

Magna Carta, LLC v Omni Recycling of Babylon, Inc.
2010 NY Slip Op 33221(U)
October 29, 2010
Sup Ct, Suffolk County
Docket Number: 08-25653
Judge: Joseph C. Pastoressa
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. JOSEPH C. PASTORESSA
Supreme Court

MOTION DATE 8-19-10
ADJ. DATE 9-2-10
Mot. Seq. # 002 - MD

-----X

MAGNA CARTA, LLC., :
 :
 Plaintiff, :
 - against - :
 :
 OMNI RECYCLING OF BABYLON, INC., :
 :
 Defendant. :
 -----X

OMNI RECYCLING OF BABYLON, INC., :
 :
 Third-Party Plaintiff, :
 - against - :
 :
 MAGNA MULCH, LLC, and MICHAEL :
 DEMARTINO a/k/a MIKE DEMARTINO, :
 :
 Third-Party Defendants. :
 -----X

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Upon the following papers numbered 1 to 30 read on this motion for summary judgment Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 17; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 18-28; Replying Affidavits and supporting papers 29-30; Other; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by the defendant/third-party plaintiff, Omni Recycling, for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint by the plaintiff, Magna Carta, LLC, is denied.

It is set forth in the complaint that in about 2007, the defendant, Omni Recycling of Babylon, Inc. (Omni), requested that the plaintiff, Magna Carta, LLC (Magna Carta) provide all work, labor, services and materials necessary to perform refuse removal from Omni's premises located at 114 Adler Street, West Babylon, New York, at a cost of \$23.00 per ton. During the course of 2007-2008, Magna Carta removed approximately 1,251 tons of refuse from Omni's location at a cost of \$28,761.96, which, to date, despite demands therefore, Omni has failed and refused to pay. A first cause of action for breach of contract is asserted. A second cause of action is asserted for quantum meruit for the work performed for the sum of \$28,761.96 which remains unpaid.

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A third-party action was commenced by the defendant/third-party plaintiff Omni against the third-party defendants, Magna Mulch, LLC (Magna Mulch) and Michael Demartino a/k/a Mike Demartino (Demartino) wherein Omni asserts that on or about August 17, 2007, Omni entered into a written credit agreement with the third-party defendants wherein Omni agreed to extend credit towards the third-party defendants for their purchases of mulch. On the credit application dated on or about August 17, 2007, it is asserted that Demartino personally guaranteed the payments for all charges incurred by Magna Mulch. It is claimed that from June 29, 2007 through February 14, 2008, the third-party defendants failed to make payments in a timely fashion and there remains an outstanding balance of \$25,450.00 for invoices 6594, 6714, 6920, 7124, 7234, 7836, 7936, and 9788. Causes of action for breach of agreement and legal fees are asserted against Magna Mulch. A third cause of action is asserted against Demartino for breach of the guarantee. A fourth cause of action is asserted against Magna Mulch for an account-stated. A fifth cause of action is asserted against Demartino sounding in fraud.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

In support of this motion, the defendant/third-party plaintiff has submitted, inter alia, an attorney’s affirmation; affidavit of Brian Nohs; copies of the summons and complaint, answer, third-party summons and complaint with exhibit A-Invoice; copy of prior motion for default judgment against Magna Mulch and Michael Demartino for failing to answer; copies of the transcripts of the examinations before trial of Richard Donato on behalf of Magna Carta and Brian Nohs on behalf of Omni, both dated September 23, 2009; and copies of invoices/outbound charge tickets. In opposing this motion, Magna Carta has submitted an attorney’s affirmation; summons and complaint and answer; affidavit of Richard Donato; copy of the transcript of the examination before trial of Brian Nohs and Richard Donato each dated September 23, 2009; a copy of the front side of a check to the order of Omni Recycling of Babylon dated July 10, 2007 in the amount of \$25,380.00; credit application dated August 17, 2007; business card of Magna Mulch; and billing statements.

Brian Nohs set forth in his affidavit dated July 28, 2010 that he is a manager of Omni Recycling of Babylon, Inc. and is familiar with the business relationship Omni had with Magna Carta and Magna Much. On or about the beginning of June 3 2007, Michael Demartino a/k/a Mike Demartino came to Omni’s place of business at 114 West Alder Street, West Babylon, New York, and represented that he was a partner of Magna Carta. That day, an agreement was reached wherein Magna Carta was to remove yard waste from Omni’s place of business and Omni would sell mulch to Magna Mulch. Nohs avers that as manager of Omni, he had the

requisite authority to enter into such agreement. Magna Mulch was permitted to purchase mulch on credit, however, it was agreed between Nohs and Demartino that Omni would hold Magna Mulch's account against Magna Carta's account so that in the event that Magna Mulch did not pay Omni, Omni could offset any monies owed to Magna Carta by any monies still owed by Magna Mulch. Nohs avers that he never dealt with anyone from Magna Carta except Demartino until about October 2, 2007 when Richard Donato of Magna Carta contacted him about monies owed by Omni to Magna Carta. He further avers that he would never have entered into the agreement with Magna Carta and Magna Mulch via Demartino had it not been agreed that Omni could hold the Magna Mulch account against the Magna Carta account.

During his examination before trial, Brian Nohs testified to the effect that there were two other managers at Omni at the time, Mike Coletta and Allen Hall. Omni handles yard waste, garbage, residential and commercial, and C&D (construction and demolition) debris, and mulch. Magna Mulch was a customer of Omni in 2007 for the purchase of mulch. Demartino was the contact person between Omni and Magna Mulch and Magna Carta. Omni reached an agreement with Demartino concerning mulch and yard waste. Demartino agreed to take Omni's yard waste and to purchase mulch from Omni. The agreed price for yard waste was "twenty-two, twenty-three" with adjustments for fuel costs. Mulch was billed by the yard between eight to twelve dollars a yard. Yard waste was billed according to scale tickets based on weight in and out. Nohs stated Demartino told him he was a partner in Magna Carta and that he was making the deal on behalf of Magna Carta. Demartino also told him that the billing had to be done separately for Magna Carta, and that they agreed that Omni would hold Magna Mulch's account against the Magna Carta account so that Omni would not get burned. Magna Mulch had submitted a credit application to Omni for credit. Omni was billed by Magna Carta for removal of the waste for which Omni received invoices. Payments were received from Magna Mulch to pay for the mulch for which Omni billed on a weekly basis. Then, Magna Mulch stopped making payments so Omni stopped paying Magna Carta on the Omni account. There was work that Magna Carta did for Omni that Omni did not pay for in the amount of "\$23,000 and change" as Omni was holding that "\$23,000 and change" amount owed by Magna Mulch against the Magna Carta account. He believed that there was a difference of about \$1,500, between what Omni owed to Magna Carta and what Magna Mulch did not pay. After a time, Nohs spoke with Richard Donato from Magna Carta and told him he could not pay the bill for the amount of money which Donato said was due to Magna Carta. He advised Donato that he would do a charge off between Magna Mulch and Magna Carta. It was at that time that Donato told him absolutely not because Demartino was not a partner in Magna Carta and had nothing to do with Magna Carta, and that Donato and Magna Carta had nothing to do with Magna Mulch. However, testified Nohs, sometimes Demartino would come to Omni's place of business to pick up mulch in Magna Carta trucks and sometimes Magna Mulch trucks. Magna Mulch trucks picked up both mulch and yard waste from Omni. Magna Carta no longer does business with Omni and Omni no longer does business with Magna Mulch.

Richard Donato testified at his examination before trial to the effect that he is currently employed with Magna Carta LLC as a general partner and he has a limited partner, Naomi Cycak. Magna Carta is in the business of brokering transportation mainly for City Carting in West Chester to transport their waste products and lawn products, and in 2007, also dealt with Omni and a New Jersey company. Magna Carta had about five or six independent transporters who transported through Magna Carta. Magna Carta provided the broker services for Omni for the removal of waste from Omni's yard. Independent owners/operators removed the waste and Magna Carta billed by the scale weight of each load. He stated there was no written agreement between Magna Carta and Omni, nor specific terms and/or conditions. He testified that Magna Carta does not own any trucks and the trucks were generally owned by the independent owners/operators. Demartino, he stated, was a limited partner with Magna Carta from its inception and obtained all of the business for Magna Carta and dispatched the drivers. Demartino was compensated by having the profits from Magna Carta split

with him. Demartino remained his partner until he “got rid of him” about a month or two “after this little fiasco,” referring to the incident with Omni. He testified that Demartino had a similar incident with Reliable Mulch, as with Omni as Demartino received mulch from both and did not pay. He testified that Demartino was buying mulch from Omni under Demartino’s own company, Magna Mulch, and then stuck Omni with the bill. Magna Carta became involved in business with Omni through Demartino who told him he could get a deal with Omni and that Omni would pay twenty-two and twenty-three dollars a ton and he approved of the same. Payments from Omni stopped in about September 2007, so he contacted Omni on October 2, 2007 and spoke with Mike Coletta from Omni and asked him to pay the outstanding bill. Coletta then sent him Magna Mulch’s invoice. He called Coletta back and told him he had nothing to do with Magna Mulch and that it was the first he learned of Magna Mulch’s bill. When he spoke to Demartino about it, Demartino told him he had a line of credit with Omni and would pay them so it would all work out.

It is determined that Omni has not established prima facie entitlement to summary judgment. It is undisputed that Magna Carta provided carting services to Omni to haul yard waste and Omni accepted those hauling services from Magna Carta. Omni does not dispute that it owes the money to Magna Carta nor the amount claimed to be owed to Magna Carta. Omni avers that it supplied mulch to Magna Mulch and not to Magna Carta. However, there are factual issues concerning Magna Mulch and Demartino and Omni concerning the payment arrangements allegedly made with Demartino and whether or not Demartino made an agreement with Omni for a set off to be applied against Magna Carta should Magna Mulch and Demartino fail to make payments for the mulch. It has not been demonstrated by Omni that anyone from Magna Carta was contacted to confirm the agreement made with Demartino or that Magna Carta at any time approved of a set off agreement.

Although no papers have been submitted to establish that Magna Carta is a limited liability company, Donato has testified that it is. A limited liability company is defined as an unincorporated organization of one or more persons having limited liability for the contractual obligations and other liabilities of the business, other than a partnership or trust, formed and existing under Limited Liability Company Law §101 et seq. and the law of New York (*2505 Victory Boulevard, LLC v Victory Holding, LLC et al*, 18 Misc3d 279, 2007 NY Slip Op 27466 [Civil Court of the City of New York, Richmond County 2007]). The acts performed in the name of a partnership cannot ordinarily be considered apart from the persons composing it (*In the Matter of the Accounting of Bayard L. Peck et al v McIntyre*, 206 NY 55 [1912]). However, in the instant action, Magna Carta claims that Demartino acted outside the scope of his responsibilities and duties in dealing with Omni and agreeing to the set off.

“It is well established that a principal may be held liable in tort for the misuse by its agent of his apparent authority to defraud a third party who reasonably relies on the appearance of authority, even if the agent commits the fraud solely for his personal benefit, and to the detriment of the principal. The reason for this rule is that the principal, by virtue of its ability to select its agents and to exercise control over them, is in a better position than third parties to prevent the perpetration of fraud by such agents through the misuse of their positions. Thus, the principal should not escape liability when an innocent third person suffers a loss as the result of an agent’s abuse, for his own fraudulent purposes, of the third person’s reasonable reliance on the apparent authority with which the principal has invested the agent. Stated otherwise, as between two innocent parties, the one who has allowed the fraud to be perpetrated should bear the loss” (*Parlato et al v Equitable Life Assurance Society of the United States*, 299 AD2d 108 [1st Dept 2002]). In the instant action, however, Omni admits that Demartino was purchasing the mulch on behalf of Magna Mulch and not Magna Carta and made application for a line of credit for Magna Mulch with Omni. There are factual issues concerning any agreement for a set off against Magna Carta for money Magna Mulch owed to Omni. There are further factual issues concerning whether Demartino was acting as an agent on behalf of Magna Carta when, and if, he was agreeing

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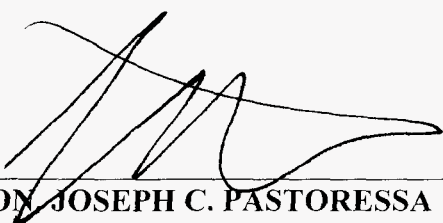
to a set off against Magna Carta, and whether he had authority to do so. Magna Carta claims it did not know of such an agreement and did not consent to the agreement concerning a set off.

Agency is a fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and be subject to his control, and consent by the other to act. An agency relationship can arise out of actual authority but also apparent authority. Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third-party, that give rise to the appearance and belief that the agent possesses the authority to enter into the transaction. Moreover, a third-party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable (see, *Empire Communications Consultants, Inc. v Pay TV of Greater New York, Inc.* 126 AD2d 598 [2nd Dept 1987]; *Jorif v Stewart Title Insurance*, 2009 NY Slip Op 30776U, 2009 Misc. Lexis 4790 [Supreme Court of New York, Nassau County]). Here the evidence establishes that Demartino was a partner in Magna Carta, LLC. As a partner and principal of Magna Carta, Demartino, it is argued, had actual authority to act with as it relates to the carting business of Magna Carta. Here there are factual issues concerning whether Omni acted reasonably, without any assurances from Magna Carta that Magna Carta would assume the debt of Magna Mulch should Magna Mulch default on its payments. With regard to any set off agreement, it has not been demonstrated by Omni that Demartino had actual authority to obligate Magna Carta to the debts of Magna Mulch.

“When a party deals with an agent, he does so at his peril, and must make the necessary effort to discover the actual scope of his authority. A third-party may not invoke the doctrine of apparent authority of an agent unless words or conduct of the principal communicated to the third party caused the third-party to believe in the agent’s authority and relied thereon. However, apparent authority may arise without a contract between the principal and the third-party, particularly where the principal has voluntarily placed the agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in assuming that such agent has authority to perform a particular act” (*General Motors Acceptance Corporation v Finnegan*, 156 Misc2d 253 [Supreme Court of New York, Orange County 1991]). Here, it has not been demonstrated that Magna Carta placed Demartino as its agent on behalf of any business Magna Mulch and Demartino were conducting. Omni has not established prima facie that it justifiably relied on Demartino’s alleged agreement as Omni also accepted a credit application from Demartino on behalf of Magna Mulch. Omni did not make any effort to discover the scope of Demartino’s authority with regard to Magna Carta or any obligation or agreement by Magna Carta on Magna Mulch’s behalf.

Accordingly, motion (002) by Omni Recycling of Babylon for summary judgment dismissing Magna Carta’s complaint is denied.

Dated: October 29, 2010



 HON. JOSEPH C. PASTORESSA

____ FINAL DISPOSITION X NON-FINAL DISPOSITION