

Bank of Am., N.A. v Netmarketer Inc.

2024 NY Slip Op 33980(U)

November 6, 2024

Supreme Court, Kings County

Docket Number: Index No. 508685/2024

Judge: Leon Ruchelsman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

-----x
BANK OF AMERICA, N.A.,

Plaintiff, Decision and order

- against -

Index No. 508685/2024

NETMARKETER INC.; ALFRED S.
BISSU, in his individual capacity and in his
capacity as Trustee for the Revocable Trust
Of Alfred Bissu; THE REVOCABLE
TRUST OF ALFRED BISSU; NADINE
BISSU, in her individual capacity and in
her capacity as Trustee for the Revocable
Trust Of Nadine Bissu; and THE
REVOCABLE TRUST OF NADINE
BISSU,

Defendants,

November 6, 2024

-----x
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The plaintiff moves pursuant to CPLR §3211 seeking to dismiss counterclaims filed by the defendants and for partial summary judgement. The defendants oppose the motion arguing that the counterclaims have merit. Papers were submitted by all parties and arguments held. After reviewing the arguments of all parties this court now makes the following determination.

Background

According to the verified complaint, on December 12, 2019 the plaintiff extended a line of credit to the defendants in the amount of \$700,000. Pursuant to the loan agreement executed in connection with the line of credit and extensions, the line expired on December 12, 2020 when all principal and interest had

to be paid. On November 20, 2020 and March 15, 2021 amended agreement were executed between the parties and the line of credit was extended to April 11, 2021. Further amendments reduced the amount of the loan extended the terms of the loan and finally the loan was extended to February 10, 2024. On February 23, 2024 the plaintiff declared the defendants in default based upon non-payment. This action was commenced and the verified complaint seeks recovery of \$342,182.76 consisting of the principal amount, plus interest and other expenses owed. The defendants answered and asserted counterclaims alleging the plaintiff breached the implied covenant of good faith and fair dealing and breach of contract and tortious interference. The plaintiff has now moved seeking to dismiss those counterclaims and seeks summary judgement concerning the loan documents.

Conclusions of Law

In relevant part, CPLR §3211(a)(1) allows the court to dismiss a complaint "where documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claims" (id). Thus, to succeed on a motion to dismiss based upon documentary evidence such evidence must utterly refute the plaintiff's allegations (Gould v. Decolator, 121 AD3d 845, 994 NYS2d 368 [2d Dept., 2014]). Consequently, a contract, which is "unambiguous, authentic and

undeniable" is documentary evidence which can support a motion to dismiss (Attias v. Costeria, 120 AD3d 1281, 993 NYS2d 59 [2d Dept., 2014]). Moreover, affidavits are not documentary evidence (see, Fontanetta v. Doe, 73 AD3d 78, 898 NYS2d 569 [2d Dept., 2010]).

It is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). Further, the implied covenant of good faith and fair dealing is premised upon parties to a contract exercising good faith while performing the terms of an agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]).

The defendants assert that the plaintiff breached the agreement as well as the covenant of good faith and fair dealing by erroneously blocked the line of credit in August 2023. The plaintiff asserted at that time that the line of credit was blocked because the defendant failed to maintain adequate insurance. Moreover, the plaintiff sought information from the defendant and provided a time frame for the production of such information that did not conform to the guidelines of the line of credit agreement. There is no dispute the defendant maintained the proper insurance and sought documents without providing

sufficient time in which the defendants could furnish such documents.

The Loan Agreement states that "the Bank may suspend or cancel the Line of Credit at any time for any reason, whether or not there is a default" (see, Line of Credit Agreement, ¶1.5(b) [NYSCEF Doc. No. 15]). The mere fact the bank provided erroneous reasons for the cancellation cannot possibly mean the cancellation was improper when in any event no reason needed to have been provided at all. Thus, notwithstanding the reasons offered by the bank, no such prejudice could result therefrom since in any event the bank had the absolute right to cancel the line of credit.

Furthermore, concerning any tortious interference it is well settled that the elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the defendant and a third party, (2) the plaintiff's knowledge of that contract, (3) the plaintiff's intentional procurement of a third-party's breach of that contract without justification, and (4) damages (Anethsia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center, 59 AD3d 473, 873 NYS2d 679 [2d Dept., 2009]). Further, the party must specifically allege that 'but for' the other party's conduct there would have been no breach of the contract (White Knight of Flatbush, LLC v. Deacons of Dutch Congregations


of Flatbush, 159 AD3d 939, 72 NYS3d 551 [2d Dept., 2018]). In this case, the plaintiff's mere closing of the line of credit was not the intentional procurement of a breach of a third party. Therefore, based on the foregoing, the motion seeking to dismiss the counterclaims is granted.

Further, there has been no basis denying the amount owed. Therefore, the plaintiff's motion seeking summary judgement is granted.

So ordered.

ENTER:

DATED: November 6, 2024
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC