

Kyer v Ravena-Coeymans-Selkirk Cent. Sch. Dist.

2015 NY Slip Op 32719(U)

April 17, 2015

Supreme Court, Albany County

Docket Number: 4445-14

Judge: Kimberly A. O'Connor

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.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

m H

LISA KYER,
INDIVIDUALLY and doing business
as SCHOOL BUSINESS SERVICES,

Plaintiff,

DECISION AND ORDER

Index No.: 4445-14

RJI No.: 01-14-115225

-against-

RAVENA-COEYMANS-SELKIRK
CENTRAL SCHOOL DISTRICT,

Defendant.

Albany County Clerk
Document Number 11827494
Rcvd 05/04/2015 1:04:38 PM



(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES: SCHILLER & KNAPP, LLP
Attorneys for the Plaintiff
(Jaime B. Thomas, Esq., of Counsel)
950 New Loudon Road, Suite 109
Latham, New York 12110

SHAW, PERELSON, MAY & LAMBERT, LLP
Attorneys for Defendant
(Mark C. Rushfield, Esq., of Counsel)
21 Van Wagner Road
Poughkeepsie, New York 12603

O'CONNOR, J.:

Plaintiff Lisa Kyer, individually and doing business as School Business Service ("plaintiff"), commenced this action seeking to recover monies allegedly due and owing by defendant Ravena-Coeymans-Selkirk Central School District ("defendant" or "District") in connection with a service contract. The District has moved, pursuant to CPLR 3211(a)(1), (5), and (7), for an order dismissing

the complaint based upon a defense founded upon documentary evidence, as barred by the statute of limitations, and on the ground that the complaint fails to state a cause of action. Plaintiff opposes the motion, and cross moves, pursuant to CPLR 3212 and 3211(c), for an order granting summary judgment in her favor for the relief requested in the complaint. In the alternative, plaintiff seeks leave to amend her complaint and/or serve a late notice of claim. Defendant opposes the cross motion.

The facts as set forth in the record are as follows. On February 19, 2013, the District's Board of Education, upon the recommendation of the Superintendent of Schools, Dr. Alan McCartney ("Dr. McCartney"), approved a contract between the District and School Business Services ("SBS") "for researching the District's opportunities to receive additional Excess Cost Aid for the 2012-2013 school year and previous years up to 15% of whatever revenues are received," and authorized the Board's president to sign the contract. The Board's president executed the contract on February 21, 2013, and a signed copy was forwarded to the plaintiff on February 26, 2013.

Pursuant to the terms of the contract, SBS agreed to "review current and prior years financial and student records and interview appropriate staff in the District in order to claim additional special education aid," and the District agreed to compensate plaintiff a "contingent fee" of "15% of the increased revenue resulting from School Business Service's recommendations and actions." According to the contract, "[p]ayment to School Business Services is due when the increased revenue is realized by the District." The contract provides that 50% of the contingency fee is due "within 30 days of the aid appearing on the output reports" for 2012-2013, and that "[t]he remaining 50% will be due by June 15th, 2013." The contract further provides that "[f]or 2013-2014, payment is due by December 31, 2013."

By letter dated June 27, 2013 from the District's Business Administrator, Diane Malecki ("Malecki"), plaintiff was notified that SBS' contract with the District was being terminated, effective June 30, 2013, and that there "[would] be no review of the 2012-2013 school year information." In the letter, Malecki explained, among other things, that "[t]he information and calculations used by [SBS] were presented to . . . [the District's] Interim Superintendent, Dr. Alan McCartney on Monday June 24, 2013 by the [District's] Director of Special Education," and that "[t]hrough the Director's explanation and those of various knowledgeable individuals at State Aid Planning, Capital Region BOCES and Questar III BOCES, it was determined by Dr. McCartney that the information was inaccurate and excessively overstated the true costs involved for the students reviewed." The letter further stated that "[d]ue to the issues that arose from [SBS'] review, the District [would] not pay for the work done to-date (*sic*)."

On or about June 28, 2013, plaintiff invoiced the District for a "Special Education Aid Claim" in the amount of \$29,635.04. Plaintiff noted on the invoice that the "[f]ee is 15% of Additional Aid," that "[p]ayment is due within 30 day[s]," and that a "2% late fee will be assessed after 30 days." By letter dated July 15, 2013, Dr. McCartney advised the plaintiff that he had reviewed SBS' invoice seeking reimbursement for STAC (System to Track and Account for Children) costs it was claiming to have found, and that after speaking with his special education staff and based upon conversations with BOCES and SED, he "[would] not authorize payment for work [his] staff and others have already done."

In response, plaintiff wrote to Dr. McCartney on July 17, 2013, acknowledging receipt of his letter of July 15, 2013 and enclosing a revised invoice, dated July 16, 2013 and totaling \$65,677.05. In her letter, plaintiff asserted that the additional aid for the students in excess of \$85,000 "[was] a

direct result of the contract with School Business Services.” She further maintained that pursuant to the terms of the contract and a comparison of the District’s March 2013 and May 2013 output reports, “[t]he total amount due to School Business Service[s] is \$65,677.”¹ Plaintiff again noted on the revised invoice that the “[f]ee is 15% of Additional Aid,” that “[p]ayment is due within 30 day[s],” and that a “2% late fee will be assessed after 30 days.” It is undisputed that the District has never paid either of the invoices issued by the plaintiff.

On August 27, 2014, plaintiff commenced the instant action, asserting causes of action sounding in tort as well as causes of action for breach of contract and an account stated. Defendant’s motion, and plaintiff’s cross motion followed.

Pursuant to CPLR 3211(a)(7), “[a] party may move for judgment dismissing one or more causes of action asserted against [such party] on the ground that . . . the pleading fails to state a cause of action.” The scope of the Court’s review on a motion to dismiss pursuant to CPLR 3211 is limited (*see Cron v. Hargro Fabrics, Inc.*, 91 N.Y.2d 362, 366 [1998]). When examining such motion, the Court must liberally construe the pleadings in plaintiff’s favor, accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001]; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]; *Lazic v. Currier*, 69 A.D.3d 1213, 1213-1214 [3d Dep’t 2010]; *Berry v. Ambulance Serv. of Fulton County, Inc.*, 39 A.D.3d 1123, 1124 [3d Dep’t 2007]; *Valentino v. County of Tompkins*, 284 A.D.2d 898, 899 [3d Dep’t 2001]).

¹ Plaintiff noted in her letter that she had printed a base report on March 1, 2013, showing high cost aid of \$351,058, and that on May 31, 2013, aid was \$788,905, resulting in additional aid of \$437,847, which included the students in excess of \$85,000.

Even applying this liberal standard, the Court finds that the plaintiff has failed to state causes of action sounding in tort. “It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated” (*Clark Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 389 [1987], citing *Meyers v. Waverly Fabrics*, 65 N.Y.2d 75, 80 n. 2 [1985]; *North Shore Bottling Co. v. Schmidt & Sons*, 22 N.Y.2d 171, 179 [1968]; *Rich v. New York Cent. & Hudson Riv. R. R. Co.*, 87 N.Y. 382, 390 [1882]). Notably, “[t]his legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract” (*Clark Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d at 389). Here, the complaint does not allege a violation of a legal duty independent of the contract. Although plaintiff asserts that defendant’s failure to pay the \$65,677.05 invoice for services allegedly rendered by SBS pursuant to the parties’ service contract was “willful,” and constitutes “misconduct,” a “violation,” and/or “negligence,” “[m]erely . . . employing language familiar to tort law[] does not, without more, transform a simple breach of contract into a tort claim” (*id.* at 390; *see Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 551 [1992]). As such, plaintiff’s first and second causes of action are dismissed, pursuant to CPLR 3211(a)(7), for failure to state a cause of action.

The Court also dismisses plaintiff’s third and fourth cases of action for breach of contract and an account stated as time-barred, pursuant to CPLR 3211(a)(5). As relevant here, Education Law § 3813(2-b) provides, in pertinent part, that “no action or special proceeding shall be commenced against [a school district] . . . more than one year after the cause of action arose.” Generally, “a cause of action accrues and the statute of limitations begins to run in contract actions from the time of the breach, which occurs when the plaintiff possesses a legal right to demand payment” (*Albany*

Specialties, Inc. v. Shenendehowa Cent. Sch. Dist., 307 A.D.2d 514, 516 [3d Dep't 2003]; *see Hahn Auto. Warehouse, Inc. v. Am. Zurich Ins. Co.*, 18 N.Y.3d 765, 770-771 [2012]; *Kingsley Arms, Inc. v. Copake-Taconic Hills Cent. Sch. Dist.*, 9 A.D.3d 696, 698 [3d Dep't 2004]).

Under the terms of the parties' contract, plaintiff was entitled to full payment for the services she allegedly rendered in connection with the District's 2012-2013 increased aid, and for which she invoiced the District for \$65,677.05, on June 15, 2013. It was at that time that her breach of contract cause of action accrued, triggering the one-year statute of limitations set forth in Education Law § 3813(2-b). Since she did not commence this action until August 27, 2014, more than one year after her breach of contract cause of action accrued, that cause of action is dismissed as time-barred. Nevertheless, assuming, for the sake of argument, that plaintiff's cause of action for breach of contract accrued either on the date she issued the revised invoice (July 16, 2013), or 30 days thereafter when payment was due (August 15, 2013), plaintiff's breach of contract cause of action would still be time-barred.

A cause of action for an account stated² "accrues on the date of the last transaction in the account" *Elie Int'l, Inc. v. Macy's W. Inc.*, 106 A.D.3d 442, 443 [1st Dep't 2013]). In this case, the last transaction on the account, as set forth on SBS' revised invoice, was the "Additional Aid Per July 15, 2103 (*sic*) Public Excess Output Report \$437,847.00," for which plaintiff billed the District a 15% contingency fee of \$65,677.05 on July 16, 2013. Because the revised invoice establishes the balance claimed to be owed by the District to the plaintiff on the account, it is on the date of that invoice that the one-year statute of limitations provided for in Education Law § 3813(2-b) began to

² "[An] account stated . . . claim [is one] based on a contract implied in law" (*Stewart v. Stuart*, 262 A.D.2d 396, 396 [2d Dep't 1999] [internal quotation marks and citation omitted])

run (see *Hertzberg v. Sanchez, P.C. v. Friendship Dairies Inc.*, 14 Misc.3d 136(A) [Sup. Ct., App. Term, 9th & 10th Jud. Dists. 2007]; *Stewart R. Fink, PC v. Weiss*, 7 Misc.3d 138(A) [Sup. Ct., App. Term, 2d & 11th Jud. Dists. 2005]). As plaintiff did not commence this action within that one-year period, her cause of action for an account stated is also time-barred.

The Court rejects plaintiff's contention that the one-year statute of limitations on plaintiff's breach of contract and account stated causes of action began to run on September 24, 2013, when she purportedly filed her notice of claim with the District. Education Law § 3813(2-b) clearly and explicitly requires that an action against a school district be commenced within one year "after the cause of action arose." This is in contrast to Education Law § 3813(1), under which "[a] claim . . . is deemed to accrue when damages become ascertainable" (*Albany Specialties, Inc. v. Shenendehowa Cent. Sch. Dist.*, 307 A.D.2d at 516). Notably, "'claim accrued' is not the same as 'cause of action accrued'" (*Matter of Bader v. Bd. of Educ. of Lansingburgh Cent. Sch. Dist.*, 216 A.D.2d 708, 708 [3d Dep't 1995]), and "a claim under Education Law § 3813(1) may accrue at a different time than a breach of contract action may accrue" (*Albany Specialties, Inc. v. Shenendehowa Cent. Sch. Dist.*, *supra* at 516; *Matter of Bd. of Educ. of Union-Endicott Cent. Sch. Dist. v. New York State Pub. Empl. Relations Bd.*, 250 A.D.2d 82, 85 [3d Dep't 1998]; *Matter of Bader v. Bd. of Educ. of Lansingburgh Cent. Sch. Dist.*, 216 A.D.2d at 708).

Here, the law is clear that a breach of contract cause of action accrues when the plaintiff possesses a legal right to demand payment and that an account stated cause of action accrues on the date of the last transaction in the account. The record demonstrates that those dates were June 15, 2013 and July 16, 2013 respectively. The filing of plaintiff's notice of claim on September 24, 2013 neither tolled the statute of limitations nor began anew the time within which her action could be

brought (see *Matter of Barner v. Jeffersonville-Youngsville Cent. Sch. Dist.*, 117 A.D.2d 162, 166 n. 1 [3d Dep't 1986]; *Matter of Miller v. McGough*, 97 A.D.2d 416 [2d Dep't 1983]).

Equally unavailing is plaintiff's assertion that her causes of action accrued or continued to accrue through December 31, 2013, the date in the contract for the District to pay SBS' contingency fee for increased State aid to the District for the 2013-2014 school year. This argument appears to rely on an assertion that the payments to be made to SBS under the contract were installment payments, combining both the contingency fee for State aid increases for the 2012-2013 school year (due by June 15, 2013), and for the 2013-2014 school year (due by December 31, 2013). However, a reading of the plain language of the contract discloses no intent to treat the contingency fee for State aid increases for the 2012-2013 school year and for the 2013-2014 school year as installment payments. Further, plaintiff has made no claim for a contingency fee in connection with any increased State aid to the District for the 2013-2014 school year in her complaint, nor are there any allegations in the complaint that plaintiff invoiced the District and/or demanded payment of such contingency fee from the District. Moreover, even if the contract could be read as providing for installment payments, plaintiff's causes of action relating to the payment due by June 15, 2013 would still be barred by the statute of limitations (see *Vigilant Ins. Co. of Am. v. Hous. Auth. of City of El Paso, Texas*, 87 N.Y.2d 36, 45 [1995]; *Westchester County Correction Officers Benev. Ass'n, Inc. v. County of Westchester*, 65 A.D.3d 1226, 1228 [2d Dep't 2009]; *CSEA Employee Ben. Fund v. Warwick Valley Cent. Sch. Dist.*, 36 A.D.3d 582, 584 [2d Dep't 2007]).

Next, the Court is not persuaded by plaintiff's assertion that her causes of action for breach of contract and an account stated with respect to SBS' contingency fee for increased State aid to the District for the 2012-2013 school year did not accrue until December 31, 2013 because it was

impossible to determine the contingency fee until the 2013-2014 year and prior years could be compared. Even assuming, without deciding, that plaintiff's damages were incapable of being ascertained until December 31, 2013, such fact would not serve to toll the statute of limitations in these circumstances (*see Ely-Cruishank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 [1993]; *see Welwart v. Dataware Electronics Corp.*, 277 A.D.2d 372, 373 [2d Dep't 2000]). Finally, plaintiff cites no legal authority to support her contention that action by the District's Board of Education was required before the District's contract with SBS could be terminated, and that in the absence of such action, the contract continued until December 31, 2013 – the controlling date for statute of limitation purposes.

In light of the foregoing determination, plaintiff's cross motion is denied as moot. Any remaining arguments have been considered and found to be without merit, or need not be reached.

Accordingly, it is hereby

ORDERED, that District's motion to dismiss is granted; and it is further

ORDERED, that the complaint is dismissed.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being returned to the attorneys for the District. A copy of this Decision and Order together with all papers on the motion are being forwarded to the County Clerk for filing. The signing of this Decision and Order and delivery of a copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order.

SO ORDERED.

ENTER.

Dated: April 17, 2015
Albany, New York

Kimberly A. O'Connor

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

- 5-4-15*
1. Notice of Motion to Dismiss the Complaint, dated October 8, 2014; Affirmation of Counsel in Support of Motion to Dismiss Complaint (Mark C. Rushfield, Esq.), dated October 8, 2014; Affidavit in Support of Motion to Dismiss the Complaint (Dr. Alan R. McCartney, sworn to September 26, 2014; Exhibits A-F; Defendant's Memorandum of Law in Support of Motion to Dismiss the Complaint, dated October 8, 2014;
 2. Notice of Cross Motion, dated November 19, 2014; Affidavit of Lisa Keyer, sworn to November 18, 2014; Affidavit of Jamie B. Thomas, Esq., sworn to November 19, 2014; Plaintiff's Memorandum of Law, dated November 20, 2014;
 3. Reply Affirmation of Defendant's Counsel in Opposition to Plaintiff's Cross-Motion for Summary Judgment or in the Alternative for Leave to Amend the Complaint and/or to Service a Late Notice of Claim and Reply Affirmation of Defendant's Counsel in Further Support of Defendant's Motion to Dismiss the Complaint Pursuant to CPLR 3211(a)(1), (5) and (7) (Mark C. Rushfield, Esq.), dated December 19, 2014; Defendant's Answering and Reply Memorandum of Law, dated December 19, 2014; *and*
 4. Reply Affidavit of Jamie B. Thomas, Esq., sworn to January 5, 2015.

Albany County Clerk
Document Number 11827494
Rcvd 05/04/2015 1:04:38 PM

