ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT Justice

IAS Part 14

QFL, INC.,
Plaintiff,

- against -

PIVOTAL PAYMENTS, INC., et al.,
Defendants.

Index No. 702120 2012

Motion Date February 11, 2013

Motion Cal. No. 89

Motion Seq. No. 2

Conference Date March 19, 2013

The following papers numbered 18 to 29, and 34 read on this motion by defendant Pivotal Payments, Inc. (Pivotal), for an order dismissing the complaint pursuant to CPLR 3211 (a) (7).

E-Filed Doc#s

Notice of Motion - Affirmation - Exhibits	18-21
Answering Affirmation - Exhibits	22-29
Reply	34

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action to recover damages alleged to have been sustained as a result of, inter alia, breach of contract. According to the complaint, plaintiff alleges the following: that on or about July 19, 2007, plaintiff entered into a Merchant Processing Agreement (Agreement) with all of the named defendants herein; that, pursuant to the Agreement, defendants reserved the right to establish, maintain, or increase a Reserve

Account to protect their security interests; that on or about October 7, 2008, defendants placed a reserve on plaintiff's account in the amount of $100,000.00; that on or about October 14, 2008, defendants increased the reserve amount by approximately $69,000.00; that on or about September 21, 2009, plaintiff closed its account with defendants and duly demanded the return of the reserve amounts being held by defendants; and that defendants refused to return said amounts without justification or explanation, and also failed to provide an accounting of those amounts being held. Plaintiff asserts four separate causes of action against defendants herein which sound in breach of contract, unjust enrichment, and wrongful reporting to the Member Alert to Control High-risk (Merchants) System (MATCH). Plaintiff also seeks an accounting with respect to all "proceeds" being held by defendants.

To the extent that Pivotal seeks dismissal of the complaint on the grounds that the complaint "engages in improper group pleading," same is not a basis for dismissal, since plaintiff does not claim that each defendant committed distinct acts giving rise to each cause of action. Rather, plaintiff claims that all defendants are alleged to have committed the same acts which form the basis of the pleaded causes of action. As such, the complaint is sufficient – in that respect – to give Pivotal "notice of the transactions and occurrences alleged to give rise to liability on [its] part" (*Stewart Tit. Ins. Co. v Liberty Tit. Agency, LLC*, 83 AD3d 532 [2011]).

Pivotal next asserts that it is entitled to dismissal of plaintiff's breach of contract claim. Pivotal argues that this claim must fail because plaintiff has failed to: (1) annex a copy of the Agreement to the complaint; (2) plead that it has performed all of its obligations under the Agreement; and (3) identify the specific provisions of the Agreement alleged to have been breached. In opposition, plaintiff annexes a copy of the relevant agreement, pointing to, inter alia, paragraph 7 (B) (iii) thereto, which states the following:

> "Funds: Funds in the Reserve Account will remain in the Reserve Account until 270 calendar days following the later of termination of this Agreement or your last transmission of sales drafts to Processor or Bank, provided, however, that you will remain liable to Processor and Bank for all liabilities occurring beyond such 270 day period. After the expiration of such 270 day period you must provide Processor with written notification indicating you desire a release of any funds remaining in the Reserve Account in order to receive such funds. You agree that you will not use these funds in the Reserve Account for any purpose, including but not limited to paying chargebacks, fees, fines or other amounts you owe Processor and Bank under this Agreement. Bank (and not Merchant) shall not have sole control of the Reserve Account."

Plaintiff asserts that it has validly and sufficiently pleaded the existence of a contract, plaintiff's performance thereunder (by depositing funds into the Reserve Account), plaintiff's demand for the amounts therein after termination of the contract, and defendants' (including Pivotal's) breach, for failure to account for or return said amounts.

Even assuming that plaintiff could cure the irregularities in the complaint (since the complaint did not, inter alia, point to any provisions in the Agreement alleged to have been breached), plaintiff's cause of action against Pivotal must still fail. Notably, the provision cited by plaintiff – noted above – does not implicate Pivotal, in that it does not place any affirmative duty upon Pivotal to return or account for any funds placed in the Reserve Account. It appears that such duty may indeed lie with the "Processor or Bank," the former defined in the Agreement as Cynergy Data, BA Merchant Services, LLC, collectively, and the latter defined as Bank of America, N.A. However, the complaint fails to separately indicate how Pivotal breached the Agreement.

Moreover, it is noted that paragraph 9 (D) of the agreement specifically states that it is "Processor and Bank" who is to perform the services under the agreement and that, inter alia, Pivotal is the exclusive agent of the Bank and it is the Bank who is responsible for Pivotal's performance. Based on the above, Pivotal has demonstrated that it is entitled to dismissal of plaintiff's first cause of action against it.

Pivotal is also entitled to dismissal of plaintiff's second cause of action, which seeks an accounting. It is well settled that "the right to an accounting rests on the existence of a trust or fiduciary relationship regarding the subject matter of the controversy at issue" (*Town of New Windsor v New Windsor Volunteer Ambulance Corps.*, 16 AD3d 403 [2005]; *see Akkaya v Prime Time Transp., Inc.*, 45 AD3d 616 [2007]; *El-Khoury v Karasik*, 265 AD2d 372 [1999]; *Wesselmann v Intl. Images*, 259 AD2d 448 [1999]; *Chalasani v State Bank of India, N.Y. Branch*, 235 AD2d 449 [1997]). Here, the relationship between plaintiff and Pivotal arose pursuant to the Agreement, and the complaint does not allege anything more than that of a contractual relationship, which does not give rise to a fiduciary obligation to be imposed upon Pivotal such that it is required to provide plaintiff with an accounting (*see Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804. [2011]; *Cuomo v Mahopac Nat. Bank*, 5 AD3d 621 [2004]).

In its third cause of action, plaintiff claims that, by defendants' collective failure and/or refusal to return the reserve amounts in the approximate amount of $169,000.00, defendants have been unjustly enriched as a result. Pivotal has demonstrated that this claim should also be dismissed, as it is simply duplicative of plaintiff's contract claim (*see Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790-791 [2012]; *Barker v Time Warner Cable, Inc.*,

83 AD3d 750 [2011]; *Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski*, 14 AD3d 644 [2005]).

Finally, defendant is entitled to dismissal of the fourth cause of action for "wrongly and unjustly reporting" to MATCH, as plaintiff fails to demonstrates that there exists such a cognizable cause of action.[1]

Accordingly, Pivotal's motion for an order dismissing the complaint against it is granted.

Dated: March 19, 2013

J.S.C.

1. It is noted that plaintiff is silent in its opposition with respect to all causes of action pleaded, with the exception of the breach of contract claim. Indeed, it appears that plaintiff concedes the untenability of its remaining causes of action, stating that "[t]he gravamen of the complaint sounds in contract."