CUH2A, Architects Engis. Planners, P.C. v PepsiCo, Inc.
2016 NY Slip Op 32486(U)
December 16, 2016
Supreme Court, New York County
Docket Number: 115530/2009
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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CUH2A, ARCHITECTS ENGINEERS PLANNERS, P.C.,

Plaintiff,

-against-

PEPSICO, INC.,

Defendant.

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Decision and Order

Index No.: 115530/2009

O. PETER SHERWOOD, J.:

In this motion, plaintiff CUH2A, Architects Engineers Planners, P.C. (CUH2A) moves for summary judgment on its claims for breach of contract and quantum meruit, asserting defendant PepsiCo, Inc. (PepsiCo) failed to pay it for services it performed related to the renovation and expansion of PepsiCo's headquarters in Purchase, New York. The parties agree that they had entered into two agreements, one dated January 18, 2008 (Statements of Undisputed Material Facts [SUMF], ¶ 3) and a Letter of Intent dated April 7, 2008 (the LOI, *id.* ¶ 5). The parties discussed additional work to be performed, but dispute whether they entered into subsequent enforceable agreements.

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "It is axiomatic that '[t]o create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms'" (*Zheng v City of New York*, 19 NY3d 556, 577 [2012] quoting *Matter of Express Indus. & Term. Corp. v. New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]).

Breach of Contract- the October Proposal

CUH2A claims it made a proposal to PepsiCo for the complete scope of professional work related to PepsiCo's Project Renew, which the defendant accepted, on October 30, 2008 (the October Proposal, *id.*, ¶17). PepsiCo denies agreeing to the October Proposal (*id.*). There is no signed agreement. Plaintiff relies on a note in the minutes of a November 21, 2008 project meeting that "CUH2A has revised their fees and JLL discussed with Carl yesterday. Quinn has finalized with Richard and CUH2A is NOW moving forward" (November Minutes, attached as exhibit H to Lutz aff, NYSCEF Doc. No. 102). As additional evidence, CUH2A claims there were no additional negotiations on the topic of the October Proposal, that proposal was never rejected, and CUH2A was not told not to perform services pursuant to the proposal (CUH2A Memo at 8-9).

PepsiCo argues that there was no agreement as to the October Proposal (Opp at 6). Jeffrey Dayton, CUH2A's former Managing Principal testified that, as of a meeting he attended in March of 2009, negotiations about the October Proposal were still ongoing, and no contract related to that proposal was ever finalized, to his knowledge (Opp at 6, Deposition of Jeffrey Dayton dated April 28, 2014, attached as exhibit CC to Marks aff, 81:11-22). Carl Chaleski, PepsiCo's Project Manager, testified that, as of the December 11, 2008, project meeting, PepsiCo had not accepted the October Proposal (Deposition of Carl Chaleski dated March 3, 2015, attached as exhibit B to Marks aff, 121-23). PepsiCo also points to subsequent meeting minutes, which it argues show continued negotiations (Opp at 9, citing December 17, 2008 Meeting Minutes, attached as exhibit EE to Marks aff, NYSCEF Doc. No. 177; February 4, 2009 Meeting Minutes, attached as exhibit FF to Marks aff, NYSCEF Doc. No. 178). Further, CUH2A project manager Richard Rosinski admitted in an e-mail that certain problems with billing were being caused "due to a lack of contract and an agreed fee" (Opp at 11, Rosinski e-mail to Kowalchuck, et al., dated December 24, 2008, attached as exhibit GG to Marks aff, NYSCEF Doc. No. 179).

When a finding of whether a contract actually exists is dependent on facts from which differing inferences may be drawn, a question of fact arises (*see Brown Bros. Elec. Contractors, Inc. v Beam Const. Corp.*, 41 NY2d 397, 400 [1977]). As there are disputed issues of material fact as to whether a contract existed, summary judgment must be denied on the breach of contract claim related to the October Proposal.

Breach of Contract- April Proposal

CUH2A also claims PepsiCo asked it to perform services related to a planned Site Planning Application (the SPA Project), which PepsiCo intended to submit to the local building department in December 2008, and that CUH2A was told to continue with SPA Project related work without having an agreement (SUMF, ¶¶ 37-42, citing affidavit of Daniel Lutz, NYSCEF Doc. No. 94, ¶¶ 42-43; Minutes from December 10, 2008 Project Meeting, attached as exhibit J to Lutz aff, at 4["Due to time constraints, CUH2A will work on land planning activities without the signed proposal In [sic] order to keep on schedule with Town approvals, PepsiCo is in agreement"]). On April 20, 2009, CUH2A submitted a final proposal to PepsiCo (the April Proposal), which, the plaintiff claims, documented PepsiCo's previous directions to perform SPA Project related services, and included terms which were already agreed-upon (SUMF, ¶¶ 43-44). PepsiCo contends CUH2A was not authorized to perform services related to the SPA Project, and PepsiCo did not expect CUH2A would perform such services (SUMF, ¶ 37, Richard Rosinski email to Carl Chaleski dated April 28, 2009, attached as exhibit JJ to Marks aff, NYSCEF Doc. No. 182 [CUH2A "must bring to your attention that we have not received any authorization from PepsiCo to perform these services"]).

As with the October Proposal, there is a dispute of material fact as to whether there was manifestation of mutual assent to an agreement regarding the April Proposal. Accordingly, summary judgment must be denied on this breach of contract claim.

Quantum Meruit Claim

In the alternative, absent a contract, CUH2A asserts a claim for quantum meruit. CUH2A must establish (1) the performance of services in good faith, (2) acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services (*Freedman v Pearlman*, 271 AD2d 301, 304 [1st Dept 2000]). CUH2A alleges it performed services (SUMF, ¶ 56; Lutz aff, ¶64). PepsiCo claims that the services were performed pursuant to the earlier agreements, and that PepsiCo was effectively being double-billed (SUMF, ¶ 56). CUH2A argues that, "while the same words were used to describe the services CUH2A was to perform, the services were performed, and used, for different purposes" (Reply at 19, citing Deposition of Daniel Lutz dated May 8, 2014, attached as exhibit B to Cohen aff, NYSCEF Doc. No. 197, at 146-47). The cited deposition pages do not entirely support this premise, as Lutz acknowledged the deliverables being compared "could be

[the exact same charts and graphs]" (*id.*). There are issues of material fact as to the performance and acceptance of services and the value of those services. Accordingly, summary judgment on the quantum meruit claim must also be denied.

Accordingly, it is hereby **ORDERED** that plaintiff CUH2A's motion for summary judgment is DENIED. The parties shall appear for a pretrial conference at 9:30 am on January 24, 2017.

This constitutes the decision and order of the court.

DATED: December 16, 2016

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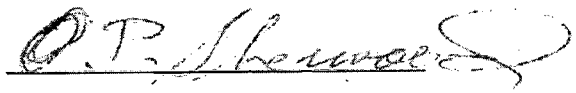

O. PETER SHERWOOD

J.S.C.