

Propoco, Inc. v North Gen. Hosp.

2007 NY Slip Op 30926(U)

April 18, 2007

Supreme Court, New York County

Docket Number: 0603121/2006

Judge: Bernard J. Fried

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED
Justice

FILED
PART 60

Pro paco
PLAINTIFF
- v -
North General Hospital
DEFENDANT

INDEX NO. #603121-2006
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

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

FILED
APR 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

FILED

Dated: 4/18/07 _____
B. J. Fried
J.S.C. **BERNARD J. FRIED**
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X
PROPOCO, INC., d/b/a
PROFESSIONAL SERVICES,

FILED

Plaintiff,

-against-

Index No.: 603121/2006

NORTH GENERAL HOSPITAL,

Defendant.
-----X

APPEARANCES:

For Plaintiff:
Weiss & Zarett, P.C.
3333 New Hyde Park Road
Suite 211
New Hyde Park, New York 10947
(Michael D. Brofman, Esquire)

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NEW YORK
COUNTY CLERK'S OFFICE

For Defendant:
Windel Marx Lane & Mittendorf, LLP
156 West 56th Street
New York, New York 10019
(John D. Holden, Esquire
Craig P. Murphy, Esquire)

FRIED, J.:

In this action, plaintiff Propoco, Inc. sues defendant North General Hospital for failing to pay for services pursuant to a service agreement between the parties. More specifically, plaintiff alleges that defendant did not pay three and one-half months of services, as well as certain termination payments under the agreement. Plaintiff's claims against defendant are based on the doctrine of account stated and breach of contract.

In response, defendant asserts various affirmative defenses, as well as a counterclaim alleging that the substandard services purportedly rendered by plaintiff constituted a breach of the agreement, which led to financial losses by defendant.

Plaintiff has moved, pursuant to CPLR 3211, to dismiss defendant's counterclaim, and pursuant to CPLR 3212, for summary judgment in its favor with respect to the various claims asserted in its complaint. For the reasons stated below, the motion to dismiss defendant's counterclaim is granted, and partial summary judgment is granted in favor of plaintiff with respect to its claims based on account stated.

According to the complaint, plaintiff is a provider of various building management and clinical engineering services to hospitals. On January 27, 2005, plaintiff entered into a service agreement with defendant, a hospital serving the Harlem community in New York City (the Contract). The commencement date of the Contract was February 1, 2005, with a term continuing for three years, unless terminated earlier by either party. Pursuant to paragraph 12A of the Contract, the non-breaching party may terminate the Contract for cause, by providing the other party with a notice to cure, and if not cured within 60 days, the party giving notice may terminate the Contract upon a further 30 days notice of termination. Pursuant to paragraph 12C, the Contract may also be terminated by either party without cause, by providing 120 days of advance notice. Under paragraph 12B, in the event defendant fails to pay plaintiff any amount due, plaintiff must provide defendant with a 30 days notice of nonpayment, and if payment is not made within 30 days, plaintiff may terminate the Contract upon the expiration of such 30 day period. The Contract requires that all notices be in writing. Moreover, pursuant to the Contract, fees for services must be paid by defendant on a monthly basis, with payment due on or before the 15th day of each month. Starting on February 15, 2006, the monthly fee for services rendered by plaintiff was increased to approximately \$25,000. A copy of the Contract is annexed as Exhibit "A" to plaintiff's motion.

The complaint alleges that defendant made payments only through March 2006, but did not pay the invoices for April, May and June, 2006, in the aggregate amount of \$75,078.75. Copies of the unpaid invoices are attached as Exhibit "E" to plaintiff's motion. The complaint also alleges that, because of such non-payment, plaintiff sent defendant a notice on July 11, 2006 (the Payment Default Notice), pursuant to paragraph 12B of the Contract. A copy of the Payment Default Notice is attached as Exhibit "F" to plaintiff's motion. By letter dated July 14, 2006, counsel for defendant notified plaintiff that defendant was terminating the Contract, effective immediately (the Termination Notice). In the Termination Notice, a copy of which is annexed as Exhibit "G" to plaintiff's motion, defendant alleged, among other things, that plaintiff breached the Contract by failing to provide quality services, as required by the Contract.

After defendant failed to pay the outstanding invoices in accordance with the Payment Default Notice, plaintiff commenced the instant action, and asserted four causes of action in its complaint. The first and second causes of action are based on the doctrine of account stated, and seek a recovery of \$75,078.75 (plus interest), the sum of the unpaid invoices. The third cause of action seeks a recovery of \$11,678.92, for unpaid services rendered by plaintiff from July 1, 2006 through July 14, 2006. The fourth cause of action seeks a recovery of \$100,105.00, which represents four additional monthly payments, if the Contract is deemed to have been terminated by defendant without cause.

In its answer, defendant asserts various affirmative defenses, including, among others, estoppel, accord and satisfaction, and breach of contract by plaintiff. Defendant also asserts a counterclaim against plaintiff in an amount of \$2.5 million, based on plaintiff's alleged

breach of the Contract, by failing to provide industry standard services.

In considering a CPLR 3211 motion to dismiss, the court is to determine whether a claimant's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002). The pleadings are to be afforded a "liberal construction," and the court is to accord the claimant "the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). However, while factual allegations in a claimant's pleading should be accorded a "favorable inference," bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995). Moreover, "[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether the [claimant] has a cause of action, not whether [he or] she has stated one". *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 (2nd Dept 2005).

On the other hand, in considering a motion for summary judgment pursuant to CPLR 3212, the Court of Appeals has noted, in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]), that:

[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal

citations omitted.]

Following the Court of Appeals' guidance, the lower courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case to determine whether relief should be granted or denied. *See e.g., Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997) (“[i]n considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion”). However, summary judgment is generally granted in favor of the movant if there are no material and triable issues of fact. *Francis v Basic Metal, Inc.*, 144 AD2d 634 (2nd Dept 1988).

Plaintiff's Motion To Dismiss Defendant's Counterclaim

Within three days after the receipt of plaintiff's Payment Default Notice, defendant dispatched its Termination Notice, informing plaintiff that the Contract was terminated immediately. In the Termination Notice (and its opposition to plaintiff's motion to dismiss), defendant asserted, among other things, that plaintiff failed to (1) staff a competent full-time site manager and other personnel at the hospital, (2) maintain the hospital's fire safety and HVAC systems, and (3) prepare an appropriate report discussing the life safety code deficiencies at the hospital and the corrective actions undertaken to remedy such deficiencies, which led the Joint Commission on the Accreditation of Health Organizations (JCAHO) to force the hospital to go on emergency medical services diversion, resulting in a substantial drop in patient admissions and revenue losses to the hospital. Hence, defendant contends that plaintiff cannot enforce the payment provisions of the Contract, when plaintiff itself breached the Contract by providing substandard services.

Plaintiff refutes defendant's allegation of malfeasance or breach of contract. More importantly, plaintiff contends that, because defendant did not provide a notice of cure with respect to any alleged malfeasance or breach of contract, as required by paragraph 12A of the Contract, defendant is precluded from asserting a counterclaim for damages. Such contention is supported by prevailing law. *See e.g., Rebh v Lake George Ventures, Inc.*, 223 AD2d 986, 987 (3d Dept 1996) (court found unconvincing defendant's claim that its failure to comply with the cure notice procedures prior to terminating plaintiffs' employment for alleged substandard performance was immaterial, and upheld lower court's grant of partial summary judgment in favor of plaintiffs on the issue of liability); *Fruin-Colnon Corp. v Niagara Frontier Transportation Authority*, 180 AD2d 222, 233 (4th Dept 1992) (court dismissed defendant's counterclaim against plaintiff for alleged contract default, and found defendant's termination of plaintiff without providing the requisite cure notice wrongful, because it deprived plaintiff of its contractual right to cure the alleged default).

Defendant argues unpersuasively that its failure to provide cure notice under the Contract was immaterial, because plaintiff had already terminated the Contract pursuant to the Payment Default Notice, which pre-dated defendant's Termination Notice. However, the Payment Default Notice was simply a notice to defendant to cure the payment default in 30 days, and if a cure was not timely made, plaintiff might exercise its right to terminate the Contract. This is in stark contrast to the Termination Notice, which, by its terms, terminated the Contract immediately, without affording plaintiff an opportunity to cure any alleged contract breach or default.

Relying on *Rattigan v Commodore Int'l, Ltd.* (1989 WL 151678 [SD NY, Dec. 8, 1989]), defendant contends that damages arising from a breach of contract counterclaim is distinct from a contract termination counterclaim, and is not precluded by a contractual notice requirement. In *Rattigan*, the district court acknowledged that “under New York law, a party’s failure to comply with a condition precedent [such as a cure notice requirement] may bar that party from asserting breach of contract.” *Id.* at *4 (citations omitted). However, in the context of ruling on the plaintiff’s request to preclude evidence as to his own purported misconduct, the federal court opined that “[t]he conditions precedent that defendant has failed to satisfy [the cure notice] relate only to the termination provision of the contract, and do not affect damage actions brought under the contract as a whole. Defendant is not suing for termination; rather, it sues for damages allegedly caused by plaintiff’s breach of duties under the contract.” *Id.* Notably, the district court did not cite any case law in support of its opinion.

Rattigan is not dispositive. First, it is axiomatic that decisions of federal courts are not binding on state courts in cases involving non-federal questions. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v McLeod*, 208 AD2d 81, 83 (1st Dept 1995) (citations omitted). Moreover, as discussed above, New York state courts have held that a party’s failure to provide contractually required cure notice generally precludes that party from seeking breach of contract damages against the other party. *Rebh* and *Fruin-Colnon*, *supra*. New York law permits contract termination without the requisite cure notice only in limited situations. *Allbrand Discount Liquors, Inc. v Times Squares Stores Corp.*, 60 AD2d 568, 568 (2d Dept 1977) (when the nonperforming party has expressly repudiated the contract); *Delvecchio v*

Bayside Chrysler Plymouth Jeep Eagle, Inc., 271 AD2d 636, 539 (2d Dept 2000) (when the breach was incurable). Here, defendant does not allege the existence of any limited situation, which would warrant an exception to the cure notice requirement. Furthermore, subsequent to *Rattigan*, the district court has held that a claimant's failure to provide the opposing party with the required cure notice prior to contract termination precluded his recovery of damages against such party under the employment contract. See *Needham v Candie's Inc.*, 2002 WL 1896892, *3 (SD NY, Aug. 16, 2002), *aff'd* 65 Fed Appx 339 (2d Cir 2003) (granting defendant summary judgment, because plaintiff's failure to give cure notice constituted a material breach of the parties' contract, which released defendant from plaintiff's contract damage claims).

Based on the foregoing, that branch of plaintiff's motion seeking a dismissal of defendant's counterclaim against plaintiff for purported breach of contract is granted.

Plaintiff's Motion For Summary Judgment
On Its First and Second Causes of Action

The first and second causes of action both sound in account stated and seek a recovery of \$75,078.75 (plus interest), the aggregate amount of three unpaid invoices. The first cause of action seeks interest from April 15, 2006, and the second from July 7, 2006. Because neither the Contract nor the invoices specify an interest rate, interest (if any) shall accrue at the rate of 9% pursuant to CPLR 5004, from the date when plaintiff served defendant with the Payment Default Notice (July 11, 2006), if the causes of action are meritorious, as explained below.

An "account stated" is "an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items

composing the account and the balance due, if any, in favor of one party of the other.” *Shea & Gould v Burr*, 195 AD2d 369, 370 (1st Dept 1993), quoting *Chisholm-Ryder Co., Inc. v Sommer & Sommer*, 70 AD2d 429, 431 (4th Dept 1979). Under this doctrine, “where an account is made up and rendered, he who receives it is bound to examine the same ... if he admits it to be correct, it becomes a stated account and is binding on both parties – the balance being the debt which may be sued for and recovered at law” *Lockwood v Thorne*, 11 NY 170, 174 (1854). Because a party receiving an account statement must examine it and make all necessary objections, an agreement to pay a debt may be implied if the party keeps the statement without objecting to it within a reasonable time, unless fraud, mistake or other equitable considerations are shown. *Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745 (1st Dept 1983); *Kramer, Levin, Nessen, Kamin & Frankel v Aronoff*, 638 F Supp 714, 719 (SD NY 1986).

In this case, the invoices for April, May and June 2006 were timely sent to defendant, but no objections to these invoices were made by defendant within a reasonable time. Therefore, under the doctrine of account stated, plaintiff is entitled to summary judgment in its favor with respect to the first and second causes of action. However, because these claims are duplicative, the first shall be deemed stricken, with the second being treated as the only validly surviving cause of action.

(a) Plaintiff’s Third Cause of Action

The third cause of action seeks recovery in an amount equal to \$11,678.92, representing unpaid services rendered by plaintiff to defendant from July 1, 2006 through and including July 14, 2006. The doctrine of account stated, however, is inapplicable to this cause

of action, because defendant promptly objected when it was presented with a statement of account by plaintiff.

In the complaint and the motion, it appears that plaintiff seeks recovery on this claim based on the alternative theory of breach of contract. It is axiomatic that in order to prevail on a breach of contract claim, a plaintiff must establish all of the following: (1) existence of a binding contract; (2) plaintiff's performance of the contract; (3) defendant's material breach of the contract; and (4) resulting damages. *See e.g., Furia v Furia*, 116 AD2d 694 (2d Dept 1986); *J&L American Enterprises, Ltd. v DSA Direct, LLC*, 2006 WL 216680 (Sup Ct, NY County 2006).

Although defendant's breach of contract counterclaim seeking affirmative recovery (in an amount of \$2.5 million) against plaintiff has been dismissed, for the reasons stated above, defendant also asserts that plaintiff breached the Contract, as an affirmative defense to plaintiff's claims. In its reply brief and affidavit, plaintiff contends that defendant's fire safety system was antiquated at the time it was installed in 1991, and was the real cause of the violations issued by JCAHO in 2006. However, defendant's breach of contract allegations against plaintiff encompassed, in addition to plaintiff's alleged failure to maintain fire safety and HVAC systems, other malfeasance as well, including, among others, plaintiff's purported failure to prepare an appropriate report to JCAHO discussing the hospital's safety code deficiencies, and the corrective actions undertaken to remedy such deficiencies.

Because material issues of fact have been raised as to whether plaintiff had performed the services pursuant to the terms of the Contract, summary judgment cannot be entered in favor of plaintiff with respect to the third cause of action.

(b) Plaintiff's Fourth Cause of Action

The fourth cause of action alleges that, due to defendant's improper termination of the Contract, plaintiff is entitled to treat defendant's Termination Notice as a termination without cause, pursuant to paragraph 12C of the Contract. In such regard, plaintiff seeks a recovery of \$100,105.00, an amount representing four additional monthly payments under the Contract. Defendant asserts, among other things, the affirmative defense that the complaint failed to state a cause of action.

Pursuant to CPLR 3212 (b), I determine whether this cause of action should be dismissed in light of all the papers and proofs submitted by the parties. In the Termination Notice, defendant asserted, among other things, that the Contract was terminated because of plaintiff's alleged failure to provide quality services, as required by the Contract. Hence, any argument that the Contract was terminated by defendant without cause does not withstand scrutiny, particularly when documentary evidence clearly demonstrates the contrary. For this reason, the fourth cause of action should be dismissed.

Accordingly, it is

ORDERED that, plaintiff's motion seeking dismissal of defendant's counterclaim is hereby granted; and it is further

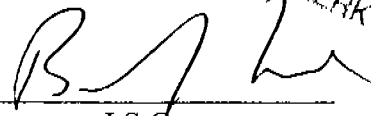
ORDERED that, plaintiff's motion seeking summary judgment with respect to the second cause of action asserted in the complaint is hereby granted, with interest accruing at nine percent, commencing as of July 11, 2006; and it is further

ORDERED that, the first and fourth causes of action asserted in the complaint are hereby dismissed, and the Clerk is directed to sever and dismiss these causes of action from

the remainder of this proceeding; and it is further

ORDERED that, the third cause of action asserted in the complaint shall continue as the sole remaining cause of action in this proceeding.

Dated: 4/18/07

ENTER: **FILED**
APR 19 2007
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J.S.C.
BERNARD J. FRIED
J.S.C.