

Compensation Guidance Inc. v Aspro Plumbing Inc.

2024 NY Slip Op 33368(U)

September 16, 2024

Supreme Court, Kings County

Docket Number: Index No. 522426/2019

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At IAS Part ___ of the Supreme Court of the State of New York, Kings County, on the ___ day of ___ 2024

SEP 16 2024

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C. SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS: PART 99

DECISION AND ORDER

-----X
COMPENSATION GUIDANCE INC.,

Plaintiff,
-against-

Index No.: 522426/2019
Motion Date: March 27, 2024
Motion Cal. No.: 16 & 17
Mot. Seq. 4 & 5

ASPRO PLUMBING INC., ASPRO MECHANICAL CONTRACTING INC.,

Defendants.
-----X

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Plaintiff's Notice of Motion for Summary Judgment, Attorney Affirmation in Support affirmed by Avram E. Frisch, Esq. on October 9, 2023, Affidavit in Support sworn to by Mark Silber on October 9, 2023, Exhibit 1- Summons and Complaint; Exhibit 2- Amended Answer; Exhibit 3- Stipulation Withdrawing Counterclaim; Exhibit 4- Deposition of Vincent Aspromonte; Exhibit 5- Contract; Exhibit 6- E-mails to Hammond Safety Group; Exhibit 7- E-mail dated September 27, 2017; Exhibit 8- E-mail dated June 9, 2017; Exhibit 9- E-mail dated July 21, 2017; Exhibit 10- E-mails dated July 12, 2017; Exhibit 11- Letters Forwarded to NYSIF; Exhibit 12- E-mails dated March 21, 2019; Exhibit 13- E-mails dated October 31, 2017; Exhibit 14- Invoices; Exhibit 15- NYSIF Audit Worksheet for 2016-17; Exhibit 16- NYSIF Audit Worksheet for 2017-2018; Exhibit 17-E-mail dated July 24, 2019; Exhibit 18- E-mail dated October 18, 2018; Exhibit 19- E-mails dated May 28, 2019; Exhibit 20- E-mail dated June 27, 2018; Exhibit 21- E-mails dated April 2019; Exhibit 22- E-mails dated May 24, 2019, Corrected Attorney Affirmation affirmed by Avram E. Frisch on October 11, 2023.....	46-71
Defendants' Notice of Cross-Motion to Dismiss the Complaint, Memorandum of Law in Opposition and in Support of Cross-Motion to Dismiss, Attorney Affirmation in Opposition and in Support of Cross-Motion to Dismiss affirmed by Joanna R. Cohen on January 4, 2024, Exhibit A- The Agreement; Exhibit B- May 9 Letters; Exhibit C- E-mail dated June 27, 2018; Exhibit D- E-mail dated August 13, 2018; Exhibit E- E-mail dated October 18, 2018; Exhibit F- Invoice and Supporting Documents; Exhibit G- Response to Invoice dated May 28, 2019; Exhibit H- E-mail dated May 28, 2019 regarding Invoice; Exhibit I- Correspondence Requesting Documentation dated August 23, 2019; Exhibit J- E-mails dated June 11, 2019 between Wilson and Hammond; Exhibit K- E-mail dated July 26, 2019 between defendants and NYSIF; Exhibit L- E-mail dated July 23, 2019 between plaintiff and defendant.....	73-87
Attorney Affirmation in Opposition to Cross-Motion affirmed by Avram E. Frisch, Esq. on February 29, 2024, Affidavit in Support sworn to by Mark Silber on February 29, 2024, Exhibit 23- License, Exhibit 24- Sublicense.....	88-91
Defendants' Sur-Reply Memorandum of Law in Opposition and in Support of Cross-Motion, Exhibit M- Plaintiff's Responses to Defendants' Demand for Interrogatories; Exhibit N- NYS Business Corporate Search for CGSI; Exhibit O- NYS Tax Warrant Search for CGSI.....	95-99

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Corrected Affidavit in Support sworn to by Mark Silber on February 29, 2024.....	100

MONTELIONE, RICHARD J., J.

Compensation Guidance, Inc. (hereinafter “Plaintiff”) commenced this action for breach of contract, unjust enrichment, account stated, and breach of the duty of good faith and fair dealing by filing a summons and verified complaint on October 13, 2019, which alleges that plaintiff and Aspro Plumbing Inc. and Aspro Mechanical Contracting Inc. (hereinafter “Defendants”) entered into a written contract wherein plaintiff agreed to work on a contingency basis to help defendants obtain refunds on workers compensation premiums. Issue was joined by defendants filing a verified answer with affirmative defenses and a counterclaim on November 29, 2019. Plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment against defendants for non-payment of commission fees allegedly owed to the plaintiff (MS#4). Defendants cross-move for an order pursuant to CPLR 3211(a)(7) dismissing plaintiff’s complaint for failure to state a cause of action, and CPLR 3015(e) arguing that plaintiff was not duly licensed at the time of services rendered (MS#5).

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. (See CPLR 3212 (b); *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. (*Spinelli v. Procassini*, 258 AD2d 577 [2d Dept 1999]; *Tassone v. Johannemann*, 232 AD2d 627, 628 [2d Dept 1996]; *Weiss v. Garfield*, 21 AD2d 156, 158 [3d Dept 1964]). The movant must therefore offer sufficient evidence in admissible form to eliminate all material questions of fact. *Alvarez v. Prospect Hosp*, 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York*, *supra* at 562; *Friends of Animals, Inc v. Associated Fur Mfrs, Inc*, 46 N.Y.2d 1065 (1979).

The essential elements to recover damages for breach of contract are “the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of its contractual obligations, and damages resulting from the breach” (*Compensation Guidance, Inc. v. Ashnu International, Inc.*, 220 AD3d 683, 684 [2d Dept 2023] [internal quotation marks omitted]). “ [A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms’ ” (*id.*, quoting *Greenfield v. Philles Records, Inc.*, 98 NY2d 562, 569 [2002]).

Plaintiff is a consultant specializing in obtaining credits, refunds, and reduced premiums in worker’s compensation policies and past audits. (NYSCEF Doc. No. 52). Plaintiff has demonstrated that the parties entered into a written agreement on May 9, 2017, by providing a copy of the same wherein plaintiff agreed to conduct a review of defendants’ current and past workers compensation policies and audit statement details in order to detect errors and overcharges that affected defendants’ policy premiums. (NYSCEF Doc. No. 53). Defendants’ President, Vincent Aspromonte Jr., testified during an EBT that defendants in fact entered into a contract with plaintiff for the purpose of obtaining credits from the New York State Insurance Fund. However, plaintiff has failed to eliminate all questions of fact with respect to its performance under the agreement. Plaintiff states that it was “successful” in obtaining credits for the defendants (NYSCEF Doc. No. 48, ¶8), and that “the savings were due to our assistance. . .”. (NYSCEF Doc. No. 52, ¶6). Yet, plaintiff never states what specific work was performed and how exactly the savings were calculated. Therefore,

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questions of fact exist as to whether the plaintiff's work was performed pursuant to the parties' agreement. Accordingly, plaintiff's motion for summary judgment against defendants for breach of contract is DENIED.

With respect to plaintiff's claim for account stated, the court finds that plaintiff has failed to establish its *prima facie* entitlement to summary judgment. (*Styles Brook Homeowners' Assn. v. Blasi*, 165 AD3d 1004, 1005 [2d Dept 2018]). While plaintiff has submitted no evidence that the parties came to an agreement regarding the balance due, defendants have submitted proof of objecting to the balance claimed by plaintiff. (NYSCEF Doc. No. 83). Therefore, plaintiff's motion for summary judgment against defendants for account stated is DENIED.

The court further finds that plaintiff's claim for unjust enrichment is duplicative of a contractual cause of action. (*See Panwest NCA2 Holdings LLC v. Rockland NCA2 Holdings, LLC*, 205AD2d 551 [1st Dept 2022]). Accordingly, the cause of action for unjust enrichment is dismissed and plaintiff's motion for summary judgment against defendants is denied in all other respects.

Next, defendants cross-move to dismiss plaintiff's complaint for failure to state a cause of action (MS#5). "On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*MJK Bldg. Corp. v. Fayland Realty, Inc.*, 181 AD3d 860, 861 [2d Dept 2020] [internal quotation marks omitted]). Where, as here, "evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal shall not eventuate" (*Gruber v. Donaldsons, Inc.*, 201 A.D.3d 887, 888 [2d Dept 2022] [internal quotation marks omitted]).

Here, assuming the facts alleged to be true and according plaintiff every favorable inference, plaintiff has set forth a cognizable cause of action against defendants to recover damages for breach of contract and stated in sufficient detail the facts constituting the alleged wrong. Both parties agree that they entered into a written agreement, and plaintiff has submitted proof of that written agreement. The evidentiary material submitted by defendants do not demonstrate, as a matter of law, that plaintiff does not have a cause of action to recover for breach of contract. Accordingly, the defendants' motion to dismiss for failure to state a cause of action is DENIED.

Turning now to the branch of defendants' motion to dismiss plaintiff's complaint pursuant to CPLR 3015(e). "[W]here the plaintiff's cause of action arises from the plaintiff's conduct of business which is required by state or local law to be licensed by the department of consumer affairs of the City of New York, . . . the complaint shall allege, as part of the cause of action, that plaintiff was duly licensed at the time of services rendered and shall contain the name and number, if any, of such license and the governmental agency which issued such license." A defendant is permitted to move for dismissal pursuant to CPLR 3211(a) if plaintiff fails to comply with the requirements of 3015(e). (*See* CPLR 3015(e); 1 NY CLS Desk Edition Civil Practice Annual R 3015 [2024]).

Plaintiff describes itself as "a consultant which specializes in obtaining credits/refunds/reduced premiums on worker's compensation policies and past audits." (NYSCEF Doc. No. 52). Defendants argue

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that plaintiff is required to be licensed as an insurance consultant under N.Y. Ins. Law § 2102(b)(3) to be entitled to compensation for reviewing or evaluating any insurance policy. Thus, plaintiff's failure to be licensed renders the agreement illegal and unenforceable. In opposition, plaintiff argues that the provisions of CPLR 3015(e) were enacted to protect consumers from unlicensed home contractors and are not applicable to this matter.

This Court disagrees with defendants' interpretation of CPLR 3015(e) and finds that its provisions are inapplicable to this matter. (*See B & F Bldg. Corp. v. Liebig* 76 NY2d 689, 692-693 [1990] [CPLR 3015(e) was enacted to enforce compliance with the Home Improvement Business provisions of the Administrative Code of the City of New York]; *see also Todisco v. Econopouly* 155 AD2d 441, 442 [2d Dept 1989] ["The purpose behind the enactment of CPLR 3015(e) was not to weaken substantive consumer rights, but, rather, to shift the burden from the homeowner to the contractor to establish that the contractor was licensed and to encourage such businesses to become licensed" [internal citation omitted]). CPLR 3015(e) mandates that licensing information of home improvement contractors must be pleaded and failure to do so will result in dismissal. Defendants' reliance on *Orchid Constr. Corp. v. Gottbetter*, 89 AD3d 708 [2d Dept 2011] is misplaced as that case involved a contractor who performed renovation work at defendant's apartment and is distinguishable. In the instant case, plaintiff is not a home improvement contractor within the meaning of CPLR 3015(e). There is no legislative history to support defendant's contention that the licensing requirement of CPLR 3015(e) was intended to apply to plaintiffs who are not home improvement contractors.

However, defendants' argument under N.Y. Ins. Law § 2102(b)(3) is persuasive. There is a paucity of law regarding workers compensation consultants, but the plain language of the statute requires a license unless there is an exception (N.Y. Ins. Law § 2102[4][A],[B],[C]), such as a licensed attorney at law, actuaries or certified public accountants, which apparently does not apply to the instant case. N.Y. Ins. Law § 2102(b)(3):

(3) Unless licensed as an insurance agent, insurance broker or insurance consultant with respect to the relevant kinds of insurance, no person, firm, association or corporation shall receive any money, fee, commission or thing of value for examining, appraising, reviewing or evaluating any insurance policy, annuity or pension contract, plan or program or shall make recommendations or give advice with regard to any of the above.

Therefore, this branch of defendants' motion to dismiss is GRANTED.

Based on the foregoing it is,

ORDERED that, defendants' cross-motion to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, and as a matter of law under CPLR 3212, is GRANTED; and it is further

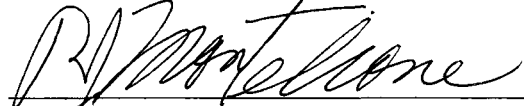
ORDERED that, plaintiff's motion for summary judgment against defendants is DENIED as academic; and it is further

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ORDERED that, any other requests for relief herein have been considered and are DENIED.

This constitutes the decision and order of the Court.

ENTER



Hon. Richard J. Montelione, J.S.C.

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