

AICCO, Inc. v Williams & Sons Erectors, Inc.
2007 NY Slip Op 32402(U)
July 31, 2007
Supreme Court, Suffolk County
Docket Number: 0002054/2006
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3/21/07
ADJ. DATES 3/23/07
Mot. Seq. # 001- MG

-----X
AICCO, INC., :
: Plaintiff, :
-against- :
WILLIAMS & SONS ERECTORS, INC., :
: Defendant. :
-----X
WILLIAMS & SONS ERECTORS, INC., :
: Third-Party Plaintiff, :
-against- :
FITZHARRIS AGENCY, INC., :
: Third-Party Defendant. :
-----X

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Upon the following papers numbered 1 to 9 read on this motion for summary judgment
_____; Notice of Motion/Order to Show Cause and supporting papers 1-3; 4-5 ;
Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 6-7 _____;
Replying Affidavits and supporting papers 8-9 _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff, AICCO, Inc., for an Order pursuant to CPLR 3212 granting it summary judgment against the defendant, Williams & Sons Erectors, Inc., on the first and second causes of action of the complaint and dismissing defendant's counterclaim, upon the ground that there are no defenses to the first and second causes of action set forth in the complaint and that defendant's counterclaim has no merit, is granted; and it is further

ORDERED AND ADJUDGED that the plaintiff shall have judgement as against the defendant, Williams & Sons Erectors, Inc., in the amount of \$49,398.49, with interest from November 17, 2005 until the date of entry of judgment, as calculated by the Clerk in the amount of _____. Upon presentation of a certified copy of this Order with Notice of Entry, the Clerk of the Court shall enter judgment as against the named defendant with statutory interest to run from the date of entry of the

judgment by the Clerk of the Court together with costs and disbursements in the amount of \$ _____ as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that a hearing shall be held on **September 21, 2007**, regarding plaintiff's application for attorneys' fees in Part 33, at 9:30 a.m., at the courthouse located at 1 Court Street, Riverhead, New York. Counsel for plaintiff shall produce at the hearing its billing records with respect to its representation of plaintiff in this matter; and it is further

ORDERED that since the Court has granted summary judgment to plaintiff against the defendant herein, the third-party action by defendant, Williams & Sons Erectors, Inc. v Fitzharris Agency, Inc., is severed and shall continue. All future documents and correspondence submitted to the Court or exchanged as between the parties shall reflect this severance. The plaintiff shall submit a copy of this Order to the Calendar Clerk of IAS Part 33 who shall note upon receipt of this Order the appropriate changes in the court's computerized records; and it is further

ORDERED that a Preliminary Conference as to the third-party action is scheduled for **September 4, 2007**, at 9:30 a.m., in the DCM Part located at the courthouse at 1 Court Street, Riverhead, New York; and it is further

ORDERED that the movant on this motion shall serve a copy of this Order upon counsel for the defendant/third party plaintiff and third-party defendant with Notice of Entry within thirty (30) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

This is an action sounding in contract. The plaintiff, AICCO, Inc., is an insurance financing company. In April, 2005, plaintiff entered into an insurance premium finance agreement (hereinafter "agreement") with the defendant, Williams & Sons Erectors, Inc. (hereinafter "Williams"). Plaintiff commenced this action seeking to recover money advanced to Williams under the agreement. Plaintiff paid an initial financed premium of \$145,460.00 with a finance charge of \$3,904.56, which was to be paid in eight monthly installments of \$18,670.62. Williams defaulted on making the first and subsequent payments and was billed for a late charge payment of \$933.53 as per the agreement. As a result of the non-payment, plaintiff, as per the agreement, cancelled the insurance policy. Plaintiff received from the insurer with whom Williams insurance broker had placed the insurance, the sum of \$103,900.00, which represented unearned premiums refunded to plaintiff minus the sum of \$45,464.96 representing earned premiums by the insurer.

Although plaintiff has demanded payment of the \$45,464.96, Williams has not made any payments due and payable under the agreement. Plaintiff now moves for summary judgment on its first and second causes of action and to dismiss Williams' counterclaim upon the ground that there are no defenses to the first and second causes of action set forth in the complaint and that Williams' counterclaim has no merit. Plaintiff is in compliance with CPLR 3212(b) (*see e.g. Osowicki v Young*, 140 AD2d 898, 528 NYS2d 716 [3d Dept 1988]), having submitted the affidavit of Joan Stratton, an assistant vice president in its litigation and other documentary evidence. Plaintiff's second cause of action seeks attorney's fees under paragraph 16 of the agreement. Williams opposes the motion and submits the affidavit of Matthew Williams, its president.

It is well settled that when parties set down their agreement in a clear, complete document, their writing should, as a rule, be enforced according to its terms (*see The Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 775 NYS2d 765 [2004]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 565 NYS2d 440 [1990]). It is an elementary principle of contract interpretation that, when parties to an agreement intend that their written agreement constitute the entire understanding between the parties, the courts should enforce their agreement as written (*see e.g. Western Union Tel. Co. v American Communications Assn.*, 229 NY 177 [1949]). Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary a writing (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, *supra*; *see also Wallace v 600 Partners*

Co., 86 NY2d 543, 643 NYS2d 669 [1995]; *Costa v District Nursing Assn. of N. Westchester, Inc.*, 175 AD2d 274, 572 NYS2d [2d Dept 1991]; *lv den* 79 NY2d 752, 580 NYS2d 198 [1991]). An agreement that is not reasonably susceptible of more than one interpretation is not unambiguous (*see Chimart Assoc. v Paul*, 66 NY2d 570, 498 NYS2d 344 [1986]). This rule adds certainty to contract interpretation and enforcement (*see R/S Assocs. v New York Job Dev. Auth.*, 98 NY2d 29, 744 NYS2d 358 [2002]).

In *W.W.W. Assocs. v Giacontieri*, 77 NY2d 157, *supra*, the Court of Appeals had occasion to revisit and reaffirm this fundamental principle of contract law “when parties set down their agreement in a clear and complete document, their writing should as a rule be enforced according to its terms” (*id* at 162). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties reasonable expectations (*see Slamow v Delcol*, 174 AD2d 725, 726, 571 NYS2d 33 [2d Dept 1991], *aff’d* 79 NY2d 1016, 584 NYS2d 424 [1992]; *W.W.W. Assoc.*, 77 NY2d 157, *supra*). Thus, “clear, complete writings should generally be enforced according to their terms” (*id.* at 160).

In the instant matter, Williams does not claim that the language in the agreement is ambiguous or incomplete. Interpretation of an unambiguous contract is a matter for the court (*see Lamont v Stony Brook Homes, Inc.*, 288 AD2d 351, 734 NYS2d 94 [2d Dept 2001]; *Sunrise Mall Assocs. v Import Alley of Sunrise Mall, Inc.*, 211 AD2d 711, 621 NYS2d 662 [2d Dept 1995]; *Lake Contr. & Dev. Corp. v City of New York*, 211 AD2d 514, 621 NYS2d 337 [1st Dept 1995]; *W.W.W. Assoc. v Giacontieri*, 77 NY2d 157, *supra*). The parol evidence rule prohibits the use of evidence outside the four corners of the document to discern what was really intended but unstated or misstated (*see W.W.W. Assoc. v Giancontieri, id.*). The purpose of the parol evidence rule is to give legal effect to whatever intention the parties may have had or thought they had. The writing, therefore, is the complete expression of the agreement between the parties, to the exclusion of any prior negotiations, whether oral or written as between Williams and any other party.

Applying these principles to the instant matter, the Court finds that the parties’ agreement is unambiguous on its face and should be given full force and effect. Since the language of the contract is clear and unambiguous, “the courts may not rewrite the agreement to relieve a sophisticated contracting party from terms that it later deems disadvantageous” (*Doris v Solomon R. Guggenheim Foundation*, 209 AD2d 380, 381, 618 NYS2d 99 [1994]). Plaintiff has shown that it only financed the insurance premiums due and owing to an insurer chosen by Williams insurance broker and it did not procure the insurer to provide coverage for Williams. It was Williams’ insurance broker, at the request of Williams, who did so.

Whether or not a writing is ambiguous is a question of law to be resolved by the court (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, *supra*). The agreement issue, read as a whole, clearly sets forth the intentions of the parties and delineates what will occur should there be a default by a party to the agreement.

Summary judgment is a drastic remedy and should not be granted where there is any doubt of the existence of a triable fact, even if arguable (*see Andre v Pomery*, 35 NY2d 361, 362 NYS2d 131 [1974]). To grant summary judgment, it is necessary for movant to establish his cause of action to warrant the court, as a matter of law, to direct judgment in his/her favor and he/she must do so by the tender of evidentiary proof in admissible form (*see CPLR 3212; Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463 [1993]; *Friends of Animals, Inc. v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

“The function of the court on a motion for summary judgment is not to resolve issues or determine matters of credibility, but merely to determine whether such issues exist” (*Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005] *citations omitted*). “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law [and] failure to make such a showing requires denial of the motion, regardless of the sufficiency of the

opposing papers . . ." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985] citations omitted; see also *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Furthermore, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (see *Stone v Goodson*, 8 NY2d 8, 200 NYS2d 627 [1960]; *Sillman v Twentieth Century Fox*, 3 NY2d 395, 165 NYS2d 498 [1957]). It is not for the court to determine issues of credibility on a motion for summary judgment (see *Williams v Bonowicz*, 296 AD2d 401, 745 NYS2d 58 [2d Dept 2002]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 655 NYS2d 25 [1997]; *Air Flow Taxi Corp. v C.I.T. Corp.*, 258 AD 857, 15 NYS2d 965 [4th Dept 1939]; *Bernstein v Kritzer*, 224 AD 387, 231 NYS 97 [1st Dept 1928]).

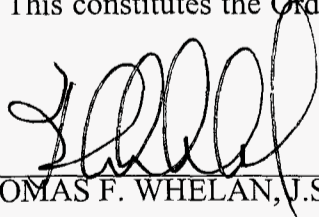
Here, plaintiff has made a prima facie showing of entitlement to summary judgment by the documentary evidence submitted on its motion and the affidavit of Joan Stratton indicating that Williams was in default under the agreement with plaintiff; that the agreement with plaintiff was not controverted by Williams; that a claim was asserted as against Williams; and that plaintiff's expenses, including attorney's fees incurred, are recoverable pursuant to the agreement. Once a prima facie showing of entitlement to summary judgment has been shown, the burden shifts to the defendant to produce evidentiary proof in admissible form sufficient to establish material issues which require a trial in this matter (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The affidavit of Matthew Williams submitted in opposition to plaintiff's motion, fails to raise any credible or triable issues of fact to defeat plaintiff's motion (see *Congregation Beth Torah v Graphic Arts Mut. Ins. Co.*, 293 AD2d 441, 739 NYS2d 454 [2d Dept 2002]; *Locapo v Suffolk County Water Auth.*, 284 AD2d 505, 727 NYS2d 319 [2d Dept 2001]; *Gardner v New York City Tr. Auth.*, 282 AD2d 430, 723 NYS2d 204 [2d Dept 2001]). Williams attempts to obscure the fact of its default by raising the existence of a variety of factual issues, which are not germane to its default and which cannot withstand close factual analysis (see *Canawill, Inc. v Nastasi, White, Inc.*, 5 Misc3d 1091 (A), 799 NYS2d 159 [Sup Ct Queens County 2004]). Unsubstantiated allegations and assertions are insufficient to defeat the motion (see *Massimo v Monfredo*, 272 AD2d 306, 707 NYS2d 356 [2d Dept 2000]; *Rebecca v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1999]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NYS2d 966, 525 NYS2d 793 [1988]). The affidavit of Matthew Williams was crafted solely to oppose plaintiff's motion and fails to raise any genuine issues of fact (see *Manziona v Wal-Mart Stores, Inc.*, 295 AD2d 484, 744 NYS2d 466 [2d Dept 2002]) and unsubstantiated allegations and bold conclusions are insufficient to raise a triable issue of fact (see *Detko v McDonald Rests. of New York*, 198 AD2d 208, 603 NYS2d 496 [2d Dept 1993], *lv app den* 83 NY2d 752, 611 NYS2d 134 [1994]; *Zuckerman v City of New York*, 49 NY2d 557, *supra*).

Plaintiff has shown that it only financed the insurance premium due and owing to the insurer chosen by Williams' insurance broker, the third-party defendant, and that Williams defaulted on the payments. Williams' liability on the agreement is beyond dispute and it has failed to raise a triable issue of fact in opposition to plaintiff's motion (see *Alvarez v Prospect Hospital*, 68 NY2d 320, *supra*). Therefore, plaintiff's motion for summary judgment is granted and it is appropriate upon the granting of summary judgment to plaintiff, to sever its causes of action from the third-party action for which resolution in a plenary proceeding may still be required (see CPLR 603, *Statewide Sav. & Loan Assn. v Sayerkill Enter.*, 65 AD2d 887, 410 NYS2d 423 [3d Dept 1978]). While plaintiff is entitled to attorney's fees, the amount of said fees are not certain and thus a hearing is required (see *Afco Credit Corp. v Boropark Twelfth Ave. Realty Corp.*, 187 AD2d 634, 590 NYS2d 519 [2d Dept 1992]).

Accordingly, the motion is granted as herein indicated. This constitutes the Order and Judgment of the Court.

DATED: 7/3/07


THOMAS F. WHELAN, J.S.C.