

Bay Crane Serv., Inc. v Atlas Concrete Constr. Corp.
2013 NY Slip Op 33975(U)
August 16, 2013
Supreme Court, New York County
Docket Number: 116254/10
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

BAY CRANE SERVICE, INC.,

Plaintiff,

- against -

ATLAS CONCRETE CONSTRUCTION CORP.
and ROGER PADOVER,

Defendants.

INDEX NO.
116254/10

DECISION/ORDER

FILED

AUG 08 2013

DONNA M. MILLS, J.:

COUNTY CLERK'S OFFICE
NEW YORK

This is a breach of contract action brought by plaintiff, Bay Crane Service, Inc. against defendants Atlas Concrete Construction Corp. ("Atlas") and its owner Roger Padover. Plaintiff now seeks summary judgment jointly and severally against the defendants, Atlas and Roger Padover.

It is undisputed that plaintiff rented equipment to Atlas for Atlas' use on a certain project in New York County. Pursuant to a written rental agreement dated August 22, 2008, beginning in September of 2008 and through March 2009, Atlas used the equipment rented from plaintiff and received, on a monthly basis, invoices which reflected the time period and rate at which the crane was used.

Plaintiff maintains, and it is undisputed that Atlas made partial payments towards the outstanding balance, but failed to remit payment for the balance due on its account. Pursuant to the rental agreement between the parties, defendants' overdue balance of \$68,002.34 is subject to interest of one and one half percent a month. Moreover, said agreement set forth that if legal action is taken to enforce payment, plaintiff is entitled to attorneys fees in the amount of twenty percent of the balance owed. Plaintiff now argues

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that it is entitled to summary judgement on an account stated theory of recovery.

Applicable Law & Discussion

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due." (Ryan Graphics, Inc. v Bailin, 39 AD3d 249, 250 [1st Dept 2007], quoting Jim-Mar Corp. v Aquatic Constr., Ltd., 195 AD2d 868, 869 [3d Dept 1999]). "An account stated is an account balanced and rendered, with an assent to the balance, either express or implied." Abbott, Duncan & Wiener v Ragusa, 214 AD2d 412, 413 (1st Dept 1995). "[E]ither

retention of bills without objection or partial payment may give rise to an account stated.” Morrison Cohen Singer & Weinstein, LLP v Waters, 13 AD3d 51, 52 (1st Dept 2004). Having received and retained invoices without an objection for a reasonable time, a defendant’s silence gives rise to an actionable account stated (see Rosenberg Selsman Rosenweig & Co., LLP v Slutsker, 278 AD2d 145 [1st Dept 2000]).

In support of its motion for summary judgment, plaintiff provides evidence of the invoices that it sent to defendants. The invoices are self-explanatory and detailed. Plaintiff asserts that defendants failed to object to the invoices within a reasonable time and, therefore, waived any right to object or refuse to make payments.

In opposition to the motion, defendants submit an affidavit from Kenneth Padover who is the Secretary of Atlas. In the affidavit, Mr. Padover argues that the invoices that were sent are inaccurate because it does not reflect credits that were owed Atlas. Mr. Padover also claims that the plaintiff was made aware of this discrepancy on numerous occasions, and it failed to credit the invoices. Defendants fail however to offer proof of its entitlement to any credit. No written proof has been submitted, and the purported oral objections have not been substantiated.

The record demonstrates that defendants failed to dispute that plaintiff sent them the subject invoices and that no objections were lodged thereto until after this action had been commenced (see Bartning v Bartning, 16 AD3d 249, 250 [2005]).

Plaintiff however fails to make out a prima facie case holding defendant Roger Padover personally liable.

Accordingly it is

ORDERED that the plaintiff’s motion for summary judgment is granted against Atlas

Concrete Construction Corp. and the Clerk is directed to enter judgment in favor of plaintiff and against said defendant in the sum of \$68,002.34, with interest at the rate of 1.5% a month from March 2009, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with attorneys' fees in the amount of twenty percent of the balance owed, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the granting of judgment against Atlas Concrete Construction Corp. and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office who are directed to mark the court's records to reflect the change in the caption herein.

Dated: 8/6/13

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AUG 08 2013
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NEW YORK

ENTER:
Donna Mills
J.S.C.

DONNA M. MILLS, J.S.C.