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

**PRESENT:** **HON. NANCY M. BANNON** **PART** **61M**

***Justice***

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EVAATE LLC,

Plaintiff,

- v -

PORTFOLIO BI, INC.,

Defendant.

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**INDEX NO.** 650125/2022

**MOTION DATE** 05/13/2024

**MOTION SEQ. NO.** 005

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 104, 105, 106, 107, 108, 109, 110

were read on this motion to/for SUMMARY JUDGMENT.

## I. INTRODUCTION

The plaintiff, Evaate LLC ("Evaate"), alleges that the defendant, Portfolio BI, Inc. ("PBI"), breached the parties' consulting agreement by failing to make the final payment due. The plaintiff now moves for summary judgment pursuant to CPLR 3212 on its sole breach of contract cause of action. The defendant opposes the motion. The motion is granted.

## II. BACKGROUND

Non-party Marko Djukic founded non-party Hentsu, Ltd. ("Hentsu") in 2015 to provide technology services to financial institutions. On February 22, 2021, Djukic sold the company to the defendant pursuant to a Stock Purchase Agreement (the "SPA"). See NYSCEF Doc. No. 85.

Under Section 3.03 of the SPA (the "Material Customer Representation"), Djukic represented, on behalf of Hentsu, that "No Material Customer has ceased doing business with [Hentsu] and [Hentsu] has not received from any Material Customer, notice (i) cancelling, suspending, terminating, or stating the intent to terminate, such Material Customer's relationship with [Hentsu], (ii) indicating that such Material Customer intends to reduce its purchase of services from [Hentsu] from the levels achieved during the 12-month period ending on

December 31, 2020 or (iii) indicating that it will adversely alter the terms upon which it is willing to do business with [Hentsu]." Id. at 20.[1] One of the material customers, Duality, would provide formal notice to Hentsu that it would leave Hentsu seven months after the merger. As relevant to the defendant's fraud defense, explained further below, the SPA stipulated that PBI is a sophisticated investor, knowledgeable about the industry in which Hentsu operates. Id.

Simultaneously with the execution of the SPA, Djukic, through his personal limited liability company, plaintiff Evaate, signed a Consulting Agreement with PBI which provided that Djukic would assist with the transition of Hentsu to PBI's ownership and work with the acquirors to retain key employees and clients. The Consulting Agreement called for Djukic to work on a full-time basis for three months and then, for the final six months of the Consulting Agreement, "*on an as-needed basis as reasonably requested by the Company.*" See NYSCEF Doc. No. 88 at 2 (emphasis added).

The Consulting Agreement provided that Djukic would earn a signing bonus, three monthly consulting fees and a "Success Fee" of $675,000.00. Djukic would earn the Success Fee if he remained "engaged and providing the [s]ervices to the reasonable good faith satisfaction of [PBI] through the Scheduled End Date, and provided that [Djukic] has complied in all material respects with his obligations, duties, representations, warranties and covenants to the Company[,]" including those contained in the SPA. Id. The defendant paid Djukic the signing bonus and the three monthly fees but did not pay the Success Fee when it was due on December 1, 2021, at the conclusion of the six month "as-needed" leg of the Consulting Agreement.

The parties agree that Djukic did not provide any meaningful services during the final phase of the Consulting Agreement. When asked whether he did any work after the first three months of the Consulting Agreement, Djukic testified that "The agreement…was that they would call me when they needed me…They never called me." See NYSCEF Doc. No. 100 at 53.

The plaintiff commenced this action on January 7, 2022, alleging a single cause of action for breach of contract based on the defendant's failure to pay the Success Fee. In its answer, the

[1] Citations herein follow the page numbering of the PDF on NYSCEF.

defendant asserts nine affirmative defenses, including two alleging that the subject "agreements were procured by fraud and/or misrepresentation" and that "plaintiff and its principals committed fraudulent acts." The affirmative defenses are pleaded in a conclusory manner. Discovery was completed. This motion ensued.

## III. LEGAL STANDARDS

On a motion for summary judgment, the moving party must establish, *prima facie*, its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). If the movant meets this burden, it becomes incumbent upon the nonmoving party to submit evidentiary proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra. The elements of a cause of action for breach of contract are (1) the existence of a contract, (2) the plaintiffs' performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010).

## IV. DISCUSSION

The plaintiff's submissions demonstrate, *prima facie*, its entitlement to judgment on its breach of contract cause of action, and the defendant fails to raise any triable issue of fact. To establish the existence of a valid agreement and its performance thereunder, the plaintiff submits, *inter alia,* the subject Consulting Agreement and Djukic's deposition testimony in which testified that "[e]verything that was asked from me in [the Consulting Agreement] I did to the best of my abilities, and with the whole idea of making that merger successful. I had no objections. I had received no complaints from anyone during that period [of the Consulting Agreement]." See NYSCEF Doc. No. 100 at 52. The parties do not dispute that the defendant did not pay the Success Fee, which establishes the defendant's failure to perform and resulting damages. Thus, the plaintiff established all four elements of its claim.

In opposition, the defendant submits no proof in admissible form but only a memorandum of law. It merely argues that it should be excused from paying the Success Fee because Djukic (i) "failed to fully perform [his] contractual obligations" under the Consulting Agreement and (ii) defrauded the defendant by falsely representing in the SPA's Material Customer Representation that there was no risk to the business relationship with Duality, Hentsu's biggest customer. These arguments are unsupported and unavailing.

To substantiate its contention that Djukic did not perform under the Consulting Agreement, the defendant (a) references Djukic's deposition testimony wherein he admits he wasn't proactive in soliciting work from the defendant and argues that Djukic (b) cannot be entitled to a "Success" fee when he was "unsuccessful" in retaining key employees, and (c) sabotaged the merger by laying off employees before the sale closed.

The defendant's attempt to read in a requirement that Djukic proactively seek out work is specious. Even if it were true, as alleged, that Djukic was "lackadaisical" by "wait[ing] for a phone call" from the defendant, such a "passive approach" (See NYSCEF Doc. No. 106) would not constitute a breach of the Consulting Agreement. During its final leg, the Consulting Agreement only required Djukic to, "on an as-needed basis," provide consulting services "to the reasonable good faith satisfaction of the Company." See NYSCEF Doc. No. 88. The defendant does not submit any proof that it ever requested services from Djukic during the final leg of the Consulting Agreement or that it had good faith objections to Djukic's performance.

Equally specious is the defendants' contention that Djukic was "unsuccessful" in retaining key employees and should not, therefore, be entitled to the "Success Fee." While the term "Success Fee" appears in a paragraph heading, the Consulting Agreement expressly provides that "headings in this Consulting Agreement have been inserted for convenience only, do not form a substantive part of this Consulting Agreement, and shall not in any way be deemed to limit or otherwise affect the meaning, interpretation or construction of this Consulting Agreement…." See NYSCEF Doc. No. 88. Therefore, although Djukic admitted at his deposition that he failed to secure the retention of key employees, that admission does not demonstrate that he failed to perform his contractual obligations. Indeed, the Consulting

Agreement does not condition payment of the "Success Fee" on some defined measure of success but required only that Djukic "assist[] the Company in working to retain the employment of Hentsu employees" and "in its efforts to transition and retain the employment of the key employees of Hentsu[.]" That is, by the express terms of the agreement, Djukic was not solely responsible for retaining employees.

The defendant's additional argument that Djukic's termination of several Hentsu employees prior to the sale of the company constitutes a breach of the Consulting Agreement is without merit. Setting aside that any such termination could only have been done by Djukic in his role as Hentsu's CEO and not in his individual capacity, any such breach would have predated the Consulting Agreement sued upon. The contract could not have been breached by conduct that preceded its execution. Moreover, the text of the Consulting Agreement expressly provides that Djukic was to "assist[] the Company in working to retain the employment of Hentsu employees *following the Transaction*[.]" See NYSCEF Doc. No. 88 at 2 (emphasis added). It is a cardinal rule of contract construction that no provision should be ignored nor any agreement interpreted so as to render any provision meaningless. See Beal Savings Bank v Sommer, 8 NY3d 318 (2007); GEM Holdco, LLC v Changing World Tech., L.P.,127 AD3d 598 (1st Dept. 2015); Tini v Alliancebernstein L.P., 108 AD3d 409 (1st Dept. 2013). Thus, any pre-contract decision to terminate Hentsu employees is thus inconsequential to Djukic's performance under the Consulting Agreement, and holding otherwise would render the final portion of the quoted language as surplusage.

In further opposition, the defendant asserts that Djukic knew or should have known that Duality, Hentsu's most important customer, was in jeopardy of leaving Hentsu, that he failed to disclose that risk, and that this non-disclosure constitutes a breach of the representations and warranties in the SPA and the Consulting Agreement. The Material Customer Representation in the SPA represents and warrants that Hentsu has not received "notice" from any Material Customer "cancelling, suspending, terminating, or stating the intent to terminate, such Material Customer's relationship with [Hentsu]" or otherwise indicating that such Material Customer intends to reduce or adversely alter the terms of its business with Hentsu. Anticipating the defendant's argument, the plaintiff submits the deposition transcript of Duality's COO, Jeff

Ziglar, who testified that he did not notify Hentsu prior to the sale that Duality planned to abandon Hentsu's service. See NYSCEF Doc. No. 98 at 21. In response, the defendant references three internal Hentsu emails that purportedly establish that Djukic had actual notice, prior to the sale, of Duality's imminent departure. However, the defendant does not submit copies of any of these emails, nor were any of them submitted by the plaintiff as exhibits to its initial moving papers. Two of the three subject emails were subsequently submitted by the plaintiff in reply. Specifically, in May 2020, Djukic wrote "in short, yes. We are at risk of losing [Duality]." See NYSCEF Doc. No. 109. Then in June of that year, Djukic wrote "[Duality] is looking to leave us, they need two things really quickly." See NYSCEF Doc. No. 110.

Generally, a movant seeking summary judgment may not make its *prima facie* showing in reliance on evidence introduced for the first time in reply. See Matter of Kennelly v Mobius Realty Holdings LLC, 33 AD3d 380 (1st Dept. 2006). However, the general rule is not inflexible and a court, in the exercise of its discretion, may consider such evidence in some circumstances. Id. at 381-82. Here, the plaintiff was not introducing any new evidence or argument. Rather, it was the defendant who raised it for the first time, expressly referencing and discussing the emails in its opposition without producing them, prompting the plaintiff to submit the actual emails in reply. As such, the court may consider the emails. See Matapos Tech. Ltd. V Compania Andina de Comercio Ltda, 68 AD3d 672 (1st Dept. 2009). Moreover, even if considered, the emails do not create a triable issue of fact. That is, the emails do not demonstrate that, at the time the SPA was executed, Hentsu had any notice of Duality's plans. The SPA was not executed until nearly eight months after the June 2020 email, during which time Duality remained a Hentsu customer and did not provide formal notice that it intended to end its business with Hentsu. Indeed, Duality remained a Hentsu customer for more than a year after these emails were written and actually *renewed* its contract with Hentsu during that time. See NYSCEF Doc. No. 82 ¶ 9.

The defendant also relies on the deposition testimony of Jeremy Siegel, Djukic's post-acquisition replacement as Hentsu CEO, which was submitted by the plaintiff with its initial papers. Siegel testified that conversations with Hentsu employees caused him to believe that Djukic was aware, prior to the sale, of Duality's intention to abandon Hentsu. Specifically, Siegel testified that he learned from other Hentsu employees that Djukic had told everybody in

Hentsu that Duality was going to end the relationship. See NYSCEF Doc. No. 101 at 67. Siegel also testified that, when Duality eventually provided formal notice in September 2021, Ewelina Obrzut (Hentsu's head of delivery) told him that there was no need to lay off employees who worked on the Duality account because Hentsu already knew that Duality would terminate and had pre-existing plans to reassign those employees. See NYSCEF Doc. No. 101 at 69.

However, as Siegel testifies only to what he was told by Hentsu staff, he does not have firsthand knowledge of Djukic telling the Hentsu staff that Duality would abandon Hentsu or that Djukic made plans for Hentsu's employees upon Duality's departure. Therefore, this testimony is hearsay, which is generally inadmissible and may be utilized in opposition to summary judgment only if it is not the only evidence submitted. See Garcia v 122-130 East 23rd Street LLC, 220 AD3d 463 (1st Dept. 2023); Rogova v Davis, 112 AD3d 404 (1st Dept. 2013). Because it submits no proof in admissible form showing that Hentsu received notice of Duality's intent to wind down its business with the company, the defendant does not raise a triable issue of fact. Compare Rubin v Napoli Bern Ripka Shkolnik, LLP, __ AD3d __ (1st Dept. June 27, 2024); Guzman v L.M.P. Realty Corp., 262 AD2d 99 (1st Dept. 1999).

Additionally, the submissions show that the defendant failed to do its pre-acquisition due diligence in that it admittedly failed to thoroughly vet Hentsu's material customers, including Duality, and inquire of their plans. Thus, the defendant cannot be heard to argue that it relied, justifiably or otherwise on Djukic's alleged misrepresentation. The due diligence process included meetings between the acquirors and Duality, as well as Hentsu's other material customers. However, according to Siegel, he understood his pre-sale meeting with Duality as merely an opportunity to exchange pleasantries, and thus did not take advantage of the meeting to inquire about Duality's plans. See NYSCEF Doc. No. 101 at 29. See Ventur Group, LLC v Finnerty 68 AD3d 638 (1st Dept. 2009) (sophisticated party cannot justifiably rely on alleged misrepresentations if that party failed to make use of the means of verification available to it).

In light of the defendant's breach, the plaintiff is entitled to recover compensatory damages of $675,000.00, plus costs and interest. Generally, interest is computed "from the earliest ascertainable date the cause of action existed". CPLR 5001(b). In a breach of contract

action, interest "accrues from the time of an actionable breach." Kellman v Mosley, 60 AD3d at 457 (1st Dept. 2009); see generally Brushton-Moira Cent. Sch. Dist. v Fred H. Thomas Assocs., P.C., 91 NY2d 256 (1998); Love v State of New York, 78 NY2d 540 (1991). Therefore, the plaintiff is entitled to statutory interest from December 1, 2021, the date of the breach.

The plaintiff's request for punitive damages is denied. Punitive damages may be awarded only "where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, and others who might otherwise be so prompted, from indulging in similar conduct in the future." Walker v Sheldon, 10 NY2d 401, 404 (1961); see Marinaccio v Town of Clarence, 20 NY3d 506 (2013). For that reason, "punitive damages are not recoverable for an ordinary breach of contract." Rocanova v Equitable Life Assur. Soc. of U.S., 83 NY2d 603, 613 (1994).

## V. CONCLUSION

Accordingly, upon the foregoing papers, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3212 for summary judgment is granted; and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff, Evaate LLC, and against the defendant, Portfolio BI, Inc., in the sum of $675,000.00, plus costs and statutory interest from December 1, 2021.

This constitutes the Decision and Order of the court.

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7/2/2024
DATE

NANCY M. BANNON, J.S.C.

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| CHECK ONE: | X | CASE DISPOSED | | | NON-FINAL DISPOSITION | | |
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| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |

650125/2022 EVAATE LLC, vs. PORTFOLIO BI, INC.,
Motion No. 005