

Bryan v Ask 4 Reports, LLC

2009 NY Slip Op 31601(U)

July 14, 2009

Supreme Court, Nassau County

Docket Number: 016442/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
Justice.

TRIAL/IAS PART 23

THOMAS A. BRYAN and PROPERTY & CASUALTY
SUBROGATION GROUP, LLC.,

Index No.: 016442/08
Motion Sequence...01
Motion Date...05/19/09

Plaintiffs,

-against-

ASK 4 REPORTS, LLC,

Defendant.

Papers Submitted:

- Notice of Motion.....X
- Affidavit in Opposition.....X
- Reply Affidavit.....X

Upon the foregoing papers, the motion by the attorneys for the Plaintiffs for an order pursuant to CPLR § 3212, granting summary judgment in favor of the Plaintiffs, is **DENIED.**

The Plaintiffs assert that the Defendant, ASK 4 REPORTS LLC, (hereinafter referred to as Ask 4) and the Plaintiff, PROPERTY & CASUALTY SUBROGATION GROUP, LLC., (hereinafter referred to as P&C) shared office space in Westbury, New York from July 2007 to July 2008. Keith Bellman was the comptroller for P&C. Bellman asserts that he served as a bookkeeper for both P&C and Ask 4. In this capacity he claims to have

maintained the accounting and financial records on QuickBooks files located on a network server shared by both P&C and Ask 4. After July 2008, Ask 4 vacated the premises it shared with P&C.

The Plaintiff's proof is shown by QuickBooks reports and schedules annexed to his affidavit. Bellman asserts he retained hard copies of numerous reports, Excel spreadsheets and other financial information previously downloaded or exported from Ask 4's QuickBooks files. In early August, 2008, Ask 4 vacated the office it shared with P&C. The Plaintiffs, in the underlying action, seek to recover rent and other charges allegedly due and owing from Ask 4 as set forth in the amended verified complaint.

There are five (5) causes of action alleged in the amended verified complaint:

(1) Between August 3, 2007 and April 1, 2008 THOMAS A. BRYAN, the individual Plaintiff, alleges he made loans to the Defendant in the total amount of \$25,000.00 without interest. He alleges that only \$500 was repaid, leaving a balance owed of \$24,500.00;

(2) In June 2007, the Plaintiff, P&C alleges that it made demand loans without interest to the Defendant in the sum of \$20,000. It alleges that no repayment has been made;

(3) Between December 31, 2007 and July 3, 2008, the Plaintiff, P&C, alleges that it incurred credit card charges in the amount of \$12,852.27, on behalf of the Defendant. The Plaintiff alleges that no amount of the credit card charges it incurred has been repaid;

(4) On or about March 17, 2008, at the request of the Defendant, the Plaintiff

P&C alleges it made a medical payment in the sum of \$2,000 for the benefit of the Defendant, Ask4, none of which the Plaintiff alleges has been repaid;

(5) From May 1, 2007 to August 11, 2008, the Defendant, Ask 4 leased office space from the Plaintiff, P&C at the monthly rental rate of \$1,500.00. The Plaintiff alleges that the Defendant is in arrears for 15 ½ months in the total amount of \$23,250.00. In addition, the Plaintiff alleges that the Defendant agreed to pay for support services and supplies provided by the Plaintiff, as well as to pay for “allocated overhead expenses for the space.” The Plaintiff alleges that the outstanding balance for services, supplies and overhead is \$29,565.26.

Thomas Bryan, the individual plaintiff, is the managing member of the Plaintiff, P&C. Thomas Bryan also asserts that he has a proprietary interest in the Defendant, Ask 4.

The Defendant interposed an amended verified answer and seven (7) affirmative defenses. Prior to the service of the amended verified answer, the Defendant served Interrogatories. Rather than respond to the Interrogatories or conduct pre-trial discovery, the Plaintiffs brought the within motion for summary judgment.

In opposition to the motion for summary judgment, the Defendant asserts that the QuickBooks reports are self serving documents created by and for the benefit of the Plaintiffs solely for the purpose of this litigation. The Defendant contends that prior to the commencement of the within action no demand was made for payment of the items alleged

in the amended verified complaint. Generally, the receipt and retention of accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness would give rise to an action based on an account stated, entitling the Plaintiffs to summary judgment in their favor. *See Shea & Gould v Burr*, 194 A.D.2d 369.

William Denberg, a member of the Defendant, Ask 4 refutes the assertion that Keith Bellman, the comptroller of the Plaintiff, P&C, was responsible for receipts, bills and financial affairs of the Defendant, Ask 4. The Plaintiffs assert that in December 2007, the Defendant, Ask 4's records were converted and entered into "QuickBooks" under the direction of Lori Upham, an outside consultant for Ask 4. The Defendant asserts that Lori Upham never worked for the Defendant, but rather was employed by the Plaintiff, P&C.

Issue finding, rather than issue determination, is the key to summary judgment (*In re Cuttitto Family Trust*, 10 A.D.3d 656; *Greco v Posillico*, 290 A.D.2d 532; *Gniewek v Consolidated Edison Co.*, 271 A.D.2d 643; *Judice v DeAngelo*, 272 A.D.2d 583), the court should refrain from making credibility determinations (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 N.Y.2d 338, 341; *Surdo v Albany Collision Supply Inc.*, 8 A.D.3d 655; *Greco v Posillico, supra*; *Petri v Half Off Cards, Inc.*, 284 A.D.2d 444, 445), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *Glover v City of New York*, 298 A.D.2d 428; *Perez v Exel Logistics*, 278 A.D.2d 213.

Issues of fact raised by the Defendant include, but are not limited to how the parties understood and agreed that the alleged charges incurred on the credit card for the

benefit of the Defendant, Ask 4 would be repaid; the circumstances surrounding the alleged obligation of the Defendant to pay \$1,500.00 per month in exchange for the use and occupancy of the premises; and the agreement, either orally or in writing, that the Defendant would be required to reimburse the Plaintiffs for “support services and supplies” provided to the Defendant.

The Defendant contends the credit card charges were incurred by Ask 4 solely for the benefit of the Plaintiff, P&C and not for the benefit of Ask 4. As to the payment of \$2,000.00 for Keith Bellman, an employee of the Plaintiff, P&C, the Defendant asserts that it had no obligation to pay any sum toward Keith Bellman’s health insurance. The Defendants claimed the loans at issue were made to an entity called New View America, which it alleges is owned by the Plaintiff. There is no indication as to the circumstances surrounding the making of the alleged loans. “As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent’s proof, but must affirmatively demonstrate the merit of its claim or defense.” *Fromme v Lamour*, 292 A.D.2d 417; *George Larkin Trucking Co. v Lisbon Tire Mart*, 185 A.D.2d 614. The Defendant has raised questions of fact precluding the granting of summary judgment in favor of the Plaintiffs against the Defendant.

Although the motion is opposed by the Defendant on the basis that discovery is incomplete, it is worth noting that the parties have presented fundamentally and diametrically opposed issues of fact. Moreover, assuming the Plaintiff, Bryan’s assertion that

he is a principal of the Plaintiff, P&C as well as the Defendant Ask 4 is correct, there is an issue as to his credibility. Issues of credibility such as the veracity of the QuickBooks reports and schedules must be construed in a light most favorable to the party opposing the motion fo summary judgment. *See Sid Capelin Assoc. v Globe Mfg. Corp.*, 34 N.Y.2d 338; *see also Glover v City of New York*,, 298 A.D.2d 428.

Accordingly, it is hereby

ORDERED, that the Plaintiff's motion for summary judgment is **DENIED**;

and it is further

ORDERED, that a Preliminary Conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference part, located in the lower level at the Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York on the **14th day of August, 2009, at 9:00 a.m.** This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require; and it is further

ORDERED, that the attorneys for the Plaintiff shall serve a copy of this Order on the Preliminary ConferenceClerk and the attorneys for the Defendants, pursuant to CPLR § 2103 (b) 1, 2 or 3 within seven (7) days from the date hereof.

This constitutes the decision and order of this court.

DATED: Mineola, New York
July 14, 2009

ENTERED
JUL 15 2009
Hon. Randy Sue Marber, J.S.C.
NASSAU COUNTY
COUNTY CLERK'S OFFICE