

<b>CBS Outdoor Inc. v California Surgical Inst.</b>
2012 NY Slip Op 30689(U)
March 15, 2012
Supreme Court, New York County
Docket Number: 602200/08
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

CBS OUTDOOR INC., a Delaware corporation,

Plaintiff,

-v-

CALIFORNIA SURGICAL INSTITUTE, a  
California corporation,

Defendant.

INDEX NO. 602200/08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1, 2, 4

Answering Affidavits- Exhibits 5

Replying Affidavits \_\_\_\_\_

CROSS-MOTION: \_\_\_\_\_ YES ☒ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 3/15/12

Donna M. Mills  
**DONNA M. MILLS, J.S.C.**

Check one: \_\_\_\_\_ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

**FILED**  
MAR 20 2012  
CLERK'S OFFICE  
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

-----X  
CBS OUTDOOR INC., a Delaware corporation,

Plaintiff,

Index No.

-against-

602200/08

CALIFORNIA SURGICAL INSTITUTE, a California  
corporation,

Defendant.

-----X  
DONNA MILLS, J.:

Plaintiff moves for summary judgment on its breach of contract action, and for summary judgment dismissing defendant's counterclaim.

Plaintiff provides outdoor advertising services throughout the United States. Defendant was one of its customers. During June and early July 2007, the parties entered into four agreements to place advertisements for defendant, three Bulletin agreements and a non-space agreement, for a total cost of \$80,000. Two of the Bulletin agreements, executed on June 18, 2007, pertained to two identical billboard locations. The third Bulletin agreement, executed on July 12, 2007, pertained to four additional billboard locations. The non-space agreement, executed on June 29, 2007, pertained to production costs.

On July 17, 2007, after the billboards were installed, defendant complained about a partial obstruction involving one of the billboards, specifically, a wall partially blocking the view. Plaintiff refers to this billboard as "Billboard 57." Plaintiff alleges that it offered to provide defendant with three additional billboards, provided defendant agreed to pay associated production costs in the amount of \$3,000. As a result, the parties entered into another Bulletin agreement, dated August 1, 2007, and a related non-space agreement, dated July 31, 2007

(hereinafter called the Bonus Contracts). Plaintiff claims that, after its contractual performance, it sought and failed to receive any payment from defendant for its services. Thereafter, plaintiff commenced this suit to recover its costs.

The complaint is based on defendant's alleged breach of the aforesaid agreements. Plaintiff seeks damages as well as attorney's fees pursuant to the terms of the agreements. In its answer, defendant includes a counterclaim based on breach of contract and negligence, alleging plaintiff's liability in allowing, in the course of its performance, an obstruction which partially affected the view of the billboards. Defendant contends that several billboards were partially obstructed due to plaintiff's performance.

Plaintiff moves for summary judgment with respect to its complaint, arguing that there are no triable issues of fact in this case. Plaintiff also moves for summary judgment dismissing the counterclaim.

Plaintiff contends that it had fully and adequately performed its services and is entitled to payment from defendant. It points out the terms of the original agreements, specifically, a provision which offers contract remedies in the event of obstructions; a provision requiring defendant to inspect billboards for specific defects within three days after installation, and to notify plaintiff, within that period, of such defects; and a provision requiring defendant to make a written objection within 15 days of receipt of an invoice, and defining a delay of payment after thirty days as a default. Plaintiff was made aware by defendant of a partial obstruction with respect to one billboard. Plaintiff states that the wall causing the obstruction had been in place prior to the parties' entering into the agreements, and that defendant's complaint occurred after the period when defendant was allowed to inspect for defects. Nevertheless, plaintiff stated it

would provide further services for defendant, provided defendant paid a slight production cost.

Plaintiff argues that the Bonus Contracts, which provide for the installation of additional billboards, represented an accord and satisfaction. The accord and satisfaction allegedly disposed of defendant's complaints about the obstruction, and precluded any further disputes which could have developed with respect to that obstruction. Plaintiff also argues that the accord and satisfaction was a modification of the earlier agreements, fully binding, and could only be rescinded or withdrawn by mutual assent.

Plaintiff asserts that this accord and satisfaction precludes the counterclaim since it resolves the obstruction complaint. Plaintiff also asserts that the counterclaim is lacking in specification, and fails to demonstrate damages.

In addition to damages, plaintiff seeks reasonable attorney's fees, as provided in the agreements. Alternatively, plaintiff argues that, in the event that there are any factual issues to be determined, plaintiff is entitled to partial summary judgment for all outstanding costs associated with the remaining billboards and agreements. Plaintiff is referring to services pursuant to the first two Bulletin agreements and the first non-space agreement, which plaintiff insist were fully performed and unpaid for.

In its opposition to this motion, defendant argues, in a general way, that there are issues relating to the obstructions, which it claims affected several billboards. Defendant states that plaintiff failed to install billboards according to agreed-upon specifications. It questions plaintiff's credibility and contends that plaintiff might have known about the obstructions prior to contract negotiations.

Defendant claims that pursuant to CPLR 2309 (c), an affidavit executed outside of New

York must have a certificate of conformity attached. According to defendant, the affidavit of plaintiff's counsel, Mr. Galtt, lacks this certificate, and the entire affidavit must be stricken.

Defendant argues that the counterclaim has merit and the damages demanded exist, though not specified at this time. It asserts that a jury will determine the extent of damages upon defendant's presentation of the evidence at trial. Defendant notes that plaintiff does not challenge the negligence part of the counterclaim.

In reply, plaintiff states that defendant fails to address the accord and satisfaction claim at all in the motion papers. Plaintiff also states that defendant has failed to respond to the claim that its complaint about the obstruction was untimely and that proper notice was never provided to plaintiff. Plaintiff contends that the opposition papers fail to establish any issues regarding the obstructions, failing to identify, by photograph or any other means, any obstructions to any of the billboards at bar. Plaintiff maintains that the lack of documentary evidence shows that defendant cannot establish triable issues of fact which would prevent the granting of this motion.

Plaintiff maintains its position that the counterclaim failed to substantiate any damages and states that its position applies to both the breach of contract and negligence theories. Plaintiff averred that, in its interrogatories, it had requested from defendant a detailed explanation of the extent and nature of the damages. Defendant failed to provide this information. According to plaintiff, while defendant reserved the right to supplement its discovery responses, there have been no supplements to date.

Plaintiff submits a copy of a certificate of conformity regarding Mr. Galtt's affidavit.

Upon examination of this certificate, the court will not strike Mr. Galtt's affidavit.

"The proponent of a motion for summary judgment must demonstrate that there are no

material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1<sup>st</sup> Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc [ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978).

“Summary judgment permits a party to show, by affidavit or other evidence, that there is no material issues of fact to be tried, and that judgment may be directed as a matter of law, thereby avoiding needless litigation cost and delay.” *Brill v City of New York*, 2 NY3d 648, 651 (2004). “Because summary judgment is a drastic measure that deprives a party of her day in court, it may be granted only if no genuine triable issue of fact is presented.” *Grossman v Amalgamated Housing Corp.*, 298 AD2d 224, 226 (1<sup>st</sup> Dept 2002), citing *Ugarriza v Schmieder*, 46 NY2d 471 (1979).

“In construing the terms of a contract, the judicial function is to give effect to the parties’ intentions.” *Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 44 (1<sup>st</sup> Dept 1999). In the Bulletin agreements, there is a Paragraph 7, which provides the following: “Advertiser/Agency [defendant] shall inspect the display within three (3) days after installation. Unless within such period, Advertiser/Agency gives written notice to Company [plaintiff] specifying any defect, the display shall be conclusively presumed to have been inspected and approved by

*Corp.*, 257 AD2d 218, 223 (1<sup>st</sup> Dept 1999). “Unlike contract law, where nominal damages are always available, actual damages are an essential aspect of a negligence claim ... [internal citations omitted].” *Mizrahi v Taic*, 266 AD2d 59, 59-60 (1<sup>st</sup> Dept 1999).

Since the only argument for dismissal involves damages, the court will decide if defendant has legal grounds for bringing its counterclaim. In suing for negligence, defendant has not responded to plaintiff’s request for proof of damages. Said damages have not been specified at this time. This aspect of the counterclaim shall be dismissed. As for breach of contract, damages, though less direct, must still be allegedly foreseeable. These damages are supposed to be based on plaintiff’s alleged failure to perform according to agreed-upon terms in the agreements. However, defendant has failed to dispute or discuss plaintiff’s documented argument of untimely objections to the work, i.e., failure to object timely to invoices, and has therefore waived its rights under the agreements.

Plaintiff has made its case for summary judgment and is entitled to damages, as well as attorney’s fees pursuant to the agreements, along with the dismissal of the counterclaim.

Accordingly, it is

ORDERED that plaintiff CBS Outdoor Inc.’s motion for summary judgment on the complaint is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant California Surgical Institute in the amount of \$496,527, together with interest at the rate of 9 % per annum from the date of July 15, 2008 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further



ORDERED that the issue of attorney's fees is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of the order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is direct to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

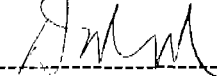
ORDERED that plaintiff's motion to dismiss defendant's counterclaim is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED:

**FILED**  
MAR 28 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

ENTER:

  
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J.S.C.

**DONNA M. MILLS, J.S.C.**

Advertiser/Agency for all purposes, whatsoever ... ." Here, plaintiff claims that defendant's complaint about the partial obstruction with respect to Billboard 57 was untimely pursuant to the terms of the agreements. Therefore, defendant waived its disapproval of the obstruction. There is no evidence of defendant disputing plaintiff's claim, and the court finds the evidence favorable to plaintiff. Furthermore, plaintiff agreed to a new agreement with defendant, in order to maintain goodwill. This resulted in the execution of the Bonus Contracts, copies of which are submitted by plaintiff. Plaintiff acknowledges the existence of an obstruction problem after completing its work. It is plaintiff's position that these contracts constitute an accord and satisfaction, which modified the former contractual terms between the parties. In effect, it allegedly represented a resolution of the obstruction problem, and permitted plaintiff to recover for services rendered without any further concerns about whether or not a breach occurred.

The doctrine of accord and satisfaction "contemplates full knowledge of the facts on the part of both parties who, in effect, enter into a new contract to expeditiously settle a contract dispute." *Progressive Northern Ins. Co. v North State Autobahn, Inc.*, 71 AD3d 657, 658 (2d Dept 2010), citing *Horn Waterproofing Corp. v Bushwick Iron & Steel Co.*, 66 NY2d 321, 325 (1985). An essential element of an accord and satisfaction is "a clear manifestation of intent by one tendering less than full payment of an unliquidated claim that the payment has been sent in full satisfaction of the disputed claim [internal quotation marks and citations omitted]." *Complete Messenger & Trucking Corp. v Merrill Lynch Money Markets, Inc.*, 169 AD2d 609, 610-11 (1<sup>st</sup> Dept 1991).

The Bonus Contracts indicate approval by the parties of plaintiff's installation of three additional billboards. Defendant also signed the agreement in which it would pay plaintiff

\$3,000 in additional costs. Nowhere in its opposition papers does defendant dispute or even address these subsequent agreements. Defendant states that it did not agree to pay for the obstructed billboard, but does not address the issue of the timeliness of its complaint. Defendant's assertion that it did not receive the additional billboards at no cost, is not substantiated, since the documentary proof shows that it approved the \$3,000 charge for the installation of these billboards.

As for the other issues raised by defendant, there is a failure to particularize its objections. While defendant refers to partial obstructions to more than one of the billboards, there is no mention of the location of these billboards, or the specific problem connected with them, with the exception of Billboard 57. While defendant contends that plaintiff failed to provide a good quality of performance, there is no indication that it objected to plaintiff's bills in a manner pursuant to the terms of the agreements.

The court finds that plaintiff has made out an accord and satisfaction. Plaintiff has submitted evidence which indicates that the parties agreed to the terms of the new agreements. There is no proof that defendant made any timely objections to plaintiff's work and it has waived the making of further objections. Therefore, defendant is obligated to pay for those services rendered.

Plaintiff also seeks dismissal of the counterclaim, specifically because of the alleged failure to substantiate damages suffered by defendant. Defendant argues that it has suffered actual damages, but the extent of them need not be elucidated at this time.

In contract law, "damages for breach must not be speculative, and must be generally foreseeable, i.e., within the contemplation of the contracting parties." *Dinicu v Groff Studios*