

GCS Software, LLC v Spira Footwear, Inc.

2013 NY Slip Op 32221(U)

September 19, 2013

Supreme Court, New York County

Docket Number: 111614/12

Judge: Saliann Scarpulla

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

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

GCS SOFTWARE, LLC,
Plaintiff,

- v -

SPIRA FOOTWEAR, INC.,
Defendant.

FILED
INDEX NO. _____
MOTION DATE SEP 20 2013
MOTION SEQ. NO. _____
MOTION CAL. NO. _____
NEW YORK COUNTY CLERKS OFFICE

111614/12
111614/2011

The following papers, numbered 1 to _____ were read on this motion to dismiss.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAVERS NUMBERED
RECEIVED
SEP 20 2013
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that plaintiff GCS Software, LLC's motion for summary judgment is decided per the memorandum decision dated 9/19/13

This constitutes the Decision and Order of the Court.

Dated: 9/19/13

(Signature)
Saliann Scarpulla, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
GCS SOFTWARE, LLC,

12
Index Number: 111614/12
Submission Date: 5/1/13

Plaintiff,

- against -

DECISION and ORDER

SPIRA FOOTWEAR, INC.,

Defendant.

-----X

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FILED

Papers considered in review of this motion for summary judgment (motion seq. no. 001):

- Notice of Motion 1
- Opposition 2
- Aff in Reply 3

SEP 20 2013
NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action to recover damages under a software license agreement, plaintiff GCS Software, LLC ("GCS") moves for summary judgment on its complaint and dismissing defendant Spira Footwear, Inc.'s ("Spira") counterclaims pursuant to CPLR § 3212.

GCS is a seller of software that assists companies in the garment industry with managing inventory, clients, and orders. GCS also provides software installation, training, and technical support services to customers.

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NYS SUPREME COURT-CIVIL

On October 12, 2011, GCS commenced this action against Spira seeking to recover \$58,250.90 due under a software license agreement, plus attorneys' fees, collection costs, and interest. GCS alleges that it entered into a written contract with Spira on February 16, 2010, under which GCS agreed to provide a perpetual license for A2000 software, as well as documentation, delivery, and installation of the software in exchange for \$62,689.50 ("the contract"). According to GCS, Spira agreed to pay \$12,537.90 upon signing of the contract and 18 monthly installments of \$2,786.20.

GCS also alleges that it provided Spira with a written estimate of 150 hours of training, implementation, and project management to be billed at a rate of \$165.00 per hour, and additional work by a trainer or programmer to be billed at \$185.00 per hour.

In this action, GCS seeks to recover \$58,250.90 (\$50,151.60 for the software license and \$8,099.30 for training and development). GCS claims that Spira made the first required payment of \$12,537.90, but that Spira did not make any further payments. GCS asserts three causes of action for breach of contract, unjust enrichment, and account stated.

On November 28, 2011, Spira answered the complaint. In the answer, Spira admitted that it entered into the contract with GCS, and that GCS provided a written proposal in conjunction with the contract. However, Spira asserted eleven affirmative defenses, including the defense that GCS materially breached the terms of the contract.

In its answer, Spira also asserted counterclaims against GCS for breach of contract and unjust enrichment. Spira claims that GCS materially breached the contract by providing defective software and by failing to provide adequate implementation, training, and project management. Spira seeks to recover \$37,953.40 on its counterclaims, which is the amount that Spira alleges it paid to GCS.

GCS argues that it is entitled to summary judgment on its complaint because it fully performed under the contract, and Spira breached the contract by failing to make the required payments. GCS claims that Spira did not provide written notice of any defect in the software as required by the contract, and that Spira never objected to the amounts due.

In support of the motion, GCS submits an affidavit from its director of sales and marketing Jason Kronish (“Kronish”). Kronish states that “GCS delivered its software to Spira and performed implementation and training work for Spira from about February, 2010 to November, 2010.” Kronish further states that “[a]t no time did Spira express any dissatisfaction with the software or services provided by GCS.”

GCS also submits a copy of the contract. Section 5(b) of the contract states that “[f]ailure of the Licensee to supply GCS in writing with data and input necessary to recreate any programming error shall void said warranty and relieve GCS of any obligation relating to that programming error.” Section 5(c) further states that “[a]ny claim by Licensee that a defect exists in the Software shall not excuse Licensee from the performance of any obligations under this Agreement.”

GCS argues that Spira did not make the required payments because of financial issues, not because the software was defective. To support this claim, GCS submits a copy of a December 21, 2010 email from Spira's chief operating officer, Robert Azar, to GCS. In the email, Azar informed GCS that Spira was "forced to lay off a portion of our staff as well as stop payments to all non essential vendors" such as GCS. Azar also stated "I don't know how best to proceed forward with A2000, but recommend we institute a 6 month hiatus and then determine at that time if the company is able and willing to finish up the A2000 rollout."

Spira opposes the motion by arguing that a material issue of fact exists as to whether the software was defective and unusable. Spira claims that the software failed to function properly and that it never used the software. Spira also claims that it objected to the amounts due and that it provided written notice of the software's deficiencies in November 2011.

Spira submits an affidavit from its chief executive officer Andrew Kratsur ("Kratsur"). Kratsur states that "Spira tried to work with GCS to fix the issues relating to their software, but was unable to get GCS to fix the software." Kratsur further states that "[i]n November 2011, Annaelisa Holguin, an attorney with Spira, sent an email, attached as Exhibit 1, outlining all of the issues that Spira had with the software."

Spira attached a copy of the email that its attorney Annaelisa Holguin ("Holguin") sent to GCS on November 2, 2011. In the email, Holguin states that "Spira notified GCS

of Software deficiencies which were not cured in 30 days and Spira was never able to utilize software and immediately uninstalled Software upon termination.” Holguin further states that her email included a “record of payments made to GCS and e-mail containing the list of deficiencies of the software which was discussed in a conference call with GCS.”¹

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

To prove a breach of contract claim, the plaintiff must demonstrate: (1) the existence of a contract; (2) plaintiff’s performance thereunder; (3) the defendant’s breach; and (4) damages. *Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dep’t 2010).

Here, I find that GCS is entitled to judgment as a matter of law on its breach of contract action. GCS demonstrated that a contract existed between GCS and Spira, and

¹ Although Spira submitted the list of software’s deficiencies that was attached to Holguin’s November 2, 2011 email, Spira did not submit a copy of the payments that it made to GCS which was purportedly attached to the email.

that GCS performed under the contract. The contract required GCS to deliver and install the software, and to provide software training to Spira. GCS' director of sales and marketing James Kronish stated in his affidavit that GCS delivered and installed the software on March 15, 2010, and that GCS employees conducted five training sessions at Spira's offices in Texas between May and November 2010.

GCS further demonstrated that Spira breached the contract by failing to make the required payments. Under the contract, Spira was obligated to pay \$62,689.50 for the software license. Through Kronish's affidavit, GCS established that Spira made a payment of \$12,537.90, but that it failed to pay the remaining contract price of \$50,151.60. GCS also submitted copies of the invoices that were not paid by Spira.

The burden now shifts to Spira to raise a triable issue of fact. In support of its assertion that the software was defective, Spira submitted an affidavit from its chief operating officer Andrew Kratsur. In the affidavit, Kratsur stated that "Spira tried to work with GCS to fix the issues relating to their software" and that GCS' software had "deficiencies" that caused Spira to spend time fixing the software.

I find that Kratsur's affidavit is insufficient to raise a triable issue of fact as to whether the software was defective. Kratsur failed to specify how the software was defective, when the defects were discovered, or to provide any detail regarding Spira's issues with the software. As Kratsur's affidavit merely consists of general, conclusory allegations that are unsupported by any factual detail, his affidavit is insufficient to raise a

triable issue of fact. *RCA Corp. v. American Standards Testing Bureau, Inc.*, 121 A.D.2d 890, 891 (1st Dep't 1986).

I also find that Spira's email to GCS in November 2011 fails to raise a genuine issue of fact because of the self-serving nature of the email. The contract specifically required Spira to provide written notice of any defects in the software to GCS. It is evident from the record that Spira did not allege any defects in the software until after this action was commenced in October 2011. Furthermore, it is clear from Spira's email to GCS in December 2010 that Spira stopped making payments to GCS because of financial issues, not because any defects in the software existed.

Moreover, even if defects in the software existed, Spira would not have been relieved of its obligation to pay for the software. Section 5(c) expressly states that any claim that a defect exists in the software "shall not excuse Licensee [Spira] from the performance of any obligations under the Agreement." Further, as specified in Section 5(a) of the contract, Spira's sole and exclusive remedy for a defect in the software was to obtain GCS' assistance in correcting the defects within a reasonable amount of time.

For the foregoing reasons, GCS is entitled to judgment as a matter of law on its breach of contract action. As to the amount of damages, Spira argues that it paid a total \$37,953.40 to GCS. However, Spira did not submit any payment records or other evidence to support its assertion that it paid \$37,953.340. Therefore, I grant summary judgment in GCS' favor on the breach of contract claim in the amount of \$50,151.60.

GCS also seeks to recover \$8,099.30 for training and development services that it provided to Spira. I find here that GCS is entitled to judgment as a matter of law on its account stated action in the amount of \$8,099.30.

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. *Ryan Graphics, Inc. v. Bailin*, 39 A.D.3d 249, 251 (1st Dep't 2007). The agreement may be implied by the receipt and retention of an account statement for an unreasonable period of time without objection. *Shea & Gould v. Burr*, 194 A.D.2d 369, 370 (1st Dep't 1993).

GCS established the existence of an account stated in the amount of \$8,099.30. Kronish stated that GCS sent monthly invoices to Spira, but that Spira failed to pay the invoices for training and development services in the amount of \$8,099.30. Kronish stated that Spira never expressed dissatisfaction with the services provided, and that Spira promised to pay the unpaid invoices on August 31, 2010, but that it never did.

Although Spira argues that it objected to the amounts due in the invoices, Spira did not present any evidence of its objections. Therefore, I grant GCS' motion for summary judgment on its account stated action in the amount of \$8,099.30.

As to GCS' demand for attorneys' fees, I deny that branch of the motion. "An award of attorneys' fees as a direct remedy must be based on contract or statute." *City of New York v. Zuckerman*, 234 A.D.2d 160, 161 (1st Dep't 1996). GCS failed to address

the issue of attorneys' fees in its moving papers, and the contract did not contain any contractual provision under which GCS is entitled to attorneys' fees.

In accordance with the foregoing, it is

ORDERED that plaintiff GCS Software, LLC's motion for summary judgment on its complaint and dismissing defendant Spira Footwear, Inc.'s counterclaims pursuant to CPLR § 3212 is resolved as follows: (a) granted on GCS' breach of contract action in the amount of \$50,151.60; (b) granted on GCS' account stated action in the amount of \$8,099.30; and (c) granted to dismiss Spira's counterclaims, and otherwise denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the plaintiff GCS Software, LLC and against Spira Footwear, Inc. in the total amount of \$58,250.90, with interest from October 12, 2011, plus costs and disbursements in this action.

This constitutes the decision and order of the Court.

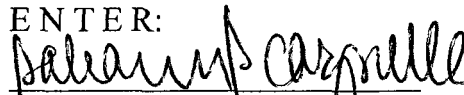
Dated: New York, New York
September 19, 2013

FILED

SEP 20 2013

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ENTER:


Saliann Scarpulla, J.S.C.