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

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DASHDEVS LLC,

Plaintiff,

- v -

CAPITAL MARKETS PLACEMENT, INC.,

Defendant.

INDEX NO. 655993/2018

MOTION DATE

MOTION SEQ. NO. 010 011

DECISION + ORDER ON MOTION

----------X

HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 362, 369, 370, 371, 372, 373, 374, 376

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

The following e-filed documents, listed by NYSCEF document number (Motion 011) 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 363, 364, 365, 366, 367, 368, 375, 377

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

I. INTRODUCTION

In this action arising from the alleged breach of a consulting agreement, the defendant moves pursuant to CPLR 3212 for summary judgment dismissing the complaint in its entirety and granting the defendant judgment on its sole remaining counterclaim, sounding in breach of contract (SEQ 010). The plaintiff opposes the motion and separately moves pursuant to CPLR 5015(a)(3) to vacate the court's April 27, 2020, decision and order, which vacated a July 30, 2019, default judgment entered in favor of the plaintiff and against the defendant in the sum of $75,312.80 (the default judgment), and reinstate the default judgment, or, in the alternative, pursuant to CPLR 3212 for summary judgment on the complaint in the sum of $67,017.00 and

dismissing the defendant's sole remaining counterclaim (SEQ 011). The defendant opposes the motion and cross moves pursuant to 22 NYCRR § 130-1.1 for an award of sanctions against the plaintiff (SEQ 011). The plaintiff opposes the cross motion.

For the following reasons, the defendant's motion is granted in part, the plaintiff's motion is granted in part, and the defendant's cross motion is denied.

II. BACKGROUND

A. Factual Background

i. The Master Agreement

The plaintiff is a limited liability company providing software application and development services, through subcontractors, to clients. The defendant is a corporation providing technology staffing and solutions to clients.

On November 10, 2017, the parties entered into a Master Contractor Agreement (the Agreement) wherein the plaintiff agreed to provide consulting services on behalf of the defendant to the defendant's clients, as set forth in separate Statements of Work. Pursuant to the Agreement, the compensation rate for the plaintiff's services was also to be set forth in the applicable Statement of Work. The plaintiff agreed to invoice the defendant on a bi-weekly basis and the defendant was required to pay "approved and uncontested" invoices within 30 days of receipt.

The plaintiff warranted, *inter alia*, that it would use all reasonable efforts to perform services under the Agreement and any associated Statement of Work in "a professional quality conforming to generally accepted industry standards and practices and to the reasonable satisfaction of the [defendant]." The plaintiff further covenanted to refrain from soliciting clients

of the defendant during the term of the Agreement and for two years thereafter. The defendant retained the right to terminate the Agreement and/or any Statement of Work for any reason upon two months' written notice. The plaintiff was permitted to terminate the Agreement and all Statements of Work in the event of a material breach of the Agreement by the defendant that remained uncured 15 days after the plaintiff provided written notice of the breach.

ii. The Pearson Project

On November 10, 2017, the parties entered into a Statement of Work to the Master Contractor Agreement (the Pearson SOW) wherein the plaintiff agreed to perform work (the Pearson Project) for one of the defendant's clients, Pearson Education, Inc. (Pearson). On or about November 20, 2017, the plaintiff began providing services under the Pearson SOW. These services included writing software code in connection with Pearson's mobile development source base. The plaintiff staffed the Pearson Project with Ukraine-based subcontractors.

According to the defendant's CEO, Boris Rozman (Rozman), the defendant became concerned about the quality of the plaintiff's work product and performance under the Pearson SOW beginning in December 2017. On December 15, 2017, the defendant's Senior Producer, Tatiana Ovsiannikova (Ovsiannikova), sent an email to the plaintiff's employees, including the plaintiff's CEO, Igor Tomych (Tomych), expressing that the coding work performed for Pearson thus far had numerous issues that "created a bad impression and made [the defendant] look bad" to its client. Ovsiannikova continued, "We never received email from [Pearson] about the bad quality and disappointment on our work." She cited correspondence from Pearson's Director of Software Development, Manik Kakar (Kakar), expressing that he had reviewed IOS code base and noted "significant lapses in code quality." She also stated that Kakar's Android code review proved "that Android team is not strong enough for this project." On December 20, 2017, Kakar

emailed Rozman directly to notify him of "a severe quality issue" with the code base. Kakar stated that "there are significant functional issues in the application" and "[m]inor performance issues." Kakar further expressed frustration that the code base was being built "for 4+ months now" but was still unfinished. Kakar elaborated in a subsequent email that he was "not commenting on quality of the code but rather its functional completeness." Kakar continued to report issues with the functionality of web application, pointing to various bugs and non-responsive elements, through December 22, 2017.

Rozman testified at his deposition that Pearson's unhappiness with the plaintiff's work on the Pearson Project lasted "throughout the whole project," and that there were "constant complaints about a number of different things." On April 9, 2018, Kakar contacted Tomych directly about "upcoming changes." When asked via email what she knew about that, Ovsiannikova wrote to Tomych, "It seems there is an issue within Pearson to continue working with Ukraine as a destination for outsourcing, not your team. The [Pearson Project] will run until [end of month]. Most likely will not be extended past then unfortunately." Ovsiannikova stated she did not know the reason why Pearson did not want to work with subcontractors based in Ukraine. The plaintiff's performance under the Pearson SOW terminated as of April 30, 2018.

iii. The Journal Engine Project

On or about March 9, 2018, the parties entered into a second Statement of Work to the Master Contractor Agreement (the Journal Engine SOW), wherein the plaintiff agreed to perform work (the Journal Engine Project) for another of the defendant's clients, with the goal of building a web site for journaling in connection with a coaching business. The Journal Engine SOW provided a list of "Deliverables," including "The code and other resources (image files, CSS, etc.)." No deadlines for performance were provided, but the contract included an estimate of 665

hours for development, not inclusive of project management and quality assurance efforts, among other things.

Rozman avers that "numerous problems" occurred in connection with the plaintiff's performance on the Journal Engine Project. In an email sent by Ovsiannikova on April 11, 2018, in response to an invoice sent by the plaintiff, Ovsiannikova stated that "there is a mistake in hours billed" because the defendant "didn't expect to receive such numbers." Ovsiannikova's specific grievances were that the work billed for was beyond a "60 hours max" estimate purportedly provided by the plaintiff and that the plaintiff was overstaffing calls/ billing for work its internal management performed.

Other than the foregoing dispute, which was limited to billing, Rozman testified at his deposition that the defendant "didn't do any work," "[n]othing was ever delivered," and "[t]hey refused to show any evidence of work in the form of code to us." The defendant's issues with the plaintiff's substantive work on the Journal Engine Project appear to have arisen, or at the very least were never articulated until, after the plaintiff sent Rozman a May 11, 2018, email attaching unpaid invoices from the Pearson Project and an invoice for April 2018 work on the Journal Engine Project, as further discussed below. Following such email, Rozman responded to Tomych that they "need[ed] to connect on [Journal Engine Project] hours" and that his "people" needed "access to [the code repository] so they can review quality of the code and architecture." Tomych responded that access to the repository would not be provided until "invoices for already rendered services are covered." Rozman then wrote to Tomych, on May 18, 2018, that the plaintiff's refusal to provide access to code for review meant the defendant had "no way to verify what was done as well as the quality of the work," and so the defendant would not pay the invoice provided. Rozman added in his email that what he had seen of the Journal Engine

Project after two months was limited to a simple interface lacking in certain core basic features, that only five tasks had been completed, and that he had identified a list of "bugs" in the visual functionality of completed work. Two emails sent by Ovsiannikova to Rozman on May 21, 2018, and May 22, 2018, include short lists of "time spent on Bugs" and "reopened tasks" in connection with the Journal Engine Project. Rozman's May 18, 2018, email to Tomych concluded, "Due to your position you will stop all work immediately until we have a resolution. If we do not have a resolution by [May 22, 2018,] we will terminate this project."

iv. Unpaid Invoices and Payment Dispute

The defendant paid the plaintiff the total sum of $81,080.00 for its work on the Pearson Project, making the last payment towards such sum in early April 2018. However, the defendant failed to pay the full sum sought pursuant to an invoice dated March 30, 2018, and any of the sums sought pursuant to invoices dated April 12, 2018, and April 30, 2018.

The defendant did not make any payments to the plaintiff in connection with work on the Journal Engine Project, which the plaintiff invoiced the defendant for on April 9, 2018, May 7, 2018, and June 7, 2018. As discussed above, the defendant objected to the April 9, 2018, invoice based on the allegedly excessive amount of time billed for work the plaintiff's management performed. When the plaintiff attempted to collect on the May 7, 2018, invoice, in addition to the April 9, 2018, invoice and the unpaid Pearson Project invoices, the parties' dispute with regard to the quality of the plaintiff's work on the Journal Engine Project, likewise discussed above, ensued.

