

KBL, LLP v Banana Kelly Community Improvement Assn., Inc.

2023 NY Slip Op 30774(U)

March 10, 2023

Supreme Court, New York County

Docket Number: Index No. 652637/2022

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

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KBL, LLP

Plaintiff,

- v -

BANANA KELLY COMMUNITY IMPROVEMENT
ASSOCIATION, INC.,

Defendant.

-----X

INDEX NO. 652637/2022

MOTION DATE 03/09/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff’s motion for partial summary judgment on its claim for account stated is granted.

Background

Plaintiff contends that when defendant’s CFO left the company, it was hired to provide defendant with accounting, consulting, booking and other financial-related services. It claims that defendant’s accounting department was completely disorganized and it was required to complete a host of tasks, including performing supervisory roles to clean up this department. Plaintiff argues that its employee assigned to work for defendant, Mr. Terry, spent an inordinate amount of time overseeing defendant’s accounting department and had little time to do his own work. It observes that it took defendant a long time to get new CFO (apparently, one candidate accepted the position before rescinding his acceptance).

Plaintiff alleges that after defendant finally hired a new CFO, Mr. Terry offered to help the transition by providing more than 50 hours of unbilled time. It claims that during the period

plaintiff provided these services to defendant, it billed \$131,600 but that defendant only paid \$45,825 and refuses to pay any more. It brings four causes of action, all arising from the unpaid services. In this motion, plaintiff moves for summary judgment on its account stated cause of action, which seeks \$85,775 (what plaintiff claims is remaining on the invoices- not the unbilled time).

In opposition, defendant claims that it objected to the invoices due to plaintiff's alleged failure to complete the work. It insists that much of the work completed by plaintiff was subpar and other tasks were never done at all. Defendant contends it timely objected to the invoices and points to an email in which it allegedly expressed dissatisfaction with the work done and the need to discuss the invoices.

In reply, plaintiff stresses that defendant made a partial payment and that there were no timely or specific objections made to the invoices.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City*

of *New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

As an initial matter, the Court observes that defendant failed to offer a counterstatement of material facts as required by 22 NYCRR 202.8-g. Therefore, the Court deems plaintiff's proposed facts as admitted (*id.*). Although this Court could overlook this procedural error, the fact is that plaintiff's statement of material facts lays out in great detail the timeline of when it submitted invoices, defendant's partial payments and its claim that defendant failed to object. That defendant did not offer specific opposition to these facts – either in a counterstatement or in substance in the opposition - compels the Court to deem these facts admitted and grant the motion.

Even if the Court were to overlook defendant's failure to submit a counterstatement of material facts, the record suggests that defendant failed to sufficiently object to the invoices. "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, thereby entitling plaintiff to

summary judgment in its favor” (*Shea & Gould v Burr*, 194 AD2d 369, 370-71, 598 NYS2d 261 [1st Dept 1993]).

Plaintiff met its prima facie burden to show it sent invoices and that defendant failed to timely object. In opposition, defendant, through the affidavit of its president, only claims that “we objected to Plaintiff’s invoices” (NYSCEF Doc. No. 22, ¶ 4). It pointed the Court to an email on June 10, 2022 in which the president of defendant claimed “I understand that you are looking for payment now but we should further discuss. There were no systems set up as discussed and the department is in far worse shape than we started” (NYSCEF Doc. No. 26 at 1).

The problem, as pointed out by plaintiff, is that in a subsequent email two weeks later, on June 24, 2022, defendant’s president claimed that “the bill was not paid Sanjay along with other bills that were not paid !!!! Reginald please let's speak today about paying the remaining balance owed to KBL !!!!” (NYSCEF Doc. No. 25 at 16). This email, combined with the fact that defendant made partial payments compels the Court to grant the motion. Defendant agreed to pay the remaining balance and defendant did not point to other instances evincing a timely objection to paying the invoices.

The Court also observes that there is no confusion about the amount plaintiff is seeking. Plaintiff explains that this cause of action seeks less than the other claims (such as the one for breach of contract) because it is only seeking the amount arising out of the invoices. The account stated claim merely seeks the amount plaintiff says is outstanding, which factors in the payments received from defendant. Plaintiff points out that the additional amounts sought in the other claims relate to purported time for which plaintiff did not bill, but still seeks compensation.

Moreover, defendant’s claim that there is a question about whether there was a contract is irrelevant. There is no dispute, on this record, that there was some agreement for plaintiff to

provide services to defendant. Under what theory plaintiff may, or may not, recover remains to be seen (other than the account stated claim). The Court points out that after granting the instant motion, the only issue remaining is the additional amounts sought that were, according to plaintiff, the time plaintiff did not include in the invoices.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for partial summary judgment on its fourth cause of action for account stated is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$85,775 plus interest from March 15, 2022 (a reasonable midpoint of the invoices) along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the balance of this action, the remaining three causes of action, are severed and this action shall proceed to discovery on these claims.

Conference: June 22, 2023 at 10:30 a.m. By June 15, 2023, the parties are directed to upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement about discovery that identifies areas in dispute and 3) letters explaining why no agreement about discovery could be reached. Based on these submissions, the Court will assess whether an in-person conference is appropriate. The failure to upload anything will result in an adjournment of the conference.

3/10/2023
DATE

ARLENE P. BLUTH, J.S.C.

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