

Ramax Search, Inc. v RD Legal Funding, LLC

2017 NY Slip Op 31972(U)

September 11, 2017

Supreme Court, New York County

Docket Number: 160848/2016

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DAVID BENJAMIN COHEN
Justice

PART 58

-----X
RAMAX SEARCH, INC.
Plaintiff,

INDEX NO. 160848/2016

MOTION DATE 2/27/2017

MOTION SEQ. NO. 001

- v -

RD LEGAL FUNDING, LLC,
Defendant.

DECISION AND ORDER

-----X
The following e-filed documents, listed by NYSCEF document number 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this application to/for Judgment - Summary

Upon the foregoing documents, it is

Decided that plaintiff's motion for summary judgment is granted. Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v. Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v. Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [*Alvarez v. Prospect Hosp.*, 68 NY2d 320 324 [1986]]. The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case

(*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Here, plaintiff seeks summary judgment on two causes of action, breach of contract and accounts stated. Under New York law, “[t]he elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, (4) resulting damage” (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 [1st Dept 2007]). To grant summary judgment based on accounts stated, plaintiff's *prima facie* burden is to prove that it sent defendant invoices, and that defendant failed to object to them within a reasonable time (*Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc.*, 37 NY2d 151 [1975]; *Rockefeller Group, Inc. v. Edwards & Hjorth*, 164 AD2d 830 [1st Dept 1990]). Even if defendant did not expressly assent, it would be bound by them as accounts stated unless fraud, mistake or other equitable considerations were shown (*Rosenman Colin Freund Lewis & Cohen v. Neuman*, 93 AD2d 745 [1st Dept 1983]). “It has been held that an account stated ‘is an account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance’ (*Volkening v De Graaf*, 81 NY 268, 270 [1880]).

Here, through the affidavit of Peter Tannenbaum and through the documents and emails submitted in support of this motion, plaintiff has established its *prima facie* burden that it and defendant had an agreement for plaintiff to provide services to defendant in exchange for a 30% fee if successful; that plaintiff introduced a successful candidate; and that defendant failed to pay its entire obligation. Plaintiff has also established through the above evidence that it submitted

an invoice to defendant, that defendant acknowledged the invoice without protest and in fact promised on multiple occasions to pay.

Having shifted the burden for summary judgment to defendant, defendant opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial. Defendant submitted the affidavit of Ronnie Dersovitz, the managing member of defendant. In the affidavit, Mr. Dersovitz does not dispute much of the facts as stated by plaintiff. He does not deny having communication with plaintiff, having his secretary print out the agreement for his signature, the benefit of the services provided by plaintiff, receiving the invoice without protest and even promising to pay the invoice. Instead, he simply states that the parties never entered into a written agreement and that the final terms were not finalized. However, this type of agreement did not require a written agreement and the final terms were clearly stated in the letter that Mr. Dersovitz had his secretary print out for him. In any event, Mr. Dersovitz expressly asked for wiring instructions and promised payment. Therefore, summary judgement is granted in favor of plaintiff. It is therefore

ORDERED, that summary judgment is granted to plaintiff on the first two causes of action in the amount of \$125,000, plus interest, costs and disbursements; and it is further

ORDERED, that the third cause of action for an award of reasonable attorney's fees is granted as against defendant and the claim for fees is severed. An inquest/trial is granted to determine the amount of fees to be awarded. Plaintiff shall cause the matter to be placed upon the calendar for such trial. Plaintiff shall, within 20 days from the date of this order, serve a copy of this order upon (counsel for) all parties hereto by regular mail and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause

the matter to be placed upon the calendar for such trial.

This constitutes the decision and order of the Court.

9/11/2017
DATE


DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE