

Howard B. Spivak Architect, P.C. v Zilberman

2008 NY Slip Op 32475(U)

September 3, 2008

Supreme Court, New York County

Docket Number: 0603399/2007

Judge: Debra A. James

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: DEBRA A. JAMES
Justice

PART 59

HOWARD B. SPIVAK ARCHITECT, P.C.,
Plaintiff,

Index No.: 603399/07

Motion Date: 03/18/08

- v -

Motion Seq. No.: 01

HENRY ZILBERMAN and SUSAN ZILBERMAN,
Defendant.

Motion Cal. No.: 08

The following papers, numbered 1 to 4 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

| |
|------|
| 1 |
| 2, 3 |
| 4 |

FILED
SEP 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall deny defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a)(5).

Plaintiff's complaint seeks damages for defendants' alleged failure to pay for architectural and related services provided by plaintiff on theories of breach of contract, account stated and quasi-contract. Plaintiff's complaint seeks "an unpaid balance due and owing from the Zilbermans to Howard Spivak of \$320,864.46, plus interest commencing from January 7, 2001 and thereafter, including a reasonable period of time following transmission of plaintiff's final invoice in February, 2005 to

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

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

defendants."

Defendants now move to dismiss the complaint on the grounds that the "Fee Summary" invoice attached to an April 11, 2006 letter from plaintiff's counsel to defendant's counsel sets forth a date of January 22, 2001 as the date up to which services were billed and that therefore the plaintiff's claims are untimely pursuant to CPLR 213 as this action was not commenced until October 15, 2007.

Plaintiff counters that its work was not completed until April 11, 2002, and that the firm issued its final invoice in November 2004. Plaintiff also asserts that defendants acknowledged the debt up until the time of the final invoice by making partial payments on January 31, 2001, March 15, 2001, April 17, 2001 and March 2, 2002. Plaintiff's "Fee Summary" sets forth that the defendants made payments on a nearly monthly basis from June 18, 1999, through April 17, 2001, and a final payment on March 2, 2002, totaling \$204,797.00.

"When a party moves to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the Statute of Limitations, that party bears the initial burden of establishing the affirmative defense by prima facie proof that the time in which to sue has expired . . . Thereafter, the burden [i]s upon the plaintiff to aver evidentiary facts establishing that the case falls within an exception to the

Statute of Limitations." Assad v City of New York, 238 AD2d 456, 457(2d Dept 1997) (internal quotations and citations omitted).

In this case, the defendants make a meritorious argument that the four corners of the complaint do not allege any breach by the defendants within the applicable limitations period. Only two dates in connection to defendants' obligations are referenced in the complaint. The complaint sets forth that interest should run from January 2001, and that the final invoice was transmitted to the defendants on February, 2005.¹ As stated previously the "Fee Summary" invoice attached to a April 11, 2006 letter from plaintiff's counsel to defendant's counsel sets forth a date of January 22, 2001 as the date up to which services were billed. In the absence of any factual allegations to the contrary, this evidence is sufficient to establish that payment was due on January 22, 2001, which was more than six years prior to the initiation of this lawsuit. Defendants have thus met their initial burden of establishing the affirmative defense of statute of limitations.

In opposition, the plaintiff claims that the limitations period only ran from the date the invoice was rendered to

¹The complaint refers to a third date, thusly: "Howard Spivak entered into an agreement for the rendition of services to be provided by Howard Spivak to the Zilbermans regarding certain work at the Zilberman's residence. That work was completed on or about March 2, 2004." This language makes clear that the March 2, 2004 date refers to work to which plaintiff's services relate, but not to the services rendered by plaintiff.

[* 4]

defendants, that the doctrine of ongoing breach applies because of plaintiff's continuing performance under the contract, and that the limitations period was tolled by the defendants partial payments. Assuming the truth of the facts alleged in the complaint and in the affidavit and exhibits submitted in opposition to the motion, plaintiff has made some factual demonstration that raises an issue of fact with respect to these theories. Sparacino v Winner, 82 AD2d 753 (1st Dept 1981).

Plaintiff is correct that if a contract provides that payment is not due until the final invoice then a breach of contract for failure to pay will not accrue until the invoice is rejected as unpaid. See Bombardier Transp. (Holdings) USA, Inc. v Telephonics Corp., 14 AD3d 358, 359 (1st Dept 2005) ("the right to payment did not accrue, under the contract, until the work was invoiced"). The complaints alleges in the alternative that the unpaid balance due and owing from the Zilbermans to Howard Spivak of \$320,864.46 was due either commencing "from January 7, 2001" or commencing from "thereafter, including a reasonable period of time following transmission of the final invoice in February, 2005 to defendants". Plaintiff's claim that defendants' obligation arose a "reasonable period of time following transmission of the final invoice in February, 2005 to defendants" raises an issue of fact whether its action was timely brought. So too, plaintiff's affidavit and exhibits averring

that services under the contract were provided as late as April 11, 2002 are sufficient to allege a timely interposition of the complaint since by plaintiff's theory payment for such services would have been due under the contract at sometime after April 11, 2002, since defendants could not have breached the contract until they omitted an obligation to perform, i.e. pay (State v Fenton, 68 AD2d 951 [3d Dept 1979]) and plaintiff alleges defendants' obligation to pay arose only after his services were performed.

The payments set forth in plaintiff's "Fee Summary" supports plaintiff's assertion of its continuing performance in that defendants' periodic remittances raise an issue that the parties agreed to progress payments following the completion of certain architectural tasks, with the last task completed on or about April 11, 2002, which is approximately six months before the expiration of the Statute of Limitations. The papers before the court raise issues of credibility with respect to the intention of the parties as to whether these were progress payments and the contract was entire, or contrarily whether the contract was divisible and the remittances made in full satisfaction of what defendants owed as of each invoice, which must be resolved by the fact finder after issue is joined and upon the completion of discovery. Shalman v Board of Education, 31 AD2d 338 (3d Dept 1969).

As to the cause of action for account stated, plaintiff contends that such only accrued upon defendants' failure to respond to the alleged November 2004 statement of account. The mere rendering of an invoice for amounts previously due does not create an account stated from the date of the latest invoice. See Slayback v Alexander, 179 AD 696, 698 (1st Dept 1917) ("it is not within the power of the creditor to extend the running of the Statute of Limitations merely by rendering the same account over again from time to time"; Joseph Gaier, P.C. v Iveli, 287 AD2d 375 (1st Dept 2001) (same). While the allegations in the complaint that plaintiff "submitted its itemized invoices to the Zilbermans identifying the total indebtedness owed by the Defendants to Howard Spivak at those times" are inartistically drawn, and conflict with plaintiff's argument that a claim based upon defendants' breach of their obligation to pay only ripened upon completion of plaintiff's work in April 2002, the court is unable to determine on this record whether plaintiff rendered "the same account over again from time to time". Edwards v Codd, 59 AD2d 148, 155 (1st Dept 1977]. Since plaintiff alleges that the payments made prior to that time were insufficient to cover the alleged indebtedness as of April 2002 and that its claims were still accruing under a contract that was entire and not divisible, and as defendants offer no evidence that they paid all invoices in full as such were rendered, it is impossible for the

court at this juncture to determine whether or not defendants' payments were referable to a debt owed within the limitations period, or accrued prior to the work allegedly performed on April 2002. Thus the court shall deny dismissal of plaintiff's claims for breach of contract and account stated on statute of limitations grounds, without prejudice to defendants making a motion for summary judgment on this ground pursuant to CPLR § 3212.

Plaintiff's allegations for tolling based upon alleged partial payments would be insufficient to defeat a motion for summary judgment. "In order that a part payment shall have the effect of tolling a time-limitation period, under the statute or pursuant to contract, it must be shown that there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder." Lew Morris Demolition Co., Inc. v Board of Ed. of City of New York, 40 NY2d 516, 521 (1976). Plaintiff's affidavit conclusorily states that the payments from defendants are evidence that the defendants not only agreed to pay such amounts, but also the additional amounts reflected in the November 2004 fee schedule. On a motion for summary judgment, this allegation would be insufficient to prevail on the partial payment exception to the

statute of limitations defense because plaintiff fails to allege circumstances leading to the inference that the payments made by defendants reflect defendants' agreement to pay an agreed amount in light of the fact that plaintiff does not assert that the amount owed was fixed at the time the payments were made. Nonetheless, whether defendants' partial payments tolled the Statute of Limitations implicates the resolution of the issues raised by plaintiff with respect to its claim of account stated and ongoing breach, which must be resolved by a trier of fact.

With respect to plaintiff's second cause of action for quantum meruit, in "an action to recover for work performed on a quantum meruit basis, the cause of action accrues when the work is completed and accepted." Elliott v Gian, 19 AD2d 196, 198 (4th Dept 1963). While the papers tend to show that all but fourteen hours of the work for which reimbursement is sought was performed outside the limitations period and that all the work had been accepted as it was completed, the court is unable to determine on this record when the work was completed. Therefore the court shall deny defendants' motion to dismiss plaintiff's cause of action for quantum meruit on statute of limitations grounds, without prejudice.

Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiff's first, second and third causes of action is DENIED; and it is further

ORDERED that defendants' are to answer the complaint upon service of this Order with notice of entry in the time allowed by the CPLR; and it is further

ORDERED that the parties are directed to attend a preliminary conference on October 28, 2008, at 9:30 A.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: September 3, 2008

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.
J.S.C.

FILED
SEP 11 2008
COUNTY CLERK'S OFFICE
NEW YORK