Following Rozman's May 18, 2018, email, the parties engaged in further correspondence, wherein Tomych asked numerous times for payment on the Pearson Project and reiterated that he would not release Journal Engine code until such payment was received. Rozman responded that

it "doesn't matter why" the plaintiff was blocking access to the code and stated that until the "situation" on the Journal Engine Project was resolved, "there is nothing more to discuss." Rozman repeatedly refused to address the Pearson Project invoices until the plaintiff released the Journal Engine code. On May 22, 2018, however, Rozman emailed Tomych stating that the defendant "plan[ned] on paying the remainder of the Pearson invoice before the end of this month." However, no payment was made by the end of May.

The defendant finally terminated the Journal Engine Project in writing on June 1, 2018. Rozman sent the June 1, 2018, termination email in response to numerous emails from Tomych requesting payment on outstanding invoices for work the plaintiff performed through the end of May on both the Pearson Project and the Journal Engine Project and clarification on the status of the Journal Engine Project. Rozman stated, in relevant part, that the termination of the Journal Engine Project was "[d]ue to a number of issues and risk factors." The main contributors, said Rozman, were "1) [time and material] underestimation (current pace per task and overall puts us at 2-3x total hours and timeline), 2) 3 failed client calls with broken functionality, 3) a huge amount of bug for such minimal tasks and 4) junior level quality of development of core features, as well as 5) [Tomych's] refusal to let the client access the code when requested for review." Accordingly, Rozman said, only "about 100-200 hours of the billed hours are acceptable." Rozman stated that the defendant's experience on the Journal Engine Project was "shockingly disappointing compared to the positive one we had working on the previous mobile project." He concluded with an offer "to settle the account for a minimal amount and transfer the current state of the codebase." Otherwise, without the code, the defendant would not pay anything towards the Journal Engine Project invoices.

Tomych rejected Rozman's proposal, stating, "I didn't get any payment for sources up to now even for the Pearson project. So, I'm not sharing anything. That's final decision." The court does not take notice of Rozman's initial response, which is in Russian and accompanied only by a translation in a screenshot from Google Translate, rather than a certified translation. See CPLR 2101(b). On June 5, 2018, the plaintiff again sent a list of open invoices, consisting of the three open Pearson Project invoices and two Journal Engine Project invoices through May 7, 2018. The list of invoices and sums due thereunder was followed by the notation, "plus 175.37 hours in May."

Rozman responded, "All [Journal Engine] invoices are fraudulent and will never be paid since access to the code was rejected. I gave a one-time offer for that [expletive] code to solve it amicably but it was rejected by [Tomych]. Whatever you build [sic] using those fake hours is not even worth $5k." On June 19, 2018, Rozman emailed Tomych to add, "Just to be clear we will pay your firm for Pearson work. That was never in question, despite your hysteric assumptions to the contrary." Rozman further stated that the Journal Engine Project "was terminated and annulled." However, he indicated that he would "be in touch regarding payment dates," presumably as concerned the Pearson Project invoices only.

On June 22, 2018, Tomych sent Rozman a formal demand letter, and on June 25, 2018, Tomych responded to Rozman's email. Both the demand letter and Tomych's email contained the same information: Tomych stated the amounts due to the plaintiff under the Pearson Project SOW, in the sum of $34,280.00, and the Journal Engine Project SOW, in the sum of $16,320.00 (including in such sum the amount contained in a third invoice dated June 7, 2018, for work performed on the Journal Engine Project in May) and demanded full payment of the outstanding amounts by July 9, 2018. Alternatively, Tomych offered to accept the full sum demanded in the

Pearson Project invoices as a full and final settlement of debt if paid by July 2, 2018. On July 6, 2018, Rozman responded, "You never showed us the code so we fired your team. We were going to settle the Pearson debt. But now you have contacted our contacts in direct breach of contract. At this point where [sic] have no choice but to sue your firm for damages."

Rozman's reference to breach of contract arose from Tomych's LinkedIn message, sent on July 6, 2018, to Kim Ades, a principal of the company for whose benefit the Journal Engine Project was undertaken. Tomych stated in the message that his team was the defendant's subcontractor on the Journal Engine Project but that "Rozman breached the contract and failed to pay us our fee for several successful implemented projects as well as for yours one [sic]." Tomych stated that the wanted to "notify" Ades about the defendant's "malpractice and unfairness" and requested a call to discuss the issue, since the plaintiff developed software for Ades and "may pass it to [her]." Ades immediately advised Rozman of the communication.

Additionally, on July 28, 2018, Tomych reached out to Kakar and informed him that the defendant did not pay for work the plaintiff did in March and April and warned that "[Rozman] might do the same to any subcontractors." Kakar advised that Pearson had paid all of its invoices from the defendant and that he would try to send receipts demonstrating such payment, but that Pearson could not be involved in subcontractor disputes.

To date, the defendant has paid no portion of the open Pearson Project invoices or Journal Engine Project invoices identified by the plaintiff. In the complaint and throughout this action, Tomych has averred, and invoices submitted support, that the amount included in Tomych's June 2018 demand was miscalculated. Specifically, the total sum due under the Pearson Project invoices should have been $50,840.00, and the total sum due under the Journal Engine invoices should have been $16,177.00.

As of the inception of this action, the plaintiff had not turned any Journal Engine code over to the defendant. In June 2021, however, the plaintiff produced what it claims is the Journal Engine source code to the defendant's counsel. Rozman disputes that this is the code the defendant was charged for.

B. Procedural Background

On December 3, 2018, the plaintiff commenced this action by filing the complaint, which alleged causes of action sounding in breach of contract (first cause of action), quantum meruit (second cause of action), unjust enrichment (third cause of action), and account stated (fourth cause of action). On March 19, 2019, the plaintiff filed a motion for leave to enter a default judgment. On June 24, 2019, the court granted the plaintiffs motion for default judgment in the amount of $67,017.00, plus costs and interest. On July 30, 2019, the Clerk entered the judgment in the total sum of $75,312.80, and in August and September 2019 the judgment was collected.

Thereafter, on April 27, 2020, the court, *inter alia*, granted the defendant's motion to vacate the default judgment. In its answer with counterclaims, the defendant asserted claims sounding in breach of contract (first counterclaim), tortious interference with contractual relations (second counterclaim), defamation (third counterclaim), abuse of process (fourth counterclaim), and fraud (fifth counterclaim). By a decision and order dated October 14, 2021, the court dismissed the second through fifth counterclaims and granted the defendant leave to amend its answer to the extent of amplifying factual allegations made in connection with the first counterclaim.

Discovery concluded, and the Note of Issue was filed, on August 27, 2021. The defendant now moves pursuant to CPLR 3212 for summary judgment dismissing all of the plaintiff's claims and for judgment on its breach of contract counterclaim, averring that record

leaves no doubt as to the plaintiff's failure to perform under the Agreement and applicable Statements of Work and the defendant's resulting injury. The plaintiff moves pursuant to CPLR 5015(a)(3) to vacate the court's April 27, 2020, order vacating the default judgment, on the ground that the defendant fraudulently represented to the court that it lacked notice of the pendency of this action until August 2019, when its bank accounts were restrained pursuant to the default judgment. Alternatively, the plaintiff seeks an award of summary judgment in its favor, pursuant to CPLR 3212, in the sum of $67,017.00, and to dismiss the defendant's breach of contract counterclaim. The defendant cross moves for sanctions pursuant to 22 NYCRR 130-1.1, alleging that the plaintiff's motion constitutes frivolous conduct.

III. LEGAL STANDARDS

A. CPLR 3212

It is well settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986). 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, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010).

B. CPLR 5015(a)(3)

CPLR 5015(a)(3) provides that the court which rendered a judgment may relieve a party from it upon the ground of fraud, misrepresentation, or other misconduct of an adverse party. "[T]hese factors are applicable to what has either occurred prior to the judgment or was the means by which the judgment was obtained." Nachman v Nachman, 274 AD2d 313, 315 (1st Dept. 2000) (citations omitted).

C. 22 NYCRR 130-1.1

22 NYCRR § 130-1.1(a) provides, in relevant part, that the court, "in its discretion, may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct . . . In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." 22 NYCRR § 130-1.1(b) provides that the court, as appropriate, "may make such award of costs or impose such financial sanctions against . . . a party to the litigation." Frivolous conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, is undertaken primarily to harass or maliciously injure another, or asserts material factual statements that are false. See 22 NYCRR § 130-1.1(c). "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual

basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of . . . the party." Id.

IV. DISCUSSION

A. Defendant's Motion for Summary Judgment

In support of its motion for summary judgment, the defendant has submitted, *inter alia*, the subject Agreement and relevant Statements of Work; the deposition transcripts of Tomych and Rozman; written email correspondence between the parties throughout the course of their relationship; written email correspondence among the parties and Kakar, Pearson's employee; Rozman's affidavit; the invoices issued by the plaintiff for work performed in connection with the Pearson Project and the Journal Engine Project; and a spreadsheet purporting to demonstrate $1,492,415.00 in revenues generated from Pearson by the defendant throughout the course of their business relationship.

i. Breach of Contract

The plaintiff's first cause of action and the defendant's sole counterclaim each sound in breach of contract. To successfully prosecute a cause of action to recover damages for breach of contract, the party making the claim is required to establish (1) the existence of a contract, (2) the party's performance under the contract; (3) the opposing party's breach of that contract, and (4) resulting damages. See Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009).

a. First Cause of Action

The gravamen of the plaintiff's breach of contract claim is that the defendant agreed to pay the plaintiff for work it performed in connection with specific software development projects

for the defendant's clients, the plaintiff performed the work contemplated, and the defendant nonetheless refused to pay. In this regard, the defendant does not dispute that the Agreement and related Statements of Work constituted binding contracts and that it has not paid the full amounts claimed by the plaintiff in invoices issued pursuant to such contracts. Rather, the defendant argues that the plaintiff did not perform under the parties' contracts, thereby extinguishing the defendant's payment obligations.

Though the defendant's submissions contain certain assertions, including in Rozman's deposition transcript, that "no work" was performed by the plaintiff, such assertions are flatly contradicted by the record before the court. To be sure, email correspondence among the parties and Pearson is replete with discussion about the work the plaintiff was performing for Pearson's benefit. Moreover, although the defendant made its concerns about the quality of work performed known, and objected to the plaintiff's refusal to allow the defendant to review source code, the parties' contemporaneous correspondence makes clear that the plaintiff was performing work under the Agreement and Journal Engine SOW.

Nonetheless, the defendant avers that the work the plaintiff performed was without contractual value because it was not done "in a professional quality conforming to generally accepted industry standards and practices and to the reasonable satisfaction of [the defendant]," as dictated by the Agreement. The defendant has supplied no proof as to the plaintiff's purported noncompliance with the first prong of this requirement. To be sure, neither party has submitted any statement from anyone with expertise sufficient to opine on what the "generally accepted industry standards and practices" applicable to the plaintiff's work in this matter are. Thus, the defendant does not meet its burden in establishing that the plaintiff's work was deficient by a professional standard.

As to the Agreement's requirement that work be done "to the reasonable satisfaction of" the defendant, the evidence the defendant submits does not establish, *prima facie*, that the plaintiff's work on the Pearson Project was unsatisfactory even on that subjective basis. To the extent that Kakar and Ovsiannikova expressed disappointment or frustration with the plaintiff's work progress and quality, such sentiments appear to have been limited to a brief period in December 2017, notwithstanding Rozman's vague statements to the contrary. It is not even clear that Kakar's disappointment was driven exclusively by the plaintiff's performance: his emails from that period on multiple occasions express concern that Pearson's software was still not in a usable state after over four months of work. But the plaintiff did not begin its work, according to the defendant, until November 20, 2017, less than one month prior to Kukar's emails. The defendant provides no cogent reason why the plaintiff should be blamed for delays wholly outside of its control.

Moreover, the defendant did not reject the plaintiff's services on the Pearson Project after they purportedly "made [the defendant] look bad." To be sure, the defendant paid the plaintiff in full for all work performed in November and December 2017. Thereafter, the plaintiff continued to perform for another four months, through April 2018. The defendant also paid the plaintiff, without objection, for its work in January 2018, February 2018, and part of March 2018. Ultimately, the plaintiff completed its work and the Pearson Project launched. Since there have been no allegations by the defendant that it was required to hire a new company or otherwise fulfill the plaintiff's obligations under the Pearson SOW, it must follow that the launch was a function of the plaintiff's labors. Further, the defendant invoiced its client, Pearson, for the Pearson Project and Pearson paid the defendant, without protest. When Pearson finally

announced that the Pearson Project was being terminated at the end of April, it made no reference to any deficiency in the plaintiff's performance.

The defendant cannot accept all of the fruits of the plaintiff's labors under the Agreement and Pearson SOW, without ever disputing an invoice, only to refuse to pay for the benefits received because, months later, it has conveniently decided it was not, in fact, reasonably satisfied by the work that was done. The defendant's assertions as to its satisfaction in this regard are entirely self-serving, unsupported, and contradicted by the evidence it has introduced. Thus, the defendant is not entitled to dismissal of the plaintiff's breach of contract claim insofar as it alleges a breach in connection with the Pearson Project.

With respect to the Journal Engine Project, however, the defendant introduces evidence demonstrating that it complained about the plaintiff's billing practices in early April 2018 and raised specific concerns about the quality of the plaintiff's work in early May 2018. The defendant never paid any of the Journal Engine Project invoices. Instead, when the plaintiff refused to allow the defendant to review source code until the defendant paid for the Pearson Project, the defendant terminated the plaintiff. Rozman wrote in his emails and confirmed in his testimony that the ability to review source code was of central importance to the defendant in entering the Journal Engine SOW; code is even designated a deliverable under the Journal Engine SOW.

While the foregoing evidence would tend to support the defendant's allegation that the plaintiff did not perform to the defendant's reasonable satisfaction, as required to recover under the Agreement and Journal Engine SOW, other pieces of evidence submitted undermine the defendant's argument. At his deposition, Tomych, who testified as having a background in computer science, contested Rozman's characterization of "bugs" in the code the plaintiff

produced as serious defects, explaining that they were issues that would generally be addressed at a client's request by quality assurance, a service the plaintiff contracted to provide in the Journal Engine SOW. Further, the Journal Engine SOW does not provide for delivery of code upon demand, prior to the completion of the code. The Journal Engine SOW also estimates that the plaintiff requires 665 hours for development of the software, outside of quality assurance efforts. But, according to the Journal Engine invoices, the plaintiff had only spent about 500 hours, none of which were for quality assurance work, on the project when the defendant announced its displeasure and told the plaintiff to stop working.

Even if these pieces of evidence were ignored, the plaintiff's opposition itself raises triable issues as to the reasonableness of the defendant's objections. Tomych states, in his affidavit, that at the time the defendant complained, "the services for the Journal Engine Project had not yet been completed, and to the extent any bugs existed or needed to be resolved, this is normal in code-writing and would have been resolved by [the plaintiff] had it been given a chance." In other words, the plaintiff contends that the defendant's premature termination of the Journal Engine SOW precluded the plaintiff from making corrections to the code, i.e., quality assurance, that would ordinarily occur further along in the code writing process. Additionally, the plaintiff highlights the defendant's failure to raise any substantive work quality issues in connection with the Journal Engine Project until the plaintiff began demanding payment, contending that the defendant manufactured dissatisfaction because it did not want to pay. In light of the foregoing, the remainder of the first cause of action survives the defendant's motion.

b. Counterclaim

To the extent the defendant's breach of contract counterclaim is premised upon the plaintiff's alleged failure to perform under the applicable agreements, the defendant does not

meet its burden on summary judgment for the reasons the court has explained. The defendant also fails to submit proof sufficient to establish it incurred $24,000.00 in "dealing with Plaintiff's Journal Engine performance issues."

Finally, the defendant provides no proof that Pearson abandoned it because of the plaintiff's purportedly poor performance. The defendant says that Pearson's mentioning not wanting to work with subcontractors in Ukraine was in actuality "a polite way of terminating the plaintiff." First, it is utterly unclear why termination on the basis of the country of origin of the plaintiff's subcontractors, with absolutely no other explanation given, constitutes "polite" behavior. Notwithstanding, the defendant's speculation that Pearson stopped working with it due to the plaintiff's poor performance on the Pearson Project, untethered from any statement by a Pearson employee to that effect, is just that. In order to establish that Pearson's departure was caused by the plaintiff as a matter of law, much more is required in the way of evidence. The branch of the defendant's motion seeking judgment on its counterclaim is denied.

ii. Quantum Meruit and Unjust Enrichment

The second and third causes of action asserted by the plaintiff sound in quantum meruit and unjust enrichment, respectively. The defendant correctly avers that a plaintiff may not recover in quasi-contract where, as here, it has a valid, enforceable contract that governs the same subject matter as the quasi-contract claim. See Clark-Fitzpatrick, Inc. v Long Island Rail Road Co., 70 NY2d 382 (1987); Ellis v Abbey & Ellis, 294 AD2d 168 (1st Dept. 2002); Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski, 14 AD3d 644 (2nd Dept. 2005). While the plaintiff would be permitted to proceed in the alternative upon a quasi-contractual theory if there were a question as to whether a valid and enforceable contract existed (see Forman v Guardian Life Ins. Co. of America, 76 AD3d 866 [1st Dept. 2010]), no party raises such issues or disputes

the enforceability of the subject agreements in this case. Therefore, the plaintiff's second and third causes of action are dismissed.

iii. Account Stated

The plaintiff's fourth and final cause of action sounds in account stated. "An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other. . . In this regard, receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated." Shea & Gould v Burr, 194 AD2d 369, 370 (1st Dept. 1993); see Morrison Cohen Singer and Weinstein, LLP v Waters, 13 AD3d 51, 52 (1st Dept 2004).

The defendant fails to demonstrate entitlement to dismissal of the fourth cause of action insofar as it seeks payment for the Pearson Project invoices. All parties acknowledge and agree that the Pearson Project invoices had all been delivered as of May 11, 2018, at the latest. The record is utterly devoid of any objection to these invoices by the defendant at any point, before or after such date. Indeed, the defendant made partial payment towards the invoices in the sum of $81,080.00, and confirmed to the plaintiff for months, in writing, on numerous occasions, that it did not have an objection to the balance. The defendant's arguments to the contrary are specious.

However, the defendant establishes entitlement to dismissal of the fourth cause of action insofar as it seeks payment for the Journal Engine Project invoices. The record is clear that the defendant consistently objected to such invoices as they were delivered and set forth bases for its objections in writing on numerous occasions. The plaintiff does not demonstrate the existence of

a triable issue in this regard. Thus, the fourth cause of action is dismissed to the limited extent that it is premised on the Journal Engine Project invoices.

B. Plaintiff's Motion to Vacate the April 27, 2020, Decision and Order

The plaintiff moves to vacate the court's April 27, 2020, decision and order, which itself vacated a default judgment entered against the defendant and awarded restitution to the defendant in the sum of $75,312.80. The plaintiff avers that the order was procured by the defendant's fraud, insofar as Rozman made a false allegation in an affidavit submitted in support of the defendant's motion to vacate, dated August 13, 2019 (NYSCEF Doc. 72). Specifically, Rozman represented that he was unaware of the instant action until the defendant's bank accounts were restrained pursuant to the default judgment in August 2019. The plaintiff contends that such representation is demonstrably false because on December 21, 2018, defense counsel sent an email to Tomych stating, in relevant part, "My client has informed me that there is a lawsuit you or your company have filed. If you have filed suit, please send me a copy of the complaint."

The court has already addressed the substance of the plaintiff's argument, i.e., that emails from defense counsel in December 2018 establish the defendant's notice of this action, in its April 27, 2020, decision and order. At that time, the plaintiff had submitted a remarkably similar email from defense counsel to Tomych dated December 23, 2018, stating, in relevant part, "I understand that you filed a complaint against [the defendant.] Please do e-mail me a copy for my review." The court determined that while "these submissions suggest that the defendant may have been on notice of the possibility of this lawsuit prior to their default, the submissions do not demonstrate that the defendant actually ever received a copy of the summons and complaint or

had actual notice of this action such that denial of the defendant's motion under CPLR 317 is warranted."

The December 21, 2018, email the plaintiff now submits contains no information that would change this determination. Indeed, the emails from defense counsel, sent days apart, are nearly identical in all material ways. Moreover, the plaintiff provides no explanation why it litigated this action for years without raising the issue of the December 21, 2018, email, which was a document within its control from the outset. The branch of the plaintiff's motion seeking to vacate the April 27, 2020, decision and order is denied.

C. Plaintiff's Motion for Summary Judgment

In support of the branch of its motion seeking summary judgment, the plaintiff has submitted, *inter alia*, Tomych's affidavit, the subject Agreement and relevant Statements of Work; written email correspondence between the parties throughout the course of their relationship; written email correspondence among the parties and Kakar; the invoices issued by the plaintiff for work performed in connection with the Pearson Project and the Journal Engine Project; the demand letter sent by the plaintiff on June 22, 2018; and excerpts from the deposition of Rozman.

i. Breach of Contract

a. First Cause of Action

The plaintiff's proof, which overlaps extensively with the proof submitted by the defendant in support of its own motion, establishes a prima facie breach of contract claim arising from the Agreement and the Pearson SOW. Specifically, the plaintiff has produced contracts wherein the defendant agreed to pay for work the plaintiff performed in furtherance of the Pearson Project at specified rates, within 30 days of receipt of approved and uncontested

invoices. The plaintiff has established it performed its obligations under the Pearson SOW and duly demanded payment therefor. The defendant concedes it never paid the plaintiff the amounts it sought.

As the court has discussed at length, any "performance issue" the defendant had with the plaintiff's work on the Pearson Project appears to have been limited in time and scope and was never used as an objection to payment for the plaintiff's work. In fact, the first time the defendant ever indicated it would not pay for Pearson Project work was in July 2018, when the defendant announced it changed its mind about paying and instead would sue the plaintiff for damages because the plaintiff contacted Ades on LinkedIn. In other words, not until its appearance in this action did the defendant ever state it had *any* principled objection to paying for the plaintiff's work on the Pearson Project based on poor performance. The defendant does not create a triable issue by establishing that it began manufacturing complaints about the plaintiff's performance years after the fact.

Thus, the plaintiff is entitled to an award of $50,840.00 for breach of the Agreement and Pearson SOW, with interest from June 11, 2018, which is 30 days after delivery of the last Pearson Project invoice and the latest deadline for payment under the Agreement.

The plaintiff is not entitled to summary judgment on the first cause of action insofar as it arises from the Journal Engine Project. As the court has discussed, there remain significant triable issues of fact as to whether the plaintiff performed as required under the Agreement and Journal Engine SOW.

b. Counterclaim

The plaintiff is not entitled to summary judgment on the defendant's counterclaim insofar as it seeks to recover expenses incurred for the plaintiff's alleged breaches during the Journal

Engine Project. Nonetheless, the plaintiff establishes that the counterclaim should be dismissed to the extent it seeks to recover under any other theory. Specifically, the plaintiff shows that the defendant can have no claim arising from Pearson's departure as a client. As discussed, the record is devoid of any proof that would support a finding that the plaintiff's poor performance caused the defendant to lose business from Pearson. Moreover, Tomych's communications with Ades and Kakar, standing alone, cannot form the basis of a claim for breach of the non-solicitation clause of the Agreement. The defendant raises no triable issue to the contrary.

ii. Quantum Meruit and Unjust Enrichment

For the reasons the court has explained, the plaintiff's second and third causes of action are duplicative of the first and are subject to dismissal on that basis. The plaintiff's motion for judgment on the same is denied.

iii. Account Stated

The plaintiff establishes its account stated claim based on its delivery of the Pearson Project invoices to the defendant, the defendant's retention of such invoices without any objection, and the defendant's partial payment towards the same.

Conversely, for the reasons the court has explained, the plaintiff cannot sustain its account stated claim to the extent it is based on the Journal Engine Project invoices. The plaintiff's motion for an award premised on such claim is denied.

D. Defendant's Cross Motion for Sanctions

The defendant's cross motion for sanctions against the plaintiff is denied for failure to demonstrate frivolous behavior sufficient to support such relief pursuant to 22 NYCRR § 130-1.1.

In light of the limited monetary value of the remaining claims before the court, the parties are strongly encouraged to explore settlement.

V. CONCLUSION

Accordingly, it is

ORDERED that the defendant's motion for summary judgment pursuant to CPLR 3212 (SEQ 010) is granted to the extent that (1) the second and third cause of action of the complaint are dismissed in their entirety, and (2) the fourth cause of action is dismissed to the limited extent that it arises from invoices delivered for the plaintiff's work on the Journal Engine Project, and the motion is otherwise denied; and it is further

ORDERED that the plaintiff's motion pursuant to CPLR 5015(a)(3) to vacate the court's April 27, 2020, decision and order, or, in the alternative, pursuant to CPLR 3212 for summary judgment (SEQ 011), is granted to the extent that (1) the plaintiff is granted judgment on its first and fourth causes of action, insofar as each arises from work performed in furtherance of, and invoices delivered for work on, the Pearson Project, in the sum of $50,840.00, and (2) the defendant's first counterclaim is dismissed to the limited extent it seeks to recover damages for the defendant's alleged loss of business and the plaintiff's alleged breach of the non-solicitation provision of the parties' agreement, and the motion is otherwise denied; and it is further

ORDERED that the defendant's cross motion for sanctions against the plaintiff pursuant to 22 NYCRR § 130-1.1 (SEQ 011) is denied; and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff, and against the defendant, in the sum of $50,840.00, with interest from June 11, 2018; and it is further

ORDERED that the remainder of the plaintiff's first cause of action and the remainder of the defendant's counterclaim are severed and shall proceed to trial.

This constitutes the Decision and Order of the court.

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

DATED: January 12, 2023