

CBS Outdoor Inc. v NY Gear, Inc.

2007 NY Slip Op 33344(U)

October 15, 2007

Supreme Court, New York County

Docket Number: 0102133/2007

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 102133/2007

CBS OUTDOOR INC.

vs

NY GEAR, INC.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 102133/07

MOTION DATE 10/1/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of plaintiff CBS Outdoor Inc., a Delaware corporation for an order granting summary judgment in its favor as against defendants NY Gear, Inc. and Hood Rich Apparel Company, Inc., d/b/a Hoodrich-Clothing Line, is **denied as premature**; and it is further

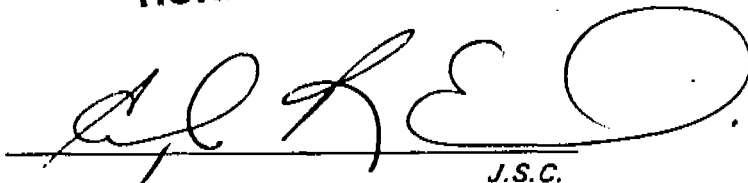
ORDERED that the cross motion of defendants NY Gear, Inc. and Hood Rich Apparel Company, Inc., d/b/a Hoodrich-Clothing Line for an order granting summary judgment in their favor as against plaintiff CBS Outdoor Inc., a Delaware corporation is **denied as premature**; and it is further

ORDERED that counsel for all parties shall appear in Part 35, 60 Centre Street Room 438 at 2:15 p.m. for a preliminary conference on Wednesday, November 14, 2007; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

HON. CAROL EDMEAD

Dated: 10/15/07


J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

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

PAPERS NUMBERED

FILED

OCT 18 2007

NEW YORK
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

CBS OUTDOOR INC., a Delaware corporation, x

Plaintiff,

-against-

NY GEAR, INC., HOOD RICH APPAREL
COMPANY, INC., d/b/a HOODRICH-CLOTHING
LINE and CAPITAL ADVERTISING,

Defendants.

EDMEAD, J.S.C. x

Index No. 102133/07

DECISION/ORDER

FILED
OCT 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Plaintiff CBS Outdoor Inc., a Delaware corporation (“plaintiff”) moves for an order pursuant to CPLR 3212, granting summary judgment in its favor as against defendants NY Gear, Inc. (“NY Gear”) and Hood Rich Apparel Company, Inc., d/b/a Hoodrich-Clothing Line (“Hoodrich”) (collectively “defendants”).

Defendants cross move for an order pursuant to CPLR granting summary judgment in their favor and against plaintiff.

Plaintiff's Contentions

On or about May 17, 2006, plaintiff entered into a contract for transit advertising, contract number 0296180, dated May 17, 2006 with defendants (the “Agreement”), whereby plaintiff agreed to provide certain advertising services as requested by defendants. Thereafter, the Agreement was not modified. No account executives or salesperson had the authority to execute or modify the Agreement on plaintiff’s behalf. This was made clear to defendants by the fact that Hector E. Gonzalez (“Gonzalez”) who is listed on the face of the Agreement as the “salesperson”

did not sign the Agreement. As such, Gonzalez had no actual, implied or apparent authority to modify the Agreement.

The Agreement required defendants to pay the total sum of \$35,550.00 for advertising over the duration of three (3)- four (4) week periods. The Agreement further provided that performance would commence on approximately July 10, 2006 and end on approximately October 1, 2006.

Pursuant to the express Terms and Conditions of the Agreement, plaintiff provided the requested advertising services and fully complied with all material provisions and obligations under the Agreement. Nonetheless, defendants failed to make any payments under the Agreement, thereby leaving a principal balance of \$35,550.00 due and owing to plaintiff.

Defendants breached the Agreement by failing to pay plaintiff in full for the agreed upon value of the billboard advertising services provided by plaintiff to defendants under the Agreement. Defendants are now indebted to plaintiff in the principal amount of \$35,550.00, plus interest.

Despite repeated demands for payment, defendants remain indebted to plaintiff for the sums set forth above.

Defendants' Contentions

The Agreement referenced by plaintiff is not the final form of the agreement between the parties. Marcel Chehade ("Chehade"), president of defendant NY Gear, states that on or about June 24, 2006, he signed an amended contract which named Hoodrich as the advertiser in place of Capital Advertising.

After the contract was finalized, problems arose in furnishing the material necessary for

the advertising campaign to plaintiff. Chehade engaged in telephone conversations and personal conversations with Gonzalez, plaintiff's agent, in which Chehade informed Gonzalez of these problems and told Gonzalez that if the advertising campaign was to proceed, it needed to be for a full twelve weeks starting from the date when the advertising material was actually furnished to the plaintiff for posting or in the alternative that the contract should be cancelled and held null and void.

On July 19, 2006 Hoodrich received correspondence from Gonzalez stating that he had received approval for the campaign to be extended so that the advertisement would last for a full twelve week term, beginning upon everything being posted and the campaign being fully running.

Upon receiving the July 19th correspondence, Chehade spoke by telephone with Gonzalez who confirmed that he had spoken with those in authority at plaintiff's business and that the campaign schedule would be adjusted according to his previously stated correspondence.

Thereafter at the end of the original contract Chehade received information stating that the campaign had been terminated on its original contract date. Plaintiff never furnished proof or certification of any posting of advertising materials whatsoever and breached the terms of the agreement as amended. During the various telephone conversations with Gonzalez prior to agreeing to the extension, Chehade and Gonzalez discussed the cancellation of the contract absent of its extension. Gonzalez stated that plaintiff had agreed that in lieu of the threatened cancellation, the advertising campaign would be extended. Thus there was additional consideration for the change in the agreement.

Plaintiff's Reply

Cehade's claim that the Agreement is not the final contract is untrue and this fact is supported by Cehade's inability to produce a copy of the alleged amended contract. And, at the time the Agreement was signed Cehade disclosed that the subject advertising was being performed on behalf of both defendants, and that Capital was merely a trade name used by defendant Hoodrich.

Cehade's claim that plaintiff never produced proof or certification of any posting of advertising materials whatsoever and breached the Agreement is refuted by the e-mails annexed to the affidavit in reply.

Gonzalez in an accompanying affidavit states that he lacked the authority to bind plaintiff to the modifications as alleged by Cehade.

Analysis

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his

or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

This court finds that issues of fact exist precluding summary judgment for either plaintiff or defendants at this juncture. Issues of fact surround significant areas of this case. (*see Personius v Mann*, 5 NY3d 857 [2005], *modfg* 20 AD3d 616 [2005]; *Campbell v City of New York*, 32 AD3d 703, 704 [2006]; *Weller v Colleges of the Senecas*, 217 A.D.2d 280, 285 [1995]).

Issues surround Gonzalez' actual and/or apparent authority, and his affidavit is inadequate to assuage those issues surrounding his authority. (*see Pyramid Champlain Co. v R.P. Brosseau & Co.*, 267 A.D.2d 539, 544, 699 N.Y.S.2d 516, *lv. denied* 94 N.Y.2d 760, 706 N.Y.S.2d 80, 727 N.E.2d 577; *Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 A.D.2d 313, 635 N.Y.S.2d 587). Gonzalez should be subject to deposition.

Further, issues exist concerning the actual parties to the Agreement. This issue is not

resolved in light of the fact that both parties raise conversations outside of the four corners of the Agreement as to the nature of the true parties.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of plaintiff CBS Outdoor Inc., a Delaware corporation for an order granting summary judgment in its favor as against defendants NY Gear, Inc. and Hood Rich Apparel Company, Inc., d/b/a Hoodrich-Clothing Line, is **denied as premature**; and it is further

ORDERED that the cross motion of defendants NY Gear, Inc. and Hood Rich Apparel Company, Inc., d/b/a Hoodrich-Clothing Line for an order granting summary judgment in their favor as against plaintiff CBS Outdoor Inc., a Delaware corporation is **denied as premature**; and it is further

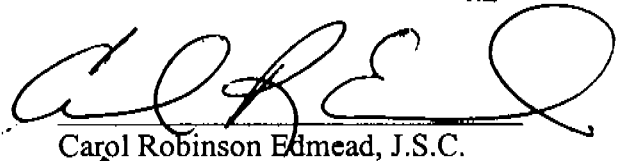
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ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

This constitutes the decision and order of this court.

Dated: October 15, 2007

HON. CAROL EDMead



Carol Robinson Edmead, J.S.C.

FILED
OCT 18 2007
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