

Giardano v Selective Surfaces, Inc.

2011 NY Slip Op 30226(U)

January 14, 2011

Sup Ct, Nassau County

Docket Number: 012069-07

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
MICHAEL GIARDANO,

Plaintiff,

-against-

**SELECTIVE SURFACES, INC. AND THOMAS
MICCIANTUONO,**

Defendants.
-----x

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 012069-07
Motion Seq. No: 1
Submission Date: 11/24/10**

The following papers have been read on this motion:

- Notice of Motion, Attorney Affirmation and Exhibits.....x**
- Plaintiff's Memorandum of Law in Support.....x**

This matter is before the Court for decision on the motion filed by Plaintiff on October 13, 2010 and submitted without opposition on November 24, 2010. For the reasons set forth below, the Court 1) grants Plaintiff's motion for judgment against Defendant Thomas Micciantuono, pursuant to the applicable Promissory Note, in the principal sum of \$75,000, plus interest, costs and attorney's fees to be determined at an inquest; and 2) denies Plaintiff's motion for judgment against Defendant Selective Surfaces, Inc., without prejudice.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3212, granting summary judgment to Plaintiff.

Defendants have submitted no opposition or other response to Plaintiff's motion.

B. The Parties' History

The Complaint (Ex. 1 to Chao Aff. in Supp.) alleges as follows:

First Cause of Action - Breach of Contract against Selective

In or about June of 2000, Defendant Selective Surfaces, Inc. ("Selective") entered into a written Participation Agreement ("Agreement") with Plaintiff. Pursuant to the Agreement, Plaintiff agreed to provide certain services to Selective, and Selective agreed to reimburse Plaintiff for his ordinary, reasonable and necessary expenses. Plaintiff performed his obligations and conditions precedent pursuant to the Agreement, and Plaintiff was obligated to reimburse Plaintiff for his ordinary, reasonable and necessary expenses in the approximate amount of \$4,450.00. Despite Plaintiff's demand, Selective has refused to reimburse Plaintiff for his expenses, for which Plaintiff seeks judgment of \$4,450.00, plus interest.

Second Cause of Action - Breach of Contract against Selective

Pursuant to paragraph 2 of the Agreement, Plaintiff was entitled to receive twenty percent (20%) ("Participation Share") annually of the net profits of Selective plus the excess of the base salary of \$95,000 ("Base Salary") to be paid to Defendant Thomas Micciantuono ("Micciantuono"), plus any expenses of Micciantuono in excess of ordinary and necessary expenses. This total sum owed to Plaintiff was referred to as the "Annual Participation" (Compl. at ¶ 15). The calculation of the Annual Participation was to be performed by Selective's "regularly employed certified public accountants" (Id. at ¶ 16), and was required to be paid to Plaintiff no later than ninety (90) days after the year-end accounting statements.

Selective allegedly breached the terms of the Agreement by failing to pay to Plaintiff his Annual Participation for the calendar years of 2000-2006, despite Plaintiff's demand for those payments. Plaintiff seeks judgment against Selective in an amount to be determined at trial, believed to be in excess of \$635,000.00, plus interest.

Third Cause of Action - Breach of Contract against Selective

Pursuant to paragraph 4(a) of the Agreement, in the event that Plaintiff offered to Selective in writing "his rights to be paid his future Annual Participation and Sales Participation," Selective would be required to pay to Plaintiff twenty percent (20%) of an amount determined by multiplying the net earnings before interest, taxes, depreciation, amortization, plus

compensation above the base salary and expenses (“EBITDA”) by four (4) (“Par. 4 Buy Out Amount”) (Compl. at ¶ 21). By correspondence dated December 6, 2006, Plaintiff demanded his Buy Amount, but Selective has refused to make the required payments to Plaintiff. Plaintiff alleges that he has been in damaged in an amount to be determined at trial, believed to be in excess of \$1,650,000.00, plus interest.

Fourth Cause of Action - Breach of Promissory Note against Micciantuono

Micciantuono executed a Promissory Note (“Note”) on or about June 1, 2000 in which he promised to pay to Plaintiff the principal sum of \$75,000.00, plus interest commencing July 1, 2000 at the rate of eight and one half (8 ½ %) percent per annum, payable as interest only in the sum of \$531.25 commencing August 1, 2000 and monthly thereafter in equal monthly payments of principal and interest in the sum of \$1,538.74 commencing August 1, 2001 and ending July 1, 2006. Despite Plaintiff’s demand, Micciantuono has failed to make the required payments under the Note.

The Note also provides that, in the event that Plaintiff commences an action to enforce his rights under the Note, Micciantuono agreed to pay reasonable costs and attorney’s fees incurred by Plaintiff in enforcing and collecting the sums due under the Note.

Plaintiff seeks judgment against Micciantuono in an amount to be determined at trial, but believed to be in excess of \$123,795.62, plus interest.

Fifth Cause of Action - Breach of Implied Covenant of Good Faith and Fair Dealing against Selective

Plaintiff alleges that Selective had an implied duty to act in good faith and deal fairly with Plaintiff with respect to the Agreement, which Selective breached by failing to compensate Plaintiff pursuant to the Agreement. Plaintiff seeks damages in an amount to be determined at trial, but believed to be in excess of \$2,289,450.00, plus interest.

Sixth Cause of Action - Unjust Enrichment

Plaintiff alleges that, unless he is compensated for the reasonable value of the services he provided to “defendant” (Compl. at ¶ 39), “defendant” will be unjustly enriched at Plaintiff’s

expense.¹ Plaintiff seeks a judgment believed to be in excess of \$2,289,450.00, plus interest.

In their Answer (Ex. 2 to Chao Aff. in Supp.), Defendants, *inter alia*, 1) admit that Selective entered into the Agreement with Plaintiff in or about June 2000, but deny that the Agreement is an enforceable contract, or that Plaintiff has any rights thereunder; 2) deny many of the allegations in the Complaint and refer the Court to the terms of the Agreement for its meaning and legal effect; and 3) assert ten (10) affirmative defenses: failure to state a cause of action; statute of limitations; statute of frauds; unenforceability of Agreement for want of consideration, failure of consideration, vagueness and indefiniteness, and unconscionability; rescission for mistake; reformation for mistake; and Plaintiff has been fully compensated for the services he provided.

The relevant provisions of the Agreement (Ex. 3 to Chao Aff. in Supp.) include the following:

Paragraph 1 provides as follows:

[Giordano] has and shall continue upon request to provide certain services in connection with the Business.² [Giordano] shall be reimbursed for ordinary, reasonable and necessary expenses which have been appropriately documented and authenticated, and which have been actually incurred in the performance of the services provided.

Paragraph 2(a) provides as follows:

[Giordano] shall be entitled to twenty (20%) percent (the "Participation Share") annually of the net profits of [Selective] plus the excess of the base salary to be paid to [Micciantuono] of \$95,000 (the "Base Salary"), plus any expenses of [Micciantuono] in excess of ordinary and reasonable expenses of [Selective] (such total sum hereinafter referred to as the "Annual Participation"). The calculation of the Annual Participation due to [Giordano] hereunder shall be determined by [Selective's] regularly employed certified public accountants in accordance with generally accepted accounting principles.

Paragraph 4(a) provides as follows:

¹ The Sixth Cause of Action does not specify the defendant, or defendants, against whom this cause of action is asserted.

² The Agreement states that Selective owns and operates a manufacturing facility producing countertops for kitchens and bathrooms, referred to in the Agreement as the "Business."

In the event that [Giordano] offers to [Selective], in writing, his rights to be paid in the future Annual Participation and Sale Participation [defined in ¶ 3 which addresses the sale by Selective of all or substantially all of its assets or stock to a third party], Selective shall then be required to pay to [Giordano] twenty percent (20%) of an amount determined by multiplying “EBITDA” (as defined hereinafter) by four (4) (“Par. 4 Buy Out Amount”). The term “EBITDA” shall be defined as net earnings before interest, taxes, depreciation, amortization, plus compensation above the Base Salary and any expenses of [Micciantuno] in excess of ordinary and reasonable expenses of [Selective], for a full calendar year, all as determined by [Selective’s] regularly employed certified public accountants in accordance with generally accepted accounting principles.

In his Affidavit in Support (Ex. 4 to Chao Aff. in Supp.), Giordano affirms the truth of the allegations in the Complaint. He submits that there is no defense to the causes of action in the Complaint, and that the defenses alleged in the Answer lack merit.

In his Affirmation in Support, Counsel for Plaintiff provides a procedural history of this matter. Plaintiff served the Summons and Complaint on Defendants on or about July 18, 2007, and Defendants subsequently served their Answer. Limited discovery was then conducted, but depositions never took place. The parties attempted, unsuccessfully, to settle this matter. Plaintiff then filed his Note of Issue, and counsel for Defendants subsequently moved to be relieved. The Court granted that application on or about January 7, 2010. On June 10, 2010, the Court conducted a pre-trial conference, at which Defendants failed to appear. The Court directed Plaintiff to serve a copy of the transcript of the pre-trial conference proceedings on Defendants (Ex. 8 to Chao Aff. in Supp.), and Plaintiff complied with that directive.

Counsel for Plaintiff affirms, further, that Plaintiff’s estimation of damages was calculated according to the terms of the Agreement and the Note, as well as the financial statements (“Financial Statements”) of Defendants (Ex. 7 to Chao Aff. in Supp.). Those Financial Statements consist of a lengthy and complex document prepared by a Certified Public Accounting firm which contains detailed financial reports regarding Selective.

C. The Parties’ Positions

Plaintiff submits that he is entitled to judgment against Selective pursuant to the Participation Agreement by establishing that 1) Plaintiff and Selective entered into the Agreement; 2) Plaintiff performed his obligations pursuant to the Agreement; and 3) Selective failed to pay to Plaintiff the sums owed under the Agreement.

Plaintiff submits, further, that it has demonstrated its right to judgment against

Micciantuono on the Note by establishing the existence of the Note (Ex. 6 to Chao Aff. in Supp.), and Micciantuono's failure to make payment pursuant to the terms of the Note.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Promissory Note

A promissory note is an instrument for the payment of money only for the purpose of CPLR § 3213. *Davis v. Lanteri*, 307 A.D.2d 947 (2d Dept. 2003); *East New York Savings Bank v. Baccaray*, 214 A.D.2d 601 (2d Dept. 1995). To establish a *prima facie* case on a promissory note, a plaintiff must establish the existence of the instrument and the defendant's failure to make payment pursuant to the terms of the instrument. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 A.D.3d 708 (2d Dept. 2008); *Mangiatordi v. Maher*, 293 A.D.2d 454 (2d Dept. 2002).

Once plaintiff has met its burden, the defendant must then establish by admissible evidence the existence of a triable issue concerning a bona fide defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, *supra*; *Northport Car Wash, Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794 (2d Dept. 2008). Bald, conclusory allegations are insufficient to defeat a motion for summary judgment in lieu of a complaint. *Federal Deposit Ins. Corp. v. Jacobs*, 185 A.D.2d 913 (2d Dept. 1992).

C. Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694, 695 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of

contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

D. Counsel Fees

Provisions or stipulations in contracts for payment of attorney's fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977). Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that they are reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). The court should consider the following factors in determining the reasonable value of the services rendered: 1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, 2) the lawyer's experience, ability and reputation, 3) the amount involved and benefit resulting to the client from the services, 4) the customary fee charged for similar services, 5) the contingency or certainty of compensation, 6) the results obtained, and 7) the responsibility involved. *Diaz v. Audi of America, Inc.*, 57 A.D.3d 828, 830 (2d Dept. 2008). In making an award of attorney's fees, the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered. *NYCTL 1988-1 Trust v. Shabbos, Inc.*, 37 A.D.3d 789, 791 (2d Dept. 2007), quoting *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006).

E. Application of these Principles to the Instant Action

The Court concludes that Plaintiff has demonstrated his right to judgment against Defendant Thomas Micciantuno, pursuant to the Promissory Note, by establishing the existence of the Promissory Note, and Micciantuno's failure to make payment pursuant to the terms of that instrument. Moreover, Defendant has failed to generate a triable issue of fact as to his obligations on that instrument. Plaintiff has also demonstrated its right to counsel fees incurred in enforcing the Note, but the Court has an insufficient record on which to base that award. Accordingly, the Court awards Plaintiff judgment against Defendant Micciantuno in the principal sum of \$75,000, plus interest, costs and attorney's fees to be determined at an inquest.

The Court denies Plaintiff's motion for summary judgment against Selective, pursuant to the parties' Agreement, as the Court has an insufficient record before it to warrant judgment on the causes of action against Selective. The Court notes, *inter alia*, that 1) Plaintiff has not provided the documentation and authentication of his business expenses required by Paragraph 1

of the Agreement; and 2) Plaintiff has not provided an affidavit by the accounting firm that prepared the Financial Statement, or an affidavit by an expert qualified to interpret that Financial Statement, explaining the calculations that form the basis of the Annual Participation and EBITDA referred to in Paragraphs 2 and 4 of the Agreement. This denial is without prejudice.

In light of the foregoing, it is hereby

ORDERED, that Plaintiff have judgment against Defendant Thomas Micciantuono in the principal amount of \$75,000, plus interest, costs and attorney's fees; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the computation of interest, costs and attorney's fees on February 16, 2011 at 9:30 a.m.; and it is further

ORDERED, that Plaintiff shall serve upon the Defendants by certified mail, return receipt requested, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before February 4, 2011; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against Defendant Micciantuono in accordance with the decision of the Special Referee.

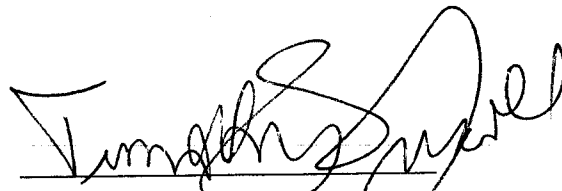
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

January 14, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
JAN 21 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE