

Olympus America, Inc. v Mingoelli

2008 NY Slip Op 33530(U)

November 14, 2008

Supreme Court, Suffolk County

Docket Number: 12564-2007

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 08-27-2008
Motion Submit Date: 09-24-2008
Motion Sequence No.: 001 MG
CASEDISP

OLYMPUS AMERICA, INC.,

Plaintiff,

-against-

GERALD J. MINGOLELLI, MDSC d/b/a
UNIVERSITY DIGESTIVE DISEASE
CENTERS and ENDOSCOPY SUITE OF
THE UNIVERSITY OF HEALTH CENTER,

Defendants.

Attorney for Plaintiff

Alan E. Marder, Esq.
Meyer, Suozzi, English &
Klein, P.C.
990 Stewart Avenue
Suite 300
PO Box 9194
Garden City, New York 11530

Attorney for Defendant

Gerald Mingoelli, Esq.
6972 N. Glen Haven Road
Homer, New York 13077

ORDERED, that the motion (motion sequence number 001) by plaintiff for an Order, pursuant to CPLR §3212, granting summary judgment in favor of plaintiff and dismissing the "counterclaim" asserted by Dr. Gerald J. Mingoelli, is granted.

Plaintiff commenced this action for breach of contract on or about April 20, 2007, against defendants GERALD J. MINGOLELLI, MDSC d/b/a UNIVERSITY DIGESTIVE DISEASE CENTERS and ENDOSCOPY SUITE OF THE UNIVERSITY DIGESTIVE HEALTH CENTER. An Answer was submitted by non-party Gerald J. Mingoelli, only. The gravamen of the Complaint is that plaintiff entered into a contract with defendant Gerald J. Mingoelli, MDSC ("defendant"), an Illinois medical doctor services corporation, for the lease of certain equipment used to perform endoscopy procedures and defendant breached the agreement by failing to pay as required by the agreement.

The submissions reflect that plaintiff and defendant entered into an agreement entitled "OLYMPUS COST PER PROCEDURE (CPP) AGREEMENT" (the "agreement") on or about November 24, 2003, wherein plaintiff leased certain equipment to defendant and defendant agreed to pay plaintiff the sum of \$48.73 for each procedure performed with the

equipment, and further agreed to pay for a minimum number of procedures by the end of each twelve month period. The agreement required defendant to report monthly the number of procedures performed and in the event defendant failed to report by the 10th day of the subsequent month, defendant agreed to pay for 130 procedures. The initial agreement was subsequently modified by a series of five (5) written amendments to the agreement, signed by either Joseph Maschek, as defendant's Vice President and/or chief executive officer or by Dr. Gerald J. Mingoelli ("Mingoelli") as president of the defendant medical doctor services corporation. Pursuant to the last amendment, signed by Mingoelli on September 13, 2004, plaintiff agreed to take back certain equipment delivered to defendant, and plaintiff further agreed to reduce the amount charged per procedure to \$57.30 from the level in a previous amendment of \$59.39.

Plaintiff alleges that beginning in January of 2006, defendant breached the agreement by failing to report the number of procedures it performed, and as a result, plaintiff issued invoices in which it sought payments based on the required amounts as set forth in the agreement and amendments thereto. Specifically, plaintiff issued invoices in the following amounts: invoices dated February 14, 2006, March 14, 2006, April 12, 2006 and May 11, 2006 each in the amount of \$7,914.56, invoices dated June 15, 2006, July 12, 2006, August 14, 2006, September 13, 2006 and October 13, 2006, each in the amount of \$7,883.07. According to plaintiff, defendant failed to make any payment toward these invoices and plaintiff declared defendant in default under the agreement. By demand letter dated October 31, 2006, plaintiff advised that it was terminating the agreement, demanded a return of the equipment, demanded payment in the amount of \$70,823.59 pursuant to the aforementioned invoices, and demanded, as liquidated damages, the amount of \$242,834.40, pursuant to a formula set forth in the agreement.

In the Answer submitted by Mingoelli, he attempts to assert affirmative defenses of fraudulent inducement and lack of personal and subject matter jurisdiction and a counterclaim essentially sounding in fraud. The named defendant has not submitted an Answer to the Complaint.

Plaintiff now moves for summary judgment on the first, second,

third and fifth causes of action of the Complaint¹ and dismissal of the counterclaim asserted by Mingolelli. In support of the motion, plaintiff submits a copy of the pleadings, the agreements, billing statements, notices of default, and an affidavit by Douglas A. Zullo ("Zullo"), chief credit officer of plaintiff. Plaintiff also submits a Statement of Undisputed Facts pursuant to Rule 19-a of the Rules of the Commercial Division in support of its motion. Initially, plaintiff argues that Mingolelli has no standing to assert any defenses or counterclaims because he is neither a party to the agreement between plaintiff and defendant nor a party to this action.

Plaintiff further states that from December 2003 to the present, defendant has possessed the subject equipment it leased and paid for use of such equipment pursuant to the agreement and amendments thereto, from June 2004 through December 31, 2005. However, beginning in January of 2006, plaintiff asserts that defendant stopped reporting the number of procedures it performed and failed to pay the invoices issued by plaintiff pursuant to the agreement. Plaintiff states that defendant failed to pay the total amount of \$70,823.59 for the months of February 2006 through October 2006, and annexes the unpaid invoices to its motion papers.

Plaintiff argues that there is no question of fact and summary judgment should be granted in its favor. Plaintiff asserts that it did not sue Mingolelli individually but nevertheless, he filed the only Answer in this action and the named defendants did not answer the Complaint. Plaintiff argues that defendants breached the plain, unambiguous language of the agreement which required payment of unpaid invoices within ten days of issuance. Specifically, as set forth in Zullo's affidavit, it is undisputed that defendant failed to pay the unpaid invoices pursuant to the terms of the agreement and such failures constituted nine (9) separate defaults. Zullo states that as of the date of his affidavit, defendant has neither returned the equipment nor made any of the payments as set forth in the above referenced demand letter. Thus, plaintiff urges the Court to grant summary judgment in its favor.

¹Plaintiff is not moving for summary judgment on count four of the Complaint which seeks to recover for the fair market value of the equipment. Instead, by letter dated November 18, 2008, plaintiff's counsel advises that in the event the Court grants the motion for summary judgment on the Fifth Cause of Action, that is withdrawing the claim under the Fourth Cause of Action without prejudice.

The only document submitted in opposition to the motion for summary judgment is an attorney's affirmation by Gerald J. Mingoelli, Esq., who states that he is the attorney for the defendant, purportedly, on behalf of himself, individually. In that affirmation, Mingoelli states that the Answer raises numerous issues of fact that warrant denial of the motion. Mingoelli alleges that deceptive and fraudulent practices by plaintiff induced defendant into entering the contract. Moreover, Mingoelli asks the Court to dismiss the Summons and Complaint for lack of jurisdiction, on the ground that plaintiff no longer has an office in New York.

In Reply, plaintiff urges the Court to disregard the attorney affirmation submitted in opposition as it is not based on any first-hand knowledge and is devoid of any documentary or other evidentiary support. Additionally, plaintiff argues that defendant failed to submit a response to the Rule 19-a statement, and thus, the allegations set forth therein are deemed admitted for purposes of the motion for summary judgment. Specifically, plaintiff argues that the Mingoelli affirmation is insufficient to defeat the motion for summary judgment because the "attorney" does not claim to have participated in the negotiation of the agreement or the underlying transactions and has failed to provide an affidavit from a person with first hand knowledge. Moreover, plaintiff asserts that the claims in the attorney affirmation are merely vague and conclusory assertions, insufficient to defeat the motion for summary judgment. Finally, plaintiff asserts that jurisdiction and venue is proper based upon the forum selection and jurisdiction clause of the agreement. Based on the foregoing, plaintiff urges the Court to grant summary judgment.

The law is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. Goldberger v. Brick & Ballerstein, Inc., 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. Zayas v. Half Hollow Hills Cent. School Dist., 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996).

Additionally, the "construction and interpretation of an unambiguous written contract is an issue of law within the province of the court" and where "the terms of an agreement are clear and unambiguous, the agreement should be enforced according to the plain meaning of its terms without the need to examine extrinsic evidence to determine the parties' intent. In the Matter of Page, 43 A.D.3d 407, 840 N.Y.S.2d 423 (2d Dept. 2007) (internal citations omitted). See also, H. Fox & Co., Inc., v. Blumenfeld, 24 A.D.3d 722, 809 N.Y.S.2d 87 (2d Dept. 2005); Levitt v. Computer Assoc. Internat'l., 306 A.D.2d 251, 760 N.Y.S.2d 356 (2d Dept. 2003). Moreover, where there is an unambiguous agreement, one party cannot defeat summary judgment by conclusory allegations of fraud or mutual mistake. Chimart Assoc., v. Paul, 66 N.Y.2d 570, 498 N.Y.S.2d 344, 489 N.E.2d 231 (1986).

In the case at bar, plaintiff has met its prima facie burden of demonstrating the absence of any material issue of fact by the submission of the agreements between the parties, the unpaid invoices, the affidavit of facts by Zullo and the demand letter. The plain language of the agreement, and the amendments thereto, obligated defendant to pay a certain amount per procedure, per month, for use of the leased equipment and to report the number of procedures performed with the equipment by the tenth day of the immediately subsequent month. In the event defendant did not report the number of procedures by the tenth day of the subsequent month, defendant agreed to pay for 130 procedures. In the event of a default, the agreement provided that plaintiff may terminate the agreement and declare the entire balance remaining as due and payable and require the return of the equipment. As set forth in the Zullo affidavit, defendant failed to report the number of procedures performed from February 2006 to October 2006 and failed to pay the invoices provided by plaintiff.

In opposition to the motion, defendant has failed to raise a triable issue of fact. At the outset, the Court agrees with plaintiff that the Answer submitted by Mingoletti was not submitted on behalf of a party to this litigation and is not being considered by the Court. The named defendant in this action is a medical doctor services corporation, to wit, a professional corporation, and not the individual. See, e.g., Somer & Wand, P.C. v. Rotondi, 219 A.D.2d 340, 642 N.Y.S.2d 937 (2d Dept. 1996). Moreover, the sole submission in


opposition to the motion for summary judgment, an attorney affirmation, without any supporting documentation, is insufficient to defeat the motion for summary judgment. Mobil Oil v. Penna, 139 N.Y.S.2d 501, 526 N.Y.S.2d 849 (2d Dept. 1988).

Based on the foregoing, the motion for summary judgment on the first, second, third and fifth causes of action of the Complaint is granted and the fourth cause of action is dismissed in accordance with the correspondence dated November 18, 2008. The "Answer" submitted by Gerald J. Mingoelli is stricken in accordance with the determination herein.

Submit Judgment in accordance herewith.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: November 14, 2008
Riverhead, New York


EMILY PINES
J. S. C.