

JB&C LLC v Infra-Structures, Inc.

2006 NY Slip Op 30366(U)

January 27, 2006

Supreme Court, New York County

Docket Number:

Judge: Bernard J. Fried

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SCANNED ON 1/31/2006
F-31-06
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED
Justice

PART 60

JB and DC LLC
PLAINTIFF

INDEX NO. #600131-2005

MOTION DATE _____

- v -

INFRA-STRUCTURE

MOTION SEQ. NO. ~~#001~~ 02

MOTION CAL. NO. _____

DEFENDANT

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 1/27/06

Bernard J. Fried
J.S.C.

BERNARD J. FRIED
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

-----X
JB&C LLC,

Plaintiff,

-against-

Index No.: 600131/05

INFRA-STRUCTURES, INC.,

Defendant.

-----X
APPEARANCES:

For Plaintiff:

Charles A. Bennett
25 Broad Street - Suite 17-D
New York, New York 10004

For Defendant

Epstein & Weil
Judith H. Weil, Esq.
225 Broadway
New York, New York 10007

Fried, J.:

Plaintiff seeks recovery of \$183,946.60, plus interest, from defendant for payment of licensing fees. In this motion, sequence number 002, plaintiff moves for summary judgment (CPLR 3212).

The complaint contains four causes of action labeled as, respectively, goods sold and delivered pursuant to CPLR 3016 (f), account stated, breach of contract and quantum meruit. It is undisputed that in or around June 16, 2003, the parties entered into a written agreement (the Agreement) pursuant to which plaintiff agreed to license to defendant the exclusive rights to manufacture plaintiff's design solutions or products (*see* Defendant's Response to Plaintiff's Rule 19-a Statement of Material Facts [Def. Rule 19-a Response] at ¶ 3). It is also

undisputed that defendant agreed to pay plaintiff a licensing fee equal to 10% of the net sales price charged to their mutual clients, exclusive of installation and delivery, for each product sold or a licensing fee of a jointly negotiated percentage based on a project's specific scope of work.

Plaintiff alleges it delivered, and defendant accepted, the licensed materials and goods, and the statements for the licensing fee due. It is undisputed that defendant made full payment of one invoice, and attempted to make several partial payments of others (Def. Rule 19-a Response at ¶ 10). Plaintiff claims it rejected two of the partial payments because they were not for the total amount of the respective invoices. It is also undisputed that plaintiff delivered additional invoices to defendant (Def. Rule 19-a Response at ¶ 9). Plaintiff contends that defendant did not object to the invoices, other than in its verified amended answer to the verified complaint (the Answer).

On a summary judgment motion, the movant bears the initial burden of proving entitlement to summary judgment by eliminating material issues of fact "by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], quoting CPLR 3212 [b]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). If the moving party establishes a basis for a grant of summary judgment, then to defeat the motion, the opposing party must present evidence that there is a triable material issue of fact (*Zuckerman*, 49 NY2d 557, *supra*).

To meet its summary judgment burden, plaintiff provides the affidavit of its chief operating officer and principal, John Scarnecchia. Annexed to Scarnecchia's affidavit are

copies of 16 unpaid invoices, with dates ranging from March through mid-October 2004.¹ Scarnecchia swears that each invoice was delivered to defendant and includes the agreed upon price. Plaintiff also submits a letter from Scarnecchia to defendant's chief executive officer, dated November 22, 2004, demanding payment of \$183,946.60, the total amount of the unpaid annexed invoices. Appended to the November 22, 2004 letter is a document that Scarnecchia describes as "a schedule of all payments received to date along with the dates and amounts of our invoices . . ." (Scarnecchia Aff., Exh. E). Defendant does not dispute that the November 22, 2004 letter was sent to it by certified mail (Rule 19-a Statement at ¶ 9).

Plaintiff points out that in the Answer, defendant admits that it licensed goods and services from plaintiff. Plaintiff also points to a document annexed to the Answer and described therein, by defendant, as "Schedule B." Schedule B contains a column labeled "Adjusted Amount Due" which refers to the work projects for which plaintiff alleges it sent defendant the previously mentioned invoices. The sum of the various figures listed in the "Adjusted Amount Due" column of Schedule B is \$119,040.00.

Plaintiff moves for summary judgment, against defendant and in its favor, for \$183,946.60. Arguing that Schedule B is defendant's concession that it owes plaintiff \$119,040.00, plaintiff moves for summary judgment for \$119,040.00 on all of the causes of action of the complaint. As for the remaining \$64,906.60 of the \$183,946.60, plaintiff argues that it is entitled to summary judgment solely on the first count of its complaint, on the

¹The 16 invoices include the invoices toward which plaintiff alleges that defendant made, or attempted to make, partial payment.

ground that defendant has not tendered objections in the Answer that meet the statutory requirements of CPLR 3016 (f).

In opposition to summary judgment, defendant submits an attorney affidavit that states, essentially, that the pleadings are attached, and legal briefs.² Defendant argues that Schedule B is sufficiently detailed to dispute plaintiff's 3016 (f) claim. Defendant also argues that there are questions of fact as to when and how payments would be made, because the Agreement is silent as to these issues. Defendant further contends that it has asserted an affirmative defense stating that plaintiff failed to perform under the contract, which raises an issue of fact.

CPLR 3016 (f) is a procedural device available to a plaintiff whose claim arises out of the sale and delivery of goods or materials to, or the performing of labor and services for, a defendant. Pursuant to CPLR 3016 (f), where a plaintiff sets forth in its verified complaint the items of its claim, and the reasonable value or agreed price of each item, the defendant is obligated to indicate the specific items it disputes and whether such dispute concerns "delivery or performance, reasonable value or agreed price" (CPLR 3016 [f]), thereby narrowing the controversy between the parties.

