

Monnahan v Meyer Davis Studio, Inc.

2011 NY Slip Op 34029(U)

June 17, 2011

Supreme Court, New York County

Docket Number: 104125/2011

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART _____

Justice

Index Number : 104125/2011

MONNAHAN, BIBI

vs.

MEYER DAVIS STUDIO, INC.

SEQUENCE NUMBER : 002

DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 002 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the application of defendant Meyer Davis Studio, Inc. for an order, pursuant to CPLR-3211(a)(7), (i) dismissing the complaint of plaintiff Bibi Monnahan, in its entirety and with prejudice, and (ii) awarding defendant costs and expenses, including any applicable sanctions under Part 130 of the Rules of the chief Court Administrator, and attorneys fees, is granted to the extent that the Verified Complaint of plaintiff Bibi Monnahan is dismissed with prejudice. And it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.
Dated: June 17, 2011

Dated: 6/17/11


HON. CAROL EDMEAD J.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: PART 35

 BIBI MONNAHAN,

x

Plaintiff,

Index No. 104125/2011

-against-

DECISION/ORDER

MEYER DAVIS STUDIO, INC.,

Defendant.

 EDMEAD, J.S.C.

x

MEMORANDUM DECISION

Defendant Meyer Davis Studio, Inc. (defendant) moves for an order, pursuant to CPLR 3211(a)(7), (i) dismissing the complaint of plaintiff Bibi Monnahan (plaintiff), in its entirety and with prejudice, and (ii) awarding defendant costs and expenses, including any applicable sanctions under Part 130 of the Rules of the Chief Court Administrator, and attorneys fees.

Background

Plaintiff is an interior designer and defendant is an architectural firm.

In 2007, plaintiff and defendant entered into a business arrangement to provide design services to Lance and Diane Rosen (the Rosens) in connection with a home they owned in Westport, Connecticut (the Westport Project). Plaintiff forward to defendant an email dated May 22, 2007 proposing ground rules for their business relationship in connection with the Westport Project. According to the terms described in the email, plaintiff would receive an hourly fee of \$150.00 per hour. Additionally, plaintiff would receive 50% of a 30% mark up over the purchase price of items sourced by the plaintiff and ultimately purchased by the Rosens for use in the Westport Project. Defendant executed and dated the email establishing its consent to the

agreement (the Email Agreement).

Defendant's Contentions

Defendant contends that the Agreement was intended specifically to cover the Westport Project. It was not intended to cover any subsequent project that the parties ended up working on together. The email states that plaintiff wanted something in writing because the parties were starting "a large phase of our project."

An email from Diane Rosen dated September 10, 2007 indicated that the Rosens sold the house in Westport and were awaiting a response from the board regarding an apartment at 800 Park Avenue.

As a consequence of the Westport house being sold in September 2007, the Westport Project wound up only four months after the parties' execution of the Email Agreement. Defendant was retained by the Rosens to provide design services in connection with their Manhattan apartment (the Manhattan Project). Defendant, in turn, retained plaintiff for her interior design services, but defendant and plaintiff never entered into any agreement that obligated it to pay plaintiff a mark-up commission in addition to paying her for her time.

Plaintiff is attempting to extract additional fees from defendant based on the terms of an agreement that was never made applicable by the parties to the Manhattan Project. In the Manhattan Project, the Rosens refused to pay any mark-up fee and insisted on a flat fee arrangement.

Plaintiff expressly acknowledged her knowledge of the flat fee arrangement insofar as she sent Gray Davis an email specifically acknowledging it.

Plaintiff's Opposition

Defendant admits that plaintiff has pleaded the existence of a contract and the breach of same with resulting damages. In moving to dismiss, defendant essentially argues that the complaint is insufficiently particular, and plaintiff has failed to argue the requisite conditions precedent. Defendant is wrong. The complaint alleges that the art pieces would be subject to a mark up, that the contract required the parties to split that mark up, and that defendant received from the Rosens the entire amount of the mark up. This standing alone states a claim for breach of contract. Further, while the actual purchase of art pieces is not explicitly alleged, the allegation that the defendant received the entire mark up resulting from those purchases leaves no room for doubt that the event took place. And, the law does not require pleading with such particularity.

As to the existence of an applicable contract, that is an issue of fact for the jury.

Defendant's Reply

The critical issue on which plaintiff relies, which she argues defeats defendant's motion to dismiss, alleges that the debtor has received the entire mark up from the Rosens. According to plaintiff, this allegation implicitly includes the allegation that the Rosens actually purchased items, a precondition to plaintiff being entitled to any mark up commission.

Regardless, the documentary record simply does not support the existence of an agreement between the parties entitling plaintiff to anything more than her hourly fee, to which she was entitled and which she admits having been paid.

That plaintiff was advised by defendant that the \$175,000 constituted a flat fee for the project and did not constitute a mark up commission to which she was entitled to share is

evidenced by her invoice rendered in May 2010 in which plaintiff acknowledged that she would not be receiving any 15% commission.

Discussion

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692

NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff’s counsel which flatly contradicted plaintiff’s current allegations of prima facie tort]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a] [7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). While affidavits may be considered, if the motion is not converted to a 3212 motion for summary judgment, they are *generally* intended to remedy pleading defects and *not to offer evidentiary support for properly pleaded claims*” (*Nonnon v City of New York*, 9 NY3d 825 [2007] [emphasis added]). As to affidavits submitted by the defendant/respondent, “[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211

unless they “establish conclusively that [petitioner] has no [claim or] cause of action” (*Lawrence v Miller*, 11 NY3d 588, 873 NYS2d 517 [2008] *citing Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

Defendant, by contrast, is subject to a strict pleading provision. In an action on a contract, the obligation to raise the issue of compliance with conditions precedent rests on the party disputing their performance or occurrence (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, *citing* CPLR 3015[a]; *see* Siegal, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3015:2, at 52). Thus, the burden to plead “specifically and with particularity” that any condition precedent has not been fulfilled rests on the party resisting enforcement of the contract (*id.*). At trial, the proponent of the agreement is required to demonstrate fulfillment of the condition only to the extent specified by the party asserting noncompliance. An exception is made if the performance or occurrence of a condition precedent has been expressly pleaded in the complaint, in which case a general denial will suffice to place satisfaction of the condition in issue (*see Allis-Chalmers Mfg. Co. v Malan Constr. Corp.*, 30 NY2d 225, 232-233 [1972]).

“On a motion to dismiss for failure to state claim on which relief could be granted, the court is not obligated to accept plaintiff’s bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like” (*San Geronimo Caribe Project, Inc. v Vila*, 663 F. Supp. 2d 54 (D.P.R. 2009)).

Contracts: Clear and Unambiguous

“It is a court’s task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not

present on the face of the document” (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [2004]). “A contract is ambiguous ‘if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings’” (*Feldman v National Westminster Bank*, 303 AD2d 271 [2003], *lv denied* 100 NY2d 505 [2003]). However, mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 [1995]).

In the instant case, plaintiff cannot rely on the Email Agreement to establish the existence of a contract with defendant covering the Manhattan Project. The Email Agreement specifically and expressly refers to “our project.” It is clear and unambiguous that the parties agreed to a specific project. There is no indicia that the parties were undertaking an expansive relationship through the Email Agreement.

Likewise, plaintiff does not allege even the bare essentials of an oral agreement to state her cause of action, e.g., when the parties made such an agreement.

To state a cause of action for breach of contract, the proponent of the pleading must specify the making of an agreement, the performance by that party, breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court New York County 2006], *citing Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). The essential terms of the parties’ purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged ((*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071 *citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; and *Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d

233, 234 [1st Dept 1994]).

A complaint alleging breach of contract must set forth the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract or by attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v. Silliker, Inc.*, 11 Misc 3d 1072, 816 NYS2d 693 (Supreme Court New York County 2006) citing *Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [1987] and accord *Valley Cadillac Corp. v Dick*, 238 AD2d 894, 894 [1987]).

Sanctions and/or Attorneys' Fees

22 NYCRR § 130-1.1 gives the Court, in its discretion, authority to award costs "in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" and/or the imposition of financial sanctions upon a party or attorney who engages in frivolous conduct." 22 NYCRR § 130-1.1 © states that conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

Notwithstanding the fact that this court finds that plaintiff's complaint fails to state a cause of action, this court declines to grant defendant's request for sanctions and/or attorney's fees.

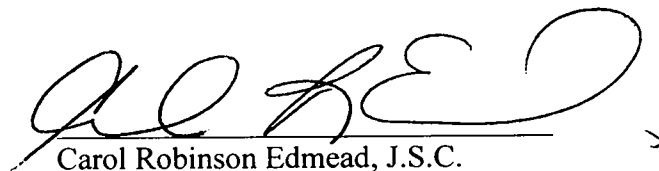
Conclusion

Based on the foregoing, it is hereby

ORDERED that the application of defendant Meyer Davis Studio, Inc. for an order, pursuant to CPLR 3211(a)(7), (i) dismissing the complaint of plaintiff Bibi Monnahan, in its entirety and with prejudice, and (ii) awarding defendant costs and expenses, including any applicable sanctions under Part 130 of the Rules of the chief Court Administrator, and attorneys fees, is granted to the extent that the Verified Complaint of plaintiff Bibi Monnahan is dismissed with prejudice. And it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: June 17, 2011



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD