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

PRESENT: HE[illegible] CAHN Justice

PART 49

Spectacolor Media

- v -

Ebony Media

INDEX NO. 604355/05

MOTION DATE 1/22/07

MOTION SEQ. NO. 02

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

FILED
MAY 24 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . . .

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

Dated: 5/21/07

Hon. Cahn
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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SPECTACOLOR MEDIA LLC t/a
CLEAR CHANNEL SPECTACOLOR,

Plaintiff,

- against -

Index No. 604355/2005

EBONY MEDIA, INC. and
PHAT FASHIONS LLC t/a BABY PHAT,

Defendants.

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HERMAN CAHN, J.:

Plaintiff moves for summary judgment in its favor on each cause of action alleged in the complaint, CPLR 3212. Defendant Phat Fashions LLC t/a Baby Phat (Phat Fashions) cross-moves to dismiss the fourth cause of action alleging unjust enrichment -- the only cause of action asserted against Phat Fashions -- pursuant to CPLR 3211 (a) (7) or, alternatively, CPLR 3212.

Plaintiff and defendant Ebony Media, Inc. (Ebony) entered into two contracts, pursuant to which Ebony agreed to pay plaintiff installation charges, and a monthly fee, for the use of two outdoor advertising display locations. Each of the Contracts commenced in June 2004, extended for a term of four months, and provides that "[t]he undersigned Advertiser Baby Phat Agency Ebony Media, Inc., hereby contracts" for the use of the outdoor advertising space (Mecks Affid., Ex. 1).[1] However, the contracts were executed and accepted only by Ebony, not by Phat Fashions, and plaintiff apparently issued the periodic invoices for the charges under the contracts only to Ebony, and not to Phat Fashions (*see id*, ¶ 4 and Exs. 1, 2; Mer Affirm., ¶¶ 7, 9). Ebony allegedly failed to pay plaintiff $199,863.66 that was due under the contracts. Although Ebony issued a check to plaintiff in April 2005, in the amount of $62,000.00, the check was Dishonored by the presenting bank, because there were insufficient funds in Ebony's bank account to cover it.

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[1] The contracts appear to be form contracts containing blanks in which the parties inserted the appropriate information.

The complaint asserts four causes of action. The first, second and third state claims against Ebony for, respectively, breach of contract, an account stated and liability on the dishonored check. The fourth asserts a claim against Phat Fashions for unjust enrichment.

That branch of the motion which seeks summary judgment as against Ebony is denied, because plaintiff has failed to establish that issue has been joined as between plaintiff and Ebony. A party may move for summary judgment only "after issue has been joined," and the movant is required to submit, in support of its motion, "a copy of the pleadings" (CPLR 3212 [a], [b]). The rule requiring joinder of issue before a motion for summary judgment may be made is "strictly adhered to" (*Sonny Boy Realty, Inc. v City of New York*, 8 AD3d 171, 172 [1st Dept 2004] [citation and internal quotation marks omitted], *affd* 4 NY3d 858 [2005]; *see also St. Paul Fire and Mar. Ins. Co. v York Claims Serv., Inc.*, 308 AD2d 347, 348-349 [1st Dept 2003]). Plaintiff, in support of its motion, has neither submitted a copy of an answer served by Ebony, nor indicated whether Ebony has or has not served an answer.[2] Accordingly, summary judgment may not be granted in plaintiff's favor on its claims against Ebony (*see St. Paul Fire and Mar. Ins. Co. v York Claims Serv., Inc.*, 308 AD2d at 349).

If Ebony has, in fact, failed to answer, plaintiff's proper course of action would be to move for leave to enter a default judgment pursuant to CPLR 3215 (*see County of Nassau v Cedric Constr. Corp.*, 100 AD2d 890, 891 [2d Dept 1984]). In certain instances, the court may deem an improperly made summary judgment motion to be a motion for a default judgment (*see id.*). However, a motion for leave to enter a default judgment must be supported, inter alia, by "proof of the facts constituting . . . the default," in the form of an affidavit made by the party or, in certain instances, by the party's attorney (CPLR 3215 [f]). Plaintiff has not submitted any proof of facts constituting a default by Ebony, or even indicated in its motion papers whether Ebony has or has not defaulted in failing to answer or to oppose the motion for summary

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[2] It appears that Ebony has also failed to oppose plaintiff's motion for summary judgment.

judgment. Accordingly, plaintiff's motion is denied -- with respect to the complaint's first three causes of action against Ebony -- albeit with leave either to renew the motion for summary judgment or to move for a default judgment, as may be appropriate under the circumstances.

Plaintiff's motion for summary judgment is also denied with respect to the complaint's fourth cause of action against Phat Fashions, and Phat Fashion's cross motion for summary judgment dismissing that claim is granted. The fourth cause of action alleges that Phat Fashions has accepted the benefit of plaintiff's services without protest or objection thereto, and that Phat Fashions will be unjustly enriched if it is permitted to retain the benefit without compensating plaintiff for them.

In order to prevail on a claim of unjust enrichment, "a [plaintiff] must show that (1) the [defendant] was enriched, (2) at [the plaintiff's] expense, and (3) that 'it is against equity and good conscience to permit [the defendant] to retain what is sought to be recovered'" (*Citibank, N.A. v Walker*, 12 AD3d 480, 481 [2d Dept 2004], quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973]). However, the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery on a claim for unjust enrichment based on events arising out of the same subject matter (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). The foregoing principle may be applied to bar an unjust enrichment claim not only where the claim is brought by one party to a contract against another party to the contract, but even where the claim is brought by a plaintiff who is a party to the contract against a defendant who was not a party or signatory to the contract (*see e.g. Paragon Leasing, Inc. v Mezei*, 8 AD3d 54, 54-55 [1st Dept 2004]; *Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003]; *Bellino Schwartz Padob Adv., Inc. v Solaris Mktg. Group, Inc.*, 222 AD2d 313, 313 [1st Dept 1995]; *Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 283 [1st Dept 1989]; *see also generally American Med. Assn. v United Healthcare Corp.*, 2007 WL 683974, *10 [SD NY, March 5, 2007] [collecting cases]).

Here, plaintiff does not dispute that the contracts are valid and enforceable and, in fact, is moving for summary judgment, as against Ebony, on its claim for breach of the contracts. Thus, plaintiff's unjust enrichment claim as against Phat Fashions is precluded by the written contracts, which govern plaintiff's "right to compensation for the very services that allegedly unjustly enriched" Phat Fashions (*Paragon Leasing, Inc. v Mezei*, 8 AD3d at 54-55).[3]

Plaintiff asserts -- although for the first time in its reply papers -- the argument that Phat Fashions is liable on the contracts because: when Ebony entered into the Contracts, it was acting in the capacity of an agent on behalf of its principal, Phat Fashions; "[a] principal is bound by contracts entered into by [its] agents in the course of their employment and within the scope of their authority"; and, accordingly, "Phat Fashions was bound by the contracts entered into by Ebony, and subject to liability to [p]laintiff upon Ebony's default" in payment (Pl. Mem. of Law in Opp. and Furth. Supp., at 2-3 [emphasis added]). However, even assuming, arguendo, that the foregoing arguments were correct, it would presumably support a breach of contract claim against Phat Fashions rather than an unjust enrichment claim.

CONCLUSION AND ORDER

For the foregoing reasons, it is

ORDERED that plaintiff's motion for summary judgment is denied in its entirety; and it

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[3] Phat Fashions has submitted an affidavit by its vice president of finance, who contends that Phat Fashions has not been unjustly enriched at plaintiff's expense, in any event, because:

> pursuant to another agreement between Phat Fashions and Ebony, Phat Fashions agreed to pay Ebony for the use of the outdoor advertising space at issue. ... . In accordance therewith, Phat Fashions has paid Ebony in full. Accordingly, Phat Fashions paid in full for any alleged benefit it may have received from the outdoor advertising space at issue.

(Morris Affid., ¶ 8.) Phat Fashions has also submitted copies of checks which purportedly evidence Phat Fashions' payment in full for the advertising display space that is covered by the contracts. However, Phat Fashions did not submit the copies of the checks with its moving papers, but only for the first time with its reply papers (Morris Affid. in Furth. Supp., ¶ 2 and Ex. 1).

is further

ORDERED that the cross motion for summary judgment by defendant Phat Fashions LLC t/a Baby Phat is granted with respect to the fourth cause of action, and the complaint is severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of Phat Fashions LLC t/a Baby Phat, dismissing the complaint as to it; and it is further

ORDERED that the remainder of the action shall continue.

Dated: May 21, 2007

ENTER:

J.S.C.