

Fiorillo v Kerr

2011 NY Slip Op 32337(U)

August 29, 2011

Supreme Court, New York County

Docket Number: 602601-2009

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

Index Number : 602601/2009

FIORILLO, JOHN

vs.

KNERR, ANTHONY

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

is this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

AUG 30 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 8/29/11

[Signature]
HON. JUDITH J. GISCHE *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
John Fiorillo,

Plaintiff (s),

-against-

Anthony Kerr d/b/a Anthony Kerr &
Associates and Anthony Kerr &
Associates, LLC,

Defendant (s).

-----X

DECISION/ ORDER
Index No.: 602601-2009
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische

J.S.C.

FILED

AUG 30 2011

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s): NEW YORK
COUNTY CLERK'S OFFICE

Papers	Numbered
Defs' n/m (3212) w/AAM affirm, AK affid, exhs (sep backs) 1,2,3
Proof of service 4

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This action was originally brought by plaintiff for fraudulent inducement (1st cause of action), unjust enrichment (2nd cause of action) and breach of contract (3rd cause of action). Following defendants' motion for the pre-answer dismissal of the complaint, the court dismissed the 1st and 2nd causes of action for the reasons stated in its prior order dated March 19, 2010.

Issue has been joined on the remaining cause of action for breach of contract and the plaintiff filed the note of issue indicating all discovery was either completed or waived. Presently before the court is a timely motion for summary judgment dismissing the sole remaining cause of action. Though there is proof of service of the motion,

plaintiff has not opposed it. Therefore it is decided on default. Although on default, defendant must still make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]).

Having set forth the facts of this case in its prior order, they will not be repeated here since the reader is presumed to be familiar with them. Briefly, plaintiff claims that the defendants induced him to use his formidable contacts in the health care industry to help them obtain a certain project. The inducement consisted of false promises he would be working on the project once obtained. Although plaintiff acknowledges the agreement was informal and unwritten, he claims the parties agreed he would be paid his usual fee as a consultant which he claims is \$300 per hour. Based on his expectation that he would be working 2 ½ days a week on the project, he estimates he is owed \$68,000 in unpaid fees.

In denying defendants motion for the preanswer dismissal of the breach of contract action, the court found that plaintiff had set forth specific enough terms to support a breach of contract action or a quasi contract claim at the pleading stage (see prior order). Now, however, defendants have put forth evidence in admissible form that there was, in fact, no agreement between them as to whether plaintiff would be paid for his involvement in the project, how many hours he would work or how he would be paid (i.e. hourly or otherwise).

At his deposition, plaintiff was asked about alleged agreement he claims he had with the defendants. Plaintiff testified that he had discussed his fees defendants Anthony Knerr and that Mr. Knerr did not seem to think his hourly rate was a problem.

Plaintiff also testified that based upon that conversation, he came away with a “general understanding” that he would be paid. Plaintiff acknowledged, however, that his fee was not based upon anything concrete, such as how much project would cost and he had no idea the project was eventually terminated. Plaintiff’s claim for unpaid fees of \$68,000 is based upon what he claims his usual hourly rate is and an estimate of how many hours he expected to work and be paid for. Plaintiff admitted at his EBT that the parties never set how many hours he could work nor did they ever discuss how the hours would be calculated. He acknowledged that there were other consultants would be involved in the project as well but did not know what arrangements they had.

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendants’ failure to perform; and (4) resulting damage (Furia v. Furia, 116 A.D.2d 694 [2nd Dept 1986]). Furthermore, to 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” (Express Industries and Terminal Corp. v. New York State Dept. of Transportation, 93 N.Y.2d 584 [1999]).

A contract must be reasonably definite in its material terms to be enforceable and a mere “agreement to agree” is not enforceable (see e.g. Martin Delicatessen v. Schumacher, 52 N.Y.2d 105, 109 [1980]). Defendants have proved that even if, as plaintiff claims, there were general discussions about whether he would be paid for his services as a consultant, and even if they had indicated that \$300 an hour was “not a problem,” these terms are too vague and indefinite to support a breach of contract claim. The parties, at best, reserved the right to revisit or address these issues at a

later time but they never reached an agreement with respect to all the material terms.

Plaintiff's view of what was agreed is without any support in the record.

Furthermore, having failed to oppose this motion, plaintiff has failed to raise any triable issues of act justifying the denial of defendants' motion. Since the terms of plaintiff's "contract" is indefinite, defendants' motion for summary judgment dismissing the remaining breach of contract action is granted and the 3rd cause of action is dismissed.

Conclusion

In accordance with the foregoing,

IT IS HEREBY

ORDERED that defendants' motion for summary judgment is granted on default and the 3rd cause of action is dismissed; and it is further

ORDERED that the complaint and this action are dismissed in their entirety; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendants Anthony Kerr d/b/a Anthony Kerr & Associates and Anthony Kerr & Associates, LLC against plaintiff John Fiorillo dismissing this action together with the costs and disbursements of this action, as taxed by the Clerk of the Court; and it is further

ORDERED that any relief that has not been expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
August 29, 2011

FILED

AUG 30 2011

So Ordered: **NEW YORK
COUNTY CLERK'S OFFICE**

Hon. Judith J. Gische, J.S.C.