

Reiter Resources, Inc. v Gilmartin
2018 NY Slip Op 32426(U)
September 24, 2018
Supreme Court, New York County
Docket Number: 652797/2017
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LBOVITS PART IAS MOTION 7EFM

Justice

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REITER RESOURCES, INC., D/B/A PROFESSIONAL ACCOUNTING SALES

Plaintiff,

- v -

RICHARD GILMARTIN,

Defendant.

INDEX NO. 652797/2017
MOTION DATE 07/31/2018
MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

BACKGROUND

Plaintiff, Reiter Resources Inc., d/b/a Professional Accounting Sales, (Reiter Resources) is a corporation organized under the laws of the State of New York. Defendant Richard Gilmartin is a certified public accountant who conducts business in New York. Plaintiff commenced this action asserting three causes of action: (1) breach of contract, (2) unjust enrichment, and (3) account stated.

On August 10, 2016, plaintiff and defendant entered into a written agreement in which defendant retained Reiter Resources to find a suitable buyer for defendant's accounting practice. Defendant agreed to pay plaintiff a performance fee equal to 10 percent of the initial sales price of the business defendant sold at the date of closing. Plaintiff introduced a buyer, Mohammad Ali, to purchase the business. On November 18, 2016, Mohammad Ali purchased the business from defendant for \$625,000. Plaintiff recommended Key Bank to finance Mohammad Ali's purchase of defendant's accounting practice. Defendant also entered into another contract to buy a residential property in California and paid a \$40,000 deposit. Key Bank delayed in financing. As a result, defendant missed the deadline to close on the California residential property and lost his deposit. (Plaintiff's Affirmation in Support, Exhibit B.)

Defendant paid only \$10,000 of the total amount due to plaintiff, \$62,500. On February 23, 2017, plaintiff made an additional demand for the remaining balance of the performance fee. Plaintiff alleges that it has been damaged in the total sum of \$52,500. Defendant claims that he is entitled to a set off for an amount not less than \$40,000.

Plaintiff moves for summary judgment under CPLR 3212 (b). Defendant, in his opposing affidavit, seeks not only the denial of plaintiff's motion but also requests that the second and third causes of actions be dismissed and summary judgment be granted in his favor.

DISCUSSION

I. Plaintiff's Motion for Summary Judgment for Breach of Contract

On the first cause of action, breach of contract, plaintiff argues that defendant breached the contract by failing to pay plaintiff the full amount of the performance fee owed under the parties' agreement. Plaintiff further argues that there is no issue of fact that defendant breached the agreement with plaintiff because (1) there is a written agreement, (2) plaintiff fully performed under the contract by introducing a suitable buyer, (3) defendant failed to pay, and (4) plaintiff suffered damages in the amount of \$52,500.

Defendant, in response, argues that he suffered damages as a result of plaintiff's recommendation of Key Bank for the financing transaction and therefore his right to set off reduces the amount to which plaintiff is entitled. Defendant alleges that plaintiff provided assurances that the closing of the sale of defendant's accounting practice to Mohammad Ali would take place in time for defendant to buy the California residential property.

Plaintiff states that the closing was beyond plaintiff's control. The parties' contract did not provide what liability, if any, plaintiff will incur if defendant relies on plaintiff to close on the sale of Defendant's business as soon as possible. Plaintiff further argues that the right to set off vests between the parties and does not depend on reliance.

Under CPLR 3212 (b), to obtain a judgment "the proponent of summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of action." (*Id.*)

Here, plaintiff's submission of Sales Consulting Agreement satisfies the prima facie requirement for breach of contract. (Plaintiff's Affirmation in Support, Exhibit C.) Defendant cannot assert a right of set off based on reliance. (*Chatham Sec. Corp. v J. R Williston & Beane*, 22 AD2d 260, 261 [1st Dept. 1964]). Defendant argues that plaintiff assured defendant that the closing will take place timely. Therefore, according to defendant, plaintiff failed to perform contract on time. However, defendant failed to provide evidentiary proof in admissible form to establish that plaintiff gave defendant such assurance.

Plaintiff proved that it had a contract with defendant, that plaintiff performed the contract, that defendant failed to pay, and that defendant owes plaintiff \$52,500.

Therefore, plaintiff's motion for summary judgment on its breach of contract claim is granted and a final judgment for \$52,500 is granted for plaintiff and against defendant.

II. Plaintiff's Motion for Summary Judgment for Unjust Enrichment

Plaintiff moves for summary judgment on its second cause of action, unjust enrichment. To prevail on a claim for unjust enrichment, a plaintiff must establish (1) that the defendant benefitted, (2) at the plaintiff's expense, and (3) that equity and good conscience require restitution. (*Castellotti v Free*, 138 AD3d 198, 207 [1st Dept 2016].)

According to the plaintiff, defendant received a benefit at plaintiff's expense and paid only a portion of performance fee. Defendant argues that the existence of a valid and enforceable contract governing a particular subject matter precludes recovery in quasi contract.

Here, plaintiff fails to make a prima facie showing of entitlement for summary judgment. Plaintiff may not maintain an unjust-enrichment claim while simultaneously alleging the existence of an express contract covering the same subject matter. (see *Universal/MMEC, Ltd. v Dormitory Auth. Of State of New York*, 50 AD3D 352, 353 [1st Dept 2008].) In the instant case, there is no dispute that parties entered into a written contract governing the payment terms of performance fee. (Plaintiff's Affirmation in Support, Exhibit C.) Therefore, plaintiff's motion for summary judgment is denied.

III. Plaintiff's Motion for Summary Judgment for Account Stated

An account-stated claim is established when a defendant does not object to bills submitted and received. (*Berkman Bottger & Rodd. LLP v Moriarty*, 58 AD3d 539, 539 [1st Dept 2009].)

Plaintiff moves for a summary judgment alleging that it has established a prima facie case for an account stated. Accordingly, plaintiff argues that there is a valid agreement between the parties for plaintiff's services and that the performance fee was due at closing. (Plaintiff's Affirmation in Support, Exhibit C.) Defendant paid \$5000 and later made another payment for \$5000 after he sent his November 29, 2016, email. (Plaintiff's Affirmation in Support, Exhibit C.) Plaintiff argues that defendant acknowledged in the November 29, 2016, email that he owed the performance fee. (Plaintiff's Affirmation in Reply at ¶ 16.)

"The account stated by an implicit agreement to pay, warranting summary judgment, will arise from either the absence of any objection to a bill within a reasonable time or partial payment of the outstanding bills." (*Paul, Weiss, Rifkind, Wharton & Garrison v Koons*, 4 Misc 3d 448, 450 [Sup Ct, NY County 2004].) Here, there is no prima facie proof that defendant assented to the full account. Instead, when viewed in the light most favorable to defendant, his emails contain intent to negotiate rather than an acknowledgement. In an email dated November 29, 2016, Richard Gilmartin wrote to Cliff Reiter: "I can bring a check when we meet. However, we will need to agree on the amount." (Plaintiff's Affirmation in Support, Exhibit C.) Richard Gilmartin also stated in the same email: "You and I can go after Key Bank for damages, but until then I am asking you to share the pain as well and be in for \$10,000 too." (*Id.*)

Therefore, plaintiff fails to establish the elements of an account stated. Plaintiff's motion for summary judgment is denied.

IV. Defendant's Requested Relief for Dismissal

Defendant seeks to dismiss plaintiff's unjust-enrichment and account-stated causes of action. (Affirmation of Steven M. Lester in Opposition to motion for Summary Judgment.) Because defendant did not cross-move for that relief, this court will not address this request.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted in part and denied in part: summary judgment on the first cause of action is granted; and the motion is otherwise denied and it is further

ORDERED that plaintiff, must serve a copy of this decision and order on defendant and on County Clerk's Office, which is directed to enter judgment accordingly.



9/24/2018

DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT		

APPLICATION:

CHECK IF APPROPRIATE: