

Furgang & Adwar, LLP v S.A. Intl., Inc.

2014 NY Slip Op 32569(U)

October 3, 2014

Supreme Court, New York County

Docket Number: 651192/2014

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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FURGANG & ADWAR, LLP,

Plaintiff,

Index No.
651192/2014

Decision and
Order

- against -

Mot. Seq. 001, 002

S.A. INTERNATIONAL, INC.,

Defendant.

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

Plaintiff Furgang & Adwar, LLP (“Plaintiff” or “FA”) moves (Mot. Seq. #001, 002)¹, pursuant to CPLR § 3213, for summary judgment in lieu of complaint against defendant S.A. International, Inc. (“Defendant” or “SA”) in the amounts of \$88,721.88 and \$56,809.78, plus interest and costs of collection. This action is based on unpaid invoices for legal services rendered to Defendant in connection with a trademark dispute between Defendant and its competitor. Plaintiff claims that Defendant agreed to pay for said services pursuant to an engagement letter (the “Engagement Letter”) between the parties, that Plaintiff created and delivered the invoices at issue pursuant to the terms of the Engagement Letter, and that Defendant has refused to pay the invoices.

Plaintiff submits the attorney affirmation of Philip Furgang (“Furgang”); a copy of the Engagement Letter, dated January 31, 2013; and, copies of various invoices addressed to Defendant (collectively, the “Invoices”), including a copy of an invoice dated December 20, 2013, for legal services and disbursements for the period of September 2013 through November 2013 (the “December 2013 Invoice”), and copies of two invoices dated February 6, 2014, for legal services and

¹ As Plaintiff’s notices of motion for summary judgment in lieu of complaint, filed on April 17, 2014 (Mot. Seq. # 001) and April 21, 2014 (Mot. Seq. #002), respectively, appear to be identical, Plaintiff’s motions for summary judgment in lieu of complaint will be addressed together.

disbursements for the period December 2013 through January 2014 (collectively, the “February 2014 Invoice”).

Defendant opposes. Defendant cross-moves (Mot. Seq. #002) for an Order, pursuant to CPLR § 3211(a)(4), dismissing this action on the ground that there is another action pending between the same parties for the same cause of action in Utah (the “Utah Action”).

As far as Plaintiff’s motion for summary judgment in lieu of complaint is concerned, CPLR § 3213 provides that, “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” A document comes within CPLR § 3213 “if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms.” (*Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 [1996] [internal citations omitted]). By contrast, the instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document. (*Id.*). The test “is not what the instrument may be reduced to by part performance or by elision of a portion of it ... but rather how the instrument read in the first instance.” (*Weissman*, 88 N.Y.2d at 445).

An action based on an instrument for the payment of money only must be based on something more than “simply” an account stated. (*Interman Indus. Prods. v R. S. M. Electron Power*, 37 NY2d 151 [1975]). Where an account stated is “consonant with the fixed terms of [an] agreement,” such as a retainer agreement, “this may be taken as an obligation warranting the accelerated procedure under CPLR § 3213, especially where the rendering of statements in connection with that account indicates a history of transactional activity.” (*Rhee v. Meyers*, 162 A.D.2d 397, 397-98 [1st Dep’t 1990] [citations omitted]). Such an acknowledgment of an obligation upon an account stated is a promise for the payment of money only. (*Id.*).

The Engagement Letter provides:

All payments are due and shall be promptly paid upon receipt of the statement. Unless the Firm is advised in writing of any dispute as to specific fees or disbursements within twenty (20) days of the invoice date, the Firm's invoices shall be deemed fair and accurate.

If a bill has or bills have not been paid as provided in this Agreement, all overdue amounts due the Firm shall be subject to an interest charge of fifteen percent (15%) per annum from the date originally billed.

This Agreement and the performance thereof and/or any dispute that may arise, including those related to fees, disbursements due, and/or services rendered to You, shall be governed by the laws of the State of New York and jurisdiction for any dispute, except as expressly provided herein, shall be exclusively within the courts located within the State of New York and within the Counties of New York, Rockland, and Westchester.

In the affidavit of Furgang, Furgang avers that, “On or about February 19, 2013, March 22, 2013, June 13, 2013, August 6, 2013, and October 21, 2013, FA delivered invoices to SA, the total amounts of which was \$153,286.50. Each of these invoices was paid.” Furgang further avers, “On December 20, 2013, FA transmitted the first [unpaid] invoice to SA for work performed but not previously billed in the Trademark Litigation through November 2013 (hereinafter the ‘December 2013 Invoice’). This statement was for a total amount of \$113,561.38.” Furgang avers that, “On December 24, 2013, SA transmitted a payment of \$25,000 to FA. Upon making this payment, SA owed FA \$88,721.88 on the December 2013 Invoice.” Furgang avers, “On January 20, 2014, SA informed FA that it was replacing FA as its counsel in the Trademark Litigation and all other matter. SA instructed FA to cease performing all further services on SA's behalf”, and that, “At SA’s request, FA prepared and transmitted the invoices of February 6, 2014 for disbursements and services performed in December 2013 and January 2014 (hereinafter the ‘February 2014 Invoice’). The invoices were for a total amount of \$56,809.78.” Furgang avers that “SA never complained that the invoiced amounts were inaccurate in any way” and that “SA has refused to pay the total amount outstanding, which is \$88,721.88 for the invoice of December 20, 2013 and \$56,809.78 for the invoices of February 6, 2014.”

In opposition, Defendant argues that SA objected to the December 2013 invoice in an email to Furgang dated December 23, 2013 (the “Blundell Email”), and in subsequent conversations between Blundell and Furgang. Defendant also argues that it commenced an action against Furgang for overbilling and malpractice, which is pending in Utah (the “Utah Action”), and further claims to have filed a formal complaint of attorney misconduct with the New York State Bar Association

(“NYSBA”) regarding Plaintiff. Defendant claims to have taken each of these actions before Plaintiff filed the instant motion for summary judgment in lieu of complaint.

Plaintiff, in turn, argues that the Blundell Email does not constitute a proper objection to the legal bills at issue. Plaintiff argues that this email expresses surprise at the bill’s size, but does not identify or express an objection to the bill itself or the services rendered. As a result, Plaintiff contends, the Blundell Email is insufficient to defeat an account stated claim. In any event, Furgang avers that Blundell disavowed the statements made in the Blundell Email in a telephone conversation between the two on December 24, 2013, and that the sum and substance of those statements is reflected in a memorandum that Furgang prepared immediately thereafter. Finally, Plaintiff argues there is no prior pending litigation between the parties, as the Utah Action has been dismissed. Plaintiff submits the decision of the Utah Court dismissing the Utah Action for improper venue on the basis of a forum selection clause contained in the Engagement Letter.

Here, Plaintiff fails to meet its burden of demonstrating its entitlement to summary judgment in lieu of complaint on its claims for an account stated. Although Plaintiff submits the December 2013 Invoice and the February 2014 Invoice along with the Engagement Letter and other invoices indicating a history of transactional activity between the parties, the Blundell email raises a question of fact as to whether Defendant acknowledged any obligation to pay the amount due and owing. In this regard, the Invoices and Engagement Letter do not clearly constitute a promise for the payment of money only warranting accelerated judgment under CPLR § 3213. (*c.f. Anthony M. Barraco, P.C. v. Rosendale*, 162 A.D.2d 899 [3d Dept 1990][finding that summary judgment in lieu of complaint properly used to recover legal fees where defendant-client signed letter acknowledging that plaintiff-attorney’s final bill was accurate and authorizing escrow agent to pay sum to law firm]). Furthermore, to the extent that Defendant raises a question of fact as to whether SA acknowledged an obligation to pay the debt in issue, the amount of the balance due and owing cannot be determined without reference to outside proof. Accordingly, Plaintiff’s motion for summary judgment in lieu of complaint is denied without prejudice to a new motion for summary judgment after Defendant answers the formal complaint filed in this action as directed below.

Defendant’s cross-motion to dismiss this action on the basis of the pendency of prior litigation between the parties is moot, as the Utah Action has been dismissed.

Wherefore, it is hereby

ORDERED that Plaintiff's motion for summary judgment (Mot. Seq. #001, 002) in lieu of complaint is denied; and it is further

ORDERED that Plaintiff shall serve a formal complaint upon Defendant within twenty days (20) of service of a copy of this Order with notice of entry; and it is further

ORDERED that Defendant's cross-motion (Mot. Seq. #002) to dismiss Plaintiff's motion for summary judgment in lieu of complaint is denied as moot.

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

Dated: October 3, 2014



Eileen A. Rakover, J.S.C.