

CIT Tech. Fin. Servs., Inc. v Franklin First Fin., Ltd.

2013 NY Slip Op 31261(U)

June 12, 2013

Supreme Court, Suffolk County

Docket Number: 37971-09

Judge: Elizabeth H. Emerson

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**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

COPY

PRESENT: Honorable Elizabeth H. Emerson

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CIT TECHNOLOGY FINANCING SERVICES,
INC. AS SERVICER FOR CIT FUNDING
COMPANY I LLC AS ASSIGNEE OF
CITICORP VENDOR FINANCE, INC.,

Plaintiff,

-against-

FRANKLIN FIRST FINANCIAL, LTD.,

Defendant.

_____ x

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DECISION AFTER TRIAL

The defendant Franklin First Financial, Ltd. (“FFF”), is a New York corporation engaged in the business of providing residential mortgages to purchasers of real property. On December 8, 2005, FFF executed a written branch manager agreement (Agreement) with Jay Cassuto (Cassuto) and Daniel Cassuto (collectively the Managers) permitting the Managers to open a branch office in Syosset, New York. The Agreement provided that the Managers “[a]cquire and/or lease all equipment, furniture, and fixtures necessary to operate the Branch office.” On February 24, 2006, Cassuto executed a “Cost Per Copy Rental Agreement” (Lease) with Citicapital Technology Finance, Inc., and approved by Citicorp Vendor Finance, Inc. as owner (collectively Citi), for copy machines to be used at the Syosset offices. The Lease provided for 63 monthly payments of \$1540, plus an additional charge for each copy over 10,000 per month. Pursuant to a Purchase and Sale Agreement dated March 31, 2007, Citi sold and assigned the Lease to the plaintiff, effective April 30, 2007. It is undisputed that the account was current at the time of the assignment, that FFF had made the necessary payments to Citi, and that FFF paid the invoices issued by the plaintiff pursuant to the Lease up to and including May 2008. The plaintiff commenced this action on September 23, 2009, alleging that FFF had defaulted under the Lease as of June 2008.

The complaint contains three causes of action for breach of contract, account stated, and unjust enrichment, respectively. By order of the undersigned dated November 18, 2010, the plaintiff's motion and FFF's cross motion for summary judgment were denied. The matter proceeded to trial on September 19, 2012; September 20, 2012; and September 21, 2012. The plaintiff was represented by Platzer, Swergold, Karlin, Levine, Goldberg & Jaslow, LLP, and the defendant was represented by Edward G. McCabe, Esq. and Ellen Bissett DeRiggi, Esq. At the trial, the plaintiff produced Michael Edward Haines (Haines) as a witness on its behalf, who presented documentary evidence that he alleged supported the plaintiff's claims. FFF produced three witnesses, who submitted additional documentary evidence.

Haines testified that the Lease was purchased from Citi by the plaintiff as part of a portfolio of leases, that the lease number was changed by the plaintiff, and that the plaintiff and Citi signed a notice reflecting the Lease assignment. The Lease indicates that FFF is the lessee, and that Cassuto signed the document. He indicated that FFF made 13 payments to Citi before the Lease was sold, and 13 payments to the plaintiff thereafter, that FFF defaulted in June 2008, and the matter was sent out for collection. Haines further testified that the plaintiff mailed invoices to the Syosset branch, that checks were received from FFF in payment of those invoices, and that the checks and the envelopes in which they were mailed indicate FFF's address at offices in Melville, New York. He identified invoices dated May 2008 to December 2008 which were not paid by FFF, and stated, specifically, that the invoice due June 14, 2008 was not paid, and that invoicing was stopped after the decision was made to place the account with outside counsel. He also identified a worksheet, used by his department to determine if litigation is warranted, that indicates the amounts due the plaintiff under the lease, and the date of default as June 15, 2008. Haines further testified as to the individual calculations on the worksheet, their meaning pursuant to the lease, and that there is an outstanding balance due of \$59,476.39. On cross examination, he acknowledged that he did not know Cassuto, or his signature, and that he did not know who signed the lease on behalf of Citi. He stated that his file includes a copy of a "verbal audit" of FFF, that he does not know who conducted the audit, and that the copy indicates that the person conducting the audit spoke with Cassuto, who is identified as president. He indicated that he does not know if the federal tax identification number on the audit copy is the actual number of FFF, and that he has not had any conversations with FFF or the vendor that arranged the financing for the rental of the equipment.

In opposition, Frederick Assini (Assini), the president of FFF testified that his corporation has satellite or branch offices with headquarters in Melville and West Hempstead, New York, and that Syosset was a branch office. Cassuto was a co-manager with his brother at Syosset pursuant to the Agreement, and an employee of the corporation. The Managers were responsible for running the branch, and have authority "in their own P & L" to spend on operations, and they must supply their own desks, phones, equipment. That is, they are essentially a functioning, running office when they begin work under the Agreement. However, they have no authority to sign contracts for the corporation, and only he can sign contracts for FFF. They are compensated based on their profit and loss (P & L) statement, receiving a salary

and a W-2. Assini further testified that he had never seen the Lease before this litigation was commenced, that he did not give Cassuto permission to enter into any equipment lease on behalf of FFF, and that Cassuto was never the president of the corporation. He stated that FFF manages the profit and loss of the branch, depositing all funds in a sub-account within FFF's bank account, issuing FFF checks to pay the branch expenses, and then splitting the net profit pursuant to the agreed compensation schedule. He indicated that the Agreement provides that all branches must operate under the FFF name, that he signed the lease for the rental of the Syosset offices along with the Managers, and that the employees at the branch were paid out of an FFF account with a payroll company. The Corporation's branch banking accountant, Stephen Bestercy (Bestercy) handled the payment of branch bills, and was responsible for investigating whether it was proper for FFF to pay such bills, and to ensure that all provisions of the Agreement were enforced. In addition, corporate policy required branch managers to send copies of any agreements that might affect their operations to FFF for approval. However, in the case of the Lease, he did not know if it was required that FFF see a copy. Assini testified that he did not know how the Managers were terminated, but that he was involved in that decision. He did not know when FFF stopped paying the invoices for the copiers, and he does not know what happened to the copy machines after the Managers were terminated. He stated that FFF does not pay copier leases directly any more.

Keith Dizeo (Dizeo) testified that he is the vice president of branch operations responsible for the oversight of FFF's branch offices, that he presented the Agreement to the Managers, and that he witnessed the Managers and Assini sign the Agreement. He spoke with the Managers about certain issues during discussions about the Agreement. However, no one brought up the subject of the leasing of equipment, and he did not know about the Lease until this lawsuit. Dizeo stated that only Assini is authorized to sign contracts and checks on behalf of the corporation. He described a verbal audit as a means to verify information on a credit application. He declared that the audit indicates Cassuto as president of FFF, and that the federal tax number on the audit was not that of FFF. Dizeo further testified that the Lease invoices were sent to the Syosset branch, which would send its expenses to Bestercy in the FFF accounting department in Melville, who would prepare checks to pay the expenses and present them to Assini for signature. The payments were then mailed out pursuant to the branch manager's direction. He indicated that, as primary liaison to FFF's branch offices, he visited the Syosset office approximately three times a week, that copy machines are necessary to the operations of a branch office, and that it was common for other branch offices to have FFF pay their copier bills, most of which concerned the leasing of copy machines. He stated that, after the Managers were terminated, he went to the Syosset office to make sure that there was no damage, that he noticed mail still being slipped under the door, and that he called the post office to have the mail forwarded to the Melville office. He noticed that there was a bill addressed to FFF for copy machines, and that the bill stood out because other bills were not in FFF's name. He called Bestercy to ask what the bill meant, and that Bestercy told him that Cassuto had confirmed that the Lease was in Cassuto's name. He then went to Bestercy's office, and Bestercy called the plaintiff's offices to tell them that FFF never authorized the Lease, that the copiers were not at

the Syosset offices, and that FFF did not know where the copiers were located. Bestercy also gave the plaintiff Cassuto's name, address, and phone number.

Bestercy testified that he is FFF's branch accountant, responsible for reconciling all of the income and expenses for branches working for FFF. He explained to Cassuto how income would be reconciled and expenses paid when Cassuto joined FFF as a branch manager. He told Cassuto that he should fax or e-mail invoices to him because it was his job to pay those invoices and to ensure that they were business-related FFF invoices. He explained that he reviewed invoices to ensure that they are a company expense, and that they are not "out of the ordinary." Bestercy further testified that when Cassuto first sent over an invoice for copiers, he called Cassuto to say that we do not pay leases for branches, and that Cassuto told him that he had signed the lease personally. He acknowledged that he did not see a copy of the Lease at that time, that FFF did not require branches to send copies of documentation to his office, and that FFF does require such documentation now. He stated that, in order for FFF to pay any of the branch's bills, FFF's name had to be on the invoice, that branch managers could not sign checks to pay branch bills, and that Assini would sign the checks. He acknowledged that all of FFF's branch offices had telephone lines, and that the accounts were in FFF's name, and that FFF expected to pay those bills and charge it back to the branch. If the branch had a negative balance in its account, FFF would pay the bills of the third party vendors that it approved. He stated that he did not find it unusual to see the FFF name on the plaintiff's invoice because it was being mailed to the Syosset location. Bestercy testified that, when Dizeo showed him the invoice after the managers were terminated, he told him that Cassuto had personally signed the Lease, that he called the plaintiff's offices to advise them of the situation, and that he gave Cassuto's information to the plaintiff in that call.

It goes without saying that the plaintiff bears the burden of proof. After consideration of the entire record produced at trial the court finds that the plaintiff has satisfied its burden of proof on its first cause of action for breach of contract. Haines' testimony establishes that the plaintiff purchased and paid value for the assignment of the Lease, that FFF performed its obligations under the Lease for 26 months, and that FFF defaulted thereunder on June 15, 2008. While the plaintiff argues that Cassuto had actual authority to enter into the Lease, the Agreement provides that the Managers did not have authority to enter into contracts which would bind FFF. Thus, the court finds that Cassuto did not have actual authority to enter into the Lease. However, the testimony of FFF's witnesses establishes that it vested Cassuto with apparent authority. Among other things, FFF required that all operations take place under its name; it would not pay a branch's bills unless its name appeared on the invoice, and all branch bills were paid by FFF's check from a bank account that appeared to the public to be a single FFF bank account. The evidence fails to support FFF's claims that Citi failed to act with due diligence in allowing Cassuto to enter into the Lease on FFF's behalf and that the plaintiff is bound by that failure. In addition, the evidence supports the plaintiff's claim that FFF ratified the Lease through its conduct over a period of more than two years.

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The plaintiff failed to establish by a fair preponderance of the credible evidence its second cause of action for an account stated. The invoices admitted into evidence do not reflect the balance due under the Lease, and there is no evidence in the record that FFF accepted said invoices with knowledge of anything more than the amount of the individual invoices, which were paid. In addition, the invoices mailed to FFF after May 2008 reflected only the alleged accrued arrears, and did not reflect the full balance due under the Lease. Moreover, Bestercy's uncontradicted testimony is that, after the Managers were terminated, he notified the plaintiff of FFF's position that the Lease was unauthorized, and not FFF's responsibility. Under the circumstances, FFF did not expressly or impliedly agree with the plaintiff that it owed the full balance due under the Lease (*see generally*, **White Plains Cleaning Servs., Inc. v 901 Props., LLC**, 94 AD3d 1108; **BRK Props., Inc. v Wagner Ziv Plumbing & Heating Corp.**, 89 AD3d 883; **Stephan B. Gleich & Assoc. v Gritsipis**, 87 AD3d 216).

The plaintiff's remaining cause of action for unjust enrichment is duplicative of the first cause of action for breach of contract. The existence of a valid and enforceable contract between the parties regarding the dispute at issue precludes recovery in quasi-contract for events arising out of the same subject matter (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388).

After consideration of all of the matters alleged, the quality of the evidence adduced and the relative credibility of each of the witnesses who have testified, the court concludes that the plaintiff has established that FFF defaulted in its performance of the parties' contract by a fair preponderance of the evidence, that it is entitled to full payment of the balance due in the amount of \$59,476.39, plus interest from June 15, 2008, and expenses in the amount of \$1,392.10, and attorneys' fees in the amount of 25% of any and all sums collected.

Submit judgment.

Dated: June 12, 2013

HON. ELIZABETH HAZLITT EMERSON

J.S.C.