SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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XOGITO GROUP, INC.,

Plaintiff,

- v -

PARALLEL TESTING INC., and MARK KALLAN,

Defendants.

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INDEX NO. 652964/2020

MOTION DATE 10/19/2021, 10/19/2021

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, and 78

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 53, 54, 55, and 79

were read on this motion for ATTORNEY WITHDRAWAL.

Upon the foregoing documents, it is hereby ordered that Plaintiff's motion for summary judgment (Mot. Seq. 002) and Defendants' counsel's motion to withdraw (Mot. Seq. 003) are decided in accordance with the following memorandum.

Plaintiff asserts five causes of action against Defendants Parallel Testing Inc. and Mark Kallan ("Parallel" and "Kallan," respectively). Plaintiff moves for summary judgment (motion seq. no. 002) on the first cause of action for breach of contract against Parallel and the third cause of action on personal guaranty against Kallan. Defendants jointly assert twenty-four affirmative defenses and fourteen counterclaims. In relation to the counterclaims, Plaintiff seeks summary judgment on its sixth affirmative defense citing documentary evidence and seventh affirmative defense of waiver, ratification, and estoppel.

Defendants' counsel moves (motion seq. no. 003) to withdraw.

Background

Plaintiff is a company that "specializes in designing and constructing software and data platforms" founded by Constantine Spathis ("Spathis") (Complaint, NYSCEF Doc. No. 1 ¶ 10-11). Parallel is a pharmacogenomics business which partnered with a Boston software design team to develop a software platform analyzing genomic data in order to pinpoint potential reactions to pharmaceutical and medical treatments (Doc. No. 1 ¶ 6, 8). The software originally developed was named "V1" (Doc. No. 1 ¶ 8). Bob Hausman ("Hausman"), Chief Operating Officer of Parallel, reached out to Spathis for "advice and guidance on how to improve V1 and successfully launch Parallel's services into the marketplace" after "various security and operational problems" caused V1 to be unsuitable for profitable deployment in the marketplace (Doc. No. 1 ¶ 9, 14).

On February 4, 2019, Plaintiff and Parallel executed a Services Agreement and Statement of Work ("SOW") to completely rebuild the software, naming it "V2" (Doc. No. 1 ¶ 15-17). Plaintiff immediately began developing V2 and in May 2019 Parallel began falling behind on its monthly invoice payments (Doc. No. 1 ¶ 21, 24). Plaintiff alleges requested changes and revisions by Parallel that caused V2's development to be significantly delayed, including modifying V2 beyond the scope of work agreed upon (Doc. No. 1 ¶ 26, Memorandum of Law in Support, NYSCEF Doc. No. 51 at 9). By September 2019, Parallel allegedly owed over $250,000 on its monthly invoice arrears and V2 was not yet ready due to the delays (Doc. No. 1 ¶ 27). Defendants allege that V2 was completed in September 2019, but after attempting to utilize it, Defendants noticed there were "system defects, fatal errors, and other substantial problems" (Answer, NYSCEF Doc. No. 16 ¶11-12). Spathis and Plaintiff demanded the invoice be paid or plaintiff would discontinue developing V2 (Doc. No. 1¶ 28). Parallel's President,

Kallan, "represented that Parallel was successful in raising additional financing through a London-based venture capital firm and had gained a large corporate employee benefit client. Kallan represented that Parallel intended to pay all of its invoice arrears in full once it gained additional financing" (Doc. No. 1 ¶ 29). Due to Parallel's overdue arrears in excess of $340,000, Plaintiff and Parallel created an addendum to the Service Agreement allowing Parallel to make monthly debt payments in addition to its monthly payments (Doc. No. 1 ¶ 34; Addendum, NYSCEF Doc. No. 3). The addendum included a personal guarantee by Kallan (Doc. No. 1 ¶ 42, Doc. No. 3 ¶6).

On April 6, 2020, V2 was completed and ready for use by Parallel (Doc. No. 1 ¶ 47). Parallel failed to make its payments again in May 2020 and by June 2020 ceased all communications with Plaintiff (Doc. No. 1 ¶ 50-54). On June 1, 2020, Parallel locked Plaintiff out of the V2 platform and denied Plaintiff access (Doc. No. 1 ¶ 55). Plaintiff alleges Parallel owes $351,187.40 plus interest.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

Discussion

Motion Sequence 002, Summary Judgment

The first cause of action is for breach of contract against Parallel while the third cause of action on personal guaranty is against Kallan. To establish a breach of contract claim, Plaintiff must demonstrate that "(1) the parties entered into a valid agreement; (2) plaintiff performed; (3) defendant failed to perform; and (4) damages" (*VisionChina Media Inc. v. Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013]).

As for the first element, the Service Agreement is signed by Kallan on behalf of Parallel and the accompanying SOW is signed by both parties. Neither party contends the Service Agreement was invalid. Moreover, even though Plaintiff's signature is not found on the service agreement, it is still a valid agreement because it has been signed by the party to be charged, vis-à-vis Defendant (*e.g.*, *Crabtree v Elizabeth Arden Sales Corp.*, 305 NY 48 [1953]).

The Addendum is signed by Plaintiff and Kallan on behalf of Parallel (NYSCEF Doc. Nos. 2 and 3). Defendants allege that "Plaintiff sought to extort Defendants into execution" of the Addendum and personal guaranty constituting economic duress (Memorandum in Opposition, NYSCEF Doc. No. 57 ¶ 49). Kallan states that Plaintiff shut down V2 leaving Defendants and its users unable to access the website at the end of November or beginning of December 2019, but it was turned back on by December 5, 2019 (Kallan Affidavit, NYSCEF Doc. No. 60 ¶61-62). Kallan alleges that after Parallel asked to have it turned back on, Plaintiff replied that it would require a personal guaranty (Doc. No. 60 ¶62). Kallan alleges that Plaintiff turned off V2 two more times (Doc. No. 60 ¶ 64-67). Kallan signed the addendum and personal guarantee on February 3, 2020 (NYSCEF Doc. No. 3).

"A contract may be voided on the ground of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat which precluded the exercise of its free will" (*Sitar v Sitar*, 61 AD3d 739, 742, 878 [2d Dept 2009]). Here, Defendants do not make clear that Kallan could not walk away from signing the agreement and guarantee, nor do Defendants state with certainty that Plaintiff shut down V2 for the sole cause of extortion rather than to continue work on the platform. Additionally, Parallel had been falling behind on payments since May 2019 and continued to fall behind during the time that Plaintiff allegedly turned off the platform. The court is unpersuaded that Plaintiff's shutting down V2 after Defendants' nonpayment constitutes actionable economic duress.

The court now evaluates the second element of Plaintiff's performance. Neither the Service Agreement and accompanying SOW, nor the Addendum, detail exactly what is to be executed through the development of V2. Both agreements do not provide details concerning the responsibilities of the parties. The Service Agreement and SOW do not mention the V2 platform and only describe the work to be completed by Plaintiff as "Professional Services" (Doc. No. 2 at 1). The Addendum mentions the V2 Platform and incorporates by reference a PowerPoint and Spreadsheet that generalize the services and estimate the time and cost (Doc. No. 3 at 1; PowerPoint and Spreadsheet, NYSCEF Doc. No. 61). It is unclear whether the PowerPoint and Spreadsheet are limited to the details and costs of fixing V1, and not including the development of V2, as the Bill of Particulars refers to a PowerPoint associated with V1 (NYSCEF Doc. No. 30 at 1). Defendants argue that the services cost more than expected from representations in the PowerPoint; however, the services or goals to be achieved are stated in the Addendum as "The tasks entailed for future Services shall be mutually agreed upon by Parallel and Xogito, from time to time, in connection with the continued development of all platforms, including V2, plus

enhancements, amendments, revisions, and new versions" (Doc. No. 3 ¶3(c)). The price term contained in the SOW is in terms of weekly services (Doc. No. 2 at 11). It is clear that services were ongoing and it is disingenuous to argue that the PowerPoint that detailed the costs of seemingly one project controls the totality of the costs of ongoing services.

Kallan alleges twelve issues or missing items on the V2 platform in April and May of 2020 that Plaintiff has failed to complete V2, and that the services have taken significantly longer than expected (Doc. No. 60 ¶ 70, 71, 75). Plaintiff alleges that delays were caused by "Parallel's inconsistent and repeated requests for revisions and changes" (Doc. No. 1 ¶ 27). Given that Plaintiff alleges that Defendant locked Plaintiff out and ceased all communications on June 1, 2020, completing V2 may have been impossible at no fault of Plaintiff (Doc. No. 1 ¶ 54-55). Due to the ambiguity in the Service Agreement, SOW, and Addendum, it is impossible for the court to verify the instances, if any, in which the Plaintiff breached the agreements, especially given the fact that the nature of the agreements were for ongoing services. Defendants argue that Plaintiff failed to provide "adequate training and services ... as provided for in the agreements." However, Defendants do not cite to the relevant provision, nor does the court find evidence of this in the record (Doc. No. 57 ¶ 20; Doc. Nos. 2 and 3). Because of the ongoing nature of the agreements to pay for services as they are rendered, the court does not find that Plaintiff breached any of the agreements.

As for the third element of Defendants' performance, it is obvious from the record that Defendants did not perform their obligations of payments as stated previously. However, Defendants assert that Plaintiff represented it would cost "$186,300.00, and it would have V2 as a fully functional and operational software application" and it already paid Plaintiff $192,964.00 (Answer, NYSCEF Doc. No. 16 ¶ 30, 16). The only evidence in the record of this amount is in an

email from Spathis, CEO and President of Plaintiff, to Bob Hausman, Parallel's Chief Operating Officer (NYSCEF Doc. No. 61). Spathis states "Attached are the cost estimates" which totals $186,340.00 and 561 man days as the time estimate (Doc. No. 61). Plaintiff claims that Defendants owe $351,187.40 in outstanding debts for nonpayment under the Service Agreement and Addendum (Doc. No. 1 ¶ 67). The Service Agreement as well as the SOW do not detail the expected cost (Service Agreement and SOW, NYSCEF Doc. No. 2). Instead, the Service Agreement provides, "In exchange for any Services and/or Professional Services, [Parallel] shall pay XOGITO the fees set forth in the applicable SOW, in the manner described in such SOW. Unless otherwise stated in the applicable SOW, all amounts will be due and payable in full within thirty (30) days of the date of XOGITO's invoice to [Parallel]." (Doc. No. 2 ¶3.1). The SOW at the end of the Service Agreement contains price terms for weekly services (Doc. No. 2 at 11) The Service Agreement also provides for a late fee of 1.5% of the invoice's value per month (Doc. No. 2 ¶ 3.1). The Addendum, signed on February 3, 2020, by both parties, including a personal guaranty by Defendant Kallan, states "it is agreed that Parallel owes Xogito approximately $373,779.97.00, plus simple interest to accrue at the rate of 1.5% per month" (Addendum, NYSCEF Doc. No 3 at 1). Plaintiff submits an invoice totaling $421,530.55 in open balance as of July 23, 2021, which includes accrued interest (NYSCEF Doc. No. 49). In emails from Defendants, the Defendants admit their difficulty in paying and seek a solution, but they never contend that the price was unreasonable or that the work was not being completed (NYSCEF Doc. Nos. 41, 44, 46). It is clear from the Services Agreement and SOW that the parties intended to enter into a contract for weekly services and pay for such, which Defendants failed to do. For these reasons, the court has no basis to conclude that Defendants performed under the contract.

As for the fourth element, Plaintiff has proven its damages with credit memos and invoices as well as the signed addendum detailing the amount agreed upon both parties to be paid overtime (NYSCEF Doc. Nos. 3, 38, and 49).

Defendants argue that summary judgment should not be granted on the basis that it has not conducted depositions and discovery in incomplete (Doc. No. 57 ¶ 48). Defendants do not identify what material remains to be discovered and only blanketly state that it is "necessary to obtain information that could support any of Defendants' defenses to Plaintiff's causes of action" (Doc. No. 57 ¶ 36). Defendants assert twenty-four affirmative defenses, many of which are bare bones conclusory statements (NYSCEF Doc. No 16). Outside of stating more discovery is needed, Defendants fail to argue the validity of most of their affirmative defenses in their opposition papers (Doc. No. 57). The Memorandum of Law in Opposition only mentions a defense of economic duress duplicative of the twenty-third affirmative defense of economic duress (Answer, NYSCEF Doc. No. 16 at 4). Defendants state that they need to depose Plaintiff, but do not identify what information is to be sought that would help prove support their affirmative defenses (Doc. No. 57). Defendants served a demand for a bill of particulars, interrogatories, and notice to produce five months before Plaintiff's motion was filed. Plaintiff produced significant documentation as well as a verified bill of particulars in response. "Mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion" (*Morales v Amar*, 145 AD3d 1000, 1003 [2d Dept 2016]).

The court finds that summary judgment on the first and third causes of action is appropriate for the reasons previously stated. Plaintiff has provided sufficient evidence in the record to support its claims, including the Service Agreement, Addendum, and Invoices for services rendered. In

their opposition papers, Defendants rely on arguments of economic duress and lack of evidentiary proof for which the court finds no merit (Doc. No. 57). The court finds that the Service Agreement, Addendum, and Personal Guaranty were properly executed, and Plaintiff performed under them. Therefore, the court grants summary judgment to Plaintiff on its first and third causes of action.

