Van Den Berg v Clinton Hall Holdings, LLC
2019 NY Slip Op 32036(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 653156/2018
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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EELCO VAN DEN BERG,

Plaintiff,

- v -

CLINTON HALL HOLDINGS, LLC,

Defendant.

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INDEX NO. 653156/2018

MOTION DATE 12/06/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39

were read on this motion to/for SUMMARY JUDGMENT

Kushnirsky Gerber, PLLC (Andrew Gerber and Penelope Fisher-Birch of counsel), for plaintiff.
Platte, Klarsfeld & Levine, LLP (Jeffrey Klarsfeld of counsel), for defendant.

Gerald Lebovits, J.:

Plaintiff commenced this action against defendant Clinton Hall Holdings, LLC, alleging that defendant violated several provisions of New York City Administrative Code § 20-927 *et seq.*, also known as the Freelance Isn't Free Act ("FIFA"). Plaintiff alleges that defendant failed to pay $1975.00 for a portion of plaintiff's work on a mural at a restaurant and bar located at South Street Seaport, 19 Fulton Street in New York County ("19 Fulton Street").

Defendant moves under CPLR 3212 for summary judgment. Defendant argues it is an improper party to the litigation because it (1) did not contract with plaintiff for the services alleged in the complaint, and (2) is not the owner or lessee of the 19 Fulton Street location.

Plaintiff cross-moves under CPLR 3212 for summary judgment against defendant, arguing that Clinton Hall Holdings is the proper party defendant, and is liable under FIFA for (i) hiring plaintiff without a contract, and then (ii) failing to pay plaintiff for the freelance services he performed. In addition to the money plaintiff alleges he is owed for the work he performed, plaintiff seeks statutory and double damages for those statutory violations, as well as attorney fees and costs.

BACKGROUND

Plaintiff Eelco van den Berg is an artist residing in the Netherlands. In April 2017, Gregory Homs contacted plaintiff regarding the commission of a mural on a wall of the 19 Fulton Street location, a bar that operates under the name "Clinton Hall."

Plaintiff agreed to create the mural, and did so based on an understanding that Homs was requesting his services as an agent of Clinton Hall. Homs and plaintiff agreed that plaintiff would be paid $5500.00 for painting the mural. Plaintiff completed the mural over two visits to New York in June and July of 2017. Plaintiff was fully paid for his work.

After the mural was completed, Homs contacted plaintiff again to perform additional work relating to the mural. This additional work included painting the entire background wall of the 19 Fulton Street location, repairing certain damaged portions of the mural, and painting the landing of the stairwell where the mural was located.

Homs and plaintiff agreed on plaintiff's fee for these additional services on August 2, 2017, and plaintiff sent a quote to Homs for the additional services on August 3, 2017. The quote was addressed to "Clinton Hall" with an address of "19 Fulton st. 10038 NYC." No written contract was drafted for this work, however.

Plaintiff continued to understand the hiring party as being Clinton Hall. He completed the additional work, and sent Homs a $1975 invoice for that work, on August 9, 2017. Plaintiff addressed the invoice to "Clinton Hall" with an address of "19 Fulton St. 10038 NYC." Plaintiff has not been paid on that invoice.

On March 15, 2018, plaintiff filed a complaint with the New York City Department of Consumer Affairs Office of Labor & Policy Standards ("OLPS"), alleging multiple violations of FIFA. Plaintiff's complaint identified defendant Clinton Hall Holdings as the hiring party.

On April 19, 2018, the OLPS sent defendant notice of plaintiff's FIFA complaint. The notice of complaint stated that plaintiff's complaint had identified Clinton Hall Holdings as the hiring party, that under FIFA Clinton Hall Holdings was required to respond, and that under the statute a failure to respond would create a rebuttable presumption in any subsequent civil action under FIFA that Clinton Hall Holdings had committed the FIFA violations alleged.

In May 2018, plaintiff's counsel received a notice from OLPS that defendant had not responded to the notice of complaint. The notice of non-response attached copies of informal correspondence between OLPS and a representative of Clinton Hall Holdings, Jordan Alterbaum. In this correspondence, Alterbaum stated that Homs was "an outside contractor that we work with from time to time," that Clinton Hall Holdings "did not have any records that directly relate to Mr. Van Den Berg other than this," and that he

"was confused as to why the complaint is directed towards our restaurant and not to Mr. Homs."

Despite OLPS's answer that Clinton Hall was receiving the notice of complaint because plaintiff identified it as the hiring party, and that a formal response was required, Clinton Hall never tendered a formal response. Plaintiff commenced this action in June 2018. The parties now move and cross-move for summary judgment.

DISCUSSION

Summary judgment allows a party to demonstrate that no material issue of fact requires a trial and that judgment may be directed in its favor as a matter of law. (*Brill v City of New York*, 2 NY3d 648, 651 [2004].) To obtain summary judgment, the movant must "establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor" by "evidentiary proof in admissible form." (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1066 [1979]) (internal citations and quotation marks omitted).

"One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Where, however, "the moving party has not met the initial burden of setting forth evidentiary facts sufficient to establish entitlement to judgment as a matter of law, the motion must be denied. There is no necessity for the opposing party to respond with evidentiary proof." (*Roman v Hudson Telegraph Associates*, 15 AD3d 227, 228 [1st Dep't 2005].)

I. Defendant's Challenge to Plaintiff's Affirmation in Support of Summary Judgment

Plaintiff's motion for summary judgment relies principally on his affirmation regarding the circumstances under which he performed the work at the 19 Fulton Street location, and the basis for his belief that he was dealing with Clinton Hall. Defendant contends, however, that this court may not consider plaintiff's affirmation because it does not comply with CPLR 2309 (c). This court agrees with defendant.

The affirmation in question was (i) submitted by a party to the action (*i.e.* plaintiff) who (ii) undisputedly resides outside the geographic boundaries of the United States. Plaintiff's affirmation therefore will be admissible in this action only if it meets two separate procedural requirements.

First, under CPLR 2106 (b), the affirmation must be "subscribed and affirmed by that person to be true under the penalties of perjury." Here, the statements made in plaintiff's affirmation were subscribed and affirmed by plaintiff to be true under the penalty of perjury, using the exact language prescribed by CPLR 2106 (b).

Second, however, the affirmation must also "comply with the additional formalities of CPLR 2309 (c)." (*U.S. Bank N.A. v Langner*, 168 AD3d 1021, 1023 [2d Dep't 2019].) It does not. Under that provision, an "oath or affirmation taken without the state shall be treated as if taken within the state" only if "accompanied by such [a] certificate . . . as would be required to entitle a deed acknowledged without the state to be recorded within the state." Plaintiff's affirmation is not accompanied by the requisite certificate of conformity, rendering it procedurally invalid. This court therefore disregards the affirmation's contents in deciding the present motion and cross-motion.[1] (*See LaRusso v Katz*, 30 A.D.3d 240, 243 [1st Dept 2006].)

II. Defendant's Motion for Summary Judgment

Under FIFA, all freelance contracts for services valued at $800 or more must be reduced to writing. (N.Y.C. Admin. Code § 20-928.) The hiring party must pay the freelancer by the due date set in the contract or, in the absence of a due date, no later than 30 days after the freelancer completes the contracted-for work. (*Id.* § 20-929.)

Here, it appears undisputed that the hiring party who retained plaintiff to carry out additional work on the 19 Fulton Street mural failed to reduce the contract between them to writing, and then failed to pay plaintiff timely for the additional mural work he performed.

The question before this court, therefore, is whether that hiring party was defendant Clinton Hall Holdings (as plaintiff contends), or a separate corporate entity whom plaintiff did not name in the action, TB Fulton 2 LLC (as defendant claims). Defendant asserts that it has established as a matter of law that TB Fulton hired plaintiff, and therefore that defendant is not liable. This court disagrees.

A. The Rebuttable Presumption of Liability under FIFA

Plaintiff properly utilized FIFA's administrative complaint procedure (*see* N.Y.C. Admin. Code § 20-931), alleging that Clinton Hall Holdings was the responsible hiring party. Clinton Hall Holdings failed to respond to this administrative complaint despite receiving notice of its obligation to do so (and the consequences of failing to respond). Under the statute, this failure to formally respond created a rebuttable presumption that Clinton Hall Holdings, as the claimed hiring party, committed the violations alleged in the complaint. (*See* N.Y.C. Admin. Code § 20-931 [d].)

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[1] Plaintiff in turn contends that defendant's affidavits should be disregarded as impermissibly self-serving and conclusory. But the affidavits plainly were provided by individuals with personal knowledge of the facts and are supported by admissible evidence. This court therefore may properly take the affidavits into account at summary judgment. (*See Zambotti v Reading*, 162 AD2d 991, 991 [4th Dep't 1990]; *Zoldas v Louise Cab Corp.*, 108 AD2d 378, 383 [1st Dep't 1985].)

Defendant argues that because it was not in fact the hiring party, it was not a proper party defendant to plaintiff's administrative complaint, and therefore had no obligation to respond to the complaint. Therefore, defendant asserts, its lack of response to the complaint did not create a rebuttable presumption of liability.

This argument, however, is foreclosed by FIFA's text. N.Y.C Admin. Code § 20-931 (e) provides that "[w]ithin 20 days of receiving the notice of complaint, the hiring party identified in the complaint *shall* send" a response to the complaint's allegations. (N.Y.C. Admin. Code § 20-931 [e]) (emphasis added). And the notice of complaint sent to defendant states on its first page that "[u]nder the Law, you are *required* to provide OLPS with a written statement within 20 days of receipt of this Notice."

This statutory requirement serves to channel issues of FIFA liability first into an administrative adjudication process rather than litigation. A party like Clinton Hall Holdings may not simply ignore that administrative process — and thereby force the freelancer to bear the costs of bringing suit in this court — with no consequences to itself.

B. Defendant's Efforts to Rebut FIFA's Presumption of Liability

Defendant also argues that it has adequately rebutted the statutory presumption of liability and met its burden to establish entitlement to judgment as a matter of law through evidence demonstrating that defendant was not the party that hired plaintiff to do the mural work.

In entering into the agreement to perform the additional work on the mural, plaintiff dealt exclusively with Gregory Homs as an agent for the hiring party. Defendant asserts that it has shown as a matter of law that Homs was acting solely as an agent of TB Fulton — which leases and operates the 19 Fulton Street location under the trade name "Clinton Hall" —making Clinton Hall Holdings an improper party defendant. This court is not persuaded.

Homs asserts in an affidavit that "[a]t all times, all of my dealings with Plaintiff were on behalf of TB Fulton 2, LLC and not on behalf of Defendant." But defendant's answer admitted the allegations in plaintiff's complaint that "Homs, an agent for Clinton Hall, contacted Mr. van den Berg regarding the commission of a mural," that the 19 Fulton Street location is "a new Clinton Hall location in the South Street Seaport," and that "Clinton Hall paid Mr. van den Berg in full for his work completing the Mural."

Additionally, documentary evidence submitted by defendant indicates that plaintiff understood himself to have been retained by Clinton Hall, rather than TB Fulton. In an August 2, 2017, email from plaintiff to Homs that discusses costs to perform the additional work on the mural, plaintiff referenced "the paint that is over at CH," as well as "[a]n Uber to go to CH," demonstrating his understanding that the 19 Fulton Street location was a Clinton Hall establishment and that Homs was working for Clinton Hall. Homs's responsive email not only approved these cost estimates without distinguishing

between Clinton Hall and TB Fulton, but stated that he could provide accommodations for plaintiff's daughter "in one of the back rooms at CH" while plaintiff performed the work.

Further, plaintiff's quote and invoice for the additional work he performed were both addressed to "Clinton Hall," and list 19 Fulton Street as the address, which defendant has already admitted is a Clinton Hall Holdings location. And the correspondence from Jordan Alterbaum of Clinton Hall Holdings with OLPS during the administrative complaint procedure stated that Homs is an "outside contractor" who works with Clinton Hall Holdings — and that the 19 Fulton Street location is "our restaurant."

Defendant's position is, in essence, that although plaintiff thought at all times he was dealing with Clinton Hall Holdings, and although the agent whom plaintiff dealt with gave no sign that the agent was working for anyone other than Clinton Hall Holdings, this court should nonetheless find *as a matter of law* that Clinton Hall Holdings is not the right defendant here because plaintiff was instead dealing — unbeknownst to himself — with another company.

Particularly in light of the rebuttable presumption of liability under FIFA, this court concludes that defendant has not met its "initial burden of setting forth evidentiary facts sufficient to establish entitlement to judgment as a matter of law" (*Roman*, 15 AD3d at 228.) The relationship among plaintiff, Homs, defendant Clinton Hall Holdings, and TB Fulton remains instead an issue of fact that cannot be decided at summary judgment. Defendant's motion for summary judgment is denied.

III. Plaintiff's Cross-Motion for Summary Judgment

Plaintiff's cross-motion for summary judgment also is denied.

CPLR 3212 (b) provides that "[a] motion for summary judgment shall be supported by affidavit . . . [t]he affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit." As discussed above, although plaintiff attempted to use an affirmation in lieu of an affidavit in this action under CPLR 2106 (b), plaintiff's affirmation is invalid. Therefore, plaintiff's cross-motion does not comport with CPLR 3212 (b)'s required provision of a supporting affidavit by a person having knowledge of the facts and must be denied.

ACCORDINGLY, it is

ORDERED that defendant's motion for summary judgment under CPLR 3212 is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment under CPLR 3212 is denied.

07/08/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE