Michael Paul Paladino Consultants, Inc. v Gotham LLC
2011 NY Slip Op 30721(U)
March 22, 2011
Sup Ct, Suffolk County
Docket Number: 16315-2008
Judge: Emily Pines
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SHORT FORM ORDER

INDEX NUMBER: 16315-2008

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 09-28-2010
Motion Submit Date: 01-25-2011
Motion Sequence No.: 001 MD

[ ] FINAL
[x] NON FINAL

---X

MICHAEL PAUL PALADINO CONSULTANTS, INC.,

Plaintiff,

-against-

GOTHAM LLC and GOTHAM PERSONNEL, LLC,

Defendants.

---X

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ORDERED, that the motion (motion sequence number 001) by defendants pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's complaint and for judgment on the counterclaims in the amount of $97,815.76 is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Michael Paul Paladino Consultants, Inc. ("MPP"), is in the business of providing clients for temporary staffing agencies. Defendant, Gotham Personnel, LLC ("Gotham"), provides temporary staffing as requested by clients and pays the employees directly. Gotham invoices its clients directly for the services provided by the temporary employees.

On April 12, 2007, MPP entered into an Agreement ("Agreement") with Gotham pursuant to which Gotham agreed to pay MPP commissions for sales by Gotham generated by MPP client accounts.

The Agreement provides, in relevant part:

SECTION II
DEFINITIONS

For the purposes of this Agreement, the following terms shall have the meanings indicated below:

* * *

COMMISSIONS - the amount paid to MPP by Gotham for sales generated by MPP client accounts.

* * *

MARK-UP - an amount calculated by using the actual dollar amount which remains after subtracting the salary paid to the temporary employee from the amount billed to a client which is then expressed as a percentage. This Mark-up figure is correlated within this Agreement to the amount of commissions paid to MPP for sales on accounts.

SALES - The total amount which is billed to a client.

* * *

SECTION IV

COMPENSATION SCHEDULE FOR MPP

1. Compensation to MPP will be paid according to the category of the accounts, as follows:

Category A: ADP-Broadridge Co. Inc. only;

Category B: independent accounts in the greater New York area: including Long Island, New York City, and New Jersey;

* * *

2. Category A:

a. Commissions on the first $15,000.00 per week will be 10%.

b. Mark up for this account must be 28% to 30%.

c. After the weekly base of $15,000.00 has been reached, commissions will be 3% of the amount over the initial $15,000.00.

* * *

3. Category B:

a. These commissions are based upon the amount of the mark up:

MARK UP	COMMISSION
22% to 27%	2% on sales
28% to 30%	3% on sales
31% to 34%	4% on sales
35% to 39%	5% on sales
40% to 44%	5.5% on sales
45% to 49%	6 % on sales
50% to 54%	6.5% on sales
55% to 59%	7% on sales
60% or greater	8% on sales

MPP performed services for Gotham from April 2007 until May 1, 2008, when Gotham terminated the Agreement. According to MPP, until March 2008, Gotham paid MPP 80%-90% of what it owed MPP under the Agreement. According to Gotham, it paid MPP $113,180.71 from March 1, 2007 through April 30, 2009.

MPP commenced the instant action against Gotham to recover unpaid commissions it claims it is owed under the Agreement. It is undisputed that the Agreement entitles MPP to commissions for sales through April 30, 2009, the year following termination of the Agreement.

In its complaint, MPP alleges that beginning on February 1, 2008, Gotham failed to pay MPP for the services it rendered. The complaint sets forth seven causes of action. The first cause of action claims that Gotham breached the Agreement by failing to pay commissions to MPP and seeks damages in the amount of $29,849.10 plus $5,000 each week subsequent to April 18, 2008. The second cause

of action is for unjust enrichment and seeks damages in the amount of $29,849.10 plus $5,000 each week subsequent to April 18, 2008. The third cause of action appears to assert a claim for negligent misrepresentation and seeks damages in the amount of $29,849.10 plus $5,000 each week subsequent to April 18, 2008. The fourth cause of action sounds in quantum meruit and seeks damages in the amount of $29,849.10 plus $5,000 each week subsequent to April 18, 2008. The fifth cause of action is for an account stated and seeks damages in the amount of $29,849.10 plus $5,000 each week subsequent to April 18, 2008. The sixth cause of action appears to assert a claim for breach of contract based upon Gotham's refusal to provide MPP with documentation regarding the services rendered to Gotham's clients and seeks unspecified damages. The seventh cause of action seeks attorneys' fees based upon Gotham's purported breach of the Agreement.

Gotham interposed two counterclaims against MPP alleging that MPP has been unjustly enriched by retaining certain commissions paid by Gotham to which it was not entitled. Gotham claims that although it paid MPP $133,180.71 in commissions, the total commissions due were actually only $15,364.95. Thus, Gotham seeks to recover $97,815.76 it claims it overpaid MPP.

At the heart of the dispute between the parties is whether the term "mark-up" as used in the Agreement to determine the amount of commissions, if any, earned by MPP is calculated as a percentage of the amount billed by Gotham to a client for providing temporary employees (sales) or as a percentage of the amount paid by Gotham in payroll to temporary employees provided to that client (payroll). As set forth above, the amount of commissions due to MPP depended on the mark-up on the particular client's account.

Gotham moves for summary judgment (1) dismissing MPP's complaint in its entirety and (2) on its counterclaim in the amount of $97,815.76. In support of its motion Gotham submits, among other things, an affidavit from its President, Craig Feingold ("Feingold"). According to Feingold, the Agreement was prepared by MPP's owner, Michael Paul Paladino ("Paladino") and Paladino's attorney. Feingold states that he did not draft any part of the Agreement, nor did Gotham have an attorney or anyone else draft, edit or revise any part of the Agreement on its behalf. Feingold admits that from April 2007 through April 30, 2009, Gotham paid MPP $113,180.71. Feingold claims that MPP's commissions were calculated by non-party Sterling Resource Funding Corp ("Sterling"). He further states that Sterling was never provided with a copy of the Agreement and was never aware of the specific definition of "mark-up" as set forth in the Agreement. Feingold claims that upon reviewing the Agreement with his partner and Gotham's attorneys, they discovered an ambiguity in the Agreement as to whether the "mark-up" for a particular client is to be calculated as a percentage of gross sales or as a percentage of gross payroll. Feingold states that his reading of the provision requires mark-up to be calculated as a

percentage of gross sales, although he believes that the alternative, calculating mark-up as a percentage of gross payroll, would be a fair and reasonable reading of the Agreement. Upon calculating mark-up as a percentage of gross sales, Feingold concludes that MPP was only entitled to commissions totaling $15,364.95 on the four accounts in dispute. Feingold explains that because Gotham paid MPP $113,180.71 in commissions on those accounts, Gotham is seeking to recover $97,815.76, the amount it overpaid MPP, on its counterclaims.

Gotham argues that the Agreement is ambiguous as to whether "mark-up" is to be calculated as a percentage of sales or as a percentage of payroll because the provision is susceptible to more than one interpretation. Next, Gotham contends that the Agreement was drafted solely by MPP and, therefore, any ambiguities in the Agreement must be construed against MPP and favorably to Gotham. Thus, Gotham argues that the provision must be construed, as a matter of law, by calculating "mark-up" as a percentage of sales. When construed in such a manner, Gotham claims that it is entitled to summary judgment dismissing MPP's complaint and on its counterclaims because it is clear that it overpaid MPP in the amount of $97,815.76.

In opposition, MPP argues that Gotham's motion must be denied because the Agreement is clear and unambiguous regarding the definition of "mark-up." Alternatively, even if the meaning of the term is ambiguous, MPP contends that the evidence demonstrates the existence of material issues of fact regarding the intentions of the parties as the calculation of mark-up under the Agreement. MPP cites to the deposition testimony of Feingold and Paladino as evidence that the parties began discussing the terms of a proposed business relationship in November 2006. MPP claims that the deposition testimony of the parties demonstrates that the Agreement was the product of an arm's length transaction which involved discussion between the parties. MPP notes that Section X of the Agreement states that "Gotham hereby agrees that, should any dispute arise in the future regarding the interpretation of any of the terms of the agreement . . . Gotham hereby waives the argument or defense that it was not represented by counsel and therefore was at a disadvantage in the negotiation, preparation, and execution of this agreement." Moreover, MPP points out that until March 2008, Gotham paid commissions to MPP based on a calculation of mark-up as a percentage of payroll, not sales. It was not until March 2010, when it interposed counterclaims, that Gotham claimed that the Agreement is ambiguous and that it should be construed so as to calculate mark-up as a percentage of sales. MPP cites to the deposition testimony of Feingold as demonstrating that Gotham understood mark-up to be a percentage of payroll. Feingold testified, in relevant part, as follows:

> Q. And as used in that agreement, what does mark-up mean?
>
> MR. PALLACI: You want him to say what the agreement says?

[* 6]

MR. KESSLER: No, what's his understanding of what mark-up meant.

A. Mark-up is the money that's above and beyond, you know, what we're paying them in, our profits, above and beyond what we're paying out.

Q. So just explain for me in the temporary staffing world mark-up, what would be what?

A. Mark-up would be the gross, mark-up is where the gross sales goes after-after you pay the employees. And you get-you mark it up above and beyond, all of the pay of all the insurance. Any anything to do with paying an employee and you mark it up, and you get the gross sales.

* * *

Q. Is the term, in the temporary employment world, is the term mark-up typically expressed as a dollar amount or is it a percentage?

A. Usually it's a percentage.

Q. And do you have any ideas as to how that percentage is typically calculated in the temporary staffing world?

MR. PALLACI: Your saying general, right?

MR. KESSLER: Yeah, in general, not saying just with regard to this, but generally.

THE WITNESS: In general how do you get to mark-up?

MR. KESSLER: Yeah, how do you get to the percentage?

A. Well, you mark-up a pay rate. I mark-up about a percentage of the pay rate, that's how I get it . . .

Additionally, MPP argues that Gotham's course of conduct in paying commissions to MPP based upon mark-up calculated as a percentage of payroll during the first year of the Agreement supports the conclusion that the Agreement is unambiguous. MPP also argues that because the Agreement was the product of an arm's length transaction which involved discussions between the parties, it cannot be construed against MPP as a matter of law.

DISCUSSION

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 85 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue; however, once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 A.D.2d 713 [2nd Dept 1996]).

Here, the parties dispute whether the term "mark-up" in the Agreement is ambiguous.

> "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v. Phillies Records*, [98 N.Y.2d 562] at 569, 750 N.Y.S.2d 565, 780 N.E.2d 166; further citations omitted). A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v. Insurance Co. of North Amer.*, 46 N.Y.2d 351, 355, 413 N.Y.S.2d 352, 385 N.E.2d 1280).
>
> Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide (*see Greenfield v. Phillies Records, supra* at 569, 750 N.Y.S.2d 565, 780 N.E.2d 1066). Furthermore, any ambiguity in contract language must be construed against the party that drafted the contract . . . (*see Matter of Cowen & Co. v. Anderson*, 76 N.Y.2d 318, 559 N.Y.S.2d 225, 558 N.E.2d 27). Where the offeror, using ambiguous language, reasonably means one thing and the offeree reasonably understands differently, there is no contract.

[* 8]

(*Computer Assocs. Int., Inc. v. U.S. Balloon Man. Co., Inc.*, 10 A.D.3d 699, 699-700 [2d Dept 2004]).

Here, the Court finds that the submissions of the parties demonstrate that the meaning of the term "mark-up" as used in the Agreement is ambiguous, as it is reasonably susceptible to more than one interpretation (*see, Fernandez v. Price*, 63 A.D.3d 672, 675 [2d Dept 2009]). Although it seems that MPP's interpretation, i.e. that mark-up is calculated as a percentage of payroll and not sales, is consistent Feingold's deposition testimony and the parties prior course of dealing, the Agreement is not clear on its face. Therefore, such extrinsic evidence may only be considered if it is determined that the agreement is ambiguous (*Id.*). Although Gotham contends that the Agreement must be construed against MPP because it purportedly drafted the Agreement, "the axiom 'contra proferentum,' which advises that any ambiguity in a document is resolved against its drafter, is a rule of construction that should be employed only as a last resort" (*Id.* at 676). Additionally, "[w]hen the language of a contract is ambiguous, its construction presents a question of fact which may not be resolved by the court on a motion for summary judgment" (*Jackson Heights Med. Group, P.C. v. Complex Corp.*, 222 A.D.2d 409, 411 [2d Dept 1995]; *see, Gorey v. Allion Healthcare, Inc.*, 72 A.D.3d 640, 641 [2d Dept 2010]). Accordingly, the motion for summary judgment by defendant Gotham is denied.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: March 22, 2011

Riverhead, New York

EMILY PINES

J. S. C.

[ ] FINAL
[x] NON FINAL