

Trinet HR Corp. v Galvani

2018 NY Slip Op 31498(U)

June 15, 2018

Supreme Court, Queens County

Docket Number: 711706/17

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

 TRINET HR CORPORATION,

Index No. 711706/17

Plaintiff,

Motion

Date March 1, 2018

- against-

 GREGORY GALVANI DBA ROTHSCHILD
LIEBERMAN LLC,

Motion

Cal. No. 221

Defendant.

Motion

Seq. No. 1

The following papers read on this motion by plaintiff, TriNet HR Corporation, for an order granting summary judgment in its favor against defendant, Gregory Galvanic DBA Rothschild Lieberman LLC, on the grounds that there is no defense to the cause of action alleged in the complaint. Defendant, Gregory Galvani, cross-moves for an order granting summary judgment dismissing the complaint and directing plaintiff to pay defendant's legal fees to oppose this action.

Papers
Numbered

Amended Notice of Motion - Affirmation - Exhibits.....	EF 29, 6-13
Notice of Cross Motion - Affirmation - Exhibits.....	EF 15-26
Reply Affirmation.....	EF 27-28

Upon the foregoing papers, the motion and cross motion are determined as follows:

Plaintiff, TriNet HR Corporation ("TriNet"), commenced the within action on August 24, 2017, and alleges in its first cause of action that at the defendant's request, it rendered services to the defendant at an agreed and reasonable price upon which there remains a balance due and owing of \$41,897.22. The second cause of action for an account stated alleges that it rendered to defendant full, just and true accounts of the indebtedness due and owing as a result of said transaction, for the sum of \$41,897.22, and that said statements were delivered to and retained by the defendant without objection. The third cause of action for breach of contract alleges that the parties entered into a contract, for which there is a balance due and owing in the sum of \$41,897.22.

Defendant, Gregory Galvani, served a verified answer and interposed nine affirmative defenses.

On a motion for summary judgment, the movant bears the initial burden of establishing, *prima facie*, entitlement to judgment as a matter of law, offering sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324[1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* showing has been made, however, “the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d at 557; CPLR 3212[b]).

Plaintiff’s counsel asserts that Rothschild Lieberman LLC is not registered in the State of New York, and therefore defendant, Galvani, is doing business as Rothschild Lieberman LLC and is solely liable for the balance due of \$41,897.22. In support of the motion plaintiff submits an affidavit AR Collections Supervisor Keith Lawrence, who states that he is “a representative” and “custodian of records” of the plaintiff and that he has reviewed the plaintiff’s relevant business records.

Plaintiff has submitted a copy of TriNet’s service agreement dated March 9, 2016, with a customer whose legal name and “d/b/a, if any,” is stated as Rothschild Lieberman LLC, with a “headquarters” address of 1 Whitehall Street, New York, New York 10004. Pursuant to said agreement TriNet was to commence providing services to the customer on the first payroll period commencing March 16, 2016 and ending on March 31, 2016; the first payroll check date is March 31, 2016; and benefits would start on March 16, 2016. The subject service agreement was signed on March 9, 2016 by Gregory T. Galvani, who stated that his title is that of Comptroller, and on March 11, 2016 by Jim Blackie, VP on behalf of TriNet. The printed agreement provides for a Customer Setup Site Contact and Customer Security Contact, and the handwritten portion names Gregory Galvani as said Customer Contacts.

In addition, plaintiff submits a copy of a TriNet Services Requisition Form Addendum, dated March 10, 2016, containing additional terms and/or clarifications regarding the March 9, 2010 agreement between TriNet and Rothschild Lieberman LLC, that was signed by Gregory T. Galvani, Comptroller and Jim Blake, VP. Said form is addressed to Rothschild Lieberman LLC, Attention: Gregory Galvani.

Plaintiff also submits a copy of a TriNet Passport Electronic Funds Transfer Agreement, which names Rothschild Lieberman LLC as the Customer; Gregory T. Galvani, as the Customer Contract, and was signed on March 9, 2016, by Gregory T. Galvani, with the title of Comptroller. A separate document sets forth the name of the customer’s bank, states that the

customer is Rothschild Lieberman, and was signed by Gregory T. Galvani, with the title of Comptroller. A copy of a blank check with the word VOID written from Rothschild Lieberman LLC checking account was also submitted by plaintiff.

The copies of TriNet's invoices and its invoice supporting registers submitted by plaintiff identify TriNet's customer as Rothschild Lieberman LLC. Mr. Galvani's name does not appear on said invoices and invoice supporting registers. Plaintiff also submits copies of collection letters sent by its counsel to Rothschild Lieberman LLC, and to Mr. Galvani.

Defendant, in opposition, and in support of his cross motion, states in his affidavit that he was hired on February 6, 2015, by Rothschild Lieberman LLC, as a "Broker Trainee," at which time he was an independent contractor. He states that in January 2010, he was promoted to Comptroller and became a full time employee of Rothschild Lieberman LLC. Mr. Galvani states that Rothschild Lieberman LLC operated as a broker-dealer registered with the Securities and Exchange Commission (SEC), pursuant to Section 15 of the Securities Exchange Act, and as a member of the Financial Industry Regulatory Authority (FINRA), and has approximately 10 employees. He states that on February 11, 2016, the members of the limited liability had a meeting, and as a result of a board resolution, it was agreed that three vendors, including the plaintiff would be contacted. Mr. Galvani states that as the Comptroller he was directed to contact TriNet on behalf of the LLC; that he was never asked to, nor did he personally guaranty the agreement with Trivet; that he signed the agreement on behalf of the LLC as its comptroller; and that he was not a member of the LLC.

Defendant has submitted various documents from his employer pertaining to his initial hiring agreement in February 2015, and a copy of the February 11, 2016, Board resolution regarding contracts to be signed by "the appropriate employees."

Defendant's counsel asserts that Rothschild Lieberman LLC was a New York limited liability company, conducting business in New York State. Counsel has submitted documentary evidence pertaining to Rothschild Lieberman's registration with the SEC and membership in FINRA. Counsel has also submitted documentary evidence demonstrating that on December 8, 2016, plaintiff commenced an action in Supreme Court New York County against Rothschild Lieberman LLC to recover damages for breach of contract, and that it served said defendant by serving the Secretary of State, as well as the defendant's purported registered agent, and that copies of the pleading and supporting documents were sent by certified mail, return receipt requested, to Rothschild Lieberman LLC at an address in Greenwich, Connecticut. Said action was voluntarily discontinued, without prejudice, on June 22, 2017. TriNet was represented by the same counsel in the New York County action and the within action.

This court finds that the plaintiff's evidence is insufficient to establish, *prima facie*, its entitlement to summary judgment on any of its causes of action. A New York limited liability company is required to file its initial articles of organization with the Department of State (LLCL §209). To the extent that Rothschild Lieberman LLC may be a New York entity, the

failure to file as a limited liability company with the Department of State would not negate its existence as a business entity, such as an unincorporated partnership or joint venture. Plaintiff has not submitted any evidence which establishes that defendant, Galvani, has operated a business under the trade name of Rothschild Lieberman LLC.

To the extent that Rothschild Lieberman LLC may be a foreign limited liability company doing business in New York and failed to obtain a certificate of authority to do business in this state, this would not impair the validity of any contract or act of the foreign limited liability company, or prevent it from defending any action or special proceeding in any court in New York (LLCL §808 [b]). Further, a “member, manager or agent of a foreign limited liability company is not liable for the contractual obligations or other liabilities of the foreign limited liability company solely by reason of the limited liability company’s doing or having done business in this state without having received a certificate of authority” (LLCL §808 [c]).

It is well-settled that “[a]n agent who signs an agreement on behalf of a disclosed principal will not be held liable for its performance unless the agent clearly and explicitly intended to substitute his personal liability for that of his principal” (*Yellow Book of N.Y., Inc. v Shelley*, 74 AD3d 1333, 1334 [2010]; *see Yellow Book Sales & Distrib. Co., Inc. v Mantini*, 85 AD3d 1019, 1021 [2d Dept 2011]). “There must be clear and explicit evidence of the agent’s intention to substitute or super add his personal liability for, or to, that of his principal” (*Star Video Entertainment v J & I Video Distrib.*, 268 AD2d at 423-424, quoting *Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964]; *see also L’Aquila Realty, LLC v Jalyng Food Corp.*, 148 AD3d 1004, 1006 [2d Dept 2017]).

Plaintiff has failed to establish that it entered into an agreement with Gregory Galvani in his individual capacity. Rather, the evidence presented by defendant, Galvani, in support of his cross motion is sufficient to establish that he signed the March 9, 2016 agreement with plaintiff and all other documents related to said agreement as the comptroller of Rothschild Lieberman LLC, and that he did not enter into any personal guaranty of his employer’s liabilities or otherwise agree to be personally liable for the contract he executed on behalf of his employer. The evidence presented by defendant, Galvani, is also sufficient to establish that plaintiff performed payroll services for his employer, Rothschild Lieberman LLC, and not for the defendant in his individual capacity.

Finally, plaintiff has failed to establish the existence of an account stated with the defendant. The evidence presented by Mr. Galvani, however, is sufficient to establish, *prima facie*, his entitlement for summary judgment dismissing the cause of action for an account stated. “An account stated is an agreement, express or implied, between the parties to an account based upon prior transactions between them with respect to the correctness of account items and a specific balance due on them” which is “independent of the original obligation” (*Episcopal Health Servs., Inc. v POM Recoveries, Inc.*, 138 AD3d 917, 919 [2d Dept 2016], quoting *Citibank [S.D.] N.A. v Cutler*, 112 AD3d 573, 573-574 [2d Dept 2013]). “A cause of action for an account stated has been described as “an alternative theory of liability to recover

the same damages allegedly sustained as a result of the breach of contract” (*A. Montilli Plumbing & Heating Corp. v Valentino*, 90 AD3d 961, 962 [2d Dept 2011]). An essential element of an account stated is that the parties came to an agreement with respect to the amount due (*see Raytone Plumbing Specialities, Inc. v Sano Constr. Corp.*, 92 AD3d 855, 856 [2d Dept 2012]). “[W]hile the mere silence and failure to object to an account stated cannot be construed as an agreement to the correctness of the account, the factual situation attending the particular transactions may be such that, in the absence of an objection made within a reasonable time, an implied account stated may be found” (*Interman Indus. Prods. v R. S. M. Electron Power*, 37 NY2d 151, 154 [1975]).

Here, defendant’s prior transactions with the plaintiff were on behalf of his employer, Rothschild Lieberman LLC, and in his capacity as its comptroller. There is no evidence of any prior agreement between the plaintiff and the defendant in his individual capacity. Furthermore, the invoices relied upon by the plaintiff were addressed solely to Rothschild Lieberman LLC, and there is no evidence that they were delivered to Mr. Galvani.

Plaintiff in opposition to the defendant’s cross motion has failed to raise any triable issues of fact.

Accordingly, plaintiff’s motion for summary judgment in its favor is denied, and defendant’s cross motion to dismiss the complaint is granted. That branch of the cross motion which seeks to recover attorney’s fees is denied.

Dated: June 15, 2018

DARRELL L. GAVRIN, J.S.C.