

Stillman v LHLM Group Corp.
2013 NY Slip Op 33032(U)
December 3, 2013
Sup Ct, NY County
Docket Number: 151948-2012
Judge: George J. Silver
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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

PRESENT: Hon. George J. Silver
Justice

PART 10

STILLMAN, ROBERT
- v -
LHLM GROUP CORP., LA BOUCHERIE INC
d/b/a LES HALLES and 15 JOHN CORP. d/b/a
LES HALLES

INDEX NO. 151948-2012
MOTION DATE
MOTION SEQ. NO. 002

The following papers, numbered 1 to 2, were read on this motion for

Table with 2 columns: Description of papers and No(s). Rows include Notice of Motion/ Order to Show Cause, Notice of Cross-Motion, Answering Affirmation(s), and Replying Affirmation(s).

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

In this action for account stated, Plaintiff Robert Stillman ("Plaintiff") moves pursuant to CPLR §3212 for an Order granting him summary judgment on an account stated and for a judgment in the amount of \$29,425.00 plus costs and interest.

Plaintiff is a Certified Public Accountant and was hired by Defendants LBI and 15 John's principal Philippe LaJaunie ("LaJaunie") in 1994 to perform accounting services.

In support of his motion, Plaintiff argues that the Defendants are jointly and severally liable, where LHLM's take over of the accounts does not relieve 15 John and LBI from liability.

In opposition, Defendants cross-move for leave to amend their answer to interpose the

- 1. Check one: CASE DISPOSED (checked) NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: GRANTED (checked) DENIED GRANTED IN PART OTHER
3. Check as appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

affirmative defenses of statute of limitations and statute of frauds. Defendants argue leave should be liberally granted, where the amendments have merit and will not prejudice the Plaintiff. Defendants argue that mere lateness is not a barrier to leave to amend. Further, Defendants argue that the fact that an amended pleading may defeat Plaintiff's cause of action is not a basis for denying the motion. Defendants aver that they mistakenly left out these affirmative defenses initially when it overlooked the relevant dates in the case. As to the statute of limitations defense, Defendants argue that all claims against LBI are from prior to 2006 and the only claims since 2006 against 15 John are for \$175, and thus, aside from the \$175, all claims against these Defendants are time-barred. Further, Defendants argue the Statute of Frauds requires the promise to pay a debt of another to be in writing. In this case, Defendants argue that no such writings exist as to LBI and 15 John. Therefore, Defendants aver that Plaintiff's motion for summary judgment must be denied. Even though LHLM paid a portion of the invoices, LHLM is not responsible for Plaintiff's debts, where there is no writing that states that obligation and LHLM simply provided accounting and bookkeeping services for the Defendants.

Analysis

a) Defendants' Cross-Motion

Pursuant to CPLR §3025, "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." (N.Y. C.P.L.R. 3025 (McKinney)) "Leave to amend pleadings should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit...A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed" (internal citations omitted) (*Frumento v. On Rite Co., Inc.*, 66 A.D.3d 828, 829, 887 N.Y.S.2d 620, 621-22 (2009)). Plaintiff has not shown any prejudice or surprise resulting directly from the delayed motion. Although untimely, there is no prejudice to Plaintiff where discovery has not yet begun. Further, the additional affirmative defenses are not palpably insufficient or devoid of merit, where Defendants made sound arguments for the inclusion of both additional affirmative defenses.

Per the statute of limitations affirmative defense, "account stated is a claim based on a contract implied in law, and the six-year contract statute of limitations applies to an action on an account stated." (275 N.Y. Jur. 2d Limitations and Laches §167). The statute of limitations for an account stated "accrues on the date of the last transaction in the account." (*Elie Int'l, Inc. v. Macy's W. Inc.*, 106 A.D.3d 442, 443, 965 N.Y.S.2d 52, 53 (2013)). When LHLM agreed to take over the invoices and bills and send payment to Plaintiff on behalf of the Defendants, it consolidated the debts for all 11 companies and began making payments from the total debt on behalf of the group of Defendants as opposed to making payments on behalf of each Defendant separately. The individual companies, including 15 John and LBI, did not make any individual payments after LHLM assumed the responsibility sometime in May 2006 (the exact date is not provided in Plaintiff's complaint or in any of the documents attached to the motion).

LHLM made payments from May 2006-October 2008. LHLM repeatedly acknowledged the entire balance still owed to Plaintiff, where it stated that it was sending payment "towards the outstanding balance we have with you from 2006. We will continue to pay you regularly and incrementally until the balance is satisfied" in its letter to Plaintiff, dated January 23, 2008. "A written request for more time within which to pay obligation is a sufficient 'acknowledgment or promise' to toll statute of limitations." (*Mesiano v. Mazzeo*, 1958, 12 Misc.2d 858, 172 N.Y.S.2d 913). Further, under "New York law, a statute of limitations period can be renewed by partial payment of principal or interest that implies a promise to pay the remainder of a debt." (*Reznor v. J. Artist Management, Inc.*, 2005, 365 F.Supp.2d 565). Thus, LHLM's obligations to repay the debt are not barred by the Statute of Limitations, where the last payment made on the account was in 2008, which renewed the statute of

limitations period. As to LBI and 15 John, it is unclear when the last transaction on each of their accounts took place. While it is certainly prior to the time LHLM assumed responsibility (sometime in May 2006), there is no exact date indicated. Thus, there are issues of fact as to the date of the last transaction on the account and as such, summary judgment is denied on Defendants' Statute of Limitations affirmative defense.

Pursuant to General Obligations Law § 5-701, "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking... Is a special promise to answer for the debt, default or miscarriage of another person." (N.Y. Gen. Oblig. Law § 5-701 (McKinney)) As it applies to Defendants LBI and 15 John, there is no written promise from either of these Defendants individually to agree to pay the debt of the remaining 11 entities. Thus, if Plaintiff prevails, LBI is only responsible for up to \$8,350.00 of Plaintiff's total debt and 15 John is only responsible for up to \$4,300.00 of Plaintiff's total debt.

b) Plaintiff's Motion for Summary Judgment

"A party moving for summary judgement must make a *prima facie* showing of entitlement to a judgement as a matter of law, providing sufficient evidence to demonstrate the absence of any material issue of fact." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81, 760 NYS2d 397, 790 NE2d 772 [2003]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Id.*) An account stated is defined as an "account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance." (*Morrison Cohen Singer & Weinstein, LLP v. Ackerman*, 280 A.D.2d 355, 720 N.Y.S.2d 486 (2001) citing *Interman Ind. Prods. v. R.S.M. Electron Power*, 37 N.Y.2d 151, 153, 371 N.Y.S.2d 675, 332 N.E.2d 859)

Plaintiff establishes that Defendant LHLM acknowledged the remaining balance of \$29,675.00 in his affidavit and the last payment towards this balance was made on October 22, 2008. The account balance was rendered to LHLM and LHLM assented to the remaining balance. There are no issues of fact raised by any of the Defendants as to the total amount owed to Plaintiff, but only as to the amounts for which each Defendant is responsible. However, Defendants LBI and 15 John have successfully asserted their affirmative defense of Statute of Frauds, and are not liable for the debt of others where there is no promise in writing to pay. In their opposition to Plaintiff's motion for summary judgment in the prior action, dated November 9, 2011, Defendants state, "all of the bills for such services were consolidated into one bill for \$29,425 which was assumed by and agreed to be paid by LHLM Group Corp." Where there are issues of fact as to whether Plaintiff's claims are time-barred against LBI and 15 John (depending on when the last transaction was made on each of their individual accounts), there remain questions of fact as to how much, if any, either of these individual Defendants owe from their remaining balances of \$8,350.00 and \$4,300.00, respectively. Thus, there remain questions of fact as to how much of the \$29,675.00 LHLM is responsible for. Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is granted as to liability; and it is further

Defendants' cross-motion for leave to amend the answer is granted; and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

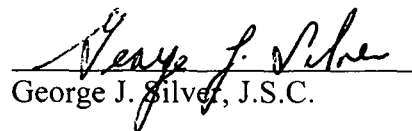
ORDERED that Defendants' cross-motion for summary judgment on its amended answer as to the Statute of Limitations affirmative defense is denied as to all Defendants; and it is further

ORDERED that Defendants' motion for summary judgment on its amended answer as to the Statute of Frauds affirmative defense is granted as to LBI and 15 John; and it is further

ORDERED that counsel are directed to appear for hearing to determine damages in Room 422, 60 Centre Street, New York, New York, on February 11, 2013 at 2:00 PM; and it is further

ORDERED that the movant shall serve a copy of this order, with Notice of Entry, upon all parties, as well as upon the Clerk of the Trial Support Office (60 Centre Street, Room 158) within thirty (30) days of entry

Dated: DEC 03 2013
New York County


George J. Silver, J.S.C.

GEORGE J. SILVER