Plaintiff also moves for summary judgment on its sixth and seventh affirmative defenses to the Defendants' fourteen counterclaims. The sixth affirmative defense states there is documentary evidence upon which a defense to the counterclaims arises and the seventh affirmative defense states the counterclaims are barred by waiver, ratification, or estoppel (Reply to Counterclaims, NYSCEF Doc. No. 17). Plaintiff summarizes Defendants' counterclaims as follows:

> (1) Xogito breached the Services Agreement by failing to correct the problems associated with V2; (2) Xogito was negligent; (3) Xogito breached an express and implied warranty; (4) Xogito breached the implied covenant of good faith and fair dealing; (5) Xogito's actions warrant a cause of action under promissory estoppel; (6) Xogito's actions constitute fraudulent inducement; (7) Xogito has misappropriated and converted V2 away from Parallel; (8) Xogito defrauded Parallel; (9) Xogito violated NY GBL § 349; (10) a request for specific performance for Xogito to perform under the Service Agreements and associated documents; and (11) Xogito's actions constitute willful misconduct, malice, fraud, wantonness, oppression, or want of care.

(Doc. No. 51 at 10.)

The remaining three counterclaims are for (12) unjust enrichment, (13) an order for specific performance, and (14) damages.

In their opposition papers, Defendants make no arguments opposing summary judgment on the counterclaims (Doc. No. 57). The only mention of their counterclaims is briefly in the procedural history and there is no mention of Plaintiff's affirmative defenses (Doc. No. 57). At most, Defendants state, "Plaintiff has failed to submit affirmative proof demonstrating its entitlement to partial summary judgment as to any aspect in its motion" and "Defendants have

demonstrated the existence of multiple triable issues of fact as to each aspect of the Plaintiff's motion" (Doc. No. 57 at 18). The court does not find any opposition to Plaintiff's motion for summary judgment in relation to the counterclaims. As the Appellate Division, First Department, has stated: "By his silence in his opposition brief, defendant concedes, as plaintiff argues, that the second, third, and sixth affirmative defenses should be dismissed" (*Steffan v Wilensky*, 150 AD3d 419, 420 [1st Dept 2017]). Under the same logic, the court finds that Defendants have conceded that summary judgment should be granted on Plaintiff's sixth and seventh affirmative defenses to the fourteen counterclaims. Because of the Defendants' silence as well as the reasons stated in Plaintiff's motion papers, the court grants summary judgment on the sixth and seventh affirmative defenses to Defendants' counterclaims.

The Services Agreement (NYSCEF Doc. No. 2) contains a prevailing party attorney fee provision (¶ 10.9).

Motion Sequence 003, Withdrawal as Counsel

The court finds that withdrawal by Defendants' counsel is appropriate for the reasons set forth in the motion to withdraw (*see*, NYSCEF Doc. No. 54 ¶ 11). . No. 54 ¶¶ 6, 12). There is no opposition to the motion to withdraw. The motion is granted.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for partial summary judgment (motion seq. no. 002) is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of Plaintiff and against Defendants Parallel Testing Inc and Mark Kallan, jointly and severally, in the principal amount of $351,187.40, with interest on the principal amount at the rate of 1.5% from May 15,

2020,[1] through the date of entry of judgment as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the reasonable attorneys' fees to be assessed in Plaintiff's favor per paragraph 10.9 of the Services Agreement shall be held in abeyance until the remaining causes of action are resolved; and it is further

ORDERED that the remainder of the action is severed and continued; and it is further

ORDERED that the motion of Raphael Weitzman, Esq., to be relieved as attorney for Defendants (motion seq. no. 003) is granted; and it is further

ORDERED that this action be stayed for a period of 30 days from the date of filing hereof to enable Defendants to retain new counsel; and it is further

ORDERED that a status conference will occur in this matter on February 22, 2023, at 10:00 a.m., at the Courthouse, 111 Centre Street, Room 1166, New York, New York.

Louis L. Nock

1/18/2023
DATE

LOUIS L. NOCK, J.S.C.

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

[1] The last invoice charged to Defendants is on May 15, 2020, for $351,187.50, which is also the same relief sought in the complaint (NYSCEF Doc. No. 9 at 30). The Memorandum of Law in Support (NYSCEF Doc. No. 51 at 6) as well as the updated invoice (NYSCEF Doc. No. 49) state Defendants in are in default of $421,530.55 which includes interest at the rate of 1.5% as agreed upon in the addendum (NYSCEF Doc. No. 3 at 1).