

CBS Outdoor, Inc. v Boaziz

2011 NY Slip Op 30892(U)

April 6, 2011

Supreme Court, New York County

Docket Number: 603622/08

Judge: Joan A. Madden

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

HON. JOAN A. MADDEN

J.S.C.

PART 4

Index Number : 603622/2008

CBS OUTDOOR

vs

BOAZIZ, MORDECHAI

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is determined in accordance with the annexed decision and order.

FILED

APR 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 6, 2011

HON. JOAN A. MADDEN

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 11

-----X
CBS OUTDOOR, INC., a Delaware Corporation,

INDEX NO. 603622/08

Plaintiff,

-against-

MORDECHAI BOAZIZ, an individual, also known as
MOTI BOAZIZ, doing business as MILAN CONDO'S,

Defendant.

-----X

JOAN A. MADDEN, J.:

In this action to recover damages for breach of contract, plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment in the amount of \$87,275.00, together with an award of attorneys fees, interest and costs. Defendant Mordechai Boaziz opposes the motion, and asserts that he is not personally liable, since he executed the contract in his capacity as an agent for a disclosed principal, Milan Condo's.

The following facts are not disputed unless otherwise noted. On October 29, 2006, defendant Mordechai Boaziz signed a "Bulletin Agreement" whereby plaintiff agreed to provide certain outdoor advertising services to Milan Condo's at a cost of \$164,400.00. The contract begins with the sentence, "Milan Condo's 'ADVERTISER/AGENCY' hereby contracts with CBS OUTDOOR (CBS) for the installation & maintenance (Service) of the outdoor advertising display as described below upon the terms and conditions as set forth in this contract for a period of 12 months." The contract goes on to state that "Agency [Milan Condo's] and the person signing on behalf of Agency [Mordechai Boaziz] represent and warrant that they are authorized

to execute the same on behalf of the advertiser and that agency fully approves same.”

Defendant Mordechai Boaziz admits that he signed the contract, which lists both his business address, 300 41st Street, #201A, Miami Beach, Florida, 33140, and his business telephone number 305-490-0600. The contract also lists “Moti Boaziz” as the “contact” person, which defendant Mordechai Boaziz admits is another name he uses. Directly below the line designating Milan Condo’s as the “Advertiser/Agency,” is the signature line on which defendant Boaziz signed his name next to the word “By” and an “X.” The following line for “Title” is blank. It is not disputed that plaintiff performed the services and sent monthly invoices addressed to Milan Condo’s at 300 41st Street, Suite 201A, Miami Beach, Florida, 33140. Plaintiff submits copies of the invoices, and an affidavit from its account executive Tim Shanahan that invoices totaling \$77,125.00 were paid and a balance of \$87,275.00 has not been paid.¹

On December 10, 2008, plaintiff commenced the instant action against Mordechai Boaziz, individually, seeking damages in the principal amount of \$87,275.00, together with interest at the contractual rate of 18% and attorney’s fees. Defendant Boaziz answered, asserting several affirmative defenses including a Fourth Affirmative Defense that “Milan Condominium Developers, LLC (sued herein as Milan Condos) is a Florida Limited Liability Company, duly organized and existing under and by virtue of the Laws of the State of Florida,” and that “[a]ny purported signature by Mordechai Boaziz on the Bulletin Agreement was done in a representative capacity for the Limited Liability Company, and not individually by the

¹Shanahan misstates the amount due as \$87,725. The correct amount as indicated on plaintiff’s documents is \$87,275 ($\$77,125 + \$87,275 = \$164,400$, the total contract amount).

defendant.”

Plaintiff is now moving for summary judgment and defendant opposes. As the proponent of a motion for summary judgment, plaintiff bears the initial burden to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidentiary proof to eliminate any material issues of fact from the case. See Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form establishing the existence of a material issue of fact requiring a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). Summary judgment, however, should not be awarded if there is any doubt as to the existence of a triable issue of fact, or where the existence of an issue is arguable. See American Home Assurance Co. v Amerford International Corp, 200 AD2d 472, 473 (1st Dept 1994).

It is well settled that “where one party to a written contract is known to the other to be in fact acting as agent for some known principal, he does not become personally liable whether he signed individually or as agent.” Ell Dee Clothing Co. v. Marsh, 247 NY 392, 397 (1928); accord Unger v. Travel Arrangements, Inc., 25 AD2d 40 (1st Dept 1966). “Knowledge of the real principal is the test, and this means actual knowledge, not suspicion.” Ell Dee Clothing Co. v. Marsh, *supra* at 397; accord Tarolli Lumber Co., Inc. v. Andreassi, 59 AD2d 1011, 1012 (4th Dept 1977). However, even if plaintiff knows of the agency relationship, it can still hold the agent liable if the identity of the principal is not made known at or before the making of the contract. See Ell Dee Clothing Co. v. Marsh, *supra*; Unger v. Travel Arrangements, Inc., *supra* at 47. “It is not important how the [plaintiff] acquired knowledge of the agency and of the

existence of the principal,” and if plaintiff in fact knew, or in view of the facts known, plaintiff should have known without investigation, the agent cannot be held personally liable. See id. Moreover, plaintiff need not have knowledge of the principal’s name, as long as it has knowledge of the principal’s identity, and that identity may be disclosed by description or by name. Id. Where the facts are disputed and doubt exists as to whether plaintiff had actual knowledge at the time the contract was made, that defendant was acting as an agent, and whether plaintiff knew the identity of the alleged principal, summary judgment should be denied. See Louis Gendelman Rigging & Trucking, Inc. v. Koepfel, 29 AD2d 540 (2nd Dept 1967); Unger v. Travel Arrangements, Inc., supra at 47.

Here, plaintiff is not entitled to summary judgment, as triable issues of fact exist as to whether plaintiff had actual knowledge that defendant Boaziz executed the contract on behalf of a corporate entity. See Louis Gendelman Rigging & Trucking, Inc. v. Koepfel, supra; Unger v. Travel Arrangements, Inc., supra at 47. The Bulletin Agreement is between plaintiff and Milan Condo’s, and Modechai Boaziz signed his name on the signature line indicating “by” and “name,” which was directly below the line listing Milan Condo’s as the “Advertiser/Agency.” Even though the agreement does not explicitly name the corporate entity, that fact alone is not conclusive as the parties’s conflicting affidavits raise an issue as to whether the corporate principal was sufficiently identified prior to the execution of the contract. See e.g. CBS Outdoor Group, Inc. v. Beifeld, 20 Misc3d 61 (App Term 1st Dept 2008) (where outdoor advertising contract clearly identified Beifeld Jewelers as the “advertiser” and principal, listed its address and phone number, and indicated that the individual defendant was signing on behalf of Beifeld Jewelers, the court held that the individual defendant met her disclosure obligations); Viacom

Outdoor Inc. v. Cerullo, 2006 WL 2289851 (SDNY) (where individual defendant provided plaintiff with corporate entity's correct address and phone number, and used a "shortened version" of the company's name, it was sufficient to let plaintiff know precisely which entity was to be bound).² The further fact that Boaziz signed the contract without limiting his signature and indicating his "title," is likewise inconclusive, in view of the conflicting affidavits as to whether plaintiff was aware that Boaziz was acting for a disclosed corporate entity. See Weinrab v. Stinchfield, 19 AD3d 482, 483 (2nd Dept 2005); I. Kaszirev Diamonds, Ltd v. Zohar Creations, Ltd, 146 AD2d 492, 493 (1st Dept 1989).

Specifically, defendant submits an affidavit from Laurie Suquet stating that in 2006 she was "employed by Milan Holdings, LLC and Milan Condominium Developers, Ltd [sic] as an Administrator" and that her job was "to oversee contracts for the condominium." She states that in 2006, she met with Tim Shanahan, "a salesman for CBS Outdoors" and "discussed the purchase of advertising materials for Milan Condominium Developers, Ltd [sic]."³ She states that she "told Mr. Shanahan that the materials were for Milan Condominium Developers Ltd

²Notably, both CBS Outdoor Group, Inc. v. Beifeld, supra and Viacom Outdoor Inc. v. Cerullo, supra involve contracts for outdoor advertising services which included identical or nearly identical language as the instant contract that "Agency and the person signing on behalf of Agency represent and warrant that they are authorized to execute the same on behalf of the advertiser and that agency fully approves same."

³It appears that the Suquet affidavit mistakenly refers to Milan Condominium Developers as an "Ltd," as opposed to an "LLC." The records of the Florida Department of State, Division of Corporations list the entity as an "LLC." Suquet also refers to Milan Holdings, LLC. Defendant alleges that the condominium property is owned by Broadway Florida Properties, LLC, which hired Milan Holdings, LLC to manage and promote the sale of the condominium apartments, and that The Milan Condominium Developers LLC is a subsidiary of Milan Holdings, LLC.

[sic],” that the company was also known as Milan Condo’s,” and that the “nickname, Milan Condo’s was commonly used by the people employed at the Condo and suppliers.” She states that Shanahan “understood the connection between the two names” and “sent the Bulletin Agreement using the name ‘Milan Condo’s’ without consulting me or anyone else at the condominium or at Milan Condo’s.” She further states that “[i]n my opinion, Mr. Shanahan and CBS Outdoors were fully aware that these two names were one and the same, and the name of the principal Milan Condominium Developers, LLC was fully disclosed to them.”

In response, plaintiff’s submits an additional affidavit from Mr. Shanahan, directly addressing Ms. Suquet’s allegations. Shanahan states that Laurie Suquet was “the only person I dealt with at Milan Condo’s,” and that during their discussions about an agreement with plaintiff for outdoor advertising services, “Laurie Suquet never revealed to me that she worked for Milan Condominium Developers, Ltd.” He also states that he does “not recall Ms. Suquet telling me that the advertising materials were for Milan Condominium Developers, Ltd, nor do I recall her telling me that Milan Condominium Developers, Ltd was also known as Milan Condos,” and that “[n]either Ms. Suquet nor anyone else told me that Milan Condos was a corporate entity.”

The Suquet and Shanahan affidavits contain conflicting allegations as to the material issues of whether plaintiff had actual knowledge that defendant Boaziz was acting on behalf of disclosed corporate entity, so as to avoid personal liability. See Louis Gendelman Rigging & Trucking, Inc. v. Koeppel, supra; Unger v. Travel Arrangements, Inc., supra at 47. Such sharply disputed allegations raise questions of credibility that can only be resolved by the trier of fact. See S.J. Capelin Assocs, Inc. v. Globe Mfg Corp., 34 NY2d 338, 341 (1974); Shapiro v. Boulevard Housing Corp., 70 AD3d 474, 475 (2010). The facts in this case are clearly

distinguishable from the facts in New England Marine Contractors, Inc., 156 AD2d 804 (3rd Dept 1989), where the court determined that defendant's affidavit did "not specifically aver that he every informed plaintiff at the time they entered into the contract that he was acting on behalf of a corporate principal, and the facts in CBS Outdoor Group, Inc. v. Beifeld, *supra*, where the court found that "plaintiff failed to submit an affidavit of a person with personal knowledge to support its contention that it had no prior knowledge that the [principal] was a corporation."

Based on the foregoing the court concludes that plaintiff is not entitled to summary judgment.⁴

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the parties are directed to appear for the pre-trial conference previously scheduled for April 14, 2011 at 3:30 p.m., in Part 11, Room 351, 60 Centre Street.

DATED: April 6, 2011

ENTER:

FILED

APR 12 2011

NEW YORK
COUNTY CLERK'S OFFICE


J.S.C.

⁴The court notes that plaintiff submits one page from the website maintained by the Florida Department of State, Division of Corporations listing corporations beginning with the name "Milan." Although defendant's purported principal, The Milan Condominium Developers, LLC, is not listed on the page provided by plaintiff, the court's search of the same website reveals that defendant's purported principal is in fact included on the "entity name list."