

Mintz & Fraade, P.C. v Credit Control Cent., Inc.

2011 NY Slip Op 31681(U)

June 20, 2011

Supreme Court, New York County

Docket Number: 106646/2010

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 106646/2010
MINTZ & FRADDE, P.C.
vs.
CREDIT CONTROL CENTRAL, INC.
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____
PAPERS NUMBERED _____
Exhibits ... _____

NOTICE OF MOTION/ ORDER TO SHOW CAUSE

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the accompanying memorandum decision.*

FILED

JUN 23 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/20/11

Saliann Scarpulla
SALIANN SCARPULLA^{S.C.}

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: CIVIL TERM: PART 19

----- X
MINTZ & FRAADE, P.C.,
A New York Professional Corporation

Plaintiff,

-against-

Index No. 106646/10
Subm. Date: 2/16/2011
Motion Seq. 001

CREDIT CONTROL CENTRAL, INC.,
An Ontario Corporation

DECISION AND ORDER

Defendant.

----- X
For Plaintiff:
Mintz & Fraade, P.C.
488 Madison Avenue
New York, New York 10022

For Defendant:
Cohn & Cohn, P.C.
116 John Street
New York, New York 10038

FILED

JUN 23 2011

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Papers considered in review of this motion to dismiss:

- Notice of Motion..... 1
- Opp..... 2
- Reply Affirm..... 3

HON. SALIANN SCARPULLA, J.:

In an action to recover damages for breach of contract, accounts stated, unjust enrichment, and quantum meruit, defendant Credit Control Central, Inc. ("Credit Control") moves to dismiss the complaint. Plaintiff Mintz & Fraade, P.C. ("Mintz & Fraade") alleges in its complaint that in March 2003 it entered into a retainer agreement with Credit Control whereby Credit Control retained Mintz & Fraade to provide legal services to defendant for collections work. Credit Control paid Mintz & Fraade \$2,500 upon execution of the retainer agreement.

Mintz & Fraade claims that on September 26, 2003 Mintz & Fraade sent Credit Control a bill for \$7,032.15, which represented work done between March 2003 and August 31, 2003. Credit Control allegedly paid \$6,624.75 of the bill. On March 25, 2004, Mintz & Fraade sent Credit Control a bill in the amount of \$6,056.40 for work done between September 1, 2003 and February 29, 2004. Credit Control allegedly did not pay any of this bill. On July 27, 2004, Mintz & Fraade sent Credit Control a bill in the amount of \$10,694.65 for work done between March 1, 2004 and June 30, 2004. Credit Control allegedly paid \$2,850 towards this bill. Mintz & Fraade states that the total unpaid balance on these bills is \$14,308.45. Credit Control allegedly did not object to any of the bills until April 2008.

On May 20, 2010, Mintz & Fraade brought this action alleging breach of contract, accounts stated, unjust enrichment and quantum meruit. Mintz & Fraade served Credit Control through certified mail but Credit Control never sent back the acknowledgement form. On August 11, 2010, Credit Control filed an answer alleging affirmative defenses of failure to mitigate, statute of limitations, lack of subject matter jurisdiction, insufficiency and impropriety of process, failure to state a claim, unclean hands, documentary evidence and laches.

Credit Control now moves to dismiss the complaint on the grounds of improper service of the summons and complaint, statute of limitations, and failure to state a claim with respect to the accounts stated and unjust enrichment causes of actions.

In support of its motion, Credit Control argues that because Mintz & Fraade never filed the affidavit of service, the service was not completed, thereby depriving the court of personal jurisdiction over Credit Control. Credit Control also argues that the statute of limitations for the breach of contract claim and quantum meruit causes of action are six years and that it was longer than six years between the breach of contract (estimated at June 2004) and when this suit was commenced. Credit Control also contends that the statute of limitations for the unjust enrichment claim is three years and as such that claim is barred as well. Credit Control further asserts that the account stated claim should be dismissed for failure to state a claim and on the ground that a valid and enforceable contract precludes a claim for unjust enrichment.

In opposition, Mintz & Fraade argues that Credit Control's motion to dismiss for insufficient process is barred as late under CPLR §3211(e), which states that the defendant has sixty days to make a motion to dismiss due to improper service. In this case, Credit Control made this motion to dismiss ninety-three days after serving its answer. Mintz & Fraade also argues that the statute of limitations does not bar the quantum meruit and breach of contract claims because legal services were provided until at least October 2005 and the summons and complaint were filed on May 20, 2010, which is within six years of the last rendered legal services. Mintz & Fraade disputes Credit Control's computation of the statute of limitations period for unjust enrichment and argues that it is actually six years. With respect to the claim for account stated, Mintz & Fraade argues that Credit Control's partial payment and failure to dispute the bill for a reasonable amount of time make the account stated claim actionable.

In reply, Credit Control argues that because the service was utterly insufficient and ineffective, the sixty-day period required by CPLR §3211(e) is inapplicable.¹

Discussion

Under CPLR 306(b), a defendant must be served within one hundred and twenty days after the summons and complaint have been filed with the court. However, the need for filing the proof of service is obviated if an answer is served within that one hundred and twenty day time limit. *Tucker v. Leak*, 268 A.D.2d 320, 321 (1st Dept. 2000).

Here, the defendant served its answer on August 11, 2010, which is eighty-two days after the summons and complaint was filed. Because the answer was served within one hundred and twenty days, the proof of service was no longer required. Thus the defendant's argument as to lack of personal jurisdiction due to failure to complete service is inapplicable.

Credit Control also argues that it was not properly served by Mintz & Fraade. Under CPLR §3211(a) a defendant must make a motion to dismiss on improper service either pre-answer or within sixty days of raising this defense in its answer. If a defendant does not make the motion within sixty days of filing their answer and cannot show undue hardship, then the defense is waived. *Worldcom, Inc. v. Dialing Loving Care Inc.*, 269

¹ On reply, Credit Control argues for the first time that the court does not have subject matter jurisdiction because Credit Control is a Canadian company and does not transact business in New York. New arguments may not be made in reply papers, which can only be used to address arguments made in opposition to the movant's position. *Azzopardi v. American Blower Corp.*, 192 A.D.2d 453, 454 (1st Dept. 1993). Therefore, the Court does not address Credit Control's arguments made for the first time on reply.

A.D.2d 159 (1st Dept. 2000). The sixty-day deadline applies irrespective of whether the defendant styles the motion to dismiss under CPLR §306(b) or CPLR §3211(a)(8).

Here, Credit Control filed its answer on August 11, 2010 and made its motion on November 12, 2010, which is ninety-three days after it filed its answer. This jurisdictional objection was not raised within the sixty-day period allotted in CPLR §3211(e) and is therefore no longer available to Credit Control.

Regarding Mintz & Fraade's equitable claims, a plaintiff may not maintain an action for unjust enrichment or quantum meruit where there is a valid and enforceable contract. *Goldman v. Metropolitan Life Insurance Co.*, 5 N.Y.3d 561, 587 (2005); *Guerrand-Hermes v. Guerrand-Hermes*, 2009 N.Y. Misc. LEXIS 2367, *12 (Sup. Ct. N.Y. County, February 24, 2009). Because the parties do not dispute that the retainer agreement is a valid and enforceable contract, Mintz & Fraade's third and fifth causes of action, for unjust enrichment and quantum meruit, respectively, are dismissed.²

Credit Control seeks to dismiss the remaining two causes of action, for breach of contract and account stated, on the ground that these causes of action are barred by the statute of limitations. Under CPLR §213(2), a claim based upon "a contractual obligation or liability, express or implied" has a statute of limitations of six years. CPLR §213(2). The statute of limitations begins to accrue at the time of the breach, but partial payment restarts the statute of limitations if it is a portion of the admitted debt under "circumstances amounting to a clearly demonstrated intention to pay the balance."

² Mintz & Fraade fails to allege a fourth cause of action, i.e. the third cause of action is followed by the fifth cause of action.

Education Resources Institute, Inc. v. Piazza, 17 A.D.3d 513, 516 (2nd Dept. 2005); *Bernstein v. Kaplan*, 67 A.D.2d 897 (2nd Dept. 1979); *William v. Lopes*, 9 Misc. 3d 1116(A), 2005 NY Slip Op 51602U, *3 (September 30, 2005).

Here, Mintz & Fraade, by its member Alan P Fraade, attests that Credit Control made a partial payment on its bills on July 27, 2004. Credit Control does not dispute the partial payment. This partial payment made by Credit Control was made less than six years before the complaint was filed in May 2010. As this partial payment restarted the running of the statute of limitations, the breach of contract cause of action is not barred by the statute of limitations.

Lastly, Credit Control's argument that Mintz & Fraade has failed to state a cause of action for account stated is unpersuasive. An account stated is "is an account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance." *Parker Chapin Flattau & Klimpl v. Daelen Corp.*, 59 A.D.2d 375, 377 (1st Dept. 1977); *Volkening v. De Graaf*, 81 N.Y. 268, 270 (1880). An account stated becomes actionable if the receiver does not make an objection within a reasonable time whereby silence is construed as an assent to the balance. *See Rodkinson v. Haecker*, 248 N.Y. 480, 485 (1928); *see also Shea & Gould v. Burr*, 194 A.D.2d 369, 371 (1st Dept. 1993).

Here, Mintz & Fraade has alleged sufficient facts to state a cause of action for account stated.

In accordance with the foregoing, it is hereby

ORDERED that Credit Control Central Inc.'s motion is granted only to the extent that causes of action three and five for unjust enrichment and quantum meruit are dismissed and is otherwise denied; and it is further

ORDERED that parties shall appear for a compliance conference in Room 279, 80 Centre Street, New York, New York on July 13, 2011, at 2:15pm.

This constitutes the decision and the order of the Court.

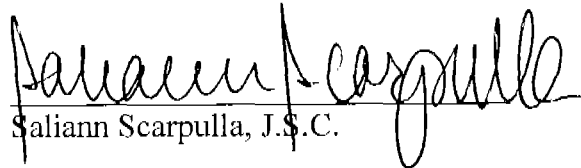
FILED

Dated: New York, New York
June 20, 2011

JUN 23 2011

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Saliann Scarpulla, J.S.C.