

Lotus Printing, Inc. v Carmichael

2013 NY Slip Op 31581(U)

July 16, 2013

Sup Ct, NY County

Docket Number: 150410/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: EILEEN A. RAKOWER

PART 15

Justice
Index Number : 150410/2013
LOTUS PRINTING, INC.
vs
CARMICHAEL, HOAGY
Sequence Number : 001
STRIKE ANSWER

INDEX NO. 150410/13

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1, 2, 3, 4

Answering Affidavits — Exhibits No(s). 5, 6, 7

Replying Affidavits No(s). 8

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 7/16/13

[Signature], J.S.C.

EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
LOTUS PRINTING, INC.,

Plaintiff,

- against -

HOAGY CARMICHAEL, and ANESHA
PUBLISHING, LLC,

Defendants.
-----X

Index No.
150410/2013

**DECISION
and ORDER**

Mot. Seq. 1

HON. EILEEN A. RAKOWER

Plaintiff Lotus Printing, Inc. ("Plaintiff") moves for an Order, pursuant to CPLR §3211(a)(1) and (a)(7), striking Defendants' affirmative defense and counterclaims and pursuant to CPLR §3212, granting summary judgment.

In support of its motion, Plaintiff submits the attorney affirmation of Romeo Salta and the affidavit of John Hanley, Plaintiff's principal. Defendants oppose, and submit the attorney affirmation of Thomas J Mitchell and the affidavit of defendant Hoagy Carmichael ("Carmichael"), on his behalf and as member of defendant Anesha Publishing, LLC ("Anesha")

Plaintiff's Complaint alleges that on or about November 21, 2011, Carmichael, the managing member of Anesha requested, and received from Plaintiff via email, an estimate and a schedule for the printing of a book Carmichael authored entitled "Grand Cascepedia Volume 2." Plaintiff alleges that after an exchange of emails, Carmichael agreed to the prices contained in the final estimate sent by Plaintiff on April 5, 2012 for a total cost of \$68,276.50. The books were shipped, but contained 288 fewer books than ordered, and Plaintiff sent Carmichael a revised, final invoice indicating \$63,935.72 as the sum due as a result of the reduced number of books.

Plaintiff alleges that Carmichael accepted the shipment of books in July 2012, accepted the revised invoice submitted to him, agreed to pay the money he owed, and throughout the summer of 2012, assured Plaintiff that the debt would be paid in full. Plaintiff alleges that while Carmichael made partial payments through Anesha's checking account in the amount of \$33,000, Defendants remain indebted to Plaintiff in the amount of \$30,935.72.

Based on these allegations, the Complaint asserts the following claims against Defendants: breach of contract (first cause of action), quasi contract (second and third causes of action), unjust enrichment (fourth and fifth causes of action), and account stated (sixth cause of action).

Plaintiff moves to strike Defendant's affirmative defense, which asserts "incorrect venue." Pursuant to CPLR §3211(b), "a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." Defendants allege that the action should have properly been brought in Westchester County, the domicile of both parties, and Plaintiff contends that venue is proper. Pursuant to CPLR §503(a), "[e]xcept where otherwise prescribed by law, the place of trial shall be the county in which one of the parties resides when it was commenced. In his opposing affidavit, Carmichael avers that he resides in North Salem, New York, County of Westchester, and that Anesha is also located in North Salem, County of Westchester, and does not and never had an office in the City of New York. Plaintiff has therefore not established as a matter of law that Defendant's affirmative defense has no merit.

Plaintiff also moves to dismiss Defendants' two counterclaims. Under CPLR §3211(a) "a party may move for a judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or ... (7) the pleading fails to state a cause of action." A motion to dismiss based on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes Plaintiff's factual allegations, conclusively establishing a defense as a matter of law. (*Goshen v. Mut Life Ins Co.*, 98 NY2d 314 [2002]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel.*

Spitzer v. Sturm, Ruger & Co., Inc., 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

Defendants' first counterclaim alleges breach of contract. Defendants allege that on or about April 5, 2012, the parties entered into a written agreement requiring, among other things, Plaintiff to deliver 2,200 hardcover copies of Carmichael's book, as well as 300 paperback copies. Defendants alleges that Plaintiff breached the contract by failing to deliver 288 books, and as a result, seek \$40,000 in damages.

The second counterclaim alleges conversion. Defendants allege that on or about November 2011, Defendants provided to Plaintiff documents and things relevant to Plaintiff's performance of its obligations under the contract, and Plaintiff has willfully, maliciously, and continuously refused to return said materials and has unlawfully continued to exercise dominion and control over the documents, causing damages.

Accepting the allegations as true, Defendants state counterclaims for breach of contract and conversion. Furthermore, Plaintiff has not established documentary evidence that conclusively establish defenses as a matter of law to these counterclaims.

Plaintiff also moves for summary judgment on its claims.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). "[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be

granted. Moreover, in deciding whether there is a material triable issue of fact, ‘the facts must be viewed in the light most favorable to the nonmoving party’” (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

CPLR §3212(f) provides that, “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”

Defendants oppose Plaintiff’s motion, contending the motion is premature because it served a Notice of Discovery and Inspection, seeking alleged documentary evidence concerning the contract at issue, which it served after Plaintiff filed the instant motion. Defendants also contend that there are triable issues of fact.

Defendants contend that there is no account stated as a matter of law as there is a triable issue regarding whether Defendants raised objections to Plaintiff’s invoices. Carmichael avers that he did not agree to the reduced number of books that were ultimately shipped to him or the final revised price. He alleges that as a result of the reduction, the amount owed to Plaintiff needed to be renegotiated since his profit was lost. Carmichael avers that he had a number of discussions with John Hanley and made it clear to him that he needed the remaining 288 products in order to pay his costs and realize a small profit. Defendants contend that despite an email in which Carmichael states that he has no intention of not paying Lotus “for the work they did,” Defendants did not intend to pay Plaintiff for work which they did not perform or were performed inadequately, of which Carmichael alleges she advised John Hanley in various telephone and in-person conversations.

Defendants further contend that there has been no breach of contract as a matter of law because Plaintiff failed to make timely delivery of the full amount of books in breach of that agreement and that upon delivery, Carmichael noticed that many of the books had already started to come apart, causing additional damages.

Defendants further contend that they are not liable under the doctrines of quasi contract and unjust enrichment as a matter of law based on Plaintiff’s failure to perform under the agreement.

In light of the issues of fact raised by Defendants in their opposition and Defendants' outstanding Notice of Discovery and Inspection, Plaintiff's motion is denied.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary compliance conference at 80 Centre Street, Room 327, on September 24, 2013, at 9:30 a.m.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 2/16/13



EILEEN A. RAKOWER, J.S.C.

EILEEN A. RAKOWER