

**Designer's Mgt. Agency, Inc. v American Dev.
Group, LLC**

2010 NY Slip Op 33437(U)

December 15, 2010

Sup Ct, NY County

Docket Number: 100264/09

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**

DESIGNER'S MANAGEMENT AGENCY, INC.,

Plaintiff,

-against-

**AMERICAN DEVELOPMENT GROUP, LLC;
PERRY FINKELMAN; 343-349 EAST 50TH
STREET LLC,**

Defendants.

INDEX NO. 100264/09

MOTION SEQ. NO. 001

FILED

DEC 15 2010

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 - 7 were considered on this motion for partial summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>7</u>
Replying Affidavits _____	_____
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<u>4 - 6</u>

Plaintiff Designer's Management Agency, Inc. ("Designer's Management") moves for partial summary judgment in its favor on its second cause of action against defendant American Development Group, LLC ("American Development"), pursuant to CPLR 3212. Defendants cross-move for summary judgment, dismissing plaintiff's second cause of action, its fifth cause of action and all causes of action against American Development.

Plaintiff is a talent representation agency for luxury fashion designers and selective personalities in the sports and entertainment industry, which also provides fashion-related business solutions to corporations through services such as co-branding, licensing, and sponsorships. Marc Beckman Aff ¶ 3. During the period of December 2006 through April 2007, plaintiff allegedly provided services to American Development in the development of a condominium based on an aggregate fee of \$120,000 to be paid in six equal monthly installments of \$20,000. Defendant Perry Finkelman is a member of defendant American Development, with whom plaintiff spoke and contracted. Payments were made for

the first four months, but American Development allegedly failed to pay plaintiff with respect to two installment payments totaling \$40,000. Plaintiff allegedly sent American Development invoices for such installment payments, but as no further payments were forthcoming, plaintiff commenced this action. In plaintiff's complaint, the following five causes of action are asserted: (1) breach of contract as to defendant American Development; (2) account stated as to defendant American Development; (3) quantum meruit as to defendants American Development and 343-349 East 50th Street LLC; (4) unjust enrichment as to defendants American Development and 343-349 East 50th Street LLC; and (5) piercing the corporate veil as to Perry Finkelman.

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. “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat summary judgment. *Id.*

Plaintiff moves for summary judgment, arguing that no material issues of fact exist with respect to its account stated claim. An account stated is established by defendant's “receipt and retention of [plaintiff's] invoices, seeking payment for services rendered . . . without objection within a reasonable time.” *Rockefeller Group, Inc. v Edwards & Hjorth*, 164 AD2d 830, 830 (1st Dep't 1990); *see also Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745, 746 (1st Dep't 1983). As for what constitutes a reasonable time to object, two months have been held reasonable, while a five-month delay in objecting to invoices has been deemed unreasonable. *See Healthcare Capital Mgmt., LLC v Abrahams*, 300 AD2d 108, 108 (1st Dep't 2002); *Shea & Gould v Burr*, 194 AD2d 369, 371 (1st Dep't

1993).

Plaintiff submits, as evidence in support of its motion, the invoices sent to defendant American Development, dated March 20, 2007 and April 1, 2007, that remain unpaid. *See Beckman Aff*, Exhs A & B. The President of Designcr's Management has also submitted an affidavit in which he attests that invoices were sent to defendant American Development and "[d]espite repeated demands from Plaintiff, [American Development] has failed to pay the outstanding balance of \$40,000. The invoices remain unpaid." *Beckman Aff* ¶¶ 9-13. Plaintiff contends that American Development has not disputed that it received the invoices and that it has not paid them. Plaintiff further contends that, as it sent defendant American Development two monthly invoices, to which American Development did not timely object, judgment as a matter of law should be granted in its favor in the amount of \$40,000.

Defendant American Development opposes plaintiff's motion and seeks summary judgment in its favor, dismissing the second cause of action for account stated. First, American Development contends that it did object to the invoices, and attaches as exhibits, email correspondence between the parties in which the services rendered by plaintiff were deemed dissatisfactory and, thus, the charges disputed. *See Nadine G. Citron Affirmation*, Exh 1. Second, American Development argues that this cause of action should be dismissed against it, as it was acting purely as an agent for its disclosed principal, defendant 343-349 East 50th Street, LLC ("East 50th Street"). Perry Finkelman, a member of both American Development and East 50th Street, asserts that "[American Development] acted as agent for East 50th Street during the construction and development of the condominium" and plaintiff was retained by American Development "on behalf of East 50th Street." *Perry Finkelman Affirmation* ¶¶ 6-7.

Based on the below reasoning, summary judgment on the second cause of action is granted in favor of plaintiff. Plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law, on its account stated claim, by demonstrating that: (1) it rendered services to defendant American Development; (2) it sent invoices to such defendant for its services; (3) some payments were made to

plaintiff, except on the last two installments; and (4) any objection posed by such defendant was untimely. Defendant American Development has failed to show that there are any genuine issues of fact that preclude summary judgment. Although American Development attaches email correspondence disputing the work performed by plaintiff, as such objection came approximately eight months after the invoices were sent, it was not within a reasonable time sufficient to withstand the granting of summary judgment on an account stated claim. As stated above, objections made after five months from when a party received invoices were held to be untimely. *See Healthcare Capital Mgmt., LLC*, 300 AD2d at 108; *Shea & Gould*, 194 AD2d at 371.

Moreover, defendant American Development's conclusory contention that it was acting merely as an agent for a disclosed principal is insufficient to raise a genuine issue of fact. Generally, an agent who is disclosed will not be liable on a contract. *Tarolli Lumber Co. v Andreassi*, 59 AD2d 1011, 1011 (4th Dep't 1977). However, an undisclosed agency relationship is insufficient as a defense brought against the agent. *See id.* at 1011-12. "Further, the agent will be liable even if the third party is aware that an agency relationship exists, so long as the agent fails to disclose the principal's identity." *Id.* at 1012 (citing *McClure v Central Trust Co. of New York*, 165 NY 108, 128 [1900]).

Although Perry Finkelman claims that he was a disclosed agent, he never states how plaintiff was informed of this alleged fact, or any specifics of such alleged disclosure. Further, defendants have provided no other evidentiary proof that American Development was acting as an agent for East 50th Street and that plaintiff knew it was acting in such capacity. No specific conversations, correspondence or documents were referenced and/or attached to support this contention, beyond Perry Finkelman's unsubstantiated and conclusory assertion that defendant American Development was acting as an agent for a disclosed principal. Instead, plaintiff contends that it was under the belief that American Development was the only party to the agreement between them, as it had received no information that American Development was acting as an agent for East 50th Street. *Beckman Aff in Opp* ¶ 10. The

President of Designer's Management, Marc Beckman, asserts that plaintiff was hired by American Development and no other party; thus, plaintiff is entitled to recover the last two installment payments on the agreement from American Development.

In addition, it is undisputed that the invoices were addressed and sent to American Development. At no time does it appear that American Development objected to the invoices on the basis that it was not the proper party and, therefore, was under no obligation to make payments. As such, summary judgment on the second cause of action for account stated is granted in favor of plaintiff and against American Development in the amount of \$40,000.

As to the remainder of defendants' cross motion, Perry Finkelman moves for summary judgment dismissing the fifth cause of action against him, and American Development moves for summary judgment dismissing all causes of action against it. In light of the above, that plaintiff has been granted summary judgment on its account stated cause of action against American Development and awarded its ultimate relief, American Development's motion to dismiss all causes of action against it is granted to the extent that the first, third and fourth causes of action against American Development are dismissed as moot. These remaining causes of action against American Development are alternative theories of recovery and, thus, duplicative of the second cause of action.

Perry Finkelman's motion to dismiss the fifth cause of action against him is granted. The fifth cause of action alleges that Perry Finkelman is the alter ego of American Development and seeks to pierce the corporate veil to hold him personally liable for the debts of the company. It is well settled that piercing the corporate veil generally "requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Matter of Morris v New York State Dep't of Taxation & Fin.*, 82 NY2d 135, 141 (1993); see also *First Capital Asset Mgmt. v N.A. Partners, L.P.*, 300 AD2d 112, 116 (1st Dep't 2002); *Matter of Guptill Holding*

Corp. v State of New York, 33 AD2d 362, 364–65 (3d Dep’t 1970), *aff’d* 31 NY2d 897 (1972). The burden is on the party seeking to pierce the corporate veil to “establish that the [corporation], through [its] domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene.” *Matter of Morris*, 82 NY2d at 142.

Defendant Finkelman submits his affirmation and states therein: “[A]ll of my dealings with the plaintiff have been as a representative and Managing Member of [American Development], and not in any individual capacity. Furthermore, any such dealings have been in the furtherance of the business activities of [the company] and not for any individual personal activities of mine.” Finkelman Affirmation ¶ 24. Finkelman additionally asserts that the development of the condominium in question was not for his personal use. *Id.* ¶¶ 25-26. In submitting a reply affidavit and memorandum of law, plaintiff, however, has failed to address and/or oppose the part of the cross motion wherein Finkelman seeks to dismiss the fifth cause of action against him. Thus, the fifth cause of action against Finkelman is dismissed.

Accordingly, it is

ORDERED that the motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendant American Development Group, LLC on the second cause of action in the amount of \$40,000, together with interest at the statutory rate from May 1, 2007 until entry of judgment, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendants’ cross motion is granted to the extent that the first, third and fourth causes of action against American Development Group, LLC are dismissed and the fifth cause of action against Perry Finkelman is dismissed; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry, upon all defendants.

Dated: _____

DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if Appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER/JUDG.

J:\Summary Judgment\BYsubjectCLIPS\CONTRACT\Designer's Management, partial sj, account stated.wpd

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