

66 Clinton Holdings LLC v BRDAR, Inc.

2023 NY Slip Op 33574(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 151605/2022

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**

<p>PRESENT: <u>HON. LOUIS L. NOCK</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>66 CLINTON HOLDINGS LLC,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>BRDAR, INC.,</p> <p align="center">Defendant.</p> <p>-----X</p>	<p>PART 38M</p> <p>INDEX NO. <u>151605/2022</u></p> <p>MOTION DATE <u>04/04/2022</u></p> <p>MOTION SEQ. NO. <u>001</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, defendant’s motion to dismiss is granted in part for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 8-9, 24) (and the exhibits attached thereto), in which the court concurs, as summarized herein.

Plaintiff has successfully alleged a cause of action for breach of contract by alleging the terms of the Creative Services and Brand Partnership Agreement between the parties, that plaintiff performed its obligations prior to defendant’s breach, that defendant did breach the agreement by ceasing work before completion, and that plaintiff has been damaged (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Defendant’s documentary evidence submitted in support of its claim that it was plaintiff who ceased performing first does not “utterly refute[] plaintiff’s factual allegations and conclusively establish[] a defense to the asserted claims as a matter of law” (*Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014] [internal quotation marks and citations omitted]). In fact, it

raises questions of fact as to the timeline of the parties' actions, which cannot be resolved on a motion to dismiss (*Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]).

Defendant's argument that plaintiff is required to pay all amounts due under the agreement due to plaintiff's termination of the agreement is unsupported by the terms of the agreement. The relevant provision provides that "[i]n the event that the Client decides to terminate the agreement, the total fees relating to any project or projects that have been initiated are payable to the Agency" (agreement, NYSCEF Doc. No. 11, § V[C]). This section also provides, however, that upon termination, defendant "shall not commence any new work, but it shall complete all work previously approved by [plaintiff]" (*id.*). This suggests, at a minimum, an ambiguity as to what plaintiff may have been required to pay upon termination, and contract ambiguities cannot be resolved on a motion to dismiss (*see, Almah LLC v AIG Empl. Services, Inc.*, 157 AD3d 416, 416 [1st Dept 2018] ["If a contract is ambiguous, the complaint should not be dismissed pre-answer before the development of a full factual record as to the parties' intent"]). The court notes that defendant's interpretation of the contract, carried to its logical conclusion, suggests that there is no scenario in which, upon termination, plaintiff would not be required to pay the entire contract price in spite of whether or not defendant had performed. "[A] contract should not be interpreted to produce an absurd result" (*Rubin v Baumann*, 148 AD3d 556, 556 [1st Dept 2017]).

Defendant's arguments of waiver and voluntary payment are similarly unavailing. The agreement provides that "[a]ny billing discrepancies must be brought to the attention of [defendant] in an expeditious manner (30 days after receipt) and be resolved within the thirty (30) day payment period or are waived" (agreement, NYSCEF Doc. No. 11, § IV). Defendant cites no authority for the proposition that a wholesale breach of contractual obligations is

encompassed within the phrase “billing discrepancies.” In any case, “billing discrepancies” is not a defined term in the agreement, and at best the agreement is ambiguous in this regard, preventing resolution on the present motion for the reasons stated above. Similarly, the voluntary payment doctrine “bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law” (*Dubrow v Herman & Beinlin*, 171 AD3d 672, 673 [1st Dept 2019]). As alleged in the complaint, which must be taken as true on the motion (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the payments made were without knowledge of the alleged discrepancy between what was promised in the agreement and the work that would actually be delivered. At minimum, factual issues remain to be resolved.

Having sustained the litigability of the first cause of action for breach of contract, the court agrees with defendant that the second cause of action for unjust enrichment and the claim for punitive damages must be dismissed. “Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded” (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). As for punitive damages, “the complaint does not allege that the breach was associated with outrageous conduct that was part of a pattern directed at the public generally” (*Eisenberg v Weisbecker*, 190 AD3d 549, 550 [1st Dept 2021], *lv denied*, 37 NY3d 903 [2021]).

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted in part and the second cause of action and the claim for punitive damages are dismissed; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after the date of filing hereof; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on November 15, 2023, at 2:15 PM.

This constitutes the decision and order of the court.

ENTER:



<u>10/12/2023</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <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