

**White Lines COM, LLC v EMS Fin. Servs., LLC**

2013 NY Slip Op 32722(U)

September 26, 2013

Sup Ct, Queens County

Docket Number: 700872/2012

Judge: Marguerite A. Grays

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS
Justice

IA Part 4

WHITE LINES COM LLC a New York Limited Liability Company.
Plaintiff(s)

Index Number 700872 2012

-against-

Motion Date June 17, 2013

EMS FINANCIAL SERVICES, LLC, a Delaware Limited Liability Company, and ESCROW MANAGEMENT SERVICES, LLC a Florida Limited Liability Company, and TELEPOINT INTERNATIONAL, a Delaware Limited Liability Company.

Motion Cal. Number 138

Motion Seq. No. 4

Defendant(s)

FILED OCT 17 2013 COUNTY CLERK QUEENS COUNTY

The following papers numbered 1 to 8 read on this motion by defendant EMS Financial Services, LLC and defendant Escrow Management Services, LLC for, inter alia, an order pursuant to CPLR 3211(a)(1) dismissing the complaint against them and on this cross motion by plaintiff White Lines COM, LLC for an order (1) imposing costs, sanctions, and attorney's fees and (2) lifting the stay of discovery.

Table with 2 columns: Description of papers and Papers Numbered. Includes items like Notice of Motion - Affidavits - Exhibits, Answering Affidavits - Exhibits, Reply Affidavits, and Memoranda of Law.

Upon the foregoing papers it is ordered that the motion and cross motion are denied.

## I. The Allegations of the Complaint:

Defendant EMS Financial Services, LLC is the parent of defendant Escrow Management Services, LLC (collectively EMS). On or about September 4, 2009, plaintiff White Lines COM, LLC and EMS entered into a Business Cooperation Agreement whereby EMS obligated itself to procure financial transactions between telecommunication companies. In these financial transactions, one telecommunication company would purchase phone minutes from another telecommunication company through a broker who would charge the purchaser more than the price agreed to by the seller. The differential provided compensation for White Lines, which would finance the transaction, and for EMS, which would provide administrative and escrow services, and for the broker.

EMS had the responsibility to review the transactions and to establish an escrow account that would be funded by plaintiff White Lines. The financing allowed the seller of the minutes to be paid promptly and the buyer to make payments at a later date.

On or about February 25, 2011, plaintiff White Lines and EMS entered into an expanded Business Cooperation Agreement whereby the former agreed to provide up to \$10,000,000 in financing. The February 25, 2011 agreement superceded the earlier Business Cooperation Agreement, and the new agreement included a provision (2.5h) which gave White Lines the option of collecting monies due to EMS from a breaching customer. If White Lines exercised its option, EMS would assign its rights to collect against the breaching customer to White Lines, and White Lines would agree to release EMS from liability pertaining to that customer. White Lines never provided any written notice to EMS that it chose to collect directly from a customer under paragraph 2.5(h).

In September, 2011, EMS notified White Lines that it had lost \$5,788,700 that the plaintiff had provided to it for financing under the Business Cooperation Agreement.

The parties subsequently negotiated an Assignment of Rights Under Funding Transactions Agreement dated September 23, 2011 which expressly terminated the Business Cooperation Agreement and released White Lines from its obligations thereunder. It provided: "As of the effective date, the White Lines BCA shall be terminated and White Lines shall have no further obligation to EMS other than as specifically set forth herein."

EMS did not receive a release under the Assignment Agreement, and the obligations of EMS under the February 25, 2011 Business Cooperation Agreement were not extinguished.

EMS committed acts and omissions of negligence in the performance of its administrative and disbursement services under the Business Cooperation Agreement, including the failure to exercise due diligence in evaluating the transactions and parties and the failure to monitor minutes used in a transaction. Moreover, EMS disbursed funds provided by White Lines in an unauthorized manner, and the owners of EMS also owned a company engaged in the telecommunications business (Telepoint International Corporation) to which they provided funding from White Lines without disclosure of a conflict of interest and without properly accounting for or documenting the transaction.

This action for, inter alia, breach of contract, breach of fiduciary duty, and negligence ensued in November, 2011.

## II. Discussion:

The motion by the defendants lacks merit.

" If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action \*\*\*." ( *Peter F. Gaito Architecture, LLC v. Simone Development Corp.* 46 AD3d 530, 530.) EMS did not show that it is entitled to the dismissal of the complaint pursuant to CPLR 3211(a)(7) because of the documentary evidence in this case.

EMS also did not show that it is entitled to the dismissal of the complaint against it pursuant to CPLR 3211(a)(1). In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted " must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim\*\*\*." (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700,702; *see, Galvan v. 9519 Third Avenue Restaurant Corp, supra; Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248.) The documentary evidence in this case does not show that the defendants are entitled to a release from their obligations under the Business Cooperation Agreement and does not show that the plaintiff is required to arbitrate its claims against the defendants.

The Assignment of Rights Agreement terminated the February 25, 2011 Business Cooperation Agreement and did not provide for a release to the defendants from plaintiff White Lines. The Assignment of Rights Agreement unilaterally released White Lines from its obligations under the Business Cooperation Agreement. According to the plaintiff, the defendants never sought a release from the plaintiff, and the plaintiff never granted a release


to the defendants. The documentary evidence in this case does not conclusively refute this allegation.

The defendants were only entitled to a release under the terminated Business Cooperation Agreement and then only if a specified procedure was followed. EMS never followed this procedure, and once the parties terminated the Business Cooperation Agreement by executing the Assignment of Rights Agreement, the defendants lost any right to a release. The Court notes that the defendants allegedly lost nearly \$6,000,000 of the plaintiff's money and allegedly also engaged in self-dealing.

The Assignment of Rights Agreement provided: "As of the effective date, the White Lines BCA shall be terminated and White Lines shall have no further obligation to EMS other than as specifically set forth herein." The Assignment of Rights Agreement extinguished any obligation White Lines had to arbitrate its disputes with the defendants.

In regard to the cross motion, the conduct of the defendants in bringing this motion was not so frivolous as to warrant sanctions, and the stay of disclosure provided by CPLR3214(b) has been removed by the determination of the defendants' motion.

Dated: SEP 26 2013



J.S.C.