

**Telamerica Media, LLC v Sound Communications,
Inc.**

2011 NY Slip Op 33597(U)

December 31, 2011

Supreme Court, New York County

Docket Number: 110898/2009

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

TELAMERICA MEDIA, LLC,
Plaintiff,
- against -
SOUND COMMUNICATIONS, INC.,
Defendant.

INDEX NO. 110898/2009
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 3, were read on this motion by plaintiff for summary judgment, pursuant to CPLR 3212.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits
Answering Affidavits — Exhibits (Memo)
Replying Affidavits (Reply Memo)

FILED

PAPERS NUMBERED	
1	_____
2	_____
3	_____

FEB 21 2012

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

In this action for breach of contract, account stated and attorney's fees, Telamerica Media LLC (plaintiff) moves, pursuant to CPLR 3212, for an order granting it summary judgment on its complaint against defendant Sound Communications, Inc.

BACKGROUND

Plaintiff owns a number of cable networks that sell advertising time to various advertising agencies. Sound Communications, Inc. (defendant) operates an advertising agency that represents various advertisers seeking placement for their advertisements in markets across the country.

The following facts are undisputed. On June 18, 2007, plaintiff and defendant entered into an advertising contract (the Agreement). As per the Agreement, plaintiff would place advertisements for the company Rack 'N Roll LLC on various cable networks for a period beginning July 9, 2007, and ending on July 29, 2007 (the media buy). The parties agreed that the media buy had a gross cost of \$150,070. The parties also agreed that defendant was

entitled to a 15% commission of the advertisement cost and plaintiff would receive the remaining 85%. In addition to the advertising costs, the Agreement further provided that there would be an "integration fee" of \$1,000 paid to defendant. Thus, the net cost of advertisement to defendant would total \$127,551.00. On July 15, 2007, defendant requested that plaintiff cease all advertisement on its behalf and cancel the remainder of its spots scheduled to air. On July 29, 2007, plaintiff issued an invoice in the amount of \$127,551. Defendant subsequently disputed the amount owed asserting that plaintiff failed to adjust the invoice following its cancellation of its media buy as of July 15, 2007. Defendant also requested that plaintiff provide it with the dates, times, and broadcast stations on which the advertisements aired.

On or about October 10, 2007, plaintiff prepared a "post-buy analysis report" which demonstrated that only 68.73% of the advertisements contracted for, actually aired. Accordingly, plaintiff issued defendant a revised invoice in the amount of \$103,140. To date, defendant has failed to remit payment. Plaintiff subsequently commenced this action based upon the theories of breach of contract and account stated. Plaintiff also seeks an award of damages, together with finance charges at 18% per annum from July 29, 2007, attorney's fees totaling \$25,785, and costs and disbursements.

Plaintiff argues that it is entitled to summary judgment because: (1) it met its obligations under the Agreement and is owed the contracted amount, (2) defendant has failed to remit any monies to plaintiff, (3) pursuant to the Agreement, plaintiff is entitled to attorney's fees following defendant's failure to pay the amounts owed, and (4) under paragraph 3 of the Agreement, defendant, as advertiser, is jointly and severally liable to plaintiff for any unpaid balance despite defendant's argument that it was acting as an agent for a disclosed principal.

In opposition, defendant argues that plaintiff is not entitled to summary judgment because: (1) plaintiff failed to submit an affidavit from a party with direct knowledge of the facts supporting its motion, (2) the invoices submitted by plaintiff fail to comply with industry

standards for affidavits of performance, (3) there is a dispute as to the amount owed as the amount fails to account for defendant's fees which are undisputedly included within the invoiced amount, (4) defendant canceled its media buy on July 15, 2007, (5) plaintiff continued to run advertisements following defendant's cancellation, and (6) plaintiff ran advertisements beyond the scope of the Agreement.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary

judgment should be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Plaintiff has failed to establish its entitlement to summary judgment. A question of fact exists as to the amounts owed under the Agreement. Plaintiff similarly failed to prove, as a matter of law, the amount of the reasonable attorney's fees to which it would be entitled under section 2 of the Agreement.

"An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other" (*Shea & Gould v Burr*, 194 AD2d 369, 370 [1st Dept 1993]). Furthermore, receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, gives rise to an actionable account stated (*id.*).

Plaintiff failed to establish its entitlement to recovery based on an account stated. "The very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness . . . so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained" (*Herrick, Feinstein LLP, v Stamm*, 297 AD2d 477, 478 [1st Dept 2002] [internal citations omitted]). The parties have failed to come together and agree upon the balance of indebtedness because the defendant disputed the revised invoice immediately after receiving it. Defendant disputes the accuracy and legitimacy of the invoices, the number of advertisements aired and whether the advertisements it contracted for actually aired in accordance with the Agreement.

The record demonstrates that defendants were sent an invoice on July 29, 2007, in the amount \$127, 551 (Affidavit of Jonathan Batt exhibit E, dated April 12, 2011) (Batt Aff.). Defendant immediately objected to the amount of indebtedness because the invoice did not reflect its cancellation of spots on July 15, 2007 (Affidavit of Scott Semaya, dated June 03,

2011) (Semaya Aff.). As stated above, in response to defendant's objections, plaintiff submitted a revised bill in the amount of \$103,140. Defendant still objected to the amount of the invoice and subsequently requested that plaintiff provide a copy of an electronic affidavit from each cable station in order to verify that the advertisements indeed aired as scheduled. Plaintiff failed to comply with defendant's request. Instead, it provided a single page document, a "post-buy analysis statement," which described the number of units that ran on each of the five cable networks during the buy, the rate for each unit aired, and the total cost of that advertising campaign (Exhibit G to Batt Aff.). However, plaintiff's submission failed to include a detailed description of the dates, times, and content of the commercials aired (*id.*).

There is also no account stated because the parties also failed to agree upon the balance of indebtedness in regard to the gross and net amounts due under the Agreement. Steven Sackler, defendant's president, contends that the invoice did not reflect the proper amounts owed because pursuant to the Agreement, the negotiated gross amount of the media buy totaled \$150,070. However, defendant was entitled to 15% of the gross amount as a fee for securing the ads and the remaining 85% would be paid to plaintiff as the net amount (Affidavit of Steven Sackler, dated June 3, 2011) (Sackler Aff.). Defendant argues that the gross and net amounts of the Agreement were altered following its July 15th cancellation. Defendant further alleges that it asked plaintiff to provide an "affidavit of performance," an industry standard document, detailing the date and time each spot ran, in addition to the name of the network on which it aired (*id.*). Based on the lack of documentation confirming that its spots actually aired as contracted prior to the cancellation, defendant challenges the sum owed to plaintiff.

In its reply papers, plaintiff's executive vice president/chief financial officer, Jonathan Batt, avers that defendant correctly asserts that it is entitled to a payment of 15% of the gross invoice (Affidavit of Jonathan Batt, dated June 23, 2011) (Batt Aff. II). Accordingly, plaintiff now

concedes that defendant owes \$87,669.00, not \$103,140. However, this acknowledgment still fails to address defendant's concerns as to whether the advertisements ran on the stations and during the times for which it contracted. The paucity of evidence submitted in support of plaintiff's motion for summary judgment, in addition to the disputes over the amounts owed to plaintiff under the Agreement, do not warrant this Court to direct judgment in plaintiff's favor. Consequently, this Court finds that plaintiff has failed to meet its burden of establishing its entitlement to summary judgment as a matter of law on its Amended Verified Complaint.

On the issue of reasonable attorneys fees, plaintiff has failed to demonstrate, as a matter of law, the amount of the "reasonable attorney's fees" under the Agreement (*8109 Pizzeria of New York, Inc. v Polo Pizza One Corp.*, 67 AD3d 627, 629 [2d Dept 2009]).

Paragraph 2 (b) (ii) of the Agreement provides in part:

"in connection with any breach by Agency or Advertiser, CableConnect shall be entitled to its costs of collection including, without limitation, court costs, reasonable attorney's fees and other related costs and expenses" (Batt Aff., exhibit C).

Plaintiff has not demonstrated why it is entitled to \$25,785.00 (25% of the alleged outstanding balance) as reasonable attorney's fees. Plaintiff's attorney alleges that he worked a total of 40 hours to date on this case, at a rate of \$350.00 per hour. Accordingly, plaintiff would be entitled to \$14,000 in attorney's fees (Affirmation of William M. Stein, dated April 12, 2009) (Stein Aff). There are no additional invoices or submissions in the record to substantiate the additional \$11,785 plaintiff is currently seeking in attorney's fees. Moreover, the information that was provided failed to detail/list the billable hours next to the description of each of the services rendered therein (*id.*). It is impossible to determine from the record how plaintiff arrived at the 40 billable hours to establish its entitlement to attorney's fees. Consequently, plaintiff has failed to set forth evidence sufficient to make out a prima facie entitlement to the attorney's fees sought on the theories contained within its complaint (*Abramson v Hertz*, 19

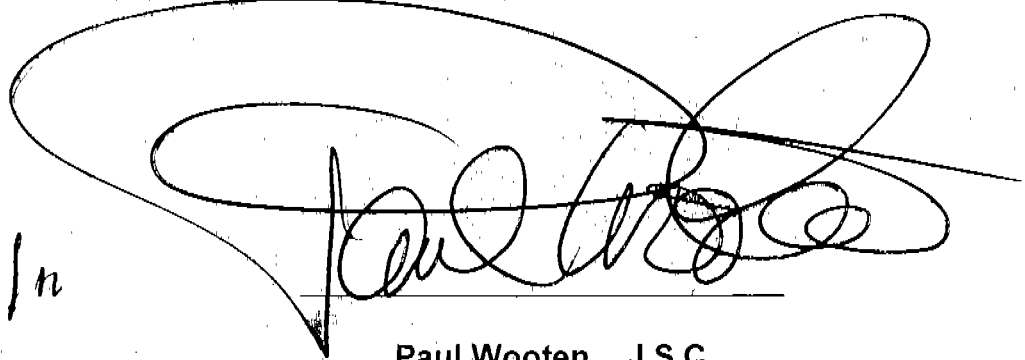
AD3d 305, 306 [1st Dept 2005]). Furthermore, the issue of reasonable attorneys fees is premature until there has been a finding of a breach of the Agreement.

Accordingly, it is

ORDERED that the motion for summary judgment is denied; and it is further,

ORDERED that this action is referred back to the Motion Support Office for reassignment to Justice Kornreich, who has a related matter bearing Index number 107817/2008.

This constitutes the Decision and Order of the Court.



Dated: 12/31/11

Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

FILED

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