

Merchant Servs., Inc. v A.S.A.P. Serv. Corp.

2007 NY Slip Op 31998(U)

July 6, 2007

Supreme Court, Suffolk County

Docket Number: 0000831/2006

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 4-23-07
SUBMITTED: 5-09-07
MOTION NO.: 01 - MD

_____x
MERCHANT SERVICES, INC. and 515 RESTAURANT,
LLC,

Plaintiffs,

LAZER, APTHEKER, ROSELLA & YEDID, P.C.
Attorneys for Plaintiffs
225 Old Country Road
Melville, New York 11747

-against-

A.S.A.P. SERVICE CORP. and JAMES GALLAGHER

JOHN T. RYAN & ASSOCIATES
Attorneys for Defendants
633 East Main Street, Suite 3
Riverhead, New York 11901

Defendants.

_____x

Upon the following papers numbered 1 to 16 read on this motion for Summary Judgment; Notice of Motion and supporting papers 1-8; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 9-10; Replying Affidavits and supporting papers 11-16; it is,

ORDERED that this motion by the plaintiffs for summary judgment in their favor on the issue of liability as to defendant James Gallagher is granted; and it is further

ORDERED that this motion by the plaintiffs for summary judgment in their favor on the issue of liability as to defendant A.S.A.P. Services Corp. is denied; and it is further

ORDERED that on the Court's own motion, the Defendant A.S.A.P. Service Corp. is granted summary judgment in its favor and the complaint is dismissed in so far as it is asserted against the defendant A.S.A.P. Service Corp.; and it is further

ORDERED that the parties are directed to proceed to trial on the issue of damages.

Summary judgment is warranted when there are no issues of fact to be resolved by the trier of fact (*see*, **Hartford Accident & Indemnity Co. v Wesolowski**, 33 NY2d 169, 172; **Sillman v Twentieth Century Fox Film Corp.**, 3 NY2d 395, 404). The 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 issue of fact (*see*, **Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853; **Zuckerman v City of New York**, 49 NY2d 557, 562; **Sillman v Twentieth Century Fox Film Corp.**, *supra* at 404). To

defeat the motion, the opponent must present evidentiary facts sufficient to raise a triable issue of fact (*see*, **Freedman v Chemical Constr. Co.**, 43 NY2d 260, 264). Mere conclusions, expressions of hope, or unsupported allegations or assertions are insufficient to defeat a motion for summary judgment (*see*, **Zuckerman v City of New York**, *supra* at 562).

The Court finds that the plaintiffs have established their entitlement to judgment as a matter of law as to defendant Gallagher based on the contract between Merchant Services, Inc., and A.S.A.P. Service Corp. executed on December 2, 2004. Pursuant to the terms of the contract, A.S.A.P. Service Corp. (“A.S.A.P.”) was a subcontractor employed by the general contractor, Merchant Services, Inc. (“Merchant”), to install a 10-inch diameter sewer line, running approximately 2,300 feet along Baylis Road in Melville, New York. The contract provides that A.S.A.P. was to execute its work in accordance with the contract drawings, specifications and any addenda contained in General Contract documents. The contract further provides that the intent of the work was to “provide [a] system that meets local code requirements leading to total customer satisfaction.” A.S.A.P. agreed that all of its work would fully comply with the code requirements in effect as of the date of the agreement and that all work was to be performed in accordance with the plans, specifications and contract documents. A.S.A.P. was responsible for informing Merchant of any discrepancies between the specifications and the plans and any deviations were to be authorized in writing. Accordingly, paragraph 10 of the contract, entitled “Change Order Procedure”, provides, “If [A.S.A.P.] encounters conditions it considers different from those described in subcontract documents or plans, it is required to issue written notice to [Merchant] before proceeding.” The contract also provides that, if any of the work or materials were found improper or defective by Merchant, A.S.A.P. could proceed to replace or correct the defective work upon written notification from Merchant to do so. Merchant also retained the option to replace and correct the defective work itself and deduct the cost of correcting the defective work from A.S.A.P.’s payment. Merchant claims that it gave A.S.A.P. an opportunity to correct the problem even though there was no contractual obligation to do so. However, A.S.A.P. continued to delay its corrective work, and Merchant exercised its contractual right to replace or correct the defective work itself. Merchant sent a letter to A.S.A.P. on August 1, 2006, informing A.S.A.P. that it was terminating their agreement and would be commencing this lawsuit.

In his Affidavit of Opposition to the motion, defendant James Gallagher states that, after a portion of the sewer pipe was installed, he became “concerned that the sewer line was being installed at an improper pitch i.e. one not in line with the blueprints drafted by Nelson & Pope,” the engineers for the project. Mr. Gallagher claims that he contacted Nelson & Pope and was given a verbal order to stop the work. This work stoppage allegedly lasted three days, at the end of which Mr. Gallagher received a communication from Nelson & Pope indicating that the pitch was “okay” and A.S.A.P. continued its work. However, Mr. Gallagher does not claim that any notification was given to Merchant pursuant to the contract requirements. Mr. Gallagher claims that Nelson & Pope were agents of Merchant and in effect, Nelson & Pope’s verbal okay to resume work was sufficient. In his affidavit, Mr. Gallagher states, “[Merchant’s] own engineers, in effect, its own agents, reviewed the work and approved the way the installation of the sewer pipe was pitched,” and, “[I]ts own engineers acquiesced in A.S.A.P.’s performance.”

In reply, the plaintiffs contend that Nelson & Pope was an independent contractor

and did not have the authority to act as an agent for Merchant. When determining if an agency relationship exists sufficient to bind the principal, the Court will determine if there was actual or contractually delegated control over the work being performed (*see, Vex v Tishman Foley Partners*, 245 AD2d 155). In addition, it is essential to the creation of apparent authority to review the words or conduct of the principal that may give rise to the appearance and belief that the agent possesses authority to act for the principal (*see, Hallock v. State of New York*, 64 NY2d 224) [Agent cannot by his own acts imbue himself with apparent authority. Authority exists upon showing that third party relied on agent because of misleading conduct of the principal, not the agent]).

The record is devoid of any proof that Merchant gave Nelson & Pope authority, actual or apparent, to act on its behalf. The contract between Merchant and Nelson & Pope states that Nelson & Pope was hired solely to survey the work site and draft the plans for the sewer lines. There is no language in the contract that gives Nelson & Pope authority to act as an agent of Merchant, and the Court finds that no such agency relationship existed. A.S.A.P.'s reliance on Nelson & Pope's authority to continue its work, which admittedly was "not in line with the blueprints," without giving the required notice to Merchant was to its own detriment.

A review of the contract shows that James Gallagher signed the contract as President of A.S.A.P. Service Corp. on November 14, 2004 and December 2, 2004. Merchant contends that it performed a complete search of the database of the New York State Department of State, Division of Corporations, and found no record of A.S.A.P. Service Corp. Merchant contends that a further search of the same database revealed A.S.A.P. Construction Services, Inc., which was incorporated 18 months after Mr. Gallagher signed the contract with Merchant and more than four months after the commencement of this action. The plaintiff submits documentary evidence in support thereof. The defendants do not address this issue in their opposition papers.

An action against a non-existent corporation cannot be maintained in this state (*see, Ospina v. VIMM Corp.*, 203 AD2d 440). Moreover, when a defendant enters into a contract in the name of a corporate entity that does not exist, that defendant becomes individually liable for the obligations under the contract (*see, Lodato v. Greyhawk North Am.*, 39 AD3d 496,497; *Brandes Meat Corp. v Cromer*, 146 AD2d 666, 667; *Puro Filter Corp. of America v Trembly*, 266 App Div 750).

The court finds that the plaintiffs have established their entitlement to judgment as a matter of law against the defendant James Gallagher. It is undisputed that he entered into a contract with Merchant as President of A.S.A.P., a non-existent corporation. It is also undisputed that the work performed by A.S.A.P. was "not in line with the blueprints," that Merchant was not given written notice of the problem as required by the contract, and that Merchant exercised its option under the contract to replace and correct the defective work. As previously discussed, Mr. Gallagher's reliance on Nelson & Pope's verbal communication that the pitch of the sewer line was "okay" was misplaced since Nelson & Pope did not have any authority to act for Merchant. Therefore, Mr. Gallagher has failed to raise a triable issue of fact sufficient to defeat the plaintiffs' motion. Accordingly, the motion is granted as to the defendant James Gallagher.

CPLR 3212 (b) provides, "If it shall appear that any party other than the moving party is entitled to summary judgment, the court may grant such judgment without the necessity of a cross-motion." Thus, a motion for summary judgment, irrespective of by whom it is made, empowers the court to search the record and award judgment where appropriate (*see, Grimaldi v Pagan*, 135 AD2d 496). Since A.S.A.P. is a non-existent corporation, this action cannot be maintained against it, accordingly, upon searching the record, the court grants summary judgment in favor of A.S.A.P. and dismisses the complaint insofar as it is asserted against A.S.A.P.

HON. ELIZABETH HAZLITT EMERSON

DATED: July 6, 2007

J. S.C.