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| K2 Intelligence, LLC v Frydman |
| 2019 NY Slip Op 32684(U) |
| September 9, 2019 |
| Supreme Court, New York County |
| Docket Number: 158665/2018 |
| Judge: Louis L. Nock |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 38

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K2 INTELLIGENCE, LLC, : Index No. 158665/2018
: Motion Seq. No. 001
Plaintiff, :
-against- : DECISION AND ORDER
:
:
JACOB FRYDMAN and :
UNITED REALTY PARTNERS, LLC, :
:
Defendants. :
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LOUIS L. NOCK, J.

Upon the reading and filing of e-filed documents numbered 7 through 21, and upon due deliberation by the court: (i) defendants’ motion to dismiss the original complaint is denied; (ii) plaintiff’s cross-motion for leave to serve and file an amended complaint is granted; and (iii) defendants’ motion to dismiss the amended complaint is denied, all as set forth hereinbelow.

Plaintiff commenced this action by summons and complaint filed September 18, 2018, seeking damages in a principal sum of \$114,133.40 arising out of its alleged rendering of “certain investigative, compliance, and/or cyber defense services to defendants in the calendar years 2016 and 2017” (Complaint [NYSCEF Doc. No. 1] ¶ 4). The complaint contains two causes of action. The first cause of action does not allege the existence of a written, or even, oral contract; but it does go far enough to be reasonably construed as alleging the existence of binding quasi-contract based on the equity underlying plaintiff’s alleged reasonable expectation of payment in exchange for services allegedly requested and rendered. The second cause of action alleges the existence of an actual account stated in the sum of \$114,133.40 and exhibits a copy of said alleged account (NYSCEF Doc. No. 2).

Defendants move to dismiss the complaint, asserting that an actual written contract does exist with regard to the services referenced in the complaint, and that said contract was only between defendant United Realty Partners, LLC; and as to which, individual defendant Jacob Frydman is not a contracting party and, therefore, not responsible for any alleged charges or services asserted by plaintiff. Defendants exhibit a document which they present as that contract (NYSCEF Doc. No. 11). Defendants further assert, *inter alia*, that since there is an actual, written, contract involved, no equitable causes of action, extrinsic of breach of contract, can coexist, thus requiring dismissal of the first cause of action for quasi-contract, at a bare minimum.

The conflicting submissions of the parties raise a triable issue of fact as to whether the purported contract exhibited by defendants is actually a contract, at all; let alone whether one or both of the defendants is a party, or are parties, thereto. As amply pointed out by plaintiff's submissions, the document in issue presents as a letter agreement – or proposed letter agreement – typed on plaintiff's company letterhead and addressed to an associate of the law firm of Herrick Feinstein LLP. It begins by defining various parties, as follows:

We are pleased to confirm the engagement of K2 Intelligence (“K2”) by Herrick, Feinstein LLP (“Firm”) on behalf of Jacob Frydman (“Client”) (Firm and Client, together with K2, are collectively referred to hereafter as the “Parties”) pursuant to this letter of engagement (the “Agreement”).

(NYSCEF Doc. No. 11.) That prefatory, defining, portion of the letter – typed by plaintiff – makes no mention, at all, of defendant United Realty Partners, LLC. Nor is that defendant mentioned, at all, throughout the entire document, as typed by plaintiff. Thus, it would seem that, as far as plaintiff was concerned, it was contracting with defendant Frydman.

Moreover, the typed signatory portion of the document lists the following anticipated signatories: “K2 INTELLIGENCE LLC,” “HERRICK, FEINSTEIN LLP,” and, most notably,

“JACOB FRYDMAN.” Nowhere does that portion of the document identify an anticipated signatory as being United Realty Partners, LLC. Remarkably, though – or perhaps not – the document contains a handwritten modification of the Frydman signatory section, identifying him as the “Manager” of “United Realty Partners, LLC.” Plaintiff’s affiant and CEO attests that said modification was completely unauthorized by plaintiff (*see*, NYSCEF Doc. No. 15), and that plaintiff’s intention, as confirmed by the typed portions of the letter, was to contract solely and exclusively with Frydman (*see, id.*), which is why she suggests that “there appears to be an absence of mutual assent” (*id.*, ¶ 15), and, hence, no contract, at all, governing the services alleged to have been rendered and unpaid for, underlying this entire action. Defendant Frydman, on the other hand, attests that he “executed the K2 engagement agreement as Manager of” United Realty Partners, LLC (NYSCEF Doc. No. 9 ¶ 16), implying that such was his understanding of the contracting parties.

In view of the foregoing patent issue of material fact – to wit, whether there was a contract, and with whom, regarding the foundational predicate for the claims in this lawsuit – it is simply impossible at this time for the court to render summary adjudication on the merit of plaintiff’s claims, which is what defendants are now prematurely asking this court to do. Therefore, the motion to dismiss is denied.

Plaintiff cross-moves for leave to serve and file an amended complaint, adding two causes of action based on the facts already alleged (*see*, Proposed Amended Complaint [NYSCEF Doc. No. 21]). The motion is granted based on the statutory mandate that such leave be freely given (CPLR 3025[b]). The court perceives no undue prejudice to defendants, at all, in such amendment at this pre-answer phase of the case. The amended complaint is deemed served and filed by virtue of its e-filing in January of this year (NYSCEF Doc. No. 21).

Defendants request the court to apply their motion to dismiss the original complaint, to the amended complaint. That request is granted (*e.g., Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35 [1st Dept 1998]). However, based on the bedrock issue of fact identified above, the motion, as applied to the amended complaint, remains denied.

Defendants will serve and file an answer to the amended complaint within twenty days from the date of e-filing of this decision and order.

Accordingly, it is

ORDERED that defendants' motion to dismiss the original complaint is denied; and it is further

ORDERED that plaintiff's cross-motion for leave to serve and file an amended complaint in the form e-filed as NYSCEF Document No. 21 is granted, and it is deemed served and filed; and it is further

ORDERED that defendants' motion to dismiss the amended complaint is denied; and it is further

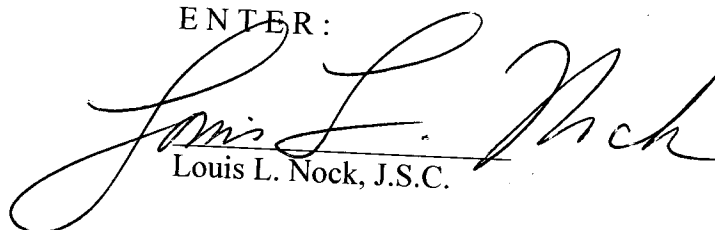
ORDERED that defendants will serve and file an answer to the amended complaint within twenty days of the date of e-filing of this decision and order; and it is further

ORDERED that a preliminary conference will occur in this matter on October 24, 2019, at 2:15 p.m., at 111 Centre Street, Courtroom 1166, New York, New York 10013.

This shall constitute the decision and order of the court.

Dated: New York, New York; September 9, 2019

ENTER:



Louis L. Nock, J.S.C.