

Traditum Group, LLC v Sungard Kiodex LLC

2014 NY Slip Op 30378(U)

February 7, 2014

Supreme Court, New York County

Docket Number: 651485/13

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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TRADITUM GROUP, LLC,

Index Number: 651485/13
Submission Date: 10/23/13

Plaintiff,

- against -

DECISION and ORDER

SUNGARD KIODEX LLC,

Defendant.

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Papers considered in review of this motion to dismiss (motion seq. no. 001):

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HON. SALIANN SCARPULLA, J.:

In this action arising from an alleged breach of a software subscription agreement, defendant Sungard Kiodex LLC (“Sungard”) moves to dismiss plaintiff Traditum Group, LLC’s (“Traditum”) complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7).

On March 30, 2012, Traditum, a commodities trading company, entered into a contract with Sungard, to purchase a subscription to Kiodex Real Time, a web-based risk management software application (“Kiodex”).¹ Under the contract, Traditum agreed to pay a subscription fee of \$77,000 per quarter for the period April 16, 2012 to April 15,

¹ It is undisputed by the parties that the contract consists of two documents, the Fee Schedule and Terms of Use.

2014, plus an \$80,000 retainer fee to Sungard for professional training and implementation services.

In Paragraph 5(a) of the Terms of Use, the contract specifies twenty-four functionality standards that the software will perform (“the twenty-four standards”). The contract states that “[i]n the event that Kiorex [Sungard] fails to meet the functionality described in the twenty-four points below during the initial testing period of July 1, 2012 to July 15, 2012, then You shall have the right, at Your sole discretion, to terminate this agreement, with no early termination fee, whatsoever, charged to You or payable by You provided there are no outstanding invoices of more than 30 days.”

On April 15, 2013, Traditum commenced this action to recover \$157,000 that it paid to Sungard for the Kiorex software (\$77,000 subscription payment for one quarter and \$80,000 retainer for professional services). Traditum alleges that Sungard failed to provide a software system that satisfied the twenty-four standards set forth in the contract, and that the system began to crash on a daily basis after nine days.

Traditum asserts two causes of action against Sungard for: (1) fraudulent inducement and (2) breach of contract. In the first cause of action for fraudulent inducement, Traditum alleges that Sungard made false representations to induce Traditum to enter into the contract. According to Traditum, Sungard allegedly represented that it could provide a working system that would, among other things, display electronically executed trades within five seconds. Sungard also allegedly represented to Traditum that

it provided a similar system to other commodity trading firms, even though it did not have such real world experience. According to Traditum, Sungard's intent in making these misrepresentations was to induce Traditum to pay fees for a system that it did not have, but that Sungard "planned to try to construct while Traditum continued to pay fees."

In the second cause of action, Traditum alleges that Sungard breached the contract by failing to achieve any of the twenty-four standards set forth in the contract. Traditum contends that the twenty-four standards constitutes "the standard upon which to judge whether the contract had been materially breached." Traditum claims that, under the contract, Sungard had the right to correct minor problems in the software that arose during the initial testing period, but that Traditum could terminate the contract early if the twenty-four standards could not be met.

Traditum alleges that, when Sungard was unable to meet the twenty-four standards at the end of the initial testing period, Traditum agreed to extend Sungard's time to make corrections to the system pursuant to two written agreements on July 13, 2012 and July 30, 2012. Traditum claims that these written agreements provided that Traditum would not incur any costs during the extension periods. However, Sungard allegedly billed Traditum for the work it performed to correct the problems (\$22,200 in July 2012 and \$2,400 in August 2012). After the two extensions expired, Traditum alleges that Sungard agreed that it could not meet the twenty-four standards in the contract, and therefore the contract was terminated.

Sungard moves to dismiss Traditum's complaint for failure to state a claim pursuant to CPLR §§ 3211(a)(7), and based upon a defense grounded in documentary evidence pursuant to CPLR §§ 3211(a)(1).

First, Sungard argues that the fraudulent inducement claim should be dismissed because Traditum did not allege any misrepresentation extraneous to the contract, and therefore the fraudulent inducement claim is duplicative of the breach of contract claim.

Second, Sungard argues that the breach of contract claim should be dismissed because Traditum failed to allege any breach of the contract. Sungard contends that, because the contract contemplates that the twenty-four standards may not be met, Sungard's failure to meet the standards cannot constitute a breach of contract. Sungard further argues that, in the event that it failed to meet the twenty-four standards, Traditum had the right to terminate the contract early under the contract, but it did not have the right to a return of the payments that it made to Sungard.

In opposition, Traditum argues that it stated a claim for fraudulent inducement because it sufficiently alleged misrepresentations of fact made by Sungard. Traditum alleges that Sungard falsely represented that it had working software that could perform risk management analysis and display trades within five seconds of their occurrence, and that the software was already in use by other commodity trading companies. Traditum

also argues that Sungard breached the limited warranty provision of the contract, which requires Sungard to substantially conform to the specifications in the contract.²

In reply, Sungard argues that, under the limited warranty provision, Traditum's sole and exclusive remedy is for Sungard to attempt to correct the errors in the software, not a refund of the payments made to Sungard.

Discussion

Under CPLR § 3211(a)(1), a defendant may move for judgment dismissing the complaint on the grounds that “a defense is founded upon documentary evidence.” Dismissal is “warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d at 88.

CPLR § 3211(a)(7) provides that a defendant may move for judgment dismissing the complaint on the grounds that “the pleading fails to state a cause of action.” In determining whether to grant a motion to dismiss based on a failure to state a cause of action, the “court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged,

² The limited warranty provision set forth in Section 6.2 of the Terms of Use states that “SunGard represents and warrants to You that the SunGard Program, as delivered by SunGard and when used in accordance with the Documentation, shall throughout the Term substantially conform any functional specifications in the Documentation. If You find a failure of the SunGard Program to substantially conform to the functional specifications in such Documentation, and provide SunGard with a written report that describes such failure in sufficient detail to enable SunGard to reproduce such failure, SunGard shall use commercially reasonable efforts to correct or provide a workaround for such failure at no additional charge to You, which shall be Your sole and exclusive remedy.”

fit within any cognizable legal theory.” *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1st Dep’t 2002).

1. Fraudulent Inducement

To state a cause of action for fraudulent inducement, a plaintiff must allege a “misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.” *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421 (1996); *Shea v. Hambros PLC*, 244 A.D.2d 39, 46 (1st Dep’t 1998).

In the complaint, Traditum alleges that Sungard misrepresented that it had a working Kiodex system and that it provided a similar system to other trading firms. Traditum further alleges that Sungard knew that their misrepresentations were false, and that Sungard made the misrepresentations to induce Traditum to enter into the contract.

I find here that Traditum sufficiently alleged misrepresentations of present fact – i.e., that Sungard falsely represented to Traditum, prior to the execution of the contract, that it had a Kiodex system that already worked and had been sold to other customers. *Gosmile, Inc. v. Levine*, 81 A.D.3d 77, 81 (1st Dep’t 2010). Traditum alleges that, at the time Sungard made the misrepresentations, Sungard did not have any intention of performing the contract, which constitutes a present fact collateral to the terms of the contract. *Manas v. VMS Associates, LLC*, 53 A.D.3d 451, 453-54 (1st Dep’t 2008).

However, while Traditum alleges the other elements of a fraudulent inducement claim, Traditum fails to allege damages not recoverable under its breach of contract claim. *Teachers Ins. Annuity Assn. of Am. v. Cohen's Fashion Opt. of 485 Lexington Ave., Inc.*, 45 A.D.3d 317, 319 (1st Dep't 2007). “[T]he damages recoverable for being fraudulently induced to enter a contract are meant to indemnify for the loss suffered through that inducement.” *Manas v. VMS Associates, LLC*, 53 A.D.3d 451, 454 (1st Dep't 2008).

Moreover, Traditum's fraudulent inducement claim is barred by the merger clause in the contract. “Although a general merger clause does not serve to exclude parol evidence of fraud in the inducement, a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral [mis]representations.” *Landes v. Sullivan*, 235 A.D.2d 657, 658-59 (3d Dep't 1997); *Weiss v. Shapolsky*, 161 A.D.2d 707, 707 (2d Dep't 1990).

Here, the contract specifically states that the Fee Schedule and Terms of Use “constitute the entire agreement between the parties concerning the subject matter hereof, and supersedes (i) all prior or contemporaneous representations, discussions, proposals, negotiations, conditions, agreements, and communications, whether oral or written, between the parties relating to the subject matter thereof.” This merger clause is sufficiently specific to bar Traditum from claiming that it was fraudulently induced into entering the contract because of prior misrepresentations.

Accordingly, I grant Sungard's motion to dismiss the first cause of action for fraudulent inducement.

2. Breach of Contract

To prove a breach of contract claim, the plaintiff must demonstrate: (1) the existence of a contract; (2) plaintiff's performance thereunder; (3) the defendant's breach; and (4) damages. *Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

The New York courts have long adhered to the "sound rule in the construction of contracts, that where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language." *R/S Assoc. v. New York Job Dev. Auth.*, 98 N.Y.2d 29, 32, 771 N.E.2d 240 (2002) (quoting *Springsteen v. Samson*, 32 N.Y. 703, 706 (1865)). When "the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations." *Del Vecchio v. Cohen*, 288 A.D.2d 426, 427 (2d Dep't 2002); *Triax Capital Advisors, LLC v. Rutter*, 83 A.D.3d 490, 492-93 (1st Dep't 2011).

Based on the allegations in the complaint, I find that Traditum sufficiently stated a breach of contract claim against Sungard. Traditum alleges that it entered into a contract with Sungard to purchase a subscription to Kiindex Real Time, and that it performed

under the contract by paying \$77,000 for the first quarter and an \$80,000 retainer for Sungard's professional services.

Traditum further alleges that Sungard materially breached the contract. Traditum claims that Sungard failed to provide a working Kiodex system that satisfied any of the twenty-four standards in the contract, and that Sungard could still not deliver a working system even after Traditum agreed to extend the initial testing period twice. These assertions are sufficient to allege a material breach of the contract as Sungard's failure to provide even a basic working system would constitute a breach "so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract." *Lasker v. Goldman Corp. v. The City of New York*, 221 A.D.2d 153, 153 (1st Dep't 1995).

Sungard argues that it could not have breached the contract by failing to meet the twenty-four standards because the contract provided Traditum with an early termination right based on this contingency. However, I find that this argument is devoid of merit. The contract contained a detailed list of the twenty-four functions that the software would perform. Based on the language of the contract, it is clear that the parties intended and reasonably expected that the software would perform the functions described in the contract. The early termination provision was clearly designed for the benefit of Traditum in the event that the software did not perform according to the contract, and not intended to allow Sungard to collect subscription fees and other payments for delivering software that did not perform any of the functionality explicitly stated in the contract.

Sungard further argues that, under the limited warranty provision, Traditum's only remedy is for Sungard to correct the errors in the software. However, Traditum's allegations suggest that the software failed its essential purpose, and therefore its remedy may not be limited by the contract's warranty provision. A limited remedy contained in a warranty may not be upheld if the product fails its essential purpose. *Solomon v. Canon USA, Inc.*, 31 Misc. 3d 30, 32 (App. Term 1st Dep't 2010).

For the reasons stated above, I find that Traditum sufficiently alleged a breach of contract claim against Sungard. Therefore, I deny Sungard's motion to dismiss the second cause of action for breach of contract.

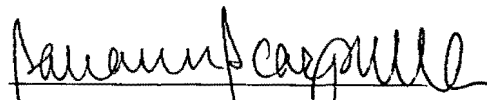
In accordance with the foregoing, it is

ORDERED that defendant Sungard Kiodex LLC's motion to dismiss plaintiff Traditum Group, LLC's ("Traditum") complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7) is granted to the extent that the first cause of action for fraudulent inducement is dismissed, and the motion is otherwise denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
February 7, 2014

ENTER:


Saliann Scarpulla, J.S.C.
HON. SALIANN SCARPULLA