

**Hockessin 2SP LLC v ADP, LLC**

2023 NY Slip Op 32438(U)

July 18, 2023

Supreme Court, New York County

Docket Number: Index No. 651362/2023

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

*Justice*

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HOCKESSIN 2SP LLC, MIDDLETOWN 2SP LLC, NEWARK  
2SP LLC

Plaintiff,

- v -

ADP, LLC,

Defendant.

-----X

INDEX NO. 651362/2023

MOTION DATE 05/01/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant’s motion to dismiss is granted in part<sup>1</sup>.

Plaintiffs bring this instant action for breach of contract, breach of the covenant of good faith and fair dealing, fraud, and gross negligence. Defendant moves to dismiss the complaint pursuant to CPLR § 3211(a)(1), (5) and (7) and move to strike paragraphs 74-77 of the complaint pursuant to CPLR § 3024(b). The portion of defendant’s motion to strike paragraphs 74-77 of the complaint is granted without opposition, the remainder of the motion is denied.

**Background**

Plaintiffs are three Delaware LLCs that each operate a restaurant in Delaware known as Two Stones Pub. Plaintiffs, Hockessin 2SP LLC (“Hockessin”) contracted with ADP to conduct payroll and tax filings for its restaurants to begin in the second quarter of 2019. Plaintiff Hockessin claims ADP mistakenly input the wrong unemployment insurance account number when filing with the Delaware Department of Labor, Division of Unemployment Insurance

<sup>1</sup> The Court would like to thank Chris Markos for his assistance in this matter.

(“DOL UI”). Plaintiffs contend that ADP was notified of the error before filing but failed to amend the filing and repeatedly and willingly failed to correct the error, resulting in Plaintiffs’ unemployment tax rate to jump from 0.3% to 6.5% for over two years for all three restaurants due to their connection with a singular owner. Plaintiffs claim they repeatedly contacted ADP to correct the error but ultimately resorted to working directly with DOL UI to resolve the issue. Working with DOL UI, Plaintiffs returned their tax rate to 0.3%, however, they were unable to recover for the quarters they were taxed at 6.5% and lost out on a federal tax credit they otherwise would be eligible to collect.

### **Standard of Review**

“In a motion to dismiss pursuant to CPLR § 3211(a)(1), the defendant has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] internal quotations and citations omitted). Further, dismissal pursuant to CPLR § 3211(a)(1) is warranted where documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law.” *Gottesman Co. v A.E.W, Inc.*, 190 AD3d 522, 24 [1st Dept 2021].

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the Court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *See Leon v Martinez*, 84 NY2d 83 [1994].

### **Discussion**

Defendant seeks dismissal of the complaint as it relates to plaintiffs Middletown 2SP LLC and Newark 2SP LLC. Specifically, defendant alleges that the complaint fails to allege any

wrongful conduct with respect to these two plaintiffs. Further, defendant contends that the contract contains an explicit bar as to consequential damages and contends those are the types of damages alleged here.

In opposition, plaintiffs contend that the damages sought are not consequential but are penalties imposed by DOL UI as a result of defendant's wrongful conduct. Additionally, plaintiffs contend that the damages alleged as to Newark 2SP LLC are foreseeable because it is part of the "joint experience account<sup>2</sup>."

Preliminarily, the Court notes that the entirety of the contract has not been provided. Specifically, the Court is left to wonder what the agreement is between defendant and Two Stones Pub as it relates to the plaintiffs in this action. Accordingly, the Court finds that defendant has failed to establish its prima facie entitlement to dismissal as defendant has failed to submit the contract in its entirety, and what has been provided does not conclusively dispose of all factual issues, namely whether the increased interest rate was a penalty. Giving all favorable inferences to the non-moving party, the Court declines to reach defendant's remaining arguments. Accordingly, it is hereby

ORDERED that defendant's motion to strike paragraphs 74-77 of the complaint are stricken without opposition; and it is further

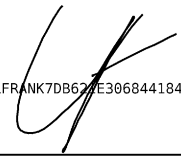
ORDERED that defendant's motion to dismiss is otherwise denied; and it is further

ORDERED that defendant shall serve an answer to the verified complaint within 20 days from the date of service of this Order with Notice of Entry.

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<sup>2</sup> Neither party has submitted any documentation

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7/18/2023  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE