

**Perez v Tirado**

2011 NY Slip Op 33860(U)

June 7, 2011

Sup Ct, Bronx County

Docket Number: 309148/10

Judge: Mary Ann Brigantti-Hughes

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**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15**

**PRESENT:** Honorable Mary Ann Brigantti-Hughes

ANDRES PEREZ,

PLAINTIFF,

-against-

ARNEL TIRADO and RYAN CHELSEA CLINTON,

DEFENDANTS.

**DECISION/ORDER**

INDEX NO.:309148/10

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The following papers numbered 1 to 14 read on plaintiff's motion noticed on December 20<sup>th</sup>, 2010 and defendants' motions to dismiss noticed on December 16, 2010 and January 28, 2011 and duly submitted on the motion calendars of January 13<sup>th</sup>, 2011 and March 11, 2011 in Part IA-15:

<u>Papers submitted</u>	<u>Numbered</u>
Plaintiff's Notice of Motion, Affirmation, & Exhibits	1,2,3,
Defendants' Notice of Motion dated December 16, 2010, Affirmation, & Exhibits	4,5,6,
Plaintiff's Affirmation in Opposition	7,
Defendants' Reply Affirmation	8, 9
Defendants' Notice of Motion dated January 28, 2011, Affirmation, Exhibits & Memorandum of Law	10,11,12,13,
Plaintiff's Affirmation in Opposition	14

Upon the foregoing papers, *pro se* plaintiff Andres Perez (hereinafter "Plaintiff") seeks a judgment of payment for services rendered to the defendants Arnel Tirado and Ryan Chelsea Clinton (hereinafter collectively referred to as "Defendants") from August to November, 2010. Defendants move pursuant to *CPLR* 3012(b) for an order dismissing Plaintiff's action for failure to serve a complaint, and have also moved pursuant to *CPLR* 3211(a)(1) and (a)(7) for an order dismissing Plaintiff's action due to a defense based on documentary evidence and/or for failure to state a cause of action. In the interest of judicial economy, the above motions are consolidated and will be disposed of accordingly in the following Decision and Order.

I. Factual and Procedural History

On March 11, 2005, while doing business as AM Floor Care & Cleaning Services, Plaintiff entered into a franchise contract with U.S. Porters, Inc to render janitorial services to certain clients. On June 25, 2007 Defendant Ryan Chelsea-Clinton Community Health Center (individually referred to as "Ryan Chelsea") entered into a contract with U.S. Porters, Inc. in which U.S. Porters, Inc would charge Ryan Chelsea \$11,084.80 per month for services rendered five times a week for two porters and two housekeepers. U.S. Porters, Inc. in turn paid Plaintiff \$9,311.24 each month for services he rendered to Ryan Chelsea.

On or about May 27, 2010 U.S. Porters, Inc. filed for bankruptcy initially under Chapter 11 of the United States Bankruptcy Code, which was later converted to a bankruptcy action under Chapter 7 of the United States Bankruptcy Code. A trustee was appointed for the bankruptcy estate. By letter dated September 23, 2010 the trustee's counsel informed Plaintiff that the franchise agreement with his company are deemed property of the debtor's bankruptcy estate and any interference was considered a direct violation of the bankruptcy code. The letter further informed Plaintiff that the contracts between U.S. Porter, Inc. and the plaintiff was still in effect and the contracts between US Porters, Inc. and its clients (including Defendants) was still in effect. It should be noted that the remainder of the letter dated September 23, 2010 is missing.

In addition, by letter dated October 8, 2010, the trustee's counsel informed all parties on annexed service list (presumably Plaintiff was included on that list) that the trustee filed a motion in the United States Bankruptcy Court District of New Jersey for an order approving the trustee's sale of the assets free and clear of all the liens claims and interest pursuant to 11 U.S.C. § 363(b), (f), and (m). The letter goes on to state that one of the assets the trustee is looking to sell is the contract between US Porters, Inc. and Defendants and that the proposed buyer was Percy Dioses (formerly the principal of US Porters, Inc.), or a limited liability entity he may form. The letter states that the court scheduled a hearing on October 14, 2010 regarding the private sale. The letter goes on to state that those addressed in the letter may attend and raise any objections if any to the sale; however the attendance is not required, but all objections must be raised at the hearing.

The trustee's motion for an order approving the trustee's sale of the assets free and clear of all the liens claims and interest was denied and it was further ordered that the "franchisees are free to negotiate with the customers of the debtor, notwithstanding pre-existing purported covenants to the contrary."

Plaintiff alleges that while in the process of bankruptcy, Mr. Dioses formed a new company, USP, LLC and started sending invoices out (presumably) to customers for janitorial services rendered. On or about November 1, 2010 an invoice was sent from USP, LLC to Defendants for the amount of \$11,084.80 regarding the monthly janitorial services rendered for November, 2010. Defendants allegedly refused to make payments to USP, LLC.

On November 4, 2010, Plaintiff filed and served a summons with notice on Defendants. Plaintiff listed as the nature of this action as a "franchise contract". On November 15, 2010 Defendants' counsel served Plaintiff with a notice of appearance and demand for complaint pursuant to CPLR § 3012(b) demanding that Plaintiff serve a complaint within twenty (20) days after service of the aforementioned notice. Plaintiff in turn served a complaint on the defendants by mail on or about December 16 or December 17, 2010. See Exhibit B of Defendants' reply affirmation dated January 11, 2011. Plaintiff alleges in his complaint that he rendered services to Defendants from the month of August through November 2010 and that payment for said services were supposed to be sent to the trustee in order for the trustee in turn pay Plaintiff.

Defendants now move to dismiss Plaintiff's action pursuant to CPLR § 3012(b) for failure to serve a complaint. Plaintiff has also moved seeking a judgment of payment for services rendered to the defendants from August to November 2010.

Subsequently, by letter dated January 3, 2011, the trustee's counsel informed Plaintiff that on November 2, 2010 the trustee filed a Notice of Information for Abandonment regarding U.S. Porters, Inc's contracts with existing clients and franchisees. The letter stated that on November 24, 2010 the bankruptcy court entered a Certification of No Objection with regards to the aforementioned notice, effectively terminating the trustees's interest in the contracts. Moreover, the trustee's counsel informed Plaintiff that the trustee has not received any payment from Defendants. However, included in Defendants' exhibits is a check dated October 28, 2010 by Ryan Chelsea to U.S. Porters, Inc. for the amount of \$22,169.60 for the invoice dates of August 2, 2010 and October 1, 2010.

On January 28, 2011, Defendants made an additional motion for an Order dismissing the complaint pursuant to CPLR 3211(a)(1) and/or(a)(7).

II. Analysis

(i) *Defendants' Motion pursuant to CPLR 3012(b)*

“A party who has commenced an action by service of a summons without complaint and fails to serve a complaint within 20 days of a demand must demonstrate the merits of the action and a reasonable excuse for the delay in order to avoid dismissal.” *Nolan v. Lechner*, 60 A.D.3d 473 (1<sup>st</sup> Dept., 2009) [citations omitted]. “The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the Supreme Court” ... “[w]hen exercising its discretion in this regard, a court should consider all relevant factors, including the extent of the delay, the prejudice to the opposing party, and the lack of an intent to abandon the action” *Grace v Follini*, 80 A.D.3d 560, 561 (2<sup>nd</sup> Dept, 2011) [citations omitted].

In the case at bar, Plaintiff argues in his opposition to Defendant’s motion to dismiss pursuant to CPLR § 3012(b), that he was not able to serve the complaint within the statutory determined time period since he did not have the money to do so. Nevertheless, Defendants served the plaintiff with a notice of appearance and demand for complaint pursuant to *CPLR* 3012(b) on November 15, 2010 and Plaintiff in turn served a complaint on the Defendants by mail on or about December 16 or December 17, 2010. Accordingly, “in view of the short delay,... the absence of any prejudice to the defendants, the existence of a potentially meritorious cause of action as set forth in the plaintiff’s proposed verified complaint” the court will exercise its’ discretion and deny Defendants’ motion pursuant to CPLR § 3012(b) and *Nolan, supra*.

(ii) *Defendants' Motion to Dismiss pursuant to CPLR 3211*

Defendants’ also move pursuant to *CPLR* 3211(a)(1) and (a)(7) for an order dismissing Plaintiff’s action due to a defense based on documentary evidence and/or for failure to state a cause of action and for such other and further relief as the Court deems appropriate.

“In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1) the documents relied upon must definitively dispose of plaintiff's claim” *Bronxville Knolls v. Webster Town Ctr. Pshp.*, 221 A.D.2d 248 (1<sup>st</sup> Dept. 1995). “[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are “essentially undeniable,” would qualify as "documentary evidence" in the proper case” *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 84 (1<sup>st</sup> Dept. 2010).

“Upon a 3211(a)(7) motion to dismiss for failure to state a cause of action, the ‘question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from all the averments’ (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept. 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. (*Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 262 A.D.2d 188 [1st Dept.1999].)”

*Kaback Enters., Inc. v. Oxford Constr. Dev., Inc.*, 2010 NY Slip Op 33722U (N.Y. Sup. Ct. Dec. 27, 2010).

Defendants present as “documentary evidence”, most importantly, the contract between Defendants and U.S. Porters, Inc. Dated June 25, 2007. This contract states that Defendant would pay U.S. Porters, Inc. \$11,084.80 per month for two porters and two housekeepers for services rendered five times per week. The contract goes on to state that the “[Defendants] acknowledges that U.S. Porters will delegate all Janitorial Services to be performed hereunder to a U.S. Porters’ franchisee and his workers.” Moreover, the contract states that “U.S. Porters will bill the [Defendants] at the beginning of the month and [Defendants] agree to pay U.S. Porters the amount that is due and owing under the terms of this contract within ten (10) days of billing date.” In addition, the contract states that “[Defendants] agree that it will not employ or contract with any U.S. Porters employees, franchisee, or any of the franchisee employees during the term of this contract or for one hundred and eighty (180) days after termination of this contact, without U.S. Porters written consent”. Lastly, the term of the contract between defendants and U.S. Porters, Inc “is for one year from the first day of service and will automatically extend for an additional year upon each anniversary date.”

“To establish a prima facie case of breach of contract, the plaintiff must plead facts that show: (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, (4) resulting damage, *Furia v. Furia*, 116 AD2d 694 (2d Dept. 1986); see *Ascoli v. Lynch*, 2 AD3d 553, (2d Dept. 2003) (citing PJI). In order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based, *Sud v. Sud*, 211 AD2d 423 (1st Dept. 1995); *Atkinson v. Mobil Oil Corp.*, 205 AD2d 719 (2d Dept. 1984).

*Greenberg Farrow Architecture v. Renaissance Equity Holdings, LLC*, 2010 NY Slip Op 52335U (N.Y. Sup. Ct. 2010).

In the case at bar, it is clear from Defendants contract with U.S. Porters, Inc that they were in privity only with U.S. Porters, Inc and not with Plaintiff. Therefore, Plaintiff may not maintain a cause of action for breach of contract against Defendants since it had no contractual relationship with the Defendants and was not in privity with them. See *M. Paladino, Inc. v. J. Lucchese & Son Contr. Corp.*, 247 A.D.2d 515 (2<sup>nd</sup> Dept. 1998).

Plaintiff likewise does not have a cause of action for quasi-contract or unjust enrichment. “It is well established... that an unjust enrichment claim is barred under the rule that ‘the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter’” *Adelaide Prods., Inc. v. BKN Intl. AG* 38 A.D.3d 221 (1<sup>st</sup> Dept. 2007) quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 (2005). The subject matter in the case at bar are the provisions in the valid contract between Defendants and U.S. Porters Inc. The contract states that Defendants are to pay U.S. Porters Inc. for the services rendered by U.S. Porters’ franchisees; i.e. Plaintiff. Therefore, the services rendered by Plaintiff did not create a quasi-contract between the plaintiff and the defendants or provide the defendant with an unjust enrichment.

Lastly, Plaintiff does not have a cause of action arising out of an account stated.

“An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due (*Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869 [1993] , citing, *inter alia*, *Interman Indus. Prods. v R. S. M. Electron Power*, 37 NY2d 151 [1975] and *Chisholm-Ryder*

*Co. v Sommer & Sommer*, 70 AD2d 429, [1979]). An account stated assumes the existence of some indebtedness between the parties, or an agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists *M. Paladino, Inc. v J. Lucchese & Son Contr. Corp.*, 247 AD2d 515, 516 [1998], citing *Gurney, Becker & Bourne v Benderson Dev. Co.*, 47 NY2d 995, 996 [1979]; see *Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479 [1991]).”

*Ryan Graphics, Inc. v Bailin*, 39 A.D.3d 249, 250, 251 (1<sup>st</sup> Dept. 2007). In the case at bar, Plaintiff and Defendants did not have prior transactions between them and there was no agreement between the parties to treat the statements as an account stated. The fact that Plaintiff mailed invoices to Defendants seeking payment for the services rendered does not give rise to a cause of action for an account stated. See *M. Paladino, Inc. v J. Lucchese & Son Contr. Corp.*, 247 A.D.2d 515, (2<sup>nd</sup> Dept. 1998).

Accordingly, Defendants’ motion to dismiss pursuant to *CPLR* 3211(a)(1) and (a)(7) shall be granted. In light of the foregoing, Plaintiff’s motion for judgment is denied as moot.

III. Conclusion

Accordingly, it is hereby,

ORDERED that Defendants’ motion pursuant to pursuant to *CPLR* 3012(b) is hereby DENIED; and it is further,

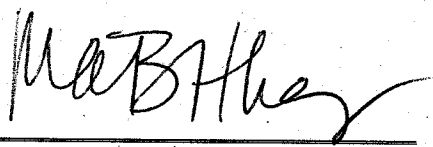
ORDERED that Defendant’s motion pursuant to *CPLR* 3211(a)(1) and (a)(7) is hereby GRANTED, and it is further,

ORDERED, that Plaintiff’s complaint is hereby DISMISSED WITH PREJUDICE, and it is further,

ORDERED that plaintiff’s motion for judgment for services rendered is hereby DENIED AS MOOT.

The above constitutes the Decision and Order of this Court.

Dated: June 7, 2011



Hon. Mary Ann Brigantti-Hughes, J.S.C.