

**GLM Communications, Inc. v Diverse Media of N.Y.,  
Inc.**

2009 NY Slip Op 33451(U)

June 22, 2009

Supreme Court, New York County

Docket Number: 101849/09

Judge: Doris Ling-Cohan

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This opinion is uncorrected and not selected for official publication.

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

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GLM COMMUNICATIONS, INC.,

Plaintiff,

Index No.:

-against-

101849/09

DIVERSE MEDIA OF NEW YORK, INC. and DIRECT  
ALTERNATIVES, LLC,

Motion Seq. No.: 001

DORIS LING-COHAN, J.:

Defendants.

JUN 26 2009

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DORIS LING-COHAN, J.:

FILED  
COUNTY CLERK'S OFFICE  
NEW YORK

Defendant Direct Alternatives, LLC (Direct) moves for dismissal of the complaint pursuant to CPLR 3211(a)(7). Plaintiff cross-moves for leave to amend its complaint.

Plaintiff, an agent of the Veterans of Foreign Wars of the United States, is suing defendants for non-payment of services rendered by plaintiff. The causes of action in the complaint include breach of contract, unjust enrichment and account stated.

Direct is moving for an order dismissing the complaint for failure to state a cause of action. Direct claims that it never received a single invoice from plaintiff. Direct argues that the first cause of action is defective on its face because the fundamental elements - the existence and specific terms of a contract, performance by the party seeking enforcement, breach by the other party, and damages attributable to the breach - are not pleaded. Direct argues that the second cause of action is also defective on its face because plaintiff failed to show how Direct has been enriched and that any enrichment has been at plaintiff's expense. In addition, because an express contract has been alleged in the complaint, a claim for unjust enrichment is precluded. Direct argues that the third cause of action is defective on its face because there was no account presented and no alleged agreement with respect to the amount of the balance due.

Opposing this motion, plaintiff states that it is owed an outstanding balance of \$40,800 for advertising services rendered to defendants. Plaintiff claims that defendant Diverse Media of

New York, Inc. (Diverse) was the agent of Direct and that Diverse placed each advertising order through a combination of an oral contract with plaintiff followed by written insertion orders. Plaintiff states that it does not know whether Direct will seek to dispute that Diverse was an authorized agent of Direct and/or dispute that the unpaid advertising was authorized by Direct. As a result, plaintiff has alleged alternative theories of contract and quasi-contract against both defendants. Plaintiff argues that it is not precluded from raising alternative theories.

Alternatively, plaintiff requests leave to amend its complaint in order to supplement the factual allegations underlying its claims against defendants. A copy of the amended complaint is submitted. In its reply papers, Direct does not object to the cross motion. However, based on papers submitted by plaintiff, Direct argues that plaintiff has failed to show that Direct was a party to any contract. Plaintiff has shown that it sent orders and invoices directly to Diverse. Direct contends that it did not receive the invoices. Direct also contends that no account stated was presented to Direct and that Direct did not benefit from plaintiff's services. Direct neither concedes nor denies that Diverse was its agent.

• On a motion to dismiss, the allegations of the complaint are deemed true and all inferences reasonably flowing from these allegations must be resolved in the pleader's favor. See *Residence on Madison Condominium v W.T. Gallagher & Assocs., Inc.*, 271 AD2d 209 (1<sup>st</sup> Dept 2000). However, the presumption of truthfulness can be challenged where allegations consist of bare legal conclusions or where factual claims are either inherently incredible or flatly contradicted by documentary evidence. See *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1<sup>st</sup> Dept 1994).

Here, plaintiff has not submitted any invoices that it sent to Direct. However, one letter, dated July 1, 2008, was sent to "Anthony Dill, Direct Alternatives" and discusses the balance due on invoices. In this letter, plaintiff states that it had outstanding invoices through its dealings

with Diverse. The letter provides Direct with information with respect to the invoices which are the subject of this lawsuit. A copy of an email communication from Mr. Dill indicates that he was concerned about Diverse not paying its debts to plaintiff and that he and Direct wanted to place more advertising with plaintiff.

This evidence provides information to support plaintiff's claims asserted against Direct. Moreover, the amended complaint provides more information than the original complaint. Direct has not opposed the granting of plaintiff's cross motion to amend the complaint.

The amended complaint alleges that Diverse is the media agent for Direct and was authorized to place advertisements on behalf of Direct. It alleges that Diverse, by oral communications with plaintiff followed by a written insertion order forwarded to plaintiff, placed advertisements in the magazine "VFW." The unjust enrichment claim remains, but states that defendants received the benefits of unpaid advertising and that plaintiff rendered services in good faith with an expectation of payment. The account stated claim also remains with the added allegation that at no time prior to the initiation of litigation by plaintiff did Direct dispute the outstanding balance that was due to plaintiff.

Alternative and inconsistent causes of action can be brought in a complaint. *See Segal v Cooper*, 49 AD3d 467, 467-86 (1<sup>st</sup> Dept 2008); *Ellis v Abbey & Ellis*, 294 AD2d 168, 170 (1<sup>st</sup> Dept 2002). The causes of action of breach of contract and unjust enrichment may be pleaded alternatively. *Loheac v Children's Corner Learning Center*, 51 AD3d 476 (1<sup>st</sup> Dept 2008).

\* In the amended complaint, it is alleged that plaintiff entered into an oral contract with Diverse, but not Direct. There are insufficient allegations to support a breach of contract claim against Direct; however, the other two causes of action are applicable to Direct.

The essence of unjust enrichment is that one party has received money or a benefit at the expense of another. *See Wolf v National Council of Young Israel*, 264 AD2d 416, 417 (2d Dept

1999). "An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due".

*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 (1<sup>st</sup> Dept 2007)(citation omitted). With respect to the account stated, Direct was given notice of the balance due and did not respond to the letter sent by plaintiff. "An action based on an account stated may exist where defendant has received a statement of the account without objecting to it within a reasonable time". *Dreyer & Taub v Rubinstein*, 191 AD2d 236 (1<sup>st</sup> Dept 1993).

Based upon the above, it is

ORDERED that Direct's motion to dismiss is granted to the extent that the first cause of action for breach of contract is dismissed as against defendant Direct; and it is further

ORDERED that plaintiff's cross-motion to amend the complaint is granted to the extent that the amendments to the complaint proposed herein with respect to the second and third causes of action shall be permitted, and the complaint attached to the cross-motion is deemed served upon defendants; it is further

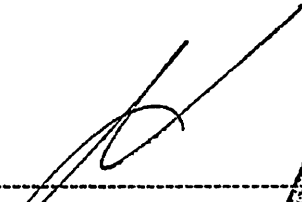
ORDERED that Direct shall serve an answer to the amended complaint within 20 days of service; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

DATED: June 22, 2009

Hon. Doris Ling-Cohan, J.S.

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