

**Black Swan Consulting LLC v Featherstone Inv.
Group**

2015 NY Slip Op 30298(U)

March 3, 2015

Supreme Court, New York County

Docket Number: 652352/2014

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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BLACK SWAN CONSULTING LLC,

Plaintiff,

Index No.
652352/2014

**DECISION and
ORDER**

- against -

Mot. Seq. 001

FEATHERSTONE INVESTMENT GROUP,
FEATHERSTONE INVESTMENT GROUP LLC, and
FEATHERSTONE INVESTMENT LP,

Defendants.

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

This is an action for breach of contract based on unpaid invoices. Plaintiff, Black Swan Consulting LLC (“Black Swan” or “Plaintiff”), claims to have entered into a service agreement (the “Agreement”) with defendant, Featherstone Investment Group, LLC (“FSIG”), on March 13, 2014. Plaintiff claims that, pursuant to the Agreement, Black Swan agreed to provide “securitization advice, analyses and other services on a transaction” to FSIG in exchange for compensation at the hourly rates set forth therein. Plaintiff claims to have provided services to FSIG as required under the Agreement from March 18, 2014 to April 9, 2014, and to have issued four invoices (the “Invoices”), totaling \$45,500.00, to FSIG, for Plaintiff’s services. Plaintiff claims that FSIG failed to pay Black Swan as required under the Agreement, and that the Invoices remain outstanding. Additionally, Plaintiff claims to have sent FSIG a letter demanding payment, and that FSIG did not respond to Plaintiff’s demand.

Plaintiff commenced this action on July 30, 2014. Defendants Featherstone Investment Group (“Group”) and Featherstone Investment LP (“LP”) along with FSIG (collectively, “Defendants”) interposed an answer on September 10, 2014.

Plaintiff now moves for an Order, pursuant to CPLR § 3212, granting summary judgment in favor of Plaintiff; and, pursuant to 3025[b], to amend the caption to add as defendants, “RMP Real Estate Sales & Management (Rent Me Properties)”, “Ford Property Management” and “ABC ENTITY (entity name being fictitious and unknown),” the entity intended being the successor(s) by merger with Featherstone Investment Group. In support, Plaintiff submits: the attorney affirmation of Winnie Lam (“Lam”), dated November 20, 2014; the affidavit of Aaron Wong (“Wong”), a principal of Black Swan, dated November 20, 2014; the affidavit of Wilson Kung (“Kung”), a product specialist at Black Swan, dated November 20, 2014; all pleadings herein; the Agreement; the Invoices; email correspondence between Plaintiff and FSIG; and, a letter, dated June 11, 2014, addressed to FSIG, demanding payment for four unpaid invoices in the total amount of \$45,500.00 (the “Demand Letter”).

Defendants oppose. Defendants cross-move for an Order, pursuant to CPLR § 3212, granting summary judgment in favor of Defendants and against Plaintiff and dismissing Plaintiff’s complaint as against Defendants. In support, Defendants submit the attorney affirmation of Scott M. Manson; a copy of a current report from the State of Michigan Department of Licensing and Regulatory Affairs indicating that “RMP Real Estate Sales and Management” is an active Michigan Limited Liability Company; and, a copy of current report from the State of Michigan Department of Licensing and Regulatory Affairs that indicates that Rent Me Properties is an assumed name of “RMP Real Estate Sales and Management”.

Plaintiff opposes Defendants’ cross-motion.

Turning first to Plaintiff’s motion to amend, CPLR § 3025 provides, in relevant part, “[a]ny motion to amend or supplement pleadings *shall* be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.” (CPLR § 3025[b] [emphasis added]). Here, Plaintiff seeks to amend the complaint to add, as defendants, “RMP Real Estate Sales & Management (Rent Me Properties)”, “Ford Property Management” and “ABC ENTITY (entity name being fictitious and unknown),” the entity intended being the successor(s) by merger with Featherstone Investment Group. However, Plaintiff fails to submit a proposed amended complaint showing the changes or additions to be made to the caption, nor any changes or additions to Plaintiff’s complaint respecting those proposed additional defendants. Accordingly, in the absence of an amended complaint in the proposed form, Plaintiff’s motion to amend fails.

As for Plaintiff's motion for summary judgment, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

"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.*, 71 A.D. 3d 80, 91 [1st Dep't 2009]).

In the affidavit of Wong, Wong avers that Black Swan is a financial consulting firm specializing in "fixed income products". Wong avers that Defendants sought Plaintiff's securitization advice, analyses and "other services" with respect to a transaction Defendants were pursuing. Wong avers that Plaintiff and Defendants discussed the services and compensation required, and that Plaintiff entered into a service agreement with Defendants to perform consulting services in exchange for compensation pursuant to the compensation terms set forth in the Agreement. Annexed to Wong's affidavit is a copy of the Agreement.

The Agreement provides:

FeatherStone Investment Group, LLC ("FSIG") has requested Black Swan Consulting LLC ("Black Swan") to provide advice with respect to one or more rental securitization transactions (the "Analysis"). In connection with the Analysis, Black Swan shall (i) provide securitization advice; and (ii) perform analyses or services requested by FSIG. This agreement confirms our understanding with respect to the engagement.

The Agreement further states: "FSIG will compensate Black Swan an amount based on the number of hours and hourly rates of the Black Swan professionals required to perform the Analysis. FSIG agrees to pay Black Swan the following hourly rates for each professional to perform the tasks listed in the preceding

paragraph.” The Agreement lists the hourly rate for “Capital Markets Specialist” as \$400. The Agreement also lists the hourly rate for “Business Analyst”, “Technology Developer”, and “Quantitative Specialist” as \$125, \$200, and \$250, respectively. The Agreement further provides:

Black Swan agrees to provide FSIG daily timesheets detailing the number of hours spent by each professional. Black Swan also agrees to provide FSIG an invoice at the end of each week. If either of those dates fall on a non-business day, then Black Swan will provide FSIG with timesheets or invoice on the next available business day. FSIG will make payments in U.S. dollars within three business days in connection with Black Swan invoices issued. Black Swan reserves the right to cease work if FSIG fails to remit invoices.

In the affidavit of Wong, Wong avers that Wong performed work for Defendants during the period from approximately March 18, 2014, to approximately April 19, 2014. Wong avers that, for any work performed for Defendants, Wong logged his hours and work activity in daily timesheets. In addition, Wong avers that he is a “Capital Markets Specialist” at Black Swan, and that, as such, his hourly rate is \$400 under the Agreement.

Wong avers that he created weekly invoices for Defendants, and that, “for any activity logged, a daily timesheet and weekly invoice was sent to defendants.” Wong avers that, “about 17 daily timesheets and four weekly invoices were sent to defendants.” Wong avers that these daily timesheets and weekly invoices were sent to Defendants via email from Black Swan’s counsel, Lam. Wong avers that the emails were addressed to James Larkin, Defendants’ Co-Chairman, and Scott M. Manson, Esq., Defendants’ Chief Executive Manager, and that both Wong and Kung were cc’d on these emails. Wong avers that he did not receive any “email or communication” from Defendants questioning or disputing the timesheets or invoices.

Wong avers, that on or about March 28, 2014, three business days after Invoice 001 was sent to defendants, Plaintiff did not receive payment from defendants as agreed pursuant to the Agreement.” Wong avers that Defendants assured Wong that they would provide payment, and that Black Swan continued to provide services for Defendant. Wong further avers that, “on April 4, April 11 and April 16, 2014, defendants fail to pay Invoice 002, 003, and 004 respectively, as

agreed pursuant to the Agreement.” Wong avers that he inquired about the unpaid invoices, and that each time, Defendants “assured” Wong that Defendants were “working on the invoices and plaintiff will be paid soon”.

Wong avers that he made several attempts to contact Defendants in May 2014 and June 2014, to no avail. Wong avers that on June 12, 2014, he asked Lam to send Defendants the Letter of Demand, demanding payment and enclosing copies of the Invoices. Pursuant to the Letter of Demand, Defendants were given two weeks to pay the Invoices. Wong avers that, “on June 26, 2014, two weeks after the demand letter was sent, plaintiff did not receive any payment or response from the defendants.”

Additionally, in the affidavit of Kung, Kung avers, that he is a “product specialist” focusing on collateralized debt obligations and residential mortgage-backed transactions at Black Swan. Kung avers that he performed work for Defendants during the period from approximately March 18, 2014 through approximately April 9, 2014. Kung avers that, for any work Kung performed for Defendants, Kung logged his hours and work activity in daily timesheets. Kung avers that, “as a ‘Capital Markets Specialist’ at Black Swan, [Kung’s] hourly rate is \$400.” Kung avers that he was cc’d on emails with attached timesheets and/or weekly invoices that Plaintiff’s legal counsel, Lam, sent to Defendants, and further states: “I confirm that two of defendants’ personnel, Mr. James Larkin, defendants’ Co-Chairman and Mr. Scott M. Manson, Esq., defendants’ Chief Executive Manager, were also cc’ed [sic] on the emails with attached timesheets and/or weekly invoices.”

Here, Plaintiff makes a prima facie showing of entitlement to judgment as a matter of law on Plaintiff’s claim for breach contract as against FSIG. Plaintiff adequately demonstrates the Agreement between Plaintiff and FSIG, its performance, FSIG’s failure to perform, and resulting damages.

In opposition, Defendants provide no proof in admissible form. Rather, they submit “Defendants’ Response To Plaintiff’s Motions For Summary Judgment And To Amend It’s Complaint” “respectfully submitted, Scott M. Manson, Esq., Attorney for Defendants.”

In that “response” they repeatedly refer to the general denials contained in Defendants’ Answer. While they say they deny there was an agreement, they do not raise an issue of fact by proof in admissible form to challenge the engagement letter signed by James Larkin, Co-Chairman for FSIG. Additionally, while they deny they

received invoices, they say nothing about the invoices provided which were sent to James Larkin, Co-Chairman Featherstone Investment Group, and make no mention of the email from James Larkin [jlarkin@featherstone.ig.com] sent to Aaron Wong. While general denials are sufficient to join issue for purposes of pleading, a response to a motion for summary judgment requires proof in admissible form sufficient to raise an issue of fact. Defendants fail to submit such proof.

This is not a motion for summary judgment in support of an account stated, despite the tenor of the response. Defendants rely on their claim that they received no invoices. The response states generally that Defendants deny receiving time sheets or Invoices from Plaintiff. However, Defendants do not dispute the address listed on the Invoices. Indeed, the response states that Defendants “orally notified Plaintiff that the invoices were excessive, were for work not authorized and for services not performed in a professional manner.” Defendants do not present any proof in admissible form as to this purported objection. The response does not state who purportedly objected to Plaintiff’s Invoices, or provide any further factual information as to when, where, or to whom the claimed objection was made.

Plaintiff has made a prima facie showing of a contract, its performance pursuant to the agreement, and Defendant’s failure to perform. In opposition, Defendants rely solely on conclusory statements contained in a “response” submitted by its attorney.

Accordingly, Defendants fail to present evidence in admissible form demonstrating that any question of fact remains requiring the trier of fact to determine the issue with respect to Plaintiff’s claim for breach of the Agreement as against FSIG, and summary judgment in favor of Plaintiff and as against FSIG on Plaintiff’s claim for breach of contract as against defendant FSIG is warranted.

With respect to that portion of Plaintiff’s motion seeking summary judgment as against Group and LP, however, Plaintiff fails to make a prima facie showing of entitlement to judgment as a matter of law on Plaintiff’s claims for breach of the Agreement as against these defendants. Defendants Group and LP are not named as parties to the Agreement, and Plaintiff does not present proof in admissible form demonstrating that Plaintiff performed services for these defendants pursuant to the Agreement. Accordingly, Plaintiff’s motion for summary judgment on Plaintiff’s claims for breach of the Agreement as against Featherstone Investment Group and Featherstone Investment LP is denied.

Turning now to Defendants' cross motion for summary judgment in favor of Defendants. As discussed above, defendants Group and LP are not named as parties to the Agreement. Defendants make a prima facie showing that Group and LP are not liable to Plaintiff under the Agreement. Indeed, the agreement itself states "You acknowledge and agree that Black Swan has been retained solely to act as an analyzer to FSIG as provided herein."

In opposition, Plaintiff fails to present proof in admissible form of any services provided specifically to Group or LP. Although Plaintiff submits an attorney affirmation stating that Defendants held themselves out to Plaintiff as a single entity known as "Featherstone Group of Companies", absent proof in admissible form that Plaintiff contracted with or provided services to Group, LP, or any entity known as "Featherstone Group of Companies", Plaintiff fails to show that these entities are obligated to Plaintiff under the Agreement.

Furthermore, the press release dated December 15, 2014, in which Defendants state that they are a single entity known as "Featherstone Investment Group" is also insufficient. The Agreement expressly states that it is an agreement between Plaintiff and FSIG, and expressly contemplates services rendered to FSIG. Accordingly, Defendants adequately demonstrate that summary judgment in favor of Featherstone Investment Group and Featherstone Investment LP is warranted.

Wherefore, it is hereby,

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

ORDERED that Plaintiff's motion for summary judgment is granted only to the extent that summary judgment is granted in favor of Plaintiff Black Swan LLC and against defendant Featherstone Investment Group LLC in the amount of \$45,500.00, with interest at the statutory rate (from 7/30/2014), as calculated by the Clerk and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendants' cross-motion is granted only to the extent that summary judgment is granted in favor of defendants Featherstone Investment Group and Featherstone Investment LP and Plaintiff's complaint is dismissed as to defendants Featherstone Investment Group and Featherstone Investment LP and the Clerk is directed to enter judgment accordingly.

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

DATED: March 3, 2015

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EILEEN A. RAKOWER, J.S.C.