

**S.P.E.C. Tech., Inc. v iStar Fin., Inc.**

2020 NY Slip Op 33879(U)

November 19, 2020

Supreme Court, New York County

Docket Number: 657221/2019

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LAURENCE L. LOVE PART IAS MOTION 63M

*Justice*

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S.P.E.C. TECHNOLOGIES, INC.

Plaintiff,

- v -

ISTAR FINANCIAL, INC.,

Defendant.

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INDEX NO. 657221/2019

MOTION DATE 10/23/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

The following read on defendant's motion for dismissal; CPLR 3211(a)(1), a defense is found upon documentary evidence; and CPLR 3211(a)(7), the pleading fails to state a cause of action. Plaintiff states causes of action for 1) account stated, and 2) breach of contract for approximately \$359,000 in relation to the design and construction of an amphitheater in Coney Island.

In or about 2012/2013, defendant iStar Financial, Inc. ("iStar") engaged plaintiff S.P.E.C. Technologies, Inc. ("SPEC") to perform design coordination and project management services to the design and construction of a Coney Island amphitheater. Services included the site plan, seating plan, and consulting with architects, engineers, and other design professionals. A dispute arose among invoices regarding services rendered.

Defendant's memorandum of law cites the reasons for dismissal as 1) SPEC's breach of contract claim accrued on or before November 29, 2013, hence is time barred per six-year statute of limitations; 2) SPEC fails to allege an enforceable agreement between SPEC and iStar, SPEC

fails to specify the date of the agreement, or any of the terms and conditions of the agreement; 3) SPEC's account stated accrued in September of 2013, hence time barred due to six year statute of limitations, and 3) SPEC has not pleaded an account stated claim against iStar because it has failed to submit the relevant invoices and set forth the specifics of the services covered by each invoice.

On a motion to dismiss pursuant to CPLR 3211, [the court] must accept as true the facts as alleged in the complaint and submission in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (see *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001]).

Plaintiff submits the affidavit of Timothy M. Thiel, principal of S.P.E.C. Technologies, Inc. Mr. Thiel affirms, "The negotiations that led to my being induced to provide services for iStar were directly with iStar personnel. While iStar argues in defense that this is belied by the fact that my invoices were sent to iStar's architects Gerner Kronick & Valcarcel ("GKV"), this was done at the direction of iStar, because GKV had to approve my invoices. That I had a contractual relationship with iStar is further confirmed by the email exchange with defendant iStar's project manager Kevin Foley, wherein he both provided written acknowledgement of \$109,000 of the debt and that GKV was acting as its agent for the purpose of making payment to SPEC, which is exactly why the invoices were directed to GKV. This email confirms the existence of a contractual relationship between my company SPEC and defendant iStar, and that GKV was acting as an intermediary" (see NYSCEF Doc. No. 24 Par. 3 – 4).

Mr. Thiel's affirmation continues, "my company's claim to a total of at least \$359,000 for work rendered inclusive of the \$109,000, is not time-barred for two reasons. First, my

company's prospective services were not completed until early 2014, so my claim with respect to the moneys owed above and beyond the \$109,000 is not time barred. Second, the remaining portion of the moneys owed was subject to approval. The fact that iStar had agreed on January 8, 2014 to make payment of \$109,000 is a ratification of the parties' mutual understanding that the remainder of all funds owed for my services would be paid" (see NYSCEF Doc. No. 24 Par. 14 – 16).

The essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach (see *Dee v. Rakower*, 112 A.D.3d 204 [2nd Dept 2013]).

Defendant highlights the first department case *Bomser*, it is black letter law that when a claim is founded upon a contract, either the relevant portions of the contract must be set forth in the complaint or a copy of the contract must be appended thereto (see *Bomser v. Moyle*, 89 A.D.2d 202, 203 – 204 [1st Dept 1982]).

Plaintiff continues in *Bomser*, [t]he parties may have intended to be bound by that oral agreement even though a written agreement was never executed (*Id.* at 204).

Plaintiff highlights that SPEC was paid \$209,000 prior to September 2013 for SPEC's services.

On a motion to dismiss based upon documentary evidence, defendant must present evidence which "utterly refutes" plaintiff's allegations and establishes a defense as a matter of law (see *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314 [2002]).

Plaintiff submits an affidavit to the amount due, an email exchange between the parties, performance of some type of agreement, and the dates of occurrence. Plaintiff does not submit the written agreement but provides an inference to some type of accord between the parties.

When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleading as true, affording the non-moving party the benefit of every possible favorable inference and determining “only whether the facts as alleged fit within any cognizable legal theory (see *D.K. Prop., Inc. v. Natl Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505[1st Dept. 2019]).

ORDERED that defendant’s motion for dismissal is denied.

11/19/2020  
DATE

  
LAURENCE L. LOVE, 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