

Howard B. Spivak Architect, P.C. v Zilberman

2012 NY Slip Op 30186(U)

January 23, 2012

Sup Ct, NY County

Docket Number: 603399/07

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

HOWARD B. SPIVAK ARCHITECT, P.C.,
Plaintiff,

Index No.: 603399/07

Motion Date: 10/18/11

- v -

Motion Seq. No.: 03

HENRY ZILBERMAN and SUSAN ZILBERMAN,
Defendants.

Motion Cal. No.: _____

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1
2, 3
4, 5

FILED

Cross-Motion: Yes No

JAN 25 2012

Upon the foregoing papers,

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COUNTY CLERK'S OFFICE

Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff cross-moves, pursuant to CPLR 602 (b), to consolidate this action with another action by the same plaintiff asserted as against the same defendants, filed in this court under index number 118165/06. The court at oral argument granted the cross motion to consolidate both actions under index number 118165/06.

Plaintiff seeks to recover money for architectural services rendered to defendants pursuant to an oral agreement. In the

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

* 2]
complaint, plaintiff has asserted three causes of action: (1) breach of contract; (2) quantum meruit; and (3) account stated.

According to the complaint, plaintiff alleges that the agreement was for plaintiff to be paid a total of \$525,661.46, of which only \$204,797.00 has been paid. It is plaintiff's position that the oral agreement provided for it to receive 15% of the total cost of defendants' project and that plaintiff was to submit invoices for hours worked, with the payments upon such invoices to be credited towards the total due. Defendants contend that they have paid all of the amounts billed and invoiced to them by plaintiff, reflecting plaintiff's hourly work, except for \$593.02, which remains outstanding. It is defendants' position that the agreement only provided that plaintiff would be paid for hourly work billed.

Plaintiff has admitted to the payments alleged to have been made by defendants. According to defendants, plaintiff is seeking to be paid a percentage of the total construction costs, which was not the compensation agreed upon pursuant to the oral contract.

In response to defendants' demand for a bill of particulars, plaintiff stated:

"An oral agreement was reached between the parties whereby they agreed that the Plaintiff would be paid on an hourly basis for his professional services related to 53 E. 65th Street. Annexed hereto as Exhibit 'A' is a copy of Plaintiff's time records for this project."

At his examination before trial (EBT), plaintiff's principal, Howard B. Spivak (Spivak), testified that his agreement with defendants was for his company to be paid on an hourly basis. Further, when asked whether the agreement indicated that the architectural firm would be paid on an hourly basis or as a percentage of the cost of construction, Spivak testified that it was to be hourly.

In November of 2004, plaintiff sent to defendants a document entitled "Fee Summary," stating that there was a balance due of \$320,864.46, indicating that plaintiff expected payment of 15% of the total cost of the project as its professional fee. The architectural services were completed in April, 2002.

Defendants argue that the complaint should be dismissed because they have performed pursuant to the oral agreement to pay plaintiff on an hourly basis, that the existence of a valid contract precludes a cause of action for quantum meruit, and that, since the amount claimed by plaintiff is disputed by defendants, plaintiff has failed to establish a right to seek judgment on an account stated. In addition, defendants move to dismiss the complaint as being time-barred, basing their arguments on the arguments previously presented to this court on a motion to dismiss. This court denied defendants' motion to dismiss based on the statute of limitations on September 3, 2008, without prejudice. In addition, in the alternative, defendants

seek to dismiss the complaint asserted as against Susan Zilberman, since Spivak admitted that he contracted only with Henry Zilberman (Zilberman).

In opposition to the instant motion, plaintiff maintains that the statute of limitations did not run on these causes of action prior to the filing of the lawsuit, that a plaintiff may plead both breach of contract and quantum meruit, and that it has sufficiently pled a cause of action for account stated. Lastly, plaintiff contends that the complaint is validly asserted as against Susan Zilberman because she is a co-owner of the property, hence a beneficiary of the agreement; she was involved in the design meetings with plaintiff; and she signed several of the checks used to pay plaintiff.

In reply, defendants claim that plaintiff never disputes that it was to be paid on an hourly basis and fails to articulate how the amount appearing on the "Fee Summary" is justified. Further, defendants maintain that the quantum meruit cause of action should be dismissed because both parties agree that there is a valid contract covering the claims. In addition, defendants assert that, even though they made payments after January 22, 2001, the date on which plaintiff says that it sent defendants a "Fee Summary," defendants claim that they never received this document. The court notes that it is identical to the one dated November of 2004, which defendants do not dispute that they

received. Moreover, defendants argue that the complaint asserted as against Susan Zilberman should be dismissed, since Spivak admitted that he contracted with Henry Zilberman, not both defendants. Lastly, defendants reiterate their statute of limitations argument.

In reply, plaintiff provides an affidavit from Spivak, in which he avers that he advised defendants, at the time that the oral agreement was entered into, that he never gives an estimate for services, but that the fee "typically" works out to be between 15% and 20% of the total cost of construction, and that payments made by defendants would be "on account" towards the total fee.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept 2006); see Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary

judgment must be denied. See Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 (1978).

That branch of defendants' motion seeking to dismiss plaintiff's first cause of action for breach of contract shall be denied. Defendants claim that the only evidence presented by plaintiff rebutting their version of the oral contract is Spivak's affidavit submitted in reply to defendants' motion, which, defendants assert, should not be given credence because it differs from Spivak's EBT and plaintiff's bill of particulars.

"Unquestionably, an affidavit tailored to avoid the consequences of a deposition lacks evidentiary value." Addo v Melnick, 61 AD3d 453, 454 (1st Dept 2009). However, in the instant matter, in addition to Spivak's affidavit, the parties have presented a "Fee Summary," one allegedly sent by plaintiff to defendants in 2001, and one admittedly sent by plaintiff and received by defendants in 2004, both before the institution of the current action, which indicates an architectural fee of 15% of the cost of construction, with the hourly billing credited to that amount. These "Fee Summaries" provide some evidence substantiating plaintiff's contention that the agreement provided for plaintiff's fee to be 15% of the total cost of construction, less amounts paid pursuant to the hourly invoices. Therefore, questions of fact and credibility exist with respect to the terms of the parties' oral agreement, which precludes the court

granting summary judgment. Prvor & Mandelup, LLP v Sabbeth, 82 AD3d 731 (2d Dept 2011); Moezinia v Damaghi, 152 AD2d 453 (1st Dept 1989).

Further, since defendants have presented no new arguments with respect to their contention that the matter is barred by application of the statute of limitations, the court adheres to its prior determination in which it declined to dismiss the suit on those grounds.

That branch of defendants' motion seeking to dismiss plaintiff's second and third causes of action for quantum meruit and account stated, respectively, is granted.

A cause of action founded in quantum meruit may be dismissed as duplicative where the complaint alleges an express and valid contract between the parties that controls the parties' relationship. Zurakov v Register.Com, Inc., 304 AD2d 176 (1st Dept 2003). Since both parties agree that they entered into a valid and enforceable contract that covers the identical injury claimed, this cause of action is dismissed as duplicative of the breach of contract claim.

"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 [internal quotation marks and citation omitted]." Fleetwood Agency, Inc. v Verde Electric Corp., 85 AD3d 850, 851 (2d Dept 2011). Where

"there is any dispute regarding the correctness of the account, the cause of action fails." M & A Construction Corp. v McTague, 21 AD3d 610, 612 (3d Dept 2005). Since there is an obvious dispute between the parties regarding the correctness of the amount claimed, this cause of action shall be dismissed.

That branch of defendants' motion seeking to dismiss the complaint asserted as against Susan Zilberman is granted. Spivak testified at his deposition that he contracted with Zilberman, and plaintiff has failed to provide any evidence that would render Susan Zilberman a contracting party to that agreement. Since the only cause of action remaining is one for breach of contract, the complaint is dismissed as against Susan Zilberman.

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion seeking summary judgment dismissing the first cause of action for breach of contract is DENIED; and it is further

ORDERED that the branch of defendants' motion seeking to dismiss the remainder of the complaint is GRANTED and the second and third causes of action are hereby DISMISSED; and it is further

ORDERED that the branch of defendants' motion seeking to dismiss the complaint asserted as against Susan Zilberman is granted and the complaint is severed and dismissed in its entirety as against said defendant; and it is further

ORDERED that the parties shall appear in IAS Part 59, Room 103, 71 Thomas Street, New York, New York for a pre-trial conference on February 23, 2012 at 2:30 P.M. and the Part Clerk is directed to schedule such conference under the above Index Number and Index No.: 118165/06 pending consolidation of the actions.

This is the decision and order of the court.

Dated: January 23, 2012

ENTER:

Debra A. Jaffe
~~DEBRA A. JAFFE~~ J.S.C.

FILED

JAN 25 2012

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