

Kone, Inc. v Resheff, Inc.

2008 NY Slip Op 30180(U)

January 14, 2008

Supreme Court, New York County

Docket Number: 0600913/2006

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
MARTIN SHULMAN
J.S.C.

PART 1

PRESENT:
Index Number : 600913/2006

KONE, INC.

vs

RESHEFF, INC.

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 600913/026

MOTION DATE _____

MOTION SEQ. NO. 002

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 A-H
~~Cross-Motion~~
Answering Affidavits — Exhibits A+B
Replying Affidavits +exh. A-C

PAPERS NUMBERED	
1,2	_____
3,4	_____
5	_____

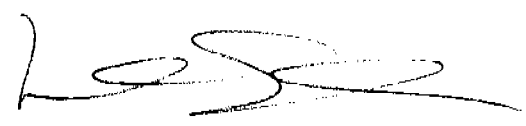
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED
JAN 23 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 14, 2008



MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X

KONE, INC.,

Plaintiff,

Index No. 600913/06

-against-

Decision/Order

RESHEFF, INC.,

Defendant.

-----X

MARTIN SHULMAN, J.:

Plaintiff Kone, Inc. ("Kone") moves, pursuant to CPLR 3212, for an order granting summary judgment on the complaint. Defendant Resheff, Inc. ("Resheff") cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint.

This is an action for breach of contract and account stated. The action arises from a construction/renovation project located at 401 Greenwich Street, New York, New York (the "Property" or the "Project"). Red Whip, Inc. ("Red Whip") is the owner of the Property and successor in interest to 401 Greenwich Corp., the Property's former owner. Red Whip employed Resheff as the general contractor on the Project. Resheff retained Kone to furnish one elevator at the Property, and to provide the necessary labor and materials to completely install the elevator.

Kone alleges in the first cause of action that, on January 2, 2002, the parties entered into an agreement pursuant to which Kone agreed to furnish labor and materials and, in turn, Resheff agreed to pay Kone the reasonable value thereof. Kone claims that it performed all of the conditions of the agreement, and that Resheff breached the agreement by failing to pay Kone the balance due in the amount of \$47,782.00. The

second cause of action for an account stated is based upon the same allegations as recited above.

In its answer, Resheff admits that it entered into the agreement with plaintiff, however, it denies the complaint's remaining allegations. Resheff asserts accord and satisfaction as an affirmative defense.

In support of its motion, Kone submits a copy of a letter which it sent to Resheff, dated November 26, 2001 (the "Proposal Letter"), proposing various terms for a contract, including a quote of \$136,275.00 for the necessary labor and materials. Item no. 12 of the Proposal Letter states, in relevant part, that "[as] previously agreed, [Kone] and Red Whip, Inc. will enter into an additional one-year complete maintenance contract at the rates previously discussed." The bottom of the Proposal Letter contains the following statement:

This offer, when accepted by [defendant] and countersigned by an officer of [plaintiff] will be the entire agreement of the parties. This offer, if accepted on any other form or document or if the terms are amended, shall not be binding on [plaintiff] unless countersigned in writing by an officer of [plaintiff].

The Proposal Letter was signed "accepted" by Resheff on January 2, 2002, but was never countersigned by Kone.

Kone further submits copies of four contract change modifications to the agreement (the "Contract Change Proposals"), two account statements and two invoices which it claims it sent to Resheff. The Contract Change Proposals provide for a total increase of \$3,275.00 to the contract amount, and authorization to proceed with the work. Kone sent these to Resheff, but they were executed by Kone and Red Whip.

With regard to the invoices, one invoice, dated October 11, 2002, shows an amount due of \$96,047.50. The "Payer" is shown as Red Whip, and the "Bill To" is shown as Resheff. A second invoice, dated December 12, 2002, shows an additional balance due to Kone in the amount of \$13,627.50, with the "Payor" and "Bill To" showing only Resheff's name and address. A copy of an account statement, dated June 20, 2003, is addressed to Red Whip only, and shows a balance due of \$34,154.50. A second account statement, also dated June 20, 2003, is addressed to Resheff only, and shows an additional amount due of \$13,627.50. Kone claims that Resheff never objected to or contested these invoices, and that there remains a balance due in the total amount of \$47,782.00.

Finally, Kone attaches a copy of a stipulation of settlement entered into by Resheff and Red Whip and 401 Greenwich Corp. Resheff had previously commenced an action against Red Whip and 401 Greenwich Corp. in Supreme Court, New York County, entitled Resheff, Inc. v 401 Greenwich Corp., Inc. and Red Whip, Inc., Index No. 600756/03, for monies owed to it for work it performed on the Project. That action was settled by stipulation, dated August 11, 2004, and provided, inter alia, for the payment of \$225,000 by Red Whip to plaintiff. The general releases between the parties specifically excluded any claims by Kone against Resheff in connection with the Project, as well as monies paid by Red Whip to Resheff on account of Kone. However, the release in favor of Resheff included claims related to the lien Kone filed against the Property, except as to amounts Red Whip paid to Resheff on account of Kone.

In support of its cross-motion for summary judgment dismissing the complaint, and in opposition to Kone's motion, Resheff maintains that there was no contract between

itself and Kone¹ because it was merely acting as an agent for Red Whip, a disclosed principal, in its dealings with Kone on the Project. Resheff argues that any monies owed to Kone for the installation of the elevator is owed by Red Whip. With regard to Kone's account stated claim, Resheff contends that it never received the invoices and statements Kone relies upon.

In its affidavit in opposition to Resheff's cross-motion for summary judgment, Kone attaches copies of two cancelled checks. The first check, dated January 4, 2002, was issued by Resheff to Kone in the amount of \$26,600.00 and is referenced as "401 Greenwich/20% Down Payment on Contract." The second check, dated November 11, 2002, was issued by Resheff to Kone in the amount of \$61,893.00, and is also referenced as "401 Greenwich."

Kone also attaches a copy of the motion and affirmation of Vashali Aggarwal ("Aggarwal") in support of Red Whip's and 401 Greenwich Corp.'s (the "third-party defendants") motion to dismiss the third-party complaint for indemnification.² Aggarwal claims, among other things, that Red Whip made full payments to Resheff for all

1. This court notes that this contradicts Resheff's answer to plaintiff's complaint, wherein it admitted the allegation in paragraph 4 that the parties entered into an agreement on January 2, 2002, whereby Resheff agreed to pay the reasonable value of the services and/or materials furnished by Kone for the Project.

2. Resheff commenced a third-party action against Red Whip and 401 Greenwich Corp. on July 9, 2007 under New York County Index No. 590614/07. At the time that this motion was filed, the third-party defendants had not yet answered the third-party complaint; however, at the time that Kone filed its affidavit in opposition to Resheff's cross-motion for summary judgment, the third-party defendants had filed their motion to dismiss, which is now *sub judice*.

requisitions submitted to it by Resheff, which payments included, inter alia, the monies owed to Kone for work and services it performed in connection with the Project.

It is well settled that a 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 (see e.g. Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidence sufficient to establish the existence of a material issue of fact (Zuckerman v City of New York, 49 NY2d 557 [1980]).

At the outset, this court notes that there is no dispute that Kone performed the services authorized and approved by Resheff and Red Whip. This court first turns to the question of whether Resheff's possible agency relationship with Red Whip for the purpose of paying Kone is dispositive of these motions. The general rule is that "an agent for a disclosed principal 'will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal'" (Savoy Record Co. v Cardinal Export Corp., 15 NY2d 1, 4 [1964], quoting Mencher v Weiss, 306 NY 1, 4 [1953]); see also News America Marketing, Inc. v Lepage Bakeries, Inc., 16 AD3d 146 [1st Dept 2005]).

Here, there is no language, or other evidence, in any of the attached exhibits which provides that Resheff, as general contractor, was merely an agent of Red Whip for the purpose of paying Kone. However, even assuming, arguendo, that there was such language or evidence of agency, this would not eliminate Resheff's obligation to pay Kone for its work on the Project since this would offend public policy and basic contract

law (Blandford Land Clearing Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa., 260

AD2d 86, 93 [1st Dept 1999]):

The customary contractual relationship between general contractor and the entities engaged to perform work on the owner's property obligates the subcontractor to perform the specified work and obligates the contractor to pay for work actually performed. The work and the payment are the mutual inducement for the obligation undertaken by each party.

(*id.* at 93; see also West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co., 87 NY2d 148, 158 [1995] ["As a matter of contract law, the owner and the general contractor are liable to plaintiff for the work plaintiff has been authorized to perform, and performed, under the subcontract agreement"]).

Moreover, although Resheff asserts "accord and satisfaction" as an affirmative defense, it does not offer any evidence to support this defense. Acceptance of a check will only operate as accord and satisfaction if the person receiving the check has been clearly informed that acceptance of the offered amount will settle or discharge a disputed claim (Complete Messenger & Trucking Corp. v Merrill Lynch Money Markets, Inc., 169 AD2d 609 [1st Dept 1991]). There is no evidence that the checks Resheff gave to Kone were accepted in settlement of Kone's claim. Accordingly, Kone's motion for summary judgment on the first cause of action for breach of contract is granted and Resheff's cross-motion for summary judgment on the first cause of action is denied.

Kone's motion for summary judgment on its second cause of action for an account stated is denied, since Kone fails to provide any evidence that it properly addressed and mailed the invoices to Resheff (Morrison Cohen Singer & Weinstein, LLP v Brophy, 19

AD3d 161 [1st Dept 2005]). Resheff's cross-motion to dismiss the second cause of action is therefore granted.

Accordingly, it is

ORDERED that plaintiff Kone, Inc.'s motion for summary judgment is granted as to the first cause of action for breach of contract, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Resheff, Inc. in the amount of \$47,782.00, together with interest as prayed for allowable by law at the rate of 9% per annum from March 16, 2006 until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff Kone, Inc.'s motion for summary judgment is denied as to the second cause of action for account stated; and it is further

ORDERED that defendant Resheff's cross motion for summary judgment dismissing the second cause of action for account stated is granted; and it is further

ORDERED that defendant Resheff's cross motion for summary judgment dismissing the first cause of action is denied; and it is further

ORDERED that the third-party action shall be severed and shall continue

This constitutes this court's Decision and Order. Courtesy copies of the Decision and Order have been provided to counsel for the parties.

DATED: New York, New York
January 14, 2008



HON. MARTIN SHULMAN, J.S.C.

FILED
JAN 23 2008
NEW YORK
COUNTY CLERK'S OFFICE