

Kapu v SES Creations, Inc.

2022 NY Slip Op 32820(U)

August 19, 2022

Supreme Court, New York County

Docket Number: Index No. 656594/2021

Judge: Sabrina Kraus

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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. SABRINA KRAUS PART 57TR

Justice

-----X

ARTO KAPU D/B/A ARTO KAPU JEWELRY COMPANY

Plaintiff,

- v -

SES CREATIONS, INC. D/B/A SES CREATIONS,

Defendant.

-----X

INDEX NO. 656594/2021

MOTION DATE 07/22/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 60, 61, 62, 63

were read on this motion to/for DISMISS DEFENSES

BACKGROUND

Plaintiff is engaged in polishing and providing expert fine polishing services for the manufacturing and/or the redesigning of fine jewelry items. Plaintiff's expert fine polishing services are rendered to other jewelers at such other jewelers' sole instance and request.

Defendant has been in the business of buying and selling and manufacturing and redesigning of fine jewelry items for a period in excess of approximately twenty (20) years. The parties have conducted business together for 20 years.

Plaintiff commenced this action based on alleged nonpayment of invoices by defendant for plaintiff's jewelry polishing services for a period allegedly covering December 2015 through June 2020.

PENDING MOTIONS

On July 22, 2022, plaintiff moved for dismissal of defendant's second, third and fifth affirmative defenses, and defendant cross-moved for partial summary judgment on its fifth affirmative defense, and for sanctions.

On August 18, 2022, the motion and cross-motion were fully briefed, marked submitted and the court reserved decision.

That portion of plaintiff's motion to dismiss the second and third affirmative defense is granted on consent. For the reasons stated below, the balance of plaintiff's motion is denied and defendant's cross-motion for partial summary judgment on the statute of limitations defense and for sanctions is also denied.

The parties both seek a ruling on defendant's Fifth Affirmative Defense which asserts the statute of limitations. Plaintiff seeks dismissal of the defense and defendant seeks partial summary judgment on the defense and dismissal of the claims asserted for payment of invoices pre-dating November 18, 2015.

Plaintiff commenced this action on November 18, 2021, by filing of a Summons and Verified Complaint. According to the Complaint from December 2015 through June 2020, defendant sought plaintiff's polishing services for an agreed upon total price.

Attached to the complaint are approximately 70 invoices to defendant against which plaintiff alleges it received only \$2,500. Included in the invoices annexed to the complaint are twenty-four (24) invoices that defendant alleges pre-date November 18, 2015. Plaintiff admits that these 24 invoices -- Nos. 3228, 3227, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025 and 1026 -- were prepared before November 18, 2015.

The Court finds that the fifth affirmative defense of statute of limitations is sufficiently pled. *Immediate v. St. John's Queens Hosp.*, 48 N.Y.2d 671 (1979); *UBS Securities LLC v. Angioblast Systems, Inc.*, 35 Misc. 3d 1201(A); *Youssef v. Triborough Bridge and Tunnel Authority*, 24 A.D.3d 661, 662 (2d Dep't 2005).

The parties agree that the applicable statute of limitations is six years. The parties disagree as to whether the tolls on limitations passed during the pandemic are applicable to this action. The court finds that they are.

Executive Order No. 202.72 was issued on November 3, 2020. Said Order was an extension of the original Executive Order 202.8 which was issued on March 20, 2020, which provides in pertinent part:

In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020... .

Governor Cuomo extended that Order several times, but the last time he extended it was in Executive Order No. 202.72, which provides in pertinent part:

Pursuant to Executive Order 202.67, the suspension for civil cases in Executive Order 202.8, as modified and extended in subsequent Executive Orders, that tolled any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding as prescribed by the procedural laws of the state, including but not limited to the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby no longer in effect as of November 4, 2020 ...

The order very clearly “tolls” the time for “commencement” through November 4, 2020 (*see also Brash v Richards* 195 AD3d 582), and the court finds it is applicable to this action.

Thus, invoices issued on or after March 2015 would not be subject to dismissal based on the statute of limitations.

However, at this juncture and based on the record before the court, the court cannot determine whether partial summary judgment as to some invoices is warranted. The copies of the invoices filed as exhibits to the motion papers are not legible to this court. The court can not determine the dates on many of the invoices or even the amounts on some of them.

Additionally, there are potential issues of fact as to whether the debt was acknowledged which could impact the statute of limitations defense, as set forth in the motion papers.

The court finds no basis for the imposition of sanctions and reminds counsel of their obligation to act in a civil manner towards each other.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that plaintiff's motion is granted to the extent of dismissing the second and third affirmative defenses and is otherwise denied; and it is further

ORDERED that defendant's cross-motion for partial summary judgment is denied without prejudice to renewal after the completion of discovery; and it is further

ORDERED that defendant's cross-motion for sanctions is denied; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

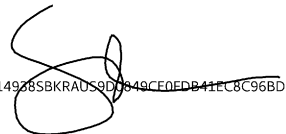
ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties appear for a virtual preliminary conference on November 10th, 2022 at 2:00 pm; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.


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8/19/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
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"/> REFERENCE