

Winick v Bueno

2010 NY Slip Op 31881(U)

July 15, 2010

Supreme Court, New York County

Docket Number: 115851/09

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 115851/2009
WINICK, STEVEN
vs.
MULTITRADE SECURITIES, LLC
SEQUENCE NUMBER : 001
DISMISS

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

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
JUL 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 15, 2010

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):

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

-----X

STEVEN WINICK,

Plaintiff,

-against-

Index No.: 115851/09
Submission Date: 5/5/2010
DECISION AND ORDER

ROBERTO BUENO, MULTITRADE
SECURITIES, LLC and LUIS RESTREPO,

Defendants.

-----X

For Plaintiff:	For Defendant:
Patricia N. Reich, Esq.	Vivian R. Drohan, Esq.
389 East 89 th Street Apt. 17F	One Penn Plaza
New York, NY 10128	New York, NY 10119

Papers considered in review of this motion to dismiss and cross motion for a default judgment.

- Notice of Motion1
- Cross Motion2
- Aff in Opp3
- Reply Aff4
- Memorandum5

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JUL 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA:

In this action to recover damages for, *inter alia*, breach of contract, defendant Roberto Bueno ("Bueno") moves to dismiss the complaint insofar as asserted against him for both failure to state a claim and improper service.¹ Plaintiff Steven Winick ("Winick") cross-moves for a default judgment against Bueno.

This action stems from a failure to execute an order to sell a basket of stocks between the companies BGC Partners ("BGC") and defendant Multitrade Securities, LLC ("Multitrade"). According to the allegations of the complaint, Winick, who was employed by BGC, contacted Bueno, who was a trader employed by Multitrade, on or about November 8, 2006 to execute an order to trade a basket of stocks. Bueno erroneously failed to execute the order and alerted Winick, BGC, and Multitrade of his

¹ At oral argument on 5/5/10, Bucno agreed to waive any improper service.

error. Multitrade's CEO Luis Restrepo ("Restrepo") told Bueno to trade out the basket the next day. Upon executing the sale, there was a loss amounting to \$60,000.

Winick alleges that Multitrade, Bueno and Restrepo ("defendants") asked him if BGC would grant them a loan for the amount lost by way of a settlement accommodation. Winick alleges that BGC agreed to loan Multitrade the \$60,000.00, and that Winick would be personally responsible for and indebted to BGC if defendants failed to repay the loan. Winick alleges that the parties agreed to the following terms²: "BGC would loan defendant Multitrade the sum of \$60,000.00 by way of a settlement accommodation, and that Plaintiff Winick would be personally responsible for and indebted to BGC in the event that defendants failed to pay back loan." Winick further alleges that Multitrade, Bueno and Restrepo also agreed that in the event they defaulted on the loan and Winick paid BGC any amounts outstanding on the settlement accommodation from his own personal funds, they would reimburse Winick for those payments.

On or about February 2, 2007, Multitrade wired the sum of \$10,000.00 to BGC, leaving an outstanding balance of \$50,000.00 due on the loan. On or about March 5, 2007 Multitrade wired another \$10,000.00 to BGC, leaving a balance of \$40,000.00 due on the loan. Winick honored his part of the agreement on the settlement accommodation, paying the outstanding balance of \$40,000.00 owed by defendants to BGC from his personal funds. He was not reimbursed by the defendants.

Winick asserts eight causes of action in the complaint, three of which are asserted against Bueno individually, for breach of contract, fraud and account stated. In his second cause of action for breach of contract, Winick alleges that he rendered services to

² It is unclear from the verified complaint whether the agreement was oral or written. There is no written contact annexed to the complaint.

Bueno at an agreed upon price of \$40,000. and that despite repeated demands from Winick, Bueno refused to pay the sum owed of \$40,000. In his fifth cause of action for an account stated, Winick alleges that an account was taken and stated between Winick and defendants which showed \$40,000 due and owing by defendants to Winick, and that although due demand was made to Bueno to pay the \$40,000, such sum has not been paid by him.

In his seventh cause of action for fraud, Winick claims that Bueno fraudulently induced Winick to enter into the settlement agreement by guaranteeing that Winick would be reimbursed for any monies paid from his personal funds. Winick further asserts that Bueno committed fraud by offering a guarantee that the "lucrative business relationship" between Winick, BGC, and Multitrade would continue if the settlement accommodation was granted between the two companies. Winick further claims that these statements were falsely made at the time that the settlement accommodation was agreed upon and thus, were made to induce the settlement amount and knowingly defraud Winick. For these acts of fraud, Winick is seeking damages totaling \$200,000.00, as well as punitive damages.

In his affidavit in support of the motion to dismiss, Bueno avers that he had no role in the original agreement between Multitrade and BGC and that it was Multitrade CEO Luis Restrepo who negotiated the settlement agreement. Bueno admits that he was aware of the agreement between the two companies, but asserts that he did not agree to the settlement accommodation nor did he participate in its negotiation.

Bueno further alleges that he was merely an agent of the principal company, Multitrade, and thus cannot be personally bound to the alleged settlement agreement.

Finally, Bueno asserts that he was only a commissioned employee, that he and his trading team took the loss on the basket of stocks out of their percentage of commission that month, and that he subsequently left the company in 2007 because he was not receiving payment.

Discussion

On a motion to dismiss pursuant to CPLR §3211(a)(7), a court must accept the allegations of the complaint as true, according them the benefit of every favorable inference to determine whether they come within the ambit of any cognizable legal theory. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC*, 19 A.D.3d 273 (1st Dept. 2005).

Winick's second cause of action is based upon Bueno's alleged breach of the settlement agreement. In order to recover damages for a breach of contract under New York law, "the complaint must, *inter alia*, set forth the terms of the agreement upon which liability is predicated, either by express reference or by attaching a copy of the contract." *Chrysler Capital Corp. v. Hilltop Egg Farms, Inc.* 129 A.D.2d 927, 928 (3rd Dept. 1987); *see also Sud v. Sud*, 211 A.D.2d 423 (1st Dept. 1995).

Here, taking Winick's allegations in the complaint as true, he has stated a claim for breach of contract against Bueno individually. In the complaint, Winick refers to the terms of the settlement agreement between the company Multitrade and the company BGC, and maintains that Bueno was also a party to the agreement. Winick's complaint alleges that Bueno agreed to the terms, which are set forth in the complaint. As such, the second cause of action for breach of contract asserted against Bueno stands.

An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of . . . the account, and the balance due. *Chisholm-Ryder Co. v. Sommer & Sommer*, 70 A.D.2d 429, 431 (4th Dept. 1979). An account stated “is an account, balanced and rendered, with an assent to the balance either express or implied.” *Abbott Duncan & Wiener v. Ragusa*, 214 A.D.2d 412 (1st Dep’t 1995). For an action on an account stated, where the parties have agreed that the defendant owes the plaintiff a certain amount of money on an account, the plaintiff must allege that 1) there has been an accounting of the alleged debt; 2) there is a specific balance due to the plaintiff by the defendant; 3) the defendant expressly or impliedly promised to pay the plaintiff; and 4) the defendant has not paid. To prove an account stated, a plaintiff need not show details of the original debt, but only that the defendant received the account and kept it for reasonable time without objection. *See United Consol. Indus. v. Mendel's Auto Parts*, 150 A.D.2d 768 (2nd Dept. 1989); *Redlyn Electric Corp. v. Dean Electric Co., Inc.*, 2009 NY Slip Op 31258U (Sup. Ct. Nassau Co., 2009).

Here, in his fifth cause of action for an account stated, Winick merely provides, “an account was taken and stated between plaintiff and defendants which showed \$40,000 due and owing by defendants to plaintiff. Although due demand was made and is still made to defendant Roberto Bueno to pay the sum of \$40,000 to [Winick] for an account stated, said sum has not been paid, nor has any portion of said sum been paid.”

Winick allegations in support of the account stated cause of action are a mere recitation of the elements of the claim, without even a scintilla of factual support. Winick fails to allege facts to show that he has supplied an accounting of the alleged debt to

Finally, the court denies Winick's cross motion for a default judgment against Bueno. Winick granted Bueno a short extension to answer the complaint. Bueno served his pre-answer motion to dismiss five days after the expiration of the extension. "It is the established policy of this State that disputes be resolved on their merits." *Murray v. Matusiak*, 247 A.D.2d 303, 304 (1st Dep't 1998); *see also Cappel v. RKO Stanley Warner Theaters, Inc.*, 61 A.D.2d 936 (1st Dcpt. 1978). Because the delay was brief and Winick asserts no prejudice resulting therefrom, Winick's cross motion for a default judgment against Bueno is denied. *See generally Siwek v. Phillips*, 71 A.D.3d 469 (1st Dept. 2010).

In accordance with the foregoing, it is

ORDERED that defendant Roberto Bueno's motion to dismiss the complaint insofar as asserted against him is granted to the extent that the fifth cause of action and seventh cause of action asserted against Roberto Bueno are dismissed; and it is further

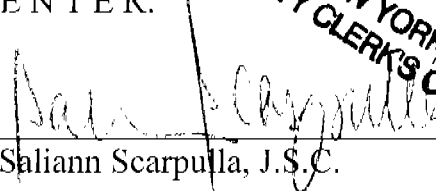
ORDERED that plaintiff Steven Winick's cross-motion for a default judgment is denied; and it is further

ORDERED that defendant Roberto Bueno is directed to serve an answer to the complaint within thirty (30) days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

Dated: New York, New York
July 15, 2010

ENTER:


Saliann Scarpulla, J.S.C.

FILED
JUL 19 2010
NEW YORK
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