

Phelps Rock LLC v ScaleWith, Inc.

2025 NY Slip Op 34719(U)

December 8, 2025

Supreme Court, New York County

Docket Number: Index No. 655398/2024

Judge: Phaedra F. Perry

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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

PRESENT: HON. PHAEDRA F. PERRY PART 35

Justice

INDEX NO. 655398/2024
MOTION DATE 01/28/2025
MOTION SEQ. NO. 001

PHELPS ROCK LLC, and EDWARD L. DANDRIDGE

Plaintiffs,

- v -

SCALEWITH, INC., and PAUL POLIZZOTTO,

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16 through 27 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, Plaintiffs Phelps Rock LLC ("Phelps Rock") and Edward L. Dandridge's ("Dandridge") (collectively "Plaintiffs") motion for summary judgment in lieu of complaint against Defendants ScaleWith, Inc. ("ScaleWith") and Paul Polizzotto ("Polizzotto") (collectively "Defendants"), or alternatively for summary judgment pursuant to CPLR 3212 is denied in its entirety.

I. Background

On October 10, 2022, Defendants retained Plaintiffs via a consulting services agreement ("CSA"). Plaintiffs allege Defendants breached the CSA by failing to pay Plaintiffs for services rendered. On October 16, 2023, the parties entered a settlement agreement (the "Settlement Agreement") to resolve the alleged breach of the CSA. Pursuant to the Settlement Agreement, Defendants agreed to pay Phelps Rock \$300,000 (NYSCEF Doc. 3). The payments described in the Settlement Agreement were memorialized in a promissory note (the "Note") executed simultaneously with the Settlement Agreement and annexed as an exhibit to the Settlement

Agreement (NYSCEF Doc. 4). Defendants made Payments of \$50,000 on November 16, 2023, and \$25,000 on January 2, 2024, but no further payments were made after January 2, 2024.

On March 6, 2024, May 6, 2024, and May 9, 2024, Plaintiffs allegedly notified Defendants that their failure to make continued payments constituted an event of default. On September 25, 2024, Plaintiffs served Defendants with a demand letter, to which Defendants allegedly did not respond. Shortly thereafter, on October 11, 2024, Plaintiffs filed a complaint alleging Defendants breached the Settlement Agreement and Note (NYSCEF Doc. 2). Defendants served their answer with affirmative defenses on December 17, 2024 (NYSCEF Doc. 12).

On January 28, 2025, Plaintiffs filed this motion for summary judgment in lieu of complaint, or alternatively for summary judgment pursuant to CPLR 3212. Plaintiffs argue there is no dispute that Defendants breached the Note by failing to make payments. Defendants oppose and argue the CPLR 3213 motion is improper, and the CPLR 3212 motion must be denied because Plaintiffs failed to perform a condition precedent to payment. Defendants also argue, amongst other things, that the motion is premature as there has not yet been any discovery.¹

II. Discussion

A. CPLR 3213

Plaintiffs' motion is denied. As a preliminary matter, the CPLR 3213 motion is improper. This provision governs motions for summary judgment in lieu of complaint. Instead of serving with the summons a motion for summary judgment, as required by CPLR 3213, Plaintiffs elected to file a complaint to which Defendants have now answered. The Court declines to overlook this procedural error pursuant to CPLR 2001.

¹ Defendants also ask in their memorandum of law to dismiss this action and declare the Note void. However, this dispositive relief is not sought via notice of motion and therefore the Court need not address it (*see Onofre v 243 Riverside Drive Corp.*, 232 AD3d 443, 443-444 [1st Dept 2024]).

But for the sake of completeness, even if the Court did overlook Plaintiff's procedural error, denial of the CPLR 3213 motion is still warranted. Section 3(c) of the Settlement Agreement states that Plaintiffs "shall comply with Section 7(c) of the CSA with regard to their obligations to return all [ScaleWith] property.... [Plaintiffs] acknowledge that their compliance with Section 7(c) of the CSA is a condition precedent to the Settlement Payment, Equity Transfer and Attorneys' Fee Payment." Section 7(c) of the CSA provides:

"[Plaintiffs] will promptly deliver to [Defendants] all of [Defendants'] Confidential Information in [Plaintiffs'] possession, and will irretrievably erase, delete, or destroy all electronic versions of [Defendants'] Confidential Information in [Plaintiffs'] possession. Upon termination of this Agreement, [Plaintiffs] will promptly return to [Defendants] all [Defendants'] Materials."

Because the agreements which Plaintiffs seek to enforce are conditioned on Plaintiffs satisfying Section 7(c) of the CSA, "the agreement is not an instrument for the payment of money only, and accelerated judgment under CPLR 3213 is not available" (*see Port Auth. of N.Y. & N.J. v White Near Costal Towing Corp.*, 187 AD3d 421, 421 [1st Dept 2020] citing *Kerin v Kaufman*, 296 AD3d 336, 337-338 [1st Dept 2002]). The agreements do not impose an unconditional obligation to pay but specifically require certain conditions prior to payment (*Vitol Americas Corp. v Targa Resources Partners LP*, 224 AD3d 421, 422 [1st Dept 2024]). Therefore, the branch of the motion which seeks a summary judgment pursuant to CPLR 3213 is denied.

B. CPLR 3212

The motion for summary judgment pursuant to CPLR 3212 is denied as premature with leave to renew upon further discovery. As a preliminary matter, Plaintiffs' failure to annex the pleadings to the motion is not fatal as all documents are readily available on NYSCEF, and this omission has not affected the substantial rights of any party (*see, e.g. Flushing AV Laundromat, Inc. v Qu*, 229 AD3d 516, 518 [2d Dept 2024]; *see also Guaman v 1963 Ryer Realty Corp.*, 127

AD3d 454 [1st Dept 2015]). However, on the merits, Plaintiffs failed to demonstrate entitlement to summary judgment.

To meet its *prima facie* burden on summary judgment, Plaintiffs were required to establish they performed under the allegedly breached contract (*see Markov v Katt*, 176 AD3d 401, 401-402 [1st Dept 2019]). Although Plaintiffs submit the affidavit of Mr. Dandridge in support of their motion, the affidavit is silent as to whether Plaintiffs satisfied the condition precedent described in section 3(c) of the Settlement Agreement (*see* NYSCEF Doc. 16). Moreover, Mr. Polizzoto submitted an affirmation claiming Plaintiffs failed to comply with section 3(c) of the Settlement Agreement because certain client files belonging to Defendants have not been returned by Plaintiffs (*see* NYSCEF Doc. 21 at ¶ 9). This raises an issue of fact which cannot be resolved at this pre-discovery juncture.

Although Plaintiffs claim the Note is a standalone agreement and the condition precedent to payment outlined in the Settlement Agreement does not apply, this is belied by the very first paragraph of the Note which states:

“[t]his Note is made in connection with that certain Confidential Settlement Agreement and General Release ("Settlement Agreement") between [ScaleWith], [Phelps Rock] and Edward L. Dandridge, dated as of the Note Issue Date, and is the Note referred to in, and is executed and delivered in connection with, the Settlement Agreement.” (NYSCEF Doc. 4).

The integrated nature of the Settlement Agreement and Note is further highlighted by the fact that the Note was annexed to the Settlement Agreement as “Exhibit B” (*see* NYSCEF Doc. 3 at § 1[a][ii]). While Plaintiffs argue text messages indicate Defendants never alleged a breach of a condition precedent, those text messages are unauthenticated and are impermissibly submitted for the first time on reply (*see, e.g. Small v City of New York*, 160 AD3d 471, 473 [1st Dept 2018]) [uncertified documents improperly submitted for the first time in reply were insufficient to meet

movant's burden on summary judgment]). Moreover, it remains an issue of fact as to whether those text messages constitute all texts or communications exchanged amongst the parties.

In any event, the Settlement Agreement and Note both contain "no waiver" clauses. The Settlement Agreement states that a waiver by either party of the breach of a provision of the Settlement Agreement shall not be construed as a waiver of any subsequent breach (NYSCEF Doc. 3 at § 8[d]). The Note states "[n]o provision may be waived, except by the written consent of the party waiving the condition or event. A waiver of a condition or event does not constitute a continuing waiver of that condition or event" (NYSCEF Doc. 4 at ¶ 8). Thus, pursuant to the terms of the Settlement Agreement and the Note, the fact that Defendants made some payments does not mean the alleged breach of the condition precedent to payment was necessarily waived.

Because no discovery has been exchanged, and a more fully developed record may show Plaintiffs did in fact comply with the condition precedent to payment or that the condition precedent was waived, the branch of the motion for summary judgment pursuant to CPLR 3212 is denied, without prejudice, with leave to renew upon further discovery. The Court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is hereby,

ORDERED that the branch of Plaintiffs' motion for summary judgment pursuant to CPLR 3213 is denied, and the branch of Plaintiffs' motion for summary judgment pursuant to CPLR 3212 is denied, without prejudice, with leave to renew upon further discovery; and it is further

ORDERED that the parties shall meet and confer immediately and submit a proposed preliminary conference order to this Court via e-mail, but in no event shall the proposed preliminary conference order be submitted any later than January 5, 2026. If the parties have a

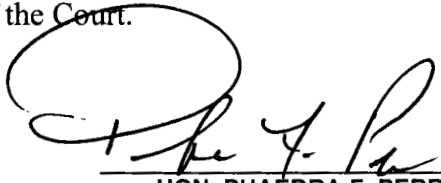
serious discovery dispute requiring a conference, they shall notify the Court of the nature of the dispute so a conference may be scheduled; and it is further

ORDERED that should the parties elect to engage in Court sponsored mediation rather than discovery, the parties shall notify the Court via e-mail so an order of referral to the Court's sponsored ADR program can be issued; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

12/8/25
DATE


HON. PHAEDRA F. PERRY, 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