

Zagoren Collective, Inc. v Aegis Capital Corp.

2014 NY Slip Op 30307(U)

January 27, 2014

Sup Ct, New York County

Docket Number: 654327/12

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon Joan A. Madden
Justice

PART 11

Index Number : 654327/2012
ZAGOREN COLLECTIVE, LLC.
vs.
AEGIS CAPITAL
SEQUENCE NUMBER : 001
SUMMARY JUDGEMENT

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the
attached Memorandum Decision and order.

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

Dated: January 28, 2014

[Signature]
HON. JOAN A. MADDEN J.S.C.
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, IAS PART 11

-----X
THE ZAGOREN COLLECTIVE, INC.,

Index No.: 654327/12

Plaintiff,

-against-

AEGIS CAPITAL CORP.,

Defendant.

-----X
JOAN A. MADDEN, J.:

Plaintiff moves for summary judgment on its claim for an account stated, and to dismiss defendant’s affirmative defenses and counterclaims. Defendant opposes the motion which, for the reasons set forth below, is denied.

This is an action to recover a debt of \$54,985.36 allegedly owed by defendant to plaintiff for marketing and advertising consultation services rendered to defendant between July 1, 2011 and June 30, 2012. These services were performed pursuant to a written contract between the parties dated July 5, 2011, under which plaintiff agreed to perform marketing and advertising services on behalf of defendant in exchange for specified compensation (hereinafter “the Agreement”). The complaint asserts causes of action for an account stated, breach of contract, and unjust enrichment. Defendant timely answered the complaint and asserted counterclaims for breach of contract and unjust enrichment. There has been no discovery.

Plaintiff now moves for summary judgment on its cause of action of an account stated, and to dismiss defendant’s affirmative defenses and counterclaims. In support of its motion, plaintiff submits the affidavit of its managing member, Glenn Zagoren (“Zagoren”). Zagoren states that plaintiff performed consulting work and additional work, all of which was pre-approved and accepted by defendant, and that from August 2011 to November 2012, plaintiff sent defendant monthly invoices in connection with the work performed in the total amount of \$200,835.21, of which \$145,850 has been paid and \$54,985.36 remains due and owing.

According to Zagoren, defendant waited until August 2012, which is between five to ten

months from receiving the invoices at issue, until it objected to the invoices at issue on the ground that it did not receive any usable work, and that such objection was insufficiently specific. Further, Zagoren states that defendant made multiple payments, before and after the outstanding invoices were issued, totaling \$145,850, between August 2011 and November 2012. Zagoren attaches e-mails sent by defendant's representatives, Deborah Barrows and David Albahari, to Zagoren, dated January 10, 2012, January 17, 2012, and February 13, 2012, which he alleges show the defendant promised to pay all outstanding invoices and arrears.¹ He also attaches, the invoices sent to defendant, including the eight invoices the defendant alleges remain unpaid dated September 29, 2011, November 9, 2011, January 2, 2012, January 9, 2012, February 6, 2012, February 22, 2012, and March 15, 2012, as well as the Agreement.

In opposition, defendant argues that summary judgment should not be granted as there has been no discovery and triable issues of fact regarding plaintiff's cause of action for an account stated. In support of its opposition, defendant submits the affidavit of its head of business development Phillip Michals ("Michals"). Michals states that defendant timely disputed and questioned the invoices during the spring of 2012, when he and Mr. Stanley Crouch, defendant's senior managing director, verbally disputed and questioned plaintiff about the sizable invoices submitted to defendant. Michals further states that between April 19, 2012 and July 17, 2012, defendant e-mailed plaintiff multiple times to dispute the charges, to request clarity, to reconcile its records with the disputed invoices, and for immediate delivery of all materials still owed by plaintiff. Defendant submits copies of these e-mails, including the email dated April 18, 2012 sent by Mr. Crouch on April 18, 2012 attempting to reconcile payments contained in plaintiff's invoice to defendant.

It states:

It is NOT AT ALL CLEAR...Quite Frankly....!! There are

¹He also attaches a January 10, 2012, from defendant's representative Deborah Barrows, who states I hope to get you payment "ASAP."

BIG line items, with no detail. For instance, your reconciliation cited the ad payment of what we considered \$10,000 to be the payment, which now is labeled a "Media Credit" of \$8,525. There are BIG line items of \$20,000 and \$30,000. One has a credit back of \$25,000 for the actual material, etc., not yet delivered.

We are now reconciling ALL our payments made to Zagoren, what we actually received, what is yet to be received and what is partial. We will need your guidance on all of that soon. ALL of this was to have been an Albahari function as consultant. Now that relationship has been ended, we have to sort it out.

I am the first to acknowledge the myriad of issues in this whole mess and my ultimate responsibility for it.

A lot of damage has been done. Water under the bridge. We have the same aims. Get paid for what was done and get what was paid for. We will get this done. Please stand by for our next contact [emphasis in original].

He also states that defendant already made payments to plaintiff totaling \$150,350.46 between August 2011 to February 2012, even though defendant has not received the work product and services that plaintiff contracted to provide. According to Michals, it has since retained another agency to provide the same services that defendant had paid plaintiff to complete.

According to Michals, on August 21, 2012, defendant's counsel and plaintiff's then-counsel spoke regarding the dispute, that during the conversation, plaintiff agreed to provide defendant with certain document which plaintiff has yet to produce.

As for plaintiff's assertion that the charges were agreed to in an e-mail sent by defendant's representative David Albahari ("Albahari"), defendant argues that Albahari was a marketing consultant retained by defendant, who was tasked, in part, with coordinating plaintiff's services to defendant, but is not and never was an employee of defendant, nor did defendant ever grant Albahari authorization to negotiate payments on its behalf. Defendant also argues that it is premature to dismiss its affirmative defenses and counterclaims, particularly as it is disputing the

amounts allegedly owed based on the invoices.

In reply, plaintiff argues that defendant has not raised an issue of fact as it has not pointed to a single objection to the contents or validity of any specific invoice. Plaintiff argues that neither defendant's e-mails sent in Spring 2012, including the April 19, 2012 e-mail, which discusses defendant's attempt to internally reconcile the invoices, nor defendant's request for certain information from plaintiff, equate to an objection.

As for the e-mails seeking information, plaintiff asserts that such requests are not objections as the information defendant sought pertained to plaintiff's vendors, who are not parties to the Agreement and do not have anything to do with defendant's obligation to pay for the work performed. Instead, plaintiff maintains that defendant's only objection occurred in August 2012, and that such objection was untimely. Further, plaintiff notes that defendant fully paid for numerous of invoices without objection, and such partial payment supports its cause of action for an account stated.

In addition, plaintiff asserts that regardless of whether Mr. Albahari was an employee or independent contractor, Mr. Albahari had the apparent authority to admit liability and promise payment and therefore defendant is bound by his representations.

To prevail on a motion for summary judgment, the movant must present a prima facie case demonstrating entitlement to judgment as a matter of law. Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985); Prince v. DiBenedetto, 189 AD2d 757, 759 (2nd Dept 1993). In addition, the proponent of a motion for summary judgment must establish that “there is no defense to the cause of action or that the cause of action or defense has no merit” (CPLR 3212 [b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Clare's Hospital, 82 NY2d 738, 739 (1993). This standard requires that the proponent of the motion put forth sufficient evidence to eliminate any material issues of fact from the case, by “evidentiary proof in admissible form” Zuckerman v.

City of New York, 49 NY2d 557, 562, (1980).

Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. id. at 562. Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist id. at 562.

“An account stated has long been defined as an 'account balanced and rendered with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note has been given for the balance.’” Morrison Cohen Singer & Weinstein, LLP v Ackerman, 280 AD2d 355, 355-356 (1st Dept 2001) (quoting Interman Industrial Products, Inc. v R.S.M. Electron Power, 37 NY2d 151 (1975)). The receipt and retention of an account, without objection for a reasonable period of time, gives rise to an account stated. Shea & Gould v Burr, 194 AD2d 369, 370 (1st Dept 1993); Rosenman Coliin Freund Lewis & Cohen v Edelman, 160 AD2d 626 (1st Dept 1990), appeal denied 77 NY2d 802 (1991).

At the same time, however, an account stated does not exist where there is any dispute about the account within a reasonable period of time. Abbott, Duncan & Wiener v. Ragusa, 214 AD2d 412, 413 (1st Dep't 1995)(finding triable issues of fact as to claim for an account stated where defendants' affidavits submitted in opposition to plaintiff's motion for summary judgment indicated there were disputes as to the amount due and the quality of work); M & A Constr. Corp. v. McTague, 21 AD3d 610, 611-12 (3d Dept 2005).

“The reasonableness of delay in objecting usually presents an issue of fact.” Dryer and Traub v. Rubinstein, 191 AD2d 236 (1st Dept 1993); compare, Morrison Cohen Singer & Weinstein, LLP, 13 AD3d 51, 52 (1st Dept 2004)(granting plaintiff summary judgment on account stated where plaintiff issued relevant invoices from October 2002 to February 2003, and

defendant did not object to invoices until September 2003, when she filed an answer to the complaint); Shea & Gould v Burr, 194 AD2d 369 (failure to object for five months to invoices gave rise to account stated where allegations of protest were merely conclusory).

Here, it cannot be said that defendant's objection, which was made at latest, in April 2012, regarding unpaid items in invoices issued during the September, November of 2011 and January and March 2012, was unreasonably delayed, as a matter of law. This conclusion is supported by the nature of defendant's objections, including defendant's claims that plaintiff billed it twice for certain items, and defendant's assertion that plaintiff failed to provide it with additional information/and documentation as to the disputed items. Under these circumstances, neither defendant's payment of certain items on the various invoices, nor representations in emails from defendant's representatives that payments on unidentified invoices would be paid are a sufficient basis for finding an account stated as a matter of law.

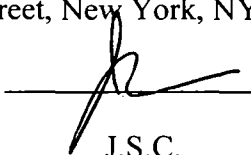
Finally, as issues of fact exist as to whether defendant breached the Agreement or was unjustly enriched by overpayments made thereunder, plaintiff's motion to dismiss defendant's counterclaims is denied.

In view of the above, it is

ORDERED that plaintiff's motion for summary judgment and to dismiss defendant's affirmative defenses and counterclaims is denied; and it is further

ORDERED that the parties shall appear on February 6, 2014, at 9:30 am, for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: January 27, 2014


J.S.C.

HON. JOAN A. MADDEN
J.S.C.