

Veritext Corp. Servs. v U.S. Adj. Corp.
2019 NY Slip Op 33058(U)
October 15, 2019
Supreme Court, New York County
Docket Number: 156192/2017
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. MARGARET A. CHAN

PART

IAS MOTION 33EFM

Justice

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VERITEXT CORPORATE SERVICES,

INDEX NO. 156192/2017MOTION DATE 07/29/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

U.S. ADJUSTMENT CORP.

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 39

were read on this motion to/for

JUDGMENT - SUMMARY

In this action for an account stated, plaintiff Veritext Corporate Services ("Veritext") moves in motion sequence 001 for summary judgment pursuant to CPLR 3212 against defendant U.S. Adjustment Corp. ("USAC") for the relief demanded in the complaint (NYSCEF #22 – Notice of Motion). Plaintiff's sole cause of action is for an account stated (NYSCEF #1 – Complaint). Defendant opposes the motion. The Decision and Order is as follows:

FACTS

Veritext is a corporation providing court reporting and deposition services. Plaintiff, through its affiant Marc Goldberg (a sales executive for plaintiff), claims that it provided these legal reporting services to defendant's various attorneys and law office clients with the understanding that all billing would be submitted to and paid by defendant (NYSCEF #24 – Affidavit of Marc Goldberg at ¶¶3-4). Plaintiff claims that it sent invoices to defendant for these services and that defendant made sporadic payments leaving invoices in the amount of \$100,817.83 still outstanding (*id.* at ¶5; NYSCEF #26 – Invoices; NYSCEF #28 – Payments). Plaintiff avers that it has no record of any objection to the amounts listed on the invoices and since partial payment was made by defendant at various points, plaintiff continued to provide the court reporting services until August 2015 (NYSCEF #24 at ¶6).

DISCUSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties

opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). “A motion for summary judgment, irrespective of by whom it was made, empowers a court to search the record and award judgment where appropriate” (*GHR Energy Corp. v Stinnes Interoil Inc.*, 165 AD2d 707, 708 [1st Dept 1990]).

“An account stated is an agreement between [the] parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance” (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 [1st Dept 2007] [citing *Jim-Mar Corp. v Aquatic Construction*, 195 AD2d 868, 869 [3d Dept 1993]). Receipt, retention, and failure to object to an invoice coupled with partial payment gives rise to an account stated (*see Shea & Gould v Burr*, 194 AD2d 369, 371 [1st Dept 1993]; *see also Rosenman Colin Freund Lewis & Cohen v Edelman*, 160 AD2d 626, 626 [1st Dept 1990]). However, partial payment is not necessary to give rise to account stated – mere retention without objection is sufficient (*see Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51, 51 [1st Dept 2004]). However, “[a]n account stated assumes the existence of some indebtedness between the parties, or an agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists” (*Ryan Graphics*, 39 AD3d at 251).

Here, plaintiff argues that defendant made partial payment on the outstanding invoices and retained the invoices without objection. Plaintiff argues that defendant’s failure to object to any of the statements, coupled with the payments on the account, should be deemed an acquiescence to the balance due, thereby entitling plaintiff to summary judgment on the account stated.

Defendant argues that the motion should be denied on the basis that plaintiff has not submitted an affidavit by anyone with personal knowledge of the alleged “understanding” between the parties or any express written agreement (NYSCEF #32 – Def Opp Memo of Law at 4). Defendant argues that without this proof of an underlying contract, a claim for account stated must be denied (*see Gurney, Becker & Bourne, Inc. v Benderson Development Co., Inc.*, 47 NY2d 995, 996 [1979]; *see also Ryan Graphics*, 39 AD3d at 251).

Defendant further argues that there is a material variance between plaintiff’s complaint and its argument on this motion. In the complaint, plaintiff claims that it “provided defendant with services” (NYSCEF #1 – Complaint at ¶3). However, the

Goldberg moving affidavit claims that plaintiff provided services to “various clients of defendant” and “to different law offices and attorneys which defendant agreed to pay for” (NYSCEF #24 at ¶¶3-4).

Defendant argues that if the allegations made in the affidavit were made in the complaint, it would have included in its answer that plaintiff's claim is barred by the statute of frauds. Defendant points to General Business Law (GBL) §399-cc which requires that “when an attorney of record orders a stenographic record of any judicial proceeding, deposition, statement or interview of a party... it shall be the responsibility of such attorney to pay for the services and the costs of such record except where... the attorney expressly disclaims responsibility for payment of the stenographic service or record in writing at the time the attorney orders... that the record be made” (GBL §399-cc; *see also Elisa Dreir Reporting Corp. v Global Naps Network, Inc.*, 84 AD3d 122, 126-127 [2d Dept 2011] [“The statute holds the attorney presumptively liable to pay the costs of reporting services given that, in modern practice, it is often the attorney rather than the client ‘who orchestrates and manages the litigation,’ and communicates with the court reporting agency.”]). Defendant argues that this provision, coupled with General Business Law §701(a)(2) which requires that “a special promise to answer for the debt, default or miscarriage of another person” be put in writing, means that plaintiff's claim for an account stated must fail as the stenographic services must be paid by the attorneys of record, not defendant, in the absence of proof of a written assignment.

Plaintiff responds that the agreement between the parties concerning the indebtedness can be express or implied (*see Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431 [1st Dept 1979]). An agreement may be implied if the party receiving the invoices retains it without objecting to them within a reasonable time or if the party makes partial payment, which constitutes acknowledgement of the correctness of the account (*id.*).

Plaintiff further argues that when a plaintiff “provid[es] documentary evidence of the invoices, and an affidavit stating that he sent the invoices on a monthly basis to defendant, and that defendant received the invoices and failed to object to the invoices until this litigation”, plaintiff establishes its entitlement to summary judgment on an account stated claim (*Glassman v Weinberg*, 154 AD3d 407, 408 [1st Dept 2017]). Plaintiff does not reply to defendant's statute of frauds argument.

Plaintiff's motion is denied. The factual circumstances here prevent plaintiff from obtaining summary judgment. Crucially, it is unclear whether defendant is required to pay plaintiff's invoices. GBL 399-cc requires that an attorney of record pay for stenographic services. The submitted invoices include the phrase “Bill To”, followed by the name of the attorney of record, and an address of USAC's place of business (NYSCEF #26 – Invoices). Additionally, it is unclear from the submitted

evidence whether the attorneys of record assigned their obligations to pay plaintiff to defendant. Viewed in the light most favorable to defendant, this indicates that the attorneys of record, not defendant, are obligated to pay plaintiff. As such, summary judgment is inappropriate at this time.

Accordingly, it is ORDERED that plaintiff's motion for summary judgment on its complaint is denied.

This constitutes the Decision and Order of the court.

10/15/2019

DATE

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE

 **MARGARET A. CHAN**
J.S.C.