

Rhodes Assoc. Exec. Search of N.Y. LLC v IS Co. LLC

2023 NY Slip Op 30627(U)

March 1, 2023

Supreme Court, New York County

Docket Number: Index No. 657339/2019

Judge: Dakota D. Ramseur

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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. DAKOTA D. RAMSEUR **PART 34M**

Justice

-----X

RHODES ASSOCIATES EXECUTIVE SEARCH OF NEW
YORK LLC

Plaintiff,

- v -

IS COMPANY LLC D/B/A IAN SCHRAGER COMPANY,

Defendant.

-----X

INDEX NO. 657339/2019

MOTION DATE 12/16/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

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

Plaintiff, Rhodes Associate Executive Search of New York, LLC (Rhodes), commenced this action to recover fees of \$180,000 allegedly due under two employee recruitment contracts with defendant, IS Company LLLC, d.b.a. Ian Schrager Company (IS). Plaintiff now moves for an order granting summary judgment pursuant to CPLR 3212 in that amount under its first and second causes of action, and for attorney's fees under its fourth¹ cause of action. IS cross-moves for an order granting summary judgment pursuant to CPLR 3212 on its first and second counterclaims, dismissing the complaint, and awarding attorney's fees. For the following reasons, plaintiff's motion is granted and defendant's cross-motion is denied.

FACTS

Rhodes is an executive search and organizational consulting services firm. The president and managing partner of Rhodes is Steven Littman (Littman). Defendant IS is a luxury hotel and real estate development company. The CEO and founder of IS is Ian Schrager (Schrager), a well-known entrepreneur, hotelier and real estate developer (plaintiff's statement of undisputed facts [PSUF], NYSCEF doc. no. 62 at ¶¶ 1-2).

In or around mid-September 2019, Schrager and Littman first communicated to discuss the scope of Rhodes' work to search for and identify candidates for two positions at IS. (defendants' counter-statement of material facts [DCSOMF], NYSCEF doc. no. 68 at ¶ 3). Following some negotiations and discussions about IS' goals, on September 30, 2019, Schrager

¹ In its papers, plaintiff refers to its cause of action for contractual attorney's fees as the third cause of action. However, that claim is labeled in the complaint as the fourth cause of action, even though it is the third one listed. The claim labeled as the third cause of action is for quantum meruit.

met with Littman and signed two separate written letter agreements pursuant to which IS retained Rhodes to identify and present candidates for the positions of “Senior Real Estate Investment Professional for Ian Schrager Company” (the Investment Professional Agreement) and “Head of Asset Management, Public Hotel for Ian Schrager Company” (the Asset Manager Agreement). (*id.*, ¶10; NYSCEF doc. nos. 32 [Investment Professional Agreement] and 33 [Asset Manager Agreement]). Schrager never read either contract before signing them (PSUF ¶ 10).

The two agreements are nearly identical in every respect other than the positions described therein, the retainer fee amounts and the installment payment terms (PSUF ¶ 11). The Investment Professional Agreement required a retainer of \$120,000 representing “the minimum fee” and which was “not refundable.” It was to be payable in three equal installments of \$40,000, with the first installment due upon commencement of the assignment and the two subsequent payments due every 30 days thereafter upon receipt of the invoices. The Investment Professional Agreement also provided that if IS cancelled the contract assignment prior to the thirtieth day, no installment would be billed beyond the initial \$40,000 one. The Asset Manager Agreement required a nonrefundable minimum fee of \$60,000 paid in three installments of \$20,000 on the same schedule as the Investment Professional Agreement, except that IS did not have the option of cancelling within 30 days. Both agreements required reimbursement of search related administrative expenses and local interview expenses equal to 5% of each installment, and provided that the prevailing party in any dispute would be entitled to its reasonable costs and attorney’s fees.

IS did not cancel the Investment Professional Agreement within 30 days (PSUF ¶¶ 15, 50). On September 30, 2019, Rhodes submitted by email its first set of invoices (the September Invoices) to Schrager IS for \$21,000 and \$42,000 pursuant to the respective agreements. On October 8, 2019, Littman advised Schrager that Rhodes had not received payment, asked Schrager to approve a wire, and asked Schrager to let him know whether there was any issue. Schrager did not respond and IS did not pay the invoices (PSUF ¶¶ 17-18).

By email dated October 11, 2019, Rhodes again sent IS the September Invoices and a copy of the agreements. In response, an IS employee, Amy Chang, advised Rhodes that IS would try to remit payment as soon as possible but that it “more likely will be [paid] next Week.” Littman wrote to Schrager about payment of the September Invoices on several additional occasions in October 2019, but there was never any response from Schrager or payment by IS (*id.*, 19-20; NYSCEF doc. nos. 11, 12, 14, 15, 16, 19, 20 [emails requesting payment]).

Also in October 2019, Littman sent multiple emails to Schrager recommending candidates for both positions at IS, forwarding their resumes, and attempting to schedule meetings with Schrager to discuss or interview the potential candidates (PSUF ¶¶ 22, 24, 28, 30-31). Schrager did not meet with any of the individuals identified by Littman, respond to his emails, or call or meet with Littman during that month (*id.* ¶ 26, 30, 32, 49). On October 31, 2019, Littman sent an email to Schrager submitting Rhodes’ second set of invoices for \$21,000 and \$42,000, which IS admits were received (*id.* ¶ 34-35; NYSCEF doc. no. 35, Notice to Admit, responses 6-8). In that email, Littman also outlined the efforts Rhodes had undertaken on IS’

behalf, noted that Schragger had reached out to Rhodes for assistance, and stated that “I do not deserve to not be paid for our work, or to be embarrassed in the marketplace.”

In response to the October 31 email, Schragger wrote “back from back to back LA opening . . . Disney World trip with family. Exhausted!! Sorry. Will call you today or tomor[r]ow. Meant no disrespect!” (PSUF ¶ 39; NYSCEF doc. no. 50). Littman replied a few minutes later, requesting an in-person meeting, with payment of the retainers in advance. He also expressed concern that Schragger’s lack of communication could damage his firm’s reputation. In particular, he explained that it might appear to the candidates that he was misrepresenting his relationship with Schragger if he could not give them meaningful status updates (*id.*). Littman followed up the next day with another email noting that he had told the candidates he interviewed that there had been a delay in the process, and again asking for a meeting and payment of the invoices (*id.*).

When Schragger did not respond, Littman then emailed him again on the morning of November 6, 2019 stating that he “would like to move forward with our relationship and the assignments,” and that he did “not understand why we are ‘stalled’ based on our two meetings and a 20 year relationship” (PSUF ¶ 41; NYSCEF doc. no. 52). Schragger replied shortly thereafter, saying “Steve, I’m so sorry. I will call ASAP....maybe not to [sic] Friday. I have hired a director of operations . . . let’s discuss” (PSUF ¶ 42; NYSCEF doc. no. 52). Littman then expressed concern regarding IS’ new hire insofar as the position appeared to be “right in the middle” of the positions that Rhodes had been hired to fill, and repeated his request for a meeting and payment (NYSCEF doc. no. 52).

Littman reiterated his concern about IS’ new hire in an email two days later (*id.*). He also stated that “I will do whatever I have to do to protect our firm in the marketplace and financially” if the standstill was not resolved by the upcoming weekend. In a November 11, 2019 email, Littman threatened “legal action” to recover payment and “do everything legally possible to make this issue as public as possible.” Schragger responded “[i]f you would just calm down, and patience [sic], not be so obsessive ... and wait for me to contact you things would be much better! I’m obviously busy and distracted and my world does not revolve around you!” Littman countered with an email recounting his candidate referrals and his demands for payment and meetings, and offered to credit any payment Rhodes received against future search services provided he could offer a credible story to the candidates whose interviews he had been trying to schedule.

In the absence of a response, on November 13, 2019, Littman advised Schragger that he had “no alternative but to refer the issue of our agreement and retainers to our attorney” (PSUF ¶ 44; NYSCEF doc. no. 53). After Schragger attempted to call him, on November 15, 2019 Littman emailed advising him “there is nothing to discuss if you are unwilling to approve payment for the initial invoices” and again offered to credit any payment against future assignments. Schragger replied that day by asking Littman to “Call me on my cell when you can. Ive [sic] called you a few times and all I get back is e mails which seem very toxic to me. Please no more emails. Call me or do whatever you want!” (NYSCEF doc. no. 88).

Littman testified that around this time, he stopped working on the IS assignments due to Schragger’s lack of communication, and to avoid embarrassing himself in dealing with the

candidates (PSUF ¶ 46). Rhodes, through counsel by letter dated November 19, 2019, then declared IS to be in breach of the agreements and demanded payment (NYSCEF doc no. 57). On or about November 30, 2019, Rhodes submitted its third set of invoices to IS for the remaining \$21,000 and \$42,000 owed under the agreements (PSUF ¶ 47).

Receiving neither payment nor a response to its letter, Rhodes commenced this action by filing of a summons and complaint on December 10, 2019. The complaint sets forth claims for breach of contract, account stated and contractual attorney's fees. Several days after the pleadings were served on IS, by letter dated December 16, 2019, counsel for IS responded to Rhodes' November 19, 2019 letter (PSUF ¶ 53). In that letter, IS disputed any breach, asserting that some of the candidates referred by Rhodes were already known to IS and had worked for it before. IS' counsel also contended that "Mr. Schrage made numerous unreturned calls and sent emails to Mr. Litman [sic] during this time period endeavoring to advise him to cease work in order to terminate the Agreements" (NYSCEF doc. no. 58). However, IS suggested that the matter be settled insofar as it acknowledged that Rhodes "did engage in some introductory work" on behalf of IS.

DISCUSSION

To demonstrate entitlement to summary judgment under CPLR 3212, the movant must establish that they are entitled to prevail on their claim or defense through "evidence in admissible form" as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [citations omitted]). If the moving party makes a prima facie showing, the opponent must establish that a triable issue of material fact exists (*id.*; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [collecting cases]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d 557, 562).

To establish a claim for breach of contract, the plaintiff must demonstrate that "(1) a contract exists; (2) plaintiff performed in accordance with the contract; (3) defendant breached its contractual obligations; and (4) defendant's breach resulted in damages" (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022] [internal quotations and citations omitted]; *see Michael Page Intern., Inc. v Icon Realty Management LLC*, 2022 WL 4287504, *2 [Sup Ct, NY Co 2022] [granting summary judgment to plaintiff under contract for employee recruitment services]). To prevail on a claim for an account stated, the plaintiff must provide "evidence of the invoices, receipt by defendant, and lack of objection by defendant for a substantial period of time" (*L.E.K. Consulting LLC v Menlo Cap. Grp., LLC*, 148 AD3d 527, 528 [1st Dept 2017]).

On this record, it is undisputed that IS breached the two agreements upon inception by failing to make immediate payment of the first installments of the nonrefundable retainer fees. At that point, Rhodes would have been entitled to demand full payment of the entire fee due under the Asset Manager Agreement, and at least the first installment due under the Investment Professional Agreement, subject to IS right to terminate within 30 days. Rhodes nevertheless accommodated IS by commencing work under both agreements, and after the first 30 days had passed, earned the right to full payment of both retainers upon tender of the invoices.

IS has not raised a colorable defense to the breach of contract claim. First, its claim that Rhodes failed to perform is a feigned issue. Rhodes fulfilled its duty to “identify and present” candidates to IS, and did so for a period of approximately six weeks without objection. It only ceased its efforts in view of IS’ undeniable failure to meaningfully communicate with Littman, interview the candidates or pay the outstanding invoices. Schrager never expressed any dissatisfaction with Rhodes’ work, and at his deposition, he directly contradicted his counsel’s assertion that he had made numerous calls and emails attempting to terminate the agreements (PSUF ¶ 50; NYSCEF doc no. 59, Schrager Dep., 235:16 - 236:7).

IS’ further contention that it was not obligated to cooperate with Rhodes is belied by the very nature of the agreements, which necessarily required IS to approve the candidates and determine whether they met its standards. Implicit in Rhodes’ obligation to “present” the candidates was IS obligation to interview them. That was clearly the understanding between the parties during their initial negotiations over the contracts, as well as their limited interactions afterwards. IS’ after-the-fact criticisms of the candidates’ qualifications is disingenuous given that there is no evidence that Schrager actually reviewed any of their resumés during the relevant period when the agreements were in effect. Furthermore, IS’ argument that its only obligation under the contract was to make the installment payments is without merit in view of its complete failure to do even that.

Accordingly, Rhodes is granted summary judgment on its first cause of action for breach of contract. As it is undisputed that the agreement provides for an award of reasonable attorney’s fees and costs to the prevailing party, summary judgment is granted as to the fourth (misidentified as “third”) cause of action as well. In view of this determination, it is unnecessary to consider whether judgment would also be appropriate under the theory of an account stated. However, it appears that such a claim would be merely duplicative of the contract claim, as it “is being utilized simply as another means of collection” (*Vanpoy Corp., S.R.L. v Soleil Chartered Bank*, 204 AD3d 486, 487–488 [1st Dept 2022]) of invoices whose time for payment was dictated by the agreements.

Finally, defendant’s affirmative defenses and counterclaims are dismissed. Defendant does not discuss or defend the eight affirmative defenses, and “[n]either plaintiff nor the court ought to be required to sift through a boilerplate list of defenses, or ‘be compelled to wade through a mass of verbiage and superfluous matter’ . . . to divine which defenses might apply to the case” (*Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 79 [1st Dept 2015], quoting *Barsella v City of New York*, 82 AD2d 747, 748 [1st Dept 1981]). Defendant also fails to defend its counterclaim for defamation, and the remaining two counterclaims, for breach of contract and breach of the warranty of good faith and fair dealing, are dismissed for the reasons set forth above in connection with plaintiff’s contract claim.

Accordingly, it is hereby,

ORDERED that plaintiffs motion for summary judgment pursuant to CPLR 3212 is granted and the Clerk of the Court is directed to enter a judgment in favor of plaintiff and against defendant for the amount alleged in the first cause of action in the complaint, \$180,000, with

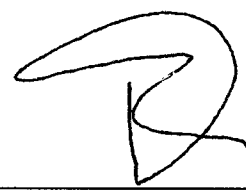
statutory interest of 9% as of November 19, 2019, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's motion for summary judgment on its third cause of action is granted, and the parties shall appear for a hearing on reasonable attorney's fees on March 21, 2023 at 11:00 a.m.; and it is further

ORDERED that the defendants' affirmative defenses and counterclaims are dismissed, it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendant, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



3/1/2023

DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE