

Sorkin v Ruddick

2007 NY Slip Op 33396(U)

October 15, 2007

Supreme Court, New York County

Docket Number: 0600458/2006

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 600458/2006

SORKIN, MICHAEL

vs

RUDDICK, MARGIE

Sequence Number : 002

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for ^{partial} summary
Judgment

PAPERS NUMBERED

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

1, 2

Answering Affidavits — Exhibits _____

3, 4

Replying Affidavits _____

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by plaintiff for partial
summary judgment is decided in accordance with
the attached memorandum decision.

FILED

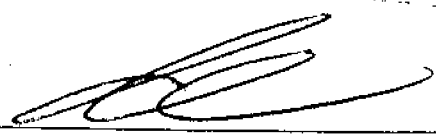
OCT 22 2007

NEW YORK
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: _____

10/15/07



J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

submission on a request for proposals to landscape Queens Plaza in Long Island City. On January 1, 2003, Ruddick entered into a written consultant contract with NYCED to provide design services in exchange for a fee of \$1,073,975.

Thereafter, the defendant Ruddick entered into a written sub-consultant agreement with the plaintiff Sorkin, for Sorkin to design the project in exchange for a fee of \$141,350. After claiming that Sorkin was unable to follow the requests of the client NYCED, Ruddick terminated Sorkin's services.

This is an action to recover damages for breach of contract in the sum of an unpaid balance of \$83,825. The plaintiff Sorkin alleges that prior to termination, he had fully satisfied his obligations under the terms of the sub-consultant agreement to the extent required to receive full compensation for his services thereunder.

The defendant Ruddick has counterclaimed for: unstated losses allegedly sustained as a result of Sorkin's failure to fully perform (first and second); the sum of \$41,625 allegedly expended to rectify the inadequate work performed by Sorkin (third); intentional interference with prospective business advantage (fourth); and defamation (fifth and sixth).

In support of his motion to dismiss the counterclaims, Sorkin argues that Ruddick has produced no evidence showing that she incurred losses, costs, damages, expenses, lost profits, loss of business expectancy resulting from, or relating to the work, employment, or termination of Sorkin.

In support of his motion pursuant to CPLR 3212 (g) for an order specifying what facts are incontrovertible, and deeming them established for all purposes, Sorkin argues that the evidence presented by him warrants an order granting partial summary judgment on the issues as to which no contrary documents have been disclosed, thereby both limiting the issues for trial and fostering a settlement.

In opposition to the motion to dismiss the counterclaims, the defendant Ruddick alleges that the plaintiff Sorkin neither fully satisfied his obligations under the terms of the sub-consultant agreement, nor timely delivered the work. Ruddick alleges that she was forced to pay the firm of Marpillero Pollak Architects the sum of \$63,825 in replacement sub-consultant fees, and incur an additional \$41,625 in expenses and costs for time and materials arising from the numerous hours reviewing, correcting and completing Sorkin's inadequate work.

In reply, Sorkin argues that both in discovery, and on this motion, Ruddick is unable to produce any documents to support her counterclaims. Ruddick cannot produce any paperwork to support her allegation that she paid the sum of \$63,825 to Marpillero Pollak Architects.

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 eliminate any material issue of fact from the case (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]). As stated by the Appellate Division, First Department:

'If the issue claimed to exist is not 'genuine, but feigned, and * * * there is in truth nothing to be tried' summary judgment is properly granted.' Rubin v. Irving Trust Co., 305 N.Y. 288, 306, 113 N.E.2d 424, 432. It is incumbent on the Court, therefore, to search the proof, if any, as proffered by affidavits or otherwise, to ascertain whether it discloses a real issue, rather than a formal, perfunctory, or shadowy one. ... It is

incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial. *Dodwell & Co. Ltd. v. Silverman*, 234 App.Div. 362, 254 N.Y.S. 746.”

Di Sabato v Soffes, 9 A.D.2d 297, 300 (1st Dept. 1959).

Preliminarily, the court notes that Ruddick fails to address the motion to dismiss her fourth, fifth, and sixth counterclaims. Therefore, the motion to dismiss the fourth counterclaim for intentional interference with contract and the fifth and sixth counterclaims for defamation are granted without opposition.

Turning to the merits, in searching the proof, as proffered by defendant, “to ascertain whether it discloses a real issue rather than a formal, perfunctory, or shadowy one” [*Di Sabato v Soffes*, 9 A.D.2d 297, 300 (1st Dept. 1959)], this Court is left with only one conclusion; despite the parties conducting extensive discovery, there is no evidence supporting the defendant Ruddick’s counterclaims and her bald assertion that she expended a substantial sum of money in order to redo Sorkin’s work. For example, in support of defendant’s claim that she expended \$63,825 under a replacement subconsultant agreement, instead of attaching invoices and/or cancelled checks, she merely attaches what appears to be a draft contract, which is unsigned. [Exh. N, Ruddick Aff. In Opp]. It is well settled that an opponent to a summary judgment motion “is required to assemble, lay bare and reveal his proofs in order to show his defenses are real and capable of being established on trial and it is insufficient to merely set forth averments of factual and legal conclusions.” *Tobron Office Furniture Corp. v. King World Productions, Inc.*, 161 A.D.2d 355, 357 (1st Dept. 1990) [internal citations omitted]; *Indig v. Finkelstein*, 23 N.Y.2d 728, 729 (1968) [“ The burden upon a party opposing a motion for summary judgment is not met merely by a repetition or incorporation by reference of the allegations contained in pleadings or bills of particulars, verified or unverified.” (internal citations omitted)]; *Maurice O’Meara Co. v.*

National Park Bank of New York, 239 N.Y. 386, 395 (1925) [“Defendant's affidavits used in opposition to the motion merely repeat the various denials contained in the answer. These denials were insufficient to raise an issue on a motion for summary judgment, since, under the rule, facts must be presented rather than mere general or specific denials in order to defeat a motion.”].

Here, defendant has failed to proffer even one invoice, nor a cancelled check, or a signed contract, in support of her counterclaims. Thus, defendant has utterly failed to lay bare her proof, both in discovery which has concluded, and in opposition to this motion. While, there may be a triable issue of material fact concerning the timely delivery of Sorkin's work as the defendant Ruddick offers her affidavit stating that the work was untimely delivered after Sorkin's employment was terminated, this really addresses the main claim rather than the counterclaims. Accordingly, the plaintiff Sorkin met his burden of establishing, prima facie, his entitlement to summary judgment dismissing the first, second and third counterclaims. Thus, summary judgment is granted dismissing the first, second and third counterclaims, which may be vacated within 10 days of service of notice of entry, upon proper papers which shall include admissible documentary proof such as invoices and cancelled checks supporting such counterclaims.¹

Shifting to the plaintiff Sorkin's motion for an order ascertaining that his list of 11 items of “fact” are not in dispute, CPLR 3212 (g) recognizes that, notwithstanding the denial of a summary judgment motion, one or several facts may nonetheless appear to be conceded or otherwise definitively resolved. However, CPLR 3212 (g) is discretionary and, in an urban county such as New York, the time necessary to be expended on each CPLR 3212(g) motion, is a luxury that the courts simply cannot afford (Siegel, Practice Commentaries, McKinney's Cons

¹ If appropriate, defendant may cross-move for discovery sanctions if such documents were not previously provided pursuant to discovery requests, and shall attach all requests and copies of court orders in support.

Laws of NY, Book 7B, CPLR C3212:35, at 46). It is suggested that the parties stipulate to any undisputed facts, for ease of trial; alternatively, notices to admit may be employed. Each side shall prepare a list of undisputed facts which shall be sent to the other side within 20 days, and shall be responded to within 20 days, in an effort to expedite this process.

Accordingly, it is

ORDERED that the motion is granted only to the extent that the first , second, third, fourth, fifth and sixth counterclaims of the answer are dismissed; summary judgment dismissing the first, second and third counterclaims may be vacated within 10 days of service of notice of entry, upon proper motion papers which shall include admissible documentary proof such as invoices and cancelled checks supporting such counterclaims;² and it is further

ORDERED that the balance of the action shall continue; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant with notice of entry.

Dated: October 15, 2007



Hon. Doris Ling-Cohan, J.S.C.

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² If appropriate, defendant may cross-move for discovery sanctions if such documents were not previously provided pursuant to discovery requests, and shall attach all requests and copies of court orders in support.