

Nearterm Corp. v Lynx Tech. Partners, Inc.
2019 NY Slip Op 31844(U)
June 26, 2019
Supreme Court, New York County
Docket Number: 654840/2017
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

NEARTERM CORPORATION
Plaintiff,

- v -

LYNX TECHNOLOGY PARTNERS, INC.,
Defendant.

INDEX NO. 654840/2017
MOTION DATE 03/27/2019
MOTION SEQ. NO. 004

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120

were read on this motion to/for JUDGMENT - SUMMARY.

This is a motion for summary judgment brought by Nearterm Corporation (Nearterm) pursuant to CPLR § 3212. Lynx Technology Partners, Inc. (Lynx) cross-moves for summary judgment dismissing the complaint pursuant to CPLR § 3212.

In October 2013, nonparty Pitts Management Associates, Inc. (PMA) engaged Nearterm's services in connection with a contract with New York State to restructure the billing system of SUNY Downstate Medical Center in Brooklyn, New York (the SUNY Project) (Smith Aff., ¶ 4). PMA contracted with Lynx to provide human resources services for the SUNY Project (id., ¶ 6). Lynx in turn engaged the services of Nearterm to assist Lynx in identifying and retaining qualified remote medical coders (id., ¶ 7). Nearterm provided a total of eight consultants for Lynx for placement as independent contractors for the SUNY Project (id., ¶ 11). Nearterm sent invoices for its services to Lynx by email on a biweekly basis (id., ¶ 13). Throughout Nearterm's involvement with Lynx in connection with the SUNY Project, Nearterm sent invoices to Lynx

for charges totaling \$1,145,233.29, of which Nearterm alleges it received payments from Lynx totaling \$1,095,080.26, leaving an unpaid balance of \$50,153.03 (*id.*, ¶ 16; NYSCEF Doc. No. 119, Plaintiff's Memorandum of Law at 2).

Nearterm commenced this action asserting causes of action for breach of contract and account stated and seeking damages in the amount of \$50,153.03 (NYSCEF Doc. No. 90, Complaint, ¶¶ 3-5). A default judgment was entered in favor of Nearterm and against Lynx in the amount of \$58,367.89 on October 11, 2017 (NYSCEF Doc. No. 7), however, the parties stipulated and agreed to vacate and set aside the judgment (NYSCEF Doc. No. 24). Nearterm's motion for summary judgment and Lynx's cross-motion for summary judgment are now before the court.

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986])). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985])). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

Nearterm fails to meet its burden in establishing entitlement to summary judgment as a matter of law. A representative of Nearterm testified during his deposition that the outstanding balance that Nearterm seeks to recover is based on six particular open invoices: invoice numbers 16206, 16227, 16265, 16291, and 16309 (NYSCEF Doc. No. 105, Smith Tr., 34:14-35:19). Lynx sent a final payment to Nearterm on February 2, 2016 in the amount of \$129,085.29, which covered invoices 16206, 16227, 16265, 16291, and 16309 (NYSCEF Doc. No. 106, Mahin Aff., ¶¶ 37-38; *id.*, exhibit G). Lynx's CEO testified at her deposition that the final payment was made following consultation with Nearterm as to the amount and that it was understood that, upon receipt, the contract was settled and closed out (Mahin Tr., 60:23-61:11). Nearterm acknowledges receipt of this payment and does not dispute that this was the "final payment" (Smith Tr., 55:17-20; Smith Aff., ¶ 22). Rather, Nearterm contends that, notwithstanding the final payment, Lynx still owes Nearterm for other, previously invoiced balances for unpaid services (Smith Aff., ¶ 18). Moreover, despite Lynx's CEO's deposition testimony that Lynx made a "final payment," she also acknowledges in her affidavit that she can only confirm that five of the six outstanding invoices were paid, and that Lynx is investigating whether invoice number 16246 in the amount of \$13,044.66 was paid (Mahin Aff., ¶ 38).

After acknowledging that all but one of the allegedly unpaid invoices on which this action was originally based have actually been paid in full, Nearterm has failed to submit proof as to which invoices, if any, remain unpaid. Instead, Nearterm offers conclusory allegations that Lynx still owes Nearterm for other, unspecified, previously-invoiced services. Such conclusory allegations are insufficient to prevail on a motion for summary judgment. As to Lynx's cross motion, Lynx has produced proof of payment of five of the invoices in question, but issues of fact remain as to

whether invoice 16246 has been paid. Lynx is entitled to partial summary judgment as to the five invoices for which proof of payment has been submitted.

Accordingly, it is

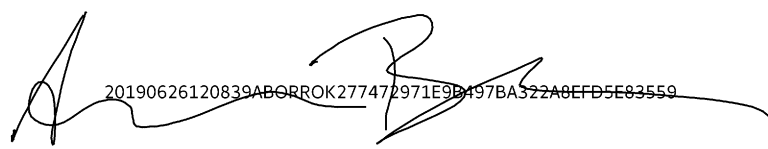
ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's cross-motion for summary judgment is granted in part to the extent the account stated and breach of contract causes of action are dismissed as they relate to the five invoices for which payment has been received, and is otherwise denied as to the account stated and breach of contract causes of action for invoice number 16246; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the parties are directed to appear for trial on July 22, 2019 @ 2:30 PM and that trial shall continue on July 26, 2019 @ 9:30 am following July 22, 2019, if necessary; and it is further

ORDERED that pretrial documents are due seven days prior to trial in accordance with the Part 53 rules.


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6/26/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

