

**Riot Media, Inc. v Visual Perspectives Intl., Inc.**

2007 NY Slip Op 31599(U)

June 8, 2007

Supreme Court, New York County

Docket Number: 0601878/2006

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED

PART 60

Index Number : 601878/2006

**RIOT MEDIA**

vs.

**VISUAL PERSPECTIVE**

SEQUENCE NUMBER : 002

PARTIAL SUMMARY JUDGMENT

C

**FBIEM**

INDEX NO. #601878-2006

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #002

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

SO ORDERED

**FILED**

JUN 11 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/8/07

*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  REFERENCE

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

RIOT MEDIA, INC., a Delaware Corporation,

Plaintiff,

Index No. 601878/06

- against -

VISUAL PERSPECTIVES INTERNATIONAL, INC.,

Defendant.

----- X

**FILED**  
JUN 11 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**APPEARANCES:**

For Plaintiff:

Silverman Perlstein & Acampora LLP  
100 Jericho Quadrangle, Suite 300  
Jericho, New York 11753  
(Jay S. Hellman, Esq.)

For Defendant:

Cahill Gordon & Reindel LLP  
80 Pine Street  
New York, New York 10005  
(Patricia Farren, Esq.)

**FRIED, J.:**

Defendant Visual Perspectives International, Inc. (VPI) moves for partial summary judgment (CPLR 3212 [e]) on its counterclaim for breach of contract, and seeks money damages. Plaintiff Riot Media, Inc. (Riot) cross-moves for partial summary judgment (CPLR 3212 [c]) on its cause of action for conversion, and seeks the return of software codes and other proprietary material that VPI is allegedly refusing to return to Riot.

In September of 2005, VPI and Riot entered into an agreement, the Professional Services Agreement (September Agreement), whereby VPI agreed to provide website design, programming, game development, and related technological and consulting services for Riot, in addition to launching Riot's website. The September Agreement provides Riot "shall be

deemed the sole and exclusive owner” of the design and related software created by VPI, including all related copyright and proprietary rights (September Agreement at § 3.5.1.1.1).

On December 21, 2005, VPI and Riot entered into another agreement, entitled the Fulfillment Services Agreement (December Agreement), for the performance of fulfillment services, including storage, packaging, and customer support.<sup>1</sup>

Annexed to the September Agreement is an express payment schedule, which states that VPI was to perform 6,800 hours of work over a 12-month period, payable at \$75 per hour, and receive \$150,000 in total (September Agreement). The full contractual amount, \$150,000, due VPI for the performance of its services was to be paid in twelve monthly installments of \$12,500, beginning on January 15, 2006 (*id.*). The payment schedule additionally states that until Riot pre-approved VPI's work, no compensation was due to VPI (*id.*).

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Evidently, VPI failed to attach the September Agreement to its notice of motion, and instead, annexed the December Agreement. Riot argues that this raises an issue of fact as to whether the parties intended the December Agreement to supercede and replace the September Agreement, because of a merger clause contained in the December Agreement.

VPI contends that it inadvertently submitted the December Agreement, and that the September Agreement is the controlling agreement which governs the parties' dispute (Farren Reply Affidavit at ¶¶ 1-5).

In light of Riot's repeated references to the September Agreement as the controlling agreement covering this dispute, and specifically, its reliance on the September Agreement to establish its ownership of the software and proprietary material in connection with its claim for conversion, the Court determines that no issue of fact is raised by VPI's apparently inadvertent submission of the December Agreement.

The parties do not dispute that VPI performed services pursuant to the September Agreement, and it appears that Riot paid one monthly installment of \$12,500. At some point in the course of the parties' contractual relationship, Riot alleges that it could no longer pay VPI its fees. Riot terminated the September Agreement, and advised VPI that it should discontinue its services, and return Riot's software and other proprietary information (Lambert Affidavit at ¶ 7). According to Riot, subsequent to its termination of the contract, VPI refused to return the proprietary material that VPI developed for Riot under the September Agreement.

VPI maintains that by October of 2005, it fully performed its obligations under the September Agreement, entitling it to the full contractual fee of \$150,000, and that Riot owes it an additional \$137,500 (Zeiler Affidavit at ¶¶ 11-12, annexed to the Affidavit of Patricia Farren, Esq.; Transcript 4:22-26). Riot acknowledges that certain fees are in arrears, but disputes that it owes VPI the full contractual sum of \$150,000 (Transcript, May 30, 2006 at 15:7-9).

In May of 2006, Riot commenced this action, seeking a permanent injunction to enjoin VPI from exercising dominion and control over Riot's website, and related software and source codes. Additionally, Riot asserted claims for breach of contract, conversion, tortious interference, and breach of the implied covenant of good faith and fair dealing. VPI counterclaimed for breach of contract, specific performance, unjust enrichment, and quantum meruit. Previously, Riot moved for a temporary restraining order, seeking to prohibit VPI from interfering with Riot's website, which this Court denied on May 30, 2006.

VPI moves for partial summary judgment pursuant to CPLR 3212 (e) on its counterclaim for breach of contract, arguing that it fully performed under the September Agreement by timely completing the design and programming of Riot's website, in addition to developing related software and source codes, pursuant to the September Agreement (VPI's Statement of Undisputed Facts at ¶¶ 6, 7). Further, VPI argues that Riot pre-approved of and accepted VPI's services. To demonstrate that Riot pre-approved of VPI's work, VPI submits three documents executed by Riot executives, each entitled "Project Signoff Sheet/Permission to Launch," and dated between October of 2005 and February of 2006 (Exhibits B, C, annexed to the Affidavit of Patricia Farren, Esq.).

While not disputing that VPI performed services for Riot under the September Agreement and that certain sums are in arrears, Riot maintains that VPI failed to establish its entitlement to judgment as a matter of law on its counterclaim for breach of contract because VPI failed to fulfill a condition precedent to payment under the September Agreement. According to Riot, VPI's entitlement to payment was expressly contingent upon the submission of invoices containing a detailed description of the number of hours worked, and argues that because VPI's invoices do not contain such information, and VPI has otherwise failed to present evidence of the number of hours it worked in support of its motion, it is not entitled to summary judgment on its counterclaim for breach of contract.

On a motion for summary judgment, the movant must demonstrate by admissible evidentiary proof that no disputed issues of fact remain that would warrant a trial (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Further, where a movant is seeking summary judgment on its own claim for breach of contract, submission of evidence of the contract,

performance, and a party's failure to make payment according to its terms sufficiently discharges the movant's burden, thereby demonstrating its prima facie entitlement to judgment as a matter of law (*General Elec. Co. v Metals Resources Group*, 293 AD2d 417, 418 [1<sup>st</sup> Dept 2002]).

VPI has established that it performed under the September Agreement by the submission of invoices for the work performed, and submission of documents signed by Riot executives pre-approving VPI's designs and work product (Exhibits B, C annexed to the Affidavit of Zachary Zeiler). Riot acknowledges that VPI performed services on its behalf pursuant to the September Agreement, does not dispute that its executives signed documents entitled "Project Signoff Sheet/Permission to Launch," pre-approving VPI's designs and work-product, and does not dispute that some fees remain in arrears to VPI.

Riot's contention that VPI failed to fulfill a condition precedent to payment under the September Agreement is unavailing. A provision will not be considered an express condition precedent absent clear language evidencing this to be the parties' intent (*Roan/Meyers Assoc., L.P. v CT Holdings, Inc.*, 26 AD3d 295, 296 [1<sup>st</sup> Dept 2006]).

The invoicing provision contained in the September Agreement is not a condition precedent to Riot's obligation to pay VPI for services rendered. The language in the September Agreement does not reflect any intent that payment to VPI was contingent upon its submission of detailed invoices. The September Agreement merely states that "VPI shall submit . . . a detailed monthly invoice that includes a detailed description of work completed and a breakdown of number of hours of Services rendered" by VPI (September Agreement at § 3.3.2).

In contrast, a condition precedent to VPI's payment is unequivocally established elsewhere in the September Agreement, relating to Riot's pre-approval of VPI's work. Section 3.3.1 of the September Agreement states that "VPI shall receive compensation . . . for all Services rendered, subject to the pre-approval by Client."

Therefore, because the parties' intent can be gleaned from the face of the September Agreement, which clearly states that the only condition precedent to VPI's payment is Riot's pre-approval of VPI's work, inserting an additional condition precedent relating to the format of invoices would be improper (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]).

Moreover, the September Agreement provides that Riot shall pay VPI all non-disputed invoices within 30 days of their receipt, and if Riot disputes any fees as appears on the invoices, Riot shall give VPI written notice within 20 days of Riot's receipt of the invoice (September Agreement at § 3.3.2). Riot does not allege that it ever disputed, either by written notice or otherwise, any of the 14 invoices that it received from VPI during the course of the parties' contractual relationship. According to the express terms of the parties' contract, by failing to provide written notice within 20 days of receiving an invoice, Riot has waived the right to dispute the format of the invoices.

Accordingly, because VPI has submitted evidence of the contract, demonstrated its own performance, in addition to Riot's failure to pay according to its terms, VPI has demonstrated its entitlement to summary judgment as to liability on its counterclaim for breach of contract (*General Elec. Co.*, 293 AD2d at 418; *Ledy v Wilson*, 38 AD3d 214 [1<sup>st</sup> Dept 2007]).

However, issues of fact remain as to the precise amount that VPI is owed under the September Agreement. While VPI alleges that it fully performed all of its obligations under the September Agreement by October of 2005, documents entitled Project Signoff Sheet/Permission to Launch, dated February of 2006, raise an issue of fact as to whether VPI actually completed full performance of the contract, entitling it to the full contractual fee of \$150,000, by the time that Riot terminated the September Agreement. This remaining factual issue of damages is referred to a referee.

Riot cross-moves for partial summary judgment on its cause of action for conversion, maintaining that the website content created by VPI on Riot's behalf was conceived, and is owned, by Riot, under the express terms of the September Agreement. VPI does not dispute that it is refusing to provide Riot with the material, absent receipt of full payment from Riot.

The Court of Appeals recently expanded the tort of conversion to include intangible electronic data (*Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283 [2007]), which includes the software and source codes at issue here. To demonstrate prima facie entitlement to judgment as a matter of law on its cause of action for conversion, Riot must demonstrate legal ownership over the material, and that VPI exercised unauthorized control over it (*Soviero v Carroll Group Intl., Inc.*, 27 AD3d 276, 277 [1<sup>st</sup> Dept 2006]).

Riot has established that it is entitled to assert legal ownership of the proprietary material created by VPI based upon contractual provisions contained in the September Agreement, that state unequivocally that Riot is the sole and exclusive owner of all of the software, source codes and other material developed by VPI for Riot's use, pursuant to the September Agreement (September Agreement at §§ 3.5.3.1.1-2). Further, the September

Agreement expressly provides that upon termination, Riot is entitled to require VPI to provide to it any proprietary technology, including software and source codes (*id.* at § 3.5.1.2).

However, Riot is not entitled to this material unless and until it pays VPI in full, pursuant to the express terms of the contract. Therefore, Riot's cross-motion for summary judgment on its cause of action for conversion shall be held in abeyance pending receipt of the report and recommendations of the Special Referee as to damages on VPI's counterclaim for breach of contract, and demonstration of full payment thereof by Riot.<sup>2</sup>

Accordingly, it is

ORDERED that the motion of defendant Visual Perspectives International, Inc. for partial summary judgment is granted as to liability; and it is further

ORDERED that the issue of damages is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as Referee, shall determine the aforesaid issue; and it is further

ORDERED that this branch of the motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated Referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk

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Given the disposition of the parties' motions herein, and the determination that both parties will, in effect, recover what they initially sought by the filing of this action and the interposing of counterclaims, the parties are strongly encouraged to consider settlement of any remaining issues, and to do so, if so advised.

of the Judicial Support Office (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the cross-motion of Riot Media, Inc. is held in abeyance pending receipt of the report and recommendations of the Special Referee as to damages on the counterclaim of Visual Perspectives International, Inc. for breach of contract, and demonstration of full payment thereof; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 6/8/07

ENTER:



J.S.C.

**BERNARD J. FRIED**  
**J.S.C.**

**FILED**  
JUN 11 2007  
NEW YORK  
COUNTY CLERK'S OFFICE