

ASI-N.Y., Inc. v Pharos Enters. LLC

2023 NY Slip Op 30164(U)

January 9, 2023

Supreme Court, New York County

Docket Number: Index No. 653001/2020

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M

Justice

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ASI-NEW YORK, INC.,

Plaintiff,

- v -

PHAROS ENTERPRISES LLC,

Defendant.

-----X

INDEX NO. 653001/2020

MOTION DATE 10/01/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, and 45

were read on this motion for SUMMARY JUDGMENT & CROSS-MOTION.

Upon the foregoing documents, it is hereby ordered that the plaintiff’s motion for summary judgment and defendant’s cross-motion for discovery and other relief (Mot. Seq. No. 001) is decided in accordance with the following memorandum.

Background

ASI-New York Inc. (“Plaintiff”) asserts five causes of action against Pharos (“Defendant”) relating to the sale of custom made interior and exterior signs (Complaint, NYSCEF Doc. No. 1 at 3). The five causes of action are as follows: breach of contract, unjust enrichment, account stated, promissory estoppel, and breach of implied covenant of good faith and fair dealing (Doc. No. 1). Plaintiff moves for summary judgment on the complaint and Defendant asserts six affirmative defenses as well as a cross motion for discovery and other relief.

Plaintiff is a business specializing in custom made interior and exterior signs (Doc. No. 1 ¶ 3). Defendant was contracted by the Mountainside Board of Education for an improvement

project at Deerfield School that included new signage (Doc. No. 38). Plaintiff states that Defendant ordered four custom signs from it which were manufactured and shipped by it to Defendant for purposes of said improvement (Affirmation in Support of Summary Judgment, Doc. No. 10 ¶ 7-8). The first sign is an aluminum plaque (“aluminum plaque”), the second sign was illuminated letters reading “DEERFIELD” (“illuminated Deerfield sign”), the third sign was illuminated letters reading “MEDIA CENTER” (“media center sign”), and the fourth sign was dimensional letters reading “DEERFIELD” (“dimensional Deerfield sign”) (Doc. No. 10 ¶ 10-13). Plaintiff provides photos of all four signs installed (Photos, NYSCEF Doc. No. 18). Plaintiff alleges that Defendant failed to remit a balance of \$7,712.25 (Doc. No. 1 ¶ 6).

The payment for the first two signs is not disputed by Plaintiff. For the aluminum plaque, there are quotes from September 22, 2015, invoice number 17080, and March 3, 2016, invoice number 15162, each quoting the plaque at \$1,625.00 (NYSCEF Doc. No. 14, Doc. No. 46). The aluminum plaque was paid in full as evidenced by check number 1486 with a memo stating it was for invoice number 15162 (Check, NYSCEF Doc. No. 27). The illuminated Deerfield sign was quoted at \$5,370.00 on November 12, 2015, by invoice 14928 (NYSCEF Doc. No. 26). Plaintiff alleges this was paid in full by check number 1307 corresponding to the amount invoiced, but the memo on the check states it is for an invoice not on the record, number 15052 (Doc. No. 27).

Plaintiff submits invoice 16528, dated April 22, 2015, signed by Defendant for two signs, which read “MEDIA CENTER” and “DEERFIELD MEDIA CENTER” for \$8,588.00, notably different descriptions from the remaining two signs, the media center sign and the dimensional Deerfield sign (NYSCEF Doc. No. 16). Plaintiff provides another invoice, number 15580, for two signs matching the description of the media center sign and the dimensional Deerfield sign

at \$7,712.25, over a year after the previous invoice of April 22, 2015, on September 22, 2016 (Invoice, NYSCEF Doc. No. 19).

A collective of four signs were installed at the school as evidenced by photographs of the installed signs from Plaintiff (Doc. No. 18). Plaintiff now seeks \$7,712.25 from unsigned invoice number 15580 which matches the description of the signs in the photographs. Defendant argues that Plaintiff submitted this invoice on September 22, 2016, which is nearly a year after Defendant signed a waiver on November 13, 2015, with Mountainside Board of Education for “Contractor’s Affidavit of Payment of Debts and Claims” stating all payments had been satisfied under the contract between Defendant and Mountainside (NYSCEF Doc. No. 38). Plaintiff moves for summary judgment on the complaint and Defendant cross-moves to compel discovery, to deny summary judgment, and to declare Plaintiff to be engaged in frivolous and vexatious litigation.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party’s evidence as true (*Hotopp Assoc. v Victoria’s Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

Discussion

The elements of a breach of contract are “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The parties do not disagree that there was a contract for the sale of the first two signs; however, the parties disagree as to whether the Defendant authorized and paid for the last two signs. Plaintiff argues there was the existence of a contract as evidenced by signed invoice number 16528; however, this invoice provides a different description than the signs actually installed as depicted in the photographs. An unsigned invoice matching the description of the signs in the photographs, invoice number 15580, is dated over a year later. The record is devoid of the exact timeline in which the last two signs were installed and devoid of any evidence of communications from the Defendant authorizing the manufacture by Plaintiff of the last signs. The court is unable to establish the existence of a contract for the last two signs.

Plaintiff also asserts that Defendant paid the first two invoices, numbers 15162 and 14928, with two checks, leaving invoice number 15580 for the last two signs unpaid. One of the checks notates invoice number 15162 in the memo, while the other check notes invoice number 15052 in the memo which does not match any of the invoices in the record. Defendant asserts that it paid Plaintiff in full and Plaintiff submitted the last invoice almost a year after the project ended and Defendant signed the release waiver with its contractor. With checks referencing missing invoices, the court is unable determine whether there was additional work completed by the Plaintiff in which Defendant did not pay; therefore, the court is unable to determine that, even if there was a contract, whether the Defendant breached that contract. Plaintiff has not established a prima facie case for breach of contract, and the court, therefore, denies plaintiff’s

motion for summary judgment because the issue whether Defendant is in default in paying for agreed-upon services remains a disputed material fact (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

As to Defendant's remaining cross-motion points, the court first assesses the motion to compel discovery of responding to Defendant's first set of interrogatories (NYSCEF Doc. No. 34) and its first request for production of documents and electronically store information (NYSCEF Doc. No. 34). The court has reviewed the Defendant's interrogatories and document demands (NYSCEF Doc. No. 34) and makes the following observations: Interrogatory No. 1 is unnecessary in light of Interrogatory No. 2, and therefore, Interrogatory No. 1 is stricken. Interrogatory No. 4 is redundant of Interrogatory Nos. 2 and 3, and therefore, Interrogatory No. 4 is stricken. Interrogatory No. 8 is redundant of Interrogatory No. 7 and is therefore stricken. Interrogatory No. 9 seeks information more appropriately ascertainable at a deposition, and is therefore stricken. Therefore, Plaintiff must fully respond only to Interrogatory Nos. 2, 3, 5, 6, 7. As for the document demands, Demand Nos. 2, 3, and 4 are stricken as redundant of Demand No. 1. Demand Nos. 6 and 7 are unnecessary in light of Demand Nos. 1 and 5. Therefore, Plaintiff must only produce documents in response to Demands 1 and 5. The prong of the cross-motion to deny summary judgment is nothing more than an opposition to the motion for summary judgment, which motion is denied herein.

As for Defendant's cross-motion to declare Plaintiff to have engaged in frivolous and vexatious litigation under 22 NYCRR 130-1.1, the mere denial of Plaintiff's motion for summary judgment, will not justify a conclusion that Plaintiff's claims are entirely and conspicuously without merit. Therefore, that prong of the cross-motion is denied.

Accordingly, it is hereby

ORDERED that the Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the defendant's cross-motion is granted to the extent that Plaintiff will respond fully to the Interrogatories and Document Demands recognized by the court as proper hereinabove, and the prong of the cross-motion declaring Plaintiff to be engaged in frivolous and vexatious litigation is denied; and it is further

ORDERED that Plaintiff shall respond to the Interrogatories, and comply with the Document Demands, recognized by the court as proper hereinabove, no later than 30 days from the filing hereof.



<u>1/9/2023</u> DATE	<hr style="width: 100%; border: 0; border-top: 1px solid black; margin-bottom: 5px;"/> LOUIS L. NOCK, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE