Leggette, Brashears & Graham, Inc. v Gemini Arts Initiative, Inc.
2017 NY Slip Op 30311(U)
February 17, 2017
Supreme Court, Kings County
Docket Number: 503877/16
Judge: Lawrence S. Knipel

At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of February, 2017.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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LEGGETTE, BRASHEARS & GRAHAM, INC.,

Plaintiff,

- against -

GEMINI ARTS INITIATIVE, INC.,
BRT POWERHOUSE LLC,
JOSHUA RECHNITZ, and
JOHN DOE #1 through JOHN DOE #100, et al.,

Defendants.

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DECISION AND ORDER

Index No. 503877/16

Mot. Seq. No. 3

The following e-filed papers read herein: NYSCEF#:

Notice of Motion, Affirmation, and Exhibits Annexed _____ 63-74 _____

Affirmation in Opposition, Memorandum of Law, and Exhibits Annexed _____ 76, 77-86 _____

Plaintiff Leggette, Brashears & Graham, Inc. (plaintiff) moves for an order (1) pursuant to CPLR 5015 (a) (1) and 2005, vacating an order on default, dated July 29, 2016, which, inter alia, granted the pre-answer motion of defendants Gemini Arts Initiative, Inc. (Gemini) and BRT Powerhouse LLC (BRT) to dismiss the complaint, pursuant to CPLR 3211 (a); and (2) upon vacatur of said order, denying said motion insofar as it relates to defendants Gemini and BRT (collectively, defendants).

Background

BRT is the owner of a polluted site abutting the Gowanus Canal in Brooklyn (the BRT site). Gemini is the developer of the BRT site. Both BRT and Gemini are owned by Joshua Rechnitz (Rechnitz). Plaintiff is a firm of professionals experienced in groundwater and environmental engineering. Plaintiff sent Gemini a proposal, dated Sept. 11, 2013 (the Proposal Agreement), to provide services on the BRT site. Rechnitz initialed the first page of the Proposal Agreement to indicate Gemini's acceptance. The Proposal Agreement stated that the cost estimate for plaintiff's services to Gemini was prepared based on the assumed project duration of three weeks; in other words, that the cost estimate was subject to change if Gemini required further services from plaintiff after the expiration of the three weeks. In that regard, the Proposal Agreement contemplated that plaintiff would submit invoices for services and expenses to Gemini "on a monthly basis."

In May 2014 (the exact date does not appear in the contract), Gemini hired nonparty PAL Environmental Services Inc. to perform remediation work on the BRT site (the PAL Contract). Although plaintiff was not a signatory to the PAL Contract, plaintiff was designated therein as "Project Manager. The PAL Contract provided, in relevant part (in art. II, § 7), that:

> "The Work [under the PAL contract] shall commence on or before May 27, 2014 and shall be completed by [so in the original] as soon as reasonably possible. [PAL] will work with [Gemini], [Gemini's] Representative and the Project Manager [*i.e.*, plaintiff] to receive from the [New York State Department of Environmental Conservation] a Certificate of Completion

> before December 15, 2015 *by completing the work before November 1, 2014. . .*" (emphasis added).

Notwithstanding the Nov. 1, 2014 completion date in the PAL contract, plaintiff continued to perform services for Gemini on the BRT site in 2015. To memorialize their continued relationship, the parties prepared a Services Agreement, dated June 10, 2015, between plaintiff as the professional and Gemini as the client (the Services Agreement). Plaintiff executed and delivered the Services Agreement to Gemini, but Gemini, for reasons undisclosed by the record, failed to execute it. The extensive email correspondence between the parties reflects that they meticulously negotiated the terms of the Services Agreement, that plaintiff made numerous changes to the draft to accommodate Gemini, and that Gemini was ready to sign it when it was presented to it in final form. The Services Agreement, although unexecuted by Gemini, contains an important provision regarding the parties' right of termination. This provision, which is relevant at this stage of litigation, states (in § 4.2) that:

> "Client [*i.e.*, Gemini] may terminate this Services Agreement for any reason and no reason, upon 5 days prior written notice of any outstanding sums due LBG [plaintiff] hereunder. LBG may terminate this Services Agreement upon 5 days prior written notice in the event they are not paid any sum due hereunder within 60 days of invoicing."

Thereafter, a payment dispute arose between plaintiff and Gemini. Plaintiff claims that Gemini owes it approximately $300,000 in the unpaid invoices (the amount owed). In March 2016, plaintiff brought an action against, as relevant herein, Gemini (the client) and

BRT (the site owner) seeking to recover from them the amount owed. Plaintiff's complaint, as relevant herein, asserts four causes of action against both defendants: (1) breach of contract, (2) quantum meruit, (3) unjust enrichment, and (4) account stated. Plaintiff's complaint also states an additional (fifth) cause of action against BRT for foreclosure of a mechanic's lien. To that end, plaintiff filed a mechanic's lien against the BRT site and served it on BRT at 126 West 74th Street, Penthouse B, New York, NY 10023 – the address which appeared both on the deed by which BRT acquired the property from the prior owner and on invoice No. 201311561 from plaintiff to BRT, dated Nov. 27, 2013.

Pre-answer, both defendants (Gemini and BRT) moved, pursuant to CPLR 3211 (a), to dismiss the complaint insofar as asserted against them. Plaintiff responded by serving and filing a written opposition to defendant's motion. Plaintiff's counsel, however, failed to appear at oral argument on defendant's motion. By order, dated July 29, 2016 (the prior order), defendants' motion to dismiss was granted on default. On Aug. 22, 2016, plaintiff moved to vacate the prior order and, upon vacatur, to deny defendants' "extant motion" to dismiss.[1] Defendants opposed. On Sept. 23, 2016, the Court heard oral argument on plaintiff's motion and reserved decision.

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[1] The original motion to dismiss sought to dismiss all claims against all defendants. Subsequently, plaintiff has discontinued all causes of action against defendant Joshua Rechnitz and the fifth cause of action for foreclosure of a mechanic's lien against defendant Gemini. The "extant motion," therefore, seeks dismissal of the first, second, third, and fourth causes of action against defendants Gemini and BRT, as well as dismissal of the fifth cause of action against defendant BRT.

Discussion

Vacatur of the Prior Order

A party seeking to vacate an order entered upon his or her failure to appear at oral argument to oppose a motion is required to demonstrate both a reasonable excuse for the default and the existence of a potentially meritorious opposition to the motion (*see Lyubomirsky v Lubov Arulin, PLLC*, 125 AD3d 614 [2d Dept 2015]). "The determination whether to vacate a default is generally left to the sound discretion of the motion court, and will not be disturbed if the record supports such determination" (*White v Incorporated Village of Hempstead*, 41 AD3d 709, 710 [2d Dept 2007]).

Plaintiff's excuse of law office failure was reasonable (*see* CPLR 2005). Moreover, there is no evidence that plaintiff intended to abandon the action, that its default was willful, or that defendants were prejudiced. In addition, plaintiff has established that it has a meritorious cause of action, warranting an adjudication of the extant motion on the merits. Accordingly, the prior order is vacated (*see Lyubomirsky*, 125 AD3d at 615; *Lu v Saia*, 123 AD3d 813, 814 [2d Dept 2014]).

Courts have authority to impose "costs in the form of reimbursement for actual expenses reasonably incurred . . . upon any attorney who, without good cause, fails to appear at a time and place scheduled for an action . . . to be heard before a designated court" (22 NYCRR 130-2.1 [a]; *Zanker-Nichols v United Refining Co.*, 127 AD3d 1347 [3d Dept 2015]). Although plaintiff's counsel failed to appear at oral argument on defendant's motion

to dismiss, this Court does not find that, under all of the attendant circumstances, sanctions are warranted under the guidelines of 22 NYCRR 130-2.1 (b) (*see Matter of Jasmine Rose M.*, 277 AD2d 384 [2d Dept 2000]; *Washington Temple Church of God in Christ, Inc. v Global Props. & Assoc., Inc.*, 43 Misc 3d 1216[A], 2014 NY Slip Op 50666[U], *6 [Sup Ct, Kings County 2014] [Schmidt, J.])

Disposition of Defendants' Extant Motion to Dismiss

Plaintiff's First, Second, Third, and Fourth Causes of Action Against Gemini

Starting with plaintiff's first cause of action for breach of contract against Gemini, the Court finds that there exist triable issues of material fact regarding, inter alia, whether and when the parties reached an agreement and whether there are documents in Gemini's possession which may constitute a memorandum in satisfaction of the writing requirements of the General Obligations Law. Plaintiff has not had the opportunity to conduct discovery. That being so, dismissal of plaintiff's first cause of action for breach of contract against Gemini is improper (*see Zolin v Roslyn Synagogue*, 154 AD2d 369, 369 [2d Dept 1989]).

Gemini's argument that the unexecuted Services Agreement cannot satisfy the Statute of Frauds is unavailing. It is true that Subdivision 1 of General Obligations Law § 5-701 (a) renders unenforceable any agreement which "*[b]y its terms* is not to be performed within one year from the making thereof" (emphasis added). Here, the Services Agreement establishes that it could have been performed within one year because it could be terminated at any time, including within one year, by either party. Therefore, the Statute of Frauds is not a bar to the

enforceability of the Services Agreement (see *Davis & Davis v S&T World Products*, 217 AD2d 645 [2d Dept 1995], *lv denied* 87 NY2d 808 [1996]; *see also Zupan v Blumberg*, 2 NY2d 547, 550 [1957]).

Moreover, the complaint adequately states causes of action sounding in quasi contract, under the theories of unjust enrichment and quantum meruit (second and third causes of action, respectively) against Gemini. "Where, as here, there is a bona-fide dispute as to the existence of a contract, or where the contract does not cover the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as contract, and will not be required to elect his or her remedies" (*Zuccarini v Ziff-Davis Media, Inc.*, 306 AD2d 404, 405 [2d Dept 2003]; *see also Moshan v PMB, LLC*, 141 AD3d 496, 497 [1st Dept 2016]).

With respect to the fourth cause of action for account stated against Gemini, the Court notes the general rule that:

> "An account stated is an agreement between parties, based upon their prior transactions, with respect to the correctness of the account items and the specific balance due. Although an account stated may be based on an express agreement between the parties as to the amount due, *an agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account.* The agreement at the core of an account stated is independent of the underlying obligation between the parties."

(*Bashian & Farber, LLP v Syms*, 2017 NY Slip Op 00621 [2d Dept 2017] [internal citations omitted and internal quotation marks omitted; emphasis added]).

Here, plaintiff's complaint sufficiently pleads an "account stated" cause of action against Gemini. This cause of action alleges that plaintiff invoiced Gemini for services

performed, that Gemini made a partial payment of plaintiff's invoices, that Gemini accepted and retained all of plaintiff's invoices without objection, and that Gemini failed to pay the balance due. In sum, the branch of defendants' motion for dismissal of first, second, third, and fourth causes of action against Gemini is denied.

Plaintiff's First, Second, Third, Fourth, and Fifth Causes of Action Against BRT

It is undisputed that BRT was not a party either to the Proposal Agreement or to the Services Agreement. Thus, the branch of defendants' extant motion for dismissal of the first, second, third, and fourth causes of action against BRT is granted.

As to the fifth cause of action for foreclosure of a mechanic's lien, BRT argues that the address at which plaintiff served it – 126 West 74th Street, Penthouse B, New York, NY 10023 – is incorrect. According to BRT (at page 15 of its memorandum of law), "as [plaintiff] knows – and as the unsigned, draft contract between [plaintiff] and [BRT] [*i.e.*, the Services Agreement] states – [BRT's] last known place of business was 98 Fourth Street, Suite 406, Brooklyn, NY 11231." However, plaintiff's Services Agreement was with Gemini, not with BRT. Gemini's address is not the same as BRT's address. As noted above, the deed of the site to BRT, as well as plaintiff's invoice No. 201311561, dated Nov. 27, 2013, to BRT, both referred to BRT's address at 126 West 74th Street. Accordingly, the remaining branch of defendants' extant motion for dismissal of plaintiff's fifth cause of action for foreclosure of a mechanic's lien against BRT is denied.

Conclusion

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion to vacate the Court's July 29, 2016 order entered on default is granted, and such order is hereby vacated without costs or disbursements; and it is further

ORDERED that the remaining branch which is for an order denying defendants' extant motion to dismiss the complaint is decided as follows:

The branch of defendants' extant motion which is to dismiss the first, second, third, and fourth causes of action against defendant Gemini is *denied*;

The remaining branch of defendants' extant motion which is to dismiss the complaint against defendant BRT is granted to the extent that the first, second, third, and fourth causes of action against defendant BRT is *granted*; and the remaining branch of such motion is denied; and it is further

ORDERED that, for the avoidance of doubt, the first, second, third, and fourth causes of action shall *survive and continue* against defendant Gemini, and the fifth cause of action shall *survive and continue* against defendant BRT; and it is further

ORDERED defendants Gemini and BRT shall answer the extant portions of the complaint within ten (10) days after service of a copy of this decision and order with notice of entry on their counsel.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,

J. S. C.

HON. LAWRENCE KNIPEL