

**Comprehensive Coaching-U, Inc. v Caldwell**

2008 NY Slip Op 30661(U)

February 29, 2008

Supreme Court, Schuyler County

Docket Number: 0000262/2006

Judge: Elizabeth A Garry

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At a motion term of the Supreme Court of the State of New York, held on submission for the County of Schuyler, New York, on November 16, 2007.

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF SCHUYLER

PRESENT: HON. ELIZABETH GARRY  
SUPREME COURT JUSTICE

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Comprehensive Coaching-U, Inc.  
727 Mallard Place North Wales, PA 19454

Plaintiff,

vs.

Larry Caldwell,

Defendant.

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**DECISION AND ORDER**

Index No. 06-262

RJI No.:

Plaintiff moved for summary judgment in this contract action. The matter was returnable on submission only on November 16, 2007. The court accepted Defendant's pro se Affidavit opposing the motion, which was sworn to on the return date. With the permission of the court, Plaintiff submitted reply papers on December 31, 2007.

#### Factual and Procedural History

This action arises out of a "Registration Installment Agreement" (hereinafter Agreement) signed by Defendant on June 14, 2005, under which Defendant agreed to make installment payments totaling \$5,500 to Coach Institute. (Plaintiff's Ex. C.) The Agreement does not indicate the nature of the services Defendant was to receive in exchange for these payments. Defendant, however, provides printouts from the website of "The Coaching Institute" through which he allegedly learned about the program, advertising a curriculum in which enrollees would learn "How to Get Started in the Booming Profession of Life Coaching and Make \$100,000 (or more) this Year." (Defendant's Exhibits H, I, J.)

Plaintiff's Verified Complaint includes a cause of action seeking to recover \$6,139.00 for a balance due under the Agreement and a cause of action for an account stated in the same

amount. (Plaintiff's Ex. A.) Defendant's pro se Answer dated October 11, 2006, alleges that Plaintiff broke the Agreement by failing to provide the promised coaching and training services. The Answer also alleges that Defendant made payments totaling \$1,000 to Plaintiff under the Agreement; that he never received a statement of account from Plaintiff in the amount stated in the Complaint and that the only statement of account he ever received, dated February 13, 2006, showed a total due of \$2,000; that the claimed debt was covered under a bankruptcy; and that on December 16, 2005, Defendant reached the following oral agreement with one Sharon Wilson, allegedly a partner in Plaintiff's organization:

Comprehensive Coaching U would drop all claims that I owed them any money and they would keep the \$1000 that I had paid them. I would stop pursuing a refund of the \$1000 I had paid them. I would keep all written and recorded information that I had received from Comprehensive Coaching U. I wouldn't pursue my complaint that they used false and misleading advertising and deceptive business practices in their written and recorded literature, advertising, e-mails, and their web site to the FTC, Better Business Bureau and the Attorney Generals of New York & Pennsylvania. I would also stop contacting other students of Comprehensive Coaching U in order to locate others that hadn't made any money in the 30 days after joining Comprehensive Coaching U.

Plaintiff's submissions in support of its motion for summary judgment include an Affidavit and an Answering Affidavit, sworn to respectively on July 31, 2007, and December 28, 2007, by Terri Levine, identified as Plaintiff's President. In the affidavits, Levine asserts that Plaintiff provided educational training and services to Defendant consisting of one hour in a "coaching center," "form access and VIP calls," and a kit of books, CDs, and DVDs. She claims that Defendant's access to these services was first limited and later cut off because he did not make the required installment payments.

As to Defendant's purported agreement with Ms. Wilson, Ms. Levine asserts as follows: "Sharon Wilson was never my partner, I have always fully owned the corporation. Ms. Wilson was a sales agent who we referred to as a "co-founder" as that gave her more credibility and had less people feeling the need to speak directly with me, as I could not handle all the calls." Ms. Levine denies that Defendant ever spoke with Ms. Wilson, alleging "Ms. Wilson never told him anything about dropping claims or that he could keep materials or agreed to him pursuing any complaint. He had no conversations with her regarding any of this." (Answering Affidavit, paras.

2, 13.)

The parties' Affidavits make contradictory claims as to the amount of partial payments made by Defendant under the Agreement, which Plaintiff contends is \$900, while Defendant offers receipts totaling \$1,000. Plaintiff submits records of what it claims is Defendant's bankruptcy, indicating that no debt to Plaintiff was included in the filing. (Attorney's Affidavit sworn to by David A. Shults, Esq., on December 19, 2007, with attachment.) Defendant does not dispute this assertion and appears to have abandoned the bankruptcy defense.

