

**Micro Tech. Intl. Inc. v Artech Info. Sys., LLC**

2015 NY Slip Op 31716(U)

September 2, 2015

Supreme Court, Suffolk County

Docket Number: 07-17472

Judge: Joseph A. Santorelli

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INDEX No. 07-17472  
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~~ORIGINAL~~

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme Court

MOTION DATE 12-19-14  
ADJ. DATE 2-26-15  
Mot. Seq. # 011 - XMD # 013 - XMD  
# 012 - XMD # 014 - MG

-----X  
MICRO TECHNOLOGY INTERNATIONAL  
INC.,

Plaintiff,

ADVANCED PAYROLL FUNDING, LTD.,

Intervenor/Plaintiff,

- against -

ARTECH INFORMATION SYSTEMS, L.L.C.  
and RANJINI PODDAR,

Defendants.  
-----X

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Upon the following papers numbered 1 to 102 read on this motion for summary judgment, etc.; Notice of Motion/ Order to Show Cause and supporting papers 1 - 64; Notice of Cross Motion and supporting papers 65 - 73; 74 - 77; 78 - 79; Answering Affidavits and supporting papers 80 - 81; Replying Affidavits and supporting papers 82 - 83; Other Affidavits, 84 - 88, 89 - 99, 100; memoranda of law, 101, 102; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendants Artech Information Systems, LLC and Ranjini Poddar for summary judgment dismissing the complaint is granted; and it is

**ORDERED** that the cross motion by plaintiff Micro Technology International Inc. for summary judgment in its favor on the issue of liability and for an order enforcing its attorney's lien is denied; and it is further

**ORDERED** that the cross motion by intervenor-plaintiff Advanced Payroll Funding, LTD for summary judgment in its favor is denied.

On July 1, 2005, IBM and defendant Artech Information Systems, LLC (Artech) entered into an agreement whereby Artech undertook to furnish technical service personnel for the project needs of IBM. On September 19, 2005, plaintiff Micro Technology International Inc. (Micro) and Artech entered into a subcontract agreement whereby Micro would furnish staffing to fulfill the technical services that Artech was to provide to IBM. According to the complaint, starting in May 2006, invoices submitted to Artech from Micro arising from the subcontract agreement were not paid by Artech. Thereafter, Micro commenced this action to recover damages for breach of contract and account stated as against Artech. It also brought a cause of action for conversion against defendant Ranjini Poddar, President of Artech. Artech asserts counterclaims against Micro for breach of contract and fraud. Pursuant to an order of this Court, dated May, 26, 2009 (Jones, J), Advance Payroll Funding (Advance) was permitted to intervene as a party plaintiff, as it possesses a perfected security interest in the assets of Micro.

Artech and Poddar move for partial summary judgment dismissing the complaint against them, arguing that plaintiff breached their subcontract. In support of their motion, Artech and Poddar submit, among other things, copies of the pleadings, a transcript of the deposition testimony of Syed Azar Naeim, principal of Micro, the subcontract agreement between Artech and Micro, and paystubs and third-tier invoices relating to the subject dispute.

Advance cross-moves for summary judgment in its favor, arguing that while Artech learned that Micro was using third tier contractors on the project in late 2006, it did not cancel the subcontract until March 2007. In support of its cross motion, Advance submits, among other things, a copy of the Master Factoring Agreement between Advance and Micro, and a transcript of Poddar's deposition testimony.

Micro cross-moves for an order enforcing its attorney's lien against Micro's claim and granting it lien priority over any alleged monies due to Advance. Micro also seeks partial summary judgment on the issue of liability, arguing that its use of independent contracts on the projects was not a material breach based on the parties' conduct. Micro further argues that Artech received payment from IBM, but failed to pay it. In support of its cross motion and in opposition to the motion by Artech and Poddar, Micro submits an affidavit of Syed Azar Naeim.

Poddar, President of Artech, states in her affidavit that Artech is a staffing company which provides staffing for IT and networking projects to a variety of corporate clients. She states that IBM is one of its customers, and that Artech became a "Tier 1 Contractor" of IBM, meaning that IBM hired Artech directly for staffing needs and Artech had the right to hire its own sub-contractors to help fulfill IBM's staffing needs. She states that Artech entered into an agreement with IBM in July 2005, which made Artech the staffing contractor for IBM on certain projects. She states that in September 2005, Artech hired Micro on the project pursuant to a written sub-contract, and that the sub-contract expressly prohibited Micro from using anyone other than a W-2 employee to perform services under the contract. Poddar further alleges that under the terms of the subcontract, Micro had to provide wage verification and verification of employment status of the persons performing services, and that its failure to do so could result in non-payment or termination. According to Poddar, one year into the subcontract, complaints arose regarding Micro's non-payment of workers, and an investigation was conducted by IBM and Artech. She states that in November 2006, IBM contacted Artech about concerns that some of the workers provided by Micro were "sub-sub-contractors" (Tier 3 workers), which is a violation of Artech's obligation to IBM. She states that Artech demanded verification of wages and status of workers used by Micro, and Micro provided pay stubs for

Micro Technology v Artech Information

Index No. 07-17472

Page No. 3

some of its workers. She states that Artech learned that the pay stubs provided by Micro were forgeries, and that none of the subject workers were actually employees of Micro. Poddar further states that Artech paid about \$122,000 to workers whom Micro failed to pay. She also states that she learned almost all of the invoices submitted by Micro to Artech during the time period at issue were fraudulently overstated in that Micro paid the workers less than the stated rate.

John Spry, Vice President of Artech, states in his affidavit that during late 2006 and early 2007, he was directly involved in the payment disputes with Micro. He states that in the beginning of Micro's subcontract with Artech, Artech routinely paid the invoices submitted by Micro. However, in September 2006, IBM raised concerns regarding Micro's compliance with the terms of the subcontract. Specifically, he explained that the initial concerns were whether Micro actually paid the amounts owed to the workers, and that later concerns arose as to whether the workers were W-2 employees of Micro. Spry states that once these latter concerns were raised, Artech put a hold on all payments to Micro, pending an investigation into the allegations. He states that Artech demanded documentation from Micro to demonstrate the relationship of each worker on the invoices and that they were paid. He states that in January 2007, after Micro sent the relevant documents, Artech made a payment to Advance, as assignee of Micro, in the amount of \$71,000. He states that after asking certain workers about their employment status and pay, it was determined that the documents sent by Micro to Artech were "bogus." He states that after it was revealed that the documents provided by Micro were forged, IBM and Artech entered into an audit process to determine how much of Artech's charges to IBM were inflated and how much of the invoices included charges for Tier 2 (or Tier 3 or Tier 4) tier sub-contractors. He states that at the conclusion of the audit, Artech was required to pay back to IBM the amounts which resulted from Micro's improper billing.

Syed Azar Naeim, principal officer of Micro Technology International, states in his affidavit that his company offers management consulting services, and that it began providing consulting services for IBM projects in 2003. He states that in 2005, IBM directed Micro to work on IBM projects under the supervision of Artech. He states that prior to entering into the subcontract with Artech, it frequently used independent contractors or subcontractors, and that it was Micro's understanding that IBM knew of this practice and did not have a problem with it. He states that Micro continued to use independent contracts and subcontractors after it entered the subcontract with Artech. Naeim states that in September 2006, Artech began falling behind on its payments of Micro's invoices, and that in December 2006 it claimed it had to conduct an audit of Micro's consultants for IBM. He states that he sent Artech the requested documentation, and that in January 2007, Artech informed him that Micro had cleared IBM's audit, but that it would only be paying a portion of Micro's invoices as the other invoices had been rejected by IBM. He states that Artech was behind in payments to Micro in the amount of about \$436,260, and that, since it refused to pay and failed to explain why it did not pay, Micro commenced this action against both Artech and IBM. Naeim states that while Poddar claims Artech paid \$122,000 to workers that Micro failed to pay, the remainder of the workers were paid by Micro. He further states that Artech has received a windfall as it received payment from IBM, yet did not pay Micro.

The subcontract agreement entered into by Artech and Micro under the section entitled Assignment or Subcontracting states as follows:

5. Assignment or Subcontracting. No part of this Subcontract or of the obligations or rights of either party hereto shall be assigned or subcontracted without the prior written consent of the other party. For purposes of this section, use of 1099s or independent contracts shall constitute subcontracting and is strictly prohibited without prior written consent from ARTECH.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

As to the first cause of action for breach of contract, Artech has established its prima facie entitlement to summary judgment as a matter of law. Here, the subcontract agreement between Artech and Micro specifically states that the use of "1099s" or independent contracts is strictly prohibited without prior consent from Artech. It is undisputed that Micro used independent contractors in violation of the terms of the subcontract. Artech submits 1099 forms, pay stubs, and agreements between the subject workers and Micro, which demonstrate that the subject workers were independent contractors. Moreover, in his deposition testimony Naeim concedes that those workers were independent contractors.

In opposition, Micro and Advance do not dispute that the subject workers were not independent contractors and do not dispute the contention that the documents submitted by Micro to Artech were fraudulent. Instead, Micro and Advance both argue that Artech has waived its breach of contract claim by making a payment to Micro in January 2007 and by accepting payment from IBM for services provided by Micro. A valid waiver "requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver would have been enforceable" (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184, 436 NE2d 1265, 451 NYS2d 663 [1982]; see *Gresser v Princi*, 128 AD2d 752, 513 NYS2d 462 [2d Dept 1987]). It may arise by either an express agreement or by such conduct or a failure to act as to evince an intent not to claim the purported advantage (see *Hadden v Consolidated Edison Co. of N.Y.*, 45 NY2d 466, 410 NYS2d 274 [1978]; *Gresser v Princi*, *supra*). A waiver "is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence;" rather, there must be proof that there was a voluntary and intentional relinquishment of a known and otherwise enforceable right (*Peck v Peck*, 232 AD2d 540, 540, 649 NYS2d 22 [2d Dept 1996]).

Here, it cannot be said that Artech waived the breach of contract by Micro by making a payment to Micro in January 2007. Payments to Micro were placed on hold during Artech's investigation into whether Micro violated terms of the subcontract, and Artech only made a payment in January 2007 after Micro submitted verification of wages paid and employment status of the workers, which Artech later determined to be fraudulent. Moreover, as to the assertion that Artech cannot be "unjustly enriched" by its acceptance of payments from IBM and its refusal to pay Micro, as a general rule, the existence of a valid and

Micro Technology v Artech Information

Index No. 07-17472

Page No. 5

enforceable written contract governing a particular subject matter precludes recovery in quasi-contract on a theory of unjust enrichment for events arising out of the same subject matter (*see Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 807 NYS2d 583 [2005]; *Yenrab, Inc. v 794 Linden Realty, LLC*, 68 A.D.3d 755, 892 NYS2d 105 [2d Dept 2009]). Additionally, Spry states in his affidavit that the money Artech received from IBM due to Micro's improper billing was returned to IBM. Finally, the subcontract contains a clause which states that a failure of either party to enforce any provision of the subcontract shall not be construed as a waiver.

As to the second cause of action, it is well settled that the "mere rendering of an account does not make it a stated one, but where an account is rendered showing a balance, the party receiving it must, within a reasonable time, examine it and object, if he disputes its correctness. If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown" (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165, 166, 567 NYS2d 704, 705 [1st Dept 1991]). Whether a bill for payment has been held by a defendant without objection for a period of time sufficient to give rise to an inference of assent, considering all the circumstances presented is generally a question of fact (*Epstein v Turecamo*, 258 AD2d 502, 684 NYS2d 621 [2d Dept 1999]). Here, plaintiff has admitted that some of the invoices submitted to Artech were not correct. As there is a dispute regarding the correctness of the account, this cause of action is dismissed (*see M&A Constr. Corp. v McTague*, 21 AD3d 610, 800 NYS2d 235 [3d Dept 2005]; *Abbott, Duncan & Wiener v Ragusa*, 214 AD2d 412, 625 NYS2d 178 [1st Dept 1995]).

With regard to the third cause of action against defendant Ranjini Poddar, conversion is the unauthorized "exercise of dominion over or interference with" a specific identifiable piece of property in defiance of the owner's rights (*Petty v Barnes*, 70 AD3d 661, 894 NYS2d 85 [2d Dept 2010]; *Gilman v Abagnale*, 235 AD2d 989, 653 NYS2d 176 [3d Dept 1997]). However, a claim to recover damages for conversion cannot be predicated on a mere breach of contract (*see Priolo Communs. v MCI Telecomms. Corp.*, 248 AD2d 453, 669 NYS2d 453 [2d Dept 1998]). Here, plaintiff's claim that Ranjini Poddar exercised unauthorized dominion and control over the purported interest of plaintiff merely restates its cause of action to recover damages for breach of contract and did not allege a separate taking (*see Tornheim v Blue & White Food Prods. Corp.*, 56 AD3d 761, 868 NYS2d 279 [2d Dept 2008]; *Hassett-Belfer Senior Hous., LLC Town of N. Hempstead*, 270 AD2d 306, 705 NYS2d 233 [2d Dept 2000]).

Accordingly, the motion for summary judgment by defendant Artech and defendant Poddar is granted, and the cross motion by plaintiff Micro and the cross motion by plaintiff/intervenor Advance are denied, as moot.

Dated: SEP 02 2015



HON. JOSEPH A. SANTORELLI  
J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION