Gotham Personnel LLC v Metro NY Balloon & Music Festival Inc.
2013 NY Slip Op 30459(U)
February 28, 2013
Supreme Court, Suffolk County
Docket Number: 09-9516
Judge: Joseph Farneti

[* 1]

SHORT FORM ORDER

INDEX No. 09-9516
CAL. No. 12-00634CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 8-28-12
ADJ. DATE 10-11-12
Mot. Seq. # 003 - MotD
004 - XMotD

GOTHAM PERSONNEL LLC, Plaintiff, - against - METRO NY BALLOON & MUSIC FESTIVAL INC. and RE/MAX OF NEW YORK, INC., Defendants.	BARTIZ & COLMAN LP Attorney for Plaintiff 233 Broadway, Suite 2020 New York, New York 10279 PHILLIPS LYTLE LLP Attorney for Defendants 437 Madison Avenue, 34th Floor New York, New York 10022

Upon the following papers numbered 1 to 23 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers with Memorandum of Law 1 - 7 ; Notice of Cross Motion and supporting papers with Memorandum of Law 8 - 13 ; Answering Affidavits and supporting papers 14 - 16 ; Replying Affidavits and supporting papers 17 - 19 ; Other Reply Memoranda of Law 20 - 23 ; it is,

ORDERED that this motion by defendants for summary judgment in their favor pursuant to CPLR 3212 is granted to the extent of severing and dismissing the second cause of action for quantum meruit and the third cause of action for unjust enrichment as asserted against defendant Metro NY Balloon & Music Festival, Inc., and the claims for attorneys' fees asserted against both defendants, and is otherwise denied; and it is further

ORDERED that the branch of the cross-motion by plaintiff for summary judgment in its favor pursuant to CPLR 3212 on its first cause of action for breach of contract as asserted against defendant Re/Max of New York, Inc. is granted with the amount of damages to be determined at trial; and it is further

ORDERED that an immediate trial on damages against defendant Re/Max of New York Inc. is directed; and it is further

ORDERED that within sixty (60) days from the date hereof plaintiff shall serve a copy of this Order with notice of entry upon the Clerk of the Calendar Control Part and said Clerk shall thereupon place this action on the calendar for a trial on damages.

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Plaintiff Gotham Personnel LLC ("Gotham"), a temporary employment agency, provided staffing in August 2008 to work at the Metro New York Balloon & Music Festival at Brookhaven Calabro Airport (the "Festival") sponsored by defendant RE/MAX of New York, Inc. ("Re/Max"). In its verified complaint, Gotham alleges that Re/Max is the owner, director, principal, manager, benefactor and promoter of defendant Metro NY Balloon & Music Festival, Inc. ("Metro NY"). It is alleged that pursuant to an agreement, Re/Max and Metro NY (hereinafter the "Defendants" when referred to collectively) retained Gotham to provide temporary employees to staff the Festival. Gotham alleges that the Defendants made partial payment as required by the agreement; however, despite having been sent invoices, and due demand for payment, the Defendants have failed and refused to tender the balance owed. Gotham seeks to recover the amount owed based on a breach of contract (first cause of action), and under quasi contractual theories of quantum meruit (second cause of action) and unjust enrichment (third cause of action), and for an account stated (fourth cause of action). Gotham also seeks attorneys' fees.

Defendants have submitted an answer in which it is explicitly admitted that the "Defendants paid Gotham for actual services rendered" and that "Metro [NY] in fact paid Gotham for the services rendered." Defendants otherwise deny the allegations set forth in the verified complaint, assert several affirmative defenses, including, among others, that Metro NY has paid all of the money it agreed to pay Gotham for the services provided (fifth affirmative defense), that Metro NY has paid, in whole, the value of the services actually provided (sixth affirmative defense), and that Gotham has not provided any services to Re/Max (seventh affirmative defense). Defendants also interpose a counterclaim for damages against Gotham for breach of its obligations under the agreement as the temporary employees provided to work at the Festival were not professional. Gotham has replied denying the allegations in the Defendants' counterclaim.

Defendants now move for summary judgment in their favor dismissing the complaint as to Re/Max and dismissing the causes of action for quantum meruit and unjust enrichment as asserted against Metro NY, and the claims for attorneys' fees. Gotham cross-moves for summary judgment on its breach of contract and account stated causes of action, or on in its quasi-contractual causes of action against Re/Max in the sum of $45,786, plus interest from August 21, 2008. Alternatively, Gotham cross-moves for the same relief against Metro NY.

First addressing Gotham's cross-motion, in support thereof, Craig Feingold, its president, has submitted an affidavit to which is attached documentary evidence. Feingold asserts that in July 2008, Gotham contacted Carolyn Weber, an executive vice president of Re/Max regarding its staffing needs for the Festival. Feingold asserts that based on various conversations and emails between Gotham's representative, Brian Goehringer ("Goehringer"), and Carolyn Weber, on July 16, 2008, Gotham submitted a written proposal to Carolyn Weber. The proposal was not signed by Gotham or by Re/Max, however, emails were exchanged wherein Carolyn Weber indicated Gotham would be retained to provide temporary workers and she listed the number of and type of personnel that would be needed for the Festival. Additionally, Feingold states that on July 30, 2008, Gotham sent an email to Carolyn Weber with the payment terms, which included an upfront down payment of 50% of the estimated final cost with the balance to be paid within thirty (30) days after the Festival. Carolyn Weber replied by

email requesting, "either a contract or formal invoice" to which Gotham emailed an invoice addressed to Re/Max dated July 30, 2008 for $16,050.00, which represented half of the total estimated cost for the temporary employees it would provide for the Festival. There was no objection to the invoice, and the down payment was made to Gotham by check dated August 4, 2008, drawn on the bank account of Metro NY. Thereafter, in the days leading up to the Festival, Carolyn Weber corresponded with Gotham by email requesting additional temporary workers, all of which were provided.

Feingold states that on August 8, 9 and 10, 2008, Gotham provided the total number of temporary workers requested by Carolyn Weber, and at the end of each day provided timesheets indicating the date, the name of the temporary employee and the number of hours worked by each temporary employee. Thereafter, on August 14 and 21, 2008, Gotham sent invoices to Re/Max totaling $61,836.00. Feingold asserts, crediting the down payment, Re/Max owes a balance of $45,786.00. Furthermore, Feingold asserts, Re/Max never objected to the invoices; it was not until the instant lawsuit was commenced that Re/Max indicated it was not liable for payment, and placed responsibility for the balance owed on Metro NY. Feingold further states that other than the correspondence and invoices via e-mail, no other formal written agreement was entered into for the Festival.

Gotham maintains the e-mails are sufficient to form a contract, and thus, it is entitled to summary judgment for breach of contract against Re/Max. Moreover, as Re/Max retained and never disputed the invoices, Gotham maintains it is entitled to summary judgment based on an account stated. Alternatively, Gotham maintains, as Re/Max disputes that it is a party to the agreement, Re/Max should be held liable for payment of the balance due under the causes of action for recovery under quasi-contractual theories. It is argued by Gotham that as it in good faith and with an expectation of compensation rendered services to Re/Max, the sponsor of the Festival, under quantum meruit, Re/Max should be held liable for payment of the reasonable value of the services. Additionally, Gotham maintains that Re/Max received $45,786,00 in labor from the temporary workers. The workers, Gotham argues, directly benefitted and enriched Re/Max's Festival. Gotham also points out that it paid the wages of the temporary employees. Therefore, Gotham argues, it would be inequitable to allow Re/Max to reap the benefits of Gotham's services without fair compensation therefor. Thus, Gotham maintains, it should be awarded recovery under the theory of unjust enrichment. In the event the Court exculpates Re/Max, and agrees with the Defendants that Metro NY was the contracting party, Gotham argues that the same arguments made against Re/Max apply to Metro NY.

In support of their motion and in opposition to the cross-motion, Defendants argue that Metro NY, not Re/Max, had the express agreement with Gotham for the services rendered at the Festival. In support of their position, Defendants have submitted the affirmation of their attorney wherein she argues that an express agreement exists between Gotham and Metro NY which bars recovery under Gotham's quasi-contractual theories. However, no evidence has been presented to establish that Metro NY had an agreement with Gotham. The deposition testimony of Henry Weber, president of both Re/Max and Metro NY, does not establish that Metro NY entered into an agreement with Gotham. Based on Henry Weber's testimony and his affidavit, his mother Carolyn Weber, acted as vice president of Metro NY, but was not employed by Metro NY. Nevertheless, Henry Weber acknowledged that Carolyn Weber, was one of the people in charge of communicating the staffing requirements to Gotham. It is also

pointed out that the down payment was paid by Metro NY and that the invoices received from Gotham contain the name "Metro NY Balloon & Music Festival." Defendants do not dispute that the Gotham invoices were received and remain unpaid.

"Whether a contract has been formed does not depend on either party's subjective intent; instead the determination must be based on 'the objective manifestations of the intent of the parties as gathered by their expressed words and deeds'" (***Brighton Investment, Ltd. v Har-Zvi***, 88 AD3d 1220, 1222, 932 NYS2d 214 [3d Dept 2011], quoting ***Brown Bros. Elec. Contrs. v Beam Constr. Corp.***, 41 NY2d 397, 399, 393 NYS2d 350 [1977]). An exchange of e-mails may constitute an enforceable contract when the communications are sufficiently clear and concrete to establish such intent (***Brighton Investment, Ltd. v Har-Zvi***, *supra;* ***Williamson v Delsener***, 59 AD3d 291, 874 NYS2d 41 [1st Dept 2009]). Furthermore, e-mails which contain the printed name of the sender at the end, constitutes a signed writing, signifying the intent to authenticate the contents thereof (*see* ***Williamson v Delsener***, *supra;* ***Stevens v Publicis S.A.***, 50 AD3d 253, 854 NYS2d 690 [1st Dept 2008], *lv dismissed* 10 NY3d 930, 862 NYS2d 333 [2008]).

Here, at the end of all the e-mails sent to Goehringer from Carolyn Weber appears her full name and title of "EX. VP" under which is printed "RE/MAX of New York, Inc." The e-mail communications contain all of the essential terms to form a contract and no evidence has been submitted to indicate that Carolyn Weber was without authority to enter into the agreement on behalf of Re/Max (*see* ***Williamson v Delsener***, *supra*). Thus, the e-mail communications between Goehringer and Carolyn Weber constituted a meeting of the minds thereby forming an enforceable contract between Gotham and Re/Max (*see* ***Newmark & Co. Real Estate, Inc. v 215 East 17 St. Realty LLC***, 80 AD3d 476, 914 NYS2d 162 [1st Dept 2011]).

Unpersuasive is Carolyn Weber's assertion in her affidavit that her name was automatically generated when the e-mail was sent, and the Defendants' analogy to the Court of Appeals case, ***Perma Tile Mosaic & Marble Co. v Estate of Short***, 87 NY2d 524, 604 NYS2d 477 (1996). The *Perma* case was decided in 1996, at a time when "electronic communication was still relatively novel" (***Naldi v Grunberg***, 80 AD3d 1, 8, 908 NYS2d 639 [1st Dept 2010], *lv denied* 16 NY3d 711, 923 NYS2d 415 [2011]). "Today, a decade into the twenty-first century, e-mail is no longer a novelty" (***id.*** at 9), and indeed it has been concluded that "an electronically memorialized and subscribed contract [is] given the same legal effect as a contract memorialized and subscribed on paper" (***id.*** at 12). Furthermore, although it is asserted that Carolyn Weber was also a vice president of Metro NY, and intended her e-mail communications to bind it and not Re/Max, Gotham cannot be charged with her subjective intent as the e-mails expressly provide otherwise; nor can Gotham be charged with knowledge of the corporate hierarchy or responsibilities of the officers/employees of either company. Therefore, based on the documentary evidence presented, an agreement existed between Gotham and Re/Max, and the former is entitled to summary judgment on its first cause of action in the complaint for breach of contract. However, as there is an issue of fact as to the balance owed, the amount of Gotham's recovery will be determined at a trial on damages.

It follows, therefore, that Gotham is not entitled to summary judgment on its cause of action against Re/Max for 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" (***Accent Collections, Inc. v Cappelli Enters., Inc.***, 94 AD3d 1026, 943 NYS2d 189 [2d Dept 2012]; ***Landau v Weissman***, 78 AD2d 661, 662, 913 NYS2d 107 [2d Dept 2010]). The agreement may be express, or implied if retained for an unreasonable period of time and not disputed (***Landau v Weissman***, *supra* at 662). "Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible" (***Accent Collections, Inc. v Cappelli Enters., Inc.***, *supra* at 1027; ***Landau v Weissman***, *supra* at 662). Here, Gotham has failed to establish its *prima facie* entitlement to judgment as a matter of law. Henry Weber testified that he disputed the amount owed when a Gotham representative came to his office a few weeks after the Festival to collect the balance on the invoice. Therefore, this branch of the cross-motion must be denied (*see* ***Accent Collections, Inc. v Cappelli Enters., Inc.***, *supra;* ***Landau v Weissman***, *supra*).

Having found that an enforceable contract exists between Gotham and Re/Max, the branch of Defendants' motion for summary judgment dismissing all claims in the complaint asserted against Re/Max is denied. However, because a contract exists, Defendants are entitled to summary judgment dismissing the second and third causes of action for quantum meruit and unjust enrichment (*see* ***Clark-Fitzpatrick, Inc. v Long Island R.R. Co.***, 70 NY2d 382, 521 NYS2d 653 [1987]). Attorneys' fees and disbursements are incidents of litigation which the prevailing party may not collect from the loser unless such an award is authorized by an agreement, by statute, or by court rule (***RAD Ventures Corp. v Artukmac***, 31 AD3d 412, 818 NYS2d 527 [2d Dept 2006], *lv denied* 7 NY3d 715, 826 NYS2d 181 [2006]), none of which apply here. Therefore, the branch of Defendants' motion for summary dismissal of Gotham's claim for attorneys' fees is also granted.

Accordingly, the motion by Defendants is granted to the extent of severing and dismissing the second and third causes of action, and the claims for attorneys' fees. The branch of the cross-motion by Gotham for summary judgment in its favor and against Re/Max on its breach of contract cause of action is granted, with the amount of recovery to be determined at a trial on damages.

Dated: February 28, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION