Creative Global Network Servs., Inc. v Sajobe Network Servs., Inc.

2007 NY Slip Op 31053(U)

April 23, 2007

Supreme Court, Suffolk County

Docket Number: 0021324/2004

Judge: Robert W. Doyle

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SHORT FORM ORDER

INDEX No. 04-21324
CAL. No. 06-01611-CO

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-1-06
ADJ. DATE 12-29-06
Mot. Seq. # 001 - MG

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CREATIVE GLOBAL NETWORK SERVICES, INC.,

Plaintiff,

- against -

SAJOBE NETWORK SERVICES, INC. and DONALD CONKLIN,

Defendants.

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Upon the following papers numbered 1 to 24 read on this motion for dismissal ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers _________; Answering Affidavits and supporting papers 18 - 23 ; Replying Affidavits and supporting papers 24 ; Other __________; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff, Creative Global Network Services, Inc. ("Creative"), for an order dismissing the third counterclaim of defendants, Sajobe Network Services, Inc. ("Sajobe") and Donald Conklin, pursuant to CPLR 3211(b) or, in the alternative, granting summary judgment dismissing the third counterclaim pursuant to CPLR 3212 is granted.

Plaintiff instituted this contract action to recover damages allegedly suffered as a result of defendants' conduct in allegedly breaching a contract between the two parties. According to the papers submitted by the parties, defendant Donald Conklin was employed by plaintiff as an engineer up and until September 16, 2002, when his employment was terminated. In the weeks that followed, Conklin formed a new company, Sajobe, and Conklin and the principles of Creative began discussing the possibility of entering into a different business relationship where Sajobe, as an independent contractor, would be required to engineer, design and install the computer infrastructure on multiple projects in the New York City Public Schools pursuant to a contract Creative had with IBM. On October 1, 2002, Saladino Barbery, president of Creative, sent Conklin an e-mail outlining the agreement between the parties. On October 18, 2002, Barbery e-mailed a copy of a proposed subcontracting agreement to

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Conklin. Neither party executed the contract. Subsequently, on November 14, 2002, Creative notified Conklin that it wanted Conklin to cease working on the project. In 2003, the parties again became involved in a new business venture, where Creative was the subcontractor of Sajobe. Conklin acknowledges that Creative was not paid for its work performed pursuant to the parties' 2003 contract.

Creative instituted this action to recover damages stemming from defendants' alleged breach of the 2003 contract between the parties. In their third counterclaim, defendants allege that Creative breached a 2002 contract that was made between the parties. Creative now moves for an order dismissing the defendants' third counterclaim, alleging that no 2002 contract existed between the parties and therefore, no breach of contract action can be maintained. Sajobe opposes the motion, arguing that the October 1, 2002 email is a written contract between the parties.

In order to state a cause of action for breach of contract, it is incumbent on plaintiff to first prove the existence of the underlying contract. "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (***Express Industries and Terminal Corp. v New York State Department of Transportation,*** 93 NY2d 584, 589, 693 NYS2d 857, 860 [1999]). It is well settled that a contract which, by its terms, cannot be performed within one year, must be evidenced by a memorandum sufficient to meet the requirements of the Statute of Frauds (General Obligations Law 5-701). Such a memorandum must contain expressly, or by reasonable implication, all the material terms of the agreement between the parties and must be signed by the party to be charged (***Intercontinental Planning, Ltd. v Daystrom, Inc.***, 24 NY2d 372, 378-79, 300 NYS2d 817, 822 [1969]). Multiple writings may satisfy the requirements of the Statute of Frauds where the terms of an agreement are established by a combination of signed and unsigned documents, letters or other writings between the parties; however, "at least one writing, the one establishing a contractual relationship between the parties, must bear the signature of the party to be charged, while the unsigned document must on its face refer to the same transaction as that set forth in the one that was signed" (***Crabtree v Elizabeth Arden Sales Corp.***, 305 NY 48, 56 [1953]).

An electronic mail that contains all essential terms of the contract can satisfy the subscription requirement of the Statute of Frauds if the party to be charged specifically typed his name on the bottom of the e-mail, manifesting an intent to authenticate the terms contained therein (*see*, ***Parma Tile Mosaic & Marble Co, Inc. v Estate of Fred Short***, 87 NY2d 524, 640 NYS2d 477 [1996]; ***Pazaaz Communications v Controlotron Corp.***, 11 Misc. 3d 1066A, 816 NYS2d 698 [2006]; ***Rosenfeld v Zerneck,*** 4 Misc3d 193, 776 NYS2d 458 [2004]. However, "where parties by their conduct have manifested their mutual intent not to be bound until execution of a formal contract, effect will be given to that intention and, until the written contract is executed, no enforceable obligation will be held to arise (***Pelham Commons Joint Venture v Village of Pelham,*** 308 AD2d 520, 521, 764 NYS2d 475, 477 [2003].

Turning to the case at bar, even assuming arguendo that the word "Sal" October 1, 2002 email was a writing sufficient to meet the subscription requirement contained in the Statute of Frauds, the e-mail itself clearly fails to contain all the material terms of the agreement between the parties. Specifically, the e-mail states that it is a document "preliminary to the contract Creative's attorney is drawing up..[and]...what follows will be the subjects we agreed to verbally and will be addressed in the

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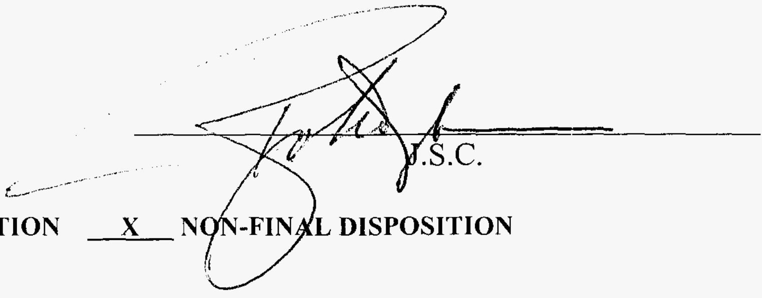
contract like-wise." The writer also indicates other contractual provisions are to follow, including non-compete and non-disclosure clauses. Significantly absent from the e-mail is any notation referencing an agreement as to the length of the contractual obligation between the parties– the very term which defendant alleges plaintiff breached. Furthermore, although defendant did start work on the project after receiving this email, a subsequent email and an attached 17-page contract containing additional terms was sent from plaintiff to defendant. Although defendant Conklin did not sign this contract, he failed to do so not because he felt there was already a valid contract in existence, but because, by his own deposition testimony, this proposed contract named him personally as the subcontractor instead of Sajobe. Clearly, all of the aforementioned actions of both parities manifest a mutual intent not to be bound until the execution of a formal contract. In that no such event occurred, no cause of action for breach of contract can be maintained against plaintiff.

Therefore, the court grants plaintiff's motion for an order seeking summary judgment dismissing defendants' third counterclaim.

Dated: APR 2 3 2007



J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**