

PRESENT: HON. ANIL C. SINGH  
SUPREME COURT JUSTICE  
Justice

PART 61

Index Number : 653483/2011  
DIRECT CABINET SALES, INC.  
vs.  
A-1 TECHNOLOGY, INC.  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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 *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 9/5/2013

ANIL C. SINGH, J.S.C.  
**HON. ANIL C. SINGH**  
**SUPREME COURT JUSTICE**

- 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

[ 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X  
DIRECT CABINET SALES, INC.,

Plaintiff,

-against-

A-1 TECHNOLOGY, INC.

Defendant.  
-----X

DECISION AND  
ORDER

Index No.  
653483/2011

HON. ANIL C. SINGH, J.:

Defendant moves pursuant to CPLR 3211 for an order: 1) dismissing the “prayer for relief” of plaintiff’s complaint to the extent that plaintiff seeks more than \$5,000 in damages, contending that a contractual provision limits plaintiff’s right to damages to one month’s payment made under the contract; and 2) dismissing the second, third, and fourth causes of action for failure to state a cause of action. Plaintiff opposes the motion.

Plaintiff Direct Cabinet Sales, Inc., commenced this action by filing a summons and notice against defendant A-1 Technology, Inc., on December 15, 2011.

The parties entered into a written agreement on November 13, 2008. Defendant agreed to design and create a custom e-commerce website for plaintiff,

and plaintiff agreed to pay for the work.

Plaintiff was not satisfied with defendant's work, so plaintiff terminated defendant's right to work on the website and retained another consultant to complete it.

The complaint alleges four causes of action. The first cause of action alleges breach of contract. The second cause of action alleges fraudulent inducement. The third cause action alleges violation of General Business Law section 349. The fourth cause of action alleges violation of a New Jersey statute, N.J.S.A 56:8-1, et seq.

Defendant filed an answer, asserting seven affirmative defenses and four counterclaims.

Defendant's first contention is that the contract limits plaintiff's right to damages to one month's payment under the contract.

The agreement states:

In the event that A-1 Technology is found in breach of commitments made herein or any part thereof, then Client's rights to recover damages from A-1 Technology shall be limited to, at most, one month of aggregate fee paid to A-1 Technology for services under this agreement.

(Notice of Motion, exhibit F, p. 13, para. 1)

Another section of the agreement addresses fees and expenses. Printed

language in the agreement states as follows:

Cost: Monthly: US \$7,000 per man month (up to 186 hours per man month) offsite

Initial Start Date: upon signature of contract and payment of money

Payments Schedule: Monthly: Payable monthly in advance on 1<sup>st</sup> of each billing month (All payments are non refundable)

Work Hours: 8 Hours Mon thru Fri and 4 hours on Saturday

Term: Month to Month

(Notice of Motion, exhibit F, p. 14).

On the margin of the same page, the following language appears in handwriting:

\$21,000 Due on start

\$21,000 Due on development of ecommerce site

\$21,000 Due on development of flash application

(Id.).

“A motion to dismiss premised on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (Morpheus Capital Advisors LLC v. UBS AG, 105 A.D.3d 145, 148 [1<sup>st</sup> Dept., 2013] (internal quotation marks omitted)).

Defendant exhibits the sworn affidavit of Ishwari Singh, the President of defendant A-1 Technology, Inc. Mr. Singh contends that, in the last month that plaintiff actually paid defendant for its services, plaintiff paid \$5,000 in May 2009.

Based upon the contractual provision limiting plaintiff's right to recover damages to "at most, one month of aggregate fee paid to" defendant, he asserts that plaintiff is precluded from seeking more than \$5,000 in damages.

The Court finds that defendant's contention is meritless because it is unclear from the written agreement exactly how much plaintiff paid each month. Nowhere does the contract state specifically that plaintiff was to pay the sum of \$5,000 per month. On the contrary, the agreement cryptically references a monthly "cost" of \$7,000 "per man month ... offsite." Likewise, the handwritten language stating that payments of \$21,000 were to be paid "on start," "on development of ecommerce site," and "on development of flash application" suggests that payments were due not on a monthly basis, but upon the completion of certain benchmarks.

In light of the agreement's ambiguity, and viewing the allegations of the complaint in the light most favorable to plaintiff, the Court finds that the branch of defendant's motion to limit plaintiff's damages is meritless.

Defendant's next contention is that plaintiff's second cause of action sounding in fraud should be dismissed for failure to state a cause of action.

"[A] cause of action seeking damages for fraud cannot be sustained when the only fraud charged relates to a breach of contract, or where the fraud claim is

duplicative” (60A N.Y.Jur.2d Fraud and Deceit section 7). Accordingly, the second cause of action must be dismissed.

Next, defendant contends that the third cause of action based upon General Business Law section 349 fails to state a cause of action.

“To state a cause of action under [GBL 349], a plaintiff must, at the threshold, charge conduct that is consumer oriented” (Gomez-Jimenez v. New York Law School, 103 A.D.3d 13, 16 [1<sup>st</sup> Dept., 2012] (internal quotation marks omitted). “The statute does not apply to a private dispute between parties which is unique to them alone” (21 N.Y.Jur.2d Consumer and Borrower Protection section 8).

In short, the Court finds this is simply a private dispute between the parties. Accordingly, the third cause of action must be dismissed.

Finally, defendant contends that the fourth cause of action alleging a violation of a New Jersey statute fails to state a cause of action.

The choice-of-law provision in the agreement states that

This agreement and all disputes arising out of or in connection with this Agreement (even if only tangentially related), shall be governed by and construed in accordance with the laws of the State of New York.

(Notice of Motion, exhibit F, p. 13).

In light of the above language, it is clear to the Court that the fourth cause of action fails to state a claim.

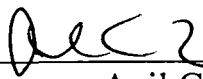
Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent that the second, third and fourth causes of action of plaintiff's complaint are dismissed; and it is further

ORDERED that counsel are directed to appear for the status conference in Room 320, 80 Centre Street, on September 25, 2013, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date:  
New York, New York

  
Anil C. Singh

**HON. ANIL C. SINGH  
SUPREME COURT JUSTICE**