Here, while the complaint provides a schedule of items, it does not appear that the items are goods or services that plaintiff provided to defendant. In fact, the evidence submitted by plaintiff indicates that the schedule reflects, and plaintiff attempts to collect fees for, materials and services provided by the defendant to a third-party, the GreenPoint

²Both parties were permitted to and did submit supplemental briefs. Defendant did not submit an affidavit of a person with knowledge to oppose the motion with either its initial or supplemental briefs.

Bank. Indeed, in its supplemental reply brief, plaintiff concedes as much where it states that the invoices it submits on this motion, which correlate with the items in the complaint, identify the licensing fees owed to plaintiff based on defendant's sales to the bank.

Neither the parties' nor the court's research has revealed that CPLR 3016 (f) is available for such claims relating to services provided to third parties (*cf.* Haig, Commercial Litigation in New York State Courts, § 63:34, at 183-84 [14A West's New York Practice Series, 2005, 2d ed]), and the plain language of the statute does not support such an interpretation. Therefore, that portion of the motion in which plaintiff seeks \$64,906.60 based solely on CPLR 3016 (f) is denied.

Plaintiff has, however, moved for and shown entitlement to summary judgment on its account stated cause of action in the amount of \$119,040.00. An account stated is an account balanced and rendered, with an express or implied assent to the balance (*Parker Chapin Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375 [1st Dept 1977]). Thus, the demand is essentially the same as if a promissory note had been given for the balance (*id.*).

The recipient of a rendered account is bound to examine it, and if he or she admits it to be correct, it becomes a stated account that is binding on both parties, the balance being the debt which may be sued for and recovered by law (*Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745 [1st Dept 1983]). “[E]ither retention of bills without objection or partial payment may give rise to an account stated, and unless fraud, mistake and/or other equitable considerations are shown, a party who within a reasonable time fails to object to accounts rendered to it will be bound by them as accounts stated (*Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]); *Rosenman*

Colin Freund Lewis & Cohen v Edelman, 160 AD2d 626 [1st Dept 1990], *appeal denied* 77 NY2d 802 [1991]; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781 [1st Dept], *appeal dismissed* 53 NY2d 1028 [1981]).

Plaintiff met its moving burden by providing admissible evidence that it rendered to defendant invoices to which defendant failed to raise an objection. In opposition, defendant submits no evidence that it objected to the invoices, but merely makes unsubstantiated, conclusory assertions regarding objections, which are insufficient to oppose a summary judgment motion (*Walter, Conston, Alexander & Green, P.C. v Vintage Creations, Ltd.*, 203 AD2d 203 [1st Dept 1994]). In addition, defendant's arguments concern the terms of the Agreement and its performance. An account stated, however, is an agreement, independent of the underlying agreement, regarding amounts due on past transactions (*see Duane Reade v Cardinal Health, Inc.*, 21 AD3d 269 [1st Dept 2005]).

In any event, defendant's contract arguments are unsubstantiated. For example, defendant argues that the Agreement is silent as to the timing of payment, thus raising an issue of fact. It also argues, however, that where a contract is silent as to the timing of payment, the law implies a reasonable time (*see Savasta v 470 Newport Assocs.*, 82 NY2d 763 [1993]). The invoices, and the services for which the licensing fees were due, were rendered in or before 2004. A reasonable time has passed.

In addition, referring to the verified complaint, defendant argues that plaintiff alleges that defendant has always made partial payments, which plaintiff typically accepted, thereby demonstrating the parties' understanding that payments were to be made in installments. Defendant mischaracterizes the complaint, however, which merely indicates that plaintiff

accepted partial payment on one invoice.

At oral argument, defendant's counsel argued that a letter submitted by plaintiff, with its moving papers, demonstrates that some prior invoices were paid in "round numbers" which raises an issue of fact as to the parties' custom and practices regarding invoice payments. Counsel's assertions lack evidentiary value where they are not supported by the affidavit of a party with knowledge and there is no indication that counsel's statements about the document or the parties' practices were made on personal knowledge.

Defendant also argues that plaintiff did not fulfill its performance requirements because it was required, pursuant to the Agreement, to design all of the components of the GreenPoint Bank project. Such argument, without admissible evidence in support, other than defendant's conclusory statement in the Answer that the plaintiff did not fulfil its performance requirements, does not suffice to defeat summary judgment (*Velez v City of New York*, __AD3d__, 2005 WL 3434874 [1st Dept]). In addition, absent a showing that facts essential to justify opposition might exist, defendant's argument that summary judgment is premature because of outstanding discovery issues also fails.

In support of its motion for summary judgment on its account stated cause of action, plaintiff submits adequate affidavits and documentary evidence to demonstrate its entitlement to judgment as a matter of law, thus shifting the burden to defendant to produce admissible evidence to establish the existence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, *supra*). Defendant has not done so. Accordingly, plaintiff is entitled to summary judgment in the principal amount of \$119,040.00, with statutory interest from November 22, 2004 (*see*

Music Sales Corp. v Mark Music Service, Ltd, 194 AD2d 470 [1st Dept] *lv denied* 82 NY2d 662 [1993]).

A conference is set for February 15, 2006, at 12:00 noon, in Part 60, at courtroom 540.

Settle Order.

Date: 1/27/06

Enter:



J.S.C.

BERNARD J. FRIED
J.S.C.