

Elanis, Inc v Hilton Hollis Intl., LLC

2010 NY Slip Op 32241(U)

August 19, 2010

Supreme Court, New York County

Docket Number: 108839/2009

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ELANIS, INC.,
Plaintiff,

INDEX NO. 108839/2009

-against-

MOTION DATE _____

HILTON HOLLIS INTERNATIONAL, LLC,
Defendants.

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion by plaintiff(s) for summary judgement.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits (Memo) _____

1

Replying Affidavits (Reply Memo) _____

FILED

AUG 23 2010

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

In this action for the collection of fees for business consulting services, Elanis, Inc., plaintiff, moves, pursuant to CPLR § 3212, for summary judgment against Hilton Hollis International, LLC, defendant, and to dismiss defendant's counterclaims. Plaintiff contends that no triable issue of fact exists regarding defendant's failure to pay past-due invoices in the amount of \$87,500. Alternatively, if plaintiff's motion for summary judgment is denied, plaintiff requests the dismissal of defendant's first affirmative defense of lack of personal jurisdiction.

Defendant cross-moves, pursuant to CPLR § 3025 (b), to amend its answer to include counterclaims for negligent misrepresentation and promissory estoppel, and to increase the amount of the alleged damages. Defendant also cross-moves, pursuant to CPLR § 3212, for summary judgment for its counterclaims of breach of contract and unjust enrichment, as well as for the proposed counterclaims of negligent misrepresentation and promissory estoppel.

FACTUAL ALLEGATIONS

Plaintiff is a company which creates long-term business plans and manages the day-to-day business operations for new fashion designers who have little or no in-house staff or experience. Plaintiff began to work with defendant in December of 2008 to assist with the management and operational services of the company. A monthly rate of \$12,500 was agreed upon for plaintiff's services for the period of December of 2008 through April of 2009.

Francoise Vianin, plaintiff's chief operating officer, maintains that defendant paid the first two invoices for plaintiff's work without any objections, however, defendant failed to pay the following three invoices. On April 22, 2009, plaintiff issued an additional invoice for \$50,000 for its work on the business plan. Plaintiff submits a copy of an e-mail from Hilton Smith a/k/a Hilton Hollis (Hollis), defendant's chief executive officer, to Vianin dated April 23, 2009. In the e-mail, Hollis acknowledges that he owes plaintiff three months of invoices, as well as the invoice for the business plan.

Vianin alleges that when he contacted Hollis about the past-due invoices, Hollis stated that defendant was having financial problems. Vianin maintains that Hollis did not complain about plaintiff's services, and that he was unaware of any allegations regarding missing bookkeeping records or unnecessary fabric until this action was commenced. Vianin further maintains that despite the allegations of defendant, plaintiff was not in possession of any of defendant's business records and that the records were stored at defendant's office.

In support of its cross motion, defendant submits an affidavit from Hollis. Hollis alleges that plaintiff caused the business to incur increased costs and sustain unnecessary damages, that plaintiff was fully aware of defendant's worsened financial situation, and that plaintiff demanded high fees for bookkeeping and for the business plan. Hollis also maintains that within two days of receipt, he orally objected to the invoices.

Hollis contends that plaintiff was aware that defendant could not pay the invoices, so he

offered plaintiff a 19% equity stake in defendant. Defendant proposed a counter-offer to plaintiff which was confirmed in an e-mail dated April 23, 2009. In this e-mail, plaintiff proposed that it receive a 19% equity stake in defendant, and that \$50,000 would be due once the business plan was funded.

Hollis maintains that the business plan has not been funded, and that investors believed that the projections included within the plan were unrealistic. Hollis alleges that Vianin waived his claim for the invoices by demanding a 19% equity stake in defendant and that the counter-offer and waiver of the invoices was understood by both parties. Hollis further maintains that based upon plaintiff's claimed growth predictions, defendant purchased excess fabric in the amount of \$36,835.27, which it did not need.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); CPLR § 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 (2003); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR § 3212 [b]).

"On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." *S. J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974); see also *Castillo v New York City Tr. Auth.*, 69 AD3d 487 (1st Dept 2010) (holding that issues of credibility are to be resolved at trial and not by motions for summary judgment).

Here, based upon the conflicting affidavits of Vianin and Hollis, several issues of fact exist. There exists a dispute as to whether Vianin's e-mail, dated April 23, 2009, was a new deal agreed to by the parties, which was made in lieu of defendant's payment of past-due invoices. Hollis avers that not only did he orally object to the invoices, but that Vianin waived his claim for the invoices by demanding a 19% equity stake in defendant. Hollis also contends that the \$50,000 for the business plan never became due, because the plan was not properly funded.

Vianin admits that when it became known that defendant's cash flow would not satisfy all of the bills, there were communications discussing a potential settlement or a pay-out. However, Vianin fails to clarify what would happen to the past-due invoices once plaintiff received the 19% equity stake. Vianin also fails to address whether or not the business plan became funded. Therefore, because there is a dispute concerning whether the counter-offer was accepted, plaintiff's motion for summary judgment must be denied.

In support of its cross motion, Hollis maintains that the business plan was inadequate and that he was advised by several potential investors that its projections were unrealistic. However, the allegations that Hilton found the business plan to be inadequate are disputed by the affirmation of Vianin which states that Hollis reviewed several drafts of the business plan, that his feedback was positive, that Hollis's changes were incorporated into the plan, that multiple revisions were made to accommodate a loss of a business venture, and that Hollis never indicated that he did not agree with the written text or the projections.

With regard to the allegations by Hollis that plaintiff was responsible for advising defendant to order \$36,835.27 worth of excess fabric, there remains a dispute concerning which party was responsible for making the decision to order the fabric. While defendant contends that plaintiff is at fault for advising it to order the fabric, plaintiff maintains that the projections for the fabric were made during reviews by Hollis and Susan Jones, an experienced sales executive whom Hollis hired as defendant's president of sales. Although Vianin contends that plaintiff attended meetings and offered opinions, he maintains that the final decision to order the fabric, was made by Hollis after discussions with Jones.

There is also a dispute concerning whether plaintiff failed to properly monitor and run defendant's bookkeeping. Vianin maintains that the bookkeeping was not a primary function of plaintiff's business consulting service. Vianin contends that Hollis informed plaintiff that a secretary at the office of his investor was handling the bookkeeping, however, the secretary was allegedly not paying the bills when they became due and not following up to collect receivables. Therefore, plaintiff offered to assist with the billing. Vianin maintains that Hollis approved all payments and signed all of the checks, and that defendant tried to set up Hollis with a bookkeeping company and arranged to have payroll and tax processing be handled by another company.

Defendant submits an affidavit from Lilia Dawn Lavin, defendant's current bookkeeper, which disputes plaintiff's allegations. Lavin maintains that plaintiff failed to properly perform the bookkeeping services and caused substantial financial harm to defendant. Lavin further maintains that plaintiff improperly balanced defendant's books which resulted in late payments to vendors and thousands of dollars in penalties. Therefore, because there exists disputes of fact regarding whether the parties agreed to a new deal in lieu of defendant's payment of the past invoices, and whether plaintiff or defendant was responsible for the excess fabric and the bookkeeping problems, plaintiff's motion and defendant's cross motion for summary judgment

must be denied.

Defendant also moves to amend its answer to include counterclaims for negligent misrepresentation and promissory estoppel, and to increase the amount of the alleged losses for the unused fabric to \$36,835.27. Pursuant to CPLR § 3025 (b), leave to amend pleadings is to be freely given. *See Sepulveda v Dayal*, 70 AD3d 420, 421 (1st Dept 2010) (leave to amend pleadings should be freely granted in the absence of prejudice or surprise, unless the proposed amendment is lacking in merit). Defendant maintains that plaintiff misrepresented itself as an expert in businesses development, that plaintiff relied on defendant's misrepresentations and sustained damages based upon its reliance upon such representations.

Plaintiff does not allege that by amending the counterclaims, it will be prejudiced or surprised, and there has been no alleged delay in seeking these amendments. Furthermore, discovery has yet to be commenced in this action. Therefore, the court will permit defendant to amend the counterclaims and amend the amount of the damages.

Plaintiff also seeks to dismiss defendant's first affirmative defense of lack of personal jurisdiction. Vianin maintains that Hollis was personally served at his principal place of business in New York County, and that pursuant to CPLR § 3211 (e), defendant's objection to service of process is waived if defendant has not made a motion to dismiss within 60 days of his answer. Defendant fails to address plaintiff's argument in its cross motion or reply papers. Therefore, because defendant has failed to move to dismiss the complaint for lack of jurisdiction in the requisite time period, defendant's first affirmative defense for lack of jurisdiction must be dismissed.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff Elanis, Inc.'s motion for summary judgment is denied; and it is further

ORDERED that the first affirmative defense of defendant Hilton Hollis International, LLC, asserting lack of personal jurisdiction, is dismissed; and it is further

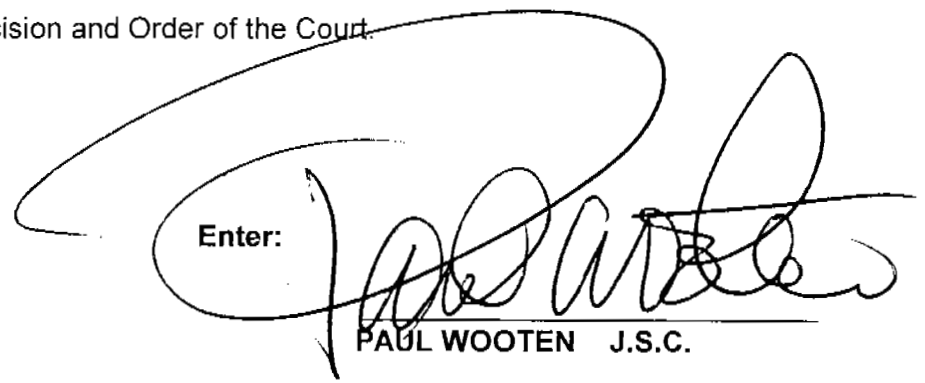
ORDERED that the part of defendant's cross motion which seeks summary judgement is denied; and it is further

ORDERED that the part of defendant's cross motion which seeks leave to amend the answer is granted, and the amended answer in the proposed form annexed to the defendant's moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that counsel for both plaintiff and defendant are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on September 30, 2010 at 11:00 a.m.

This constitutes the Decision and Order of the Court.

Dated: August 19, 2010

Enter: 
PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: : DO NOT POST REFERENCE

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