

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

2010 NY Slip Op 32836(U)

October 12, 2010

Supreme Court, New York County

Docket Number: 101849/09

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 101849/2009
GLM COMMUNICATIONS
vs.
DIVERSE MEDIA OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

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

this motion to/for _____

PAPERS NUMBERED

1, 2, 3, 4
5, 6
7

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 *is decided in accordance*
with the attached memorandum decision.

FILED
OCT 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/12/10


JUSTICE DORIS LING-COHAN

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: IAS PART 36

-----X
GLM COMMUNICATIONS, INC.,

Plaintiff,

-against-

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

Defendants.

Index No. 101849/09

Motion Seq. No. 003

FILED
OCT 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

DORIS LING-COHAN, J.:

Defendant Direct Alternatives, LLC ("Direct") moves for summary judgment, pursuant to CPLR 3212, dismissing plaintiff GLM Communications, Inc.'s remaining claims of unjust enrichment and account stated against it and for reasonable attorneys' fees, costs and disbursements incurred by it in defending this action. Direct also moves for a default judgment, pursuant to CPLR 3215, on its cross-claim for indemnification against co-defendant Diverse Media of New York, Inc. ("Diverse Media").

Plaintiff, an advertising sales agent for *Veterans of Foreign Wars* ("VFW") magazine, commenced this action to recover \$40,800 for three advertisements that were published in the VFW magazine through defendant Diverse Media, an advertising buying service, for defendant Direct's products, and were never paid for. In its amended complaint, plaintiff alleges that "[d]efendants contracted with Plaintiff to place a certain full-page advertisement" in the January 2008, March 2008 and May 2008 editions of the VFW magazine at the rate of \$13,600 for each advertisement. Am Compl ¶¶ 10-15. Plaintiff further alleges: "Specifically, Diverse Media, by oral communication with Plaintiff followed by a written insertion order forwarded to Plaintiff,

placed advertising” in such editions. *Id.* ¶¶ 11, 13, 15.

In a prior motion, defendant Direct moved to dismiss the complaint against it and plaintiff cross-moved to amend the complaint. By order dated June 22, 2009, this Court dismissed plaintiff’s breach of contract cause of action against Direct, but denied the motion with respect to plaintiff’s claims for unjust enrichment and quantum meruit, and allowed plaintiff to amend these claims. Subsequently, a default judgment was entered on November 23, 2009 in favor of plaintiff and against defendant Diverse Media in the amount of \$40,800, for Diverse Media’s failure to appear or answer in this action.

In now moving for summary judgment, defendant Direct argues that there are no material issues of fact that would preclude the granting of summary judgment. Direct contends that the allegations and evidence demonstrate that there was no relationship between plaintiff and Direct, since plaintiff contracted with co-defendant Diverse Media and not with Direct for the advertising services. Direct further contends that plaintiff’s argument that Diverse Media was its agent is irrelevant because the evidence proves that it made payments to Diverse Media for the advertisements and, thus, plaintiff cannot demonstrate that Direct was unjustly enriched. Moreover, Direct argues that plaintiff’s account stated claim should also fail since it never agreed that money was owed to plaintiff from it, but only acknowledged that it would assist plaintiff in getting paid by Diverse Media.

Plaintiff opposes the motion, contending that there are material issues of fact in dispute. First, plaintiff contends that defendant has not produced credible and undisputed proof that it has paid Diverse Media for the advertisements at issue herein. Plaintiff challenges the evidence submitted by Direct, stating that the two checks submitted as proof of payment are drawn by two

different third party entities, and the emails referenced by Direct have not been proven to have been received and accepted by Diverse Media. Harry Church Aff in Opp ¶ 6 (attached to Demetrios G. Melis Affirmation). Plaintiff also asserts, in its memorandum of law, that: “it is simply not credible that the sole email correspondence between the co-defendants are four emails purportedly sent by Defendant which, perhaps not coincidentally, contain self-serving allegations related to the subject matter of this litigation.” Brief in Opp at 5. Second, in support of its account stated claim, plaintiff contends that defendant Direct was aware of, and did not dispute, plaintiff’s expectation of payment and the value of said advertisements.

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 NY2d at 562. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. *Id.*

The following facts are undisputed. Three advertisements for defendant Direct’s products were published in the January 2008, March 2008 and May 2008 editions of the VFW magazine. Orders for such advertisements were placed by defendant Diverse Media. Diverse Media communicated with plaintiff in placing such orders. Plaintiff billed Diverse Media for such advertisements. It is also undisputed that plaintiff sent defendant Direct a letter in July 2008,

informing Direct that it still had “outstanding invoices for all three publications for [Direct’s] product Soravil, through Diverse Media.” Leslie Wybiral Affirmation, Exh 4.

Beyond such undisputed facts, evidence has been submitted which demonstrates that defendant Direct should not be held accountable to plaintiff either under a claim of unjust enrichment or a theory of account stated. In viewing the evidence as a whole, defendant Direct has made a prima facie showing of entitlement to dismissal of the action as a matter of law.

In order to prevail on an unjust enrichment cause of action, a plaintiff “must establish that the defendant benefitted at the plaintiff’s expense and that equity and good conscience require restitution.” *Whitman Realty Group, Inc. v Galano*, 41 AD3d 590, 592–93 (2d Dep’t 2007).

“The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.”

Mandarin Trading Ltd. v Wildenstein, 65 AD3d 448, 451 (1st Dep’t 2009).

Defendant Direct has submitted evidence to demonstrate its agreement with Diverse Media, that it was invoiced for the advertisements by Diverse Media and that it made payment to Diverse Media. Tim Blue, Direct’s representative, stated in his affidavit that Diverse Media had solicited Direct to purchase advertising space for its product Soravil in the August 2007, October 2007, January 2008 and March 2008 issues of the VFW magazine.¹ *See* Blue Aff ¶ 4. Blue stated that Diverse Media offered Direct a “buy 3 get 1 free” deal on the advertisements. *See id.*

Direct has submitted an email from Tim Blue to a sales representative for Diverse Media, Denise Marchetti, on April 26, 2007, in which he acknowledged acceptance of the deal and that

¹ Payment for the advertisements in the August and October 2007 issues of VFW magazine are not being sought in this action as plaintiff received payment for such advertisements.

* 6]

Pur Hoodia check #2527 was being issued, in part, as advance payment for the advertisements for the Solavil product to run in the VFW magazine in August 2007, October 2007 and January 2008. *See id.* ¶ 8; Exh E. As the August and October 2007 advertisements are not at issue here, Direct has submitted, as evidence, Advertising Orders that were sent on April 26, 2007 to Direct by Diverse Media for its approval of the third and fourth advertisements, which noted that payment for the January 8, 2008 advertisement was made, via check #2527, and the fourth advertisement for the March 2008 issue was at no charge. *See Blue Aff* ¶¶ 5, 7; Exhs A, C.

As to the first advertisement for which plaintiff seeks recovery, on December 13, 2007, Diverse Media sent an Advertising Order to plaintiff referencing an advertisement to be placed in the January 2008 issue of the VFW magazine. *Wybiral Aff*, Exh 2 at 1. On January 14, 2008, Diverse Media invoiced Direct for the advertisement in the January 2008 issue, wherein the box captioned "Terms" was marked "PD." *Blue Aff* ¶ 6; Exh B. Direct submitted, as proof of payment, check #2527, which was endorsed and deposited into Diverse Media's account at JPMorgan Chase Bank, N.A. on April 27, 2007, as pre-payment for the January 2008 advertisement. *See Blue Aff*, Exh E.² On January 17, 2008, plaintiff invoiced Diverse Media for the advertisement that appeared in the January 2008 issue of VFW magazine. *See Wybiral Aff*, Exh 3 at 1.

As to the second advertisement for which plaintiff seeks recovery, on January 16, 2008, Diverse Media sent an Advertising Order to plaintiff referencing an advertisement to be placed in

² Thereafter, plaintiff billed Diverse Media for the advertisements that appeared in the August and October 2007 issues of VFW magazine. On March 25, 2008, Diverse Media paid plaintiff for those two advertisements and, thus, they are not at issue in this lawsuit. *See Wybiral Affirmation*, Exh G.

* 7]

the March 2008 of the VFW magazine. *See* Wybiral Aff, Exh 2 at 2. As to this advertisement, Direct states that it was part of a “buy 3 get 1 free” deal and, thus, was at no charge. *See* Blue Aff ¶¶ 4, 10. Diverse Media invoiced Direct for the advertisement in the March 2008 issue at no charge and on the preprinted invoice in the box captioned “Terms” is typed “PD.” *See id.* ¶ 10; Exh F. On February 28, 2008, plaintiff invoiced Diverse Media for the advertisement that appeared in the March 2008 issue of the VFW magazine. *See* Wybiral Aff, Exh 3 at 2.

Direct states that in January 2008, Diverse Media offered Direct another opportunity to “buy 2 get 1 free,” specifically, for Direct to purchase advertisements in May and June/July and receive a free advertisement in October 2008. Blue Aff ¶ 11. On January 17, 2008, Diverse Media sent an Advertising Order to Direct for its approval for the May 2008 issue. *Id.* ¶ 12; Exh G. On January 24, 2008, Tim Blue sent an email to Denise Marchetti at Diverse Media memorializing Direct’s acceptance of the “buy 2 get 1 free” offer and confirming that Check #4168 totaling \$127,850 was being sent for invoices due and as prepayment for the May and June/July 2008 issues. Blue Aff ¶ 13; Exh I. Diverse Media received and endorsed check #4168 and deposited it into its account at JPMorgan Chase Bank, N.A. on January 25, 2008. *See* Wybiral Aff, Exh H.

As to the third advertisement for which plaintiff seeks recovery, on March 26, 2008, Diverse Media sent an Advertising Order to plaintiff referencing an advertisement to be placed in the May 2008 issue of the VFW magazine. Wybiral Aff, Exh 2 at 3. On May 1, 2008, plaintiff invoiced Diverse Media for the May 2008 advertisement. *See* Wybiral Affirmation, Exh 3 at 3.

Defendant Direct has supplied evidence to demonstrate that it made payment to Diverse Media with regard to the advertisements placed in the VFW magazine; thus, it would be unjust to

require it to also compensate plaintiff, especially in light of the fact that the evidence shows plaintiff's agreement was with Diverse Media and such entity was the one who contracted with plaintiff, not Direct. As defendant Direct has made a prima facie showing that the unjust enrichment cause of action should be dismissed, the burden shifts to plaintiff to set forth evidence in admissible form sufficient to demonstrate that there are disputed issues of material fact which warrant denial of defendant's motion. However, plaintiff has failed to submit evidence that sufficiently disputes defendant's evidence. Instead, plaintiff makes only conclusory assertions without any evidentiary support.

Although plaintiff attempts to preclude the granting of summary judgment, it fails to set forth sufficient, admissible evidence to do so. Plaintiff's opposition consists solely of attempts to question defendant's credibility, without providing any real evidence to oppose the proof submitted by Direct. Plaintiff submits the affidavit of Harry Church, the executive vice-president of plaintiff, which speculatively questions, *inter alia*: whether the emails that show proof of payment were actually sent and received; whether the Advertising Orders between Direct and Diverse Media were altered; how additional discovery was now discovered and produced; and the connection between the bank accounts upon which the checks were drawn and the alleged payments. *See Church Aff* ¶¶ 6, 9, 11–15 (attached to Demetrios G. Melis Affirmation in Opp).

For example, with respect to Direct's proof of payment, plaintiff conclusorily asserts that: "Mr. Dill now claims Defendant does not use its product names as 'fictitious business names or doing business names', but Defendant also claims payment of advertisements by a certain check #2527 drawn by an unknown third entity named 'Pur-Hoodia Plus'." *Id.* ¶ 12. However, a mere speculative assertion by someone without any personal knowledge, without more, is insufficient

to deny summary judgment in light of Direct’s president’s sworn statement that:

To more efficiently account for the income and expenses related to each of its products Direct maintains a separate checking account for each product and has the name of the product printed on the corresponding checks. On occasion, when Direct renders payment for a batch of advertisements for multiple products, Direct will issue one check drawn on the account for one of those products.

Anthony Dill Aff ¶ 4. Moreover, plaintiff’s vice-president states that “Defendant’s main alleged proof of payment appears to be copies of certain emails, which may or may not have been actually sent.” Church Aff in Opp ¶ 6. However, in light of the fact that Direct’s president has affirmatively stated in his affidavit that such emails were sent, copies were attached to the within motion, and plaintiff has offered no evidence to demonstrate there is any proof or reasonable belief that the emails were not sent, such opposition is inadequate.

As another example, plaintiff contends, without any personal knowledge, that some of the evidence “appear[s] to have been altered” and “Defendant has now suddenly produced documents . . . which were never previously produced to Plaintiff.” *Id.* ¶¶ 9–11. However, other than making these speculative allegations of improper behavior on the part of Direct, plaintiff has not provided any support for such allegations. Such allegations amount to no more than “mere conclusions . . . or unsubstantiated allegations” which are “insufficient” to defeat summary judgment. *Zuckerman v City of New York*, 49 NY2d at 562. For the reasons stated above, defendant’s motion for summary judgment is granted and the unjust enrichment cause of action is dismissed.

“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.”

never disputed the letter, such interpretation of the facts are inaccurate. While Direct did not directly contest plaintiff's claim of outstanding balances (although its president contends he "never accepted as correct the outstanding balances itemized in [the] July 1, 2008 letter"), regardless, Direct certainly was not accepting responsibility for such payments, as it is clear, from testimony by both plaintiff and Direct, that such payments were supposed to come from Diverse Media. See Church Tr 72:3-16; Anthony Dill Aff ¶¶ 9-10. In any event, Direct's president has stated that he spoke with plaintiff's vice president in November 2008 to set up a conference call to "come up with a plan of how Diverse was going to get GLM paid to date," which plaintiff has not disputed. Dill Aff ¶ 8. Direct also submitted email communication it sent to Diverse Media, and copied to plaintiff, which plaintiff has not disputed having received, that indicates Direct was attempting to assist plaintiff in getting paid by *Diverse Media*. Dill Aff, Exh C (emphasis added). As such, defendant's motion for summary judgment is granted and the account stated cause of action is dismissed.

As for attorneys' fees, costs and disbursements, only costs and disbursements are appropriate to be awarded to defendant Direct in this case, as the successful party on this motion. However, attorneys' fees are generally not available as an item of damages, unless authorized by agreement between the parties, by statute or by court rule. *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 (1989). Defendant Direct has not cited to any agreement, statute or court rule that would allow it to recover legal fees. Thus, its request for attorneys' fees is denied.

With regard to defendant Direct's motion for a default judgment against its co-defendant Diverse Media on its cross-claim for indemnification, such motion is denied as moot as

defendant Direct has succeeded on its motion for summary judgment to dismiss the amended complaint against it. Thus, as acknowledged by defendant, such motion is only applicable if defendant's motion was denied and plaintiff subsequently could be successful on its claim against Direct.

Accordingly, it is

ORDERED that defendant Direct Alternatives, LLC's motion is granted solely to the extent that the amended complaint is dismissed with costs and disbursements to such defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and is otherwise denied; and it is further

ORDERED that within 30 days of entry of this order, defendant Direct Alternatives, LLC shall serve a copy of this order with notice of entry, upon plaintiff.

Dated:

10/12/10



DORIS LING-COHAN, J.S.C.

J:\CONTRACTS\GLM Communications, sj granted on unjust enrichment, acct stated.wpd

FILED
OCT 13 2010
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