

Brown v Pacifica Found.
2016 NY Slip Op 30505(U)
March 25, 2016
Supreme Court, New York County
Docket Number: 156457/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
STEPHEN M. BROWN,

Plaintiff,

- v -

PACIFICA FOUNDATION,

Defendant.
-----X

Index No.
156457/2015

**DECISION
and ORDER**

Mot. Seq. 1

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

Plaintiff, Stephen M. Brown (“Plaintiff” or “Brown”), commenced this action against defendant, Pacifica Foundation (“Defendant” or “Pacifica”) by the filing of a Summons and Complaint dated June 24, 2015 for breach of contract. Plaintiff claims that Defendant has breached the parties’ agreement by failing to pay Plaintiff’s legal fees incurred in defending the action captioned *Bernard White v. Pacifica Foundation and Stephen M. Brown*, 11-CV-2192 (PGG)(“the Underlying Action”) and/or failing to satisfy the retention owed by Pacifica under Pacifica’s insurance policy with Chartis, Policy No. 01-207-44-92 (“the Chartis Insurance Policy). In addition, Plaintiff brings a claim for breach of a loan agreement entered between Plaintiff and Defendant on May 16, 2011 (“Loan Agreement”). Plaintiff claims, pursuant to the Loan Agreement, Plaintiff loaned Pacifica \$30,000.00 and to date, Pacifica has failed to repay the loan in breach of the terms of the Loan Agreement.

Plaintiff now moves for summary judgment. Defendant does not oppose.

Plaintiff submits the attorney affirmation of Lee J. Mendelson, a member of the firm of Morritt Hock & Hamroff (“MHH”) in connection with the Underlying Action; the affidavit of Brown; Summons & Verified Complaint; Answer; Pacifica’s Amended and Restated Bylaws; Chartis Policy; and an email dated July 29, 2011 stating that Pacifica “has agreed to provide a defense to Mr. Steve

Brown” in the Underlying Action “as a person covered by our insurance policy with Chartis, as provided by the policy” and serves as “Pacifica’s assurance to Mr. Brown that it will provide reasonable defense costs rendered on his behalf by the firm of Hughes Hubbard & Reed, including the firm’s attorney fees at the rate approved by Chartis.” Plaintiff also submits the retainer agreement between Hughes Hubbard & Reed LLP (“HH&R”) and Brown; the decision granting Pacifica and Brown’s motion for summary judgment in the Underlying Action; Statement of Account from HH&R; and a Contract between Brown and Pacifica entered on May 16, 2011.

As averred by Brown in his affidavit, Pacifica is a California foundation that operates a network of not-for-profit radio stations in the United States. WBAI 99.5 FM is a radio station owned by Pacifica. Brown was a member of WBAI’s Local Station Board. As a member of the Board, he was a Delegate of Pacifica pursuant to Article 7 of Pacifica’s Amended and Restated Bylaws. As a Delegate and as a member of the Board, Pacifica’s Bylaws apply to him, including Article 11 of the Bylaws, “Indemnification of Directors, Officers, Delegates, Employees and Other Agents,” with respect to the legal fees and expenses he incurred in connection with the defense of the Underlying Action. Brown further states, that pursuant to Section 10 of Article 11 of the Bylaws, Pacifica purchased the Chartis Policy. Brown states that the Chartis Policy covered the claims asserted against him and Pacifica in the Action, subject only to the payment to Chartis of \$125,000.00 as Pacifica’s retention under the Chartis Policy.

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 Dept. 2009]).

Plaintiff has shown that Pacifica breached its agreement to indemnify Brown for the legal fees and expenses Brown incurred in defending himself in the Underlying Action. Plaintiff has made a prima facie showing of entitlement to summary judgment on his first cause of action against Pacific in which he seeks a judgment in the amount of \$90,220.00, representing the amount of money that Brown personally paid to HHR in order to satisfy the remainder due under the retention under the Chartis Insurance Policy that Pacifica failed to pay. Plaintiff has also made a prima facie showing of entitlement to summary judgment on his second cause of action for breach of contract in which he seeks a judgment in the amount of \$95,405.26, representing the legal fees Plaintiff incurred in order to defend himself and successfully advocate for his right to obtain his own counsel to afford him the coverage he was entitled to under the Chartis Insurance Policy. Plaintiff has also made a prima facie showing of entitlement to summary judgment on his third cause of action for additional attorneys' fees he has incurred in connection with the Underlying Action since April 27, 2015, pursuant to Section 3 of Article 11 of the Bylaws. In addition, Plaintiff has also made a prima facie showing of entitlement to summary judgment on his fourth cause of action for breach of the parties' Loan Agreement.

Pacifica does not oppose, and as such, fail to raise a triable issue of fact. Where the movant has established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be granted. (*See generally Access Capital v. DeCicco*, 302 A.D. 2d 48, 53-54 [1st Dept. 2002]).

Wherefore, it is hereby

ORDERED that Plaintiff's motion for summary judgment is granted without opposition; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff, Stephen M. Brown, and against defendant Pacifica Foundation, on the first cause of action in the Complaint in the amount of \$90,220.00 together with interest as prayed for allowable by law (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, 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 Clerk is directed to enter judgment in favor of plaintiff, Stephen M. Brown, and against defendant Pacifica Foundation, on the second cause of action of the Complaint in the amount of \$95,405.26 together with interest as prayed for allowable by law (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, 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 Clerk is directed to enter judgment in favor of plaintiff, Stephen M. Brown, and against defendant Pacifica Foundation, on the third cause of action and that the amount of reasonable attorneys' fees and costs is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendants, of the date of the hearing; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff, Stephen M. Brown, and against defendant Pacifica Foundation, on the fourth cause of action of the Complaint in the amount of \$30,000.00 together with interest as prayed for allowable by law (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

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

DATED: MARCH 25, 2016

MAR 25 2016


EILEEN A. RAKOWER, J.S.C.