Jiangxi Wanzai Golden Peak v July 4 Ever Inc.
2013 NY Slip Op 33229(U)
December 16, 2013
Supreme Court, New York County
Docket Number: 116541/2008
Judge: Paul Wooten
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SCANNED ON 12/26/2013

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JIANGXI WANZAI GOLDEN PEAK, FIREWORKS CORPORATION and GOLDEN PEAK CANADA, INC.
Plaintiffs,

Index No: 116541/2008

-against-

Sequence No: 004

JULY 4 EVER INC., JULY 4 EVER NEW YORK and VINCENT ESPOSITO,
Defendants.

The following papers were read on the plaintiffs' motion to strike defendants affirmative defenses pursuant to CPLR 3126 and in the alternative for summary judgment pursuant to CPLR 3212 and defendants' cross-motion for summary judgement and to dismiss the complaint against a defendant.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

FILED
DEC 19 2013
NEW YORK
COUNTY CLERK'S OFFICE

BACKGROUND

This is an alleged breach of contract action brought by the plaintiffs seeking monies and damages for the non-payment of the delivery of goods to the defendants. Plaintiffs are foreign corporations that allegedly acted in a joint venture to manufacture and sell fireworks in North America. Plaintiff Jiangxi Wanzai Golden Peak (Golden Peak) is a corporation established and located in China that manufactures fireworks. Plaintiff Golden Peak Canada, Inc. (Golden Peak Canada) is a corporation established and located in Toronto, Canada since 1999 that provides for the order, delivery and sale of said fireworks in North America. Plaintiffs allege in an amended complaint that they had an agreement to sell fireworks to the defendants, though there was no written contract between the parties, and that the defendants breached said agreement by accepting the goods without rendering payment owed to the plaintiffs in the amount of $225,323.04. Accordingly, plaintiffs commenced this action against three defendants

asserting causes of actions for breach of contract, quantum meruit, unjust enrichment and account stated. In their answers, defendants assert general denials and various affirmative defenses, including that defendants Vincent Esposito (Esposito) and July 4 Ever New York (J4NY) are not proper parties. Specifically, defendants aver that J4NY does not exist as a business entity and Esposito is a corporate officer for July 4 Ever Inc. (July 4 Ever) and therefore cannot have individual liability.

Plaintiffs now move for sanctions pursuant to CPLR 3126 to strike the defendants' answers and affirmative defenses for failure to respond to the plaintiffs' discovery demands and in the alternative for summary judgment, pursuant to CPLR 3212, for more than $247,815.56 for the goods (*see* plaintiffs' affidavit in support ¶¶ 11, 12, exhibit five and six).

Defendants cross-move for: (1) summary judgment dismissing the complaint against Esposito, as an individual, and as against J4NY as a non-existing business entity; (2) summary judgment dismissing the complaint as against all defendants; (3) the disqualification of plaintiffs' counsel from representing plaintiffs in this action; and (4) the imposition of sanctions against plaintiffs pursuant to 22 NYCRR § 130.1.1.

STANDARD

A. Summary Judgement

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Santiago v Filstein*, 35 AD3d 184,185-186 [1st Dept 2006]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the

opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "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" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

B. Disqualification of Counsel

It is well settled that "[t]he disqualification of an attorney is a matter that rests within the sound discretion of the court" (*Flores v Willard J. Price Assocs., LLC*, 20 AD3d 343, 344 [1st Dept 2005]; *see Wells Fargo Bank, N.A. v Caro*, 82 AD3d 880, 881 [2d Dept 2011]; *Falk v Gallo*, 73 AD3d 685, 685 [2d Dept 2010]; *Harris v Sculco*, 86 AD3d 481, 481 [1st Dept 2009]). "The right to counsel is not absolute and may be overridden where necessary . . . but it is a valued right and any restriction must be carefully scrutinized" (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 [1987]; *see Matter of Abrams [John Anonymous]*, 62 NY2d 183, 196 [1984]). "A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing . . . should not be abridged absent a clear showing that disqualification is warranted" (*Gulino v Gulino*, 35 AD3d 812, 812 [2d Dept 2006]; *ee S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 443; *Matter of Abrams*, 62 NY2d at 196; *Campolongo v Campolongo*, 2 AD3d 476, 476 [2d Dept 2003]; *Dominguez v Community Health*

Plan of Suffolk, 284 AD2d 294, 294, [2d Dept 2001]). Accordingly, "motions to disqualify opposing counsel are disfavored . . . and require a high standard of proof" (*Ciao-Di Rest. Corp. v Paxton 350, LLC*, 22 Misc 3d 1117[A], at *2 [Sup Ct, NY County 2008]; *see Goldsmith v Ellenberg*, 2013 WL 2142264, *8, 2013 NY Misc LEXIS 1997, *17 [Sup Ct, NY County 2013]; *see also Northwestern Natl. Ins. Co. v Insco, Ltd.*, 2011 WL 4552997, *4, 2011 US Dist LEXIS 113626, *31 [SD NY 2011]; *Tradewinds Airlines, Inc. v Soros*, 2009 WL 1321695, *3, 2009 US Dist LEXIS 40689, *9 [SD NY 2009]).

When considering a motion to disqualify, "the court is guided, but not bound by" the RPCs (*Harris*, 86 AD3d at 481; *see S & S Hotel Ventures Ltd Partnership*, 69 NY2d at 443; *Falk*, 73 AD3d at 686). Courts "must consider the totality of the circumstances" (*Ferolito v Vultaggio*, 99 AD3d 19, 27 [1st Dept 2012], quoting *Abselet v Satra Realty, LLC*, 85 AD3d 1406, 1407 [3d Dept 2011]; *see Parnes v Parnes*, 80 AD3d 948, 952 [3d Dept 2011]), and must take care to 'avoid mechanical application of blanket rules'" (*Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 98 [1st Dept 2008], quoting *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 132 [1996]; *see S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 444). "The function of the court on such a motion is restricted to the taking of such action as may be necessary to insure a proper representation of the parties and fairness in the conduct of the litigation" (*Young v Oak Crest Park, Inc.*, 75 AD2d 956, 957 [3d Dept 1980]; *see Booth v Continental Ins. Co.*, 167 Misc 2d 429, 436 [Sup Ct, Westchester County 1995]).

> "The Court of Appeals has recognized that disqualification motions present significant competing concerns. While the Code provisions establish ethical standards to guide lawyers in their professional conduct, they are not to be applied rigidly as if they are controlling law. A balance must be maintained between the vital interest in avoiding the appearance of impropriety, the concern for a party's right to representation by counsel of its choice, and the danger that disqualification motions can become 'tactical derailment weapons for strategic advantage in litigation'" (*Veritas Capital Mgt. L.L.C. v Campbell*, 22 Misc 3d 1107[A], *6

[Sup Ct, NY County 2008] [internal citations omitted], *affd* 75 AD3d 479 [1st Dept 2010]).

The party seeking to disqualify a law firm or an attorney "bears the burden of establishing that such a drastic remedy is warranted" (*O'Donnell, Fox & Gartner, P.C. v R-2000 Corp.*, 198 AD2d 154, 155 [1st Dept 1993]; *see S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 443; *NYK Line (North America) Inc. v Mitsubishi Bank, Ltd.*, 171 AD2d 486, 488 [1st Dept 1991]). To meet its burden, a movant "must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" (*Tekni-Plex, Inc.*, 89 NY2d at 131; *see Falk v Chittenden*, 11 NY3d 73, 78 [2008]; *Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 636 [1998]; *Solow v W.R. Grace & Co.*, 83 NY2d 303, 308 [1994]; *Scopin v Goolsby*, 88 AD3d 782, 784 [2d Dept 2011]; *Campbell*, 75 AD3d at 480-481).

C. Quantum Meruit and Unjust Enrichment

In order to state a claim for "quantum meruit, a plaintiff must allege its good faith performance of services, the defendant's acceptance of those services, an expectation of compensation for the services, and the reasonable value of those services" (*Skillgames, LLC v Brody*, 1 AD3d 247, 251 [1st Dept 2003], citing *Freedman v Pearlman*, 271 AD2d 301, 304 [1st Dept 2000]).

"The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011], quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415 [1972]). "A plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*id.* [internal

quotation marks omitted]). In order to "prevail on a claim of unjust enrichment in New York, a plaintiff must establish that the defendant benefitted at the plaintiff's expense, and that equity and good conscience require restitution" (*Amaranth LLC v JPMorgan Chase & Co.*, 2008 NY Slip Op 33544[U] [2008] [internal citations omitted]; *see Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dept 1998]). Furthermore, the existence of a valid contract typically precludes the availability of quasi contractual remedies, such as quantum meruit and unjust enrichment, for events arising out of the same subject matter (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]; *IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401 [1st Dept 2007]).

D. Account Stated

"An account stated is an account, balanced and rendered, with an assent to the balance either express or implied" (*Abbott, Duncan & Weiner v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995], citing *Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 153 [1975]). "[T]he very meaning of an account stated is that the parties have come together and agreed upon the balance of the indebtedness..." (*Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st Dept 2002]). However, there can be no account stated if there is any dispute about the account (*see Abbott, Duncan & Weiner*, 214 AD2d at 412). Additionally, any issues raised about the quality of the goods constitutes a dispute concerning the account (*c.f. Mulitex USA, Inc. v Marvin Knitting Mills, Inc.*, 12 AD3d 169 [1st Dept 2004]). In order to establish a sale and delivery of goods, there must be an "acceptance of the goods and... [the] failure either to pay the agreed upon price or raise any objection to the sale terms, as reflected in the invoices..." (*Sunkyong Am v Beta Sound of Music Corp.*, 199 AD2d 100 [1st Dept 1993]). Any objections to the sale terms must be made when the goods are delivered or within a reasonable time thereafter (*Id*).

D. Sanctions

Part 130 of the Rules of the Chief Administrator permits courts to sanction an attorney

and/or a party for engaging in frivolous conduct, and such conduct is frivolous if it is: (1) "completely without merit in law"; (2) "undertaken primarily to... harass or maliciously injure another"; or (3) "assert[ing] material factual statements that are false" (*see* 22 NYCRR § 130-1.1; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]).

DISCUSSION

In support of their motion for summary judgment plaintiffs submit the unsworn declaration of Shirley Luo (Luo), President of Golden Peak Canada, dated September 16, 2009, the sworn deposition statement of Lou, dated March 18, 2010, the affidavit of Sesame Chen (Chen), President of Golden Peak, dated September 9, 2010 (Chen Affidavit), in both the English and Chinese Languages, and various invoices, communications and records.

In support of their cross-motion, defendants submit, *inter alia*, an attorney affirmation, the Court pleadings and record, and the sworn deposition statement by Luo, dated March 18, 2010. Defendants assert that they are entitled to summary judgment because there is no privity of contract between the defendants and Golden Peak, nor was there any agreement between plaintiffs and Esposito, individually. Defendants maintain that J4NY does not exist and there was never any agreement between J4NY and the defendants. Defendants also assert in opposition to the plaintiffs' motion that the proof submitted by plaintiffs, namely the Chen Affidavit, is insufficient as a matter of law because Chen required a Chinese interpreter at her deposition, but the Chen Affidavit is not supported by a translated affidavit.

Plaintiffs' motion to strike defendants' answer and counterclaims pursuant to CPLR 3126 is denied, and alternatively their motion for summary judgment on their complaint is denied as to the first cause of action for breach of contract. Specifically, there is no dispute amongst the parties that no written contract existed, and as such, this cause of action cannot lie. As such, the portion of defendants' cross-motion seeking summary judgment dismissing the complaint is granted as to the first cause of action for breach of contract which is hereby

dismissed.

However, plaintiffs' motion for summary judgement on their third (unjust enrichment) and fourth causes of action (account stated) are granted (*see Georgia Malone & Co. Inc. v Ralph Rieder*, 86 AD3d 406 [!st Dept 2011]; *Sunkyong*, 199 AD2d at 100-101 ["The uncontroverted evidence established a sale and delivery of the goods in question, the defendant's acceptance of the goods and its failure either to pay the agreed upon price or raise any objection to the sale terms, as reflected in the invoices, when the goods were delivered or within a reasonable time thereafter"]). In light of the above, plaintiffs are not entitled to also recover in quantum meruit, and the second cause of action seeking such relief is dismissed.

The Court finds that there is insufficient proof by the plaintiff to support a claim against defendant Esposito, individually, or articulate a reason to pierce the corporate veil, thus, partial summary judgment on its claims against Esposito are denied and defendant Esposito's cross-motion for summary judgment to dismiss the complaint as against him is granted. Also defendants' cross-motion for summary judgment to dismiss against J4NY is granted as the defendants have met their burden of proof, without opposition from the plaintiffs, that there is no factual issue that J4NY is not a proper or legal entity

In addition, the portion of defendants' cross-motion seeking to disqualify plaintiffs' counsel from representing plaintiff in this action, based upon plaintiffs' counsel's prior representation of the defendant in an alleged similar action is denied. The disqualification of counsel is a matter that rests within the sound discretion of the trial court (see *Harris v Sculco*, 86 AD3d 481 [2011]). "When considering a motion to disqualify counsel, a trial court must consider the totality of the circumstances and carefully balance the right of a party to be represented by counsel of his or her choosing against the other party's right to be free from possible prejudice due to the questioned representation" (*Ferolito v Vultaggio*, 949 NYS2d 356, 363 [1st Dept 2012], quoting *Abselet v Satra Realty, LLC*, 85 AD3d 1406, 1407 [2011]).

In such cases where attorneys are proceeding against a former client, "disqualification has been directed on a showing of 'reasonable probability of disclosure' of confidential information obtained in the prior representation" *(Saftler v Government Empls. Ins. Co.*, 95 AD2d 54, 57 [1st Dept 1983], citing *Greene v Greene*, 47 NY2d 477, 453 [1979]). Generally, in such cases, an attorney will be disqualified where the party seeking that relief meets his burden by establishing a substantial relationship between the issues in the litigation and the subject matter of the prior representation, or where counsel had access to confidential material substantially related to the litigation (*see Saftler*, 95 AD2d at 57; *see also District Counsel 37 v Kiok*, 71 AD2d 587 [1st Dept 1979]). However, disqualification will not be granted "where there is no substantial relationship or where the party seeking disqualification fails to identify any specific confidential information imparted to the attorney" (Saftler, 95 AD2d at 57). Here the defendants fail to meet their burden to establish that disqualification of plaintiffs' counsel is warranted.

In light of the Court's rulings, plaintiffs' motion and defendants' cross-motion for sanctions are both denied.

CONCLUSION

Based on the foregoing, it is hereby,

ORDERED that plaintiffs' motion to strike defendant's answer and counterclaims pursuant to CPLR 3126 are denied; and it is further,

ORDERED that plaintiffs' motion for summary judgment on their complaint is granted as to the third and fourth causes of action for unjust enrichment and account stated as against defendant July 4 Ever, inc. in the amount of $225,323.04, with statutory interest from the date of plaintiff's complaint; and it is further,

ORDERED that the portion of plaintiff's motion for summary judgment on their complaint is denied as to the first and second causes of action for breach of contract and quantum meruit,

and those claims are hereby dismissed; and it is further,

ORDERED that plaintiffs' motion for sanctions pursuant to Part 130 of the Rules of the Chief Administrator, 22 NYCRR 130.1.1, et. seq., is denied; and it is further,

ORDERED that defendants' cross-motion for summary judgment dismissing the complaint as against defendants Vincent Esposito, individually and July 4 Ever New York are granted, and the complaint is hereby dismissed as against those parties; and it is further;

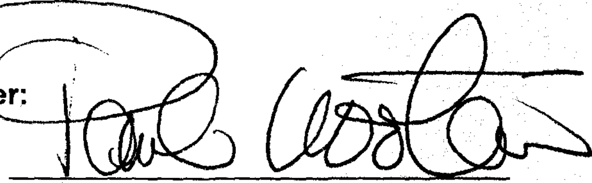
ORDERED that the portion of defendants' cross-motion seeking summary judgment on the complaint is granted as to the first and second causes of action for breach of contract and quantum meruit, but is otherwise denied; and it is further,

ORDERED that the portion of defendants' cross-motion seeking the disqualification of plaintiffs' counsel from representing plaintiffs in this action and for the imposition of sanctions against plaintiffs, pursuant to Part 130 of the Rules of the Chief Administrator, 22 NYCRR 130.1.1., et seq. is denied; and it is further,

ORDERED that plaintiff shall serve a copy of this Order, with Notice of Entry, upon all parties and the Clerk of the Court, who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 12/16/13 Enter:



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