

N-Tier Sec. Dev. Studio Ltd. v George Davidsohn & Son, Inc.

2011 NY Slip Op 30586(U)

March 9, 2011

Sup Ct, New York County

Docket Number: 601197/10

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. EILEEN A. RAKOWER

PRESENT

PART 15

Index Number : 601197/2010
N-TIER SECURITIES DEVELOPMENT
vs
DAVIDSOHN, GEORGE
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 601197/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1, 2	
3, 4	
5, 6, 7	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 3/9/11



HON. EILEEN A. RAKOWER

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
N-TIER SECURITIES DEVELOPMENT
STUDIO LIMITED,

Plaintiff,

Index No.
601197/10

FILED

- against -

Decision and
Order

MAR 14 2011

GEORGE DAVIDSOHN & SON, INC and
DAVIDSOHN GLOBAL TECHNOLOGIES,
INC.,

NEW YORK
COUNTY CLERK'S OFFICE

Mot. Seq. 001

Defendants.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff N-Tier Securities Development Studio Limited (“N-Tier”) brings this action for breach of contract, breach of the covenants of good faith and fair dealing, unjust enrichment, conversion, collection of attorneys’ fees, and declaratory relief, as against defendants George Davidsohn & Son, Inc. and Davidsohn Global Technologies, Inc. (“Global”).

N-Tier and Global are both companies that provide information-technology solutions to corporations. In or around June 2008, Global contacted plaintiff to discuss the possibility of acquiring plaintiff through a “friendly acquisition.” On July 16, 2008, N-Tier and Global entered a Mutual Confidentiality and Non-Circumvention Agreement (“confidentiality agreement”), in connection with the acquisition discussions.

N-Tier alleges that, in or around July 2008, it made an oral agreement with Global to have Global assist it in implementing an enhancement of plaintiff’s proprietary “Corporate Action System,” for one of N-Tier’s clients, Pershing, LLC. N-Tier alleges that it and Global worked together on the Pershing Project from July 30, 2008 until November 15, 2008. N-Tier claims that it provided the “lion’s share” of the services to Pershing and that Global’s role in the project was only to act as N-Tier’s agent, to lend its name to the project, and to take minutes at meetings between

Pershing and N-Tier.

In or around October or November of 2008, it is alleged that, without N-Tier's knowledge or consent, Global billed Pershing \$48,419.00. Pershing allegedly paid Global in full on November 4, 2008, but Global claims that Pershing eventually reversed payment, holding it as a credit against future work. N-Tier alleges that Global breached the confidentiality agreement by using information gained through the acquisition discussions in order to unilaterally bill Pershing and deprive N-Tier of its share of revenue. N-Tier is seeking reimbursement of a share of the proceeds from the project.

N-Tier is also seeking damages in connection with Global's use of N-Tier's "Booth" at the "Sibos Convention." The Sibos Convention is described by N-Tier as a "large international financial services industry event," which is hosted by the Society for Worldwide Interbank Financial Telecommunication ("SWIFT") in Vienna. N-Tier asserts that having a booth at the Sibos Convention is highly prestigious, and is only available to organizations that have been approved by SWIFT. As such, Global, which is not an approved member, was only permitted to use a booth because it was in the process of acquiring N-Tier. N-Tier alleges that Global solely promoted its own name and products at the Sibos Convention, and that Global agreed to pay all fees and expenses charged by SWIFT for use of the Sibos booth. N-Tier seeks reimbursement of said fees in the amount of \$22,669.92.

Global now moves for summary judgment pursuant to CPLR 3212, seeking to dismiss the complaint. N-Tier opposes and cross-moves to amend its complaint. Global, in support of its motion, submits: the pleadings; a copy of a document titled "Statement of Work Customer Swift Messaging Function - Global Corporate Actions," which is printed on Pershing letterhead; a document titled "Pershing, LLC Global Corporate Actions System Control Improvements Functional Overview Requirements Document;" a document titled "Re: Mutual confidentiality and Non-Circumvention Agreement;" and an invoice sent from Global to Pershing, dated September 23, 2008.

Global asserts that plaintiff's breach of contract claim, which is based upon the confidentiality agreement, should be dismissed because that agreement pertains solely to the acquisition discussions, and in no way relates to the Pershing project. As to the Sibos Convention claims, Global asserts that it attended as N-Tier's guest,

that it never agreed to be responsible for any fees associated with the use of N-Tier's table, and that "at the 2008 Sibos Conference Plaintiff's and George Davidsohn & Son, Inc.'s combined services were displayed."

N-Tier, in opposition, submits: the pleadings; two notices to take depositions; a request for answers to interrogatories; plaintiff's first notice for discovery and inspection, dated July 16, 2010; correspondence between the parties; a proposed amended complaint; the affidavit of Eamon Moore, CEO of N-Tier; an invoice from N-Tier to Pershing; a printout titled "Sibos 2008: official installation date and time; and a copy of an invoice from SWIFT to N-Tier.

N-Tier argues that the motion is premature because discovery remains outstanding which would assist it in opposing the motion. Specifically, N-Tier argues that it served Global with several discovery requests, and noticed depositions of Global witnesses, but that Global has failed to comply. Rather, plaintiff claims, Global requested that a preliminary conference be scheduled in order to work out a discovery schedule. The day before the conference, Global served N-Tier with the instant motion for summary judgment. In support of its cross-motion, plaintiff seeks to add a cause of action for *quantum meruit*, based on both the Pershing project, and Global's use of the Sibos booth.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557[1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

Where facts essential to justify opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied. (See CPLR §3212[f]).

Here, N-Tier has yet to receive any discovery from Global, including, but not

limited to, a response to its D&I, production of witnesses for deposition, and answers to N-Tier's interrogatories. Indeed, as a result of Global's filing of the instant motion, the preliminary conference in this matter has been adjourned three times.

There are outstanding items of discovery which may serve to clarify the various agreements between the parties regarding both the Pershing Project and use of the Sibos booth. Moreover, N-Tier seeks information from Global which may show if, and to what extent, Global used confidential information in order to establish a separate relationship with Pershing. Thus, the motion is premature.

As for N-Tier's cross-motion to amend, leave to amend shall be freely given. (*see*; CPLR 3025[b]). There has been no showing that the amendment will cause any prejudice or surprise to Global.

Wherefore it is hereby

ORDERED that the motion is denied; and it is further

ORDERED that the parties shall appear, as previously scheduled, for a Preliminary Conference on April 5, 2011 at 9:30 a.m. in Room 308 at 80 Centre Street; and it is further'

ORDERED that plaintiff's cross-motion for leave to amend its complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants shall serve an answer to the amended complaint within 20 days from the date of said service.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: March 9, 2011



Eileen A. Rakower, J.S.C.

FILED

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