Koolyk v Amusement Indus., Inc.
2018 NY Slip Op 32532(U)
October 3, 2018
Supreme Court, New York County
Docket Number: 653080/2015
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17
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ELISSA E. KOOLYK,

Plaintiff,

-against-

AMUSEMENT INDUSTRY, INC. d/b/a WESTLAND INDUSTRIES, PRACTICAL FINANCE CO., INC., ALLEN ALEVY, and STEVEN ALEVY individually and doing business as BANKERS CAPITAL REALTY ASSOCIATES,

Defendants.
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Index No: 653080/2015

Motion Seq. No.: 006

DECISION AND ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

This action arises out of a legal consulting agreement ("Agreement") between plaintiff Elissa E. Koolyk ("Plaintiff") and defendants Amusement Industry, Inc., Practical Finance Co., Inc., Allen Alevy, and Steven Alevy, individually, and doing business as Bankers Capital Realty Associates (collectively, "Defendants"). The dispute between the parties involves the interpretation of the "bonus provision" in the Agreement, as explained below. The Complaint, as Amended ("Complaint"), alleges that Defendants failed to pay Plaintiff the bonus pursuant to the Agreement. Plaintiff asserts a cause of action for breach of contract and anticipatory breach of contract. Plaintiff moves for summary judgment on the Complaint in her favor. Defendants oppose Plaintiff's motion and cross-move for summary judgment dismissing the Complaint.

BACKGROUND

Plaintiff was retained to represent Defendants in three lawsuits that arose out of their loss of $13 million that defendant Amusement Industry, Inc. ("Amusement") had invested in a real

estate transaction (Complaint, ¶ 2). Defendants retained Plaintiff, a litigator with more than thirty years of experience, at a "very low hourly rate," but, under the Agreement, agreed to also pay her a bonus or success fee (*Id.*, ¶¶ 3, 6). Plaintiff rendered legal services to Defendants for approximately four years, prosecuting their claims in the litigation related to the real estate transaction ("Litigation"), for which Defendants have recovered sums exceeding $26 million (*Id.*, ¶ 4). Plaintiff alleges that, "despite reaping the fruits of [her] significant multi-year efforts," Defendants have refused to pay her the bonus, and "have no intention of doing so in the future" (*Id.*, ¶ 5).

More specifically, the Complaint alleges that, in September 2010, Defendants contacted Plaintiff to discuss the possibility of retaining her to represent them in the Litigation (*Id.*, ¶ 12). Plaintiff and Allen Alevy, the principal of Amusement, negotiated the terms of her retention, including salary and bonus, and Allen Sragow ("Sragow"), a non-party who was then Amusement's corporate attorney, participated in most or all of such negotiations (*Id.*, ¶ 14). On December 7, 2010, the parties executed the Agreement, dated as of October 11, 2010. In the Agreement, a copy of which is annexed as Exhibit "B" to the Joshua Abraham Affirmation in Support of Plaintiff's motion ("Abraham Affirmation"), Defendants are referred to as "Clients," and Plaintiff as "Consultant" (*Id.*, ¶¶ 19-20). A portion of the bonus provision in the Agreement was drafted by Sragow, who, in addition to being Amusement's corporate counsel at the time, was also a Client of Plaintiff and a signatory to the Agreement on his own behalf (*Id.*, ¶ 21).

The bonus provision of the Agreement states,

"So long as Consultant continues to render services in the Litigation, in the event any member of the Clients collects any net monetary judgment or settlement in the Litigation from any party to the Litigation that produces a net profit at that time, the Clients agree to

pay Consultant a bonus of 3% of the *net profit* calculated at that time, within 30 business days after any member of the Clients receives payment of any such judgment. By way of example only: If Clients collect an amount such that the total amount collected to that date exceeds the sum of $13,000,000 plus the *fees and costs* expended as of that date, the difference between the payment and that sum is the profit, and Consultant will be due 3% of that profit" (Agreement, ¶ 3(c) [emphasis added]).

Plaintiff alleges that "she never would have signed any agreement that deducted more than de minimus amounts over and above the $13 million, because the [bonus] provision was always intended to compensate [her] at a later time for taking an initial low hourly salary of $70" (Complaint, ¶ 24). She also alleges that, prior to the execution of the Agreement, and at various times thereafter during her employment, defendants Allen Alevy and Steven Alevy, father and son, repeatedly told her and assured her that they anticipated she would receive a bonus of "hundreds of thousands of dollars" (*Id.*, ¶ 26).

Plaintiff further alleges that she worked diligently on the Litigation for about 3,000 hours over four years, and that she performed a significant number of critical tasks, including preparing for and attending depositions, researching and drafting pleadings, motions, discovery requests and responses, and representing Clients at court hearings, mediation sessions and meetings with the U.S. Attorneys in New York (Complaint, ¶¶ 31, 32). As a result of her hard work and the work of other attorneys retained by Defendants, Defendants have recovered at least $26 million from one of the lawsuits in the Litigation, and "are expected to recover additional amounts in the future" (*Id.*, ¶¶ 33-35).

On May 5, 2015, Plaintiff wrote to Amusement's general counsel, Harvinder Anand, requesting that she be paid the bonus based upon the $26 million recovery (*Id.*, ¶ 38). In a letter dated May 7, 2015 ("May 7, 2015 Letter"), Anand replied that, based upon Defendants'

computation pursuant to paragraph 3(c) of the Agreement, there was a "net loss" to the Clients, not a "net profit," which meant that no bonus was due Plaintiff under the Agreement (*Id.*, ¶ 39).

Responding to the May 7, 2015 Letter, Plaintiff requested that Anand provide her with documentation to support Defendants' claim that the amount of "fees and costs," as that term is used in the Agreement, exceeded $13 million such that there was no bonus due her (*Id.*, ¶ 42). Anand agreed to do so only if she would sign a non-disclosure agreement prohibiting her from using the documents in any future action, but Plaintiff declined Anand's demand (*Id*). Plaintiff alleges that, despite the fact that the parties "had never agreed to deduct any amounts other than the initial $13 million investment and minor court costs," Defendants deducted numerous sundry items in an attempt to avoid their obligations to pay her the bonus, which items, as listed in Anand's letter of June 3, 2015, included payments made to "outside attorneys, the document review vendor, deposition summary vendor, reporter services, mediation services, travel providers . . . internal legal department costs, and . . . taxes" (*Id.*, ¶ 43). On September 10, 2015, after Defendants refused to pay the bonus pursuant to the Agreement, Plaintiff formally withdrew as counsel of record for Defendants in the underlying Litigation and commenced the instant action (*Id.*, ¶ 47).

DISCUSSION

Summary Judgment

In setting forth the standards for considering a summary judgment motion, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hosp.*, the following:

> As we have stated frequently, 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 demonstrate the

> absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. 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 the action.

(68 NY2d 320, 324 [1986] [internal citations omitted]; *Gammons v City of New York*, 24 NY3d 562, 569 [2014] [movant must tender sufficient evidence to show the absence of any disputed material issues of fact to warrant the court, as a matter of law, in directing summary judgment]).

The courts routinely scrutinize summary judgment motions, as well as the facts and circumstances of each case, to determine whether relief may be granted. *Andre v Pomeroy,* 35 NY2d 361, 364 [1974] [because entry of summary judgment "deprives the litigant of his day in court[,] it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"]; *Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997[[in weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion"). Moreover, the courts have held that bare allegations or conclusory assertions in pleadings are insufficient to create genuine issues of fact necessary to defeat a summary judgment motion (*Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). On the other hand, "[w]here different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]; *accord Jaffe v Davis*, 214 AD2d 330, 330 [1st Dept 1995] [conflicting inferences required denial of summary judgment motion]).

Breach of Contract

The requisite elements of a breach of contract claim are existence of a contract, plaintiff's

performance pursuant to the contract, defendant's breach of the contract, and damages resulting from that breach (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). "Generally, a party alleging a breach of contract must demonstrate the existence of a . . . contract reflecting the terms and conditions of their . . . purported agreement" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 [2011] [internal quotation marks and citation omitted]). A pleading alleging a breach of contract should specify "the terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant" (*Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]; *see also Sebro Packaging Corp. v S.T.S. Indus.*, 93 AD2d 785, 785 [1st Dept 1983]).

It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Moreover, "[e]xtrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (*Id*). Further, a contract is unambiguous if the language used has "'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'" (*Id.* at 569, quoting *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]).

However, "'[i]f there is ambiguity in the terminology used. . and determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, then such determination is to be made by the jury'" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017] *quoting Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 171-172 [1973]; *see*

Discovision Assoc. v Fuji Photo Film Co., Ltd., 71 AD3d 488, 489 [1st Dept 2010] ["[a] contract is ambiguous if it is susceptible to more than one reasonable interpretation, and while, in an appropriate case, summary judgment may be granted even if a contract is ambiguous, this is not such a case"] [[internal quotation marks and citations omitted]; *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66-67 [1st Dept 2008] ["[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more meanings"] [internal quotation marks and citation omitted]; *Eden Music Corp. v Times Sq. Music Publs. Co.*, 127 AD2d 161, 164 [1st Dept 1987] ["when the meaning of a contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented which cannot be resolved on a motion for summary judgment"]).

In support of her motion for summary judgment, Plaintiff argues that she and Sragow, Amusement's corporate attorney and drafter of the bonus provision who also negotiated the Agreement, have established the meaning of the bonus provision (Plaintiff's brief at 4-6). Specifically, Plaintiff argues that the words "fees and costs," as used in the bonus provision of the Agreement in reference to calculating the "net profit" from the Litigation, "refer to those expenses taxable in a federal court bill of costs" citing portions of Sragow's deposition transcript, a copy of which is annexed as "Exhibit F" to the Abraham Affirmation (*Id.* at 5). Plaintiff also argues that, if the terms of an agreement are ambiguous, the ambiguity may be resolved or clarified by the testimony of the drafter of such terms (*Id.* at 9). Plaintiff further maintains that, because Sragow testified that he and she had discussed "the items that could be deducted in computing the fees and costs, and [had] discussed deducting only those items included in a typical federal bill of costs, such [as] transcript fees, filing fees, and witness fees," Sragow's

testimony confirms her interpretation of the bonus provision, and such interpretation must be applied in this action (*Id.* at 6).

In opposition and in support of their cross-motion, Defendants contend that there is no ambiguity in the term "net profit," because its interpretation must be based upon the "ordinary business meaning" used in "business agreements." Thus, they assert that it is untenable for Plaintiff to introduce "unnecessary parole evidence in an attempt to manufacture another meaning for that contract term" (Defendants' Memorandum at 1-2). Defendants also argue that this Court should construe "net profit" to mean the deduction of "all expenses of any and every nature" before its computation (Defendants' Supplemental Memorandum at 6). They also assert that, because the Agreement does not contain any language limiting the calculation of "net profit" to only costs included in a federal bill of costs, the Agreement should not be construed to contain a limitation (*Id*).

In addition, Defendants maintain that Sragow was "not empowered to negotiate any contract term on behalf of any other party," and that "Plaintiff [has] concede[d] that Allen Alevy retained the authority to negotiate the Agreement's terms" (Defendants' Memorandum at 2). Defendants also contend that Plaintiff failed to discuss the costs and fees relating to the contingency fee arrangement with Allen Alevy and other Clients of the Agreement, as required by law, and, therefore, her current claim for the bonus payment must fail (*Id.* at 3).

Moreover, Defendants (and Allen Alevy in particular) argue that, because Alevy is a businessman with years of experience, his understanding of "net profit" was "revenue minus all costs and taxes, and to the extent it is charged, interest" (Allen Alevy Affidavit, ¶ 7). Alevy also asserts that Plaintiff failed to identify the "fees and costs" that "she would deduct from any

contingency fee she may obtain related to the [Litigation,] either at the time of those [phone] calls or any time prior to her signing a written fee agreement" (*Id.*, ¶ 8). Further, Defendants argue that New York courts have determined, that "net profit" is to be construed in accordance with the understanding of an "ordinary business person," and that means "all expenses of any and every nature [i]ntended to be deducted before the net profit, upon which the bonus was to be paid" (Defendants' opposition at 21-23, citing *Roth v Embotelladora Nacional*, 1 AD2d 403, 405-406 [1st Dept 1956] aff'd 2 NY2d 864 [1957]; *see also* Defendants' Supplemental Memorandum at 6). Defendants contend that any "ambiguity is determined by looking within the four corners of the document, not to outside sources" (*Id.* at 5, quoting *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009]).

In reply, Plaintiff contends that the Agreement defines "net profit" by way of an example that refers to a deduction of the Litigation's "fees and costs," which, as explained by Sragow in his testimony, "meant the sort of fees and costs that you would expect on a bill of costs" (Plaintiff's Reply Memorandum at 2, 4). Plaintiff also contends that, during negotiation of the Agreement, Sragow, who drafted that portion of the bonus provision containing the words "fees and costs," specifically discussed "deducting only those items included in a federal bill of costs, such as transcript fees, filing fees and witness fees" (*Id.* at 2, citing to Sragow deposition transcript).

Defendants argue that Plaintiff's reliance on Sragow's testimony as to the meaning of the disputed terms is misplaced, because his testimony "was specifically limited to his current conclusory opinion that was uninformed by any communication with Allen Alevy" (Defendants' Supplemental Memorandum at 4). Defendants also argue that "Sragow, who was acting as a

client and attorney, was not a disinterested party," and that it would be inappropriate to consider his testimony (Defendants' Memorandum at 29). Defendants further maintain that "because Plaintiff and Sragow drafted the language of the Agreement, if any ambiguity is found to exist, the contractual provision must be construed against those who participated in drafting the bonus provision, namely Plaintiff and Sragow" (*Id.* at 21).[1]

Allen Alevy argues that he is not individually liable, because Plaintiff terminated the Agreement as to him individually in November 2014, with respect to representing him in the Litigation (Defendants' Memorandum at 13-14). Specifically, he argues that, because paragraph 7(d) of the Agreement states that "[a] termination of this Agreement shall not have any impact on the Clients' obligation to pay Consultant all Consulting Fees owed to it pursuant to paragraph 3 for services rendered prior to the termination of this Agreement," and because Plaintiff has been paid the Consulting Fees in paragraph 3(a) of the Agreement, Alevy is not liable for payment of the bonus in paragraph 3(c) of the Agreement.

Paragraph 3(c) states that, "so long as Consultant continues to render services in the

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[1]Responding to this Court's instruction to provide supplemental briefing on the issue of whether Sragow, as attorney, had the apparent authority to bind Defendants/Clients to the terms of the Agreement, Defendants argue that "the topic of authority is misplaced" and that "this Court should not even reach the question of authority" (Defendants' Supplemental Memorandum at 1). Specifically, Defendants argue that consideration of Sragow's apparent authority is misplaced or unnecessary because of Plaintiff's own fiduciary obligations regarding a contingency fee agreement, which require her to fully disclose the terms of the Agreement to Defendants, and that New York law casts the burden "on attorneys who drafted the retainer agreements to show that the contracts are fair, reasonable and fully known and understood by their clients" (*Id.* at 9). Defendants further argue that no evidence shows that Allen Alevy had cloaked Sragow with apparent authority, and that Plaintiff's testimony reflects that Alevy retained the power to negotiate the terms of her compensation, which means that Sragow "was not authorized to make any verbal representations" on behalf of Alevy and other Defendants/Clients (*Id.* at 10). In opposition, plaintiff argues that it is well settled that defendants are bound by the Agreement as entered into by their attorney.

Litigation, in the event *any member of the Clients* collects any net monetary judgment or settlement . . . that produces a net profit . . . *the Clients agree to pay* Consultant a bonus of 3% of the net profit . . . ." (Agreement, ¶ 3(c) [emphasis added]). A logical interpretation of this paragraph leads to the conclusion that the Clients are jointly liable to pay Consultant the bonus, in the event that any of the Clients collects a monetary judgment or settlement. It is undisputed that at least one of the Clients has received a settlement exceeding $26 million. Therefore, there is an issue of fact as to whether all Clients, including Allen Alevy, would be liable for payment of the subject bonus.

Defendant Steven Alevy separately argues that he is "surprised to be named as a party to this matter" because he understood that Plaintiff was "hired by my father [Allen Alevy] and that she [plaintiff] would look to my father or the business entities he owned for a recovery of any fee she was owed" (Steven Alevy Affidavit, ¶ 14). However, given that Steve Alevy is also a signatory to the Agreement, there is an issue of fact as to his liability for the bonus.

The subject Agreement on its face is ambiguous as it is susceptible to more than one interpretation given the use of both the terms "net profit" and "fees and costs". In addition, the evidence submitted by both parties raises issues of fact as to the intent of the parties (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d at 66-67; *Eden Music Corp. v Times Sq. Music Publs. Co.* at 164-165). As such, Plaintiff's motion and Defendants' cross-motion for summary judgment on Plaintiff's cause of action for breach of contract are denied.

Anticipatory Breach of Contract

The second cause of action for anticipatory breach of contract alleges that Defendants have not settled with all parties to the Litigation, and thus would likely receive additional

recoveries in the form of settlements or judgments in the future (Complaint, ¶¶ 59-65). Plaintiff refers to the May 7, 2015 Letter, from Defendants stating, among other things, that "after we incorporate all applicable costs, fees, expenses, and taxes, we anticipate that the net loss figure will only grow larger" (May 7, 2015 Letter at 2).[2] Defendants argue, among other things, that this cause of action is invalid because it is not based upon a definite and final evidence of intention to forgo of performance of the Agreement by Defendants (Defendants' Memorandum at 14-19).

Defendants also argue that, on May 22, 2015, one of their officers advised Plaintiff that "even though the numbers do not show a net profit, we still want to voluntarily give you something in recognition of your service . . . and I want you to look through the numbers and tell me what you think is fair" (*Id.* at 16). Defendants assert that the officer's statement expressed an intent to abide by the Agreement, not to repudiate it (*Id*).

Notably, Defendants assert that "other than the March 31, 2015 settlement payment, Clients only received nominal payments of $1,508 that Plaintiff has already claimed in her breach of contact claim," and, thus "no damages remain to be claimed in the anticipatory breach of contact claim that have not been sought in the breach of contract claim and there is no possibility of any future damages" (*Id.* at 17). In reply, Plaintiff contends that the additional recovery of $1,508 is "truly immaterial," and if she prevails on this claim, her damages based upon 3% of the additional recovery would only be $45.24, and thus, she is "prepared to reduce her damages claim by $45.24" (Plaintiff's Reply Memorandum at 6).

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[2]The May 7, 2015 Letter also states that defendants' preliminary computation to determine whether there is any net profit, shows a net loss not a net profit, meaning that no bonus would be due Plaintiff under the Agreement.

In light of the foregoing, based on the representation by Plaintiff's counsel regarding the immateriality of her claim for anticipatory breach of contract, Defendants' cross-motion for summary judgment to the extent it seeks to dismiss plaintiff's cause of action for anticipatory breach on contract is granted.

CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment dismissing the Complaint is granted only to the extent of dismissing plaintiff's second cause of action for anticipatory breach of contract and is otherwise denied; and it is further

The Clerk shall enter judgment accordingly.

Dated: October 3, 2018

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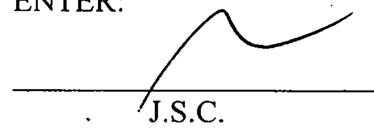

J.S.C.

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