

ABM Janitorial Servs., Inc. v CLK-HP LLC

2011 NY Slip Op 30322(U)

January 27, 2011

Sup Ct, Nassau County

Docket Number: 011618-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**ABM JANITORIAL SERVICES, INC. and
ABM JANITORIAL NORTHEAST, INC.,**

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiffs,

-against-

**Index No: 011618-10
Motion Seq. Nos: 1 & 2
Submission Date: 11/19/10**

**CLK-HP LLC,
CLK-HOULIHAN-PARNES LLC,
CLK-HP 90 MERRICK LLC,
MARCUS AVENUE ACQUISITION LLC,
CLK-HP 300 BROADHOLLOW LLC, and
CLK-HP 534 BHR LLC,**

Defendants.

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The following papers have been read on these motions:

- Order to Show Cause, Affidavit in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affirmation in Opposition and Exhibit.....X**
- Affidavit in Opposition and Exhibit.....X**
- Notice of Motion, Affidavit in Support,
Affirmation in Support and Exhibits.....X**
- Plaintiffs' Rule 19-a Statement.....X**
- Memorandum of Law in Support.....X**
- Affirmation in Opposition, Affidavit in Opposition and Exhibits.....X**
- Supplemental Affirmation in Opposition and Exhibit.....X**
- Plaintiffs' Affirmation in Response,
Affidavit in Response and Exhibits.....X**
- Reply Affirmation in Further Support and Exhibits.....X**
- Plaintiffs' Reply Memorandum of Law.....X**

This matter is before the Court for decision on 1) the Order to Show Cause filed by

Plaintiffs on June 25, 2010, and 2) the motion filed by Plaintiff on September 20, 2010 and submitted on November 19, 2010. For the reasons set forth below, the Court 1) denies Plaintiffs' Order to Show Cause in its entirety; 2) grants Plaintiffs' motion for partial summary judgment in favor of Plaintiffs and against Defendants in the sum of \$677,096.34, together with statutory interest from June 15, 2010, on the causes of action in the Complaint alleging breach of contract (the First, Fourth, Seventh, Tenth, and Thirteenth Causes of Action) and account stated (the Second, Fifth, Eighth, Eleventh, and Fourteenth Causes of Action); 3) denies Plaintiffs' motion to sever the remaining causes of action in the Complaint, and directs that the remaining causes of action in the Complaint for quantum meruit (the Third, Sixth, Ninth, Twelfth and Fifteenth Causes of Action), imposition of a constructive trust (Sixteenth Cause of Action) and for a preliminary injunction (Seventeenth Cause of Action) are hereby dismissed; and 4) denies, as moot, Plaintiffs' application for expedited discovery.

BACKGROUND

A. Relief Sought

In their Order to Show Cause, Plaintiff moves for an Order 1) for a preliminary injunction enjoining Defendants and their affiliates and agents from dissipating funds received from their tenants and specifically earmarked and allocated for payment of Plaintiffs' cleaning services; and 2) granting expedited discovery, pursuant to CPLR § 3012.

In their motion, Plaintiffs move for an Order 1) pursuant to CPLR § 3212(e), awarding partial summary judgment in favor of Plaintiffs and against Defendants CLK-HP LLC, CLK-Houlihan-Parnes LLC, CLK-HP 90 Merrick LLC, Marcus Avenue Acquisition LLC, CLK-HP 300 Broadhollow LLC, and CLK-HP 534 BHR LLC (collectively "Defendants") on the causes of action in the Complaint for breach of contract (the First, Fourth, Seventh, Tenth, and Thirteenth Causes of Action) and account stated (the Second, Fifth, Eighth, Eleventh, and Fourteenth Causes of Action); and 2) severing the remaining claims against Defendants and allowing said claims to continue.

Defendants oppose Plaintiffs' Order to Show Cause and motion.

B. The Parties' History

This is an action by Plaintiffs to recover an aggregate of approximately \$677,000.00 for

janitorial and related cleaning services rendered by the Plaintiffs to the Defendants at a number of office buildings in Nassau County owned and operated by the Defendants. The Complaint (Ex. B to Ps' OSC) alleges as follows:

Between April 2007 and May 2008, Plaintiffs and Defendants entered into six written agreements ("Agreements"), pursuant to which Plaintiffs agreed to provide Defendants with janitorial and related cleaning services at their premises located in Woodbury, East Meadow, Lake Success and Melville, New York. From April 2007 to June 15, 2010, Plaintiffs fully and satisfactorily performed all of their obligations under the Agreements. On June 15, 2010, Plaintiffs ceased providing these services due to non-payment by the Defendants and the expiration of the Agreements.

With respect to all of the work performed, Plaintiffs sent to the Defendants regular, monthly statements of account in the form of invoices that set forth in detail the services rendered and the amounts due. Defendants accepted the services rendered by the Plaintiffs without complaining at any time, either orally or in writing, about the nature or quality of the services performed and without protesting or objecting to the accuracy of the bills. Defendants, however, failed to pay many of the invoices, leaving a collective unpaid balance of \$677,096.34 due and owing as of June 15, 2010. Plaintiffs allege that Defendants have failed and refused to pay the \$677,096.34 balance due and owing under the invoices as of that date, despite due demand.

Plaintiffs advance seventeen (17) causes of action in the Complaint: the first, fourth, seventh, tenth, and thirteenth numbered causes of action all sound in a breach of contract claim; the second, fifth, eighth, eleventh, and fourteenth numbered causes of action all sound in an account stated claim; the third, sixth, ninth, twelfth, and fifteenth numbered causes of action all sound in quantum meruit/unjust enrichment claim; the sixteenth cause of action seeks the imposition of a constructive trust; and the seventeenth cause of action is for a preliminary injunction. With respect to the sixteenth cause of action, Plaintiffs seek to have a constructive trust imposed on the separate fund or account allegedly set aside by the Defendants for the portion of the rents collected from their commercial tenants that is earmarked and allocated for the payment of cleaning services such as those provided by the plaintiffs. Plaintiffs call this fund

a "Cleaning Services Trust Fund."

C. The Parties Positions

With respect to their application for a preliminary injunction, Plaintiffs allege that injunctive relief is necessary to prevent the Cleaning Services Trust Fund from being dissipated during the pendency of this action. They assert that, without injunctive relief, Plaintiffs will be irreparably harmed if these funds are diverted, as their cause of action for a constructive trust will be rendered ineffectual.

With respect to their motion for partial summary judgment, Plaintiffs submit that they have demonstrated their right to judgment on the breach of contract causes of action by establishing the existence of the Agreements, Plaintiffs' performance pursuant to the Agreements, Defendants' breach of the Agreements, and the resulting damages. Moreover, Defendants have provided only conclusory denials, and do not dispute that Plaintiffs fully performed under the Agreements, and Defendants failed to pay for the services provided by Plaintiffs. Thus, Defendants have failed to raise any defense to Plaintiffs' action for breach of contract.

Plaintiffs contend, further, that they have demonstrated their right to judgment on the causes of action for account stated by establishing that they provided regular statements of accounts to Defendants, who did not contest these invoices and, in fact, made regular payments on these invoices for years. Defendants have offered only vague objections that do not create a material issue of fact.

Plaintiffs concede that adjudication of their claims for unjust enrichment, constructive trust and injunctive relief will not be necessary if the Court grants their motion for judgment as to the causes of action for breach of contract and account stated (Ps' Memorandum of Law in Supp. at p. 9).

In opposition to Plaintiffs' application for a preliminary injunction, Defendants maintain that they do not have a specially earmarked fund for the janitorial and related cleaning services rendered to them by Plaintiffs, or anyone else, that is funded by monies paid by their tenants. Defendants submit that, as there is no "Cleaning Services Trust Fund," not only is the motion for a preliminary injunction unwarranted, but Plaintiffs' application for the imposition of a constructive trust is also academic. Defendants also submit that, as Plaintiffs' claims in this

action for breach of contract, account stated, or alternatively quantum meruit, all surround an economic loss that is compensable by money damages, an award of injunctive relief is not proper.

In opposition to Plaintiffs' motion for partial summary judgment, Defendants submit an unsigned copy of a letter dated October 10, 2008 in which the Plaintiffs purportedly terminated all of its contracts with the Defendants effective October 13, 2008 (Ex. A to Supp. Aff. in Opp.). Defendants maintain that, as Plaintiffs have failed to establish that any new written contracts were entered into following the issuance of this termination letter, or that the contracts terminated by the plaintiffs were ever reinstated, Plaintiffs breach of contract claim cannot be supported and, at the very least, presents issues of fact requiring a trial.

In his Affidavit in Response, Paul Savage ("Savage"), Vice President of Operations, affirms that he drafted this letter in October 2008, at another time when Defendants were in default in payment, and that the letter became unnecessary upon Defendants' curing of the default at that time. Savage affirms, further, that his review of the file reflects that this letter was never sent to Defendants, and notes that Defendants do not provide an affidavit from anyone with personal knowledge asserting that Defendants received this letter.

With respect to Plaintiffs' account stated claims, the Defendants submit the affidavit of Joe Baglio, the executive Vice President of Defendant CLK/Houlihan-Parnes, LLC who affirms that the Defendants "have objected to the accuracy of the amounts demanded by Plaintiffs in [the] Complaint" (Baglio Aff. in Opp. at ¶ 5).

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v.*

Mid-Hudson Waste, Inc., 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *see Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c). The existence of a factual dispute, however, will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. *Melvin v. Union College*, 195 A.D.2d 447, 448 (2d Dept. 1993).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is

any doubt regarding the existence of a triable issue of fact. *Id.*

C. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694, 695 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

The four elements of a constructive trust are: 1) a confidential or fiduciary relation, 2) a promise, 3) a transfer in reliance thereon, and 4) unjust enrichment. *Sharp v. Komalski*, 40 N.Y.2d 119, 121 (1976); *Church of God Pentecostal Fountain of Love, MI v. Iglesia De Dios Pentecostal, MI*, 27 A.D.3d 685 (2d Dept. 2006). A constructive trust will not be imposed unless it is demonstrated that a legal remedy is inadequate, *Evans v. Winston & Strawn*, 303 A.D.2d 331, 333 (1st Dept. 2003); *Bertoni v. Catucci*, 117 A.D.2d 892, 894 (3d Dept. 1986), and a constructive trust is essential to prevent unjust enrichment, *Counihan v. Allstate Ins. Co.*, 194 F.3d 357, 362 (2d Cir. 1999).

A party establishes a *prima facie* case for an account stated by proving that the defendants received and retained bills for services rendered to the defendants without objection. *Nebraskaland, Inc. v. Best Selections, Inc.*, 303 A.D.2d 662 (2d Dept. 2003); *Herrick Feinstein LLP v. Stamm*, 297 A.D.2d 477 (1st Dept. 2002). There can be no account stated where no account was presented or where any dispute about the account is shown to have existed. *Abbott, Duncan & Wiener v. Ragusa*, 214 A.D.2d 412 (1st Dept. 1995), citing *Waldman v. Englishtown Sportswear*, 92 A.D.2d 833, 836 (1st Dept. 1983).

A cause of action for recovery in quantum meruit must be dismissed where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which covers the dispute between the parties. *Clark-Fitzpatrick v. Long Island Rail Road Co.*, 70 N.Y.2d 382, 389 (1987). *See also Battery Park Realty, Inc. v. RKO Delaware, Inc.*, 18 A.D.3d 690 (2d Dept. 2005).

D. Application of these Principles to the Instant Action

With respect to their application for injunctive relief, Plaintiffs have failed to establish a likelihood of success on the merits of their cause of action for a constructive trust because they have failed to establish the existence of any "Cleaning Services Trust Fund" or any other specially earmarked fund funded by the monies paid by defendants' tenants expressly for the janitorial and related cleaning services rendered by the Plaintiffs. There is no evidence on this record, including in the language of the agreements at issue, that establishes that the Defendants were required or obligated to delineate any monies to be separately paid by the tenants for the Plaintiffs' janitorial services. Given that Plaintiffs have failed to establish the existence of any "Cleaning Services Trust Fund," they have not demonstrated a likelihood of success on the merits with respect to their cause of action for a constructive trust.

In addition, given the existence of the written Agreements, Plaintiffs may not maintain their causes of action for unjust enrichment. Thus, they have not demonstrated a likelihood of success on those causes of action.

Finally, although Plaintiffs have established a likelihood of success on the merits on the causes of action for breach of contract and account stated, they have not demonstrated a sufficient prospect of irreparable harm to warrant the issuance of a preliminary injunction. Specifically, Plaintiffs have not established that money damages are inadequate to fully compensate them for the damage they suffered and, accordingly, the Court denies Plaintiffs' Order to Show Cause for injunctive relief.

The Court, however, grants Plaintiffs' motion for an Order awarding them partial summary judgment against the Defendants on the causes of action in the Complaint for breach of contract and account stated. Plaintiffs have tendered sufficient admissible evidence to show that there are no material issues of fact on their breach of contract claims as well as their account stated claims by providing proof of the relevant Agreements and invoices, establishing their compliance pursuant to those documents as well as Defendants' failure to object to the invoices, and demonstrating Defendants' failure to submit payment despite due demand. Accordingly, the burden shifts to the Defendants to produce admissible proof establishing a material issue of fact.

With respect to Plaintiffs' breach of contract claim, the Court notes the absence of a valid signature on the letter purportedly terminating the agreements at issue. There is no evidence that

burden shifts to the Defendants to produce admissible proof establishing a material issue of fact.

With respect to Plaintiffs' breach of contract claim, the Court notes the absence of a valid signature on the letter purportedly terminating the agreements at issue. There is no evidence that this letter was anything more than a draft, or that the Plaintiffs sent the letter to the Defendants. Notably, despite relying on this letter, Defendants do not affirm that they actually received the letter. In addition, the evidence before the Court establishes that the parties' agreements remained in effect until June 15, 2010, when the Plaintiffs terminated the contracts for non-payment. While this Court is mindful of its function on a motion for summary judgment not to resolve issues of fact or determine matters of credibility, *Roth v. Barreto*, 289 A.D.2d 557, 558 (2d Dept. 2001), given the absence of any admissible evidence raising a triable issue of fact with respect to Plaintiffs' termination of the contracts at issue, the Court grants Plaintiffs' motion for summary judgment on their breach of contract claims.

In light of the written Agreements, the Court dismisses Plaintiffs' causes of action for quantum meruit, numbered third, sixth, ninth, twelfth and fifteenth.

With respect to the causes of action for account stated, Defendants' reliance on the Affidavit of Joseph Baglio, which conclusorily asserts Defendants' objections to the accuracy of the amount demanded by Plaintiffs in the Complaint, is insufficient to preclude summary judgment in Plaintiffs' favor. In his Affidavit, Baglio affirms that "Defendants have objected to [the] accuracy of the amount demanded by Plaintiffs in [the] Complaint," and argues that "Defendants are entitled to discovery of Plaintiffs [sic] books and records concerning amounts charged, and payments credited, to Defendants." Baglio contends that Defendants are entitled to discovery including but not limited to 1) documents relating to the time period subsequent to the alleged expiration of the subject agreements, and 2) "records concerning Defendants' communications with Plaintiffs relating to issues with Plaintiffs' charges and invoices which would corroborate Defendants' defense that Defendants took issue with Plaintiffs' charges and invoices which would corroborate Defendants' defense that Defendants took issue with, and objected to, Plaintiffs' invoices." Baglio concludes that "Defendants cannot properly oppose Plaintiffs' motion for summary judgment on Plaintiffs' breach of contract and account stated causes of action without first discovering the above information which is in Plaintiffs' exclusive knowledge, custody, possession and control."

The Court views Defendants' opposition as mere conclusions and unsubstantiated

allegations that are insufficient to create material issues of fact requiring a trial. Baglio does not explain why Defendants are not in possession of the documents supporting their claim that they objected to Plaintiffs' invoices. Nor have Defendants produced any document supporting their claim that, during the term of the relevant agreements, they objected to the amounts charged. Finally, Defendants have offered no explanation why such documents, if they even exist, would be in the exclusive possession of the Plaintiffs. In light of the foregoing, the Court concludes that Defendants have failed to present any non-conclusory admissible evidence of a dispute with respect to Plaintiffs' invoices, or to rebut their liability on the accounts stated. Accordingly, the Court also grants Plaintiffs' motion for summary judgment on their account stated claims.

In light of the foregoing, the Court grants Plaintiffs motion for summary judgment against Defendants on the first, fourth, seventh, tenth, and thirteenth numbered causes of action sounding in breach of contract as well as on their second, fifth, eighth, eleventh, and fourteenth numbered causes of action sounding in account stated. Plaintiffs are entitled to a judgment against Defendants CLK-HP LLC, CLK-Houlihan-Parnes LLC, CLK-HP 90 Merrick LLC, Marcus Avenue Acquisition LLC, CLK-HP 300 Broadhollow LLC, and CLK-HP 534 BHR LLC in the sum of \$677,096.34, together with statutory interest from June 15, 2010.

The Court also dismisses the sixteenth and seventeenth causes of action in the Complaint, seeking a constructive trust and injunctive relief, because, *inter alia*, Plaintiffs have failed to establish the existence of any "Cleaning Services Trust Fund" that would justify creation of a constructive trust or an injunction to protect such a fund.

The Court denies, as moot, Plaintiffs' application for expedited discovery.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

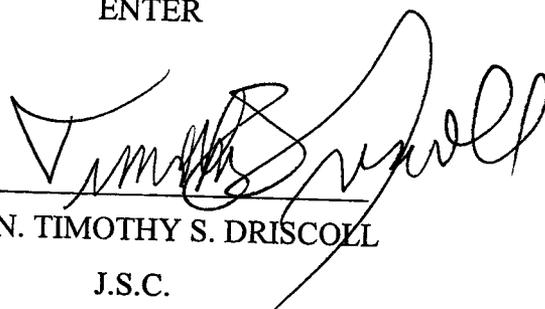
Settle Judgment on Notice.

DATED: Mineola, NY

January 27, 2011

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HON. TIMOTHY S. DRISCOLL
J.S.C.