

**Hunter Green Assoc., Ltd v Triad
Communications Group, Inc.**

2009 NY Slip Op 31074(U)

May 14, 2009

Supreme Court, New York County

Docket Number: 103152/2006

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 12

Index Number : 103152/2006
HUNTER GREEN
 VS.
TRIAD
 SEQUENCE NUMBER : 002
 SUMMARY JUDGMENT

INDEX NO. 103152/2006
 MOTION DATE 1-28-09
 MOTION SEQ. NO. 002
 MOTION CAL. NO. 5
 his motion to/for SO

PAPERS NUMBERED
1-3
5

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 IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED

MAY 18 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/14/09

[Signature]
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: CIVIL TERM: PART 12

----- X
HUNTER GREEN ASSOCIATES, LTD

Plaintiff,

-against-

TRIAD COMMUNICATIONS GROUP, INC.,

Defendant/
Third-Party Plaintiff,

-against-

TRIAD WIRELESS GROUP, INC.,

Third-Party Defendant.

-----X

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Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Motion, Affirmation, and Exhibits.....	<u>1,2</u>
Affidavit of Service.....	<u>3</u>
Affirm. in Opp.....	<u>4</u>
Affirm. (in Reply).....	<u>5</u>

PAUL G. FEINMAN, J.:

Defendant Triad Communications Group, Inc. ("Triad C") moves pursuant to CPLR 3212 for summary judgment against plaintiff Hunter Green Associates ("Hunter") on the bases that (1) the contract for employment services between Hunter and Triad C, on which Hunter's claim of payment rests, is unenforceable as illegal and contravening public policy, and (2) that plaintiff has failed to state a cause of action against Triad C, because the contractual relationship giving rise to plaintiff's claim of payment existed with Triad Wireless Group, Inc. ("Triad W"),

not Triad C. In the alternative, Triad C moves pursuant to CPLR 3025[b] for leave to amend its answer to include additional affirmative defenses.¹ Hunter opposes the summary judgment branch of the motion. Triad W has not appeared on the motion.²

Triad C is a New Jersey-based telecommunications company specializing in installation of cellular broadcasting equipment and the erection of radio and cellular towers. Hunter is an employment agency operating out of New York. In the spring of 2005, William Wager, secretary at Hunter, met Philip Dejoy, president of Triad C, and in the course of conversation concerning their respective businesses and the need by Triad C for a particular type of worker, Wager promised that Hunter would try to find potential workers; shortly thereafter Hunter provided Triad C with a list of candidates, out of whom Triad C chose one individual. Triad C and Hunter then entered into a written agreement for the provision of “consulting employment services” on May 24, 2005 (Def. Ex. F; Affirm. Opp. Ex. A). Both parties agree that the services of one Damon Williams were provided under this contract.

On August 18, 2005, Victor Dejoy, Philip Dejoy’s brother, incorporated Triad W, another telecom company, in New Jersey. In the months following the signing of this agreement, Hunter provided a number of additional workers for the telecom construction projects primarily in Texas, but also in Indiana and California. Triad C alleges that Hunter established a business relationship with Triad W and provided all of the employees subsequent to Damon Williams to Triad W. Hunter firmly maintains that it provided all of the employees to Triad C pursuant to the May 24 agreement. In any event, Hunter was uncompensated for its services other than for

¹Triad C includes a proposed amended verified answer as Exhibit X, which is unsigned.

²It appears that Triad W has never answered or otherwise appeared in the action.

providing the initial worker to Triad W. On March 7, 2006, Hunter duly initiated the present suit by filing its summons and complaint in New York State Supreme Court, New York County. Hunter alleges three causes of action: breach of contract and accounts stated for non-payment of the invoices, and quantum meruit for compensation arising out of Triad C's alleged circumvention and direct hiring of Hunter workers. On June 21, 2006, Triad C filed its verified answer and third-party complaint impleading Triad W. On June 23, 2006, Triad W filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, which was converted by order of the court to Chapter 7 liquidation on January 1, 2007 (Mot. Ex. R, S).

Choice of Law Clause

The general rule in New York is that absent fraud or violation of public policy, a court is to apply the law selected in the contract as long as the state selected has sufficient contacts with the transactions (2 N.Y. Prac. § 12:2). Article 14 of the May 24 contract states the following:

14. Law of New York

14A. Both Parties hereto do hereby consent to jurisdiction in the State of New York with regard to all controversies which may arise with respect to the execution, interpretation of, and compliance with the terms and provisions of this Agreement; and both Parties hereto agree that New York [sic] applies and, in addition, waive any other venue or forum to which they might otherwise be entitled by virtue of domicile or otherwise.

(Affirm. in Opp. Ex A). Triad C argues that this paragraph is a forum selection clause, and that therefore the contract is unenforceable as Hunter was required, yet failed, to be licensed as an employment agency in New Jersey, pursuant to N.J. Stat. § 34:8-45[b], and therefore cannot maintain its claim. Triad C points out that because there is no word "law" stated in the body of the text of Article 14, the clause cannot be interpreted to provide for choice of law. Were the clause to be construed as a choice of law provision, then there would be no dispute that under

New York law, Hunter could maintain suit for collection of fees (Kodsi Affirm. ¶ 59). Hunter argues that the omission of the word “law” after the word “New York” and before the word “applies” was a mere typo that should not be allowed to defeat the intent and agreement of the parties that the parties are to employ New York law in the courts of New York to interpret and resolve any legal issues.

It is settled law in New York that contractual terms will be given their plain meaning where the intention of the parties is clearly and unambiguously set forth. Contracts are to be interpreted so that no portion of the contract is rendered meaningless or redundant (4 NY Prac. § 59:16). If it can consistently and reasonably be done, such an interpretation must be adopted as will render the whole agreement operative, and so far as possible, effect will be given to all the language (22 NY Jur. 2d Contracts § 249; *see also Williams Press v State of New York*, 37 NY2d 434, 440 [1975]). Courts may as a matter of interpretation carry out the intention of a contract by transposing, rejecting, or supplying words to make the meaning of the contract more clear, but such an approach is appropriate only in those limited instances where some absurdity has been identified (*Wallace v 600 Partners Co.*, 86 NY2d 543 [1995], citing *Castellano v State of New York*, 43 NY2d 909, 911 [1978]; *see also Hickman v Saunders*, 228 AD2d 559 [2d Dept 1996] [substituting the word “on” for the word “or,” as it was the only logical reading]).

Here, Article 14 is susceptible only to a single reading. The heading of Article 14 leaves no doubt that the clause it introduces involves a choice-of-law provision. It is also evident that the word omitted is the word “law,” because it is the only word that makes the phrase “both Parties hereto agree that New York applies,” whole and meaningful. The alternative choice, the words “forum” and “venue,” would render the first part of Article 14 redundant. Accordingly, the

Court will read the word “law” into the language “both parties hereto agree that New York [law] applies.” Therefore, because it is proper to understand that Article 14 provides for the New York law to govern the current agreement, and because the present suit bears a reasonable relationship to the State of New York, given that plaintiff is a New York entity, New York law governs, permitting Hunter’s suit for the recovery of fees owing under the May 24, 2005, agreement.³ Accordingly, there is no need to address defendant’s arguments concerning New Jersey public policy or the grouping of contacts test, and its motion for summary judgment and dismissal of the complaint on the ground that New Jersey law governs is denied.

Questions of Fact

Under CPLR 3212(b), summary judgment “shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” To warrant a court’s directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. (*Daliendo v Johnson*, 147 AD2d 312, 317 [2nd Dept 1989]). On a motion for summary judgment based upon a written contract, the construction of an unambiguous contract is for the court to pass on, and circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered when the intention of the parties can be gathered from the instrument itself (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162-64 [1990]). Nevertheless, where interpretation of contract terms or provisions is susceptible to at least two reasonable

³In addition, plaintiff’s action would not be precluded even if the New Jersey substantive law applied, because Triad C did not raise the affirmative defense of illegality by statute or common law in its responsive pleading, filed June 21, 2006 (Mot. Ex.B), or even in its proposed amended pleading (Mot. Ex. X), thereby waiving said defense pursuant to CPLR 3018[b].

interpretations, and intent must be gleaned from disputed evidence or from inferences outside the written words, it becomes an issue of fact that must be resolved by trial (*Amusement Bus Underwriters v American Intl. Group*, 66 NY2d 878, 880-81 [1985]).

In the present case, the language of the May 24, 2005 agreement is infused with a fair amount of ambiguity,⁴ which is further underscored by a near complete lack of adherence to the corporate formalities in the effectuation of business transactions between the parties. For instance, the language of the written agreement does not expressly state that it is a blanket contract that creates a general framework for the provision of employees to Triad C, nor does it expressly limit itself to the provision of employment services only by Damon Williams. Article 2 of the contract (“Contract Price and Invoicing”) refers in plural to “services performed by Hunter’s employees, agents or subcontractors (hereinafter collectively ‘consultants’),” and Article 7 fixes the continuous duration of the agreement at one year from the day of execution. Arguably, this suggests that Hunter and Triad C entered into the agreement for the provision of employment services by Hunter’s “consultants” for not less than a year starting May 24, 2005, which could include all of the employees provided for the jobs in Texas, Indiana, and California during the year when the May 24 agreement was in effect. On the other hand, Appendix A, at the end of the contract, includes only Damon Williams’ name and his pay rate, which suggests that the contract was intended to govern only Damon Williams’ provision of employment services.

The ambiguity is amplified by Article 2, paragraph C, which says that expenses are considered “extraordinary” if they involve “travel beyond the Company’s New York location or

⁴The copy of the agreement appended to defendant’s motion papers is missing pages 9 and 10, and the Court relies upon the copy of the agreement included by plaintiff as Exhibit A to Flynn’s Affirmation in Opposition.

client sites in the Northern New Jersey area.” This language can be interpreted in favor of either side. On one hand, the language presupposes travel of Hunter’s employees outside of New York and New Jersey, supporting Hunter’s argument that the May 24 contract covers the Texas job. On the other hand, paragraph C implies that the parties expected the contracted hires to work only in New York and New Jersey, which favors Triad C’s position that it is responsible for Damon Williams’ services only.

Given the ambiguity in the language of the contract, the Court would have to consider the circumstances surrounding the execution of the agreement and the parties’ subsequent business activities and practices to determine the identity of the proper corporate entity that is responsible to Hunter for its services. A careful review of the record reveals it to be inconclusive, containing contradictory evidence sufficiently supportive of either side. Contrary to defendant’s argument, the allegations do not establish with sufficient certainty that the business operations of Triad C and Triad W were sufficiently separate and distinct such that the actions of Triad W could not be imputed to Triad C. Therefore, the existence of genuine issues of material fact warrants denial of defendant Triad C’s motion for summary judgment on Hunter’s claims for breach of contract, accounts stated, and quantum meruit.

Amendment of Answer

Under CPLR 3025[b], a party may amend its pleading at any time by leave of court, which shall be freely given upon such terms as may be just, including the granting of costs and continuances. In effectuating a weighty policy favoring decision making on the merits, New York courts liberally grant leave to amend pleadings, even in cases marked by pointed procrastination

and tardiness (*see e.g. Goldstein v Brogan Cadillac Oldsmobile Corp.*, 90 AD2d 512, 513 [2nd Dept 1982]). However, where leave to amend is sought after the case has been certified as ready for trial, “judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious” (*Countrywide Funding Corp. v Reynolds*, 41 AD3d 524, 525 [2d Dept. 2007], quotation omitted, citation omitted). Here, defendant Triad C requests leave to add several affirmative defenses to its original answer, which was filed on June 21, 2006 (Def. Ex. X). The proposed defenses allege, in sum, the statute of frauds, failure to mitigate, assumption of risk of nonpayment, lack of contract, and no grounds to pierce the corporate veil. Defendant offers no explanation for why it seeks amendment so tardily, but Hunter has not opposed this branch of defendant’s motion. Mere lateness alone is not a barrier to the amendment, rather it is lateness coupled with significant prejudice to the other side (*Edenwald Contr. Co. v City of N.Y.*, 60 NY2d 957, 959 [1983] [quotation omitted]). Here, despite the tardiness of the request, having been made three months after the filing of the note of issue, the Court has not been made aware of any reasons why leave should not be granted for defendant to assert proposed affirmative defenses four through ten, as these defenses sufficiently arise from the underlying allegations.

However, the Court refuses leave to amend to add the third affirmative defense of the statute of frauds as it is untimely. The statute of frauds, if appropriate, is required to be asserted in the initial answer or in the answer amended as of course (CPLR 3018 [b]; *see also* Siegel, NY Prac. § 223 [4th Ed. 2005]). Where the statute of frauds is not raised as a defense in the initial answer, defendant is deemed to have waived that defense (*Chester Nat’l Bank v Rondout Marine Inc.*, 46 AD2d 985 [3rd Dept 1974], *lv denied* 37 NY2d 706 [1975]). Here, defendant Triad C did not raise the statute of frauds defense in its initial answer (Def. Ex. B), and no answer amended

not raise the statute of frauds defense in its initial answer (Def. Ex. B), and no answer amended as of course was filed by defendant. Thus, defendant Triad C has waived the defense of the statute of frauds and may not raise it in its amended answer. Accordingly, the Court grants leave for defendant to amend its answer, other than to include a third affirmative defense of the statute of frauds. It is therefore,

ORDERED that defendant Triad Communications Group, Inc.'s motion for summary judgment is denied; and it is further

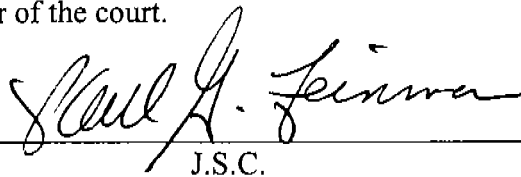
ORDERED that the branch of the motion requesting leave to amend the initial answer is granted in part and denied in part to the extent described above; and it is further

ORDERED that defendant shall file and serve on all parties an amended answer within 10 days of entry of this decision and order; and it is further

ORDERED that plaintiff shall, within 30 days of the filing of the amended answer, serve a copy of this order on the Clerk of Trial Support (60 Centre St., Room 158), who shall set this matter down for trial in Part 40.

This constitutes the decision and order of the court.

Dated: May 14, 2009
New York, New York



J.S.C.

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