

Duane Morris LLP v Astor Holdings, Inc.

2008 NY Slip Op 32305(U)

August 5, 2008

Supreme Court, New York County

Docket Number: 0109609/2005

Judge: Joan A. Madden

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

PRESENT: **HON. JOAN A. MADDEN**

PART 11

J.S.C. Justice

Index Number : 109609/2005

DUANE MORRIS LLP

VS.

ASTOR HOLDINGS

SEQUENCE NUMBER : 005

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Decided per attached.

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

FILED

AUG 19 2008

COUNTY CLERK
NEW YORK

Dated: Aug 5, 2008

HON. JOAN A. MADDEN J.S.C.

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NON-FINAL DISPOSITION

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REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 11

-----X
DUANE MORRIS LLP,

Plaintiff,

—against—

Index No.: 109609/05

ASTOR HOLDINGS, INC. and ROBOT WARS LLC,

Defendants.

MADDEN, J.:

FILED
AUG 19 2008
COUNTY CLERK

Plaintiff Duane Morris LLP moves, pursuant to CPLR 2221, to reargue that portion of the court's order dated October 22, 2007 and entered on October 25, 2007 (Order) which granted partial summary judgment to Duane Morris on its claims for an account stated against the defendants, awarding the firm judgment in the amount of \$354,035.76 against defendant Astor Holdings, Inc., and denying the motion with respect to defendant Robot Wars LLC. Familiarity with the prior order is assumed, and all abbreviated terms in the prior order are incorporated herein by reference.

Reargument is granted. The court denied summary judgment against Robot Wars on the account stated claim based on the following incorrect factual conclusion:

While Duane Morris contends that this action seeks to recover only unpaid fees and disbursements generated in connection with the Roski action, the firm does not explain why Robot Wars, which was not a party to the Roski action, still owes the firm \$100,000.

Order, at 16, n. 3. While most of the documents regarding the Roski action previously submitted to the court on the prior motion refer to only one plaintiff in the Roski action (see, e.g., Answer, ¶ 64; Astor Holdings, Inc. v Roski, 325 F Supp 2d 251 (SD NY 2003); Jacobs Reply Aff., Exhs.

33 and 34), the court clearly overlooked the fact that the complaint in this action explains that Duane Morris was originally hired to represent both companies in a lawsuit to be filed against Roski and Battlebots, Inc.. Complaint, ¶ 4. “In or around April 2002, Plotnicki advised plaintiff that Robot Wars no longer wished to pursue any claims in the Roski Action, and plaintiff took the steps necessary to discontinue Robot Wars’ claims. Thereafter, plaintiff represented only Astor in the Roski Action.” Complaint, ¶ 5. The court also overlooked the fact that defendants admitted these allegations (see Answer and Counterclaims, ¶¶ 4, 5; Amended Answer and Counterclaims, ¶¶ 4, 5), and the fact that the docket sheet for the Roski action lists Robot Wars as one of the plaintiffs and shows that a motion was filed in that action on April 18, 2002 for leave to serve an amended complaint (see Jacobs Reply Affirm., Exh. 37 at 1).

Duane Morris now argues that the court should award it a judgment against Robot Wars for \$74,801.53, representing the difference between the amount the court awarded Astor to pay and the total amount of the eight unpaid invoices attached to the complaint (\$428,837.29 - \$354,035.76 = \$74,801.53). In the alternative, Duane Morris asks for a judgment against Astor in the total amount of \$428,837.29. This latter argument is rejected on the ground that the third cause of action in Duane Morris’s complaint alleging an account stated against Astor only sought damages in the amount of \$354,463.82 (see Complaint, ¶¶ 43-44), and plaintiff only moved for that amount in seeking partial summary judgment against Astor (see Memo. of Plaintiff Duane Morris LLP in Support of its Motion for Summary Judgment, at p. 16 [“Accordingly, Duane Morris is entitled to summary judgment on its account stated claim against Astor for \$354,463.82 . . . ”]). Therefore, it would be inappropriate for the court to award a higher amount on a motion for reargument, even if the proof supported such an award. See Fox v Abe Schrader Corp., 36

* 4]

AD2d 591 (1st Dept 1971) (reargument is never a vehicle for seeking new forms of relief); see also DeSoignies v Cornasesk House Tenants' Corp., 21 AD3d 715, 718 (1st Dept 2005) (reargument cannot be used to argue a new theory of liability not previously advanced). Nevertheless, the court acknowledges that it had originally intended to award Astor the amount sought on the prior motion, that is, \$354,463.82.¹

The account stated claim against Robot Wars is based, not on the eight invoices sent in 2004 as the court previously believed, but on the December 31, 2003 letter agreement whereby Robot Wars acknowledged that it owed Duane Morris the sum of \$100,000 as of November 30, 2003. The question, therefore, is whether Robot Wars still owed that amount of money eight months later, taking into account any new fees and expenses incurred and any payments made after this letter agreement. Since it is undisputed that Robot Wars did not incur any new legal fees or expenses and the only payments defendants made in 2004 were applied to new legal fees and expenses incurred by Astor in connection with the Roski action, there is no dispute that Robot Wars still owes Duane Morris \$100,000.

Defendants argue in opposition to this motion that Duane Morris misstated the amount of money that was actually due from the defendants when Astor and Robot Wars each signed the December 31, 2003 letter agreements, whereby they committed to pay Duane Morris the sums of \$254,035.76 and \$100,000, respectively. This argument was not raised in connection with the prior motion, and may not be raised now. Nevertheless, Duane Morris has demonstrated by

¹Despite the misstatements in both parties' motion papers (see Pls. Memo. of Law in Support, at pp. 2, 3, 10; Defs. Memo. of Law In Opp., at pp. 2, 4; Reply Affidavit of Fran Jacobs sworn to on January 16, 2008, ¶¶ 3, 10, 12), the amount awarded by the court on the prior motion was \$354,035.76. Indeed, a judgment in that amount was entered on June 18, 2008.

documentary proof that these figures are correct, because the balance was not limited to fees relating to the Roski action, but included another \$14,434.35 for services relating to matters billed to "General" or matter "00003." See See Norbitz Reply Affirm., ¶¶ 5-7 and Exh. A thereto.

Thus, Duane Morris is entitled to recover \$100,000 against Robot Wars on its account stated cause of action, not \$74,801.53 as Duane Morris now contends. However, in order to make this award, the court must vacate portion of the Order and the Judgment, and award a slightly lesser amount of money as against Astor so that the two awards match the balance owed on the eight invoices defendants admittedly received and to which they made no objection, namely \$428,837.29. In this regard, the court notes that Duane Morris never explained why it sued to recover the total sum of \$454,463.82 against both defendants, when the eight invoices they previously offered to the court total only \$428,837.29 -- a difference of \$25,626.53. The answer lies in a mathematical error by Duane Morris and the afore-mentioned invoice dated December 5, 2003 for general matters not submitted on the prior motions. Contrary to Duane Morris' claim, the amount of new fees billed to Astor after the December 31, 2003 letter agreement is \$309,235.88, not the \$320,428.06 stated in their papers. Subtracting the \$120,000 payments Plotnicki admittedly made in 2004, the net balance owed is \$189,235.88, not the \$200,428.06 alleged in the complaint at paragraph 21 -- a difference of \$11,192.18. As stated above, the original balances as of December 31, 2003 included legal fees and expenses in the amount of \$14,434.35 billed to "General" or "0003." These two numbers (\$11,192.18 + \$14,434.35) total \$25,626.53, and explain why the amount Duane Morris originally sued for does not match the amount of the net balance of the final invoice dated August 6, 2004.

Accordingly, Duane Morris should have been awarded the sum of \$328,837.29 as against Astor, not the \$354,463.82 claimed, and the sum of \$100,000 as against Robot Wars, for a total award of \$428,837.29. These two figures match the total amount of the eight outstanding invoices previously submitted to the court and the amount Duane Morris seeks to recover on reargument. While it appears that the December 5, 2003 invoice for general matters totaling \$14,434.35 is still outstanding, the court declines to award any amount that is higher than the amount plaintiff has requested on reargument and it is not at all clear which entity is responsible for this invoice.

For the foregoing reasons, it is

ORDERED that plaintiff's motion for reargument of the court's prior order dated October 22, 2007 and entered on October 25, 2007 (Order) is granted; and it is further

ORDERED that, upon reargument, the court hereby amends the Order by deleting the first two decretal paragraphs on page 44, and substituting the following:

“**ORDERED** that plaintiff's motion for summary judgment (seq. no. 002) is granted in part and denied in part as follows; and it is further

ORDERED that the plaintiff is granted partial summary judgment on its third and fourth causes of action for an account stated, those claims are severed and the Clerk is directed to enter immediate judgment in favor of plaintiff Duane Morris LLP (a) against defendant Astor Holdings, Inc. on the third cause of action in the amount of \$328,837.29 plus interest at the legal rate from August 6, 2004; (b) against defendant Robot Wars LLC on the fourth cause of action in the amount of \$100,000, plus interest at the legal rate from August 6, 2004; and (c) together with taxable costs and disbursements as against both defendants, jointly and severally; and it is further”

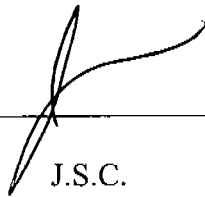
and it is further

ORDERED that the Judgment entered on June 18, 2008 is hereby vacated, and the Clerk

of the Court is directed to enter a new judgment, nunc pro tunc to June 18, 2008, in accordance with the Order, as amended herewith.

Dated: August 5, 2008

ENTER:



J.S.C.

FILED
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