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

PRESENT: HON. EILEEN A. RAKOWER Justice PART 15

Index Number : 115678/2008
CELERANT TECHNOLOGY CORP.
vs.
MACLYN ENTERPRISES, INC.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 115678/08
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 19 2010
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/13/10

HON. EILEEN A. RAKOWER

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CELERANT TECHNOLOGY CORP.,

Plaintiff,

Index No.
115678/08

- against -

Decision and
Order

MACLYN ENTERPRISES, INC. A/K/A
MACLYN FRANCHISING, INC. D/B/A
BAUBLES,

Defendants.

Mot. Seq. 01

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Celerant Technology Corp. ("Celerant") brings this action for breach of contract arising out of the alleged breach of a "Software Licence and Service Agreement," entered into on January 29, 2008 between Celerant and defendant Maclyn Enterprises, Inc. A/K/A Maclyn Franchising, Inc. D/B/A Baubles ("Maclyn"). Celerant seeks entry of judgment in the amount of $30,124.91. Maclyn brings counterclaims for the amounts of $17,000.00 and $8,423.00, respectively. Celerant now moves for summary judgment on the complaint pursuant to CPLR 3212. Maclyn opposes.

Celerant is a software product and services company and is the owner of the software entitled "Celerant Command Retail Management System, v. 6.0 ("the software"). Maclyn is a retail establishment and franchisor which contracted with Celerant for the "development, implementation, integration . . . support [and maintenance] services" of Celerant's payment processing software. The payment terms for the software as listed in the contract is as follows:

> 33% of the Corporate System, which is $8,282.00, is due as a Deposit upon the execution of this Agreement.
>
> 33% of the Corporate System, which is $8,282.00, shall be due upon the

Live Date[1] of the first store.

34% of the Corporate System, which is $8,533.00, shall be due within 30 days after the Live Date of the first store.

It is undisputed that Maclyn paid the first installment on the contract upon entering into the agreement.

Celerant, in support of its motion submits a copy of the software agreement; several invoices; the pleadings; and a letter from Ian Goldman, President of Celerant to Sam Machacek of Maclyn. Celerant asserts that Maclyn defaulted on its second and third payments and that Celerant has "duly performed all of the terms, covenants and conditions of the aforesaid Master Software Agreement," Further, Celerant asserts that "Defendant simply does not have a meritorious defense to this lawsuit . . . Defendant has never raised any objections to plaintiff's services rendered to the account stated prior to institution of this litigation."

Maclyn, in opposition, submits: a "Notice of Appearance, Answer, Discovery Demands and Demand for a Verified Bill of Particulars;" a "Demand for Information;" plaintiff's bill of particulars; defendant's bill of particulars as to affirmative defenses; "Defendant's Response to Plaintiff's First Notice for Discovery and Inspection;" and the affidavit of Samuel Machacek, President of Maclyn. Maclyn first argues that Celerant's motion is premature as there is oustanding discovery. Specifically, Maclyn points out that no depositions have been held and the parties have not held a preliminary conference yet. In any event, Maclyn argues, there are material issues of fact regarding whether Celerant breached the agreement by not installing a working system within the time period allotted. To this end, Maclyn submits multiple emails that it sent to Cerelant, complaining about the performance of the software. By way of reply, Celerant asserts that it is undisputed that it "provided defendant with the agreed upon software and it was installed and up and running prior to the eight week deadline, i.e., March 26, 2008 . . ."[2]

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[1]Live Date is defined in the contract as: "the first date when the Software is placed in *actual productive use by a store or website* and is used to process a non-test transaction."

[2] In another part of its reply, and in its letter to Maclyn, Celerant states that the software was installed on March 19, 2008.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557[1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

"An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other . . . In this regard, receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor." (*Shea & Gould v. Burr*, 194 AD2d 369,370[1st Dept. 1993]).

Section 3(e) of the Amendment to the Software License and Service Agreement states:

> **Celerant Delays**. *If Celerant cannot install Version 6.1.0 of the Software*, including the franchise security feature, within eight weeks of the date of the Agreement and Licensee is in compliance with the payment terms in the Agreement, then *the Agreement may be cancelled by the Licensee.* In that event, all fees paid to Celerant by the Licensee shall be returned to the Licencee by Celerant within 15 days of the return of all merchandise, provided by Celerant to the Licensee, in original packaging and in resalable condition. Any merchandise not returned in original packaging and in resalable condition shall be deducted from the amount returned to the Licensees by Celerant.

