Jaze Tech., Inc. v 21 Fire Is. Ave., LLC
2011 NY Slip Op 32151(U)
July 26, 2011
Supreme Court, Nassau County
Docket Number: 263/11
Judge: Denise L. Sher
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SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

JAZE TECHNOLOGY, INC. and
BERNARD S. FELDMAN, P.C., as Escrow Agent,

Plaintiffs,

Index No.: 263/11
Motion Seq. No.: 01
Motion Date: 05/12/11
XXX

- against -

21 FIRE ISLAND AVE., LLC ,VTEQE, LTD.,
VOLUMETRIC TECHNIQUES, LTD. and STRUX CORP.,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits	1
"Reply Affirmation" and Exhibits	2
Reply Affirmation in Further Support of Motion	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs move, pursuant to CPLR § 3212, for an order awarding them summary judgment, granting the relief sought in the Complaint and dismissing the Counterclaim brought by defendants Vteqe, Ltd., Volumetric Techniques, Ltd. and Strux Corp. (hereinafter collectively "Vteqe"). Defendants Vteqe submitted papers entitled "Reply Affirmation" which the Court will be treating as opposition to the instant motion. No papers were submitted by defendant 21 Fire Island Ave., LLC ("Fire Island").

The instant action involves the sum of $51,000.00 now being held by plaintiff Bernard S. Feldman ("Feldman") in escrow.

In a contract dated July 1, 2002, plaintiff Jaze Technology, Inc. ("Jaze") agreed to sell certain real property located at 21 Fire Island Avenue, Babylon, New York to PLH Manufacturing Company, Inc., who, in turn, assigned its rights as contract vendee to defendant Fire Island. On March 11, 2004, a closing took place at which plaintiff Jaze conveyed title to the subject real property to defendant Fire Island. As part of the closing, defendant Fire Island made and delivered a purchase money note and mortgage to plaintiff Jaze representing part of the purchase price. In September 2004, plaintiff Jaze alleged that defendant Fire Island was in default under the purchase money note and mortgage. Defendant Fire Island disputed the default and claimed that plaintiff Jaze was required to resolve a dispute between plaintiff Jaze and defendant Vteqe. Prior to the closing, defendant Vteqe claimed that it had performed certain work, labor and services for plaintiff Jaze and was entitled to compensation pursuant to an invoice dated February 2, 2004.

Plaintiff Jaze and defendant Fire Island resolved their dispute by entering into an escrow agreement on October 25, 2004, under which the sum of $51,000.00 was paid by defendant Fire Island and deposited into escrow with plaintiff Feldman as escrow agent. The $51,000.00 payment was credited toward the balance owed by defendant Fire Island under the purchase money note and mortgage. The escrow agreement also provided that the escrow agent would hold the $51,000.00 on deposit pending the receipt of a general release from defendant Vteqe or a Court Order or Judgment resolving the dispute.

Plaintiffs submit that defendant Vteqe never commenced an action against plaintiff Jaze or defendant Fire Island to collect the monies allegedly due under the February 2, 2004 invoice. Plaintiffs further submit that the $51,000.00 remains to this date on deposit in escrow with plaintiff Feldman. Plaintiffs commenced this action in order to obtain the Court Order or Judgment required under the escrow agreement. Plaintiffs argue that it is well established law

that an action for breach of contract or to collect money for services rendered or under an invoice for same must be commenced within six (6) years after the final services have been rendered. Plaintiffs argue that, in the case at bar, the invoice upon which defendant Vteqe relies was dated February 2, 2004 and all services allegedly performed were provided before that date. Plaintiffs contend therefore that the statute of limitations for defendant Vteqe to commence an action expired on February 2, 2011. Plaintiffs further argue that defendant Vteqe cannot rely on the escrow agreement to extend the statute of limitations since defendant Vteqe was not a party to said agreement and has no right to rely on its contents. Additionally, the escrow agreement was made on October 25, 2004, and, even if that date was used as the basis for the statue of limitations, defendant Vteqe's time would have expired.

In opposition, defendant Vteqe argues that "[a]lthough Plaintiff's (*sic*) motion states that the statute of limitations on any action by Vteqe has run as of February 2, 2010, (i) it overlooks some key facts as to the dates the services (*sic*) rendered and the dates to which Vteqe agreed to defer their payment for those services, (ii) it overlooks a key distinction between a breach of contract case on account of failure to perform versus nonpayment, and (iii) Jaze's later acknowledgment of its obligation to Vteqe restarted the statute of limitations."

Defendant Vteqe submits that later invoices for services it rendered to plaintiff Jaze, which were issued on July 22, 2004 and August 11, 2004, demonstrate that work on this project continued well after the date of the initial invoice and well after the date plaintiff Jaze closed on the sale of the subject property. Defendant Vteqe submits that "[p]laintiff's (*sic*) claim that the statute would begin to run when work was complete ignores the fact that Vteqe had previously agreed to undertake its services on the basis that it accept payment therefor much later, even a year or more later. Since the agreement between Vteqe and Jaze included this accommodation to Jaze, it was unable to bring action for nonpayment until Jaze's closing was complete, and it

received proceeds from which to pay Vteqe."

Defendant Vteqe argues that the time for it to bring an action for plaintiff Jaze's failure to pay would not have passed until six years after the condition that plaintiff received proceeds from its sale was fulfilled and defendant Vteqe was notified of the fulfillment of that condition. Defendant Vteqe therefore submits that, once the sale of the subject property was completed and money was set aside from the sale to make payment to defendant Vteqe, and defendant Vteqe was informed of this, only then did the cause of action accrue. Defendant Vteqe contends that it could not have independent knowledge of the occurrence of this condition being fulfilled as an outsider to the transactions between plaintiff Jaze and defendant Fire Island and, therefore, it was plaintiff Jaze's responsibility to notify defendant Vteqe. Defendant Vteqe adds that plaintiff Jaze cannot claim the benefit from the running of the statute of limitations from the date of the escrow agreement when only it could have informed defendant Vteqe of its existence. Since plaintiff Jaze's notice to defendant Vteqe of the satisfaction of this condition did not occur until August 23, 2005, that is the date from which the cause of action accrued.

Defendant Vteqe alternatively argues that, even if the cause of action accrued on August 11, 2004, plaintiff Jaze restarted the statute of limitations by acknowledging its obligation to defendant Vteqe on August 23, 2005. Defendant Vteqe cites New York General Obligations Law § 17-101 in support of its argument that the statute of limitations begins running anew when a party acknowledges its obligation under a contract. Defendant Vteqe submits that, when plaintiff Jaze provided a copy of the escrow agreement to defendant Vteqe through is counsel and commenced discussions for the release of money to pay defendant Vteqe and no statements inconsistent with an intent to pay were made, the statute of limitations was then restarted.

In reply to defendant Vteqe's opposition, plaintiffs argue that none of defendant Vteqe's arguments have any legal merit. With respect to defendant Vteqe's assertion that its offers to accept a reduced amount or to extend any date for payment extended the statute of limitations, plaintiffs state that said offers were never accepted by plaintiff Jaze and that defendant Vteqe

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does not contend that said offers were accepted. Additionally, even it there was such an agreement, it was not in writing, nor signed by plaintiff Jaze. Plaintiff Jaze further submits that "[c]ounsel's reliance on the Escrow Agreement ("the Agreement") dated October 25, 2004, is entirely misplaced. That Agreement was made to resolve a dispute between Plaintiff, Jaze Technology Inc. as a purchase money mortgage and Defendant, 21 Fire Island Ave., LLC, as the obligor under that mortgagee. The Agreement did not contain any condition that had to be fulfilled before Defendants could seek payment, and indeed the Defendants could and did seek payment long before October 25, 2004." Finally, with respect to defendant Vteqe's argument that it was a third party beneficiary of the escrow agreement and that it contained an acknowledgment of the alleged debt, plaintiff Jaze states that "[p]aragraph F of the agreement specifically states that the claim of the Defendants was being disputed by the Jaze Technology, Inc., and thus there was no acknowledgment of the debt. To the contrary, the dispute was reaffirmed."

In a letter to the Court dated June 1, 2011, and with a copy sent to defendant Vteqe's counsel, plaintiffs object to the service of defendant Vteqe's Sur-Reply and requests that it not be considered by the Court. Plaintiffs' counsel asserts that "I have just received what appears to be an unauthorized sur reply affirmation dated May 30, 2011, from James E. Clark, Esq., attorney for the defendant. It is respectfully requested that this sur reply be disregarded, as it is not authorized by CPLR Rule 2214."

The Court will not consider defendant Vteqe's Sur-Reply insofar as such is not provided for in the CPLR and the Court did not give defendant Vteqe permission to submit same.

The statute of limitations for an action to recover on a breach of contract or to collect money for services rendered or under an invoice for same is six years. *See* CPLR § 213(2). On February 2, 2004, defendant Vteqe sent an invoice to plaintiff Jaze demanding payment in the amount of $74,910.00 for work done by defendant Vteqe at 21 Fire Island Avenue, Babylon, New York. *See* Plaintiffs' Affirmation in Support Exhibit D. Said invoice indicates the work

that had been completed prior to the billing. It is also noted that defendant Vteqe sent an invoice to plaintiff Jaze on July 22, 2004, in the amount of $5,000.00, for an exposure report prepared by defendant Vteqe for plaintiff Jaze. *See* Defendant Vteqe's Affirmation in Opposition Exhibit C. Defendant Vteqe sent another invoice to plaintiff Jaze on August 11, 2004, in the amount of $2,275.00, for additional work done by defendant Vteqe at 21 Fire Island Avenue, Babylon, New York. *See id.* However, defendant Vteqe's Counterclaim is for $74,910.00, the amount stated in the February 2, 2004 invoice. *See* Plaintiff's Affirmation in Support Exhibit B. Defendant Vteqe makes no Counterclaims for the amounts detailed in the July 22, 2004 and August 11, 2004 invoices which makes the dates said invoices were issued irrelevant to the statute of limitations in the proceeding before this Court. Additionally, defendant Vteqe has failed to provide any evidentiary proof that plaintiff Jaze accepted an alleged offer to accept a reduced amount or to extend any date for payment. Defendant Vteqe has also failed to provide any written evidentiary proof that plaintiff Jaze allegedly agreed to extend the date of payment and the limitations period to an indefinite date in the future. *See* New York General Obligations Law § 17-103.

With respect to defendant Vteqe's argument pursuant to New York General Obligations Law § 17-101, that plaintiff Jaze restarted the statute of limitations by acknowledging its obligation to defendant Vteqe in the October 25, 2004 escrow agreement, in order for a writing to be deemed an acknowledgment, it "must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it." *Lew Morris Demolition Co., Inc. v. Board of Ed. City of New York*, 40 N.Y.2d 516, 387 N.Y.S.2d 409 (1976). *See also Hui v. East Broadway Mall, Inc.*, 4 N.Y.3d 790, 795 N.Y.S.2d 157 (2005). Paragraph F of the escrow agreement reads, "[o]bligor [defendant Fire Island] has disputed its claimed default asserting that prior to its acceleration Obligee [plaintiff Jaze] was required to resolve its dispute with an entity VTEQE Ltd. (pursuant to a letter dated March 11, 2004), an entity that allegedly performed certain environment clean-up work at the premises for Obligee. The Obligee disputes

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the Obligor's possession and has threatened to foreclose upon the Purchase Money Mortgage held by it, and enforce its rights under the Purchase Money Mortgage Note." Paragraphs 3(a) and (b) of the escrow agreement read, "(a) The Escrow Agent shall hold in escrow the funds and shall release to VTEQE Ltd. or its predecessors in interest (it being the intention of the parties that the entity who performed work, labor and serviced and/or provided material to Obligee in the area of environmental work and/or clean up) which facilitated the sale of the premises by Obligee to Obligor only such sums as is necessary to pay in full all *valid obligations* owed by Obligee. (b) The Escrow Agent shall continue to hold such funds as is being deposited with it pending a (i) General Release from VTEQE Ltd. and/or its appropriate predecessor *resolving the dispute* with Obligee or (ii) receipt of a judicial determination in the form of an order, judgment or other determination which *resolves this dispute*. (emphasis added)" It is evident from the aforementioned language used in the escrow agreement, that plaintiff Jaze was recognizing an ongoing dispute about an alleged existing debt with defendant Vteqe, not recognize that said existing debt was valid. Furthermore, recognizing that the existing debt was disputed and could only be resolved through either a settlement or court order is inconsistent with an intention on the part of the debtor to pay said alleged debt. *See Lew Morris Demolition Co., Inc. v. Board of Ed. City of New York, supra*; *Hui v. East Broadway Mall, Inc., supra.*

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v.*

Associated Fur Mfrs., Inc., 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

In the instant motion, the Court finds that plaintiffs have made a *prima facie* showing of entitlement to judgment as a matter of law. They have established through their legal argument and evidentiary proof that the Counterclaim by defendant Vteqe is time barred by the statute of limitations and therefore the escrow funds at issue should be released to plaintiff Jaze as the party entitled to same.

As previously stated, if a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*,

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supra. The Court concludes that defendant Vteqe failed to raise a triable issue of fact.

Accordingly, plaintiffs' motion for summary judgment, granting the relief sought in the Complaint and dismissing defendants' Counterclaim is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

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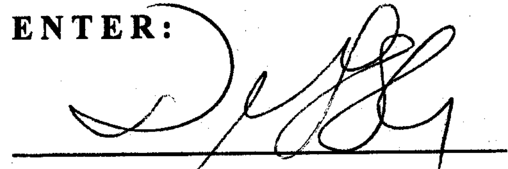

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
July 26, 2011

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