

**De Lage Landen Fin. v New Life Anointed Ministries
Intl., Inc.**

2013 NY Slip Op 32037(U)

August 27, 2013

Supreme Court, New York County

Docket Number: 650391/2012

Judge: Ellen M. Coin

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ELLEN M. COIN

PRESENT: _____
Justice

PART 63

Index Number : 650391/2012
DE LAGE LANDEN FINANCIAL
vs.
NEW LIFE ANOINTED MINISTRIES
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

**MOTION AND CROSS-MOTION(S) ARE
DECIDED IN ACCORDANCE WITH ANNEXED
DECISION AND ORDER.**

This constitutes the decision and order of the Court.

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

Dated: 8/27/13

Em J.S.C.
HON. ELLEN M. COIN

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

-----X
DE LAGE LANDEN FINANCIAL SERVICES, INC, AS
ASSIGNEE OF CISCO SYSTEMS CAPITAL
CORPORATION,

Index No.: 650391/2012
Subm. Date: May 1,2013
Motion Sequence: 002

Plaintiff,

-against-

NEW LIFE ANOINTED MINISTRIES INTERNATIONAL,
INC., D/B/A NEW LIFE ANOINTED MINISTRIES
INTERNATIONAL INC.,

Defendant.

-----X
For Plaintiff:
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Papers considered in review of this motion for summary judgment :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Memorandum of Law in Support.....	<u>2</u>
Notice of Cross-Motion.....	<u>3</u>
Affirmations in Opposition.....	<u>4</u>
Reply Memoranda.....	<u>5</u>

ELLEN M. COIN, J.:

The complaint alleges that plaintiff is an assignee of Cisco Systems Capital Corporation (Cisco) pursuant to an assignment dated September 12, 2007. Plaintiff alleges that on June 12, 2007, defendant New Life Anointed Ministries International, Inc. (New Life) and Cisco executed a Master Lease Agreement and Master Lease Schedule, as amended by Lease Agreement dated August 27, 2007 for Cisco to finance defendant's acquisition of computer equipment from non-party supplier ACI Solutions, LLC (ACI). The complaint alleges that on October 16, 2007, New Life executed a progress payment addendum (the October addendum).

The progress payments constituted partial payments by Cisco to ACI in consideration for delivery of the equipment to defendant. In return, New Life agreed to pay interest on the progress payments. The October addendum provided that in the event that the agreement did not commence within 150 days of the first progress payment, New Life would be responsible for Cisco's progress payments to ACI. Commencement was to occur upon defendant's acceptance of the equipment. Plaintiff alleges that two progress payments were remitted to ACI, one in the amount of \$85,976.80, on September 12, 2007, and one in the amount of \$51,586.08, on October 23, 2007. Neither party disputes that the leased equipment did not arrive, because New Life's building project stalled.

The complaint further alleges that on April 27, 2009, plaintiff notified defendant that it was in default under the October addendum, because the equipment was not accepted by defendant within 150 days of the first progress payment as required. The complaint sets forth two causes of action: (1) breach of contract, seeking damages in the amount of \$160,718.27, and (2) on an account stated. Plaintiff also seeks reasonable attorney's fees.

This action was originally commenced at the Federal District Court, Eastern District of Pennsylvania, but was dismissed for lack of personal jurisdiction. Thereafter, it was brought in this court. Following denials of New Life's pre-answer motion to dismiss under CPLR §3211 (a) (3), (8) and (10), it served an answer and immediately moved for summary judgment.

New Life argues that the October addendum is not legally binding. Upon Cisco's request and prior to the signing of the June master lease, New Life provided Cisco with a Certificate of Incumbency and Authority, listing Eugene Reeves as the officer with authority to execute any agreement with Cisco on its behalf. Accordingly, New Life argues, the August lease and the

October addendum are invalid and non-binding on New Life, because both were signed by Jeffrey Cherry as New Life's project manager, without authority from New Life. New Life submits affidavits from Cherry and Reeves, attesting that Reeves' signature on the June addendum and Cherry's signature on the October addendum were each a forgery.

Additionally, New Life attacks plaintiff's standing to sue on Cisco's lease, arguing that the acknowledgment of assignment provided by plaintiff refers to a lease number different from that found in the agreement. The lease number on the acknowledgment is 24850272, while both the June and August master leases contain only "Ref. No. TFV-15659" on the front page. New Life further argues that in the prior federal action, the federal court stated that plaintiff's proof was not properly authenticated.

Plaintiff cross-moves for summary judgment, relying on the June addendum, which was executed by Eugene Reeves, instead of the later October addendum. Plaintiff claims that the June agreement was subsequently amended in August 2007. The June addendum contained language similar to that in the October addendum and provided that New Life would be liable to plaintiff for all progress payments. Plaintiff argues that the June addendum is a valid document and that New Life is liable under its terms, regardless of the legal enforceability of the October addendum. Plaintiff also contends that the two progress payments that were remitted are evidence of defendant's acceptance of the June addendum. Plaintiff further argues that New life is barred from raising any defenses because plaintiff is a holder in due course pursuant to UCC 9-403. Specifically, plaintiff states that it received the assignment from Cisco for value, in good faith and without knowledge of defendant's claims or defenses.

In the alternative, plaintiff argues that the August agreement was an amendment of the

June agreement, not an altogether separate and different agreement, and that the equipment referred to in the June addendum was also a part of equipment referred to in the October addendum. Plaintiff insists that Jeffrey Cherry was authorized to execute the October addendum because he identified himself as defendant's secretary on the Certificate of Incumbency, and the document does not expressly provide that Reeves was the only authorized representative of defendant.

Discussion

“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 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 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 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “[W]here 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, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff has brought this action in its capacity as an assignee of Cisco's interests in the aforesaid agreements. Under New York law, “an assignment is a transfer or setting over of property, or some right or interest therein, from one person to another, and unless in some way qualified, it is properly the transfer of one whole interest in an estate or chattel or other thing.” (*Int'l Design Concepts, LLC v Sacks Inc.*, 486 F Supp 2d 229, 236 [SDNY 2007] [citation

omitted]). ““ No particular words are necessary to effect an assignment; it is only required that there be a perfected transaction between the assignor and assignee, intended by those parties to vest in the assignee a present right in the things assigned.”” (*Condren, Walker & Co., Inc. v Portnoy*, 48 AD3d 331, 331 [1st Dept 2008] [citation omitted]). An assignment of a claim grants the assignee the same rights and interests with regard to the assigned claim to which the assignor had been entitled with all of its infirmities, equities, and defenses. (*See Madison Liquidity Investors 119, LLC v Griffith*, 57 AD3d 438, 440 [1st Dept 2008]).

Paragraph 7 in the June Master Lease and paragraph 8 in the August Master Lease reserve to Cisco the right to assign the leases. De Lage has submitted sufficient proof of Cisco’s assignment to De Lage in the form of a copy of a notarized acknowledgment of assignment to establish its right to enforce the agreement, and hence its standing to sue. Any discrepancy between the identifying numbers in the lease agreements and the acknowledgment of assignment have been sufficiently clarified by the affidavit of Raymond Ridge to preclude dismissal of this action. New Life has not submitted any evidence to the contrary. However, additional non-party discovery from Cisco should conclusively resolve this issue.¹

The remaining issues of enforceability of the August Master Lease and the October Addendum cannot be resolved at the present stage as the requisite discovery has not been conducted. Both Reeves and Cherry select which documents they admit they signed and which documents, especially the governing June and October addendums, they allege that they did not

¹ New Life’s reliance on a footnote in a decision by the federal court in a prior action is misplaced. The federal court’s statement – that were it not to dismiss the action for lack of personal jurisdiction over New Life in Pennsylvania, it would have granted judgment in New Life’s favor because plaintiff’s business records were not properly authenticated – is dictum, bearing no preclusive effect on plaintiff’s ability to prove its case before this Court.

execute. Under New York law and general contract law, a forged signature renders a contract void ab initio. (*Orlosky v Empire Security Systems, Inc.*, 230 AD2d 401, 403 [3rd Dept 1997] [citations omitted]). However, “[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature.” (*Banco Popular North America v Victori Taxi Mgt., Inc.*, 1 NY3d 381, 384 [2004][rejecting cosigner’s assertion, coupled with an inconclusive report from a signature expert, that her signature on the financing agreement was forged). To support a claim of forgery, additional factual assertions are required, placing pre-litigation conduct in line with a denial of genuineness. (*Id.*; see also *JPMorgan Chase Bank, N.A. v Bauer*, 92 AD3d 641, 642 [2nd Dept 2012]; *Acme American Reapirs, Inc. v Uretsky*, 39 AD3d 675, 677 [2nd Dept 2007]). On the present record, New Life’s assertions of forgery seem specious and legally insufficient. (*First Indemnity of America Ins. Co. v Shinas*, 2009 US Dist Lexis 91103, *31-32, 2009 WL 3154282, *9 [SDNY 2009]). However, determination of this issue should await completion of depositions of Reeves and Cherry, affording New Life an opportunity to develop a fuller record than the bare-bones assertions made now.

Additional discovery should also shed light on whether the August lease and October addendum are binding on New Life. In order for these agreements to be binding, an agency relationship must be established between Cherry and New Life. Actual agency relationships include both express and implied agencies. (*Dinaco, Inc v Time Warner, Inc.*, 2002 US Dist Lexis 20173, *7, 2002 WL 31387265, *4 [SDNY 2002]). An express agency relationship did not exist between Cherry and New Life because Cherry’s names is not listed next to Reeves’ in the certificate of incumbency and authority, but Cherry could have been cloaked with apparent

authority.

“Apparent authority is conferred by the conduct of a principal which justifies a third party’s belief that an agency relationship exists.” (*Property Advisory Group, Inc. v Bevona*, 718 F Supp 209, 211 [SDNY 1989][citations and quotation marks omitted]). “It is essential to the creation of apparent authority that words or conduct of the principal are communicated to a third party and these words or conduct give rise to the reasonable belief that the agent possesses authority to enter into a transaction.” (*Id.* [citations and quotation marks omitted]). “The appointment of a person to a position with generally recognized duties may create apparent authority.” (*Id.*). Since Cherry was listed on the Certificate of Incumbency as New Life’s secretary and acted as a project manager in dealings with Cisco, there is a genuine issue of fact as to the level of his apparent authority to enter into contracts with Cisco. New Life’s current characterization of Cherry merely as a former employee is incongruent with present documentary evidence. Further discovery, including depositions of all witnesses involved in pre-contract negotiations, will fully delineate the outer perimeters of Cherry’s apparent authority.

As New Life’s defenses are based on alleged irregularities that go to the heart of contract creation and the evidence of assignment is inconclusive, the Court will not at the present time address plaintiff’s holder-in-due-course argument.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff’s motion for summary judgment is denied; and it is further

ORDERED that defendant’s cross-motion for summary judgment is denied.

DATED: August 27, 2013

ENTER:



Ellen M. Coin, A.J.S.C.