

**Commercial Tenant Servs., Inc. v Securities  
Indus. Automation Corp.**

2008 NY Slip Op 30213(U)

January 22, 2008

Supreme Court, New York County

Docket Number: 0650201/2006

Judge: Herman Cahn

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT

Index Number : 650201/2006

PART 49

COMMERCIAL TENANT SERVICES

vs

SECURITIES INDUSTRY AUTOMATION

INDEX NO. 650201/06

Sequence Number : 001

MOTION DATE \_\_\_\_\_

DISMISS

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

C

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

PAPERS NUMBERED

**FILED**

JAN 25 2008

NEW YORK COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....**

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

Dated: January 22, 2008

[Signature]

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 49

-----X

COMMERCIAL TENANT SERVICES, INC.,

Plaintiff,

-against-

Index No. 650201/06

SECURITIES INDUSTRY AUTOMATION  
CORPORATION,

Defendant.

-----X

**HERMAN CAHN, J.:**

In this action for breach of contract and related issues, defendant Securities Industry Automation Corporation (SIAC) moves, to dismiss the first, third, fourth and fifth causes of action for failure to state a cause of action, CPLR to 3211 (a) (7); for summary judgment dismissing the claims concerning the audit of defendant's premises at 55 Water Street, New York, New York, CPLR 3212; and for declaratory judgment on the sixth cause of action.

**FACTS**

Plaintiff Commercial Tenant Services, Inc. (CTS) provides commercial lease audit services, in the course of which CTS identifies overpayments that its clients have made to landlords or other entities. CTS entered into a service agreement with SIAC in October 2002, which allegedly resulted in CTS identifying hundreds of thousands of dollars of overpayments made by, and annual refunds due to, SIAC with respect to lease charges for its MetroTech Office. The agreement provided for SIAC to pay CTS a contingent fee based upon the amount SIAC

**FILED**  
JAN 25 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

recovered, or the amount that its payments were reduced. In its complaint, CTS alleges that SIAC used the CTS' information and findings to obtain further refunds and credits from its landlords without paying CTS its contractual fees for such refunds and credits. Specifically, CTS alleges that SIAC has refused to pay CTS fees on any recoveries that it has received as a result of audits after 2003. Additionally, CTS contends that SIAC has withheld information about how it used CTS' information, which resulted in refunds, and that SIAC used CTS' information to have another entity audit lease charges for the MetroTech Office for 2002, and did not compensate CTS for those refunds, although they were obtained as a result of CTS' audit.

The parties entered into a subsequent agreement regarding SIAC's Water Street Office. The agreements between CTS and SIAC consist of the Corporate Consultant's Agreement, Statement of Work Schedule "A," Addendum "A," Statement of Work #2, and Statement of Work #3. Statement of Work, Schedule A, provides that CTS will "review and analyze SIAC's submitted leases, rent statements, electric billings, and escalations statements including the 2001 operating expenses . . . ." SIAC agreed to pay CTS 35% of

a Refund obtained by SIAC for charges that have previously been billed or are billed for the current lease and fiscal years for which CTS conducts its review, or through the date of final settlement with SIAC's Landlord for issues relating to CTS' findings, and for two (2) years subsequent to when Refunds are actually received, or, with respect to lowered future rents, when a bill for the original amount would have been payable.

Notice of Motion, Ex. A. Statement of Work #2 provides for CTS to perform a review and analysis of SIAC's office at 55 Water Street, New York, New York. Payment was based upon a daily rate, with a maximum fee of \$9,000.00. Statement of Work #3 provides for payment to CTS if SIAC actually receives a refund, as defined in the agreement. It states that SIAC agrees to

pay CTS 35% of the refund for years that CTS conducted its review and analysis, and 35% of the refund for the first and second year following the review period on which CTS and/or SIAC and the relevant party reach a final settlement.

CTS brings this action, contending that SIAC has not paid it the full amount that was owed, and has refused to provide information necessary to determine the appropriate fee. Further, CTS alleges that SIAC used the information CTS generated in order to have another entity represent it in negotiations with the landlord. CTS' first cause of action is for breach of contract, the second is for quantum meruit, the third is for unjust enrichment, the fourth is for promissory estoppel, the fifth is for breach of duty of good faith, and the sixth seeks a declaratory judgment that CTS is owed fees on any refunds obtained by defendant as a result of work undertaken by plaintiff for the years for which plaintiff performed a lease audit, through the date of defendant's settlement with its landlord(s), and for two years thereafter.

## DISCUSSION

### Breach of Contract

SIAC contends that, with respect to the MetroTech Office, the agreement is unenforceable because of the indefiniteness of the duration of SIAC's payment obligation. It maintains that the duration of the obligation is contingent upon the event of SIAC settling with its landlord or others, and that such a time is uncertain, which renders the agreement unenforceable. In addition, SIAC contends that the only time frame included in Schedule A was the 2001 lease year and that, therefore, CTS had no right to be SIAC's exclusive representative for any other year. SIAC also avers that it was permitted to utilize CTS' findings and did not do anything improper. Consequently, SIAC argues that the breach of contract cause of action should

be dismissed.

With respect to its argument that the contract is void for indefiniteness, SIAC's position is not compelling. Where parties to an agreement indicate an intention to be bound and do not agree on any further terms, the contract is not an agreement to agree, which is unenforceable. *See Matter of 166 Mamaroneck Ave. Corp. v 151 East Post Road Corp.*, 78 NY2d 88 (1991). Further, determining that a contract is unenforceable for indefiniteness is a last resort, and is not invoked unless there is no way to determine the terms of the parties' agreement. *Id.* Here, the parties agreed to the terms. The only question was for how long SIAC would be required to pay a fee to CTS. Contrary to SIAC's assertion, that is a matter that can be determined from the evidence.

The agreement requires SIAC to pay the 35% fee for each year that it realizes a benefit from CTS' work on its behalf. If SIAC reaches a settlement with the landlord, or other overcharging entity, then SIAC is required to pay the fee for every year for which it received a benefit up until it reaches the settlement, and for two years after reaching the settlement. The contract is enforceable; the parties did not have to agree on further terms. SIAC's position is without merit, and the contract is enforceable.

With respect to SIAC's contention that it was entitled to use the information that CTS had culled, SIAC is only partially correct. While SIAC may have been entitled to disseminate the information, that did not relieve it of an obligation to compensate CTS for its contribution to SIAC's reduced costs. The agreement provides that CTS is entitled to fees for any year in which its work was instrumental in reducing the charges to SIAC. That was not limited to 2001; 2001 was merely included in the time frame.

SIAC maintains that CTS was fully paid for the review of SIAC's lease at the Water Street Office. It notes that Statement of Work #2 provides for a fixed fee, which SIAC paid. Statement of Work #3 provides for a percentage-based fee. SIAC does not dispute the enforceability of that section, because it sets a definite duration for SIAC's obligation to pay the commissions. Specifically, it includes the time periods under review and the two subsequent years. Nonetheless, SIAC contends that this cause of action should be dismissed with respect to the Water Street Office, because CTS invoiced SIAC for the commissions on all the recoveries that SIAC received and SIAC paid those invoices in full. Therefore, SIAC seeks summary judgment dismissing any claim for breach of contract under Statement of Work #2 and #3.

CTS contends that summary judgment should be denied because the parties have not completed discovery and CTS does not have any way of knowing whether the information regarding the refunds that SIAC provided it was accurate. CTS' invoices were based upon information that SIAC gave it, but it did not have an opportunity to ascertain whether SIAC gave it complete information. CTS also claims that SIAC misreads the provisions of Statement of Work #3, and that it actually provides for payment for two years following SIAC's settlement of claims based upon the years that CTS reviewed.

While it is true that information regarding the invoices, and their payment, is within both parties' knowledge, the facts underlying the invoices are not equally available to both parties. CTS has demonstrated that "further discovery might reveal material facts in the movant's exclusive knowledge . . . ." (*Pampris v Egnasher*, 20 AD3d 746, 747 [3d Dept 2005] [citations omitted]) in the form of the amount of the refunds on which the fee is to be based. Consequently, it would be premature to grant summary judgment with respect to the Water Street

Office at this time.

### Unjust Enrichment

CTS raises a claim for unjust enrichment based upon its claim that SIAC used CTS' work in order to obtain refunds via a third party, which negotiated the refund based upon CTS' work without compensating CTS. SIAC contends that the unjust enrichment claim must fail because the facts show that SIAC paid CTS for the services it rendered.

As discussed above, CTS claims that SIAC used its information to obtain refunds without paying it the fee that was required. The fact that SIAC disputes that allegation does not render the cause of action subject to dismissal. At this juncture, it cannot be determined whether CTS' information was improperly used, or used in a manner that required SIAC to pay CTS further fees.

However, this does not end the inquiry. Where there is a bona fide dispute as to whether a contract exists, a plaintiff may proceed on a theory of quasi contract, including unjust enrichment. *See Foster v Kovner*, 44 AD3d 23 (1<sup>st</sup> Dept 2007). Here, on the other hand, plaintiff is seeking to recover under the terms of the contract. Under such circumstances, the unjust enrichment claim is duplicative of the breach of contract claim and must be dismissed. *Brown v Brown*, 12 AD3d 176 (1<sup>st</sup> Dept 2004).

### Promissory Estoppel

SIAC contends that the fourth cause of action, seeking to recover on a theory of promissory estoppel, should be dismissed because the provision of the agreement on which CTS relies for a promise to pay is ambiguous and indefinite.

To state a cause of action for promissory estoppel, a party must allege a clear and

unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise was made and an injury resulting from the reliance on the promise. *New York City Health and Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489 (1<sup>st</sup> Dept 2004). Here, CTS has alleged that SIAC made a promise to pay it the contingent fee set forth in the agreements, in reliance upon which CTS provided auditing services. It further alleges that it was not fully compensated for its services.

While SIAC argues that the agreement can be read in several different ways, there is no question that SIAC did promise to pay for CTS' services. However, that promise was in the form of the parties' contract. "[A] simple breach of contract claim may not be considered a tort unless a legal duty independent of the contract - i.e., one arising out of circumstances extraneous to, and not constituting elements of, the contract itself - has been violated." *Brown v Brown*, 12 AD3d at 176. CTS has not alleged any such independent duty. Therefore, this cause of action is duplicative of the breach of contract cause of action and is dismissed.

#### Breach of Good Faith and Fair Dealing

SIAC contends that the fifth cause of action, for breach of the implied covenant of good faith and fair dealing, cannot stand because there is no enforceable contract. Further, even if the contract were enforceable, SIAC maintains that this cause of action must be dismissed because CTS assigned SIAC all its rights in any documentation, and to the proprietary rights in the documentation. Therefore, according to SIAC, it was permitted to share information with a third party.

Initially, the court notes that, at this juncture, the breach of contract cause of action is not being dismissed and that the court finds that the contract is not void. Consequently, that reason

for dismissing this cause of action is rejected.

In its complaint, CTS alleges that SIAC violated the terms of the contract by contravening the exclusive nature of CTS' position for the years for which it performed an audit. Further, CTS contends that SIAC has refused to pay CTS the full amounts that CTS is due and has refused to provide information regarding how it used CTS's information and the amounts that it recovered as a result. These allegations essentially repeat the claims of the breach of contract cause of action. Thus, this cause of action is duplicative and is dismissed. *Engelhard Corp. v Research Corp.*, 268 AD2d 358 (1<sup>st</sup> Dept 2000).

#### Declaratory Judgment

SIAC seeks a declaratory judgment declaring that the base agreement is unenforceable for indefiniteness and that SIAC has not breached that portion of the agreement that is enforceable. As has been discussed in this decision, SIAC's position is not compelling. However, this cause of action does not seek any relief that cannot be obtained pursuant to the breach of contract cause of action. Thus, it, too, is duplicative and is dismissed. *Artech Info. Sys. v Tee*, 280 AD2d 117 (1<sup>st</sup> Dept 2001).

#### CONCLUSION

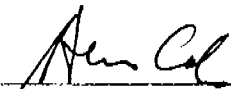
Accordingly, it is hereby

ORDERED that the motion of Securities Industry Automation Corporation is granted only to the extent that the third, fourth, fifth and sixth causes of action are dismissed, and is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: January 22, 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
JAN 25 2008  
NEW YORK  
COUNTY CLERK'S OFFICE