#### Legal Analysis

A movant for summary judgment must tender evidentiary proof in admissible form sufficient to warrant the court as a matter of law in directing judgment in its favor. Only when the movant has made this prima facie showing does the burden shift to the opposing party to tender evidentiary proof in admissible form of genuine issues of material fact sufficient to require a trial. (CPLR 3212 [b]; Zuckerman v. New York, 49 NY2d 557, 562 [1980]). On a summary judgment motion, the court is to accept as true the opposing party's evidence and any of the movant's evidence that favors the opposing party. (Weiss v. Garfield, 21 AD2d 156 [3d Dept. 1964]).

The only evidence Plaintiff offers in support of the cause of action in its Verified Complaint for an account stated in the amount of \$6139.00 is Levine's assertion that Defendant was sent statements of account and did not object to them. (Affidavit of July 31, 2007, para. 13.) No supporting documentation is provided. Even if Levine's conclusory allegation were enough to meet Plaintiff's prima facie burden to establish its entitlement to summary judgment on this claim, Defendant presents a copy of what he avers is the only statement of account he ever received, dated February 13, 2006, in the amount of \$2,000.00 and marked "Final Statement of Account." (Defendant's Affidavit, para. 13, Ex. M.) Plaintiff's reply papers included nothing to dispute this assertion. Thus, Plaintiff has not shown that it is entitled to summary judgment on its cause of action for an account stated in the amount of \$6139.00.

Similarly, Plaintiff offers insufficient evidence to support its claim in the first cause of action that there is an unpaid balance under the Agreement in the amount of \$6139.00. The Agreement itself provides that Defendant was to make installment payments in the total amount

of \$5,500.00. Plaintiff acknowledges that Defendant paid \$900.00, while Defendant offers receipts documenting that he paid \$1,000. Plaintiff does not indicate whether the \$6,139.00 figure credits Defendant with partial payments in either amount, nor does it attempt to explain the discrepancies between the amount claimed in the Complaint, the \$5,500.00 figure given in the Agreement, and the \$2,000 "Final Statement of Account" dated February 13, 2006.

Defendant's claim that he reached an agreement with Ms. Wilson in settlement of the claim, raised in his Answer in the nature of an affirmative defense and repeated in his Affidavit opposing the summary judgment motion, must be accepted as true for purposes of resolving this motion. (Weiss, supra.) Plaintiff's evidence on this question is insufficient to permit the court to resolve the question in Plaintiff's favor as a matter of law. Ms. Levine's assertions that Ms. Wilson made no such agreement with Defendant and, in fact, never spoke with Defendant at all do not appear to be based on personal knowledge. No affidavit is provided from Ms. Wilson herself. In support of his assertion that Ms. Wilson was a "partner" with the authority to settle the claim in December of 2005, Defendant offers a "welcome e-mail" dated June 2, 2005 signed by Ms. Wilson as "Co-Founder" (Defendant's Ex. G), a printout from Plaintiff's website dated November 4, 2005 that identifies Ms. Wilson and Ms. Levine as the company's "founders" and "CEOs" (Defendant's Ex. I), and an e-mail from Ms. Levine dated June 14, 2006, stating, "Effective immediately, Sharon Wilson is no longer affiliated in any way with my company." Factual questions as to whether Ms. Wilson had actual or apparent authority to settle the claim are raised not only by these submissions, but also by Ms. Levine's assertion that Ms. Levine was a sales agent who had no ownership interest in the business but who was referred to as a "co-founder" to give her "more credibility." (Plaintiff's Answering Affidavit para. 2.) Resolution of these issues depends on credibility determinations to be made at trial.

Finally, the parties disagree as to whether Plaintiff provided Defendant with the promised coaching and training services. The Agreement itself does not enumerate the services in question, and the parties' affidavits differ dramatically as to what promises were made, what services were offered, what services were provided, and why payments and services were eventually discontinued. Like the purported settlement, these are factual questions which cannot be resolved

without determinations of credibility. Thus, Plaintiff is not entitled to summary judgment on either cause of action in its Complaint.

Conclusion

For the reasons set forth above, Plaintiff's motion for summary judgment is denied in its entirety.

Dated: *February 29, 2008*  
Norwich, New York

ENTER

  
Hon. Elizabeth A. Garry

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Schuyler County Supreme and County Court Chief Clerk, with original Decision and Order; Notice of Motion for Summary Judgment dated January 31, 2007, with Affidavit in Support of Motion for Summary Judgment sworn to by Terri Levine on July 31, 2007 and Exhibits A through D; Affidavit in Opposition of Motion for Summary Judgment sworn to by Larry Caldwell on November 16, 2007, with Exhibits G through M; Attorney's Affidavit sworn to by David A. Shults, Esq., on December 19, 2007, with 9 pages of attachments; and Answering Affidavit of Terri Levine, sworn to on December 28, 2007.