

Brooks v Metropolitan Who's Who, Inc.

2008 NY Slip Op 32777(U)

October 2, 2008

Supreme Court, Nassau County

Docket Number: 10374/08

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

PRESENT: HON. WILLIAM R. LaMARCA
Justice

BRUCE BROOKS,

Plaintiff,

-against-

METROPOLITAN WHO'S WHO, INC. and
CAMBRIDGE WHO'S WHO PUBLISHING,
INC.,

Defendants.

Motion Sequence #1, #2
Submitted July 16, 2008

INDEX NO: 10374/08

The following papers were read on these motions:

Notice of Motion.....	1
Notice of Cross-Motion.....	2
Memorandum of Law in Support of Cross-Motion.....	3
Reply Affirmation in Further Support and in Opposition to Cross-Motion.....	4
Casimano Affidavit in Support.....	5

Requested Relief

Plaintiff, BRUCE BROOKS, moves for an order, pursuant to CPLR §3213, for judgment in lieu of complaint in the minimum amount of \$41,875.00, plus interest from May 8, 2008 and attorneys fees, costs and disbursements. Defendants, METROPOLITAN WHO'S WHO, INC. (hereinafter referred to as "METROPOLITAN") and CAMBRIDGE WHO'S WHO PUBLISHING, INC. (hereinafter referred to as "CAMBRIDGE") oppose the

motion and cross-move, pursuant to CPLR §3212, for an order granting them summary judgment dismissing plaintiff's action in its entirety on the ground that there is no genuine issue of triable fact as to plaintiff's claims. The motion and cross-motion are determined as follows:

Background

Counsel for METROPOLITAN alleges that it is a subsidiary of CAMBRIDGE with offices in Uniondale, New York and that METROPOLITAN is in the promotional products business. Anthony Casimano, the President of METROPOLITAN acknowledges that the company publishes a biography for executives and professionals who pay a membership fee which is renewable. The biographies, published either as a hard cover book or online, provide its members with a source for networking and marketing. METROPOLITAN also provides its members with a wall plaque memorializing membership with METROPOLITAN.

This action arises from the manufacturing of the wall plaques which had previously been outsourced. Plaintiff alleges that, on February 28, 2008, he entered into a Consulting Agreement with METROPOLITAN in which he agreed to create an "Award and Plaque Production Department", which consisted of assisting METROPOLITAN in setting up laser engraving machinery, instructing in the proper laser engraving procedure and managing the Department in exchange for remuneration. BROOKS states that the agreement was for a three (3) year period, from February 28, 2008 through February 27, 2011, with compensation at the rate of \$1,250 per month, with a per annum discretionary bonus of up to \$35,000 per year. BROOKS asserts that, upon commencement of the Agreement, he assisted METROPOLITAN in the purchase and installation of the necessary engraving machinery and created an "Award and Plaque Production Department", and remained

available to instruct the staff in proper laser engraving techniques. He claims that he received payments for 2 ½ months, in the total sum of \$3,125, but was then terminated by METROPOLITAN, without cause. It is plaintiff's position that the Consulting Agreement is an instrument for the payment of money only and that METROPOLITAN breached the Agreement by failing to remit the remaining mandatory payments in contravention of the terms and conditions of the Agreement. Counsel for BROOKS purportedly sets forth three (3) "causes of action", the first for breach of contract, the second for *quantum meruit*, and the third for fraud, and argues that plaintiff is entitled to judgment in lieu of complaint.

A review of the Consulting Agreement, dated February 28, 2008, reflects that it contains the above noted terms for plaintiff's duties and compensation, as well as, *inter alia*, a Termination Clause for "cause" and confidentiality provisions. The Agreement is signed by BRUCE BROOKS but is unsigned by METROPOLITAN.

In opposition to the motion, Mr. Casimano states that plaintiff is not suing on an instrument for money only, but rather on a Consulting Agreement which he never signed. Mr. Casimano relates that plaintiff began working at METROPOLITAN before the Agreement was signed and it quickly became apparent that BROOKS had lied about his qualifications, that he had no idea how to operate the machinery and software that the company had purchased, that he had no idea how to keep the necessary raw materials in stock, that he treated employees and vendors poorly and that he was working for his own company on METROPOLITAN time. Mr. Casimano states that he refused to sign the Agreement. He also claims that BROOKS ordered inferior shipping boxes and many plaques were returned by members because they were damaged, which led to many complaints from METROPOLITAN members who were not getting their plaques or who

were receiving plaques that were damaged. Mr. Casimano relates that BROOKS alienated the UPS and FED EX drivers and the situation became so intolerable that he was terminated in mid-April, 2008. It is Mr. Casimano's position that BROOKS was terminated for cause, that this is not an action based upon an instrument for the payment of money only, that CAMBRIDGE has no place in this action as BROOKS was working at METROPOLITAN, and that plaintiff was fully compensated for the time he provided to METROPOLITAN. He asserts that all of BROOKS' causes of action will fail.

An affidavit of Maria Pinto, a METROPOLITAN employee, corroborates Mr. Casimano's assertions and contends that BROOKS, who was supposed to be her immediate supervisor, turned out to be completely incompetent and had no idea how to use the software or how to operate the machinery, in addition to being "nasty". An affidavit of Desmond Cummings, an employee of Metropolitan Direct Marketing, Inc. who works alongside METROPOLITAN employees, confirms that BROOKS "ordered people around" and was "nasty". In the Memorandum of Law, counsel for METROPOLITAN asserts that it is entitled to judgment as a matter of law because METROPOLITAN did not execute the Agreement, which is unenforceable if not signed. Alternatively, he claims that even if deemed to be an oral agreement, a contract to engage a party for three (3) years is barred by the Statute of Frauds. Moreover, he asserts that plaintiff has no damages because he has been paid. It is counsel's position that the claim for breach of contract, *quantum meruit* and for fraud should be dismissed.

In reply, counsel for BROOKS contends that an enforceable contract between BROOKS and METROPOLITAN exists. He claims that BROOKS accepted METROPOLITAN's offer by signing the Agreement and beginning performance. It is

plaintiff's position that METROPOLITAN cannot accept the benefits of plaintiff's performance, establishing the plaque making department as well as managing and training its employees, without being bound to make the required payments under the Agreement. Counsel for plaintiff argues that there is a valid written contract, not an oral contract, which does not violate the Statute of Frauds. Additionally, he contends that plaintiff has not been paid the reasonable value of his services (which is denied by Casimano) and, even if the Court finds that no written agreement exists, he should be paid on a *quantum meruit* basis. Finally, counsel for plaintiff urges that METROPOLITAN induced plaintiff to establish and develop the "Award and Plaque Production Department" under the guise of a three (3) year consulting contract but never had any intention of keeping plaintiff as an employee and the fraud claim should not be dismissed.

The Law

CPLR 3213 affords a speedy and efficient remedy to secure a judgment in certain cases where service of formal papers would be unnecessary for the expeditious resolution of the dispute between the parties. The accelerated procedure applies solely to an action based upon a judgment or an instrument for the payment of money only. In order to succeed on the motion, the cause of action must be proven by the instrument itself and a failure to make payments according to its terms When the instrument itself calls for something more than the payment of money, however, a CPLR 3213 motion will be denied For purposes of the statute, "an instrument for the payment of money only" must be a written unconditional instrument.

Technical Tape, Inc. v Spray Tuck, Inc., 131 AD2d 404, 517 NYS2d 147 (1st Dept. 1987); see also, *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 646 NYS2d 308, 669 NE2d 242 (C.A. 1996). Assuming for discussion purposes that the Consulting Agreement was signed by both parties, it is clear that both parties had rights and obligations under the Agreement over and above a simple obligation to pay. Where there are questions of performance by

a party within the context of a written agreement, that is not an instrument for the payment of money only. *Haupt v Metal City Findings Corp.*, 47 AD2d 837, 365 NYS2d 882 (2nd Dept. 1975). Based on the foregoing the Court finds that outside proof is needed for enforcement, which disqualifies this matter for CPLR §3213 treatment and the motion for judgment in lieu of complaint is denied. The moving and answering papers shall be deemed the complaint and the answer, respectively. The Court now turns to the cross-motion for summary judgment dismissing the complaint.

