

**Yellow Book Sales & Distrib. Co., Inc. v Mid-Hudson
Waste, Inc.**

2012 NY Slip Op 30611(U)

March 2, 2012

Supreme Court, Nassau County

Docket Number: 13979/10

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

YELLOW BOOK SALES AND DISTRIBUTION
COMPANY, INC.,

TRIAL/IAS PART 31
NASSAU COUNTY

Plaintiff,
- against -

Index No.: 13979/10
Motion Seq. No.: 01
Motion Date: 02/07/12
XXX

MID-HUDSON WASTE, INC. and
ROBERT J, KISSH, Individually,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affidavit and Exhibits	1

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

Plaintiff moves, pursuant to CPLR § 3212, for an order granting summary judgment in its favor and against defendants. No opposition was submitted to the instant motion.

This is an action for breach of a promissory obligation for advertising services in the sum of \$27,004.04, with contractual attorneys fees and contractual interest. Plaintiff commenced the action with the filing of a Summons and Verified Complaint on or about July 23, 2010. Issue was joined on or about September 1, 2010.

Plaintiff submits that the present action is based upon contracts, signed by defendant Robert J. Kissh (“Kissh”) on behalf of defendant Mid-Hudson Waste, Inc. (“Mid-Hudson”), whereby defendants engaged plaintiff to provide advertising services in plaintiff’s publications.

On or about October 20, 2006, June 26, 2007, October 2, 2007, November 6, 2007 and January 25, 2008, defendants executed various contracts for advertising to be placed with plaintiff's publications. *See Plaintiff's Affidavit in Support Exhibits B-F.*

Plaintiff asserts that, based upon the aforementioned contracts, "there exists a principal balance due plaintiff by said defendants to be the sum of \$43,664.19. No part of said sum has been paid, except the defendants have paid the sum of \$16,660.15 on account, thereby leaving a present balance due and owing of \$27,004.04, no part of which has been paid although duly demanded." *See Plaintiff's Affidavit in Support Exhibit G.*

Plaintiff submits that the aforementioned contracts between plaintiff and defendants were entered into by both the corporate defendant Mid-Hudson with individual defendant Kissh as co-obligor. Paragraph 15(F) of the October 20, 2006 and June 26, 2007 contracts reads, "[t]he signer agrees that he/she has the authority and is signing this agreement (1) in his/her individual capacity, (2) as a representative of the Customer, and (3) as a representative of the entity identified in the advertisement or for whose benefit the advertisement is being purchased (if the entity identified in the advertisement is the same as the Customer or the signer). By his/her execution of this agreement, the signer personally and individually undertakes and assumes jointly and severally with the Customer, the full performance of this agreement, including payment of amounts due hereunder." *See Plaintiff's Affidavit in Support Exhibits B and C.* Paragraph 15(G) of the October 2, 2007 and November 6, 2007 contracts reads, "[t]he signer agrees that he/she has the authority and is signing this agreement (1) in his/her individual capacity, (2) as a representative of the Customer, and (3) as a representative of the entity identified in the advertisement or for whose benefit the advertisement is being purchased (if the entity identified in the advertisement is the same as the Customer or the signer). By his/her execution of this agreement, the signer personally and individually undertakes and assumes

jointly and severally with the Customer, the full performance of this agreement, including payment of amounts due hereunder.” See Plaintiff’s Affidavit in Support Exhibits D and E. Paragraph 15 of the January 25, 2008 contract reads, “*Authority, Persons Obligated, Signer Obligated*: The signer agrees that he/she has the authority and is signing this agreement (1) in his/her individual capacity, (2) as a representative of the Customer, and (3) as a representative of the entity identified in the advertisement or for whose benefit the advertisement is being purchased (if the entity identified in the advertisement is the same as the Customer or the signer). By his/her execution of this agreement, the signer personally and individually undertakes and assumes jointly and severally with the Customer, the full performance of this agreement, including payment of amounts due hereunder.” See Plaintiff’s Affidavit in Support Exhibit F.

Additionally, pursuant to paragraph 13 of the October 20, 2006, June 26, 2007, October 2, 2007 and November 6, 2007 contracts, defendants agreed to be responsible for attorney’s fees up to thirty-three percent (33%) in the event this matter had to be referred to attorneys for collection. See Plaintiff’s Affidavit in Support Exhibits B-E. Pursuant to paragraph 12 of the January 25, 2008 contract, defendants agreed to be responsible for attorney’s fees up to twenty-five percent (25%) in the event this matter had to be referred to attorneys for collection. See Plaintiff’s Affidavit in Support Exhibit F.

Plaintiff argues that, by reason of defendants’ default in payment under the duly entered into contracts between the parties, plaintiff is entitled to attorneys’ fees in the sum of \$8,911.33. Plaintiff adds that, on or about May 7, 2010, an Account Stated was duly rendered by plaintiff to defendants which defendants retained and accepted without objection. See Plaintiff’s Affidavit in Support Exhibit G.

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).

Based upon the evidence and legal argument provided in its motion as detailed above,

the Court finds that plaintiff has established *prima facie* entitlement to judgment as a matter of law.

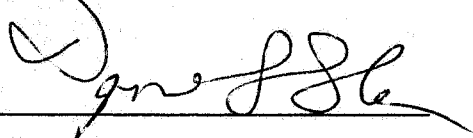
Since plaintiff demonstrated a sufficient *prima facie* showing, the burden shifts to defendants to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.*

As previously stated, defendants have failed to submit any opposition to defeat the motion for summary judgment.

Accordingly, plaintiff's motion, pursuant to CPLR § 3212, for an order granting summary judgment in its favor and against defendants for the relief demanded in the Verified Complaint is hereby **GRANTED**. Plaintiff is directed to submit judgment to the Clerk in the amount of \$27,004.04, plus applicable interest, costs and disbursements, as well as attorney's fees in the sum of \$8,911.33.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
March 2, 2012

ENTERED
MAR 06 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE