

Higgins v Vue Mgt. Inc.
2011 NY Slip Op 31741(U)
June 13, 2011
Sup Ct, NY County
Docket Number: 117441/2009
Judge: Paul Wooten
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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JOANNE-NOEL HIGGINS,
Plaintiff,
- against -

NYS SUPREME COURT
RECEIVED
JUN 08 2011

INDEX NO. 117441/2009
MOTION DATE _____
MOTION SEQ. NO. 001

VUE MANAGEMENT INC.,
Defendant.

MOTION SUPPORT OFFICE
MOTION CAL. NO. _____

The following papers, numbered 1 to 6, were read on this motion by plaintiff for summary judgment in lieu of complaint, or alternatively, for summary judgment; and cross-motion by defendant for summary judgment and/or to compel discovery.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	FILED 1, 2
Answering Affidavits — Exhibits (Memo)	3, 4
Replying Affidavits (Reply Memo)	JUN 27 2011 5, 6

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Joanne-Noel Higgins ("plaintiff") brings this action against defendant Vue Management Inc. ("defendant" or "Vue"), to enforce payment on several dishonored checks. The checks, which bounced for insufficient funds, were issued between December 13, 2003 and November 16, 2005, as payments for services rendered by plaintiff from January 2003 to November 2005. Defendant maintains that plaintiff's action is brought against the wrong party because the dishonored checks were issued by non-party Vue Represents Artist Management, Inc. ("Vue RAM"), an earlier entity that was dissolved in 2004, and, further, that the action is time-barred. Discovery is not complete and the Note of Issue has not been filed. Before the Court is plaintiff's motion for summary judgment in lieu of complaint, pursuant to CPLR 3213, or alternatively, for summary judgment, pursuant to CPLR 3212, seeking judgment against defendant in the sum of \$26,792.20, plus costs and interest from November 16, 2005.

Defendant has responded in opposition to the motion and cross-moves for summary judgment dismissing the complaint, pursuant to CPLR 3212, and/or to compel responses to discovery demands, pursuant to CPLR 3124. Defendant also requests sanctions against plaintiff and her counsel under 22 NYCRR § 130-1.1.

BACKGROUND

Plaintiff submits in support of her motion, *inter alia*, her own affidavit; copies of the dishonored checks; and the summons. In opposition and in support of its cross-motion, defendant submits, *inter alia*, an affidavit of its owner and Director, Gina Lengyel ("Lengyel"); copies of other checks issued to plaintiff; printouts from the NYS Department of State; and discovery demands. In opposition to defendant's cross-motion, plaintiff submits a supplemental affidavit. The following facts are undisputed.

Plaintiff is involved in providing makeup services. Defendant is an extant photography management and production company that was formed on August 16, 2005. Vue RAM was an artist management agency formed on August 24, 2001, that was dissolved by Proclamation/Annulment of Authority on June 30, 2004.

Plaintiff alleges in her affidavit that she rendered services to defendant from January 2003 to November 2005. In consideration of her services, defendant purportedly compensated her with a series of checks totaling \$26,792.20. Plaintiff presented the checks for payment at Washington Mutual Bank and/or Commerce Bank, and each check was dishonored for insufficient funds and returned to plaintiff unpaid. Plaintiff claims that defendant has, to date, failed to honor the checks.

Plaintiff submits copies of the subject checks, which are dated between December 13, 2003 and November 16, 2005 (*see* Not. of Mot, Ex. B). With the exception of two of the checks (dated January 5, 2005 and November 16, 2005), the face of the checks indicate that they were issued from an entity referred to as Vue Represents Management, Inc. ("Vue Represents") from

an account at HSBC Bank.¹

In opposition, Lengyel asserts in her affidavit that Vue RAM briefly served as plaintiff's agent and that when amounts were paid to Vue RAM on jobs in which plaintiff participated, Vue RAM retained an agency fee and paid the balance to plaintiff. Lengyel claims that plaintiff was paid all of the money that she was owed, whether by Vue RAM or by its factoring company, Photo Associates, Inc. Defendant submits copies of checks made payable to plaintiff totaling \$18,719.50, that are dated between January 12, 2003 and June 21, 2005, which Lengyel claims are replacement checks for the checks that bounced (*see* Lengyel Aff., Ex. 4). Lengyel also alleges that Vue RAM's office was invaded in 2005, and that its computers and other records were stolen which has affected its ability to access the entirety of its records, including receipts for cash payments made to plaintiff.

In her supplemental affidavit, plaintiff denies that the checks submitted by defendant are "replacement" checks for the checks that were dishonored for insufficient funds. Plaintiff also claims that said checks were issued for services separate and apart from the services she rendered in connection with the bounced checks. She also notes that Vue RAM's name does not appear on any of the bounced checks, and that many of the bounced checks were issued after Vue RAM dissolved.

Plaintiff commenced the present action on December 11, 2009, by filing a summons with notice. Defendant filed an answer on January 23, 2010. Defendant submits an affidavit of its counsel indicating that plaintiff has failed to comply with certain discovery demands served on February 6, 2010. Plaintiff does not dispute its failure to comply with the demands.

DISCUSSION

Plaintiff argues that she is entitled to judgment as a matter of law in the amount of

¹The Court notes that the parties do not clarify the distinction between Vue RAM and Vue Represents.

\$26,792.20, plus costs and interest from November 16, 2005, because there are no issues of fact as to the monies due and owing as a result of the dishonored checks. She argues that it is undisputed that defendant issued the checks as compensation for her services, and that the subject checks bounced for insufficient funds and have not been paid.

Defendant argues that plaintiff's motion should be denied, and that the Court should grant its cross-motion dismissing the complaint and/or should compel plaintiff to comply with its discovery demands. Defendant contends that plaintiff has sued the wrong party because the dishonored checks were issued by Vue RAM, an entity that was dissolved on June 30, 2004. Defendant also claims that Vue RAM ultimately paid all of the sums that were owed to plaintiff in the form of cash and replacement checks. Defendant further asserts that plaintiff's claims are time-barred by the six-year statute of limitations since they are based on an alleged failure to pay for services rendered in early to mid 2003. Defendant additionally seeks sanctions against plaintiff and her counsel based on their alleged failure to account for the replacement checks or to comply with discovery demands.

In reply, plaintiff argues that defendant has failed to demonstrate that it honored any of the bounced checks, and she disputes defendant's contention that the checks it submits are "replacement" checks. She also claims that there are triable issues of fact as to whether defendant was the entity that issued the dishonored checks, or is the "alter ego" of Vue RAM, since the two entities shared the same principal, business purpose and possibly checking account. Plaintiff further claims that this action is not time-barred because it is predicated on bounced checks, and thus, the statute of limitations began to run when the checks were issued, not when the underlying services were performed. Plaintiff also argues that defendant's cross-motion is premature since there is outstanding discovery. Finally, plaintiff argues that sanctions are not warranted as her claims are made in good faith.

CPLR 3213 permits a party to move for summary judgment in lieu of a complaint based

on an "instrument for the payment of money only." To establish a prima facie case, the plaintiff must present an instrument for the payment of money only and a failure to make the payment thereunder (*see SCP (Bermuda) Inc. v Bermudatel Ltd.*, 224 AD2d 214, 216 [1st Dept 1996]). Once the plaintiff has met this burden, the defendant must come forward and establish the existence of a triable issue of fact or a bona fide defense (*see id.*; *Silber v Muschel*, 190 AD2d 727 [2d Dept 1993]).

It is well established that a check, a negotiable instrument, is an instrument for the payment of money only, and therefore qualifies for CPLR 3213 relief (*see First Inter-County Bank of New York v DeFilippis*, 160 AD2d 288, 289 [1st Dept 1990]). "A motion for summary judgment in lieu of a complaint in an action on a negotiable instrument will be granted only when it is clear that no triable issue or real question of fact is presented, or where the defense raised is unrelated to the plaintiff's cause of action, or is clearly without merit" (*Nussdorf v Lekach*, 2009 WL 129905 [Sup Ct Nassau County 2009] [citations omitted]).

Here, plaintiff has met her prima facie burden of establishing her entitlement to judgment as a matter of law enforcing payment of the dishonored checks, by submitting copies of the subject checks and undisputed proof that the checks were dishonored for insufficient funds (*see First Inter-County*, 160 AD2d at 289; *Denton Publications, Inc. v Lilledahl*, 112 AD2d 658, 659 [3d Dept 1985]; *J. Juhn Assocs., Inc. v 3625 Oxford Ave. Assocs., L.P.*, 2005 WL 1552835, at *1 [Sup Ct Nassau County 2005]). To the extent that plaintiff's action is predicated upon recovering payment for dishonored checks that were *issued* between December 13, 2003 and November 16, 2005, the action would fall within the six-year statute of limitations inasmuch as this action was commenced on December 11, 2009 (*see CPLR 3-122(1)(b)*; *Homer Engineering Co. v State*, 12 NY2d 508, 511 [1963]; *Brown v Blum*, 1999 WL 1042904, at *3 [Sup Ct NY County 1999]). The burden thus shifts to defendant to establish the existence of a triable issue of fact or a bona fide defense (*see SCP*, 224 AD2d at 216).

The Court finds that defendant has presented sufficient evidence to raise triable issues of fact warranting denial of plaintiff's motion (*see J. Juhn*, 2005 WL 1552835, at *2). Lengyel asserts in her affidavit that plaintiff was in fact paid all of the sums due. Moreover, defendant submits copies of several checks purportedly representing "replacement" checks for the checks that were dishonored for insufficient funds. There is a clear factual dispute between the parties as to whether these checks were in fact replacement checks. There are also questions of fact regarding whether defendant was the entity that actually issued the dishonored checks, since Vue Represents' name, not defendant's or Vue RAM's, appears on the face of the checks. Therefore, since triable issues of fact remain in dispute, plaintiff's motion for summary judgment in lieu of complaint, or alternatively, for summary judgment, is denied.

With respect to defendant's cross-motion for summary judgment dismissing the complaint, the Court finds the motion premature, as discovery which could reveal evidentiary proof relevant to resolving the factual issues in this case has not been completed (*see* CPLR 3212 [f]; *George v New York City Tr. Auth.*, 306 AD2d 160, 161 [1st Dept 2003]; *Arez v Twin Parks Northeast Houses, Inc.*, 294 AD2d 266, 267 [1st Dept 2002]). Were the Court to consider the cross-motion on its merits, the Court would conclude, in any event, that there are material issues of fact which preclude summary judgment in defendant's favor at this stage of the litigation (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). The Court notes, in particular, that there are questions of fact as to whether defendant is the entity that issued the dishonored checks, or the alter ego of Vue RAM (*see Commissioners of State Ins. Fund v Ramos*, 80 AD3d 447 [1st Dept 2011]). Accordingly, defendant's cross-motion for summary judgment dismissing the complaint is denied. To the extent that defendant seeks to compel discovery, however, the parties are ordered to appear for a status conference.

Lastly, the Court finds that defendant has failed to demonstrate sufficient grounds to warrant sanctions under the present circumstances (*see Benishai v Benishai*, 83 AD3d 420, 420

[1st Dept 2011; *Parkchester South Condominium Inc. v Hernandez*, 71 AD3d 503, 504 [1st Dept 2010)]. Defendant's request for sanctions is therefore denied.

For these reasons and upon the foregoing papers, it is,

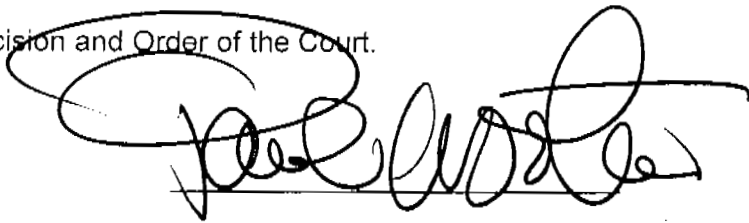
ORDERED that plaintiff's motion for summary judgment in lieu of complaint, or alternatively, for summary judgment, is denied; and it is further,

ORDERED that defendant's cross-motion for summary judgment is denied; and it is further,

ORDERED that the parties are directed to appear at a status conference on July 27, 2011, at 11:00 a.m., in Part 7, at 60 Centre Street; and it is further,

ORDERED that defendant shall serve a copy of this Order, with Notice of Entry, upon plaintiff.

This constitutes the Decision and Order of the Court.



Dated: June 13, 2011

Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

FILED

JUN 27 2011

NEW YORK
COUNTY CLERK'S OFFICE