IPFS Corp. v Berrosa Auto Corp.
2018 NY Slip Op 33254(U)
December 11, 2018
Supreme Court, New York County
Docket Number: 650200/2018
Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN **PART** IAS MOTION 45

Justice

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IPFS CORPORATION

Plaintiff,

- v -

BERROSA AUTO CORP.,

Defendant.

INDEX NO. 650200/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents:

a. Introduction

Plaintiff IPFS Corporation ("IPFS") moves for summary judgment in this action pursuant to CPLR § 3212. Plaintiff filed this action on January 15, 2018. Defendant Berrosa Auto Corp. ("Berrosa") filed its answer on March 29, 2018. Plaintiff filed for summary judgment on July 30, 2018. Oral argument was heard before the Court on October 30, 2018. For the reasons described below, Plaintiff's motion for summary judgment is granted.

b. Background

Plaintiff IPFS is a corporation which finances insurance premium payments. Plaintiff entered into six insurance premium finance arrangements (the "Agreements") with Defendant between February 28, 2017, and April 27, 2017. Under the Agreements, IPFS would pay 80% of the premiums Berrosa owed to the insurance company, and Berrosa would pay the remaining 20%. In exchange, Berrosa would repay IPFS for the amount financed, plus finance charges, in

monthly installments. The total Berrosa was supposed to pay IPFS across all the agreements, including the principal balance and finance charges, came to $805,616.07.

From April 6, 2017, through July 24, 2017, Defendant Berrosa made a total of $365,176.21 in payments to IPFS under the Agreements. Berrosa stopped making payments after July 24, 2017. (NYSCEF 1). In response, IPFS sent a Notice of Intent to Cancel on August 7, 2017, warning Berrosa that if it did not make the proper payments, the insurance policies would be cancelled. (NYSCEF 18). On August 31, 2017, IPFS sent a notice of cancellation to Berrosa for failure to make the demanded payments. (NYSCEF 19). IPFS cancelled the insurance policies and was refunded $414,323.30 by the insurance companies, which it credited towards Defendant's outstanding balance. After these credits, as well as a smaller credit for $343.57 based on a finance charge adjustment, Plaintiff alleges that Defendant has an outstanding balance of $43,590.22. (NYSCEF 1).

c. *Legal Standard*

CPLR § 3212 provides in relevant part that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party… [T]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." "To defeat summary judgment the opponent must present evidentiary facts sufficient to raise a triable issue of fact, and averments merely stating conclusions, of fact or of law, are insufficient." *Mallad Constr. Corp. v. County Fed. Sav. & Loan Ass'n*, 32 N.Y.2d 285, 290 (1973).

In a breach of contract case, summary judgment may be granted where the terms of the agreement are unambiguous, as interpretation of a contract is a matter of law to be decided by the

Court. *Rhone-Poulenc Inc., v. Union Carbide Chemicals and Plastics Co. Inc.*, 190 A.D.2d 565 (1st Dep't 1993) (citing *American Express Bank Ltd. v. Uniroyal, Inc.*, 164 A.D.2d 275, 277 (1st Dep't 1990) (granting summary judgment "[w]here the intent of the parties can be determined from the face of the agreement")). On the other hand, if the relevant contract language is ambiguous, and extrinsic evidence as to the intent of the parties is in conflict, there is a question of fact and summary judgment should be denied. *American Express Bank Ltd.*, 164 A.D.2d at 277.

d. Liability

In this case, the Agreements are unambiguous, and clearly state the terms of the arrangements. Defendant is unable to articulate ambiguity in the contract language that would require further fact discovery or extrinsic evidence to interpret the plain meaning of the contract.

In support of its motion Plaintiff has provided copies of the original agreements, as well as Affidavits of Melissa Waal, an employee in the Litigation Recovery Unit of IPFS. (NYSCEF 12-19, 11, 33). Defendant submitted an affidavit of Leonard Leff, CEO of Berrosa. (NYSCEF 29). The Agreements clearly explain the breakdown of payments between IPFS and Berrosa to the insurance company, and the schedule of payments from Berrosa to IPFS. Each Agreement contains the total premium owed to the insurer, the "cash down" payment which Berrosa was to make to the insurer, and the principal balance to be financed by IPFS. (NYSCEF 12-17).

Under the Agreements, the "principal balance" *(i.e.*, the amount IPFS paid to the insurance company) is the total premium owed to the insurance company minus the "cash down payment" made to the insurance company by the insured Berrosa. In addition, IPFS charges a "finance charge" for each transaction. Here, Defendant paid the insurance company approximately 20% of the insurance premiums on each policy (the "cash down payment"), and

Plaintiff financed the remaining 80% (the "principal balance"). Plaintiff then billed the Defendant for the premiums it financed, plus the financing charges, in monthly installments.

Leonard Leff, CEO of Berrosa, claims in his affidavit that based on his prior experience with these arrangements the 20% payment Berrosa made to the insurance company was actually a security deposit, which would be deducted from the final installment payments owed to IPFS, much like a security deposit in a lease. Mr. Leff's assertion that the "cash down payments made on each of the contracts are routinely applied toward any outstanding balances at the end of the contract," [NYSCEF 29] is inconsistent with the unambiguous terms of the Agreements. The Agreements plainly state the total of the premiums owed to the insurer; the portion of that amount (20%) that was paid by Berrosa; and the remaining principal balance (80%) that was financed by IPFS. The Agreements also clearly indicate that Berrosa will make payments to IPFS for the principal balance IPFS paid to the insurance company, plus the finance charge. Berrosa's cash down payment was paid to the insurance company, and went directly toward the total premium owed to the insurance company, not towards the principal balance owed to IPFS. (Transcript of Proceedings Oct. 30, 2018, at 11-12). Nothing in the Agreements indicate that the cash down payment made to the insurance company would cover any outstanding balance owed to IPFS in the event of default by Berrosa. Mr. Leff's purported prior experience as to what is "routinely" done, even if true, cannot supersede the unambiguous terms of the Agreement. Nor does he explain why such an arrangement would make commercial sense, given that it would leave IPFS with a loss of its principal if Berrosa decided to stop making payments, which is exactly what happened here.

Defendant also claims that based on its prior course of dealings with IPFS there is an issue of fact as to whether IPFS should be paid by Berrosa or by the insurance company for the

outstanding balance. (Transcript of Proceedings Oct. 30, 2018, at 2, 7). However, the language of the contract is also unambiguous as to this issue. Paragraph six of the Agreement provides, in part, that the "[l]ender may cancel the scheduled policies... if the insured does not pay any installment according to the terms of this Agreement... and the unpaid balance due to Lender shall be immediately due and payable by the Insured. Lender at its option may enforce payment of this debt without recourse to this security given to Lender." (NYSCEF 2-7). Paragraph nine further states that "[a]ny money Lender receives from an insurance company shall be credited to the balance due Lender with any surplus refunded to whomever is entitled to the money." (NYSCEF 2-7).

The contract is unambiguous as to Defendant's obligations, and Defendant's conclusory assertion of a prior course of dealing that is inconsistent with the plain language of the contract (and that would leave the insurer out of pocket because of Berrosa's default) does not give rise to a genuine issue of material fact. *See National Abatement Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA,* 33 A.D.3d 570, 571 (1st Dep't 2006) (granting summary judgment when the written contract is "reasonably susceptible to only one meaning, leaving no occasion to consider parol evidence of the parties' course of conduct.") (citing *239 E. 79th Owners Corp. v. Lamb 79 & 2 Corp.*, 30 A.D.3d 167, 168 (1st Dep't 2006)).

Defendant's reliance on CPLR § 3212(f) to avoid summary judgment is unavailing. Defendant speculates that Plaintiff *may* have been made whole when the insurance company refunded a portion of the premium amount upon cancellation of the policy, but offers no support for that speculation. (Transcript of Proceedings Oct. 30, 2018, at 17). Defendant argues that it requires discovery to investigate the facts, and therefore summary judgment is premature. However, this information is not "unavailable" to Defendant. A party may be entitled to further

discovery under CPLR § 3212(f) if the information sought is "in the exclusive control" of the movant. *Erkan v. McDonald's Corp.*, 146 A.D.3d 466, 467 (1st Dep't 2017); *Global Minerals and Metals Corp. v. Holme*, 35 A.D.3d 93, 103 (1st Dep't 2006) (holding that "where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied."). Here, Defendant does not explain why it could not seek and obtain this information from its insurer. In sum, Defendant has failed to raise a genuine issue of material fact and failed to provide a justification for a fishing expedition to chase down its speculation.

e. Damages

Plaintiff alleges that there is a total outstanding balance of $43,590.22 on the Agreements. (NYSCEF 1, 11). Plaintiff explained how it arrived at the outstanding balance of $43,590.22 in its Verified Complaint and in the Affidavit of Melissa Waal. (NYSCEF 1, 11, respectively). Defendant points to no documents, invoices, payment records, or any other evidence to refute Plaintiff's assertion. Defendant's conclusory statement that it disputes the amount due is insufficient to give rise to an issue of fact to be explored at trial. *See Home Boys Shopping Network Inc., v. Lloyds New York Ins. Co.*, 237 A.D.2d 164, 164 (1st Dep't 1997) (granting summary judgment against Plaintiff when Plaintiff's "conclusory" and "unsupported" damages estimate "failed to raise any triable issue with regard to damages.").

f. Attorneys' fees

Defendant does not dispute that under the agreement Plaintiff is entitled to attorneys' fees in relation to collection of costs. (Transcript of Proceedings Oct. 30, 2018, at 22). The Agreements state that the "Insured agrees to pay attorney fees and other collection costs to Lender to the extent permitted by law if this Agreement is referred to an attorney or collection

agency who is not a salaried employee of Lender, to collect any money Insured owes under this Agreement." (NYSCEF 2-7, ¶13). Plaintiff is entitled to reasonable attorneys' fees under the Agreements, with the amount to be determined by a Judicial Hearing Officer.

Therefore, it is:

ORDERED that Plaintiff's motion for summary judgment is Granted, and the Clerk of the Court is directed to enter a judgment in favor of Plaintiffs and against Defendants in the sum of $43,590.22, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that Plaintiff's request for attorneys' fees is Granted, and referred to a Judicial Hearing Officer ("JHO") to hear and determine; and it is further

ORDERED that a JHO or Special Referee shall be designated to determine the attorneys' fees owed to Plaintiff; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646–386–3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this order with notice of entry on defendants within five days and that counsel for plaintiffs shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212–401–9186) or email an

Information Sheet (which can be accessed at http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

This constitutes the Decision and Order of the Court.

HON. JOEL M. COHEN
J.S.C.

12/11/2018
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
APPLICATION:	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[X]	REFERENCE