

<b>Prime Protective Sys., Inc. v Lawrence Nursing Care Ctr., Inc.</b>
2017 NY Slip Op 30857(U)
April 21, 2017
Supreme Court, Kings County
Docket Number: 510056/2014
Judge: Sylvia G. Ash
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At an IAS Term, Com 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21<sup>th</sup> of April 2017.

P R E S E N T:

HON. SYLVIA G. ASH,  
Justice.

-----X

PRIME PROTECTIVE SYSTEMS, INC.,

Plaintiff,

**Decision / Order**

- against -

Index No. 510056/2014

LAWRENCE NURSING CARE CENTER, INC.,

Defendant.

-----X

The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

1 - 3  
4 - 5  
6

Defendant, Lawrence Nursing Care Center, Inc., moves for summary judgment, dismissing Plaintiff's complain, and to recover costs and expenses, including attorney's fees, pursuant to CPLR §3220 and Part 130 of the Rules of the Chief Administrator of the Court of New York. Plaintiff, Prime Protective Systems, Inc., opposes. For the reasons set forth below, Defendant's motion is DENIED in its entirety.

***Background***

Plaintiff commenced this action on October 28, 2014, to recover unpaid contractual fees in connection with services that it provided to Defendant. Plaintiff, who has since been succeeded in interest by another entity, was in the business of providing security guard services. Defendant, an operator of a nursing home in Queens, New York, contracted with Plaintiff on December 10, 2004 to provide security guard services in its facilities.

According to Defendant, due to the damage caused to its facilities by Hurricane Sandy in 2012, many of the records pertaining to the services provided by Plaintiff, including invoices, were lost or damaged. In May 2013, Plaintiff notified Defendant of the existence of an outstanding balance owed for services rendered from 2010 through 2013. The parties disputed the correct amount owed. Plaintiff claimed that Defendant owed an outstanding balance of \$195,471.72 and commenced this action.

Defendant now moves for summary judgment, arguing that the parties have long since settled the case. In support, Defendant submits, among other documents, an affidavit from its administrator, Michael Kraus, email communications from representatives of both parties and copies of checks submitted to Plaintiff and Plaintiff's attorney, Reginald A. Jacobs.

Mr. Kraus affirms that on December 19, 2014, the parties discussed the contours of a potential settlement, but did not agree on the correct amount owed by Defendant. Postponing the determination of the correct amount owed, the parties allegedly agreed that Defendant would make a substantial payment toward satisfying the outstanding balance by December 30, 2014. Defendant would then make weekly \$5,000 installment payments to satisfy the remainder of the outstanding balance.

Mr. Kraus further affirms that as agreed by the parties, Defendant made an initial payment of \$44,259.49 to Plaintiff on December 23, 2014. Subsequently, on January 6, 2015, Mr. Jacobs forwarded Defendant two documents for execution, a Judgment by Confession and a Stipulation and Forbearance Agreement. The proposed Judgment by Confession was for \$195,471.72, along with interest, costs and attorney's fees. Defendant objected to signing the documents on the ground that the \$195,471.72 amount did not include prior payments that it had made.

At a February 5, 2015 meeting, taking into account prior payments made, the parties allegedly agreed that the remaining balance of Defendant's debt was \$102,669.90. Subsequently, Plaintiff allegedly directed Defendant to forward the weekly \$5,000 payments to Mr. Jacobs, Esq., to satisfy Mr. Jacobs' legal fees. From February 13, 2015 through May 7, 2015, Defendant made payments totaling \$55,000 to Mr. Jacobs. In an email dated May 7, 2015, Plaintiff acknowledged the payments to Mr. Jacobs and confirmed that Mr. Jacobs' legal fees had been paid in full.

After confirming that Mr. Jacobs' legal fees had been paid in full, Mr. Kraus affirms that Plaintiff unexpectedly requested a reimbursement of those fees. Plaintiff indicated that Mr. Jacobs' legal fees were not included in Defendant's underlying debt. And that the parties' service agreement allowed it to collect, legal fees, interest, and collection costs. Defendant objected, arguing that the parties had agreed to exclude legal fees and the other costs as part of their alleged settlement. Defendant maintains that it has paid a total of \$198,201.68 to Plaintiff to date, exceeding the \$195,471.72 of the lawsuit and that it should be granted summary judgment.

In opposition, Plaintiff argues that the parties did not enter into a written settlement agreement and that the amount owed by Defendant was not in dispute. In support, Plaintiff submits an affidavit from its Chief Executive Officer, Terry English. Mr. English affirms that the parties attempted to settle the matter, but Defendant disagreed that it owed \$195,471.72 and rejected the proposed settlement. According to Mr. English, the payments made by Defendant toward

satisfying its debt were not made as part of a settlement agreement. Rather, Mr. English claims that those payments were made as part of a payment plan. Plaintiff concedes that Defendant has made payments totaling \$198,210.69 to date. However, Plaintiff insist that it is entitled to reimbursement of its attorney's fees and to recover interest payments and collection costs, as called for by the parties' service agreement.

### *Discussion*

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). When deciding a motion for summary judgment, the court's function is issue finding rather than issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*see Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998]).

"Stipulations of settlement are judicially favored, will not lightly be set aside, and 'are to be enforced with rigor and without a searching examination into their substance' as long as they are 'clear, final and the product of mutual accord' " (*Peralta v All Weather Tire Sales & Serv., Inc.*, 58 AD3d 822, 822 [2d Dept 2009], quoting *Bonnette v Long Is. Coll. Hosp.*, 3 NY3d 281, 286 [2004]). To be enforceable, stipulations of settlement must conform to the criteria set forth in CPLR §2104 (*see Eastman v Steinhoff*, 48 AD3d 738, 739 [2d Dept 2008]).

Where, as here, a settlement is not made in open court, CPLR §2104 provides: "[a]n agreement between parties or their attorneys relating to any matter in an action . . . is not binding upon a party unless it is in a writing subscribed by him or his attorney." "The plain language of the statute directs that the agreement itself must be in writing, signed by the party (or attorney) to be bound" (*Bonnette v Long Is. Coll. Hosp.*, 3 NY3d at 286). In addition, since settlement agreements are subject to the principles of contract law, "for an enforceable agreement to exist, all material terms must be set forth and there must be a manifestation of mutual assent" (*Diarassouba v Urban*, 71 AD3d 51, 60 [2d Dept 2009]).

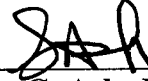
Here, Defendant relies upon email communications and copies of checks submitted to Plaintiff and Mr. Jacobs, to support the proposition that the parties have settled the case. However, those documents do not serve as proper substitutes for the requirements of CPLR §2104 because they fail to reflect a clear and final product of the parties' mutual accord. Indeed, the only settlement documents submitted in this case appear to have been the Judgment of Confession and Stipulation and Forbearance Agreement of January 2015. Defendant concedes that the parties did not sign those documents, as the parties disagreed on the substance of the documents' contents.

Further, while the parties agree that Defendant has made payments totaling \$198,210.69 toward the satisfaction of its debt, the parties disagree on whether those payments were made as part of a settlement or pursuant to a payment plan under the service agreement. Furthermore, the parties disagree as to whether Plaintiff is entitled to reimbursement of the \$55,000 paid to Mr.

Jacobs and to collect interest and other costs associated with Defendant's debt. Therefore, Defendant's motion is DENIED in its entirety.

This constitutes the Decision and Order of the Court.

ENTER,



Sylvia G. Ash, J.S.C

HON. SYLVIA G. ASH, JSC