

DISTRICT COURT OF THE COUNTY OF SUFFOLK, SECOND DISTRICT

Present:

HON Stephen L. Ukeiley
Judge

Motion Date August 1, 2011

MARTIN CONTROL SYSTEMS, INC.

Plaintiff

-Against-

JAQUELINE SABARESE

Defendant

Upon the following papers numbered 1 to 6 read on this motion to dismiss the counterclaims and for summary judgment
 Notice of Motion/xxxxxxxxxxxxxxxxxxxxx and supporting papers 1 - 3
 Notice of Cross Motion and supporting papers _____
 Answering Affidavits and supporting papers 6
 Replying Affidavits and supporting papers _____
 Filed papers _____ ; Other Exhibits- 5
Memorandum of Law - 4

(and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that this motion by the plaintiff to dismiss the defendant's counterclaims on the ground that the counterclaims may not be interposed in this action as they are precluded by contractual provision (CPLR §3211(a)(6)) and based upon defendant's failure to plead the counterclaim for constructive fraud in detail (CPLR §3016(b)) is granted in all respects. The defendant's pro se answer, which is not in proper form, purports to assert counterclaims for constructive fraud, negligent misrepresentation, malicious prosecution, punitive damages, treble damages and attorney's fees. The plaintiff's complaint is based upon a breach of contract for alarm monitoring services. The contract contains a provision whereby defendant agreed to waive her right to interpose counterclaims against the plaintiff. Such contractual provision is valid and enforceable except with regard to the counterclaim alleging constructive fraud (*Sterling National Bank & Trust Co. of New York v. Giannetti, 53 AD2d 533*). Hence, the counterclaims based upon negligent misrepresentation, malicious prosecution, punitive damages, treble damages and attorney's fees must be dismissed based upon the contractual waiver provision. The court notes that the counterclaim for malicious prosecution cannot be asserted in the very action alleged to be malicious as there needs to be a prior action that terminated in favor of the party asserting the claim (see *Flaks, Zaslów & Co., Inc. v. Bank Computer Network Corp., 66 AD2d 363*). Also, the counterclaim for punitive damages fails to allege that the plaintiff's conduct was egregious, directed at the defendant, and that the conduct was part of a pattern of similar conduct directed to the public at large (*Rocanova v Equitable Life Assur. Soc., 83 NY2d 603; Cross v. Zyburo,*

185 AD2d 967). Finally, a claim for attorney's fees must be predicated on authority of either contract, statute or court rule (*AG Ship Maintenance Corp. v. Lezak*, 69 NY2d 1, 5). The defendant does not set forth a predicate for attorneys fees. As for the counterclaim alleging constructive fraud, even construing the allegations in a light most favorable to the defendant, the allegations for constructive fraud lack any specific detail and, thus, fail to comply with the pleading requirements of CPLR §3016(b). Further, the allegations regarding this particular counterclaim are predicated on a purported concealment of material facts in the complaint upon filing of this action. Such allegations do not make out, even potentially, a prima facie case for constructive fraud. The counterclaim for constructive fraud is dismissed based upon a failure to state a cause of action (CPLR §3211(a)(7)) and failure to comply with the pleading requirement of CPLR §3016(b).

The plaintiff further moves for summary judgment on the complaint pursuant to CPLR §3212. The complaint pleads two causes of action. The first cause of action is predicated upon a breach of contract for alarm monitoring services. The second cause of action is for recovery of attorney's fees under the contract. As previously stated above, attorney's fees can only be awarded where authorized by contract, statute or court rule (*Chapel v. Mitchell*, 84 NY2d 345, 349; *Hooper Assocs. Ltd. v. AGS Computers, Inc.*, 74 NY2d 487, 491). Attorney's fees are merely incidents of litigation that are recoverable only by the prevailing party in an underlying action (*Chapel v. Mitchell*, 84 NY2d 345, 349). As incidents of litigation, attorney's fees are generally not recoverable in an action that is separate and distinct from the action on the underlying substantive claim (see *Burke v. Crosson*, 85 NY2d 10, 17-18). Hence, the plaintiff improperly pleaded a separate cause of action for attorney's fees.

In order to establish a prima facie showing of entitlement to judgment as a matter of law the proponent of a motion for summary judgment must tender sufficient evidence to demonstrate the absence of any material issues of fact (*Ferluckaj v. Goldman Sachs & Co.*, 12 NY3d 316, 320; *Moore v. 3 Phase Equestrian Center, Inc.*, 83 AD3d 677 citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324). In the court's opinion the affidavit of plaintiff's president sufficiently establishes a prima facie showing of entitlement to judgment as a matter of law on the first cause of action for breach of an alarm monitoring contract and it demonstrates the absence of any material issues of fact. However, the court finds that the plaintiff miscalculated the amount of its damages. In this regard the plaintiff relies on a liquidated damages clause in the contract to calculate its damages. Such provision provides for the recovery of 80% of the balance of the remaining payments due under the term of the contract. The monthly fee is alleged to be \$45.00 and plaintiff alleges that there are two years remaining under the five year term of the contract as of January 2, 2011. Thus, the proper amount of damages is \$864.00 (80% x45x24). As an additional item of damages the contract for alarm monitoring services provides for the recovery of reasonable attorney's fees by the plaintiff. The court hereby awards plaintiff reasonable attorney's fees in the amount of \$288.00 on its first cause of action.

Once a prima facie case is shown the burden shifts to the opponent of the motion to assemble and lay bare admissible proof demonstrating that genuine issues of fact exist (*Zuckerman v. City of New York*, 49 NY2d 560, 562). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue (*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966). The factual issues must be real, not feigned, since a sham of frivolous issue will not preclude summary relief. In the court's opinion the defendant has failed to raise any genuine material issues of fact supported by admissible evidence. The defendant does not deny entering into the underlying contract for alarm monitoring services. The defendant does not deny that the equipment used for the alarm monitoring services was removed, at her request and at her expense, to a new location during the term of the contract. The defendant does not deny that she paid the annual contractual fee for the year 2010 for alarm monitoring services after the transfer of the equipment to the new location. Other than the defendant's mere conclusory allegations, there was no competent proof put forth to evince that the contract was in any way terminated at the time of the transfer of the equipment. In the court's opinion the defendant has failed to satisfy her burden on the motion for summary judgment.

Accordingly, judgment is granted in favor of the plaintiff dismissing all of the defendant's counterclaims. Judgment is granted in favor of the plaintiff against the defendant on the first cause of action of the complaint in the amount of \$864.00 together with interest thereon from January 2, 2011, reasonable attorney's fees of \$288.00, plus costs and disbursements. Submit judgment to the clerk of the court.

Dated: August 18, 2011

Decision to be published on line ___ Yes No

mailed
8/26/11



J.D.C.

Hon. Stephen L. Ukilley