

3B Associates LLC v Ecommission Solutions, LLC

2020 NY Slip Op 31578(U)

May 13, 2020

Supreme Court, New York County

Docket Number: 657537/2017

Judge: Andrew Borrok

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.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM
Justice
INDEX NO. 657537/2017
3B ASSOCIATES LLC MOTION DATE 11/14/2019, 11/14/2019
Plaintiff, MOTION SEQ. NO. 004 005
- v -
ECOMMISSION SOLUTIONS, LLC, DECISION + ORDER ON MOTION
Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 102, 103, 104, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 133, 134, 135, 136, 137, 138, 139, 140

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 005) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 141

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, 3B Associates LLC's (3B Associates) motion for summary judgment for breach of contract (Mtn. Seq. 004) pursuant to CPLR § 3212 is denied and eCommission Solutions, LLC's (ECS) motion for summary judgment (Mtn. Seq. 005) pursuant to CPLR § 3212 is granted solely to the extent that the second and fourth causes of action for an accounting are dismissed.

The Relevant Facts and Circumstances

3B Associates commenced this lawsuit alleging breach of an agreement (NYSCEF Doc. No. 66, the Agreement), dated March 20, 2006, by and between 3B Group, Inc. (3B Group) and ECS, whereby ECS would pay a certain percentage of its net profits to 3B Group (id., ¶ 1). The

Agreement also provided that it could not be assigned or modified without written agreement, and would be binding upon the parties and their successors:

4. The rights, duties and obligations under this Agreement shall not be assigned, transferred, pledged or encumbered in any manner whatsoever, *except by prior written agreement executed by the parties hereto.*

...

6. This Agreement shall not be changed, modified or cancelled except by prior written agreement between the parties hereto.

7. This Agreement, and each and all of the terms and provisions hereof, shall be binding upon, and shall inure to the benefit to each of the parties hereto, their respective heirs, representatives, executors, successors and/or assigns.

(*id.* at 3 [emphasis added]).

3B Associates was formed on July 28, 2010 (NYSCEF Doc. No. 138). Pursuant to an Assignment and Assumption Agreement (NYSCEF Doc. No. 70, the **Assignment Agreement**), dated January 1, 2011, by and between 3B Group as assignor and 3B Associates as assignee, 3B Group assigned its interest in the net profits of ECS to 3B Associates. Pursuant to the Agreement, ECS made four payments to 3B Associates for net profits in 2011, 2012, and the first through third quarter of 2013 (NYSCEF Doc. No. 1, ¶ 17). A certificate of dissolution was filed for 3B Group on January 28, 2013 (NYSCEF Doc. No. 84).

3B Associates asserts the following claims against ECS: (i) breach of contract for failure to pay net profits (first cause of action), (ii) an accounting for the net profits (second cause of action), (iii) breach of contract for failure to pay a portion of the sale of a controlling interest of ECS (third cause of action), (iv) an accounting for the sale of a controlling interest of ECS (fourth cause of action).

Discussion

On a motion for summary judgment, the movant “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

Motion Sequence 004 (3B Associates’ Motion for Summary Judgment)

The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff’s performance, (3) the defendant’s breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

3B Associates argues that the court should grant summary judgment finding ECS in breach of contract because (i) the Agreement is a valid contract between 3B Group and ECS, (ii) 3B Associates is the successor-in-interest to 3B Group, (iii) ECS ratified the assignment by issuing four checks to the 3B Associates in 2012 and 2013, (iv) ECS acknowledged the sufficiency and receipt of consideration from 3B Associates pursuant to the Agreement, and (v) ECS breached the Agreement by failing to pay net profits from 2014 through 2017.

Whether a party is a successor-in-interest to performing a particular contract is generally a question of fact, which depends on the circumstances of each case (*see Bd. of Mgrs. of 100 Congress Condominium v SDS Congress, LLC*, 152 AD3d 478, 481 [2d Dept 2017]).

If a written contract provides that it can only be changed by a signed writing, an oral modification of that agreement is generally not enforceable (General Obligations Law § 15-301 [1]; *Tierney v Capricorn Invs.*, 189 AD2d 629, 631 [1st Dept 1993]). However, a written agreement that forbids oral modification may nevertheless be modified if there is partial performance of an oral modification that is unequivocally referable to the alleged oral modification (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]).

It is undisputed that 3B Group and ECS entered into the Agreement. However, there remain material issues of fact concerning whether ECS consented to 3B Associates as an assignee or whether 3B Associates is a successor-in-interest to 3B Group's rights under the Agreement. The court notes that pursuant to the Assignment Agreement, 3B Group only purported to assign its interest in the net profits of ECS to 3B Associates. And, significantly, as discussed above, pursuant to Paragraph 4 of the Agreement, an assignment of a party's rights under the Agreement required written agreement of the parties which undisputedly did not occur (NYSCEF Doc. No. 66 at 3).

Although 3B Associates argues that it is the successor-in-interest to 3B Group, it is not the successor-in-interest by operation of law by virtue of a merger or other consolidation (i.e., 3B Group was not merged into 3B Associates pursuant to the statute (re: either the New York Business Corporations Law or the New York Limited Liability Company Act) – 3B Group was

dissolved). In addition, although Mr. Behrens attests that 3B Associates was formed because 3B Group was reorganized for income tax purposes, and that this was accomplished by transferring all the assets subject to liabilities of 3B Group to the new limited liability company, 3B Associates, and that the ownership and business interests of the two companies remained the same (NYSCEF Doc. No. 63, ¶ 7-8), Mr. Behrens does not provide sufficient documentary evidence to corroborate his claims. While Mr. Behrens attaches the 2011 tax returns of 3B Associates and 3B Group to assert that all income of 3B Group would be reported by 3B Associates (NYSCEF Doc. Nos. 71-72), the record is silent as to the nature of the business that 3B Group engaged in, whether such business was continued through 3B Associates, and whether 3B Associates assumed any other contractual obligations of 3B Group.

To the extent that 3B Associates relies on *Herbert Morris & Partners, Ltd. v Opti-Ray, Inc.*, 290 AD2d 486 [2d Dept 2002] to argue that 3B Associates is the successor-in-interest to 3B Group, *Herbert Morris* does not entitle 3B Associates to judgment. In *Herbert Morris*, the Second Department reversed the trial court holding that the defendants were entitled to judgment because viewing the evidence in the light most favorable to the plaintiff, there was no rational basis by which a trier of fact could find that the plaintiff was the successor-in-interest because, among other things, there was no formal assignment of the plaintiff's rights. Here, unlike in *Herbert Morris*, although 3B Associates falls short of demonstrating their right to judgment as the successor-in-interest to 3B Group, there remains an issue of fact for trial.

In addition, there are material issues of fact as to whether there was an oral modification to the Agreement or part performance to bring this case within the exception to General Obligations Law § 15-301 [1] as set forth in *Rose, supra*. Mr. Behrens attests that in 2012, he advised Mr.

Hoffman during a meeting that 3B Group formed a new entity for tax purposes and that all payments made pursuant to the Agreement would be made payable to 3B Associates, which Mr. Hoffman acknowledged by stating “Okay” (NYSCEF Doc. No. 63, ¶ 29). However, Mr. Hoffman testified during deposition that he did not agree to change or modify the Agreement (NYSCEF Doc. No. 109, at 160-161). There is also an issue of fact as to whether ECS’s issuance of four checks to “3B & Associates” and 3B Associates’ acceptance of the checks constitute part performance (NYSCEF Doc. No. 74) as Mr. Hoffman explained at his deposition that he just assumed that it was a d/b/a. Accordingly, 3B Associates’ motion for summary judgment is denied.

Motion Sequence 005 (ECS’s Motion for Summary Judgment)

Upon the foregoing reasons, that branch of ECS’s motion for summary judgment to dismiss the action because 3B Associates lacks standing to enforce the Agreement is denied because there are material issues of fact as to whether 3B Associates is a consented to assignee or successor-in-interest to 3B Group’s rights under the Agreement.

However, the branches of ECS’s motion for summary judgment to dismiss the second and fourth causes of action for an accounting are granted because ECS has met its burden of coming forward and demonstrating its right to judgment and 3B Associates did not meet its burden of creating an issue of fact for trial in their opposition papers and, an in any event, there is no fiduciary relationship between 3B Associates and ECS (*see Kazi v Gen. Elec. Capital Bus. Asset Funding Corp. of CT*, 116 AD3d 592, 592 [1st Dept 2014] [contractual relationship alone does not give rise to fiduciary relationship]).

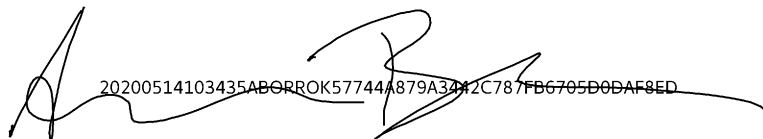
Accordingly, it is

ORDERED that 3B Associates' motion for summary judgment (Mtn. Seq. 004) is denied and ECS's motion for summary judgment (Mtn. Seq. 005) is granted solely to the extent that the second and fourth causes of action for an accounting are dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment in accordance with the foregoing.

5/13/2020

DATE



20200514103435ABORROK57744A879A34A2C787FB6705D0DAF8ED

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE