

**L.K. McLean Assoc., PC v Baldassano Architecture,
LLP**

2019 NY Slip Op 34713(U)

April 24, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 612081/2015

Judge: Martha L. Luft

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

Index No. 612081/2015.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

PRESENT:

Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

L.K. McLEAN ASSOCIATES, PC,

Plaintiff,

Mot. Seq. No.: 001 - MD
Orig. Return Date: 09/12/2018
Mot. Submit Date: 12/04/2018

-against-

Mot. Seq. No.: 002 - MD
Orig. Return Date: 09/12/2018
Mot. Submit Date: 12/04/2018

BALDASSANO ARCHITECTURE, LLP

Defendant.

PLAINTIFF'S ATTORNEY
Lauren Davies, Esq.
L'Abbate, Balkin, Colavita & Contini LLP
1001 Franklin Avenue
Garden City, NY 11530

DEFENDANT'S ATTORNEY
Christopher Bianco, Esq.
Eagan & Golden LLP
96 South Ocean Avenue
Patchogue, NY 11772

Upon the e-filed documents numbered 5-14 and 16-26, it is hereby

ORDERED that plaintiff's motion for summary judgment (mot. seq. 001) and defendant's cross motion for summary judgment (mot. seq. 002) are both denied; and it is further

ORDERED that a preliminary conference in this matter is scheduled for **Tuesday, May 21, 2019 at 9:30 am in the DCM Part.**

Plaintiff has moved for summary judgment on its complaint seeking damages for defendant's alleged breach of an account stated. Defendant cross-moves for dismissal of the complaint, arguing that there was no account stated and any claim based upon the underlying contract between the parties is barred by the statute of limitations.

There is no dispute that the parties entered into a contract in May of 2006 by which plaintiff was to provide engineering services to defendant, an architectural firm, that was engaged

L.K. McLean Associates, PC v. Baldasano Architecture LLP
Index No. 612081/2015

LUFT, J.
Page 2

by the County of Suffolk to design and construct a new Suffolk County Police Fourth Precinct building. The current lawsuit was commenced by filing the summons and complaint on November 13, 2015.

Plaintiff relies upon an email allegedly sent on April 6, 2010 by Thomas Cromer, defendant's Chief Financial Officer to Roy Fulkerson, plaintiff's Vice President. The email purports to attach a "proposed payment plan to have you paid for your services on 4th Precinct." The attachment is a spreadsheet entitled, "Louis K. McLean Associates, PC, AR Analysis." The extremely brief affidavit, sworn to by Roy Fulkerson, submitted in support of plaintiff's motion, provides little explanation of the spreadsheet, however, the court would assume that "AR" refers to "accounts receivable." Mr. Fulkerson merely characterizes it as a list of the "open invoices" and an agreement "to pay \$66,150 of the invoices pursuant to a payment plan in satisfaction of the total open invoices totaling \$76,120." Mr. Fulkerson further swears that six payments were made by defendant, but the total balance due was never satisfied.

This email is the basis of plaintiff's claim for an account stated. Plaintiff argues that it essentially recognizes a debt owed by defendant and contains nothing inconsistent with the intent by defendant to pay such debt. Plaintiff relies upon General Obligations Law (GOL) §17-101 for the timeliness of its current filing.

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 eliminate any material issues of fact from the case. Such evidence must be in admissible form. *Shafi v Motta*, 73 AD3d 729, 730, 900 NYS2d 410, 411 [2d Dept. 2010]. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]. The movant has the initial burden of proving entitlement to summary judgment. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Id.* Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact." CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]. The court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true. *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987].

Plaintiff has failed to make the requisite showing. The April 6, 2010 email that is the crux of its case has not been properly authenticated, and, as such cannot be considered by the court on this motion. *Shafi v Motta*, 73 AD3d at 730, 900 NYS2d at 412; *AQ Asset Management LLC v Levine*, 128 AD3d 620, 621, 13 NYS3d 1, 2 [1st Dept. 2015]. While Mr. Fulkerson avers that

L.K. McLean Associates, PC v. Baldasano Architecture LLP
Index No. 612081/2015

LUFT, J.
Page 3

Tom Cromer sent him an email on April 6, 2010, there is no reference to the specific exhibit annexed to the motion papers containing a copy of the email, let alone any more definite statement as to any other details about its authenticity. Authentication of emails, text messages, etc., can be accomplished through circumstantial evidence showing context that provides indicia of reliability. *People v Green*, 107 AD3d 915, 916-17, 967 NYS2d 753, 756 [2d Dept. 2013]. Here there is no surrounding context provided for the critical email. There is no responding email from Mr. Fulkerson, acknowledging his agreement, nor any preceding email from him to Mr. Cromer reflecting some type of discussion between them.

Moreover, the email and its attachment facially raise certain questions regarding authenticity. For example, the signature block on the bottom of the email, under Thomas Cromer's name, indicates the address of the defendant as being "Long Island, New York," when it is clear from elsewhere in the record that their address is in Patchogue. The variety of fonts used, the odd locution, number of misspellings and typographical errors and the unbusiness-like salutation, contrast sharply with the emails from Mr. Cromer contained in Exhibit B of the plaintiff's motion (the original Answer served *pro se* by Mr. Cromer).

Most telling is the fact that the attachment does not appear to be a payment schedule proposal from defendant at all. Rather, it appears to be a report of some sort generated by the plaintiff, in that is entitled "Louis K. McLean Associates, PC - AR Analysis." It seems to reflect payments made, in months subsequent to the April 6, 2010 email, on four invoices, and to reflect that those invoices had a remaining balance of "0.00" as of, respectively, 5/12/ 2010, 5/28/ 2010, 10/29/2010, and 11/12/2010. In addition, the six payment figures that Mr. Fulkerson attests to in his affidavit do not match up with any figures in the attachment.

Whether this analysis is correct or not is, of course, beside the point. The point is that a number of decisive questions of fact remain in this matter. The court's job on a motion for summary judgment is not to resolve issues of fact, but rather to determine whether any issues of fact remain. *Vega v Restaini Const. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13, 16 [2012]. Here they surely do, and the plaintiff's motion must be denied for failure to establish a *prima facie* showing of entitlement to judgment.

Defendant's motion is supported by an affidavit from Alexander Badalamenti, a partner in Baldasano Architecture, LLP. He avers that defendant paid for all services rendered by plaintiff, but provides no support for that statement. He also characterizes the April 6, 2010 email from Mr. Cromer as a settlement proposal rather than an acknowledgment of an existing debt and states that Mr. Cromer was not an authorized agent of defendant. The principal argument raised is that the statute of limitations has run on any contract cause of action because the last invoice was mailed in 2008. No documentation of the latter was provided. Defendant's motion papers contain correspondence from Mr. Cromer to plaintiff from as recent a date as August 18, 2015, alluding to discussions between the parties regarding outstanding invoices.

L.K. McLean Associates, PC v. Baldasano Architecture LLP
Index No. 612081/2015

LUFT, J.
Page 4

While the court has just ruled that the April 6, 2010 email has not been properly authenticated at this time, that does not preclude the possibility of such authentication being established in the future. If it were to be properly authenticated, the defendant has not met its burden of establishing that there are no issues of fact as to whether it amounted to an account stated, and whether it satisfied the provisions of GOL §17-101. The statute provides that the statute of limitations starts running anew where there is a written acknowledgment of a debt signed by a party to be charged thereby and contains nothing inconsistent with the intention on the debtor's part to pay such debt. *Lew Morris Demolition Co., Inc. v Bd. Of Educ. Of City of New York*, 40 NY2d 516, 520-21, 387 NYS2d 409, 411 [1976].

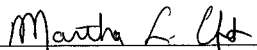
Defendant's argument that the CFO and partner in a company has no authority to bind it is unavailing. *Forcelli v Gelco Corp.*, 109 AD3d 244, 972, NYS2d 570 [2d Dept. 2013]. Nor can it be said that it is beyond dispute that the email does not acknowledge the debt and evince an intention to pay it. Finally, defendant has not shown that, looking at the facts in the light most favorable to plaintiff, there is no question as to whether the email, together with the alleged partial payments, if accurate, constituted an account stated. *Redemption Plus, LLC v Advantage Entertainment Service Corp.*, 168 AD3d 1010, 1011, 93 NYS3d 48, 50 [2d Dept. 2019] (agreement to an account may be implied where defendant makes partial payments on such account).

Thus, defendant has also failed to establish a *prima facie* showing of entitlement to judgment dismissing the case, and the cross-motion is, therefore, denied.

The prosecution of this case languished for years before these motions were filed. The court has set the matter down for a preliminary conference, and the parties are directed to move forward with any necessary discovery forthwith.

ENTER

Date: April 24, 2019
Riverhead, New York


MARTHA L. LUFT, A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION