

T. Reagan Trucking, Inc. v Creer Design Group, Inc.
2010 NY Slip Op 30598(U)
March 19, 2010
Supreme Court, New York County
Docket Number: 601820/09
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA

PART 19

Index Number : 601820/2009
 T. REAGAN TRUCKING, INC.
 VS.
 CREER DESIGN GROUP, INC.
 SEQUENCE NUMBER : 001
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

1 this motion to/for _____

PAPERS NUMBERED

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 and cross-motion are decided in accordance with accompanying memorandum decision.

FILED
 MAR 23 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

This Constitutes Decision and Order of the Court.

Dated: 3/18/10

Saliann Scarpulla
SALIANN SCARPULLA 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):

3-23-10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X

T. REAGAN TRUCKING, INC.

Plaintiff,

Index Number 601820/09
Submission Date 2/24/09
Mot. Seq. No. 001 and 002

-against-

DECISION & ORDER

CREER DESIGN GROUP, INC. and
KYONG S. KWAK

Defendant.

----- X

Appearances: For Plaintiff:
Charles E. McBain, Attorney
& Counselor at Law, PLLC
By Michael R. Wood, Esq.
47 Oakland Avenue
Harrison, New York 10528
914-830-9945

For Defendants:
Sciarra & Catrambone, LLC
By Charles J. Sciarra, Esq.
1130 Clifton Avenue, Ste 3--Second Floor
Clifton, New Jersey 07013
973-242-2442

Papers considered in review of this motion for summary judgment:

Papers	
Notice of Mot. and Affirm. in Supp.....
Affirm. in Opp.....	<u>2</u>
Reply Aff. in Further Supp.....	<u>3</u>

FILED
MAR 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON SALIANN SCARPULLA, J.:

In this case for recovery on an equipment supply contract, plaintiff T. Reagan Trucking, Inc. ("T. Reagan") moves pursuant to CPLR 3212 for summary judgment on its four causes of action, breach of contract, unjust enrichment, account stated, and fraud. Separately, defendants Creer Design Group, Inc. ("Creer") and Kyong S. Kwak ("Kwak"), the vice president of Creer, move pursuant to CPLR 1007 and 3025(b) to implead Creer's subcontractor, Rowland F. Harris and Rowland F. Harris Construction

(collectively "Harris Construction"). T. Reagan does not oppose Creer's motion.

Motion sequences 001 and 002 are consolidated for disposition.

In support of its motion, T. Reagan offers a copy of the equipment rental contract bearing Kyong S. Kwak's signature on behalf of Creer. This contract is a rate agreement. It does not include any commitment as to the kind of equipment that was to be ordered or the duration of rent. T. Reagan supplements the contract with "time and materials tickets," which indicate the equipment T. Reagan supplied on June 23-26 and July 7-11, 14-17 of 2008, together with the corresponding number of hours. Based on these tickets, T. Reagan issued Creer invoices in the aggregate amount of \$26,180.00. Creer made an attempt to make a partial payment, but Creer's check did not clear.

By affidavit of Kyong S. Kwak, Creer argues in opposition to summary judgment that one of Creer's employees, Susie Bae, signed the rate agreement with Kwak's signature without the authority of Creer officers. According to Creer, its subcontractor Harris Construction is responsible for the invoices, because Harris Construction used the rental equipment and failed to pay for it. Only when Harris Construction stopped paying for the rental equipment did T. Reagan demand payment from Creer.

Discussion

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." The motion must be supported by (1)

an affidavit, (2) by a copy of the pleadings and (3) by other available proof, such as depositions and written admissions. CPLR 3212 (b). To warrant a court's directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. *Epstein v Scally*, 99 A.D.2d 713 (1st Dep't 1984). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that the defense is real and can be established at trial. *Indig v Finkelstein*, 23 N.Y.2d 728 (1968); *see also Vogel v Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1st Dep't 2002). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

Here, T. Regan has met its burden of establishing entitlement to a judgment as a matter of law on its breach of contract cause of action. The undisputed evidence establishes that there was a valid, enforceable agreement between T. Reagan and Creer. Despite the fact that the agreement left open the exact type of equipment and the number of hours for which it was to be rented, the agreement does not suffer from lack of definiteness and certainty of terms. See UCC §§ 2-A-204(3) and 2-A-207. Such additional terms were reflected in the written tickets as the equipment was rented on a rolling basis.

Creer's self-serving, unsupported assertions that Kwak did not sign the agreement and that Susan Bae was not authorised to contractually bind Creer are insufficient to raise

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an issue of fact requiring a trial.¹ Kwak's affidavit contains no information about Susan Bae's functions in Creer, and Kwak does not specifically claim that he personally did not authorize Bae to execute the contract on his behalf, *i.e.*, he does not claim that Bae forged his signature. Creer also does not argue that prior to litigation it ever communicated to T. Reagan that the rate agreement was not properly executed or that Creer objected to it, even though Creer received and retained a copy of the rate agreement after it was signed.

That Harris Construction, Creer's subcontractor, used the equipment, does not affect Creer's obligations to T. Reagan under the written agreement. Further T. Reagan has shown entitlement to payment of the invoices issued in connection with the rate agreement as an account stated. An account stated is an account balanced and rendered, with an assent to the balance expressed or implied, so that the demand is essentially the same as if a promissory note had been given for the balance. *See Parker Chapin Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 377 (1st Dep't 1977) (citation omitted).

T. Reagan has made out its account stated cause of action by submitting its invoices and an affidavit of a person with knowledge attesting that the invoices were sent and that no objection was made to them. *See Duane Reade v Cardinal Health, Inc.*, 12 A.D.3d 224, 225 (1st Dep't 2004); *see also Rosenman Colin Freund Lewis & Cohen v Edelman*, 160 A.D.2d 626, 626 (1st Dep't 1990).

¹ The Court notes that Creer did not request an opportunity for further discovery under CPLR 3212(f). Both parties requested the Court to issue a decision on the basis of the evidence presented herein.

Creer never objected to the T. Reagan's invoices. While Creer now contends that it did not timely receive the bills, Creer makes no allegation that it ever communicated to T. Reagan that Creer was not obligated to pay for T. Reagan's services. On the contrary, Creer made out a check to T. Reagan in the amount of \$9,310.00 in an attempt to at least partially cover the debt, but the check did not clear. Creer then faxed a note to T. Reagan, dated February 5, 2009, asking it to try to deposit the check again and explaining that Creer had not yet resolved its "problem" with Harris Construction and is doing the best it can to pay T. Reagan. Creer's communications indicate that not only did Creer fail to object to T. Reagan's invoices, but Creer also implicitly acknowledged their validity. *See Morrison Cohen Singer & Weinstein, L.L.P. v Ackerman*, 280 A.D.2d 355, 356 (1st Dep't 2001). Therefore, T. Reagan is entitled to a summary judgment against Creer on its breach of contract and account stated causes of action in the amount of \$26,180.00.

T. Reagan, however, has not established any grounds to hold Kwak, vice president of Creer, personally liable on Creer's agreement with T. Reagan. The contract evidences only that Kwak's signature was on behalf of Creer, not Kwak personally. *See Salzman Sign Co., Inc. v Beck*, 10 N.Y.2d 63, 67 (1961). Therefore, after searching the record pursuant to CPLR 3212(b), T. Reagan's complaint is dismissed in its entirety as to Kwak.

T. Reagan's claims for unjust enrichment and fraud are also dismissed, because they are self excluding claims. *See Clark-Fitzpatrick, Inc. v Long Island Rail Road Co.*, 70 N.Y.2d 382, 388 (1987)(finding that one cannot recover damages in quasi contract in

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the presence of a valid contract covering the same subject). Further, actions that solely constitute a breach of contract cannot support a claim of fraud. *New York Health & Racquet Club, Inc. v NIA/Kornreich LLC*, 290 A.D.2d 348, 348 (1st Dep't 2002).

In accordance with the foregoing, it is

ORDERED that the motion by plaintiff T. Reagan Trucking, Inc. for summary judgment is granted on its first and third causes of action, for breach of contract and account stated, as against defendant Creer Design Group, Inc. only, and is otherwise denied; and it is further

ORDERED that the Clerk of Court enter Judgment against defendant Creer Design Group, Inc. only on plaintiff's first and third causes of action for breach of contract and account stated in the amount of \$26,180.00, together with the costs and statutory rate of interest from August 3, 2008; and it is further

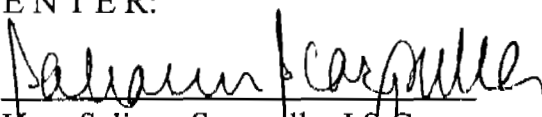
ORDERED that the plaintiff's complaint is dismissed in its entirety with prejudice as against defendant Kyong S. Kwak only, and plaintiff's second and fourth causes of action for unjust enrichment and fraud are dismissed with prejudice as against defendant Creer Design Group, Inc.; and it is further

ORDERED that motion by Defendant Creer Design Group, Inc. pursuant to CPLR 1007 and 3025(b) to implead Rowland F. Harris and Rowland F. Harris Construction is granted without opposition, and the third-party complaint shall be filed and served no later than May 27, 2009; and it is further

ORDERED that plaintiff T. Reagan Trucking, Inc. shall serve a copy of this order with notice of entry upon all parties and the County Clerk within thirty (30) days of entry.

This constitutes the decision and order of the Court.

Dated: New York, New York
March 19, 2010

ENTER:

Hon. Saliann Scarpulla, J.S.C.

FILED
MAR 23 2010
NEW YORK
COUNTY CLERK'S OFFICE