

**Morris Visitor Publ., LLC v Sid Patterson  
Adv. Inc.**

2008 NY Slip Op 31746(U)

June 18, 2008

Supreme Court, New York County

Docket Number: 0110811/2007

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C.

PART \_\_\_\_\_

*Justice*

Index Number : 110811/2007  
**MORRIS VISITOR PUBLICATIONS**  
vs.  
**SID PATTERSON ADVERTISING INC**  
SEQUENCE NUMBER : 002  
DISMISS ACTION

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.

**FILED**

JUN 24 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/18/08

HON. JUDITH J. GISCHE J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
MORRIS VISITOR PUBLICATIONS, LLC,

Plaintiff

-against-

SID PATERSON ADVERTISING INC., and  
EXECUTIVE CLUB LLC d/b/a "ROBERT'S  
STEAK HOUSE",

Defendants.  
-----X

**DECISION/ORDER**

Index No.: 110811/07

Seq. No.: 002

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

**FILED**

JUN 24 2008  
Numbered

**Papers**

Defs n/m (§3211), w/PB affirm, SP affil, exhs	1
Pltff GS affirm in opp, exhs	2
Defs PB affirm in further support	3

COUNTY CLERK'S OFFICE  
NEW YORK

*Upon the foregoing papers the court's decision is as follows:*

This is an action arising from an alleged breach of a contract. The court has before it defendants' motion to dismiss the complaint pursuant to CPLR §§ 3211 (a) (1), 3211 (a) (7) and 3211 (a) (10); and, in the alternative, for summary judgment on the complaint. CPLR § 3212. Plaintiff opposes the instant motion.

Defendants are Sid Paterson Advertising Inc. ("SPA Inc.") and Executive Club LLC d/b/a "Robert's Steak House" ("EC LLC").

Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). Nonetheless, defendants' motion must be denied for the reasons that

follow.

Defendant SPA Inc. and a company called Guest Informant entered into an advertising services contract on August 15, 2006 (the "contract"). Defendants argue that plaintiff is not a proper party and that Guest Informant, LLC,<sup>1</sup> is a necessary party for the action to proceed. Nonetheless, Sid Paterson, president of the defendant Sid Paterson Advertising Inc., states that:

[He has] seen some publicity which referred to either "MVP" or "MORRIS VISITOR PUBLICATIONS". This material indicated that "GUEST INFORMANT" was one of a group of related or affiliated publications which were part of the "MORRIS VISITOR PUBLICATIONS GROUP".

Plaintiff claims that Guest Informant, LLC, was merged into SPA Inc. Plaintiff has provided the affidavit of Daniel Finnegan, plaintiff's Credit Manager, and a copy of a Certificate of Merger, which was filed with the Delaware Secretary of State on December 26, 2006. Mr. Finnegan states that "[b]y this merger, upon information and belief, [plaintiff] has assumed the right to all of Guest Informant's causes of action."

### Discussion

To the extent defendant seeks relief under CPLR § 3211, the facts as alleged by plaintiff in the complaint will be accepted as true, and afforded the benefit of every possible favorable inference (EBCI, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank

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<sup>1</sup>

The parties interchangeably refer to the entities Guest Informant and Guest Informant, LLC. It is unclear to the court on this record whether these two entities are one and the same, and if not, what the relationship is between these two entities. In this decision, the court preserves the parties' references but acknowledges that this may create some confusion. This confusion, however, highlights issues of fact which do not affect the outcome of the court's decision.

Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1<sup>st</sup> Dept 2003]), unless clearly contradicted by evidence submitted by the moving party in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1<sup>st</sup> Dept 2006]). In that regard, where, as in this case, the parties submit affidavits and other evidentiary materials in support of the motion, the court may consider such documents and affidavits to remedy any defects in the pleading. Leon v Martinez, 84 NY2d 83, 88 [1994].

Based on the foregoing, defendants have failed to meet their burden in establishing that plaintiff does not have standing to prosecute this action. Although the fact that Guest Informant, LLC, merged into plaintiff was not alleged in the complaint, plaintiff has amplified its pleadings sufficiently so as to withstand defendants' motion to dismiss. Defendants admit entering into the contract with Guest Informant, and there is sufficient evidence on this record from which a trier of fact may conclude that plaintiff is a successor-in-interest of Guest Informant, LLC.

Defendants also argue that they are entitled to summary judgment dismissing the complaint "upon the grounds [that] the complaint as pleaded has no merit." The sole cause of action in the complaint sounds in breach of contract. Plaintiff has provided a copy of the contract, wherein Paragraph "13" of the terms and conditions provides:

[Plaintiff] reserves the right to hold advertiser and/or its advertising agency jointly and severally liable for such monies as are due and payable to the [plaintiff].

Under the contract, the Advertiser is listed as Robert's Steak House and SPA Inc. was to be billed. Mr. Paterson signed the contract. Plaintiff claims that it has duly

performed all of its obligations under the contract and that defendants have failed to perform by failing to make payments as they became due. Plaintiff alleges that \$35,360.04 is currently due and owing. Plaintiff also seeks its reasonable attorneys fees of \$5,154.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 NY2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d

459 (2<sup>nd</sup> dept. 2003).

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 AD2d 694 (2<sup>nd</sup> Dept. 1990). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Industries and Terminal Corp. v. New York State Dept. Of Transportation, 93 NY2d 584 (1999).

Defendants have not met their burden on this motion in establishing that the sole cause of action for breach of contract is completely without merit. Nonetheless, there are sufficient facts in this record from which a reasonable fact finder could conclude that SPA Inc. and/or EC LLC breached the contract with Guest Informant by failing to make payments as they became due thereunder. For the reasons already stated herein, the issue of whether plaintiff is a successor-in-interest of Guest Informant is also one to be considered at trial. Accordingly, defendants' motion is denied in its entirety.

**The parties shall appear for the preliminary conference on July 17, 2008 at 9:30 a.m. in Part 10, 80 Centre Street.**

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
June 18, 2008

Ordered:  
Hon. Judith J. Gische, J.S.C.

**FILED**  
JUN 24 2008  
COUNTY CLERK'S OFFICE  
NEW YORK