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NO. 1768/03

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 23 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 6-30-03
Submission Date: 7-18-03
Motion Sequence No.: 001,002/MOT D

MCR CONSULTING, INC.
Plaintiff,

- against -

NEXTGEN, INC. and JACOB ADONI,
Defendants.

COUNSEL FOR PLAINTIFF
Heller, Horowitz & Feit, P.C.
292 Madison Avenue
New York, New York 10016

COUNSEL FOR DEFENDANTS
Joseph & Terracciano, Esqs.
485 Underhill Blvd. Suite 302
Syosset, New York 11791

ORDER

The following papers were read on Defendant Adoni's motion to dismiss or for summary judgment and Plaintiff's cross-motion for summary judgement on its first and fifth causes of action:

Notice of Motion dated April 1, 2003;
Affirmation of Peter J. Terracciano, Esq. dated April 1, 2003;
Affidavit of Jacob Adoni sworn to on March 31, 2003;
Notice of Cross-motion dated June 18, 2003;
Affidavit of Robert Grosz sworn to on June 18, 2003;
Affidavit of Alan A. Heller, Esq. sworn to on June 18, 2003;
Affirmation of Peter J. Terracciano, Esq. sworn to on July 9, 2003;
Affidavit of Jacob Adoni sworn to on July 10, 2003;
Affidavit of Alan A. Heller, Esq. sworn to on July 16, 2003;
Affidavit of Robert Grosz sworn to on July 16, 2003;
Affirmation of Peter J. Terracciano, Esq. dated July 17, 2003.

Defendant Jacob Adoni ("Adoni") moves for an order pursuant to CPLR 3211

dismissing this action against him or, alternatively, for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint.

Plaintiff MCR Consulting, Inc. ("MCR") cross-moves for summary judgment on its first cause of action (breach of contract) and fifth cause of action (account stated).

BACKGROUND

Defendant Nextgen, Inc. ("Nextgen") is a business which provides clients with computer programming and technical services. MCR employs personnel who possess the technical and computer skills that Nextgen needed to service its clients.

By written agreement dated August 21, 2000, Nextgen retained MCR to provide technical services and personnel as required by Nextgen. Pursuant to ¶ 5(a) of the agreement, Nextgen was to pay MCR for services rendered and personnel provided upon presentation of an invoice.

Pursuant to the terms of the agreement, MCR agreed to provide technical services and personnel on behalf of Nextgen to a third party, Investment Management Services, Inc. ("IMS"). MCR was to be paid $115.00/hour for the services it rendered to IMS for Nextgen. The agreement anticipated that the work would be performed during the period of August 21, 2000 to August 21, 2001.

MCR alleges that it provided services to IMS on behalf of Nextgen during the period August 21, 2000 through January 8, 2002. By invoices dated December 21, 2001, December 24, 2001, December 28, 2001 and April 25, 2002, MCR billed Nextgen for 1,544 hours at the agreed upon rate of $115.00 per hour. The total amount billed by

MCR in these invoices totaled $177,560.00. Nextgen has not paid MCR for the charges reflected on these invoices.

Nextgen concedes that it has not paid these invoices but asserts that it has a defense to these claims in that MCR breached its agreement by submitting untimely, inaccurate and improperly signed time sheets.

Nextgen billed IMS directly for the work that MCR was performing on behalf of Nextgen. To confirm the time being expended on the project by MCR employees, the MCR employee performing the work would prepare a time sheet reflecting the dates upon which the work was performed and the time spent on that on that day. The time sheets would be signed by the MCR employee and a representative of IMS. The time sheets were prepared in quadruplicate. Two copies of the time sheets were to be submitted to Nextgen, one copy would be retained by IMS and one copy would be retained by MCR. The time sheets were kept at the request of Nextgen on forms it prepared.

IMS did not pay Nextgen for a portion of the work performed by MCR on behalf of Nextgen. Nextgen commenced an action in this Court seeking to recover $223,880.00 which it claims was due from IMS in connection with the work being performed by MCR. That action has been settled and discontinued. The terms of the settlement including the amount received by Nextgen in settlement of the action has not been disclosed inasmuch as it is subject to a confidentiality agreement.

DISCUSSION

A. Summary Judgment – Standard

Summary judgment is a drastic remedy which will be granted only when it is clear to the court that there are not triable issues of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); and Andre v. Pomeroy, 35 N.Y.2d 361 (1974). See also, Akseizer v. Kramer, 265 A.D.2d 356 (2nd Dept. 1999). In order to obtain summary judgment, the moving party must make a *prima facie* showing of entitlement to judgment as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the party opposing same must come forward with proof in evidentiary form establishing that triable issues of fact exist or establish an acceptable excuse for its failure to do so. Zuckerman v. City of New York, *supra;* Davenport v. County of Nassau, 279 A.D.2d 497 (2nd Dept. 2001); and Bras v. Atlas Construction Corp., 166 A.D.2d 401 (2nd Dept. 1991).

Summary judgment should be denied if there us and doubt that a triable issue of fact exists. Freese v. Schwartz, 203 A.D.2d 513 (2nd Dept. 1994); and Miceli v. Purex Corp., 84 A.D.2d 562 (2nd Dept. 1984). In order to grant summary judgment, the court must determine that there are no possible issues of material fact. Leo v. Gugliotta, 212 A.D.2d 761 (2nd Dept. 1995); and Daliendo v. Johnson, 147 A.D.2d 312 (2nd Dept., 1987).

When deciding a motion for summary judgment, the court must view the

evidence it a light most favorable to the party against whom the motion is made and must also accord that party all reasonable inferences which can be drawn from the evidence. Negri v. Stop & Shop, 65 N.Y.2d 625 (1985). See also, Louniakov v. M.R.O.D. Realty Corp., 282 A.D.2d 657 (2nd Dept. 2001).

B. Defendant Adoni's Motion to Dismiss of for Summary Judgment

MCR's complaint alleges seven causes of action. All of the causes of action, under different theories, seek to recover the same damages; the amount claimed to be due to MCR from Nextgen for services rendered in connection with the August 21, 2000 agreement – $177,560.00. Plaintiff's theories of recovery are: (a) first cause of action - breach of contract; (b) second cause of action - conversion; (c) third cause of action - unjust enrichment; (d) fourth cause of action - constructive trust; (d) fifth cause of action - account stated (e) sixth cause of action - quantum meruit; and (f) seventh cause of action - fraud and deceit. All of these causes of action are pleaded against both the corporate Defendant, Nextgen, and its president Adoni.

Adoni signed the contract in his capacity as president of Nextgen. He did not sign the contract individually nor did he personally guaranty Nextgen's obligations under the terms of the contract. MCR does not allege a cause of action seeking to hold Adoni liable for the obligations of Nextgen under the contract on the basis of "piercing the corporate veil."

MCR opposes Adoni's motion to dismiss or for summary judgment only to the extent that it seeks to dismiss the seventh cause of action; the cause of action for fraud

and deceit. Since MCR does not oppose the dismissal of the first six causes of action to the extent that they press any claims against Adoni and since Adoni has made a *prima facie* showing of entitlement to summary judgment, his motion must be granted as to the Plaintiff's first six causes of action.

The remaining fraud (seventh) cause of action is based upon the allegations that Adoni advised Robert Grosz, MCR's president, the Nextgen would pay MCR the outstanding balance or a pro rata portion of the outstanding balance when Nextgen settled its action against IMS. MCR alleges that this representation was knowing made and was false and that as a result of this statement, MCR failed to take action to enforce any rights it had against Nextgen and IMS.

"The elements of common law fraud are a representation of a material fact, falsity, scienter, reliance and injury." Kline v. Taukpoint Realty Corp., 302 A.D.2d 433 (2nd Dept. 2003). See also, Sutton Assocs. v. Lexis-Nexis, 196 Misc.2d 30 (Sup.Ct. Nassau Co. 2003). The reliance must be justified and reasonable. Laurel Ridge, L.L.C. v. A. Alfredo Nurseries, Inc., 286 A.D.2d 710 (2nd Dept. 2001); and Sutton Assocs. v. Lexis-Nexis, *supra.*

A cause of action for fraud may not be maintained where the fraud claim relates to a breach of contract. A misrepresentation by a party of its intention to perform the terms of the contract is insufficient to allege fraud. Atkins Nutritionals, Inc. v. Ernst & Young, LLP., 301 A.D.2d 547 (2nd Dept. 2003); and WIT Holding Corp. v. Klein, 282 A.D.2d 527 (2nd Dept. 2001). In order to allege a cause of action for fraud, the Plaintiff

must allege that the Defendant breached a duty owed to Plaintiff other than an obligation or duty owned pursuant to the terms of the contract. Spodek v. Neiss, 291 A.D.2d 551 (2nd Dept. 2002); and Non-Linear Trading Co., Inc. v. Braddis Assocs., Inc., 243 A.D.2d 107 (1st Dept. 1998).

In this case, Plaintiff has alleged only those obligations and duties that were owed under the terms of the contract. Pursuant to the terms of the agreement, Nextgen was to pay MCR "upon presentation of an invoice." The obligation of Nextgen to pay MCR for services provided under the terms of the agreement were not contingent or dependent upon Nextgen receiving payment from IMS for MCR's services. Any promise made by Adoni to pay MCR upon settlement of the action brought by Nextgen against IMS was nothing more than a promise to comply with the obligations owed by Nextgen to MCR pursuant to the terms of their agreement. Therefore, the complaint fails to state a cause of action for fraud and the seventh cause action must also be dismissed.

MCR's argument that as a result of the representation made by Adoni to Grosz that MCR did not bring an action against IMS is without merit. MCR had no claim against IMS. MCR rendered services to or on behalf of Nextgen based upon its contractual relationship with Nextgen. MCR's right of recovery is based upon that relationship.

C. MCR's Motion for Summary Judgment on its First and Fifth Causes of Action

The first cause of action alleges a claim for breach of contract. In order to establish a *prima facie* case for breach of contract, Plaintiff must establish the terms of the agreement, the consideration, performance by the Plaintiff, breach by the Defendant and damages as a result of the breach. See, e.g., Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986). See also, 2 NY PJI2d 4:1 at p. 538 (2003). In this case, MCR has established all of the necessary elements of the claim. It has proven the existence of a written agreement dated August 21, 2000; the consideration - MCR's agreement to provide technical services and personnel on behalf of Nextgen for the payment of a fee; performance by the Plaintiff - the time sheets and invoices reflect dates and times of services rendered supported by an affidavit of a person with knowledge attesting to those facts and, breach by the Defendant and damages - Nextgen's failure to pay for those services as provided for by the agreement.

Since Plaintiff has established a *prima facie* case, it becomes incumbent upon the Defendant to introduce evidence in admissible form indicating the existence of issues of fact or provide a reasonable excuse for its failure to do so. See, Zuckerman v. City of New York, *supra.*

Nextgen's defense is exclusively on the issue of damages. Nextgen asserts that the time sheets inaccurately reflect the amount of time spent on the project by MCR. Nextgen also asserts that some of the time sheets supporting the bills for the services for which it has refused to make payment were not signed by a representative of IMS or

the purported signature is not that of someone authorized to sign on behalf of IMS. Stated simply, Nextgen asserts that it was overbilled. It further asserts that this can be confirmed solely by the representatives of IMS who will be subpoenaed to testify as non-party witnesses in connection with discovery in this action.

CPLR 3212(f) provides that summary judgment should be denied where "facts essential to justify opposition may exist by cannot then be stated." In order to defeat a motion for summary judgment on this basis, the party opposing the motion must establish that the party's ignorance of the facts is unavoidable and what attempts have been made to discover those facts. Saunders v. Wells, 285 A.D.2d 497 (2nd Dept. 2001). The party must establish that there is a likelihood that discovery will lead to such evidence. A mere hope of finding evidence to defeat summary judgment is not sufficient. Frouws v. Campbell Foundry Co., 275 A.D.2d 761 (2nd Dept. 2000) and Mazzaferro v. Barterama Corp., 218 A.D.2d 643 (2nd Dept., 1995).

Hearsay evidence may considered in opposition to a motion for summary judgment where other evidence in admissible form is submitted and where the party provides a valid excuse for its failure to submit evidence in admissible form. Schwaller v. Squire Sanders & Dempsey, 249 A.D.2d 196 (1st Dept., 1998) and Balsam v. Delma Engineering Corp., 203 A.D.2d 203 (1st Dept., 1994).

In this case, Nextgen has submitted only hearsay evidence in opposition to the motion which sets forth its belief that the time sheets do not properly reflect the time spent on the project. Stated simply, Nextgen asserts that it was overbilled. It has also

demonstrated a reasonable excuse for this. The exact amount of time spent on this project by MCR is exclusively within the knowledge of MCR and/or IMS.

Nextgen was required to sue IMS to recover the amount it billed IMS for the services rendered to IMS by MCR on behalf of Nextgen. Even though that action has been settled, one can infer that there is an adversarial relationship between Nextgen and IMS. This is clear from the statement of Nextgen's counsel that it will have to issue a subpoena to IMS to obtain its records and testimony.

This also indicates that reason why Nextgen has been unable to submit an affidavit of someone with knowledge of the issues on this motion. The people with knowledge regarding any irregularities or improprieties in the time sheets and invoices are employees of IMS. They are not under the control of Nextgen nor is their cooperation obtainable without legal process.

Nextgen has not be dilatory in conducting discovery. A Preliminary Conference has not yet been held. Plaintiff's cross-motion was made in response to Adoni's motion which was made almost simultaneously with the joinder of issue.

However, since the only defense raised by Nextgen to MCR's breach of contract claim relates to the issue of the amount due, MCR is entitled to summary judgment on this cause of action on the issue of liability.

MCR is not entitled to summary judgment on its fifth cause of action which states a claim for account stated. To establish a claim on an account stated, Plaintiff must establish that Defendant received and retained invoices seeking payment for services

rendered without indicating an objection to the charges within a reasonable time. Greenspan & Greenspan v. Wenger, 294 A.D.2d 539 (2nd Dept. 2002); and Ruskin, Moscou, Evans & Faltischek, P.C. v. FGH Realty Credit Corp., 228 A.D.2d 294 (1st Dept. 1996). Defendant's failure to object to the bill cannot be construed as consent to the correctness of the amount claimed to be due and owing. Whether a bill has been held for a sufficient period of time without objection so as to give rise to an inference of assent under all of the facts and circumstances is normally a question of fact. It becomes a question of law only when only possible inference is that Defendant assents to the correctness of the charges contained in the invoice. Yannelli, Zevin & Civardi v. Sakol, 298 A.D.2d 579 (2nd Dept. 2002); and Legum v. Ruthen, 211 A.D.2d 701 (2nd Dept. 1995). In this case, there is no evidence that MCR sent these invoices to Nextgen on repeated occasions. Furthermore, in this case, Nextgen's failure to object to the bills does not give rise to the inference that it assented to these accounts. See, Epstein v. Turecamo, 258 A.D.2d 502 (2nd Dept.1999).

Nextgen's assertion that ¶ 3(e) of the agreement bars this action is without merit. That clause prohibits MCR from making a claim for contribution against Nextgen as a result of any damages or injuries caused by an MCR employees in the performance of the contract. The clause does not bar a claim by MCR to recover should Nextgen refuse to pay what is contractually due and owning. The interpretation of this provision advanced by Nextgen would deprive MCR of any right to seek recovery for services rendered pursuant to the agreement. An agreement which would prevent MCR from

seeking recovery under all circumstances is void as against public policy. See, Graphic Scanning Corp. V. Citibank, N.A., 116 A.D.2d 22 (1st Dept. 1986).

D. MCR's Application for Legal Fees

Paragraph 16 of the August 21, 2000 agreement provides that if either party to the agreement is in breach thereof, the non-breaching party's costs and expenses including reasonable attorney's fees incurred in enforcing the agreement.

MCR seeks to recover the legal fees it has incurred in bringing this action. In order to recover legal fees, MCR must be successful on its claim for damages. If Nextgen is ultimately successful in its defense on damages, then MCR would not be entitled to recover legal fees.

Therefore, MCR's request for legal fees is denied with leave to renew if it is successful on its claim for damages. See, Arent Fox Kintner Plotkin & Kahn, PLLC v. Lurzer GmbH, 297 A.D.2d 590 (1st Dept. 2002); and Torrioni v. Unisul, Inc., 214 A.D.2d 314 (1st Dept. 1995).

Accordingly, it is,

ORDERED, that the motion of Defendant Jacob Adoni seeking summary judgment dismissing this action against him is **granted** and the Clerk is directed to enter judgment setting forth that this action has been dismissed as against Adoni; and it is further,

ORDERED, that Plaintiff's cross-motion for summary judgment on its first cause of action alleging breach of contract is **granted** solely on the issue of liability; and it is further,

ORDERED, that Plaintiff's motion for summary judgment on its fifth cause of action alleging account stated is **denied**; and it is further,

ORDERED, that MCR's motion for counsel fees in connection with this action is **denied** with leave to renew if MCR is successful in its claim for damages; and it is further,

ORDERED, that counsel for the parties are directed to appear before the court for a Preliminary Conference on November 13, 2003, at 9:30 a.m. to schedule discovery on the issue of Plaintiff's damages on its claim for breach of contract and on Plaintiff's other causes of action.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
October 7, 2003

Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

OCT 23 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE