

5W Pub. Relations LLC v Elmwood Ventures LLC

2025 NY Slip Op 30889(U)

March 14, 2025

Supreme Court, New York County

Docket Number: Index No. 654042/2024

Judge: Lyle E. Frank

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

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

-----X

5W PUBLIC RELATIONS LLC

Plaintiff,

- v -

ELMWOOD VENTURES LLC,

Defendant.

-----X

INDEX NO. 654042/2024

MOTION DATE 10/07/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24

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

This action arises out of an alleged *inter alia* breach of contract. Plaintiff now moves for summary judgment. Defendant opposes the motion. For the reasons set forth below, plaintiff’s motion for summary judgment is denied.

Background

The parties entered into a contract wherein plaintiff was to provide public relations services. Plaintiff alleges that defendant has defaulted by failing to pay the monthly installments pursuant to the contract terms. Further, plaintiff contends that invoices were sent to defendant and defendant did not object to the invoices.

Standard of Review

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University*

Medical Center, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages.

VisionChina Media Inc. v Shareholder Representative Servs., LLC, 109 AD3d 49, 58 [1st Dept 2013].

Plaintiff may establish an account stated by any one of three alternative means: (1) the retention of bills without objection for a reasonable period of time, (2) partial payment, or (3) the plaintiff's acknowledgment of the debt. See *Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745, 746 [1st Dept 1983] (account stated established by receiving and retaining bills without any timely objection); *Liddle O'Connor, Finkelstein & Robinson v Koppelman*, 215 AD2d 204 [1st Dept 1995] (account stated based only on partial payment); *Bracken & Margolin, LLP v Schambra*, 270 AD2d 221 [2d Dept 2000] (account stated based on retention of invoices without objection and acknowledgment of obligation to pay).

The First Department has held that "a claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract" (*Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012] quoting *Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 485 [1st Dept 1991]).

Discussion

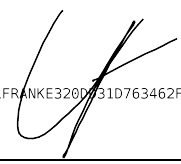
Preliminarily, the portions of the motion seeking summary judgment on the quasicontractual causes of action are denied. It is undisputed that there is a contract that governs the relationship between the parties, accordingly the quasicontract claims must fail.

In support of its motion, plaintiff submitted an affidavit as well as records that purport to establish plaintiff's performance pursuant to the contract. The affidavit also identifies 4 invoices sent to the defendant and asserts that those invoices were retained and never objected to. At the outset, without reference to the opposition, the Court takes issue with plaintiff's submissions. First, although there is reference to invoices sent by the plaintiff, there are no invoices submitted in support of this motion. Further, the alleged invoiced amounts vary in amount, which is contrary to the terms of the underlying contract. Second, the submitted document entitled "Media Impressions" NYSCEF Doc. 9, coupled with the affidavit, does not establish plaintiff's performance pursuant to the contract. At this point, the Court is without sufficient admissible evidence to make a determination that plaintiff performed pursuant to the terms of the contract or that invoices were properly sent and retained by the defendant.

In opposition to the motion, defendant submits an affidavit disputing that plaintiff performed pursuant to the terms of the contract, among other things defendant contends that plaintiff did not perform the account management and reporting portion of the contract and that it did in fact object to the invoices. Plaintiff has failed to establish prima facie showing of entitlement to judgment as a matter of law and there are questions of fact that preclude summary judgment. Accordingly, it is hereby

ADJUDGED that the motion for summary judgment is denied.

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3/14/2025

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE