Fleishman v Backpane, Inc.
2014 NY Slip Op 30491(U)
February 27, 2014
Sup Ct, New York County
Docket Number: 652704/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER **PART 15**
Justice

CRAIG FLEISHMAN,

Plaintiff,

- v -

THE BACKPANE, INC., MATTHEW MICHELSON,

Defendants.

INDEX NO. 652704/2013

MOTION DATE ______

MOTION SEQ. NO. 1

MOTION CAL. NO. ______

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answer — Affidavits — Exhibits	3, 4
Replying Affidavits	5

Cross-Motion: X Yes No

This is an action to recover $34,683.00 from Defendants in connection with consulting services allegedly rendered by Plaintiff on Defendants' behalf pursuant to an alleged oral agreement between the parties. The Complaint alleges causes of action for breach of contract, unjust enrichment, quantum meruit, account stated and trespass to chattels.

Plaintiff alleges he was retained by defendant to provide strategic consulting services with respect to various business matters. Plaintiff provided services from February 12, 2013 and continuing through June 21, 2013. Plaintiff delivered invoices to defendants for services rendered. Defendants failed to make timely payment, despite demand. Plaintiff learned that a website which had been registered by Plaintiff was irrevocably transferred from Plaintiff's web hosting account by defendant without Plaintiff's knowledge or permission.

Presently before the Court is Plaintiff's motion for default judgment against Defendants based on their failure to answer or otherwise appear.

Defendants oppose Plaintiff's motion for default judgment, on the basis that Plaintiff failed to provide additional notice pursuant to CPLR §3215(g)(3) and (g)(4) and because Defendants' counsel engaged in discussions and email correspondence with Plaintiff regarding service of Defendants' response to Plaintiff and advised Plaintiff on October 10, 2013 that such response would be served by October 31. The instant motion was filed on October 22, 2013.

Here, in light of Plaintiff's failure to provide additional notice to defendant Michelson pursuant to CPLR §3215(g)(3) and given the preference in this state that matters be resolved on their merits, Plaintiff's motion for default judgment is denied.

Defendants further cross move for an Order, pursuant to CPLR §3211(a)(1) and (a)(7) dismissing the Complaint. Defendants submit the attorney affirmation of John R. Goldman. Plaintiff opposes.

Defendants contend that Plaintiff, a practicing attorney, cannot maintain his breach of contract claim because the alleged oral agreement which included legal analysis is unenforceable under New York law because it is not in writing. Defendants further argue that the remaining claims for unjust enrichment, quantum meruit, and account stated are duplicative of Plaintiff's breach of contract claim.

CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> > (1) a defense is founded upon documentary evidence;
> >
> > (7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR §3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

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]).

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dept. 2009]).

For a claim of unjust enrichment, the "plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dept. 2011]). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark- Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]. However, a party is not "precluded from bringing an action for breach of contract and, as alternative theories, quantum meruit and unjust enrichment" when "[t]here is a dispute as to the scope of work, intended by the original oral contact and whether plaintiff is owed money outside the scope of that agreement." *Loheac v. Children's Corner Learning Ctr.*, 51 A.D. 3d 476, 476 [1st Dept 2008].

An account stated is "an account balanced and rendered, with an assent to the balance express or implied." (*Morrison Cohen Singer & Weinstein v. Janet L. N. Ackerman, 280 AD2d 355, 720 NYS2d 486* [1st Dept 2001]).

Here, upon review of the four corners of Plaintiff's complaint and accepting all allegations as true, the Complaint states a cause of action for breach of contract, unjust enrichment, quantum meruit, and account stated. Furthermore, Plaintiff has stated a claim for trespass of chattels based on the allegations that on or about April 19, 2013, Defendants "intentionally took unlawful control over the Internet domain name 'MANDELA.IS' for the purpose of altering registration information for 'MANDELA.IS' to fraudulently withhold control of 'MANDELA.IS' from its lawful registrant" and "with the intent to deprive the Plaintiff its owner, of registration, ownership and control of 'MANDELA.IS'."

Furthermore, Defendants' documentary submissions do not flatly contradict the factual allegations of the Complaint. While Defendants may have a defense based on their contention that Plaintiff performed legal services absent a retainer agreement in accordance with 22 NYCRR 1215.1, Plaintiff disputes Defendants' characterization of the services he rendered on Defendants' behalf.

Based on the foregoing, it is hereby,

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

ORDERED that Defendants' cross motion is denied; and it is further

ORDERED that Defendants shall file and serve an answer within 20 days of receipt of a copy of this Order with Notice of Entry thereof.

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

Dated: 2/27/2014

HON. EILEEN A. RAKOWER *J.S.C.*

Check one: **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**