

Sugatan, Inc. v SBLA Beauty, Inc.

2024 NY Slip Op 33237(U)

September 13, 2024

Supreme Court, New York County

Docket Number: Index No. 651788/2023

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>SUGATAN, INC.,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>SBLA BEAUTY, INC.,</p> <p align="center">Defendant.</p> <p>-----X</p>	<p>PART 38M</p> <p>INDEX NO. <u>651788/2023</u></p> <p>MOTION DATE <u>09/26/2023</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) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, and 41 were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, plaintiff’s motion for summary judgment on the complaint is granted as to the third cause of action for an account stated, for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 6, 7, 40) and the exhibits attached thereto, in which the court concurs, as summarized herein. Defendant’s cross-motion for leave to amend the answer and for partial summary judgment is granted to the extent of dismissing the second cause of action for unjust enrichment and/or quantum meruit as duplicative of the first cause of action for breach of contract, and is otherwise denied.

Pursuant to a Master Services Agreement (the “MSA”) dated January 25, 2021, plaintiff undertook to provide certain advertising services to defendant, a maker of beauty products (MSA, NYSCEF Doc. No. 8). As relevant to the instant motion, the MSA provides that plaintiff’s services “shall be provided by staff possessing the required skills and experience and that the Services shall be performed in a professional and workmanlike manner” (*id.*, § 5 [a]). Defendant’s “sole and exclusive remedy for [plaintiff’s] breach of [plaintiff’s] warranty shall be

that [plaintiff] will reperform the non-compliant Services, or fix any non-compliant Deliverable” and will refund the cost paid by defendant for any such service or deliverable if plaintiff cannot reperform (*id.*, § 5 [d]). Any claim under this provision requires written notice to plaintiff (*id.*, § 5 [e]). Either party could terminate the agreement upon 30 days written notice of a breach and failure to correct (*id.*, § 2 [b]). Upon termination, defendant agreed to pay for any services rendered through the date of termination.

Beginning in March of 2022, defendant began raising concerns about how plaintiff was managing the advertising services defendant had paid for (NYSCEF Doc. Nos. 32-35). It is difficult to form a full picture of how the conversations proceeded, as defendant has only provided snapshots of conversations on various media from March and April 2022. Finally, on May 1, 2022, and without the requisite notice of a material breach, defendant terminated the MSA (termination email, NYSCEF Doc. No. 9). There was an email exchange between the parties, during which defendant’s principal stated to plaintiff’s principal that defendant would “settle up” as to any outstanding amounts (NYSCEF Doc. No. 15). Plaintiff then informed defendant that there was an outstanding balance of \$130,669.25 for services already rendered prior to termination, across four invoices dated May of 2022 (demand email, NYSCEF Doc. No. 10; invoices, NYSCEF Doc. Nos. 11-14). The record contains no evidence that defendant disputed the invoices post-receipt or paid the outstanding balance. On March 14, 2023, plaintiff sent defendant a pre-arbitration demand pursuant to the MSA’s dispute resolution provisions. Defendants did not respond, and plaintiff then commenced this action.

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]).

“Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, “the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). “[I]t is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Turning first to defendant's cross-motion for partial summary judgment, defendant asserts that plaintiff's claims for unjust enrichment and/or quantum meruit, and account stated, are impermissibly duplicative of the cause of action for breach of the MSA. The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Here, the parties do not dispute the existence or the applicability of the MSA, and the cause of action for unjust enrichment and/or quantum meruit must be dismissed as duplicative. As to the account stated claim, however, as the Appellate Division, First Department, has recently reaffirmed, “an account stated is an independent cause of action that can be asserted simultaneously with a breach of contract claim and that an account stated claim should not be dismissed as duplicative of a breach of contract

claim” (*Aronson Mayefsky & Sloan, LLP v Praeger*, 228 AD3d 182, 187 [1st Dept 2024]). As defendant offers no other argument as to why the account stated claim should be dismissed, its motion is denied on that point.

Turning to plaintiff’s motion for summary judgment on its claims for breach of contract and account stated, plaintiff has established prima facie entitlement to summary judgment on its claim for an account stated. “An account stated is an agreement, independent of the underlying agreement, regarding the amount due on past transactions” (*Duane Reade v Cardinal Health, Inc.*, 21 AD3d 269, 269-70 [1st Dept 2005]). “The receipt and retention of an account, without objection, within a reasonable period of time, coupled with an agreement to make partial payment, gives rise to an account stated entitling the moving party to summary judgment in its favor” (*Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355, 356 [1st Dept 2001]). Thus, where a party retains invoices for a sufficient period of time without objection, an account has been stated (*Musical Elecs., Ltd. v U.S. Elecs., Inc.*, 74 AD3d 691, 692 [1st Dept 2010]).

Here, the invoices in question are dated April 4 and May 2, 2022 (NYSCEF Doc. Nos. 11-14). As averred by plaintiff’s Director of Finance, Josh Schleifer, defendant has never objected to the invoices, either before or after terminating the agreement (Schleifer aff., NYSCEF Doc. No. 6, ¶¶ 8-9). In this regard, the MSA provides that defendant must object to invoices within 10 days of receipt of the invoice, pay any undisputed amounts, and explain the reasons for the dispute (MSA, NYSCEF Doc. No. 8, § 4 [d]). The affidavit of defendant’s Executive Vice President, Robert Koyman, lists certain complaints that defendant had regarding plaintiff’s services; but does not identify any timely disputes to specific invoices, as required by the MSA. Indeed, approximately ten months after termination, plaintiff sent a pre-arbitration

demand that defendant ignored. Thus, whether or not plaintiff failed to deliver its services in the contractually required manner, defendant's failure to object to the invoices in the time required, or indeed at any time thereafter, entitles plaintiff to summary judgment on its claim for an account stated. At best, defendant has raised issues of fact regarding plaintiff's claim for breach of the MSA, which do not bar summary judgment with regard to the account stated claim.

Finally, defendant's cross-motion for leave to amend the answer is denied. Leave [to amend] shall be freely given upon such terms as may be just" (CPLR 3025[b]). Absent undue delay, prejudice, or surprise, and provided the proposed amendment arises from the same transactions and occurrences as the original complaint, the motion should be granted (*Fellner v Morimoto*, 52 AD3d 352, 353 [1st Dept 2008]). A court must first, however, examine the merits of the proposed amendment (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 365-66 [1st Dept 2007]). Leave should not be granted where the proposed new cause pleading is "palpably insufficient or patently devoid of merit" (*Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640 [2d Dept 2015]). Here, the proposed amended answer includes additional factual allegations regarding plaintiff's asserted breaches of the MSA. However, because an account stated claim is a separate agreement from that on the underlying claim, defendant's proposed amended answer would not provide a defense to the account stated claim even if defendant could establish that plaintiff failed to perform under the MSA as required. It is defendant's failure to timely object to the invoices that is the basis for plaintiff's entitlement to summary judgment, and the proposed amended answer does not set forth any timely objections to plaintiff's invoices. The proposed amendment is, therefore, palpably insufficient.

Accordingly, it is hereby

ORDERED the plaintiff's motion for summary judgment is granted as to the third cause of action for an account stated, and defendant's cross-motion is granted to the extent of dismissing the second cause of action for unjust enrichment and/or quantum meruit and otherwise denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$130,669.25, with interest thereon at the statutory rate from May 1, 2022, through entry of judgment, as calculated by the Clerk, 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 claim for attorneys' fees is denied. A party may not recover its own attorneys' fees absent a contract, statute, or court rule that allows such recovery (e.g. *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 584 [2018]). Plaintiff does not submit any such provision allowing them to recover attorneys' fees.

This constitutes the decision and order of the court.

ENTER:



<u>9/13/2024</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION			
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APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT		<input type="checkbox"/>	REFERENCE