

**Windels Marx Lane & Mittendorf, LLP v West Harlem
Community Org. Local Dev. Corp.**

2018 NY Slip Op 32834(U)

October 30, 2018

Supreme Court, New York County

Docket Number: 160626/2016

Judge: Gerald Lebovits

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

PRESENT: HON. GERALD LBOVITS **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 160626/2016

WINDELS MARX LANE & MITTENDORF, LLP,

MOTION SEQ. NO. 002 & 004

Plaintiff,

- v -

WEST HARLEM COMMUNITY ORGANIZATION LOCAL
DEVELOPMENT CORPORATION, 157 WEST 119TH STREET
HOUSING DEVELOPMENT FUND CORPORATION, LENOX AND
PENNAMON HOUSING DEVELOPMENT FUND CORPORATION,
240-2 WEST 116TH STREET HOUSING DEVELOPMENT FUND
CORPORATION, & EDITH PENNAMON APARTMENTS
HOUSING DEVELOPMENT FUND CORPORATION

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 116, 118, 119, 120

were read on this motion to/for

JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 115, 121, 122, 123, 124

were read on this motion to/for

JUDGMENT - SUMMARY

Motion sequence numbers 002 and 004 are consolidated for disposition. In motion sequence number 002, plaintiff Windels Marx Lane & Mittendorf LLP moves pro se, pursuant to CPLR 3215, for a default judgement against defendant West Harlem Community Organization Development Corporation (West Harlem), and, pursuant to CPLR 3212 (a), for summary judgement against the other defendants. In motion sequence number 004, defendants 157 West 119 Street Housing Development Fund Corporation, Lenox and Pennamon Housing Development Fund Corporation, 240-2 West 116 Street Housing Development Fund Corporation, and Edith Pennamon Apartment Housing Development Fund Corporation (collectively HDFCs) move for: (a) summary judgment dismissing the complaint, as against them, an order to strike the complaint, pursuant to CPLR 3216; and, pursuant to § 130-1.1 of the Uniform Rules, an award of sanctions in the form of attorney fees against plaintiff, both in its capacity as plaintiff, and as counsel.

As an initial matter, plaintiff presents affirmations by Charles E. Simpson, Esq., both to support its motion, and to oppose defendants' motion. CPLR 2106 provides, in relevant part:

“The statement of an attorney admitted to practice in the courts of the state . . . who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury may be served or filed in an action in lieu of and with the same force and effect as an affidavit.”

Mr. Simpson is a member of defendant. As such, he is a party, within the meaning of CPLR 2106, and, accordingly, he is not authorized to submit evidence through an affirmation. (See *Matter of Sassower v Greenspan, Kanarek, Jaffe & Funk*, 121 AD2d 549 [2d Dept 1986] [noting that former partner of party law firm is a party].) However, having failed to object, defendants have waived this defect. (See *Sam v Town of Rotterdam*, 248 AD2d 850 [2d Dept 1998]; see also *Lopez v Gramuglia*, 133 AD3d 424 [1st Dept 2015].)

The complaint alleges the following three causes of action: (1) breach of contract; (2) account stated; and (3) quantum meruit. They will be discussed in turn.

Absent a valid contract, there can be no claim of a breach thereof. Here, plaintiff relies upon a retainer agreement (Agreement) between itself and West Harlem, and the four HDFCs. (See Simpson affirmation 4/4/18 Exhibit F.) The Agreement is signed by nonparty Joednee Copeland twice, first as president of West Harlem, and then as president of the HDFCs. It is dated “As of December 1, 2014.” As discussed below, the Agreement was written subsequently and backdated to its stated effective date. On November 18, 2014, Copeland was terminated from her position as executive director of nonparty West Harlem Community Organization (WHCO) by a resolution of the latter’s board of directors. (Hayes affidavit 5/7/18 ¶ 35.) WHCO provides housing services in West Harlem by sponsoring HDFCs that own and manage residential buildings, the apartments of which are rented to low income tenants. (Hayes affidavit 5/7/17 ¶ 10.) Previously, Copeland and nonparty Andre Soleil, the then-chairman of the WHCO board of directors, had formed West Harlem as a managing entity for the HDFCs. (Hayes affidavit 5/7/18 ¶ 21.)

In March 2015, WHCO and the HDFCs sued Soleil, Copeland, and West Harlem, in an action — *West Harlem Community Organization Inc. v West Harlem Community Organization Local Development Corporation et al*, index number 651003/2015 — to regain managerial control of the HDFCs.

By order, dated September 30, 2015, then-Justice Oing granted WHCO a preliminary injunction barring West Harlem from continuing to manage the HDFCs. (NYSCEF Doc. No.54.) It is undisputed that WHCO, which owns no real property in its own name, is the sole member of each of the HDFCs, and that the November 18, 2014, resolution, that terminated Copeland, gave her successor the authority to make all business and management decisions regarding the properties owned by the HDFCs. Consequently, at the time that Copeland signed the Agreement on behalf of the HDFCs, she had no authority to do so.

Plaintiff correctly argues that apparent authority by an agent suffices to bind her principal to a contract. But apparent authority may not be established either by the party seeking to hold a principal liable, or by that principal’s agent:

“Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority. . . . Moreover, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable.”

Hallock v State of New York, 64 NY2d 224, 231 (1984). Clearly, a party that knows that a would-be agent lacks actual authority cannot appeal to apparent authority. Here, nothing in the record suggests that either WHCO, or the HDFCs, gave plaintiff any reason to believe that Copeland was authorized to retain plaintiff on behalf of the HDFCs. Plaintiff’s billing records show that, at the time that plaintiff drafted the Agreement, it knew that Copeland had been terminated from her position with WHCO. On December 2, 2014, plaintiff billed for “reviewing [an] email letter to Joednee Copeland regarding termination of WHCO Executive Director, of Housing.” (Simpson affirmation in support of plaintiff’s motion, exhibit I at 65.) Two days later, plaintiff billed for a “call to William Fried regarding meeting [with the New York City Department of Housing Preservation and Development].” (Id. at 66.) Thus, at that time, plaintiff knew, not only that Copeland was no longer employed by WHCO, but also that WHCO and the HDFCs were represented by their current counsel. It was only on December 12, 2014, that plaintiff billed an entry for “Draft[ing] Engagement Letter, New Matter Memo and cover letter for West Harlem Community Organization Local Development Corporation and its HDFCS affiliates.” (Id. at 66.) Accordingly, the first cause of action fails, as against the HDFCs.

A plaintiff alleging an account stated must show that the defendant “received, retained without objection, and partially paid invoices without protest.” (*Emery Celli Brinckerhoff & Abady, LLP v Rose*, 111 AD3d 453, 453-454 [1st Dept 2013]; see also *Mintz & Gold LLP v Daibes*, 125 AD3d 488, 489 [1st Dept 2015].) Plaintiff shows only that invoices were sent to West Harlem. (See Simpson affirmation in support of plaintiff’s motion, exhibit I.) Andrea Hayes, the executive director of the West Harlem EarlyLearn Preschool & Family Child Care Network, a division of WHCO, avers that WHCO did not receive any of those invoices at its address prior to the commencement of this action. (Hayes, affidavit ¶ 38.) West Harlem’s retention of the bills that plaintiff sent it does not bind the HDFCs.

Plaintiff’s claim of quantum meruit, as alleged against the HDFCs lacks merit. Plaintiff represented Copeland, Soleil, and West Harlem, when they were sued by WHCO and the HDFCS. Plaintiff’s invoices, on which plaintiff seeks to recover here include its work in that case, work adverse to the interests of WHCO and the HDFCs. (See Simpson affirmation, ¶¶ 14 and 17 and exhibit I, passim.) To the extent that plaintiff’s work for West Harlem and Copeland, in connection with certain investigations by governmental bodies, may have benefitted the HDFCs, plaintiff cannot demonstrate such benefit, inasmuch as the HDFCs were represented by their current counsel in regard to those matters. Moreover, even if the HDFCS derived some benefit from plaintiff’s legal services, those services were performed at the behest of third parties, viz. Copeland and Soleil, not at the behest of defendants. Accordingly, plaintiff cannot prevail, here. (See *Douglas Ellman, LLC v East Coast Realtors, Inc.*, 149 AD3d 544, 544 [1st

Dept 2017] [dismissing quantum meruit claim for work performed at behest of third party]; *Prestige Caterers v Kaufman*, 290 AD2d 295, 295 [1st Dept 2002] [same].)

That branch of plaintiff's motion which seeks a default judgment against West Harlem is unopposed, and, inasmuch as Copeland did not lack authority to sign the Agreement on behalf of West Harlem, it is granted.

As there are no relevant facts in dispute, and as all of plaintiff's claims against the moving defendant lack merit, those defendants are entitled to summary judgment. Inasmuch as the complaint is dismissed, the motion to strike is denied as academic.

Defendants' request for sanctions, in the form of payment of their attorney fees, incurred in defending this action, bringing their motion for summary judgment, and defending against plaintiff's motion for summary judgment, is amply justified, not merely by the lack of merit in plaintiff's complaint, but by plaintiff's attempt to collect attorney fees for work directly adverse to defendants' interests.

Accordingly, it is hereby

ORDERED that, in motion sequence number 002, that branch of the motion of plaintiff Windels Marx Lane & Mittendorf that seeks summary judgment against defendants 157 West 119 Street Housing Development Fund Corporation, Lenox and Pennamon Housing Development Fund Corporation, 240-2 West 116 Street Housing Development Fund Corporation, and Edith Pennamon Apartments Housing Development Fund Corporation, is denied, and that branch that seeks a default judgment against defendant West Harlem Housing Development Fund Corporation is granted on default. Plaintiff must serve a copy of this decision and order on the County Clerk's Office, which is directed to enter judgment in favor of plaintiff and against defendant West Harlem Community Organization Local Development Corporation in the sum of \$380,833.44 with interest at the statutory rate from April 4, 2018 until the date of entry of judgment, as calculated by the Clerk, together with costs and disbursements as calculated by the Clerk; and it is further

ORDERED that the motion of defendants 157 West 119 Street Housing Development Fund Corporation, Lenox and Pennamon Housing Development Fund Corporation, 240-2 West 116 Street Housing Development Fund Corporation, and Edith Pennamon Apartments Housing Development Fund Corporation, for summary judgment is granted and the complaint is dismissed with costs and disbursements as calculated by the Clerk upon the submission of an appropriate bill of costs; and it is further


ORDERED that that branch of said defendants' motion that seeks an order striking the complaint is denied as academic; and it is further

ORDERED that the motion of said defendants for attorney fees is granted; and it is further

ORDERED that the issue of the amount of attorney fees said defendants are entitled to is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk in the General Clerk's Office to arrange a date for the reference to a Special Referee.

10/30/2018
DATE


GERALD LEBOVITS, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> REFERENCE