Sherman Adv. v Kamali Org., LLC
2010 NY Slip Op 31411(U)
June 1, 2010
Sup Ct, Nassau County
Docket Number: 11386/09
Judge: Daniel R. Palmieri
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

TRIAL TERM PART: 45

SHERMAN ADVERTISING,
a Division of Baynard Advertising Agency, Inc.,

Plaintiff,

INDEX NO.: 11386/09

-against-

MOTION DATE:5-6-10
SUBMIT DATE:5-20-10
SEQ. NUMBER - 001

THE KAMALI ORGANIZATION, LLC and
GOLDEN GATE RESIDENCE, LLC, a/k/a
GOLDEN GATE RESIDENCE LLC,

Defendants.

The following papers have been read on this motion:

Notice of Motion, dated 4-5-10..1
Affidavit in Opposition, dated 4-10.................................2
Reply Affidavit, dated 5-14-10...3

The motion by defendant Kamali Organization, LLC, (Kamali) for summary judgment pursuant to CPLR §3212 is denied.

This is an action for advertising services for a condominium project in Queens County. The moving papers allege that the owner of the project is co-defendant Golden Gate Residence, that Kamali merely acted as disclosed agent for Kamali and as such is not responsible for the contractual obligations of its principal. Kamali has annexed copies of its

Management Agreement, its document response (sans exhibits) copies of four checks issued on a Golden Gate account which plaintiff contends are signed by a person named Kamali, a credit card copy issued to a person named Jackie Kamali and Golden Gate. Neither side has submitted invoices or correspondence.

Plaintiff, in opposition denies that it was informed of Kamali's agency status and states that all of its dealings and invoices went to Kamali and the agreement, which was not in writing, was made only with Kamali. Plaintiff has submitted copies of electronic mails to and from Jackie Kamali, none of which refer to Golden Gate in which decisions are made and directions given by Kamali.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche,* 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient

to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries*, Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

It is well settled that where there is a disclosed principal agent relationship and a contract relates to a matter of the agency, the agent will not be personally bound unless there is clear and explicit evidence of the agent's intention to be bound. *I. Kaszirer Diamonds, Ltd., v. Zohar Creations, Ltd.*, 146 Ad2d 492, 494 (1st Dept. 1989). Even where an agent signs an agreement in his/her own name, there is no liability as to the agent where the counter-party was aware that the agent was acting for a disclosed principal. *Leonard Holzer Assoc., Inc., v. Orat*, 250 AD2d 737 (2d Dept. 1998).

To be effective disclosure must occur at the time the contract is made. Disclosure occurring after the contract is made will not relieve the agent of liability. *Ardwin v. Englert*,

81 AD2d 960 (3d Dept. 1981). An agent for an undisclosed principal is liable on any contracts made on behalf of the principal. Since Kamali entered into the contract in question. Unless it is shown that the intent of the parties was to bind only the disclosed principal, Golden Gate, Kamali is liable either as a principal or as an agent for an undisclosed principal. *J.P.Endeavors v. Dushaj*, 8 AD3d 440 (2d Dept. 2004).

Here, Kamali has failed to submit uncontroverted documentary and testimonial evidence establishing that in its dealing with plaintiff, Kamali was acting as a disclosed agent on behalf of Golden Gate. *See Newman v. Berkowitz*, 50 AD3d 479 (1st Dept. 2008).

Thus, Kamali has failed to make a *prima facie* showing of entitlement to relief and its motion should be denied without regard to the strength of the opposing papers.

However, even allowing that Kamali has made a *prima facie* showing of the right to relief, plaintiff has raised issues of fact which require denial of this motion.

Plaintiff denies knowledge of Kamali's agency status and has submitted copies electronic mails that support such contention. That a selected few checks were issued to plaintiff with the Golden Gate name creates a factor to be considered in making the ultimate determination of liability but standing alone, are insufficient to form a basis for granting this motion.

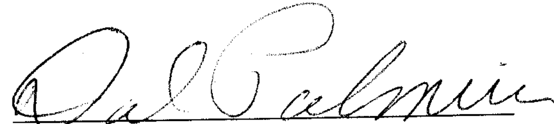
Plaintiff's request for summary judgment is denied as it was made without benefit of cross motion, CPLR §2215, and while plaintiff's evidence might be sufficient to raise issues of fact on Kamali's motion, it is not enough to eliminate all relevant questions of fact.

The motion is denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: June 1, 2010



HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
JUN 02 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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