SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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LAURICE EL BADRY RAHME, LTD.
D/B/A BOND NO. 9 NEW YORK,

Plaintiff,

Index No. 650034/2014

- against -

DECISION

Mot. Seq. 01

KING & PARTNERS, LLC,

Defendant.

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HON. EILEEN A. RAKOWER

This action involves an alleged breach of an agreement. Plaintiff, Laurice El Badry Rahme, Ltd. d/b/a Bond No. 9 New York ("Plaintiff"), is a manufacturer of beauty products, including perfumes bearing the Bond No. 9 brand which are sold at retail venues and on the internet on the Bond No. 9 website. Plaintiff contracted with Defendant, King & Partners, LLC ("Defendant" or "King"), a web development company, to develop and implement a new Bond No. 9 website and e-commerce platform. Defendant interposed an answer.

A "Statement of Work" ("SOW") was signed on July 19, 2013, which stated, "King will partner with Client to help strategize, design, and build a dynamic and engaging framework that will blend content and commerce with visual stimulation and interactivity to create an innovative, best in class ecommerce site for Bond No. 9 powered by Sellect e-commerce and CMS Platform."

A Master Service Agreement ("MSA" or "Agreement"), dated July 23, 2013, was executed by the parties. The contract price for website and e-commerce development and integration in the Statement of Work and Agreement was $289,000, with a down-payment of $144,500 toward the contract price required.

The MSA contained a cancellation clause.

Plaintiff contends that King commenced work under the parties' Agreement, but that King repudiated the contract when Plaintiff declined to use Sellect Commerce, LLC, another company owned by and/or affiliated with King, "to provide what is know [sic] as 'back office' services for Bond No. 9's web based business.

Plaintiff's Complaint contains four cause of action: breach of contract (first cause of action), rescission of the parties' contract (second cause of action), demand for damages pursuant to the Cancellation Clause of the Agreement based on King's cancellation of the contract (third cause of action), and specific performance seeking all "Work Product" that King has allegedly failed to deliver to Plaintiff (fourth cause of action).

Presently before the Court is Plaintiff's motion for partial summary judgment on its third cause of action, which seeks damages under the Cancellation Clause of the parties' agreement, and on its fourth cause of action which seeks specific performance and demands that King deliver to Plaintiff the "Work Product." Plaintiff is not moving with respect to its first cause of action for breach of contract and second cause of action seeking rescission.

Plaintiff submits the affidavit of Laurice Rahme, Plaintiff's President. Annexed to Rahme's affidavit, among other documents, is a Master Service Agreement entered into by the parties and a Statement of Work.

Defendant opposes, and submits the affidavit of Anthony King, the Creative Director of King.

The SOW provides the following cancellation fee provision:

> JOB CANCELLATION FEE: In the event the SOW is terminated prior to the end of the agreement, Client shall pay King a Job Cancellation Fee as follows;
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> If the termination is on or before Final Concept Design King shall be paid an amount equal to $75,000 of the Fees;

> If the termination date is after Final Concept Design but on prior to Final Batch 1 Detailed Design, King shall be paid in an amount equal to $115,000 of the Fees;
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> The Job Cancellation Fee shall be paid in a single lump sum (less any fees paid prior to such termination date) together with any expense incurred by King prior to the termination date.

Article 6 of the MSA is a termination provision providing both parties with the right to terminate the agreement at any time, upon thirty days advance notice. It further provides, "However, if King terminates this Agreement it shall be entitled to fifty (50%) percent of the job cancellation fees specified in the SOW."

Shortly before being paid the $144,500 required deposit, King commenced its work under the MSA and SOW. King's work proceeded to the state in the SOW defined as "after the Final Concept Design but on or prior to Final Batch 1 Detailed Design" at which time Plaintiff contends that King ceased performing under the MSA and SOW, notifying Plaintiff that it would do no additional work under the MSA and SOW. Plaintiff alleges that King terminated the Agreement, and gave notice of termination through a series of emails.

Plaintiff contends that "[b]ecause there are no issues of fact as to the stage in the SOW at which termination occurred," it seeks partial summary judgment on its third cause of action, which seeks relief due under the cancellation clause of the MSA and SOW.

Plaintiff argues, "In accordance with the MSA and SOW, the fee valuation to which King is entitled for the state at which termination occurred is $115,000. Because King terminated, it is only entitled to $57,500.00 of that sum, or fifty (50%) percent of the specified fee. Accordingly, Bond No. 9 is entitled to a judgment for $87,000.00, that being the excess of the fee paid ($144,500) over the fee due ($57,500.00)."

Additionally, Plaintiff seeks summary judgment on its fourth cause of action for specific performance requiring King to deliver to Plaintiff the Work Product,

as such term is defined in the parties' Agreement.

In opposition, Defendant contends that it was Plaintiff, not King, that terminated the parties' agreement when despite prior communications and "an assumption on which the contract was based," Plaintiff changed its mind after King commenced the work and advised King that they had decided not to use Sellect, "a platform that was developed along with King and is an integral part of [King's] success and [King] would have never proceeded without its use." Anthony King avers in his affidavit, "The website had been designed to be integrated with the Sellect ecommerce platform."

Anthony King further avers that Plaintiff "misstates that work product was never provided to them, when in fact, I had sent it Certified with the tracking via USPS to the Bond Office."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]). "[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, 'the facts must be viewed in the light most favorable to the nonmoving party.'" (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

Defendant has raised factual issues in opposition to Plaintiff's motion for summary judgment. Here, as demonstrated in the parties' conflicting affidavits, there are factual issues as to which party breached the contract and terminated the contract, as well as whether King delivered to Plaintiff the "work product."

Wherefore, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JUNE 13, 2014

EILEEN A. RAKOWER, J.S.C.