

**De Lage Landen Fin. Servs., Inc v Radiology
Specialists of Denver P.C.**

2018 NY Slip Op 31429(U)

January 23, 2018

Supreme Court, New York County

Docket Number: 152915/16

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

DE LAGE LANDEN FINANCIAL
SERVICES, INC/ as assignee of FUJIFILMS
MEDICAL SYSTEMS U.S.A., INC.,

Plaintiffs,

-against-

RADIOLOGY SPECIALISTS OF DENVER
P.C.,

Defendant.

Index No.: 152915/16
DECISION/ORDER
Motion Seq. Nos. 001 & 002

Platzer, Swergold, Levine, Goldberg, Katz & Jaslow, LLP, New York City (Morgan Grossman of counsel), for plaintiffs.
O'Rourke & Hansen, PLLC, New York City (James J. O'Rourke of counsel), for defendant.
Gerald Lebovits, J.

Motion sequence numbers 01 and 02 are consolidated for disposition.

According to the complaint, defendant executed a written "Fee Per Study Agreement" (the Agreement) for equipment, software, and related accessories (the System) with Fujifilms Medical System U.S.A., Inc. (FMSU), on or about September 28, 2009. (Plaintiff's Notice of Motion, Exhibit A ¶ 14.) FMSU provided defendant with financing for the System, and defendant agreed to make certain payments. (Affidavit in Support of Plaintiff's Motion for Summary Judgment at ¶ 6.) Plaintiff, De Lage Landen Financial Services, alleges that FMSU transferred all its rights, title, and interest and none of its liabilities under the Agreement to plaintiff on or about September 27, 2011, and that plaintiff was FMSU's assignee. (Affidavit in support of Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment at ¶ 8.) Plaintiff also alleges that defendant defaulted under the Agreement on or about December 30, 2015, by failing to make the required Minimum Quarterly Payments Per Additional Study Fees, which constituted a default under the Agreement. (Affidavit in Support of Plaintiff's Motion for Summary Judgment at ¶ 22.)

Plaintiff commenced this action in April 2016 to recover the unpaid principal amount of \$74,362.77, plus accrued interest and additional interest continuing to accrue through and including the date of entering of a judgment, together with applicable repayment penalties, late fees, reasonable attorney fees, and costs and disbursements for this action. (Plaintiff's Affirmation at ¶ 4.) The complaint asserts three causes of action: (1) breach of contract; (2) account stated; and (3) unjust enrichment. (Plaintiff's Notice of Motion, Exhibit A ¶¶ 3-15.)

Defendant filed its answer on May 27, 2016. The answer contains 14 affirmative defenses: (1) plaintiff and/or plaintiff's assignor caused their injury; (2) plaintiff, plaintiff's assignors and/or others over whom defendant has no control or right of control; (3) plaintiff and/or plaintiff's assignors did not mitigate the losses; (4) plaintiff and/or plaintiff's assignors were in bad faith and defendant is entitled to reasonable attorney fees and related expenses pertaining to the defense of this action; (5) defendant paid to the plaintiff and/or plaintiff's assignors and plaintiff and/or plaintiff's assignors accepted the sum of \$5,000 in full satisfaction and settlement of the claims advanced in the complaint; (6) the account stated between the plaintiff and/or plaintiff's assignors and the defendant, is not correct or accurate; (7) the action is frivolous, made in bad faith and was commenced to harass the answering defendant; (8) plaintiff and/or plaintiff's assignors and defendant never entered into a legal contract as there was no meeting of the minds; (9) if a contract exists, plaintiff and/or plaintiff's assignors breached said contract by failing to provide consideration due to the persistent failure of the product to perform as represented; (10) if a contract exists, plaintiff and/or plaintiff's assignors are barred from recovering damages due to their breach of contract; (11) if the contract exists, plaintiff and/or plaintiff's assignors are estopped from advancing claims by the deliberate and continued failure to perform pursuant to the terms of the alleged contract; (12) if a contract exists, plaintiff and/or plaintiff's assignors have waived their claims by failing to perform; (13) if a contract exists, plaintiff and/or plaintiff's assignors negligently, recklessly, and/or intentionally misrepresented the product's performance, never cured the failure despite repeated requests, and continued to misrepresent the function and performance of the product; and (14) defendant seeks to recover its attorney fees, costs, and sanctions. (Plaintiff's Notice of Motion, Exhibit B ¶¶ 10-24.)

Plaintiff now moves for summary judgment and to summarily dismiss defendant's answer under CPLR 3212 (motion sequence no. 001). It argues that defendant's defenses have no merit. Defendant opposes the motion and argues that the presence of disputed material issues of fact preclude summary judgment.

Defendant moves for leave to amend the verified answer under CPLR 3025 (motion sequence no. 002), adding factual allegations and two additional affirmative defenses that plaintiff was not a holder in due course and that plaintiff's actions frustrated the contract's purposes. Plaintiff opposes defendant's motion for leave to amend the factual allegations and two additional affirmative defenses.

I. Plaintiff's Motion for Summary Judgment

Plaintiff's summary-judgment motion is denied.

Summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court, as a matter of law, in directing judgment in favor of any party." (CPLR 3212 [b].) The movant must make a prima facie showing of entitlement to judgment as a matter of law and show sufficient evidence to demonstrate the absence of any material issue of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].)

To decide whether plaintiff is entitled to summary judgment on its claims for breach of contract, account stated, and unjust enrichment, the court must first determine whether plaintiff has standing as the assignee. Plaintiff alleges that FMSU transferred all its rights, title, and interest and none of its liabilities under the Agreement to plaintiff on or about September 27, 2011, and that plaintiff was the assignee of FMSU. (Affidavit in Support of Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment at ¶ 8.) Plaintiff does not include the assignment agreement between plaintiff and FMSU in its exhibits, but includes a copy of proof of the payment from plaintiff to FMSU for \$149,721.36 in support of the Assignment and of plaintiff's right to receive the required payments from defendant.

Defendant argues that plaintiff did not allege the terms of a putative assignment, the date of a putative assignment, and the limitation of the assignment. (Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, at 4.)

Plaintiff, in response, alleges that defendant remitted payments to plaintiff for approximately four years before defaulting under the Agreement and argues that plaintiff is entitled to the balance under the Agreement. (Affidavit in Support of Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment at ¶ 9.) Plaintiff also argues that defendant expressly waived its right to hold plaintiff liable for any obligations or responsibilities owed by FMSU to defendant. (*Id.* at 11.) Plaintiff refers to section 11 of the parties' Agreement.

Defendant states that it was advised that Lesseedirect was FMSU's banking partner and was instructed to make some of the payments under the Agreement to Lesseedirect and some of the payments to FMSU; and defendant regarded Lesseedirect as a depository bank for FMSU with no rights as an assignee. (Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, at 4.) Defendant further states that all its dealings regarding the System were with FMSU, including implementation, invoices, telephone calls, emails correspondence, service calls, and training. (*Id.* at 5.)

Without providing the agreement between plaintiff and FMSU, plaintiff has not provided sufficient evidence to demonstrate the absence of any material fact. The Court of Appeals has held the following regarding assignments:

"If, as between the assignor and assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest. In other words, the plaintiff must have some title, legal or equitable, to the thing assigned. If the assignee have such title it is enough. The consideration paid, the purpose of the assignment, the use to be made of any proceeds collected is immaterial." (*Spencer v Standard Chems. & Metals Corp.*, 237 NY 479, 480-481 [1924] [internal citations omitted].)

Plaintiff has not demonstrated legal title. Plaintiff has demonstrated only that consideration was paid. Plaintiff's proof is therefore insufficient to satisfy its burden for summary judgment. Plaintiff's affidavit in support of summary judgment is conclusory. It merely quotes portions of defendant's agreement with Fujifilms Medical Systems U.S.A., Inc. In conclusory terms, the affiant states that defendants owe \$74,362.77.

Because the court is denying summary judgment, that aspect of plaintiff's motion to dismiss defendant's defenses is denied at this time.

No need exists for the court to address defendant's remaining arguments in opposition. But in any event, Dr. Robert P. Allen's affidavit in opposition, provides sufficient material issues of fact to warrant denying summary judgment.

Plaintiff's motion for summary judgment is denied.

II. Defendant's Motion for Leave to Amend

Defendant's motion for leave to amend to add factual allegations and two additional affirmative defenses is granted.

CPLR 3025 (b) provides that parties may amend their pleadings and that courts shall freely grant leave. A motion for leave to amend should be freely granted "unless the proposed amendment is palpably insufficient or patently devoid of merit." (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010].) Motions for leave to amend should be freely granted as a matter of discretion absent prejudice or surprise, unless "the amended pleading plainly fails to state a cause of action and, thus, lacks merit." (*Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990].) A defense can "nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025 (b), as long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay, and is not palpably insufficient or patently devoid of merit." (*Dixon v Chang*, 137 AD3d 957, 959 [2d Dept 2016].)

Plaintiff argues that defendant submitted the motion for the sole purpose of tactically delaying the court from deciding plaintiff's summary-judgment motion. (Plaintiff's Affirmation in Opposition, at 4.)

Defendant argues that its motion for leave to amend its answer is not overly burdensome because no disclosure has occurred. (Defendant's Affirmation in Reply at ¶ 11.) Plaintiff has not shown that the amendment would cause plaintiff prejudice or surprise resulting from the delay.

Plaintiff further contends that defendant's motion for leave to amend is without merit because defendant has waived any claim against plaintiff as FMSU's assignee. (Plaintiff's Affirmation in Opposition at ¶ 13.) Under UCC § 9-403, "an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment: (1) for value; (2) in good faith; (3) without notice of a claim of a property or possessory right to the

property assigned; and (4) without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under §3-305(a).” The agreement between defendant and FMSU not to assert against the assignee any defense that defendant might have against FMSU is enforceable when the assignee is a holder in due course under UCC § 9-403.

Defendant’s motion for leave to amend seeks to add two additional affirmative defenses that plaintiff was not a holder in due course and that plaintiff’s actions frustrated the purpose of the contract.

Because the court cannot tell whether plaintiff has legal title and that plaintiff has a proper assignment, defendant’s amendment is palpably sufficient and has merit.

Plaintiff then argues that New York courts have dispensed with determining a motion to amend pleadings when a motion for summary judgment is pending and the parties have had ample opportunity to address the merits of the case. (Plaintiff’s Affirmation in Opposition at ¶ 14.) The case plaintiff relies on, *Stephanie R. Cooper, P.C. v Robert*, in which the same party filed a motion for leave to amend and a motion for summary judgment, is different from the present case. (*See* 78 AD3d 572 [1st Dept 2010].) Defendant’s motion for leave to amend the answer to add factual allegations and two additional affirmative defenses is granted.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is denied and defendant’s motion for leave to amend is granted; and it is further

ORDERED that defendant’s amended complaint, NYSCEF document number 26, is deemed served and filed; and it is further

ORDERED that defendant must serve a copy of this decision and order with notice of entry on all parties and on the General Clerk’s Office, which is directed to amend its records accordingly; and it is further

ORDERED that the parties appear for a compliance conference on March 14, 2018, at 10:00 a.m., in Part 7, at 60 Centre Street, room 345.

Dated: January 23, 2018


J.S.C.

HON. GERALD LEBOVITS
J.S.C.