Sofser Consulting, Inc. v G & A Restoration, Inc.
2015 NY Slip Op 30827(U)
May 15, 2015
Supreme Court, New York County
Docket Number: 650418/13
Judge: Paul Wooten
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

SOFSER CONSULTING, INC.,
Plaintiff,

-against-

G & A RESTORATION, INC.,
Defendant.

INDEX NO. 650418/13

MOTION SEQ. NO. 002

The following papers were read on this motion by defendant for leave to amend its answer and cross-motion by plaintiff for a trial preference.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ **Yes** ☐ **No**

Motion sequence numbers 002 and 003 are hereby consolidated for purposes of disposition.

In this commercial contract action, defendant G & A Restoration, Inc. (G&A) moves for leave to amend its answer, while plaintiff Sofser Consulting, Inc. (Sofser) cross-moves for a trial preference (collectively, motion sequence number 002). Also before the Court is a motion by G&A for summary judgment to dismiss the complaint (motion sequence number 003).

BACKGROUND

G&A is a construction company that was created and licensed in New York State (*see* notice of motion [motion sequence 002], exhibit A [complaint], ¶ 5). Sofser is a construction consulting company that was created and licensed in the State of Florida, although it has an office in, and does business in, New York (*id.*, ¶ 5). In its complaint, Sofser alleges that it executed a contract with G&A sometime in 2006 (the contract) under the terms of which Sofser

would:

> "a) locate construction projects appropriate for G&A; b) introduce G&A to potential customers; c) advise G&A on bidding for contracts; d) if necessary, interact with G&A's customers to ensure payment was made to G&A; e) draft, edit and deliver proposals for construction projects; f) apply and submit documentation to the New York City Department of Buildings [DOB]; g) assist and monitor projects on job sites; h) attend project meetings until project completion; ... i) perform foreman duties on certain projects ... [and ensure] compliance with scaffolding licensing requirements" (*see* notice of motion [motion sequence 002], exhibit A [complaint], ¶ 10, 12).

The Court notes that the parties have not annexed a copy of any contract to their moving papers, but claim that their contract was oral, and that they rely on deposition testimony as to its provisions. Sofser also alleges that it performed all of its duties under the contract, and that, in return, it received ten percent of the proceeds of all of the construction projects that it presented to G&A between 2006 and late 2012 (*id.*, ¶¶ 13-15). However, Sofser claims that G&A began to breach the contract in late 2012 in that G&A has refused several of its demands for payment, and that G&A has stated that it considers that the contract was "terminated" earlier (*id.*, ¶¶ 16-20).

Sofser was deposed on April 23, 2014 via its president, Sergio Natali (Natali), who stated that, after he had incorporated Sofser in Florida in 2008, he made a "verbal agreement" with the principal of G&A, whom he had known and worked with before, under which Sofser received 10% of any jobs involving customers that Sofser introduced to G&A (*see* notice of motion [motion sequence number 002], exhibit D at 65, 71, 83). Natali specifically stated that, in his capacity as the "only owner of Sofser," he performed a number of services for G&A, including locating appropriate jobs, putting together proposals, submitting permit applications to the DOB, acting as foreman and collecting money (*id.* at 65-66). Natali further alleged that he was made an "officer" of G&A, specifically its secretary/treasurer, in order that G&A could use his "rigger license" to obtain scaffold permits and do work that involved scaffolding (*id.* at 66-

71). Natali finally stated that his disagreement with G&A began in 2012 when he was told that he would not be paid a fee for any job on which G&A did not use his rigger's license on, and he responded that he was supposed to be paid for every job that involved a customer that he brought in (*id.* at 85-86).

G&A was deposed on April 22, 2014 via its owner, Giuseppe Giambrone (Giambrone), who stated that he incorporated G&A in 2005, and acknowledged having made an arrangement with Natali in 2008, but denied that there was ever a contract between Sofser and G&A (*see* notice of cross-motion [motion sequence 002], exhibit B at 21, 41-42, 109). Instead, Giambrone asserted that he brought Natali into his company so that G&A could make use of his rigger's license, since Giambrone didn't have one, and the process to obtain one was lengthy (*id.* at 31-34, 43-44). Giambrone also asserted that the payment arrangement between himself and Natali was informal, and that there was no set amount fixed that he was supposed to pay Sofser per job (*id.* at 43-46, 49-50). Giambrone denied that Natali ever came to work sites, obtained insurance or did any other work related to the jobs for which Sofser was paid, other than provide the use of his rigger's license (*id.* at 48-49, 63-65). Giambrone also denied that he had ever stopped paying Natali, but rather claimed that he merely stopped paying him for jobs on which Natali's rigger's license had not been used (*id.* at 52-53). Finally, when he was presented with copies of receipts for jobs for which Sofser is claiming a 10% commission, Giambrone asserted that some of the purchase orders were fabricated, and claimed that the work had never actually been done (*id.* at 109-112).

For its part, Sofser presents copies of the aforementioned purchase orders and invoices as well as copies of correspondence between its and G&A's respective counsel (*see* notice of motion [motion sequence 003], exhibits F-Q).

Sofser commenced this action on February 6, 2013 by the filing of a summons and complaint that sets forth causes of action for: 1) breach of contract; 2) unjust enrichment; 3)

quantum meruit; and 4) promissory estoppel (*see* notice of motion [motion sequence 002], exhibit A). On March 13, 2013, G&A served and filed an answer with affirmative defenses and counterclaims for: 1) overpayment of agreement recovered; 2) tortious interference with prospective economic affairs; 3) tortious interference with contract; 4) conversion; and 5) duress/recission (*id.*; exhibit B). G&A served its reply on March 27, 2013 (*id.*, exhibit C). Now before the Court are G&A's motion for leave to amend its answer to add two new affirmative defenses, and G&A's separate motion for summary judgment to dismiss the complaint. Also before the Court is a cross-motion brought by Sofser for a trial preference

DISCUSSION

Motion Sequence 002

The first branch of G&A's first motion seeks leave to amend its answer to include the affirmative defenses of: 1) lack of capacity to sue; and 2) violation of Business Corporations Law § 1312(a) (*see* notice of motion [motion sequence 002], Maimone affirmation, ¶ 1). Here, G&A argues that Sofser will not suffer any prejudice as a result of its proposed amendment, and that the reason it did not include these two affirmative defenses in its original answer is that it did not obtain documentary evidence to show that these defenses were viable until after the commencement of discovery (*see* notice of motion [motion sequence 002], Maimone affirmation, ¶¶ 9-60). Sofser responds that G&A waived its right to raise these affirmative defenses by failing to include them in either its answer or a pre-answer motion to dismiss (*see* plaintiff's memorandum of law at 7-8). G&A's reply papers restate its original argument (*see* Maimone reply affirmation, ¶¶ 1-41). After reviewing the controlling case law, the Court finds for Sofser on this issue.

Normally, "[i]t is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay," unless "the proposed pleading fails to state a cause of action. . . or is palpably insufficient as a matter of law" (*Davis & Davis v*

Morson, 286 AD2d 584, 585 [1st Dept 2001]). However, in *RCA Records v Wiener* (166 AD2d 221 [1st Dept 1990]), the Appellate Division, First Department, plainly held that:

> "A defense that a corporate plaintiff has failed to comply with the requirements of Business Corporation Law § 1312 is based on the premise that plaintiff is without legal capacity to sue, and this defense is waived unless raised either by motion to dismiss or in the responsive pleading" (166 AD2d at 221).

Sofser correctly notes that a party may not amend its answer to include a waived defense (*see* plaintiff's memorandum of law at 9-12; *see e.g. Addesso v Shemtob*, 70 NY2d 689 [1987]). G&A's papers fail to cite any authority or raise any colorable argument as to why no waiver took place here, as a matter of law. G&A was not required to substantiate Sofser's non-compliance with Business Corporation Law § 1312 in its answer; it merely had to allege it. G&A failed to do so. As a result, its two new proposed affirmative defenses (which allege essentially the same thing, i.e., lack of capacity to sue) are deemed waived. As a result, the Court finds that the first branch of G&A's first motion is denied.

The balance of G&A's first motion seeks a stay, pursuant to Business Corporation Law § 1312(a), until Sofser obtains the authorization to do business in New York. G&A cites the decision of this court (York, J.) in *Tars Uluslararasi Dis Ticaret Turizm ve Sanayi Ltd., Sirketi v Leonard* (8 Misc 3d 1004 [A], 2005 NY Slip Op 50919 [U] [Sup Ct, NY County 2005], *affd as mod* 26 AD3d 298 [1st Dept 2006]), for the proposition that Business Corporation Law § 1312 "does not deprive the Court of jurisdiction. . . [but rather] merely brings about a stay of the proceedings until authorization to do business is obtained" (8 Misc 3d 1004, *1). Sofser does not answer this argument in its reply papers. Normally, this might be deemed to constitute a concession of the point and acquiescence to the relief requested, however, for the reasons to be discussed below, the Court denies this branch of G&A's first motion as moot.

Sofser's cross-motion seeks a trial preference, pursuant to CPLR 3403, on the ground that Natali is 70 years of age. The statute specifically provides that:

> "(a) Preferred cases. Civil cases shall be tried in the order in which notes of issue have been filed, but the following shall be entitled to a preference:
>
> ***
>
> 4. in any action upon the application of a party who has reached the age of seventy years.
>
> ***
>
> (b) Obtaining preference. Unless the court otherwise orders, notice of a motion for preference shall be served with the note of issue by the party serving the note of issue, or ten days after such service by any other party; or thereafter during the pendency of the action upon the application of a party who reaches the age of seventy years, or who is terminally ill" (CPLR 3403).

G&A does not oppose this request in its reply papers. As above, this might normally be deemed to constitute a concession of the point and acquiescence to the relief requested. However, for the reasons to be discussed below, the Court denies Sofser's cross-motion as moot.

Motion Sequence 003

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Svc. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez*, 68 NY2d 320, 324 [1986]; *see also Scafe v Schindler El. Corp.*, 111 AD3d 556, 556 [1st Dept 2013]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]; CPLR 3212[b]). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st

Dept 2012]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d 941 [1957] [internal quotation marks omitted]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

Here, G&A argues that the complaint must be dismissed pursuant to General Obligations Law (GOL) § 5-701 because the contract between it and Sofser was never reduced to writing, and therefore violates the statute of frauds (*see* notice of motion (motion sequence number 003), Maimone affirmation, ¶¶ 8-35). G&A specifically refers to GOL § 5-701(a)(10), which provides, in part, that:

> "a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> 10. Is a contract to pay compensation for services rendered in negotiating... a business opportunity... . 'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This

> provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman" (GOL § 5-701[a][10]).

G&A then argues that the complaint and the uncontroverted deposition testimony state that Sofser's only service to G&A was to "procure customers and secure business opportunities" (*see* notice of motion [motion sequence 003], Maimone affirmation, ¶¶ 11-19). G&A thus concludes that the contract, which both parties admit was oral, fell outside the statute of frauds (*id.*, ¶¶ 20-27). Sofser responds that it "provided a wide range of services in exchange for the 10% contract fee to be paid by G&A," and that "rather than a finder's fee agreement, the parties' relationship was more a joint venture" (*see* plaintiff's memorandum of law at 15). Sofser particularly points to the quantity of contracts and receipts that it presented that show that it provided G&A with a "rigger's license" necessary to obtain scaffolding permits at a number of construction jobs that G&A performed (*id.*, ¶¶ 15-20). G&A replies that the rigger's license in question was held by Natali personally, not Sofser, alleges that it made payments to Sofser because Naftali did not want to be paid personally, and also alleges that it stopped using Natali's license after 2008 when Giambrone obtained his own "rigger's license" (*See* Maimone reply affirmation, ¶¶ 7-11). After considering the evidence at hand, the Court finds that G&A's motion for summary judgment is granted.

It is true, as G&A argues, that GOL § 5-701(a)(10) requires contracts "to pay compensation for services rendered in negotiating... a business opportunity" to be in writing. Here, it is certainly true that the contract was not in writing, and that it involved - at least in part - Natali presenting "business opportunities" to G&A for which he was paid in his corporate form; i.e., Sofser. This, alone, would provide sufficient grounds to dismiss the complaint, and the Court finds that the respective arguments and counter arguments herein, which all involve a factual inquiry into the nature of the relationship between the parties, are therefore not relevant.

The Court also notes that GOL § 5-701(a)(1) provides that the statute of frauds applies to any agreement that "[b]y its terms is not to be performed within one year from the making thereof." This statute has specifically been held to apply to agreements for "the rendition of services and payment of commissions over an indefinite period of time" (*Satra Ltd. v Coca-Cola Co.*, 247 AD2d 248, 249 [1st Dept 1998]). Here, the deposition testimony makes it clear that the contract between Sofser and G&A has an indefinite term of operation. Indeed, Giambrone denied that he has stopped making payments to Natali, but rather claimed that he has merely stopped paying him for jobs on which he did not use Natali's rigger's license (*see* notice of motion [motion sequence 003], exhibit B at 52-53). Natali similarly claimed that the arrangement was ongoing, and claims that his problem with G&A arose in 2012 when Giambrone ceased paying him for all of the construction jobs that he procured, and only paid him for the ones on which his rigger's license was used (*id.*; exhibit A at 85-86). Finally, the documentary evidence at hand clearly shows that G&A made payments to Sofser over a period of time from 2008 to 2012 (*id.*; exhibits Q-F). Under these circumstances, the Court concludes that the "contract" between Sofser and G&A was clearly not capable of being fully performed within one year, and that it is therefore subject to GOL § 5-701(a)(1). Because that contract is *not* in writing, it violates the statute, and, as a result, cannot be the subject of a breach of contract claim. This violation also serves to bar Sofser's causes of action for recovery under the equitable theories of quantum meruit and unjust enrichment (*see e.g. Snyder v Bronfman*, 13 NY3d 504 [2009]; *Rogoff v San Juan Racing Assn.*, 77 AD2d 831 [1st Dept 1980], *affd'* 54 NY2d 883 [1981]). Accordingly, the Court finds that G&A's motion is granted, and that Sofser's complaint is dismissed.

CONCLUSION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion of defendant G & A Restoration, Inc. (motion sequence 002) is denied; and it is further,

ORDERED that plaintiff Sofser Consulting, Inc.'s cross-motion pursuant to CPLR 3403 (motion sequence 002) is denied; and it is further,

ORDERED that defendant G & A Restoration, Inc.'s motion for summary judgment pursuant to CPLR 3212 (motion sequence 003) is granted and the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further,

ORDERED that counsel for defendant G & A Restoration, Inc. is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 5|15|15

PAUL WOOTEN J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

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