

**Masque Sound & Recording Corp. v Le Poisson
Rouge NYC, LLC**

2010 NY Slip Op 33290(U)

November 22, 2010

Sup Ct, NY County

Docket Number: 114190/2009

Judge: Joan A. Madden

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

PRESENT: How Joaw A. Madder
Justice

PART 11

Index Number : 114190/2009
MASQUE SOUND & RECORDING CORP.
VS.
LE POISSON ROUGE NYC LLC.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 4-15-10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached Memorandum Decision & Order.

FILED

NOV 30 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: November 22, 2010

[Signature]
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 : 1AS PART 11

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MASQUE SOUND & RECORDING CORPORATION,
Plaintiff,

-against-

LE POISSON ROUGE NYC, LLC,
Defendant.

FILED

Index No. 114190/2009

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Joan A. Madden, J.

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Masque Sound and Recording Corporation ("Masque") moves for summary judgment against Le Poisson Rouge NYC, LLC ("LPR") to recover the unpaid balance on a written contract between the two parties. LPR opposes the motion.

Masque designs, leases, sells and installs sound systems. On April 8, 2008, Masque entered into a contract with LPR (the "Agreement") for the sale and installation of a sound system (the "Equipment") for a total cost of \$667,977.98. Out of this sum \$554,758.00 was for the Equipment, \$61,600 was for the labor, and the remaining \$51,619.98 was for New York sales tax. The Agreement specifies that LPR "agrees to payment terms and conditions at date of contract initiation" (Agreement, 2). The Agreement also contains a choice of law clause providing that the Agreement will be "governed and construed in accordance with the laws of the State of New Jersey" (Agreement, 3).

Masque now seeks to recover the amount of the final invoice, \$51, 619.98, which was due on November 28, 2008. The complaint alleges causes of action for breach of contract, an account stated and unjust enrichment.¹

¹ By interim decision and order dated July 26, 2010, the court directed that the parties serve each other with a memorandum of law supported by New Jersey case law in light of the New Jersey choice of law clause in the Agreement and required proof that Masque remitted payment of New York sales tax. Both sides complied with the court's order.

Pursuant to the Agreement, Masque and LPR established payment terms, agreeing to an installment payment schedule and setting the amounts of the installment payments. The Equipment was installed by Masque, and LPR paid a total of \$616,358.00 in installments over the course of several months to Masque. The payments were made each time LPR received an invoice from Masque, and each of the invoices designated a portion of the installment payment as the amount of sales tax owed for that payment. All of the invoices were paid, except for the last, for \$51,619.98, which was equivalent to the total amount of sales tax due under the Agreement. LPR's last payment was made in June 2008. Masque has submitted proof in the form of checks and a spreadsheet showing that it remitted the amounts specified as sales tax on each of the invoices to the New York State Department of Taxation and Finance (the "Department of Taxation"), including the \$3,989.09 allocable for sales tax on the last invoice at issue here which LPR did not make payment on.

LPR maintains that it is not required to pay sales tax in connection with its purchase of the Equipment from Masque since it paid sales tax related to the purchase of the Equipment under a sale/leaseback agreement ("the Lease") with Commerce Bank (now TD Bank)("the Bank"), which agreement was entered into to finance the Equipment sale. In support of its position, LPR submits the affidavit of Justin Kantor ("Kantor"), a managing member of Red Fish, LLC (which is the managing member of LPR). Kantor states that on or about March 25, 2008, Geoffrey Shearing ("Shearing"), the President and Chief Operating Officer of Masque, introduced Kantor to Rob Shultis ("Shultis"), an agent of the Bank, and that from this meeting LPR arranged to finance the purchase of the Equipment with the Bank through the Lease under which LPR "was to complete the purchase of the Equipment from [Masque]..., immediately re-sell it to the Bank, and lease it back from the Bank by making monthly lease payments [and that] LPR would have

[* 4].
an option to reacquire the Equipment from the Bank at the end of the Lease term” (Kantor Affidavit, ¶ 6).

The Lease, by and between the Bank and LPR, was executed on July 23, 2008, and requires LPR to pay a sum of \$630,058.64 in 48 installments to the Bank. Kantor states that this sum includes the full amount of the sales tax due in relation to Masque’s sale of the Equipment to LPR, and that Shultis directed him “to withhold the sales tax...from the final Equipment installment payment [LPR] made to [Masque] on or about June 10, 2008” since under the Lease, LPR would pay the taxes as part of the Lease payments. (Kantor Affidavit, ¶ 7). Kantor states that Shearing was a party to these discussions concerning the payment of the sales tax (Id. ¶ 8). In addition, Kantor maintains that the Bank informed him that no sales tax is due on LPR’s purchase of the Equipment from Masque, and that “the Bank’s standard practice in ‘sale-leaseback’ transactions is to deliver a Certificate of Resale to the original seller (in this case Masque), which would then make an application of sales tax exemption to New York State” (Id. ¶ 20).

Kantor states that the \$51,619.98 was not paid to Masque because he was told by the Bank to pay the sales tax off during the Lease payments, as was agreed in the Lease to which Masque was not a party. He also asserts that it was not until November 2008, five months after LPR paid the final installment for the Equipment, that Masque contacted LPR over the final balance. LPR also submits evidence that it is seeking an Advisory Opinion from the New York State Department of Taxation, at its own expense, on whether sales tax is due on the original purchase of the equipment from Masque or on the Lease payments to the Bank.

In response, Masque asserts that under the terms of the Agreement, LPR was required to pay sales tax on the purchase of the Equipment over to Masque, and points out that the

Agreement requires that any modification or amendment be in writing. Specifically, it provides that:

This contract agreement represents the entire understanding of the parties hereto with respect to the subject matter hereof and supersedes all prior and contemporaneous negotiations, understandings and agreements, written or oral, among the parties hereto with respect to the subject matter hereof, all which prior agreements and understandings are hereby rendered null and void. The contract agreement may not be amended or modified except by writing executed by the parties hereto... The right of either party at any time to require strict performance by the other party hereto of any or all of the terms and conditions of this contract agreement will in no way be affected or impaired by prior waiver, forbearance, or course of dealing.

In addition, Masque notes that it was not a party to the Lease and that the Lease was signed three months after the Agreement. By this time, Masque had already been remitting sales tax on invoice payments from LPR.

Discussion

On a motion for summary judgment, the proponent "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..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).²

The court will apply New Jersey law to resolve this dispute since the Agreement contains a New Jersey choice of law clause in the Agreement and as New Jersey law bears a reasonable

² Although New Jersey law applies to the substantive issues of summary judgment, procedural standards are based on New York law. See Tanges v. Heidelberg North America, Inc., 93 N.Y.2d 48 (1999). In any event, the standards for summary judgment in New York and New Jersey are similar and do not change the outcome of this motion. See e.g. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995).

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relationship to this dispute since Masque's business is based in New Jersey. See Weisbach Elec Corp. v. Mes-Tec North America, Inc., 7 N.Y.3d 624, 627 (2006)(courts will enforce choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the dispute).

Under New Jersey law, Masque's motion for summary judgment on its breach of contract claim must be granted as under the unambiguous terms of the Agreement, LPR was required to pay over to Masque a total of \$667,977.98, including \$554,758.00 for Equipment, \$61,600.00 for labor, and \$51,619.98 for New York sales tax (to be remitted to the Department of Taxation by Masque). See James v. Federal Ins. Co., 5 N.J. 21, 24 (1950)("it has long been the law in this State that when the contract is clear the court is bound to enforce the contract as it finds it"). In addition, the record shows that Masque clearly designated, on each invoice it sent to LPR, the portion of the payments that were for sales tax. Furthermore, Masque has submitted evidence that it remitted the sales tax portion of each installment payment to the Department of Taxation, including the \$3,989.09, which was the amount of sales tax specified on the unpaid final invoice.

LPR's argument that the parties modified the Agreement and the installment payment terms such that LPR was not required to make the final installment payment is unavailing. As a preliminary matter, Masque's participation in discussions with the Bank and LPR concerning the financing of the purchase of the Equipment, including LPR's sales tax obligations, does not sufficiently evidence an intent to modify the terms of the Agreement.

In any event, the Agreement contains a "no oral modification provision" and the record contains no writing modifying the terms of the Agreement such that LPR was relieved of its obligation to perform in accordance with the Agreement, paying the full price for labor and the Equipment to Masque as well as paying over to Masque the sales tax thereon (for remission to the Department of Taxation by Masque). Compare Oscar v. Simeonidis, 352 N.J. Super. 476 (2002)(finding that parties modified original lease agreement where parties amended agreement in writing as required by original agreement).

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Next, contrary to LPR's assertion, permitting Masque to recover payment in accordance with the terms of the Agreement does not advance injustice or hardship to LPR such that the Agreement should not be enforced according to its terms. Notably, the New Jersey cases which LPR cites in support of the proposition that enforcement of a contract must not advance injustice or hardship to either party concern whether a court should exercise its discretion to grant a request for specific performance of a contract, and as such, are inapplicable here. See e.g. Kilarjian v. Vastola, 379 N.J.Super. 277 (2004). While LPR may be in an unenviable position of having to pay the full price of the Equipment to Masque and at the same time having paid sales tax twice in relation to the Equipment, these circumstances do not provide a basis for excusing LPR from its contractual obligations. Furthermore, LPR's contention that it is unable to pursue a refund of the sales tax it paid twice is unsubstantiated.

Based on the above, Masque is entitled to summary judgment on its cause of action for breach of contract and is entitled to recover \$51,619.98, plus interest from LPR. In light of this decision, the claims for unjust enrichment and an account stated, which seek the same relief as the breach of contract claim, are dismissed as moot.

Accordingly, it is

ORDERED that the motion for summary judgment on the breach of contract claim in the complaint is granted and the Clerk is directed to enter judgment in favor of plaintiff Masque Sound & Recording Corporation and against defendant Le Poisson Rouge NYC, LLC, in the amount of \$51,619.98, plus interest at the statutory rate from December 28, 2008, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk.

November 23,
Dated: ~~October~~, 2010

FILED

NOV 30 2010

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J.S.C.