On March 31, 2008, more than eight weeks from the date of the agreement, Mr. Machacek writes in an email:

1. I have the Ingenico[3] units here. I am assuming they can be programmed remotely or when you are here to do the installation. Please confirm.
2. I would like to understand what the options are for supporting credit cards across all locations. I am worried we are not going to be ready for this by the time we go live.
3. *Let me know when you can discuss the upgrade to version 6.1[.0] with John.* (emphasis added).

On April 3, 2008, Mr. Machacek wrote:

I am assuming the Ingenico units will not get out and back prior to going live (Wednesday morning) so we will have to configure Celerant accordingly and reconfigure once they are completed . . .

On April 4, 2008:

Just a few questions . . . getting nervous .
. . .
6. Are we going to be able to go live Wednesday morning?

On April 18, 2008:

Support is closing incidents, but the bottom line is I still don't have a working system, I spent 6 hours today and we got the Igenicos running, but there are still open issues with them before I can go live . . . What is the plan to get the Igenicos fully operational? Who is working on it?

Also on April 18, 2008:

Please help me keep things moving . . . we originally planned on going live a week ago today and no end is [in] site . . .
We got the Ingenicos operational. Visa works, but debit does not, discovery does not.

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[3]"Payment terminals."

On April 22, 2008 Mr. Machacek writes:

> I am at the end of my patients [sic] waiting for the timely support I need to get Celerant operational. Operations means Ingenico, Quickboooks interface, everything I paid for . . . I was told the new version was ready and the Quickbooks interface was complete. I paid for a specific result and Celerant is not holding up their end of the agreement . . .

Mr. Machacek writes on May 1, 2008:

> I am not even close to live and no intention of paying Celerant until I have a working system am not playing the debugger of a alpha/beta software version) . . .

On May 7, 2008, Mr. Machacek writes:

> At this rate I may have a working system by Christmas. This is not acceptable . . . As you know (Mike) I only bought this system based on your assurance that the system would be up and functioning before the sales of me [sic]first franchisee . . .

By letter dated May 22, 2008, Mr. Machacek states:

> Maclyn is hereby cancelling the Software License and Services Agreement . . . because Celerant did not meet its obligation to install the Software within eight weeks of the date of Agreement . . . we are returning the software and expect the return of all fees paid by us to you within 15 days of this invoice . . .

In response to Maclyn's cancellation letter, Ian Goldman, President of Celerant writes in a letter dated May 28, 2008:

> I am in receipt of your letter . . . regarding your desire to cancel our Agreement. Unfortunately, we are not in agreement with you letter or the contractual justification you are citing in the letter . . .
>
> 1. The software was installed and delivered to you on March 19,

> 2008. [This] is in within the eight week requirement in the contract.
> 2. You are not in compliance with the payment terms in the Agreement. A Payment was due upon the "Live date of the first store". That payment has never been made and the first store went live in April.
> 3. Any occurrence of default must be accompanied by written notice of such default, followed by a thirty day cure period, before any remedies may be invoked. To date, we have not received a valid default notice.

Celerant provides a series of invoices dated January 30, 2008 due as per the contract, and one dated April 18, 2008 for expenses incurred April 6 and 7, 2008, covered in paragraph 3 of the contract and due upon receipt. Defendant demonstrates that it did not simply receive and retain such invoices without objection.

Issues of fact exist as to whether defendant breached the agreement. Celerant fails to establish when, if ever, Maclyn "went live," as that term is defined in the agreement, which would have triggered the second and third payments indicated in the January invoices. Additionally, there are issues of fact regarding whether Maclyn, through its string of emails, objected to an account stated. Finally, there are issues of fact as to whether Celerant performed a timely installation of the software pursuant to the agreement, and whether defendant effectively cancelled the agreement, thereby calling into question its obligation to pay the April invoice.

Defendant asserts that this motion is premature. Where facts essential to justify opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied. (See CPLR §3212[f]). Here, defendant points out that depositions remain outstanding. Indeed, there has been no preliminary conference in furtherance of discovery.

Wherefore it is hereby

ORDERED that the motion is denied; and it is further

ORDERED that the parties shall appear for a Preliminary Conference in front of the Honorable Justice Eileen A. Rakower on June 22, 2010 at 9:30 a.m. in Room

308 at 80 Centre Street.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: May 13, 2010

Eileen A. Rakower, J.S.C.