

Barretta Realty Skyline v Old Town Abstract Co. LLC
2011 NY Slip Op 32303(U)
August 16, 2011
Supreme Court, Nassau County
Docket Number: 15323/10
Judge: F. Dana Winslow
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**BARRETTA REALTY SKYLINE div. of
RED VISION SYSTEMS, INC.,**

**TRIAL/IAS, PART 4
NASSAU COUNTY**

Plaintiff,

-against-

**MOTION SEQ. NO.:001
MOTION DATE: 3/28/11**

**OLD TOWN ABSTRACT COMPANY LLC and
HOMETOWN ABSTRACT COMPANY LLC
d/b/a NEW YORK ABSTRACT COMPANY and
JOSEPH LOPARDO,**

INDEX NO.: 15323/10

Defendants.

The following papers having been read on the motion (numbered 1-3):

- Notice of Motion.....1**
- Affirmation in Opposition.....2**
- Reply Memorandum of Law.....3**

Motion by plaintiff Barretta Realty Skyline Div. of Nassau County Red Vision Systems, Inc. ("plaintiff") for summary judgment pursuant to CPLR §3212 against: (i) defendant Old Town Abstract Company LLC ("Old Town") for the sum of \$7,966.50; and (ii) defendants Hometown Abstract Company LLC ("Hometown") d/b/a New York Abstract Company and Joseph Lopardo ("Lopardo") for the sum of \$12,490.50.

This is an action to recover sums allegedly due and owing for services rendered, based upon causes of action sounding in breach of contract and account stated. Plaintiff alleges that, at the request of defendant Old Town, plaintiff researched 111 liens, charges, liabilities and other matters affecting title to real property, for the agreed price of \$8,057.50, of which there remains an unpaid balance of \$7,966.50. [Complaint ¶3.] Plaintiff further alleges that, "at the request of Lopardo and/or the entity identified to plaintiff as the trade name New York Abstract Company," plaintiff researched 150 liens, charges, liabilities and other matters affecting title to real property, for the agreed price of \$12,490.50, none of which has been paid. [Complaint ¶¶ 19, 20.] Plaintiff seeks to hold Lopardo personally liable for the latter amount based upon the contention that New York Abstract is not a distinct legal entity but, rather, an assumed name, trade name or "doing business as" Hometown, and that Lopardo never disclosed this fact to plaintiff.

Annexed to the Complaint is an invoice summary and individual invoices enumerating each title searched, the Order ID number and description of the specific searches performed, and the fees (agreed price) charged for each search. Also annexed to the Complaint is the Affidavit and Verification of Arnelle Farrell (“Farrell”), sworn to on August 6, 2010 (the “Farrell Affidavit”). Farrell claims to be the “official of plaintiff in charge of credit and collection” and “custodian of the plaintiff’s billing records and supporting materials,” who is “fully familiar with the transactions of the parties.” [Farrell Affidavit ¶1.] Among other things, Farrell attests to the authenticity of the invoices and their delivery to defendants by mail, in the ordinary course of business, on or about the date of each invoice.

Old Town, Hometown and Lopardo filed a joint Answer to the Complaint, which generally denies plaintiff’s allegations. In opposition to summary judgment, defendants do not dispute the existence of the debt or the amount due. Nor do they deny that the pleading requirements of CPLR §3016(f) have been satisfied, nor challenge any particular item or items included in the invoices. The Court notes that defendants do not question Hometown’s liability for the debt, nor Lopardo’s authority to bind Hometown to the agreement.

The sole dispute concerns Lopardo’s personal liability for the \$12,490.50 debt. Defendants submit Lopardo’s Affirmation in Opposition to Summary Judgment, dated November 16, 2010 (the “Lopardo Affirmation”), in which Lopardo contends, essentially, that the identity of his principal, Hometown, was known by, and disclosed to plaintiff. Specifically, Lopardo claims that plaintiff billed Hometown for services rendered from the time of Hometown’s formation until the time that Lopardo informed plaintiff, through its agents Danielle Jacobsen and “Chuck” (surname unknown), that Hometown filed a certificate of “doing business as” New York Abstract Company. Lopardo claims that he then requested that all future invoices should be made out to the trade name, New York Abstract Company. [Lopardo Affirmation ¶¶ 4-8.] The Court notes that all of the bills evidencing the \$12,490.50 debt are made out to New York Abstract Company (NYAC), ATTN: Joseph Lopardo. No bills in the name of Hometown were attached to any of the papers.

The Court finds that plaintiff has established, *prima facie*, the existence of the debt and the amounts due. Plaintiff has satisfied the pleading requirements of CPLR §3016(f), by attaching a list of the services provided with enough detail to permit evaluation of the correctness of each entry. See *Summit Sec. Services, Inc. v Main Street Lofts Yonkers, LLC*, 73 AD3d 906, 907 [2nd Dept 1010]; *Teal, Becker & Chiarmamonte, CPAs, P.C. v Sutton*, 197 AD2d 768, 769 [3rd Dept 1993]; *Empire State Fuel Corp. v 2683 Morris Associates, LLC*, 31 Misc3d 40, 42, 2011 N.Y. Slip Op 21053 [NY App. Term, Feb. 14,

2011]. Defendants were required by statute to provide a Verified Answer indicating specifically those items in dispute, and whether they were disputed with respect to delivery or performance, reasonable value or agreed price. CPLR §3016(f); *Garber Building Supplies, Inc. v Shalom Corp.*, 2011 WL 2506061, 2011 N.Y. Slip Op 51129 [NY App. Term, Jun 15, 2011]. Failure to make specific denials constitutes an admission of the scheduled items and may constitute a sufficient basis for granting summary judgment to the plaintiff. *Netguistics, Inc. v Coldwell Banker Prime Properties, Inc.*, 23 AD3d 719, 720 [3rd Dept 2005]. Defendants produce no evidence in opposition to the motion, and therefore fail to raise an issue of fact with respect to the debt and amounts due. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].

On the issue of Lopardo's personal liability, it is well settled that an agent who enters into an agreement on behalf of a principal whose identity or legal status is not disclosed may be held personally liable on the agreement. *Courthouse Corporate Center LLC v Schulman*, 74 AD3d 725 [2nd Dept 2011]; *Continental Manor II Condominium Homeowners Assn. v Depew*, 277 AD2d 340 [2nd Dept 2000]; *Kaplon-Belo Associates, Inc. v Farrelly*, 221 AD2d 321 [2nd Dept 1995]. The use of a principal's trade name, without disclosing the identity and corporate status of the principal, does not relieve the agent of personal liability. See *Continental Manor*, 277 AD2d at 340; *New England Marine Contractors, Inc. v Martin*, 156 AD2d 804 [3rd Dept. 1989]; *Lumer v. Marone*, 148 Misc. 997 [NY App. Term, Nov. 19, 1990].

The defense of agency in avoidance of personal liability is an affirmative defense. The burden of establishing the disclosure of the agency relationship and the corporate existence and identity of the principal is upon the proponent of the agency defense. *Courthouse Corporate Center*, 74 AD3d at 727.

In this case, defendants rely solely upon the Lopardo Affirmation to establish this defense. Insofar as Lopardo is a party to this law suit, however, his unsworn submission, in the form of an affirmation instead of an affidavit, is inadmissible and cannot be used to defeat plaintiff's motion. CPLR §2106; *Slavenburg Corp. v Opus Apparel*, 53 NY2d 799 [1981]; *Morrison Cohen LLP v Fink*, 81 AD3d 467, 468 [1st Dept 2011]; *Pisacreta v Joseph A. Minniti, P.C.*, 265 AD2d 540 [2nd Dept 1999]. Although an attorney is authorized to submit an affirmation in lieu of an affidavit in most circumstances, "even those persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action." *Slavenburg*, 53 NY2d at 801n. [1981]. In the absence of admissible evidence to establish the agency defense, Lopardo cannot avoid personal liability.

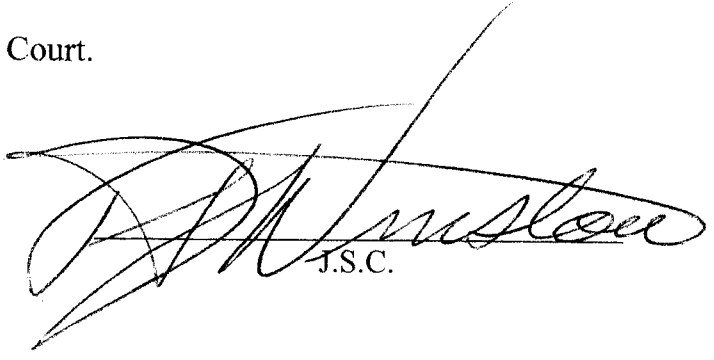
The Court has considered the remaining contentions of the parties and finds them to be without merit. Based upon the foregoing, it is

ORDERED, that plaintiff's motion for summary judgment, against defendant Old Town for the sum of \$7,966.50 and defendants Hometown d/b/a New York Abstract Company and Lopardo for the sum of \$12,490.50, is **granted**. Submit judgment on 15 days notice.

This constitutes the Order of the Court.

Dated:

8/16/11


J.S.C.

ENTERED
AUG 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE