

TC Servs. USA Inc. v Ideal Home Health Inc.

2024 NY Slip Op 32980(U)

August 15, 2024

Supreme Court, Kings County

Docket Number: Index No. 509272/2023

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : COMMERCIAL PART 8

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TC SERVICES USA INC. a/k/a WOTC.COM,

Plaintiffs,

Index # 509272/2023

- against -

August 15, 2024

IDEAL HOME HEALTH INC.,

Defendant,

-----x
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #3

The defendant has moved pursuant to CPLR §3211 seeking to dismiss the first and fourth causes of action of the complaint. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior orders, on October 7, 2021 the defendant hired the plaintiff to obtain Internal Revenue Tax Credits, specifically Federal Employee Retention Tax Credits [hereinafter ERTC]). Initially, the parties agreed the plaintiff would be paid fifteen percent of all credits recovered and later that amount was reduced to twelve percent. The complaint alleges the plaintiff obtained credits in the amount of \$4,734,921.38 and sought a twelve percent fee in the amount of \$568,190.56. The complaint alleges the plaintiff performed another similar service and was never paid and that other similar services will incur fees to the plaintiff when the defendant files their tax returns. The complaint alleges defendant refused to pay the amounts sought and instituted this lawsuit. The complaint alleges causes of

action for breach of contract and account stated. The plaintiff has now moved seeking to dismiss the first cause of action for breach of contract based upon the ERTC Agreements and to dismiss the cause of action for account stated. As noted, the motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Perez v. Y & M Transportation Corporation, 219 AD3d 1449, 196 NYS3d 145 [2d Dept., 2023]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Archival Inc., v. 177 Realty Corp., 220 AD3d 909, 198 NYS2d 567 [2d Dept., 2023]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Lam v. Weiss, 219 AD3d 713, 195 NYS3d 488 [2d Dept., 2023]).

8 NYCRR §29.10 prohibits unprofessional conduct in the practice of public accountancy. Indeed, that statute appears within a larger statute that governs many different industries

including optometrists (8 NYCRR 29.8) and message therapists (8 NYCRR 29.13) among others. Education Law §7401 defines public accountancy and lists three definitions. The first is offering to perform or performing any attest or compilation services defined in Education Law §7401-a. That law defines "attest" to include "any audit to be performed in accordance with generally accepted auditing standards or other similar standards" or "any review of a financial statement to be performed in accordance with standards, developed by a federal governmental agency, commission or board or a recognized international or national professional accountancy organization, that are acceptable to the department in accordance with the commissioner's regulations" or "any examination to be performed in accordance with attestation standards developed by a federal governmental agency, commission or board or a recognized international or national professional accountancy organization, that are acceptable to the department in accordance with the commissioner's regulations" or "ny engagement to be performed in accordance with the auditing standards of the public company accounting oversight board" (see, Education Law §7401-a(1) (a-d)).

Compilation means "providing a service that presents, in the form of financial statements, information that is the representation of the management or owners of the client without undertaking to express any assurance of the accuracy of the

information in the statements, to be performed in accordance with standards, developed by a federal governmental agency, commission or board or a recognized international or national professional accountancy organization, that are acceptable to the department in accordance with the commissioner's regulations" (id., at Paragraph 3).

Further, public accountancy also includes incident to the above definition "offering to perform or performing professional services for clients, in any or all matters relating to accounting concepts and to the recording, presentation, or certification of financial information or data" or "offering to perform or performing, for other persons one or more types of the following services including but not limited to accounting, management advisory, financial advisory, and tax exclusive of services within subdivisions one and two of this section, involving the use of professional skills or competencies of the licensed accountant as described in the rules of the board of regents, including professional services rendered to one's employer not required to register under section seventy-four hundred eight of this article, in any and all matters related to accounting concepts and to the recording of financial data or information or the preparation or presentation of financial statements" (see, Education Law §7401(2), (3)).

In this case, the plaintiff did not perform any work which

can be defined as public accountancy at all. The plaintiff merely prepared documents so that the defendant can be able to take advantage of certain tax credits available.

Likewise, the plaintiff was not a 'tax preparer' as defined in 20 NYCRR Part 26. Therefore, there is no basis to dismiss any of the causes of action based upon those statutes.

Turning to the argument the agreements are unconscionable and should be voided as a matter of public policy, as noted in King v. Fox, 7 NY3d 181, 818 NYS2d 833 [2006] quoting Black's Law Dictionary "at common law an unconscionable agreement was one that no promisor (absent delusion) would make on the one hand and no honest and fair promisee would accept on the other" (id). Thus, an unconscionable contract is one that is "so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (Simar Holding Corp., v. GSC, 87 AD3d 688, 928 NYS2d 592 [2d Dept., 2011]). To demonstrate a contract is unconscionable, it must be shown the contract was both procedurally and substantively unconscionable when made (Gillman v. Chase Manhattan Bank, N.A., 73 NYS2d 1, 537 NYS2d 787 [1988]). Further, where the facts underlying the claims of an unconscionable contract are essentially undisputed the court may decide the matter as a question of law (David v. #?1 Marketing

Services Inc., 113 AD3d 810, 979 NYS2d 375 [2d Dept., 2014]).


Thus, an agreement where a party promises a contingency fee of twenty-five percent for any real estate property tax benefit obtained under the New York City Industrial and Commercial Incentive Program (ICIP) was not considered unconscionable (see, Mazursky Group Inc., v. 953 Realty Corp., 166 AD3d 432, 88 NYS3d 159 [1st Dept., 2018]). There are cases that hold a contingency fee that is disproportionate to the amount recovered may be unconscionable (see, Hoganwillig PLLC v. Hendel, 126 AD3d 1311, 6 NYS3d 338 [4th Dept., 2015]). However, that is a fact sensitive analysis which requires further discovery. Thus, at this juncture there is no indication that as a matter of law the fees were disproportionate and unconscionable and that the =y should be declared void.

Consequently, at this time the motion seeking to dismiss the first and fourth causes of action is denied.

So ordered.

ENTER:

Dated: August 15, 2024
Brooklyn, N.Y.



Hon. Leon Ruchelsman
JSC