

Longplay, LLC v Sokoloff-Schaffer
2020 NY Slip Op 31439(U)
May 8, 2020
Supreme Court, New York County
Docket Number: 654327/2019
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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LONGPLAY, LLC, : Index No. 654327/2019

Plaintiff, : DECISION & ORDER

-against- :

NATHALIE SOKOLOFF-SCHAFFER; :
BENJAMIN CRUZ; A DIFFERENT :
KIND OF ANIMAL, LLC; and :
ADKOA, LLC, :

Defendants. :
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LOUIS L. NOCK, J.

Defendants move (seq.no. 001) to dismiss the complaint on grounds of documentary evidence (CPLR [a] [1]) and failure to state a claim (CPLR [a] [7]). Plaintiff opposes the motion and cross-moves for an order deeming its late filing of affidavits of service of process as timely, *nunc pro tunc* (CPLR 2004), and for sanctions (22 NYCRR 130-1.1).

Per the complaint,¹ plaintiff, a California limited liability company, is engaged in the business of providing “business development and creative marketing services, including branding strategy and design” (Complaint ¶ 3). A document titled “Work Proposal,” dated October 22, 2016, was prepared by plaintiff describing services that it was prepared to provide for a three-month period “to help ADKOA to define its 2020 Strategy” in exchange for payment of \$5,000 per month plus tax; a success fee of \$7,500 in the event of the materialization of a successful business opportunity that was presented by plaintiff; and expenses, as fixed in that Work Proposal (NYSCEF Doc. No. 16). The Work Proposal also contains a late payment

¹ Except to the extent that the court cites to exhibits submitted by the parties, the facts stated herein are based on the yet-unproven allegations of the complaint, taken as true unless superseded by the evidentiary import of such exhibits (*Maas v Cornell Univ.*, 94 NY2d 87 [1999]).

penalty of “20% more per month,” although it is unclear whether that is applied to the base monthly payment amount or to said amount plus any additional success fee and expenses.

The complaint identifies individual defendants Sokoloff-Schaffer and Cruz as founders and principal shareholders “of ADKOA,” a New York limited liability company (Complaint ¶¶ 4-5). Entity defendants ADKOA, LLC, and *A Different Kind of Animal, LLC*, are alleged to be two separate New York limited liability companies with two separate Department of State identifiers and two separately listed addresses (Complaint ¶¶ 6-7). The complaint alleges, on information and belief, that the individual defendants have periodically used both companies’ names interchangeably (Complaint ¶ 10).

The Work Proposal reads as follows in its addressee block:

A DIFFERENT KIND OF ANIMAL
(ADKOA)
Nathalie Sokoloff & Ben Cruz
54 Mercer - 2nd floor
New York, NY 10013

The Work Proposal was ostensibly accepted as a contract by virtue of Sokoloff-Schaffer’s signature thereon; but the threshold question is, on whose behalf? It is signed by Sokoloff-Schaffer under her typed name – the only typed name on there – but bearing no indication whatsoever in the signature portion of the contract that it was signed by her in her official capacity as a shareholder of either of the entity defendants and, thus, on behalf of either of them. The addressee block quoted above does not tell us whether it is merely that – an addressee block – or whether it is a substantive identifier of who the payment obligor is (or payment obligors are) under the contract. Moreover, defendant Cruz’ signature is nowhere on the contract, although his name appears in the addressee block, creating further ambiguity. Although the complaint alleges that “Defendants,” without qualification, are parties to the contract (Complaint ¶ 13),

both Sokoloff-Schaffer and Cruz assert that Sokoloff-Schaffer signed it in her capacity as an officer of ADKOA, LLC, only, and not on any other entity's behalf, and not on her own personal behalf (*see*, NYSCEF Doc. Nos. 15, 17).

The complaint alleges that “Defendants” (without qualification) are in default in payment obligations under the Work Proposal contract, seeking \$38,450 in damages, representing an unpaid balance plus application of the 20% late payment penalty (*see*, Complaint ¶ 39).

There is evidence in the record of an “adkoa.us” email communication from Sokoloff-Schaffer assuring Arnaud Pigounides, a principal of plaintiff, that outstanding balances (unstated therein) will be paid (*see*, NYSCEF Doc. No. 25). But, again, there is no concrete indication based on the paper record so far as to who or what is the payment obligor (or are the payment obligors) under the contract – the most rudimentary of facts in any breach of contract case.

Defendants have moved to dismiss the complaint. They assert that the contract's late payment penalty is usurious, at 20%. While it is true that usury ordinarily applies to loans and not contracts (*see, Donatelli v Siskind*, 170 AD2d 433 [2d Dept 1991]), it *can* apply to forbearances (*see*, Penal Law 190.40). There is evidence in the record that plaintiff extended a forbearance in respect of monies alleged to be recoverable in this lawsuit (*see*, NYSCEF Doc. No. 26); but it is as yet unclear whether the late payment penalty was applied, as accrued during any period of forbearance.

Defendants further argue that the individual defendants are not bound by the contract. However, as indicated above, it is as yet unclear who the payment obligor is (or payment obligors are) under the contract. Moreover, while plaintiff's principal asserts, on information and belief, that conditions exist which would warrant application of the doctrine of piercing the corporate veil (*see*, NYSCEF Doc. No. 23 ¶ 34), such determination can only be made after

discovery can reveal the existence of such conditions (*see, Ledy v Wilson*, 38 AD3d 214, 214 [1st Dept 2007] [referring to the issue of corporate veil piercing as a “fact-laden claim” unsuited to summary adjudication]).

Defendants seek dismissal on the ground that affidavits of service of process were not filed within the 20-day period after service (CPLR 308 [4]). Per the affidavits of service: Sokoloff-Schaffer was served August 21, 2019. That means the 20-day window closed on September 10, 2019. Cruz was served September 24, 2019. That means the 20-day window closed on October 14, 2019. The affidavits were filed October 29, 2019. Late filing of an affidavit of service of process “is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or *sua sponte* by the court in its discretion pursuant to CPLR 2004” (*Khan v Hernandez*, 122 AD3d 802, 803 [2d Dept 2014]). Plaintiff has, in fact, cross-moved for the exercise of such discretion. The court now grants that cross-motion, given the fact that the delay cannot be considered substantial in this court’s view, and given the fact that defendants have answered the complaint and will not be unduly prejudiced by this exercise of discretion. The affidavits of service of process are deemed timely filed, *nunc pro tunc*.

Defendants seek dismissal of the non-contractual causes of action in the complaint (such as unjust enrichment) on the general premise that the existence of a contract governing the parties’ rights limits causes of action relating to those rights to those sounding in breach of contract. While that premise is true (*see, e.g., Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 [2012]), as the above discussion indicates, it is yet to be determined who the parties to the contract are. The only thing we know for sure at the present time is, the Work Proposal contract was prepared by plaintiff and signed by Sokoloff-Schaffer. Further facts need to be developed through discovery and, perhaps, trial.

Lastly, defendants seek sanctions based on their assertion that the contract is usurious. That relief cannot be granted because, as indicated, the issue of usury is still open for determination. Plaintiff has cross-moved for sanctions based on its assertion that the motion is frivolously made. The court disagrees. Many issues of fact remain to be determined in this case, as indicated. Until such issues are tried and determined, or otherwise disposed of on summary judgment after discovery, this court cannot possibly conclude that defendants' positions are frivolous, or even incorrect at this pre-discovery stage of the case.

For all the foregoing reasons, summary dismissal of the complaint is impossible at this point in time. Therefore, the motion to dismiss must be denied.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is denied, and its request for a sanctions assessment against plaintiff is similarly denied; and it is further

ORDERED that plaintiff's cross-motion for an order declaring its filing of the affidavits of service of process timely, *nunc pro tunc*, is granted, and that the sanctions assessment against defendants sought in its cross-motion is denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
May 8, 2020

ENTER:



Hon. Louis L. Nock, J.S.C.