

**AB Envtl. Servs./Able Envtl.
Servs. v Mystic Tank Lines Corp.**

2007 NY Slip Op 31825(U)

June 20, 2007

Supreme Court, Suffolk County

Docket Number: 0011431/2006

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

-----x
AB ENVIRONMENTAL SERVICES / ABLE
ENVIRONMENTAL SERVICES,

Plaintiff,

-against-

MYSTIC TANK LINES CORP. and ANCHOR TRANSIT
CORP.,

Defendants.
-----x

CALENDAR DATE: January 24, 2007
MNEMONIC: Mot D.

PLTF'S/PET'S ATTORNEY:

McGreevy & Henle LLP
P.O. Box 18
Mattituck, NY 11952

DEFT'S/RESP ATTORNEY:

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Upon the following papers numbered 1 to 15 read on this motion for summary judgment ;
Notice of Motion/Order to Show Cause and supporting papers 1-8 ; Notice of Cross-Motion and
supporting papers _____; Answering Affidavits and supporting papers 9-11 ; Replying
Affidavits and supporting papers 12-15 ; Other _____; and after hearing counsel in support of and
opposed to the motion it is,

ORDERED that this motion by the plaintiff for summary judgment pursuant to
CPLR §3212 is hereby granted on the issue of liability only as well as on the two (2)
\$50,000.00 payments due and owing the plaintiff by the defendants pursuant to the
agreement of August 10, 2005 and the matter will be set down for trial on the remaining issue
of damages still owing.

Plaintiff, AB Environmental Services, (hereinafter AB) instituted this action
against the defendants, Mystic Tank Lines, Corp., and Anchor Transit Corp. (hereinafter
Mystic) for damages resulting from breach of a contract for services involving an
environmental spill. AB was contacted by Mystic to provide labor and remedial clean up
services as a result of a motor vehicle accident occurring on June 10, 2005 at approximately
8:58 a.m. involving a Mystic truck and thirteen other vehicles on Route 27 (Sunrise Highway)
and Route 231 in West Babylon, Suffolk County on Long Island, New York. AB responded
and performed the emergency remedial cleanup of gas and oil spills to the satisfaction of all
parties, including all governmental agencies involved and the New York State Department of
Environmental Control (DEC). These cleanup services were provided under New York State
DEC Spill #05-02904 and encompassed not only the roadways but the area of Sampawams
Creek in Babylon. AB and Mystic thereafter entered into a contractual agreement, dated
August 10, 2005, setting forth the payment schedule for the work performed on June 10,
2005. This agreement was signed by Leonard Baldari on behalf of Mystic. The agreement,
pursuant to its terms, provided for a \$50,000.00 payment on or before October 31, 2005, a
second \$50,000.00 payment payable on or before December 31, 2005 with the balance of the
bill payable no later than February 28, 2006.

Notwithstanding the services provided by AB and the agreement set forth on August 10, 2005 Mystic has not made any payments, even though AB claims Mystic has been provided with invoices and detailed records of the work performed. Mystic claims that there was no contract and that the agreement is vague because it fails to set forth the total amounts owed. Mystic contests the amounts owed. AB claims no amounts have been paid and it is owed a total amount of \$271,051.06 for the cleanup services and labor provided on June 10, 2005. This lawsuit thereafter ensued.

For the following reasons, AB's motion for summary judgment pursuant to its CPLR §3212 is hereby granted to the extent that it is awarded summary judgment on both the issue of liability and on the two (2) \$50,000.00 payments due and owing by Mystic pursuant to the agreement of August 10, 2005. This action is set down for trial on the remaining issue of damages that may still be owed. AB is awarded judgment against Mystic in the amount of \$50,000 plus interest from October 31, 2005 and \$50,000.00 plus interest from December 31, 2005 representing the two (2) \$50,000.00 payments agreed to between the parties and the remaining amounts due and owing are subject to discovery and trial.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. *Elzer v. Nassau County*, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); *Steven v. Parker*, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); *Gaeta v. New York News, Inc.*, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in *Sillman v. Twentieth Century Fox*, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*DiMenna & Sons v. City of New York*, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App. Div. 1019), or where the issue is 'arguable' (*Barnett v. Jacobs*, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (*Esteve v. Avad*, 271 App. Div. 725, 727)."

However, while summary judgment is a drastic remedy, depriving as it does a litigant of his day in court [*VanNoy v. Corinth Central School, District*, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. *DiSabato v. Soffee*, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); *Usefof v. Yamali*, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980).

Here, in the case at bar, Mystic concedes AB performed the remedial services involving the environmental cleanup resulting from the accident. Mystic's sole opposition to the motion is the claim that the amounts of money being sought are not supported, yet AB has provided invoices of the work performed. Clearly, the agreement between the parties contemplated the payment of two (2) \$50,000.00 payments to be made on October 31, 2005 and December 31, 2005 with the balance due for the environmental cleanup on February 28, 2006. There being no defense on the issue of liability by Mystic to AB since the work was performed or as to the two (2) \$50,000.00 payments required, the Court finds no issues of fact precluding the granting of summary judgment on the issue of liability or on the two (2) payments called for by the agreement and contract between the parties.

As has been stated so many times in the past, mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a party's request for summary disposition. *V. Savino Oil and Heating Co. Inc. v. Rana Management Corp.*, 161 AD2d 635, 555 NYS2d 413 (2nd Dept. 1990); *Dabney v. Ayre*, 87 AD2d 957, 451 NYS2d 218 (3rd Dept. 1982). See, also, *Marine Midland Bank N.A. v. Idar Gem Distributors, Inc.*, 133 AD2d 525, 519 NYS2d 898 (4th Dept. 1987). Here, defendants do not contest the fact or raise an issue of fact that AB performed environmental cleanup services on Mystic's behalf and at their behest, except to suggest that the amounts owed are in dispute because the agreement left the total balance owed to be uncertain. Yet, it is clear that two (2) payments of \$50,000 was due and owing and thus the only sum in dispute is the total remaining amount upon which defendants seek further discovery.

The discovery as to the invoices and amounts owed does not preclude a granting of summary judgment on the issue of liability. The claims that AB's motion for summary judgment is premature because discovery by way of depositions and documentation of the amounts owed has not been completed is unavailing, especially on the issue of liability only. A party opposing a summary judgment motion may not complain of a lack of discovery without demonstrating some evidentiary basis or fact pattern to suggest that additional discovery might lead to some relevant evidence or facts to defeat the motion. *Lambert v. Bracco*, 18 AD3d 619, 795 NYS2d 662 (2nd Dept. 2005); *Romeo v. City of New York*, 261 AD2d 379, 689 NYS2d 517 (2nd Dept. 1999). There has been no showing, other than mere conjecture, surmise and speculation by Mystic that the contract and agreement for AB's services was not valid. In fact, the thrust of Mystic's arguments is directed not at the fact that AB performed remedial cleanup for it, but that the amounts owed are in dispute. On that issue, its arguments have some merit and therefore, the Court grants summary disposition to AB on liability only and awards summary judgment on the two (2) \$50,000 payments plus applicable interest but reserves for trial on the issue of the remaining damages due and owing on the total balance allegedly remaining.

Finally, CPLR §3212 (c) provides in part:

"If it appears that the only triable issues of fact arising on a motion for summary judgment related to the amount or extent of damages, ... the court may, when appropriate for the expeditious

disposition of the controversy, order an immediate trial of such issues of fact raised by the motion... before the court... .”

This case is ripe for an immediate trial on the issue of the remaining damages, if any, due and owing by Mystic to AB. Therefore, this Court sets this matter down for a pre-trial discovery conference on July 18, 2007 at 11:00 am at which time the Court will supervise the completion of discovery and provide the parties with an immediate trial date on the remaining issue of what, if any, amount of damages is still due and owing AB for the remedial environmental clean up services provided defendants on June 10, 2005.

(1974): As the Court noted in Andre v. Pomeroy, 36 NY2d 131, 362 NYS2d 131, 133

“[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (Millerton Agway Co-op v. Briarcliff Farms, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.”

Accordingly, AB’s motion for summary judgment pursuant to CPLR §3212 is granted on the issue of liability only as well as on the two (2) \$50,000.00 payments due and owing AB by Mystic pursuant to the agreement of August 10, 2005 and the matter will be set down pursuant to CPLR §3212 (c) for trial on the remaining issue of damages.

The parties are directed to appear before this court on July 18, 2007 at 11:00 am to enter into a court ordered and supervised discovery schedule and set forth an immediate trial date on the remaining issue of damages owing to AB. AB is directed to serve a copy of this order on all parties, including Mystics’ insurance carrier AIG, as well as the Court’s Calender Clerk to ensure proper calender entry on July 18, 2007 at 11:00 am.

Settle Judgment

The foregoing constitutes the decision of the Court.

Dated: JUN 20 2007

J.S.C.