

**AJS Designs NYC, LLC v Gottbetter**

2009 NY Slip Op 32241(U)

September 24, 2009

Supreme Court, New York County

Docket Number: 115949/2008

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan  
Justice

PART 36

Index Number : 115949/2008

AJS DESIGNS NYC, LLC

vs.

GOTTBETTER, ADAM

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO.

115949-08

MOTION DATE

MOTION SEQ. NO.

#001

MOTION CAL. NO.

\_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2

3

4

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 *is decided in accordance with the attached memorandum decision.*

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

**FILED**  
SEP 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/24/09

**HON. DORIS LING-COHAN**

J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 36

-----X  
AJS DESIGNS NYC, LLC,

Plaintiff,

-against-

ADAM GOTTBETTER,

Defendant.

Index No. 115949/08

Motion Seq. No. 001

**FILED**  
SEP 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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**DORIS LING-COHAN, J.:**

Plaintiff AJS Designs NYC, LLC ("AJS") moves for summary judgment, pursuant to CPLR 3212, in its favor and against defendant Adam Gottbetter in the amount of \$74,319.16 plus interest, costs and disbursements, and attorneys' fees.

This action arises out of an agreement between the parties for AJS to provide interior design services for defendant. On March 12, 2007, defendant executed and delivered to plaintiff an express Design Consultation/Procurement Agreement, pursuant to which plaintiff would provide interior design services and the procurement of furniture, finishes and accessories for a Park Avenue residence and a Watermill residence, and provided for payment based on a schedule of hourly rates (the "Agreement"). Plaintiff alleges that, after the Agreement was executed, instead of purchasing the contemplated apartment on Park Avenue, defendant purchased a residence on Fifth Avenue. Plaintiff alleges that the interior design services provided for the Fifth Avenue residence are subject to the above written agreement, although not specifically stated therein.

Defendant terminated plaintiff's services by letter dated April 1, 2008. Plaintiff alleges that it fully performed under the Agreement by providing services to defendant, in response to

[\* 3 ]

defendant's demands. However, defendant avers that plaintiff failed to timely and adequately provide the services it promised, causing defendant to hire another designer and incur damages including costs for change orders, additional construction work and the cost of living in a hotel since defendant's residential apartment was still under renovation after 9 months.

Plaintiff alleges that it provided services to defendant in the amount of \$179,530.23, but only partial payment was made by defendant totaling \$105,211.07. No further payments have been made. Therefore, plaintiff commenced this action, alleging causes of action for services rendered and for reimbursement of legal fees. Defendant counterclaims for breach of contract, negligence and fraud.

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). However, it should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). "Moreover, the motion court should draw all reasonable inferences in favor of the nonmoving party in determining whether to grant summary judgment." *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 (1st Dep't 2002). In deciding such a motion, the court's role is "issue-finding, rather than issue-determination." *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted).

Plaintiff moves for summary judgment, arguing that no material issues of fact exist with respect to the services it rendered to defendant. Plaintiff contends that a valid, enforceable, written agreement existed between the parties, pursuant to which it provided adequate services to defendant and that, although invoices were sent, full payment has not been made by defendant.

In opposition, defendant argues that summary judgment is inappropriate and premature, as there are issues of fact regarding plaintiff's performance under the contract and defendant's alleged breach. First, defendant contends that plaintiff failed to timely complete the renovations, which was a key term of their agreement, since the renovations needed to be completed by mid-April 2008 in order for defendant to move in. While plaintiff contends that there was no "time is of the essence" clause in the written contract, defendant challenges the written agreement's applicability in this case because the agreement was limited to the Park Avenue and Watermill residences, and did not explicitly cover the Fifth Avenue residence.

Second, defendant disputes the services rendered by plaintiff, maintaining that plaintiff failed to competently provide the services it had promised over a nine-month period from June 2007 through March 2008. As examples in support of defendant's claim that plaintiff's services were inadequate, defendant asserts that: (1) the interior designer with whom he worked was difficult to reach, which contributed to delays and shoddy work; (2) plaintiff's designs were deficient; (3) plaintiff's measurements and procurement of accessories were inaccurate; and (4) plaintiff failed to make weekly inspections and to supervise the renovations. Further, defendant contends that due to the poor quality of the services performed by plaintiff, he was required to terminate their agreement and hire another interior designer. Defendant asserts that he notified plaintiff of his dissatisfaction with the services plaintiff rendered, which defendant also outlined in the termination letter dated April 1, 2008.

Defendant also contends that plaintiff failed to send timely, monthly invoices. Defendant asserts that plaintiff sent him an invoice dated January 28, 2008 on March 13, 2008 for services allegedly rendered in August through December 2007. Plaintiff thereafter also sent an invoice

[\* 5 ]

dated March 13, 2008 for services rendered in January and February 2008, and subsequently re-sent the invoice on May 15, 2008 with an increased amount of \$7,028.29.

“The question of whether there has been substantial performance – or a breach – is to be determined, whenever there is any doubt, by the trier of fact.” *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 189 (1st Dep’t 2002). Defendant has set forth sufficient facts to withstand this summary judgment motion. Disputed issues in this case, such as whether plaintiff substantially and adequately performed its obligations in providing interior design services as well as procuring furniture and accessories, whether defendant had a valid excuse for failing to make complete payment, and what remaining amount, if any, is due plaintiff, preclude the granting of summary judgment. In addition, it is unclear, at this juncture, especially in light of the fact that no discovery has occurred to date, whether the written agreement is applicable to the services provided by plaintiff for defendant’s Fifth Avenue residence.

Despite the issuance of a preliminary conference order on June 19, 2009, it is undisputed that no discovery has been completed in this case. As such, summary judgment is premature where, as in the instant case, discovery requests remain outstanding that could reveal evidentiary proof in admissible form crucial to the issues in this case. *See George v New York City Transit Auth.*, 306 AD2d 160, 161 (1st Dep’t 2003); *Arez v Twin Parks Northeast Houses, Inc.*, 294 AD2d 266, 266 (1st Dep’t 2002).

Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment is denied; and it is further

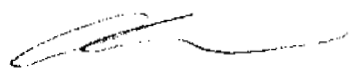
ORDERED that, as previously scheduled, **counsel shall appear in Part 36, for a compliance conference, on October 23, 2009 at 9:30 AM, Room 428, 60 Centre Street, New**

York, New York; and it is further

*note* ~~W~~ ORDERED that counsel shall expedite all remaining discovery; and it is further ~~V~~

ORDERED that within 30 days of entry of this judgment and order, defendant shall serve a copy upon plaintiff with notice of entry.

Dated: 9/24/05

  
\_\_\_\_\_  
Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\AJS Designs.Coltbetter, sj denied - sub perform, breach of k disputed issues, no discovery.wpd

**FILED**  
SEP 30 2009  
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NEW YORK