The moving papers set forth three (3) causes of action sounding in breach of contract, *quantum meruit* and fraud. The elements for a cause of action for breach of contract are 1) formation of a contract between plaintiff and defendant, 2) performance by plaintiff, 3) defendant's failure to perform and 4) resulting damage. *Ledain v Town of Ontario*, 192 Misc2d 247, 746 NYS2d 760 (Supreme Wayne Co. 2002). Defendant argues that no contract exists between the parties because METROPOLITAN did not sign the Consulting Agreement. *Williston on Contracts* §6.26 suggests that a contract is formed by an offer, acceptance of the offer and consideration. In the event of doubt, the Restatement of Contracts Second directs that an offeree may choose to accept either by a return promise or by rendering performance, which creates the existence of a bilateral contract. The beginning of performance by the offeree acts as a promise that the offeree will complete the performance and constitutes valid consideration. *Williston on Contracts* §6.26, *supra*. In the case at bar, the plaintiff signed the contract and accepted the offer, partially performed and, indeed, received payments from METROPOLITAN in accordance with the terms of the Consulting Agreement which is further evidence of consideration. *Cf.*

NJP Enterprises Inc. v Shooze, Inc., 280 AD2d 533, 720 NYS2d 190 (2nd Dept. 2001). The Court finds that an enforceable express contract was formed by the parties and that the Statute of Frauds is not applicable herein. *Cf. Municipal Consultants Publishers, Inc. v Ramapo*, 47 NY2d 144, 417 NYS2d 218, 390 NE2d 1143 (C.A. 1979); *Howard v Daly*, 61 NY 362, N.Y. Lexis 419 (C.A. 1875); *Justice v Lang*, 42 NY 493 (C.A. 1870); General Obligations Law §5-703(4).

To state a cause of action to recover in *quantum meruit*, the plaintiff must allege the performance of services in good faith, the acceptance of the services by the person to whom they are rendered, and expectation of compensation, and the reasonable value of the services allegedly rendered. *Tesser v Alboro Equipment Company*, 302 AD2d 589, 767 NYS2d 253 (2nd Dept. 2003). The existence of an express agreement ordinarily precludes recovery in *quantum meruit*. *Tesser v Alboro Equipment Company, supra*.

To establish a cause of action for fraud, plaintiff must establish that 1) defendant made material misrepresentations that were false; 2) that the defendant knew the representations were false and made it with intent to deceive the plaintiff; 3) that plaintiff justifiably relied on defendant's representations and 4) that plaintiff was injured as a result of defendant's representations. *Leno v DePasquale*, 18AD3d 514, 794 NYS2d 662 (2nd Dept. 2005). CPLR Rule 3016(b) requires particularity in the pleadings with respect to fraud or mistake, and directs, as follows:

Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (see, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]). Indeed, “[e]ven the color of a triable issue, forecloses the remedy” *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover “[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate” (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party’s pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales*,

Inc., 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept. 1988]).

Conclusion

After a careful reading of the submissions herein, it is the Court's judgment that, giving plaintiff every favorable inference, numerous questions of fact exist with respect to each parties performance under the contract that preclude the granting of summary judgment with respect to plaintiff's breach of contract cause of action. However, given its finding that an express contract was demonstrated, there can be no reasonable view of the pleaded facts with respect to the claim for *quantum meruit* compensation upon which relief can be granted. Nor has plaintiff sufficiently pleaded a cause of action for fraud.

Based on the foregoing, it is hereby

ORDERED, that plaintiff's motion for judgment in lieu of complaint is denied; and it is further

ORDERED, that defendant's cross-motion for summary judgment dismissing the complaint is denied except with respect to the causes of action for *quantum meruit* compensation and for fraud which are dismissed; and it is further

ORDERED, that the parties shall appear for a Preliminary Conference on November 12, 2008, at 9:30 A.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski.

There will be no adjournments, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: October 2, 2008



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