

**Globe Stor. & Moving Co. Inc. v East W. Transfer,
LLC**

2021 NY Slip Op 30753(U)

March 12, 2021

Supreme Court, New York County

Docket Number: 150854/19

Judge: Lynn R. Kotler

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. LYNN R. KOTLER, J.S.C.

PART 8

GLOBE STORAGE & MOVING CO. INC.

INDEX NO. 150854/19

- v -

MOT. DATE

MOT. SEQ. NO. 002

EAST WEST TRANSFER, LLC AND COWEN INC.

The following papers were read on this motion to/for sj
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

ECFS Doc. No(s).
ECFS Doc. No(s).
ECFS Doc. No(s).

This action arises from the breach of a contract and asserts related causes of action. Defendant Cowen Inc. ("Cowen") now moves for summary judgment in its favor. Plaintiff Globe Storage & Moving Co. Inc. (sometimes "Globe") opposes the motion.

Pursuant to interim order dated March 10, 2021, the court directed the parties to provide a copy of the video annexed to Cowen's motion papers as Exhibit "H" via Dropbox or some other cloud sharing service and the motion was adjourned to 3/23/21 for control. Cowen has complied with the court's order. Therefore the motion is advanced and decided in this decision/order.

Plaintiff has already obtained a default judgment against codefendant East West Transfer, LLC ("EW") which has failed to appear in this action. Issue has been joined as to Cowen but note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

According to the complaint, on or around December 11, 2018, EW entered into a contract with Cowen wherein EW agreed to remove and/or dispose of certain items at Cowen's office located at 1633 Broadway, 48u, Floor, New York, New York (the "premises"). On or about December 11, 2018, EW then entered into an agreement with plaintiff whereby plaintiff agreed to provide the manpower and equipment necessary to remove/dispose of the items on the premises.

According to the sworn affidavit of Alan Fleisher, plaintiff's Executive Vice President, plaintiff "sent its manpower and equipment ... on December 17, 2018, December 18, 2018, December 19, 2018, December 20, 2018 and December 27, 2018 performed (sic) its services as required and agreed". Fleisher further states that "[o]n December 27, 2018 we were advised that Cowen terminated their contract with [EW] and as such Globe ceased work on that date." Fleisher asserts that plaintiff is owed \$25,152.99 for the work, services and equipment it provided and as of this date it has not received that equipment

Dated: 3/12/21

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [X] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

back which it believes remains in Cowen's possession or was given by Cowen to EW without plaintiff's permission or authority.

Plaintiff asserts five causes of action against Cowen for breach of contract, account stated, unjust enrichment, unpaid labor and services and conversion of plaintiff's equipment. Cowen argues that it is entitled to summary judgment dismissing all these claims based upon the undisputed facts and relying upon the deposition testimony of its manager and chief operating officer. In support of the motion, Cowen has provided, *inter alia*, an email from Fleisher to Cowen's manager which states in relevant part:

- 1) Globe [] was contracted by [EW's] Mr. David LaConte to liquidate the [premises]. [EW] is an approved vendor who Cowen has partner with in the past. From my understanding the relationship has been in effect for some time.
- 2) Globe proceeded to perform the liquidation on 12/17 through 12/20 and 12/27/18. The project ceased after 12/27/18 due to a disagreement between [EW] and Cowen.
- 3) Globe entered into negotiations with you to finish the project. ... After you informed us that Capital Moving was awarded the remainder of the project I made arrangements with Capital to have my equipment returned. ... I find out that I was lied to and Capital was not awarded. ... I immediately travel to [the premises] and call you letting you know I'm on the 48th floor and I am looking at a large inventory of Globe equipment – which by the way I videotaped. ... David LaConte then promised a check for \$20,000.00 by end of day. David LaConte agrees to deliver my equipment street level at 6:00pm to my truck. ...

In conclusion, I don't hold you responsible for my agreement with [EW]. I do hold you responsible for being totally irresponsible and possibly criminal in allowing [EW] to use my equipment that you knew was owned by Globe []. ... If I didn't investigate further I would have had approximately \$7,000.00 moving equipment stolen from your facility. ... Furthermore when I told you [EW] owed Globe \$25,000.00 for the work performed for you your response was "not my problem".

...

Mike I have attached a bill for \$20,000.00 for the liquidation Globe performed for the de-commission of the [premises]. ...

Meanwhile, plaintiff contends that Cowen "failed to produce the documents as requested at the deposition of their witnesses, depriving plaintiff and now the court of key information germane to plaintiff's claims" and "Cowen's deposed witnesses leave open clear issues of fact by their testimony."

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Cowen is entitled to summary judgment dismissing the breach of contract claim. The four elements required of a cause of action for breach of contract are: [1] formation of a contract between the parties;

[2] performance by plaintiff; [3] defendant's failure to perform; and [4] resulting damage (*Furia v. Furia*, 116 AD2d 694 [2d Dept 1986]). Since there is no dispute that plaintiff did not enter into an enforceable contract with Cowen, this first cause of action against Cowen is severed and dismissed.

An account stated exists when bills, invoices or statements evidence a party's indebtedness and that party does not object within a reasonable time (*Russo v. Heller*, 80 AD3d 531 [1st Dept 2011]; see also *Ryan Graphics, Inc. v. Bailin*, 39 AD3d 249 [1st Dept 2007]). Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails (*Abbott, Duncan & Wiener v. Ragusa*, 214 AD2d 412 [1st Dept 1995]). Cowen argues that because "[p]laintiff has not produced evidence that establishes any agreement at all between Cowen and [p]laintiff" and "the uncontroverted evidence in this case is that Cowen did not even know of the existence of Globe until after Abandonment", the cause of action fails.

Cowen cites *Ryan Graphics, Inc. v. Bailin* (39 AD3d 249, 251 [1st Dep't 2007]), wherein the First Department held "[a]n account stated assumes the existence of some indebtedness between the parties, or an agreement to treat the statement as an account stated." Cowen has come forward with *prima facie* proof that it did not even know of plaintiff's role at the project, let alone that it entered into an agreement to perform the underlying labor and services. Indeed, the email from Fleisher submitted by Cowen on this motion unequivocally establishes that plaintiff alternatively sought to obtain payment from Cowen for the services it indisputably provided in connection with its performance of a contract with EW. Assuming *arguendo* that the bill annexed to Fleisher's email was sufficient to evidence Cowen's indebtedness to plaintiff, it is undisputed that Cowen objected to the bill within a reasonable time thereby defeating the cause of action as a matter of law. Accordingly, plaintiff's account stated claim against Cowen is also severed and dismissed.

The court next considers the parties arguments as to plaintiff's unjust enrichment and unpaid labor and services claims. Cowen argues that both claims should be treated the same and that its relationship is too attenuated from the plaintiff to sustain either cause of action. The court disagrees.

An unjust enrichment claim is a quasi-contract arising when a defendant was enriched at plaintiff's expense and it is against equity and good conscience that defendant retain what is sought to be recovered (*Travelsavers Enterprises, Inc. v. Analog Analytistics, Inc.*, 149 AD3d 1003 [2d Dept 2017]). An unjust enrichment claim does not lie where there is an enforceable agreement between the parties (*Accurate Copy Serv. of America, Inc. v. Fisk Bldg. Assocs. L.L.C.*, 72 AD3d 456 [1st Dept 2010] citing *Singer Asset Fin. Co., LLC v. Melvin*, 33 AD3d 355, 358 [2006]). Further, "a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party" (*Georgia Malone & Co., Inc. v. Rieder*, 19 NY3d 511 [2012] citing *Sperry v. Crompton Corp.*, 8 NY3d 204 [2007]).

Here, plaintiff was performing work at Cowen's office. While Cowen argues that it wasn't aware of Globe's existence at that time, that fact does not warrant dismissal of plaintiff's unjust enrichment claim as a matter of law. This is doubly so, where Cowen was aware of plaintiff contemporaneously or thereabouts with EW's breach of plaintiff's contract, plaintiff claims that it unsuccessfully discussed with plaintiff the option for the latter to continue performing the work and was otherwise aware of plaintiff's claims herein; see email *supra*: "not my problem".

Cowen further argues that because Cowen paid EW for 50% of the work performed, "it would be against equity and good conscience to have Cowen pay twice for a singular job." This argument fails since it implicitly concedes that Cowen could be found liable for the balance of the work for which it did not pay, and the record is undeveloped as to the value of the work performed by plaintiff.

Accordingly, Cowen's motion for summary judgment dismissing plaintiff's unjust enrichment and unpaid labor and services claims is denied.

Plaintiff's final claim for conversion alleges that "equipment including but not limited to dollies and red racks with high bars" remained at the premises in defendants' possession without plaintiff's permis-

sion after December 27, 2018 and the value of that property is \$680. Cowen argues that plaintiff has not established that Cowen was aware of any of Globe's equipment being left at Cowen's premises and even if it was, Cowen was not aware of the existence of plaintiff at the time of the alleged conversion and never interfered with Globe obtaining its alleged equipment.

Meanwhile, plaintiff points to Cowen's chief operating officer's testimony, and argues that "Cowen's documented conduct establishes, at a minimum, the factual basis for Plaintiff's claim of conversion" and "Cowen has failed to rebut that information to remove the issue of fact..."

The elements of a cause of action in conversion are the plaintiff's right to possession, intent of the defendant, and defendant's interference with plaintiff's property rights to the exclusion of plaintiff's rights (*Komolov v. Segal*, 101 AD3d 639 [1st Dept 2012]). Cowen has established through admissible evidence that it did not convert plaintiff's equipment. Indeed, the record is devoid of any proof that Cowen intentionally interfered with plaintiff's rights to some unspecified dollies and racks. This is a motion for summary judgment, and its plaintiff's burden to lay bare its proofs and defeat Cowen's *prima facie* showing. As Cowen correctly points out on reply, plaintiff's opposition does not even state what objects were "converted." Further, Fleisher's email admits that its equipment valued at \$7,000 was returned by EW. Otherwise, there is no proof on this record from which a reasonable factfinder could conclude that Cowen converted any of plaintiff's equipment. Accordingly, Cowen's motion as to this cause of action is also granted.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that Cowen's motion for summary judgment is granted to the extent that plaintiff's claims against it for breach of contract, account stated and conversion are severed and dismissed; and it is further

ORDERED that the balance of the motion is denied.

Plaintiff is directed to file note of issue on or before March 26, 2021.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 3/12/21
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.