SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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FM COST CONTAINMENT, LLC,

Plaintiff,

- v -

42 W 35TH PROPERTY LLC, MEADOW CAPITAL MANAGEMENT LP, and HOTEL ASSET VALUE ENHANCEMENT, INC.,

Defendants.

INDEX NO. 653515/2020

MOTION DATE 05/06/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

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HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

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

I. INTRODUCTION

In this action arising from a professional service agreement for tax assessment reduction, plaintiff FM Cost Containment (FMCC) moves pursuant to CPLR 3212 for summary judgment on its breach of contract claim against defendant +42 W 35th Property LLC (+42). FMCC also moves for summary judgment dismissing +42's counterclaim for attorneys' fees. +42 opposes the motion. For the following reasons, the motion is denied.

II. BACKGROUND

A. The Parties

Plaintiff FMCC is a provider of, among other things, audit minimization and reduction services. Bill Flick (Flick) and Jim Malone (Malone) are partners of FMCC. Defendant +42 owns the Gregory Hotel located at 42 West 35th Street in Manhattan. David Israel is a Senior Vice President of non-party Hotel Asset Value Enhancement, Inc. (Hotel AVE), who has acted

as an intermediary with respect to matters involving +42 and the Gregory Hotel. While Hotel AVE was formerly named as a defendant in this action, all claims against Hotel AVE and nonparty Meadow Capital Management, LP, have been dismissed pursuant to the court's order dated January 11, 2021, affirmed by the Appellate Division, First Department, on March 3, 2022.

B. The Agreement

FMCC and +42 entered into a written Professional Services Agreement (the Agreement) dated July 11, 2016. Adam McMaster signed the Agreement as chief financial officer of +42. Flick signed as chief executive officer of FMCC.

The Agreement requires FMCC to use its "best efforts" to reduce the audit assessment of the New York State taxing authority for +42 for the period between September 1, 2013, and May 31, 2016. Article 3 of the Agreement requires FMCC to "[r]eview the financial records of [+42] to quantify and substantiate any reductions to the audit assessment or any overpayments of sales and use taxes that would have occurred within the audit period and three-year Statute of Limitations." More specifically, FMCC's duties were to (a) "prepare and file, on a timely basis, the relevant Petitions for Refund," (b) "contact vendors for the purpose of obtaining refunds, (c) "[r]eview the financial records of [+42] to quantify and substantiate any reductions to the audit assessment or any overpayments of sales and use taxes, and (d) "[r]epresent [+42] at any hearings held in connection with filed petitions."

Article 4(A)provides that "FMCC's fee for the services rendered to [+42] shall be Thirty Percent (30%) of the Total Refund . . .". "Total Refund" is defined under Article 1(H) as including "all sales and use taxes, interest and penalties, and/or financial benefit . . . received **as a result of the efforts of FMCC**" as well as "any reduction to sales and use taxes, interest and

penalties assessed or proposed to be assessed by the state in its sales and use tax audit **as a result of the efforts of FMCC**" (emphasis added).

Finally, Article 7(G) provides that the prevailing party in any litigation to enforce the Agreement is entitled to costs, including attorneys' fees.

C. The Dispute

In or around July 2016, the Gregory Hotel received an audit assessment (the assessment) from the State of New York taxing authority (the auditor). Consequently, the parties entered into the Agreement in order to reduce the assessment and FMCC began performing work for +42 pursuant to the Agreement.

On November 30, 2017, the vice president of the tax group of +42's then-hotel manager sent an email Malone and McMaster advising them to contact the auditor to address the issue of fixed assets. The schedule attached to the email contained a list of +42's fixed assets, including, among other things, an assessment of $1,579,532.03 based on an "invoice amount" of $17,797,544.00 for ledger entry "16200 – Building and improvement" dated December 31, 2015. Subsequently, by emails dated November 30, 2017, and December 1, 2017, Malone advised McMaster and Israel to provide him the invoices related to the construction jobs found to have tax liability.

By email dated March 6, 2018, Malone again advised Israel that the state was "looking to assess $2,098,461.52 if we are unable to locate the capital invoices/ [journal entries] needed for the review." +42 contends that the auditor's assessment was reduced by $1,579,532.03 after McMaster obtained the journal entries from +42's accountant demonstrating that they did not correspond to any purchase or sale, and then forwarded them to the auditor through FMCC. FMCC, however, contends that Malone engaged in back-and-forth communications with the

auditor over a period of weeks to convince the auditor to reduce the amount based upon the journal entries. +42 counters that Malone did not initially understand what the journal entries were, and that the auditor's determination was based upon, at most, the entries themselves and a two-line explanation included in his transmittal email.

Around May or June 2018 there were discussions between FMCC and +42 about reducing FMCC's fee, but no compromise ultimately materialized. On July 13, 2018, FMCC sent +42 an invoice for $710,800.52. +42 did not pay the invoice. This action ensued.

D. Procedural Background

The complaint, filed July 8, 2020, sets forth four causes of action sounding in: (1) breach of contract; (2) breach of verbal or implied agreement; (3) promissory estoppel/ detrimental reliance; (4) unjust enrichment. By decision and order dated January 8, 2021, the court, *inter alia*, dismissed the second, third, and fourth causes of action in their entirety. On January 29, 2021, +42 filed an answer asserting defenses and two counterclaims seeking to recover contractual attorneys' fees. By decision and order dated May 17, 2021, the court dismissed the first counterclaim.

Following discovery and the filing of the Note of Issue, the plaintiff filed the instant motion seeking summary judgment on its surviving breach of contract claim against +42. The plaintiff further seeks summary judgment dismissing +42's second counterclaim, by which +42 claims entitlement to attorneys' fees incurred in its defense of this action.

III. LEGAL STANDARD

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64

NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Scott v Triborough Energy Corp., 194 AD3d 529, 530 (1st Dept 2021). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept 1970).

IV. DISCUSSION

To successfully prosecute a cause of action to recover damages for breach of contract, the plaintiff is required to establish (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). A "written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Greenfield v Philles Records, 98 NY2d 562, 569 (2002) (citations and internal quotation marks omitted).

A plaintiff seeking a percentage fee under an unambiguous contract conditioning payment on the plaintiff's performance in reducing the defendant's expenses must demonstrate that its own efforts were responsible for such reduction. In Econobill Corp. v S & S Mach. Corp., 62 AD3d 941 (2nd Dept 2009), for example, the court found that the plaintiff was entitled to summary judgment on its claim for a 50% fee under a "Tele–Audit Shared Saving

Agreement" where it submitted the affidavit of its president and documentary evidence establishing it obtained a $50,000 refund and fixed reductions in the defendant's monthly telephone bills "through its own efforts." Id. at 942. In that case, the plaintiff demonstrated that it audited the defendant's telephone bills, sent technicians to examine the defendant's office phone lines, circuits and wiring, wrote to the defendant's telephone service provider to identify erroneous charges, and negotiated with the provider to obtain a refund for overcharges and reductions in the monthly billing charges. Id. at 941. Similarly, in Comp. Guidance Servs., Inc. v Harry's Nurses Registry, Inc., 112 AD3d 776 (2nd Dept 2013), the plaintiff was awarded its fee of 50% of any refunded premiums or credits received from its worker's compensation insurer where it recommended a reclassification of certain "class codes" of the defendant's employees for individuals employed by the defendant. Id. at 777.

The parties do not cite to any case law specifying the degree of effort that a party preforming tax audit services must expend to be credited with a particular reduction and receive the corresponding contingent fee. However, research reveals a handful of trial court cases interpreting similar tax reduction agreements which indicate that recovery, as in the case with percentage fee arrangements generally, should be limited to fees earned by reason of the actual services performed by the plaintiff under the contract in question. See YCA Corp v Peters, 2009 WL 4068509, *1 (App Term 2009)("the contract drafted by plaintiff should be construed as entitling plaintiff only to the reduction actually achieved by dint of his labor, not by any reduction which had already been achieved retroactively, by others"); Prop. Tax Rsch. Co. v Falstaff Brewing Corp., 708 F2d 1333, 1335–36 (8th Cir. 1983)(whether the plaintiff "convinced" the auditor to reduce a tax, thereby effecting the reduction under the parties' service agreement, was an appropriate issue for the jury); Tax Matrix Techs., LLC v Wegmans Food

Markets, Inc., 154 F Supp 3d 157, 181 (ED Pa 2016) (finding it ambiguous whether the reduction services that plaintiff was claiming compensation for fell within the scope of the agreement).

Here, FMCC submits evidence sufficient to state a *prima facie* breach of contract claim inasmuch as it demonstrates the existence of the Agreement, FMCC's performance of services specified in the Agreement, and +42's failure to pay any part of the sum FMCC claims is owed under the Agreement. This evidence consists of, *inter alia*, an attorney's affirmation, excerpts from the depositions of Flick, Israel, and McMaster, the signed Agreement, and email correspondence regarding the missing invoices between Malone, Israel, and McMaster. However, +42's submissions in opposition, including additional email correspondence and excerpts from the depositions of Flick and McMaster, establish the existence of a triable issue of fact as to what portion of +42's financial benefit from the reduced assessment was received "as a result of" FMCC's effort under the Agreement, thereby casting doubt on whether FMCC is entitled to full amount claimed.

Although the Agreement could have more specifically quantified how substantial FMCC's "efforts" must be, it plainly calls for more than the mere approval of a reduction by the auditor during the period of FMCC's engagement. As noted above, Article 1(H) requires that the reduction be achieved "as a result of the efforts of FMCC." Article 3(C) obligates FMCC to "[r]eview the financial records," and "quantify and substantiate any reduction to the audit assessment." If, in fact, all FMCC did was act as an intermediary to forward the relevant invoice or journal to the auditor, without any review, quantification, substantiation, or other action contemplated by the Agreement, its action would not be sufficient to merit the compensation it now seeks.

The court rejects FMCC's contention that once the audit was turned over to it, the parties understood that "the meter [] would start to run" regardless of whether FMCC was actually involved in achieving the ultimate results. As in any action brought upon a contract between the parties, the clear and unambiguous language of the contract controls. The record establishes that the parties, two sophisticated business entities, engaged in robust, arms-length negotiation as to the Agreement terms, with a particular focus on the terms of compensation. They could have chosen to condition the percentage payment on the receipt of any refund by +42 during the period of FMCC's engagement. Or, they could have elected to include language in the Agreement encompassing in FMCC's contractual duties any communications between FMCC and the auditor on +42's behalf. If they had done either, FMCC's right to payment in the full sum demanded would be clear. But that is not the case. FMCC cannot now introduce extraneous and self-serving representations, purportedly made by one of its principals, that the "understanding" between the parties was anything other than what is in the signed writing. See Greenfield v Philles Records, supra at 569-70; Reiss v Financial Performance Corp., 97 NY2d 195, 199 (2001); Bank of N.Y. Mellon v. WMC Mortgage, LLC, 136 AD3d 1, 9 (1st Dept. 2015).

FMCC insists in its reply that the reduction did, in fact, result from Malone's substantive efforts to persuade the auditor in the course of their communications. However, FMCC's claim is not supported by admissible evidence submitted on this motion. Rather, FMCC has offered only Flick's hearsay testimony about what he was told Malone did, or what Flick believes Malone would hypothetically have done. Hearsay cannot be used to support a motion for summary judgment. AIU Ins. Co. v American Motorist Ins. Co., 8 AD3d 83 (1st Dept 2004); Wen Ying Ji v Rockrose Dev Corp., 34 AD3d 253, 254 (1st Dept 2006). Furthermore, the efforts expended by each party must be described with some specificity. See Econobill, 62 AD3d 941,

942 ([“t]he conclusory and completely unsubstantiated claim by the defendant’s General Counsel that he ‘personally pursued telecommunications rate adjustments and rebates’ was insufficient to raise an issue of fact as to whether the subject refund and billing reductions were in actuality achieved through the defendant's own efforts”).

The plaintiff’s motion for summary judgment on the complaint is therefore denied. Furthermore, the plaintiff’s motion for summary in its favor on the defendant’s counterclaim for attorney’s fees is denied because a determination as to who is the “prevailing party” is necessarily premature.

V. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff’s motion for summary judgment is denied in its entirety.

This constitutes the Decision and Order of the court.

DATED: September 21, 2022

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON