Coleman & Assoc. Enter., Inc. v Verizon Corp. Serv. Group, Inc.
2013 NY Slip Op 32188(U)
September 11, 2013
Sup Ct, New York County
Docket Number: 652641/2012
Judge: Eileen Bransten
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN

PRESENT: _____ J.S.C. _____ PART 3
Justice

Coleman & Assoc.
-v-
Verizon

INDEX NO. 652641/12
MOTION DATE 4/23/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 9-11-13

EILEEN BRANSTEN J.S.C.

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 THREE

----------X

COLEMAN & ASSOCIATES ENTERPRISES, INC.,

Plaintiff,

-against-

Index No. 652641/2012
Motion Date: 4/23/13
Motion Seq. No.: 001

VERIZON CORPORATE SERVICES GROUP, INC.,

Defendant.

----------X

BRANSTEN, J.

Presently before the Court is Defendant Verizon Corporate Service Group, Inc.'s ("Verizon") motion to dismiss Plaintiff Coleman & Associates Enterprises, Inc.'s ("Coleman") Complaint pursuant to CPLR 3211(a)(1) and (a)(7). Coleman opposes the motion. For the reasons that follow, Verizon's motion is granted in its entirety.

I. Background

Plaintiff Coleman offers information technology and other professional services to governmental and commercial clients. (Compl. ¶ 1.) Relevant to the instant dispute, Coleman provides customer care support services to Verizon customers pursuant to a Professional Services Agreement ("PSA") entered into by the parties on August 21, 2001. *Id.* ¶ 6.

Under the PSA, the parties could elect to execute a Statement of Work ("SOW") for each "Call Center" at which Coleman was to provide services. *Id.* ¶ 7; *see also* Affidavit of Gary Mayne ("Mayne Aff.") Ex. A at § 1 (PSA). The Complaint alleges that two such SOWs were executed by the parties.

In August 2001, the parties entered into SOW Number 1 ("SOW 1"), which governed Coleman's provision of services at the Verizon Call Center in Norfolk, Virginia. *Id.* ¶ 10. Section 5 of SOW 1 set forth the "Pricing Structure" to be paid by Verizon for Coleman's services in Norfolk. *Id.* ¶ 11; *see also* Mayne Aff. Ex. B § 5 (SOW 1). Notably, this Pricing section required annual pay increases for Norfolk Call Center employees based on the Consumer Price Index ("CPI"). *See* Mayne Aff. Ex. B § 5.

Significantly later, in November 2007, Verizon and Coleman entered into SOW Number 2 ("SOW 2"), which governed Coleman's provision of services at a second Call Center – Tampa, Florida. *Id.* ¶ 13. For reasons unexplained, SOW 2 was executed as Amendment No. 1 to the PSA. Like SOW 1, SOW 2 contained a detailed "Pricing" section. *See* Mayne Aff. Ex. D at § 17.0 (SOW 2). However, fundamental to this dispute, the SOW 2 Pricing section was silent as to annual pay increases under the CPI. *Id.*

Notwithstanding SOW 2's failure to reference CPI increases, Coleman alleges that it sought verbal approval from Verizon for CPI labor rate increases for Tampa employees

in Juanary 2007. *Id.* ¶ 17. Verizon denied this request. *Id.* Coleman then asked again for CPI increases in early 2008 and again was rebuffed by Verizon. *Id.* ¶ 18. Then, in late 2008, when Coleman sought CPI labor rate increases for a third time, Verizon's representatives purportedly "verbally approved" the increases, effective January 1, 2009. *Id.* ¶ 19.

Coleman then invoiced Verizon for the increases, and Verizon approved and paid those invoices through 2009 and the first four months of 2010. *Id.* ¶ 21. In May 2010, however, Verizon informed Coleman that the CPI increases had not been approved in writing, rendering them unenforceable and requiring Coleman to revise its invoices to reflect the rates agreed upon in SOW 2. *Id.* ¶ 22. While Coleman revised the invoices and refunded Verizon the alleged overpayments, it now asserts that Verizon's refusal to repay the 2009/2010 CPI increases constitutes a breach of the parties' agreements. Accordingly, Coleman filed the instant action, asserting three claims against Verizon: (1) breach of contract; (2) promissory estoppel; and, (3) account stated.

II. Analysis

Verizon now seeks dismissal of all three counts asserted against it in Plaintiff Coleman's Complaint. For the reasons that follow, the Court rejects Plaintiff Coleman's tortured reading of the agreements and concludes that the parties' contracts do not

provide for CPI-based increases at the Tampa site. Likewise, Plaintiffs' promissory estoppel and account stated causes of action fail to state a claim.

A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are

contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003). Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

B. *Count One – Breach of Contract*

Verizon contends that the plain language of the contracts executed by the parties mandates dismissal of Plaintiff's breach of contract claim. Specifically, Verizon argues that the agreements unambiguously provide that CPI increases be paid only at the Norfolk site – not Tampa, as Plaintiff alleges. Plaintiff counters that the agreements unambiguously state that the parties were to look to SOW 1 to determine pricing terms and conditions of all future SOWs, including SOW 2. Therefore, the annual CPI adjustment in SOW 1 applied to SOW 2, although unreferenced in SOW 2.

One of the fundamental tenets of contract interpretation is that agreements are construed according to the parties' intent, and the primary evidence of what parties to a written agreement intended is what was said in the writing.[1] *See, e.g., Slatt v. Slatt*, 64

[1] While the PSA states that shall be governed by Virginia law, Coleman nonetheless maintains that New York law applies, contending that the parties amended the PSA to add a New

N.Y.2d 966, 966 (1985). "A written contract will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose." *Westmoreland Coal Co. v. Entech, Inc.*, 100 N.Y.2d 352, 358 (2003). Where the provisions of a contract are clear and unambiguous, "the courts should not strain to superimpose an unnatural or unreasonable construction." *Maurice Goldman & Sons, Inc. v. Hanover Ins. Co.*, 80 N.Y.2d 986, 987 (1992). Accordingly, courts may not fashion a new contract for the parties under the guise of interpreting the writing. *See, e.g., Jade Realty LLC v. Citigroup Commercial Mortg. Trust 2005-EMG*, 83 A.D.2d 567, 568 (1st Dep't 2011) (*quoting Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 199 (2001)).

Here, the PSA provided that Coleman and Verizon enter into separate SOWs for each Call Center site. The separate SOWs for the Norfolk and Tampa sites each contained clear and unambiguous pricing terms for the labor to be provided at each Call Center. In clear and precise language, SOW 1 included a provision for a CPI price

---

York choice of law provision through the "Fourth Amendment of Subcontractor Agreement," executed on July 20, 2009, *see* Affidavit of Steven D. Burnett, Ex. 1. The Fourth Amendment, however, appears to pertain to an agreement separate from the PSA. For example, the Fourth Amendment provision addressing New York law explicitly states that it modifies and replaces a "Section (c) entitled 'Governing Law' of Section 25 entitled 'GENERAL TERMS'." *Id.* § 5. There is no such provision in the PSA. Notwithstanding the foregoing, Defendant Verizon consents to application of New York law. Accordingly, this Court shall apply New York law in its construction of the parties' agreements. *See MBIA Ins. Corp. v. Royal Bank of Canada*, 28 Misc. 3d 1225(A), at *22 (Sup. Ct. Westchester Cnty. 2010).

increase. SOW 2's pricing terms likewise were stated clearly and unambiguously; however, the terms of SOW 2 were fundamentally different. SOW 2 listed different labor categories and functions and different rates for employees at the Norfolk center. *See* Mayne Aff. Ex. D at § 17.1. Moreover, most pertinent, SOW 2 failed to provide for CPI adjustments. *Id.*

Further, after spelling out the costs for which Verizon would reimburse Coleman, SOW 2 expressly stated that "no other cost or expense incurred by Coleman will be reimbursed by Verizon Online, unless they are approved in writing in advance by the Verizon Account Manager." *See* Mayne Aff. Ex. D at § 17.1. Thus, SOW 2 clearly and unambiguously provides for payment of labor costs for the Norfolk site and expressly excludes any costs not stated in the agreement, except to the extent approved in advance in writing. The CPI adjustments are therefore not included under the plain language of SOW 2 and the verbal authorizations purportedly received by Coleman do not bring these adjustments under Section 17.1, as these approvals admittedly were not obtained in writing.

Despite the clear language of SOW 2, Coleman nonetheless maintains that the Court should look instead to SOW 1 to determine SOW 2's pricing term. Coleman points to Section 2 of the PSA, which states:

> In consideration of the services to be rendered by provider, Verizon agrees to pay the fees of Provider and on the terms and conditions as set forth in Attachment A.

(Mayne Aff. Ex. A at § 2.) Attachment A was SOW 1.

Coleman then contends that this Section 2 language must be read in conjunction with Section 1, which states in relevant part that:

> Provider shall, in accordance with the terms and conditions of this Agreement *and any Statements of Work placed hereunder*, provide the professional services and products described in such Statements of Work. The initial Statement of Work under this Agreement is attached hereto as Attachment A, Statement of Work No. 1. If any provision of a *Statement of Work placed hereunder* conflicts with the terms and conditions of this Agreement, this Agreement shall take precedence unless the Statement of Work expressly states that it shall override the applicable provision(s) of this Agreement.

Id. § 1. Looking to the last sentence of Section 1, Coleman asserts that Section 2 requires that the payment terms of SOW 1 govern all future SOWs.

Coleman's reading of Section 1 however, is belied by the text of Section 1. This Section provides that separate Statements of Work could be executed for each Call Center site and that all such Statements of Work executed by the parties could be placed on their own terms under the PSA. The provision speaks specifically to SOW 1, the only Statement of Work entered into by the parties at or around the time of the PSA's execution. However, nothing in this provision states that future SOWs would be incorporated into SOW 1. Instead, the provision states that the PSA governs; that each

SOW is placed under the PSA; and to the extent that the individual SOWs conflict with the PSA, the PSA terms govern those conflicting provisions of the individual SOWs.

To bolster its reading, Coleman points to the integration clause in Amendment No. 1 to the PSA, signed July 2, 2007. (Mayne Aff. Ex. C ¶ 4.) This boilerplate integration clause states that:

> The [PSA], SOW1 as modified, this Amendment No. 1 and the SOW 2 represent the complete and exclusive understanding between the parties and supersedes and cancels all previous written and oral agreements and communications relating to the subject matter hereof. Except as explicitly modified herein, all terms and conditions of the Agreement and SOW1, as modified, shall continue in full force and effect.

Id. Coleman asserts that this integration clause "plainly states that the PSA and SOW 1 would continue in full force and effect with regard to SOW 2" so to provide for "Coleman's entitlement to the annual CPI adjustment on the base rates as stated in SOW 2." (Pl.'s Br. in Opposition at 7-8.) However, the integration clause does not so provide. Instead, Section 4 plainly states that the PSA, SOW 1, and SOW 2 are each an integrated document remaining in effect and superceding prior agreements and communications. There is no basis in the unambiguous language of this provision to conclude that it pulls terms from SOW 1 and inserts them in SOW 2.

Accordingly, the Court concludes SOW 2 unambiguously sets forth the payment terms for the Tampa Call Center and that these unambiguous terms do not provide for the payment of a CPI adjustment. While Plaintiff offers extrinsic evidence of the parties'

intent – here, through post-contractual conduct, such evidence shall not be considered since the Court concludes that the contractual terms are unambiguous. *See, e.g., Atlantic Aviation Inv. LLC v. MatlinPatterson Global Advisers LLC*, 92 A.D.3d 461, 461-62 (1st Dep't 2012) (holding that "there is no need to resort to extrinsic evidence to discern" meaning of unambiguous provision). Thus, Defendant Verizon's motion to dismiss Plaintiff's breach of contract claim is granted.

C. *Count Two – Promissory Estoppel*

Plaintiff Coleman's promissory estoppel claim is likewise dismissed for failure to state a claim. A claim for promissory estoppel "cannot stand when there is a contract between the parties." *Susman v. Commerzbank Capital Markets Corp.*, 95 A.D.3d 589, 590 (1st Dep't 2012).[2] Here, there is such a contract governing the subject matter of Plaintiff's claim – the Pricing of Plaintiff's services at the Tampa site. Since Plaintiff fails to "allege a duty independent of the contract[]," *CARI, LLC v. 415 Greenwich Fee Owner, LLC*, 91 A.D.3d 583, 583 (1st Dep't 2012), its promissory estoppel claim cannot

[2] This quasi-contract claim, as well as the account stated claim addressed in the next section, is governed by New York law. While the contractual choice of law provision provides for the application of Virginia law to "the construction, interpretation, and performance" of the PSA, Plaintiff's promissory estoppel claim is extra-contractual. Accordingly, the PSA's "choice of law" provision is inapplicable, and the law of the forum, New York, applies. *See Fieldman v. Smart Choice Commc'n, LLC*, 41 A.D.3d 343, 344 (1st Dep't 2007) (concluding that choice of law provision in contract does not apply to consideration of "extra-contractual wrong").

lie. Accordingly, Defendant's motion to dismiss Plaintiff's promissory estoppel claim is granted.

D. *Count Three – Account Stated*

Plaintiff's final claim seeks recovery under an account state cause of action. This claim is premised on the allegation that Verizon agreed to compensate Coleman for rate increases for labor at the Tampa site. *See* Compl. ¶ 47. Accordingly, Coleman maintains that Verizon is liable for the full amount of the account stated in Coleman's invoices for labor at the Tampa site in 2009 and 2010, including the full amount of the CPI increase.

"An account stated is an account, balanced and rendered, with an assent to the balance either express or implied." *Abbot, Duncan & Wiener v. Ragusa*, 214 A.D.2d 412, 413 (1st Dep't 1995). "The very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness ... so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained." *Herrick, Feinstein LLP v. Stamm*, 297 A.D.2d 477, 478 (1st Dep't 2002). Accordingly, "[t]here can be no account stated where ... any dispute about the account is shown to have existed." *Abbot, Duncan & Wiener*, 214 A.D.2d at 413; *Reade v. Cardinal Health, Inc.*, 12 A.D.3d 224, 225 (1st Dep't 2004) (dismissing counterclaim for account stated since "there was a 'dispute about the account.'").

Plaintiff's own allegations in the Complaint demonstrate a dispute about the account in question. Plaintiff pleads that Verizon disputed Coleman's entitlement to the CPI increase for the Tampa site. *See* Am. Compl. ¶ 50 ("Defendant wrongfully demanded that Plaintiff issue a credit for the CPI increase, which its agents previously approved and to which they had not objected.").

While Plaintiff asserts that Defendant's objection to the CPI payments was not timely, the Complaint reveals that Defendant objected in May 2010 to invoices submitted in 2009 and the first four months of 2010. *See id.* ¶¶ 21-22. The timing of these disputes was within the two-year contractual window that the parties granted Verizon to audit and determine "the correctness of [Coleman's] billing." *See* Mayne Aff. Ex. A at § 19 (PSA). Thus, while an account stated may result from the retention of an invoice without objection, here the parties' contract provides that Verizon had the ability to challenge invoices for a two-year period. Thus, giving all inferences to Plaintiff from the facts as pleaded, the Court cannot find that Plaintiff has stated a claim for an account stated.

III. Conclusion

Accordingly, it is

ORDERED that Defendant Verizon Corporate Service Group, Inc.'s motion to dismiss is granted in its entirety; and it is

ORDERED that the Clerk is directed to enter judgment in favor of Defendant dismissing this action, together with costs and disbursements to Defendant, as taxed by the Clerk upon presentation of a bill of costs.

Dated: New York, New York
September 11, 2013

ENTER:

Hon. Eileen Bransten