

Construction Specifications Inc. v Gwathmey Siegel Kaufman & Assoc. Architects, LLC
2016 NY Slip Op 31463(U)
July 28, 2016
Supreme Court, New York County
Docket Number: 161583/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CONSTRUCTION SPECIFICATIONS INC.,

Plaintiff,

- v -

GWATHMEY SIEGEL KAUFMAN & ASSOCIATES
ARCHITECTS, LLC,

Defendant.

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

Index No.
161583/2015

**DECISION
and ORDER**

Mot. Seq. 001

Plaintiff Construction Specifications Inc. (“Plaintiff”) commenced this action for nonpayment of services (first cause of action of the Complaint) and account stated (second cause of action of the Complaint), seeking to recover \$31,405.75, plus interest, from defendant Gwathmey, Siegel, Kaufman & Associates Architects, LLC (“Gwathmey” or “Defendant”).

Plaintiff now moves for an order, pursuant to CPLR section 3212, granting summary judgment in favor of Plaintiff and awarding Plaintiff \$31,405.75. In support, Plaintiff submits the affidavit of Aaron Pine, Plaintiff’s Records Keeper, and the attorney affirmation of David J. Gold, Esq., annexing a copy of the Specification Consulting Services Agreement, dated February 1, 2012 (the “SCS Agreement”); copies of Plaintiff’s invoices and statement of account; a copy of the Summons and Verified Complaint; and the affidavit of service of the Summons and Verified Complaint on Gwathmey, dated December 3, 2015.

In his supporting affidavit, Pine states that Plaintiff and Defendant entered into the SCS Agreement on or about February 1, 2012. Pursuant to the SCS Agreement, Plaintiff was to perform certain services. Plaintiff claims that it provided the required services to Defendant from February 1, 2012, to January 4, 2013 pursuant to the parties’ SCS Agreement. Plaintiff states that “Defendant never complained about Plaintiff’s services nor objected to Plaintiff’s invoices and Statement of Account.”

Plaintiff claims that Defendant owes \$31,405.75, which is the sum of \$25,124.60 for open invoices and an additional \$6,281.15 for attorneys' fees. The cost for attorneys' fees represents 25% of the invoices. In requesting attorneys' fees, Plaintiff relies upon "Part 2 – Limitations" of the SCS Agreement, which provides: "The Architect shall make CSI whole in the event of any liability arising out of or relating to this Agreement."

In opposition, Defendant submits the attorney affirmation of Dwayne Shivnarain, Esq., the General Counsel of Gwathmey, and the affidavit of Monica Dejesus, the processor of vendor payments for Gwathmey. Attached to Dejesus affidavit are three checks that Defendant made payable to Plaintiff in the amounts of \$3,222.00, \$6,442.50, and \$1,932.90. Dejesus avers that she disputed Plaintiff's invoices and requested an accounting reconciliation.

In her affidavit, Dejesus contends that amounts Defendant paid to Plaintiff have not been credited and that the amount Plaintiff asserts it is owed does not represent what Defendant actually owes. Dejesus also states, "I also disputed whether Plaintiff was retained by Defendant to perform all the work that Plaintiff alleges it performed as there are no executed contracts for the work allegedly performed." Dejesus contends that she asked Plaintiff to provide executed contracts for the services it allegedly performed and proof of the allegedly performed work, i.e., the written specifications for the projects. Dejesus contends that Plaintiff never furnished these materials. Dejesus also states, "Defendant recognizes that Plaintiff did perform some services on Defendant's behalf ... [h]owever, Defendant does not know exactly what Plaintiff was asked to do or what it actually did as no contracts were executed."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. *Esteva v. City of New York*, 30 A.D.3d 212, 213 (1st Dept. 2006). That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. *Epstein, Levinsohn, Bodine, Hurwitz & Weinstein, LLP v. Shakedown Records, Ltd.*, 8 A.D.3d 34, 35 (1st Dept. 2004) (citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985)). 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. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). The affirmation of counsel alone is not sufficient to satisfy this requirement. *Id.* at 563. In addition, "bald, conclusory allegations, even if believable, are not enough." *Ehrlich v. Am. Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 259 (1970).

An account stated is “an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other.” *Shea & Gould v. Burr*, 194 A.D.2d 369, 370 (1993) (internal citation removed). To establish a cause of action for account stated, the plaintiff must show that the parties agreed upon the account balanced and rendered, and that the defendant did not object to the account stated within a reasonable time, resulting in the defendant’s express or implied promise to pay the balance. *Interman Industrial Products, Ltd. v. R.S.M. Electron Power, Inc.*, 37 N.Y.2d 151, 153–54 (1975). An agreement may be implied if the defendant makes partial payments reducing the balance of the account. *See, e.g., Cook & Associates Realty, Inc. v. Chestnutt*, 65 A.D.3d 937, 938–39 (1st Dept. 2009) (client’s partial payments on brokerage firm’s invoices warranted recovery on account stated); *Parker, Chapin, Flattau & Klimpl v. Daelen Corp.*, 59 A.D.2d 375, 378 (1st Dept. 1977) (where defendant made partial payment of account, such payment constituted an acknowledgment of the validity of the bill, thereby establishing it as an account stated). However, “[t]here can be no account stated where no account was presented or where any dispute about the account is shown to have existed.” *Abbott, Duncan & Wiener v. Ragusa*, 214 A.D.2d 412, 413 (1st Dept. 1995).

Here, Plaintiff has demonstrated that it rendered invoices covering services performed and that Defendant received invoices for such services. Defendant has not denied that it entered into an Agreement with Plaintiff, that Plaintiff provided the services, that Defendant received the Plaintiff’s invoices and account statements, and that a balance was due. Moreover, there is no indication that Defendant objected to Plaintiff’s statement of account within a reasonable period of time. Although Dejesus states in her affidavit, “I disputed Plaintiff’s invoices and requested an accounting reconciliation[,]” Dejesus does not provide any detail as to how, when, and to whom the objections to the invoices were made. *See Shea & Gould*, 194 A.D.2d at 370–71 (finding that defendants’ allegations of protest were “merely conclusory” and “failed to relate when and to whom the alleged telephone calls were made or to specify the substance of the alleged conversations”).

Defendant submits photos of checks evincing partial payments toward the account. Defendant submits proof that it wrote three checks to Plaintiff in the amounts of \$1,932.90, \$6,442.50, and \$3,222.00, dated March 22, 2013, November 9, 2012, and September 20, 2012, respectively. In the reply papers, Plaintiff submits invoices dated October 4, 2012 and December 7, 2012, in addition to an account statement of “all transactions” dated October 17, 2013, which purportedly

demonstrate that Defendant's payments were credited. It appears that the amounts of \$6,442.50 and \$1,932.90 were credited; however, it is not demonstrated that Plaintiff credited Defendant's check for \$3,222.00, dated September 20, 2012. Indeed, the opposition shows that check was negotiated September 26, 2012, and deposited into Bank of America account ending in #5637.

With respect to Plaintiff's request for attorneys' fees, which Plaintiff bases upon "Part 2 – Limitations" of the unsigned SCS Agreement, it is not "unmistakably clear" from the contract that the parties intended to provide for reimbursement of attorneys' fees. *See, e.g., Colonial Sur. Co. v. Genesee Valley Nurseries, Inc.*, 94 A.D.3d 1422, 1423 (4th Dept. 2012) ("A party may not recover attorneys' fees arising from litigation with the other party to a contract unless an intent to provide for such reimbursement is unmistakably clear from the language of the promise.").

Wherefore, it is hereby

ORDERED that Plaintiff's motion for summary judgment is granted; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff and against defendant, Gwathmey, Siegel, Kaufman & Associates Architects, LLC, in the amount of \$21,902.60 together with interest prayed as allowable by law (at the rate of 9% per annum from January 4, 2013) 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.

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

DATED: JULY 28, 2016

JUL 28 2016



EILEEN A. RAKOWER, J.S.C.