SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN Justice PART 52

Index Number : 652302/2010
11TH ST. ASSOCS. LLC
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 7, were read on this motion to/for summary judgment.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1-2
Answering Affidavits — Exhibits + memoranda No(s). 3,4,5
Replying Affidavits + memoranda No(s). 6,7

Upon the foregoing papers, it is ordered that this

motion and cross-motion are decided in accordance with accompanying memorandum decision.

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

Dated: 10/10/13

HON. MARGARET A. CHAN, J.S.C.

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 — NEW YORK COUNTY

PRESENT: Hon. Margaret A. Chan *Justice* PART 52

11TH STREET ASSOCS. LLC,

Plaintiff,

- v -

THE CITY OF NEW YORK AND THE CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION/DEPARTMENT OF SOCIAL SERVICES,

Defendants.

DECISION and ORDER

Index # 652302/2010
Motion Date: 6/15/2013
Motion Seq: 002

Plaintiff, 11th Street Associates LLC (11th Street) and defendants (collectively, the City) entered into a written contract (the agreement) for plaintiff to provide emergency housing to various disenfranchised people at plaintiff's property located at 320 East 11th Street. The agreement provided a nightly rate of $70.00 so long as the eligible person remained in the facility (*see* Pltf mot, Exh C). Plaintiff moved for summary judgment in the amount of $414,098.64 representing unpaid amounts for various people it housed pursuant to the agreement. The City cross- moved and asserted that while some of the claims are proper and unopposed by the City, the bulk of the claims were made for the first time in the motion for summary judgment and were not part of the plaintiff's Notice of Claim. The City asserted that pursuant to NYC Admin Code §7-201, recovery for them is barred without first submitting the sought after amounts in a notice of claim. The decision and order is as follows:

The total amount sought by plaintiff in its motion for summary judgment is $414,098.64. That value represents unpaid stays for nine city clients over the following time periods as such:

John Davis	2/1/2007 - 6/30/2010 *	$23,708.64
Jose Trujillo	8/1/2008 - 6/20/2009	$22,680.00
Yolanda Molina	6/9/2009 - 8/6/2012	$80,850.00
Louis DeFonza	8/11/2008 - 6/14/2010	$47,110.00
Paul Grayton	6/1/2010 - 10/31/2012	$61,880.00
David McKenzie	6/1/2010 - 10/31/2012	$61,880.00
Guy Culley	4/21/2010 - 10/31/2012	$64,750.00
Glen Richardson	6/3/2010 - 06/30/2010	$1,960.00
Roger Docker	7/11/2008 - 06/14/2010	$49,280.00

* plaintiff stated that the City paid a portion within that total time frame, but $23,708.64 remained outstanding

The City's cross-motion conceded some claims, while asserting that other claims are subject to summary judgment as a matter of law. As to the concessions, the City stated that plaintiff is owed payment for residents: (1) John Davis in the amount of $23,351.36; (2) Jose Trujillo in the amount of $22,680.00; (3) Yolanda Molina in the amount of $33,390.00; (4) Louis Defonza in the amount of $47,040.00; (5) Paul Grayton in the amount of $3,570.00; (6) David McKenzie in the amount of $1,540.00; (7) Guy Culley in the amount of $11,410.00; and (8) Glen Richardson in the amount of $1,960.00. This completely resolved the claims related to Jose Trujillo and Glen Richardson, which were pleaded as the third and ninth causes of action respectively. Therefore, the third and ninth causes of action are resolved on consent and plaintiff may enter judgment for the third and ninth causes of action accordingly.

The City raised that the notice of claim for this action filed on October 22, 2010, sought a total amount of $229,851.36. No further notices of claim were filed. The complaint alleged nine causes of action for breach of contract and one cause of action for account stated. The complaint sought a total of $246,931.36 for the unpaid stays of City clients.

The City argued plaintiff cannot recover more than the amount sought in the Notice of claim pursuant to NYC Admin Code §7-201(a). NYC Admin Code §7-201(a) states in pertinent part:

> In every action or special proceeding prosecuted or maintained against the city, the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims, upon which such action or special proceeding is founded, were presented to the comptroller for adjustment, and that the comptroller has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment. . .

The City argued that this section bars recovery of damages accruing after the notice of claim is filed.

The purpose of statutory notice of claim requirements for claims filed against the City is to afford the City an opportunity to investigate circumstances surrounding a claim and assess the merits while information is still readily available (*see* GML §50-e [concerning matters in tort]; *Teresta v City of New York*, 304 NY 440 [1952]). Plaintiff argued that the continued filing of Notices of Claim would be an impractical result creating additional unique index numbers and resulting in unnecessary litigation for one single dispute. Plaintiff called the City's argument limiting claims up to the amount in the notice of claim "not merely frivolous, but sanctionable" (Pltf's Reply p 6, para 13) and "unsupported by any case law" (id). Plaintiff must not have thoroughly considered the leading case law cited by the City – *Varsity Tr., Inc. v Board of Educ. of City of N.Y.*, (5 NY3d 532 [2005]).

The underlying facts of the *Varsity* case are similar to the case at bar in that damages continued to accrue after the action was filed. In that matter, plaintiff, a bus company, had a long-term contract with the City to provide busing to students. The notice of claim in that action claimed the City failed to appropriately make payments on the contract from 1995 into 1997. Litigation in the action continued through 2001. The Court of Appeals held that plaintiffs in that action "failed to continue to file new notices of claim every three months during the litigation to cover the ongoing underpayments" pursuant to the relevant notice strictures of Education Law § 3813 (1) (*Varsity Tr., Inc. v Board of Educ. of City of N.Y. at* 535). Citing to strict statutory interpretation of notice of claim requirements, the Court of Appeals held "future plaintiffs, after starting the lawsuit, need only

continue to file the notices of claim that they have filed before the lawsuit." (*id.* at 536-537). The Court further explained "[t]his allocation of responsibility is not overly burdensome on plaintiffs and avoids any possible confusion about which acts of the government the plaintiffs find unlawful." (*id.* at 537). As the *Varsity* case speaks directly to continually accruing damages post notice of claim, it is applicable here.

Plaintiff's memorandum in reply to the City's motion for partial summary judgment did address the *Varsity* case briefly (*see* Plft Reply Memo, p 9). It claimed that the *Varsity* case was inapposite as the Education Law required notice within three months after the accrual of a claim and non-payment of the claim for thirty days thereafter. Similarly here, a statute requires notice. In this case, the NYC Admin Code §7-201(a) requires a demand (although there is no three month time-frame to the demand) and non-payment of the claim for thirty days thereafter. Accordingly, the *Varisty* case is authority here and failure to provide additional notices of claim is fatal to plaintiff's additional claims that accrued post notice of claim.

Plaintiff also claimed that the City's instant motion was barred by the doctrine of collateral estoppel as plaintiff won judgments on two other actions in this Supreme Court for enforcement of a similar agreement with the City[1]. The first of those actions, *Helm Realty Corp. v The City of New York, et al.* (Index No. 106160/2009), was granted on default. Collateral estoppel may not be invoked where the matter was not fully litigated, such as a matter on default (*see Kaufman v Eli Lilly and Co,* 65 NY2d 449, 456-457 [1985]). As to the other action, *Branic Intl. Realty Corp. v City of New York,* 27 Misc3d 1222(A) [Sup Ct, NY Cty 2010]), the issue there did not concern claims accruing after the notice of claim. It did involve payment for the services provided in the contract. [2] Thus, as the issue here was not previously litigated in those prior actions there is no collateral estoppel.

Finally addressing plaintiff's final cause of action for account stated, plaintiff does not argue account stated in its memorandum of law in support of its motion for summary judgment, but rather addressed it mostly in its reply and opposition papers. The City argued in its cross-motion for partial summary judgment that account stated is not applicable here where the agreement is unenforceable. The City has not demonstrated that the agreement is unenforceable – in fact it conceded payments under the agreement. The City has, however, demonstrated that it is entitled to statutory notice prior to the commencement of the action. It would be logical that if a statute requires notice as discussed above, then an account stated is not permissible. If it were, it would completely circumvent the notice requirements discussed above. Accordingly, the tenth cause of action for account stated is dismissed.

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[1] Plaintiff's affiant in this action, Hank S. Freid, describes himself as a managing member of plaintiff corporation, Helms Realty Corporation, and Branic International Realty Corp. . These companies each own a building that provided shelter for disenfranchised people pursuant to an agreement with the City. The agreements while unique for each property contain the same terms and provisions.

[2] In *Branic Intl. Realty Corp.*, the issues litigated had to do with the use of sign-in sheets for residents to establish occupancy for payment on the related agreement.

In sum, plaintiff is awarded summary judgment on the third and ninth causes of action. The City has conceded some liability for the first, second, fourth, fifth, sixth, seventh and eighth causes of action. Plaintiff is awarded partial summary judgment as to those causes of action. The tenth cause of action is dismissed. Settle order. The parties are directed to appear for a pre-note settlement conference before this court on November 13, 2013 at 2:00 PM in Room 289, to address the remaining amounts in dispute, if any.

This constitutes the decision and order of the court.

Dated: October 10, 2013

Margaret A. Chan , *J.S.C.*