

<b>Julius Silvert, Inc. v Open Kitchen 17, LLC</b>
2019 NY Slip Op 30394(U)
February 20, 2019
Supreme Court, New York County
Docket Number: 654118/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 3EFM

Justice

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JULIUS SILVERT, INC.

Plaintiff,

- v -

OPEN KITCHEN 17, LLC,

Defendant.

INDEX NO. 654118/2018

MOTION DATE 10/16/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12

were read on this motion for

SUMMARY JUDGMENT AND TO DISMISS AFFIRMATIVE DEFENSES

Upon the foregoing documents:

This is a lawsuit to collect on unpaid invoices. Plaintiff Julius Silvert, Inc. ("Julius Silvert") moves for summary judgment on its claim against Defendant Open Kitchen 17, LLC d/b/a Union Fare ("Open Kitchen") and to dismiss Defendant's affirmative defenses.

Factual Background

Plaintiff, a food distributor, sold and delivered goods to Defendant pursuant to a Credit Agreement (the "Agreement") between the parties. The Agreement included various terms and conditions concerning payment, as well as the following provision about the calculation of attorney's fees in the event of a collection action: "The undersigned purchaser agrees to pay, in the event the account becomes delinquent and is turned over to an attorney for collection, attorney's fees equal to 33 1/3% of the balance due whether or not suit is instituted, plus all attendance [sic] collection fees." (NYSCEF 9). Trouble arose in 2018, when Plaintiff demanded payment for goods that Plaintiff had sold and delivered to Defendant between May 16 and August 4. (NYSCEF 1). The unpaid balances owed to Plaintiff from this period totaled

\$42,358.31. (NYSCEF 5). Defendant's Union Fare restaurant closed in early August 2018. (NYSCEF 11).

Plaintiff commenced this suit against Defendant on August 17, 2018, seeking \$56,477.75. (NYSCEF 1). That figure reflected not only the unpaid invoice amount, but also an additional \$14,119.42 that is purportedly required under the Agreement. (NYSCEF 5). Defendant answered the Complaint on September 19, 2018, denying Plaintiff's allegations and stating a number of affirmative defenses. (NYSCEF 3).<sup>1</sup> On October 16, 2018, Plaintiff moved for summary judgment on its claim and to dismiss Defendant's affirmative defenses. (NYSCEF 5). Again, Plaintiff sought "an agreed upon amount due of \$56,477.75." (*Id.*). Defendant opposed, solely on the ground that a disputed issue of material fact existed as to the reasonableness of the attorney's fees sought by Plaintiff. (NYSCEF 11).

For the reasons set forth below, Plaintiff's motion for summary judgment is granted in part and denied in part.

### **Legal Analysis**

To prevail on a motion for summary judgment, the movant "must establish its entitlement to such relief as a matter of law by submitting proof in admissible form demonstrating the absence of triable issues of fact." *Argento Const. Corp. v Jacob & Co. Watches, Inc.*, No. 156322/13, 2014 WL 4430350 (N.Y. Sup. Ct. Sep. 05, 2014) (citing *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)). Conversely, "[t]o defeat summary judgment the opponent must

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<sup>1</sup> While these affirmative defenses were listed in Defendant's Answer, Defendant has offered no legal or factual basis to support them. As discussed herein, Defendant's only argument for opposing summary judgment was based on the attorney's fee portion of the amount sought by Plaintiff. Under these circumstances, Defendant's affirmative defenses must be dismissed. *See Seidler v Metropolitan Arts & Antiques Pavilion Ltd.*, No. 0601474/2005, 2005 WL 6012108 (N.Y. Sup. Ct. Nov. 23, 2005) (dismissing affirmative defense where party "provided absolutely no facts to support" it).

present evidentiary facts sufficient to raise a triable issue of fact, and averments merely stating conclusions, of fact or of law, are insufficient.” *Mallad Const. Corp. v. County Fed. Sav. & Loan Ass’n*, 31 N.Y.2d 285, 290 (1973).

Here, Plaintiff is entitled to summary judgment on its claim for \$42,358.31 in unpaid amounts accrued by Defendant between May 16, 2018 and August 4, 2018. Plaintiff has established its right to this amount by submitting unrebutted evidence in several forms: (1) a Statement of Account showing an “Amount Due” of \$42,358.31; (2) copies of individual invoices addressed to Union Fare representing 51 separate deliveries that occurred during the relevant period; and (3) an affidavit by Bryan Henry, Plaintiff’s Controller, averring that the goods were delivered and that Defendant has failed to pay for them. (NYSCEF 5, 8). *See Argento Const. Corp.*, No. 156322/13, 2014 WL 4430350, at \*1 (granting summary judgment on plaintiff’s claim for unpaid fees upon submission of invoices and sworn affidavits); *Citistaffing, L.L.C. v Oiring*, No. 162369/14, 2015 WL 1938755, at \*2 (N.Y. Sup. Ct. Apr. 24, 2015) (same).

By contrast, Plaintiff’s demand for \$14,119.42 in attorney’s fees, based solely on the provision in the Agreement quoted above, does not warrant summary judgment in its favor. Contrary to Plaintiff’s claims, the fact that the Agreement provides for a 33 1/3% fee does not, in and of itself, settle the issue. *See, e.g., Prince v. Schacher*, 125 A.D.3d 626, 628 (2d Dep’t 2015) (noting that court “[is] not bound by the fixed percentage set forth in the [note], but [has] the inherent authority to determine reasonable attorneys’ fees”); *Wasserbauer v. Marine Midland Bank Rochester*, 92 Misc. 2d 388, 397 (Monroe Cty. Sup. Ct. 1977) (“The notion that attorneys fees, fixed at the time of agreement solely by arbitrary percentages of then unknown monetary balances, may be deemed to be automatically ‘reasonable’ in every situation, regardless of the procedures, time, effort and skill necessarily demanded of counsel, is archaic.”).

Fixing attorney's fees at an arbitrary percentage of an unknown amount (i.e., "the balance due") acts as a kind of liquidated damages provision, one which may constitute an unenforceable penalty. See *Equitable Lumber Corp. v. IPA Land Development Corp.*, 38 N.Y.2d 516, 524 (1976); *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n*, 24 N.Y.3d 528, 536 (2014) ("A provision which requires damages grossly disproportionate to the amount of actual damages provides for [a] penalty and is unenforceable.").

In *Equitable Lumber*, the Court of Appeals held that this type of attorney's fee provision may be unenforceable under the Uniform Commercial Code if it does not "relate[ ] to the normal contingent fee charged by attorneys in the collection context," or is "so unreasonably large that it serves as a penalty rather than a good faith attempt to preestimate damages." 38 N.Y.2d at 521-523; see also *First Nat. Bank of E. Islip v. Brower*, 42 N.Y.2d 471, 474 (1977) (noting "the strong public policy of our State which condemns the contractual imposition of a penalty" in the context of agreements "purporting to fix attorneys' fees"). Although a number of cases have permitted the party seeking fees under such a fixed-percentage provision to obtain reasonable fees that are actually incurred,<sup>2</sup> the Court in *Equitable Lumber* stated that "[i]n the proper case a provision that one party to a contract pay the other party's attorney's fees in the event of breach may be unconscionable." 38 N.Y.2d at 523 (remanding to lower court to "determine whether the amount stipulated was unreasonably large or grossly disproportionate," in which case "the provision is void as a penalty"); see also *Deak Nat'l Bank v. Bond*, 89 Misc. 2d 95, 98 (Del. Cty.

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<sup>2</sup> See, e.g., *Maina v. Rapid Funding NYC LLC*, 148 A.D.3d 596, 596 (1st Dep't 2017) ("remand[ing] the matter for a determination of defendants' reasonable attorneys' fees"); *Indus. Equip. Credit Corp. v. Green*, 92 A.D.2d 838, 838 (1st Dep't 1983) ("[P]laintiff may be entitled to recover an attorney's fee of 20% if it can demonstrate that the quality and quantity of the legal services rendered were such as to warrant . . . that full percentage.").

Sup. Ct. 1976) (“[T]his court finds that the language relied upon by the plaintiff for the collection of attorney’s fees produces an unconscionable result and is, therefore, unenforceable.”).

Moreover, as is expressly provided in the Uniform Commercial Code: “If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.” N.Y. U.C.C. Law § 2-302(1) (McKinney). “When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.” *Id.* §2-302(2).

In this case, Plaintiff has submitted no evidence showing that the attorney’s fees it seeks relate in any way to the legal services actually rendered. Instead, Plaintiff’s claim rests entirely on the face of the Agreement. (NYSCEF 5, 12). And the Agreement seems particularly susceptible to abuse here. Not only does the fee provision exact a large and seemingly arbitrary percentage of any unpaid balance, it does so “whether or not suit is instituted,” ignoring the nature of the work done by counsel and thus the costs incurred by Plaintiff. *See Equitable Lumber Corp.*, 38 N.Y.2d at 523 (“[A] greater amount would be charged in the event that litigation was necessitated as opposed to settlement; and additional charges might be required for possible appellate procedures.”); *Deak Nat’l Bank*, 89 Misc. 2d at 98 (voiding language that provided for a 15% attorney’s fee whether or not “an action be commenced”); *Wasserbauer*, 92 Misc. 2d at 398 (concluding that counsel’s “remuneration must be measured by his efforts”). Even if a suit *is* instituted, the nature of the work required by an attorney presumably will vary

depending on the circumstances. For example, a sizeable unpaid balance may be recovered in a straightforward suit, while a smaller sum may well implicate thornier legal issues and prompt a more protracted, costlier action. The Agreement here makes no such distinctions. Without more, the arbitrary figure in the Agreement does not establish Plaintiff's right to a 33 1/3% fee as a matter of law.<sup>3</sup>

Accordingly, summary judgment with respect to attorney's fees under the Agreement is denied. If Plaintiff proceeds with its claim for attorney's fees, the Court will hold a hearing to determine whether the attorney's fee provision of the Agreement is unenforceable in whole (*i.e.*, Plaintiff is entitled to no recovery of fees because the provision is an unconscionable penalty) or in part (*i.e.*, Plaintiff must demonstrate that the fees are reasonable and were incurred).<sup>4</sup>

Therefore, it is:

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<sup>3</sup> The instant case appears to fall toward the straightforward end of the spectrum: Plaintiff filed a four-paragraph Complaint, and Defendant's opposition to summary judgment did not dispute the amount owed under the outstanding invoices.

<sup>4</sup> Plaintiff states in its brief in support of its motion that it "is prepared to waive the attorney's fees . . . in order to expedite resolution of this matter." (NYSCEF 12). Whether that offer is designed to expedite resolution of the case or to avoid a ruling as to the unenforceability (at least in part) of the fee provision, or both, a statement in a brief does not constitute a withdrawal of a claim for relief. In response to this Decision and Order, Plaintiff can follow through on the suggestion that it will decide not to pursue this claim, but that possibility does not render the matter moot for purposes of reaching the issue in this Decision. Should Plaintiff decide to proceed with a request for fees in this matter, it must submit to a hearing before this Court on the question of whether the fee provision is enforceable under New York law. *See Equitable Lumber Corp.*, 38 N.Y.2d at 524.

The Court is left to wonder how many of Plaintiff's debtors simply pay attorney's fees under this provision, rather than challenging them and seeking a reduction as a matter of law. However, the Court can only decide the issue on a case by case basis. Enacting rules of general application to govern attorney's fee provisions is a job for the legislature, which has done so, for example, with respect to retail installment contracts. *See* N.Y. Pers. Prop. Law § 302(7) (McKinney) ("[R]etail instalment contract may provide for the payment of attorneys' fees not exceeding fifteen percent of the amount due and payable under such contract where such contract is referred to an attorney not a salaried employee of the holder of the contract for collection, plus the court costs.").

**ORDERED** that the branch of Plaintiff's motion for summary judgment seeking to collect \$42,358.31 in unpaid amounts is Granted; and it is further

**ORDERED** that the branch of Plaintiff's motion for summary judgment seeking \$14,119.42 in attorney's fees is Denied; and it is further

**ORDERED** that Plaintiff's motion to dismiss Defendant's affirmative defenses is Granted; and it is further

**ORDERED** that the Clerk of the Court is directed to enter a judgment in favor of Plaintiff and against Defendant in the sum of \$42,358.31, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of the Court.

2/20/2019  
DATE

  
JOEL M. COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				OTHER	<input type="checkbox"/>
				REFERENCE	<input type="checkbox"/>