Levy Premium Food Serv. v God Save the King LLC
2020 NY Slip Op 34193(U)
July 3, 2020
Supreme Court, Kings County
Docket Number: 508833/2016
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings
Part 91

Index Number **508833/2016**
NO SEQ#

LEVY PREMIUM FOOD SERVICE, A DIVISION OF COMPASS,

Plaintiff,

against

GOD SAVE THE KING LLC D/B/A PROVOCATEUR,

Defendant.

TRIAL DECISION

After trial for the above matter, in which the court had sufficient opportunity to assess the credibility of witnesses and the weight of the admitted testimony and exhibits, the court finds as follows, based upon the preponderance of the credible evidence:

FACTUAL BACKGROUND

Plaintiff brought this action against defendant to recover money that plaintiff claims defendant owes pursuant to an agreement with plaintiff on or about March 2, 2013 for "[g]oods sold delivered work labor services rental [sic]". Plaintiff claims that defendant breached this agreement by failing to pay and that defendant owes plaintiff $67,000.00.

At trial, Greg Costa, who was employed by plaintiff as the assistant director of operations for concessions at the Barclay Center in Brooklyn, testified that plaintiff provided catering and other services for events at the Barclay Center (transcript at 10-12). He testified that plaintiff catered a concert for God Save the King LLC (*id.* 12). Mr. Costa further testified that he oversaw the beverage service for the event, and that this service was memorialized in a banquet event order, or "BEO" (*id.* 12-13).

Plaintiff submitted copy of three banquet event orders into evidence as part of Exhibit 2.

The first BEO states that it was for an event on March 2, 2013 called "Provocateur Product" at the Barclays Center. The second BEO is for an event on March 2-5, 2013, for "Provocateur Buyout Fee", and the third BEO, also on March 2-5, 2013, was for "Provocateur". Each of the three BEOs list Nicole D. Jacobsen-Zaytsev as the on-site contact. The first BEO describes the drinks to be provided and the cost for those drinks, in the total amount of $23,685.16. The second BEO describes the charges for food per person, plus fees and taxes, in the amount of $39,195.00. The third BEO describes the charges for the waitstaff to be provided, plus taxes, in the amount of $7,316.40. Also part of Exhibit 2 are two invoices for events on March 2, 2013, in the amount of $23,685.16 and $7,316.40, which are the amounts listed on two of the three BEOs in Exhibit 2.

Plaintiff also submitted four invoices that Mr. Costa claimed related to a banquet event order, and the court accepted them into evidence on that basis as Exhibit 1 (transcript at 15-16, 28). However, these invoices relate to an event that is different from the BEOs in Exhibit 2 and the complaint.

In addition, plaintiff submitted copies of emails between Mr. Costa and Nicole D. Jacobsen-Zaytsev dated November 25, 2014 to December 18, 2014. The subject of the e-mails is "Provocateur – Barclays Center (Invoices)". In the emails, Mr. Costa and Ms. Jacobsen-Zaytsev discuss the correct amount that should have been billed. In Ms. Jacobsen-Zaytsev responses, her signature states "Nicole D. Jacobsen-Zaytsev Hi-Fi Marketing Group 381 Park Avenue South, Suite 1123 New York, New York 10016". Below her signature block is "www.provocateurny.com". The emails were admitted into evidence as Exhibit 3.

Plaintiff submitted additional emails among Mr. Costa, Marco Fabozzi of Levy Restaurants, and Ms. Jacobsen-Zaytsev dated from July 14, 2014 to February 13, 2015. Again,

below Ms. Jacobsen-Zaytsev's signature block is "www.provocateurny.com". The subject of the e-mails is "Provocateur – Barclays Center (Invoices)". In these emails, they discuss the amounts due for, among others, a March 2013 event called "SHM Barclays Center". Ms. Jacobsen-Zaytsev states in her email to Mr. Costa and Mr. Fabozzi, dated December 4, 2014, that $48,014.45 is due for "SHM". They also discuss the execution of a promissory note to address the remaining amount plaintiff claimed it was owed. The emails were admitted into evidence as Exhibit 4.

In addition, plaintiff offered a copy of a promissory note between Hi-Fi Marketing Group, LLC, as "Maker", and plaintiff as "Holder". The promissory note is not signed, but it states that Hi-Fi Marketing Group, LLC shall pay plaintiff Premium $100,001.63 on or before February 10, 2016. The promissory note was admitted into evidence as Exhibit 5.

Plaintiff also offered an email from David Heffner to Mr. Costa and others, dated April 8, 2015, in which Mr. Heffner states that a payment was received from Provocateur. He also notes there has been "no word on the $ they allegedly sent on 3/17 or the signed note". The email included what appears to be a cut and paste or screen shot of a wire payment confirmation. The confirmation shows a payment of $8,333.41 on April 7, 2015. The box labeled "reference" in the confirmation includes the following "ORIG: GOD SAVE THE KING LLC". The email was admitted into evidence as Exhibit 6.

Mr. Costa testified at trial that, once he received the email marked as Exhibit 6, he requested and received a statement of the deposit made from the payment. He received a single-page document memorializing payment on April 7, 2015, in the amount of $8,333.41 to plaintiff from God Save the King, LLC, located at 381 Park Avenue South, Room 1123, New York, New York, 10016. The court accepted the document in evidence as Exhibit 7. The court also notes

that, according to the website for the New York Department of State, God Save the King, LLC is located at that address (*Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 20 [2d Dept 2009] [a court may take judicial notice of information from government websites]).

Defendant did not appear at the trial, except through counsel. Additionally, defendant did not call any witnesses and offered no exhibits.

ANALYSIS

To prove his cause of action for breach of contract, plaintiff must prove the existence of a contract, his performance under the contract, defendant's breach of that contract, and resulting damages (*JP Morgan Chase v J.H. Elec. of New York, Inc.*, 69 AD3d 802, 803 [2d Dept 2010]). Furthermore, UCC § 2-201(1) requires a contract for the sale of goods in excess of $500 to be in writing "sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought".

UCC § 2-105(a) defines "goods" broadly as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action" (*Calltrol Corp. v DialConnection, LLC*, 51 Misc 3d 1221[A], 2016 NY Slip Op 50765[U], *7 [Sup Ct, Westchester County 2016], citing *In re Estate of McManus,* 83 AD2d 553, 555 [2d Dept 1981]). Thus, the agreement at issue was for "goods" as defined by UCC § 2-105(a) and so it must comply with UCC § 2-201(1).

Although plaintiff did not submit a written contract signed by defendant, it is enforceable pursuant to at least one of the exceptions set forth in UCC § 2-201(3). UCC § 2-201(3) states that a contract that does not comply with UCC § 2-201(1) may still be enforceable:

> (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller,

> before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
>
> (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
>
> (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Section 2-606).

The goods were not specifically manufactured and defendant did not admit in its pleadings or in court that there was an agreement. However, as Mr. Costa testified and as memorialized in Exhibit 2, the goods for the March 2013 event were delivered and accepted pursuant to the BEO (*see, e.g., Beard v Chase*, 162 AD3d 533, 544 [1st Dept 2018], *appeal dismissed,* 32 NY3d 1182 [2019]; *see also Bayside Fuel Depot Corp. v Nu Way Fuel Oil Burners Inc.*, 25 Misc 3d 1237[A], 2009 NY Slip Op 52469[U], *12-13 [Sup Ct, Kings County 2009]). Furthermore, the emails between plaintiff and Ms. Jacobsen-Zaytsev of Hi-Fi Marketing Group and Provocateur show that they agreed that they owed at least $48,014.45 for the March 2013 event. Thus, the court finds that there is an enforceable contract pursuant to UCC § 2-201(3)(c) and that plaintiff performed under the contract.

Defendant God Save the King's counsel objected at trial that defendant did not breach any agreement with plaintiff, and that plaintiff has not proven defendant does business as Provocateur.[1] The agreement, as memorialized in the BEOs and invoices admitted in evidence,

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[1] Defendant's counsel repeatedly objected to any claim that defendant did business as Provocateur, and even went so far as to state definitely that defendant did not do business as Provocateur (transcript at 49 and 53). Because counsel effectively testified as to this point, the court conducted a simple government records search (*Kingsbrook*, 61 AD3d at 20) and found that, in fact, defendant does do business as Provocateur Night Club (https://www.tran.sla.ny.gov/servlet/ApplicationServlet?pageName=com.ibm.nysla.data.publicquery.PublicQuerySuccessfulResultsPage&validated=true&serialNumber=1234694&licenseType=OP).

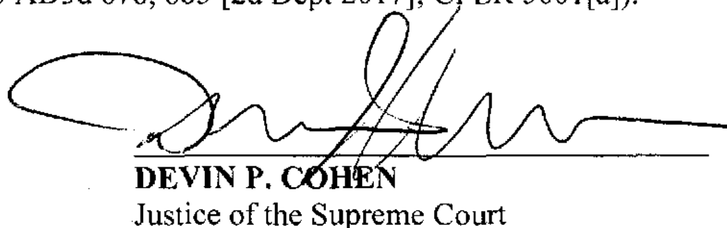
is between plaintiff and an entity called Provocateur. It appears that "Provocateur" is a business name that is related at least to Hi-Fi Marketing Group, as shown in the emails between plaintiff and Ms. Jacobsen-Zaytsev. Hi-Fi Marketing Group and God Save the King share the same address, communicated with others through a common representative, and commingled finances, in that God Save the King paid a portion of the debt owed by Provocateur, without explanation or reservation of rights. Their common address and shared finances sufficiently demonstrate, especially in the absence of any contrary evidence, that Provocateur, Hi-Fi Marketing Group, and God Save the King are, or operate as, a single organization (*Pae v Chul Yoon*, 41 AD3d 681, 682 [2d Dept 2007] [piercing the corporate veil on a breach of contract action where the sole owner of the defendant corporation was responsible for the breach and failed to observe "corporate formalities, such as the lack of a distinction between corporate funds and the defendant's personal funds"]; *Azte Inc. v The Auto Collection, Inc.*, 36 Misc 3d 1238[A], 2012 NY Slip Op 51731[U], *10 [Sup Ct, Kings County 2012], *affd sub nom. AZTE, Inc. v Auto Collection, Inc.*, 124 AD3d 811 [2d Dept 2015] [piercing the corporate veil between individual and company where both shared a common address and commingled personal and business funds]; *Flowers v 73rd Townhouse LLC*, 149 AD3d 420, 421 [1st Dept 2017] [holding company liable for actions done under an unregistered business name]).

Despite counsel's claim at trial that defendant was not a party to, and did not breach, any agreement with plaintiff, it has not acted consistently with such an assertion. First, defendant did not seek to implead any other party who might be held responsible for paying plaintiff for the goods and services plaintiff provided. Second, defendant did not provide any witness of its own, subpoena any other witness, or offer any evidence or explanation to contest plaintiff's claims (*Matter of Adam K. v Iverson*, 110 AD3d 168, 177 [2d Dept 2013] [recognizing that "in a

nonjury civil trial, where the trial court, as finder of fact, is permitted to draw a negative inference against a party failing to call a witness"]). As a result, defendant does not explain why it voluntarily paid more than $8,000 on an agreement to which, it now claims, it is not a party and did not breach. It also fails to explain the overlapping points of contact between itself, Hi-Fi Marketing Group, and Provocateur. The only testimony and documentary evidence submitted at trial is from the plaintiff, and that evidence is uncontested.

CONCLUSION

For the foregoing reasons, the court awards judgment in favor of plaintiff on his breach of contract claim against God Save the King and Provocateur jointly and severally. The court awards plaintiff $48,014.45, which is the amount agreed to by the parties for the March 2013 event, plus costs and pre-judgment interest on that amount from May 26, 2016 (the date plaintiff commenced the action) at the statutory rate of nine percent per annum (*Castle Restoration & Const., Inc. v Caste Restoration, LLC*, 155 AD3d 678, 683 [2d Dept 2017]; CPLR 5001[a]).



July 3, 2020
DATE

DEVIN P. COHEN
Justice of the Supreme Court

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