

Bursor & Fisher, P.A. v Imbesi Law P.C.

2021 NY Slip Op 31040(U)

March 22, 2021

Supreme Court, New York County

Docket Number: 651500/2018

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
INDEX NO. 651500/2018
BURSOR & FISHER, P.A. MOTION DATE 01/19/2021, 01/19/2021
Plaintiff, MOTION SEQ. NO. 002 003
- v -
IMBESI LAW P.C., DECISION + ORDER ON MOTION
Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 76

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

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

Upon the foregoing documents, the motions are decided as follows:

Plaintiff, Bursor & Fisher, P.A. ("Bursor") commenced the instant action by filing a summons and complaint on March 28, 2018 seeking to recover based upon defendant's alleged breach of a Joint Prosecution Agreement ("JPA") and asserting causes of action based upon breach of contract, quantum meruit and account stated. Defendant moved to dismiss pursuant to CPLR 3211(a)(1) and (7) and said motion was denied by this Court on August 22, 2018. Defendant, Imbesi Law, P.C. ("Imbesi") interposed an answer on September 20, 2018. Thereafter, the parties conducted the depositions of Joseph I. Marchese, a Partner at Bursor, Vincent J. Imbesi, the named partner of Imbesi and Brittany S. Weiner, a partner at Imbesi. Plaintiffs now move for summary judgment on the complaint and defendant now moves for summary judgment, dismissing the complaint.

Bursor, non-party Military Justice Attorneys, PLLC (“MJA”), Imbesi Law P.C. served as co-counsel for the plaintiffs in a putative class action lawsuit captioned *Strumlauf et al. v. Starbucks Corporation*, Case No. 16-cv-01306 (N.D. Cal.) (“Strumlauf”) pursuant to a JPA entered into by said firms on February 2, 2017. Said JPA governed the obligations and responsibilities of each firm with regard to the litigation. Pursuant to the JPA, Bursor and MJA were each responsible for 40% of litigation costs and expenses, while Imbesi was responsible for 20% of litigation costs and expenses. Over the course of the Strumlauf Action, the plaintiffs’ firms incurred expenses and litigation costs totaling \$198,879.44, all of which were advanced by Bursor. Pursuant to the JPA, Imbesi’s share of said expenses and costs is \$39,775.88, the entirety of which remains outstanding and which is the subject of the instant lawsuit.

The JPA sets forth that it is governed in accordance with the laws of the State of California.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff’d* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most

favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

Under California law, “[t]he elements for a breach of contract claim are: (1) a contract exists; (2) plaintiff’s performance or excuse for nonperformance; (3) defendant’s breach; and (4) resulting damages to plaintiff.” *Yi v. Circle K Stores, Inc.*, 258 F. Supp. 3d 1075, 1082 (C.D. Cal. 2017).

It is undisputed that the JPA is a contract entered into between the parties. It is further undisputed that Bursor & Fisher advanced all litigation costs and expenses incurred by the plaintiffs’ firms, which totaled \$198,879.44. Pursuant to the JPA, Imbesi’s share of said expenses and costs is twenty percent or \$39,775.88. Between January 9, 2018 and March 13, 2018, Bursor repeatedly contacted Imbesi by both phone and e-mail seeking payment of the \$39,775.88 of expenses, the entirety of which remains outstanding. As such, plaintiff has established a *prima facie* entitlement to summary judgment on its first cause of action seeking to recover for breach of contract.

In opposition to plaintiff’s motion and in support of its motion for summary judgment, dismissing the action, Imbesi argues that Section 2(b) of the JPA is a condition precedent to performance of the contract, which Bursor has failed to meet. Pursuant to Section 2(b) of the JPA, “Each of the Plaintiffs’ Firms shall provide a report of their billable time and expenses in the Starbucks Actions once every three months. The reports shall be sent to Gerald Healy, Brittany Weiner, and Joseph Marchese. The Plaintiffs’ Firms agree to keep accurate, complete and contemporaneous records of time spent in the Starbucks Actions, and of costs and expenses incurred.”

“California law allows a contract to be interpreted in a way that “give[s] effect to the mutual intention of the parties as it existed at the time of contracting.” Id. (citing Cal. Civ. Code § 1636). “[A] condition precedent is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises.” *Realmuto v. Gagnard* 110 Cal.App.4th 193, 199 (2003). “The existence of a condition precedent normally depends upon the intent of the parties as determined from the words they have employed in the contract.” 13 Williston on Contracts (4th ed.2000 § 38:16, at p.441). “[T]here is no required magical incantation to create a condition precedent to formation.” *Roth v. Garcia Marquez*, 942 F.2d 617, 626 (9th Cir. 1991); *Frankel v. Board of Dental Examiners*, 46 Cal.App.4th 534, 545 (1996) (“Neither law nor equity require that every term and condition be set forth in a contract... The court should accord an interpretation which is reasonable.”). “[W]hether a provision is a condition precedent is to be determined from the whole contract, its purpose and the intention of the parties.” *JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc.*, 243 Cal.App.4th 571, 596 (2015).

Based upon the deposition testimony of Marchese, Weiner and Imbesi, the parties hotly contest whether Bursor sufficiently apprised Imbesi of the costs and disbursements of the underlying action, said dispute is irrelevant as a matter of law, Section 2(b) of the JPA is not a condition precedent to payment of plaintiff’s costs and expenses. There is no language in Section 2(b) which even suggests that same is a condition precedent. The court notes that “[c]onditions precedent are not favored in the law and courts shall not construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that effect.” *Frankel v. Board of Dental Exam’rs*, 54 Cal. Rptr. 2d 128, 137-38 (Cal. Ct. App. 1996); see also *In re Old Canal Fin. Corp.*, 550 B.R. 519, 531 (C.D. Cal. 2016) (“A condition precedent may not

be implied unless it is necessary to make the contract reasonable.”) (citing Cal. Civ. Code § 1655). The Court further notes that interpreting Section 2(b) as suggested by plaintiff would lead to the absurd result of allowing plaintiff to pay none of the costs and disbursement of the underlying action and further requires the Court to accept that Imbesi was entirely ignorant of the sums being advanced by Bursor. The Court has evaluated defendant’s remaining arguments and finds them to be without merit. As such, defendant has failed to establish a *prima facie* entitlement to dismissal of this action and has failed to establish an issue of fact precluding the granting of summary judgment to plaintiff.

ORDERED that the plaintiff’s motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$39,775.88, together with interest at the rate of 9% per annum from the date of January 9, 2018 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

3/22/2021
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE