SCG Siddharth Creative Group Inc. v Von Klueger LLC
2016 NY Slip Op 31802(U)
September 28, 2016
Supreme Court, New York County
Docket Number: 652939/2015
Judge: Barry Ostrager

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

X

SCG SIDDHARTH CREATIVE GROUP INC.,

Plaintiff,

-against-

VON KLUEGER LLC,

Defendant.

X

INDEX NO. 652939/2015

Motion Seq. No. 003

OSTRAGER, J:

Presently before the Court is the motion by plaintiff SCG Siddharth Creative Group Inc. ("SCG") to reargue this Court's August 22, 2016 decision denying the plaintiff's motion for summary judgment. Reargument is granted, and upon reargument, summary judgment is denied for the following reasons.

Facts

The defendant, Von Klueger LLC ("Von Klueger") engaged SCG as a sub-contractor to provide services to a Von Klueger client, Vertical Screen ("Client"). The plaintiff and defendant executed two agreements in connection with this project, the Terms of Service Agreement ("TOSA") dated March 25, 2013 and the Statement of Work ("SOW") dated March 18, 2013 (NYSCEF Doc. No. 6 and 7). The TOSA provided the basic terms and conditions of the agreement and the SOW specified the services and work product to be provided by SCG. Under the SOW, SCG was to provide Von Klueger with strategic positioning and branding services for Vertical Screen, including position statements, value propositions, and a brand story. The SOW defined these items as "Deliverables."[1]

[1] "Deliverables. SCG will craft a strong, unique and most competitive 'brand story,' for VS and it's properties to establish VS's character, belief, purpose. This exercise will distill into VS's mission and vision statement and

Procedural History

On August 24, 2015, the plaintiff SCG filed a Summons and Complaint with the Court, alleging three causes of action for breach of contract, attorney's fees, and account stated. SCG seeks $51,000 in damages which includes $45,000 in unpaid services and $6,000 in expenses (Complaint, ¶ 7).

On November 20, 2015, the defendant Von Klueger filed an answer with two counterclaims, breach of contract and breach of the implied covenant of good faith and fair dealing (NYSCEF Doc. No. 2). In its counterclaims, Von Klueger asserted that SCG failed to perform its obligations under the SOW and TOSA as SCG's services were deemed by the Client to be "defective, inadequate, insufficient, and completely unacceptable" (*id.*, ¶ 3). In addition, Von Klueger asserted that as a result of SCG's alleged breach, the Client terminated Von Klueger's contract on this and related projects (¶ 6). Von Klueger seeks $250,000 in damages on each of its counterclaims.

On February 2, 2016, the plaintiff SCG moved to strike several of Von Klueger's affirmative defenses, which the Court partially granted in an order dated March 4, 2016 (NYSCEF Doc. No. 23). A Preliminary Conference Order was completed on that day (NYSCEF Doc. No. 22). On June 1, 2016, the parties returned to Court for a Compliance Conference and raised issues with respect to outstanding discovery (NYSCEF Doc. No. 24). Thereafter, the defendant Von Klueger outlined the plaintiff's deficient document responses in a letter dated June 14, 2016 (NYSCEF Doc. No. 83). Two days later, on June 16, 2016, the plaintiff SCG moved for summary judgment (motion sequence 002).

positioning statement. The VS brand story will find it's expression in every customer/client/target audience touch point in tone, look and feel of every and any design/visual element, which we will document in a VS 'Brand Manifesto' (Brand Bible). The holistic brand communication elements will be scalable, and will work across communication and advertising platforms from online to offline" (NYSCEF Doc. No. 6 at 3).

Motion Sequence 002

In support of its motion for summary judgment, the plaintiff SCG primarily relies on TOSA §4.4 in asserting that it is entitled to summary judgment as a matter of law. SCG claims that Von Klueger received Deliverables in June and July of 2013 and failed to provide 3-days' written notice of any deficiency in the Deliverables as required by TOSA §4.4, and therefore the Deliverables were "deemed acceptable"[2] (MOL in support at 3). In addition, SCG asserted that it sent an invoice to Von Klueger for an outstanding balance of $45,000 on November 17, 2013, to which Von Klueger "*never* objected" (Siddharth aff, ¶ 13).[3]

The defendant Von Klueger opposed the plaintiff's motion for summary judgment on the basis that it was premature as discovery was still ongoing (and several discovery demands by Von Klueger were still outstanding), and that other TOSA provisions precluded grant of summary judgment in this action.

In a decision dated August 22, 2016 the Court denied that plaintiff's motion for summary judgment because, material issues of fact exist, the plaintiff has not established the notice requirements of TOSA §4.4 related to "Deliverables requiring testing," and the plaintiff has not established it is entitled to summary judgment as a matter of law given the procedural history and the facts of this case.

On September 7, 2016, approximately two weeks after the Court rendered its decision, the plaintiff SCG moved to reargue (motion sequence 003).

[2] "Client [Von Klueger], within three (3) business days of receipt of each Deliverable, shall notify Agency [SCG], in writing, of any failure of such Deliverable to comply with the specifications set forth in the SOW, or of any other objections, corrections, changes, or amendments Client wishes made to such Deliverable ... In the absence of such notice from Client, the Deliverable shall be deemed accepted" (NYSCEF Doc. 7 at vi).

[3] This statement is contradicted by plaintiff's memorandum of law in support of its motion which states that "Von Klueger did not dispute this invoice [$45,000] until the filing of the answer in this case, over a year after receiving the invoice" (NYSCEF Doc. No. 42 at 5).

Motion Sequence 003

The plaintiff's motion for reargument is granted, and upon reargument, summary judgment is denied as the plaintiff has not demonstrated it is entitled to judgment as a matter of law.

The penultimate paragraph in TOSA §4.4 expressly provides for a final review and a 3-day objection period of final Deliverables before remaining payments become due under the parties' agreement.[4] Mr. Peter Von Klueger, the defendant's managing member, stated in his verified responses to the plaintiff's interrogatories[5] that SCG never sent Von Klueger completed Deliverables but only trickled in portions of the work between March and June of 2013 (NYSCEF Doc. No. 53 at 6). This statement coupled with two emails dated June 13, 2013 and July 17, 2013 in which SCG emailed Von Klueger a "copy" of Deliverables (*see* NYSCEF Doc. Nos. 31-34) raise material issues of fact as to whether SCG completed and provided Von Klueger with final Deliverables.

Additionally, TOSA §2.2 required SCG to perform the services at issue in a "professional manner" and according to customary standards of the advertising industry. Mr. Von Klueger's verified statements raised several issues of fact as to whether or not SCG complied with this standard. For example, Mr. Von Klueger stated that the plaintiff's work product "were perceived by the client [Vertical Screen] to be inadequate, unacceptable, contradictory, filled with grammatical errors, and so unacceptable that the client had to write its own copy in house" (*id.* at 5). In addition, "the copy written by Plaintiff's [SCG's] ... failed to rise [to] the sophisticated business level demanded by the client, and as a result the client refused to give further comments

[4] "Upon completion of the Work, the Client will be notified and have opportunity to review it. The Client should notify Agency, in writing, of any unsatisfactory points within three (3) business days of receipt of such notification" (moving papers, Exh. C at vii).

[5] Although the plaintiff has asserted that Mr. Von Klueger's interrogatory responses have not been properly verified, the plaintiff has failed to establish that the verification falls short of CPLR 3021 requirements.

or directions..." (*id.*). Further, the "Plaintiff's promised branding exercise was deficient in that it failed to produce or allow useable and tangible results and was not useable in any capacity by the client or Defendant in the service of the client" (*id.*). Mr. Von Klueger also stated that the "deliverables failed to synchronize or work in tandem with Defendant's [Von Klueger's] design communication work, including, for example, the style guide book and, subsequently, none of the 'Brand Diagnostic' findings made by Plaintiff were useable in Defendant's final brand style guide" (*id.*).

Although the defendant Von Klueger has not furnished evidentiary proof, such as emails or letters, substantiating the allegations it has made in its counterclaims and confirming the statements made by Mr. Von Klueger, there remains issues of material fact that preclude grant of summary judgment in favor of the plaintiff. Von Klueger, of course, will ultimately be put to his proof on these issues. The parties should proceed to complete discovery and develop a fuller record in this action.

For all the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for reargument is granted, and upon reargument, summary judgment is denied. The parties shall appear in Room 341 for a status conference on December 20, 2016 at 9:30 a.m.

Dated: September 28, 2016

BARRY R. OSTRAGER J.S.C.
JSC