SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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PROMAK NY, INC.,

Plaintiff,

Index No.: 650134/14

- against -

GIGAWATT GLOBAL COOPERATIEF, U.A.,

Defendant.

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DONNA MILLS, J:

In 2010, the sole owner and employee of Plaintiff, Promak NY, Inc. ("Plaintiff"), Ira Green, began to work with Gigawatt Global Cooperatief U.A. ("Defendant") to provide expertise in the area of international energy management. Green worked pursuant to a written services contract, which set forth his salary requirements. On May 28, 2012, Plaintiff entered into the services agreement which again set forth Green's salary, as well as reimbursable expenses. Green contends that Defendant failed to pay him as set forth in the services agreement.

To memorialize Defendant's obligation to pay the outstanding amount owed to Plaintiff, Defendant's Chairman Howie Rodenstein sent an email to Ira Green, agreeing that as of January 30, 2013, Defendant owed Plaintiff $141,625 in expenses/consulting fees, plus interest. This email was sent from Rodenstein's email account, and was signed by him on behalf of Defendant.

On September 12, 2013, Plaintiff's counsel sent a demand letter to Defendant asserting Plaintiff's rights under the services agreement, notifying Defendant of its breach of the services agreement, and setting forth the amount owed to Plaintiff. Defendant acknowledged receipt of that letter.

On November 14, 2013, Defendant's counsel sent an email to Plaintiff's counsel affirming the following: (1) that Defendant owes Plaintiff back salary, and (2) that Defendant owes Plaintiff expenses. The writing was signed by Defendant's counsel, Chana Gluck.

On December 9, 2013, Plaintiff's counsel sent an email to Defendant's counsel again setting forth the sums owed to Plaintiff by Defendant for the agreed upon back salary and expenses, calculated pursuant to the services agreement.

On December19, 2013, Defendant's counsel sent an email to Plaintiff's counsel stating that Defendant "is prepared to pay the agreed outstanding debt it owes to [Plaintiff] in monthly installments, until its financial circumstances change."

Plaintiff now brings this motion for summary judgment in lieu of a complaint pursuant to CLR § 3213. Plaintiff alleges that, because it has demonstrated Defendant's indebtedness and failure to pay on due demand, it is entitled to summary judgment in lieu of a complaint to recover the $141,625, less the only payments made in the amount of $2,062, plus interest.

In order to succeed on the motion, the cause of action must be proven by the instrument itself (*Weissman v Sinorm Deli*, 88 NY2d 437 [2nd Dept 1996]). In support of the motion for summary judgment in lieu of complaint, proof of the Agreement and of defendant's failure to make the payments provided for in the Agreement was submitted, thereby establishing the plaintiff's prima facie entitlement to judgment as a matter of law (see *Forstadt v Allen*, 16 Misc3d 132A [2007]). If a prima facie case is made out by the instrument and a failure to make the payments called for by its terms, the moving party would be entitled to summary judgment unless the other party came forward with

evidentiary proof sufficient to raise an issue as to the defenses to the instrument [see *Seaman-Andwall Corp. v Wright Machine Corp.*, 31 AD2d 136 [1st Dept 1968]).

In opposition to the motion for summary judgment in lieu of complaint, Defendant cross moves to dismiss, alleging improper service on the ground that its Chairman Howie Rodenstein was not authorized to accept service. Defendant also objects to venue in New York on the ground of forum non conveniens.

Plaintiff contends that service was properly effected. First, Plaintiff argues that Rodenstein, who was a founder of Defendant company, its Chairman, its Acting CFO at the time of service, the Chairman of its Advisory Board, and who regularly negotiated on behalf of Defendant (including with regard to the note at issue) was an officer, director, managing or general agent capable of accepting service under the CPLR. Finally, Plaintiff argues that in addition to the lawful service on Rodenstein, Plaintiff served Defendant at its corporate address in the Netherlands on January 28, 2014.

This Court finds that the Plaintiff properly served the Defendant, and as such, this Court has personal jurisdiction over Defendant.

This Court next must address whether New York is the proper forum for this action. It is well settled that a plaintiff's choice of forum should not be disturbed absent a balance of factors strongly favoring the defendants and, although the residence of a plaintiff is not the sole determining factor on a motion to dismiss on grounds of forum non conveniens, it is generally "the most significant factor in the equation" (*Cadet v. Short Line,* 173 A.D.2d 270, 569 N.Y.S.2d 662).

In the instant case the Plaintiff's residence in New York provides a substantial nexus to this State, and the record does not show that the Defendant will be

inconvenienced or prejudiced in any way if the action is maintained in New York. Moreover, the services agreement between the parties contains a forum selection clause stating that, "[e]xclusive jurisidiction with respect to any matter arising from or related to this Agreement shall rest with the competent courts in the State of New York[.]"

As Defendant does not deny the debt or default and posited no assertions other than those addressed above, this court will award summary judgment in lieu of complaint to Plaintiff.

Accordingly it is

ORDERED that the motion for summary judgment in lieu of complaint herein is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $139,563., together with interest at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross-motion is denied in its entirety.

Dated: 5/13, 2014

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.