Heinsight, LLC v Hudson Energy Servs. LLC
2019 NY Slip Op 31701(U)
June 13, 2019
Supreme Court, New York County
Docket Number: 152541/2014
Judge: Tanya R. Kennedy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63
--X
Heinsight, LLC, d/b/a Heinseight
Energy Solutions,

Plaintiff,

Index Number: 152541/2014

Motion Sequence Numbers:
004 and 005

-against-

Hudson Energy Services LLC,

Defendant.
--X
TANYA R. KENNEDY, J.S.C:

Hudson Energy Services LLC (Hudson or Defendant) moves for summary judgment, pursuant to CPLR 3212, to dismiss the amended complaint, which asserts causes of action for breach of contract, unjust enrichment, quantum meruit, imposition of a constructive trust, and fraud (motion sequence 004). Heinsight LLC d/b/a Heinseight Energy Solutions (Heinsight or Plaintiff) moves for partial summary judgment, pursuant to CPLR 3212, on its cause of action for breach of contract (motion sequence 005). The court held oral argument on the motions, which are consolidated for disposition and decided in accordance with the following.

BACKGROUND

Plaintiff "is an energy broker that acts as a middleman and earns commissions on contracts between energy providers, such as [defendant], and end user customers" (Kirk Hein [Kirk] supporting affidavit, ¶5; Blake Hein [Blake] supporting affidavit, ¶5). Among the types of contracts defendant offers its clients is an "unwind/rewind" contract, also known as a "retention" contract, where an old contract between defendant and its customer is cancelled and a new contract is substituted (*id.*, ¶¶12-13).

Defendant's customers, such as Corpus Christi Retail Venture, L.P. (Corpus), are typically property owners that purchase and use the energy which defendant provides (Plaintiff's Statement of Facts, ¶¶2, 16). Evolving Energy (Evolving) was the initial broker that served as the middleman for a July 12, 2010 contract between defendant and Corpus for the provision of energy (Sullivan Supporting Affirmation, Exhibit F; Blake affidavit, ¶15). However, on August 10, 2012, plaintiff forwarded to defendant an exclusive consulting agreement indicating that defendant's long-time client, Corpus, engaged plaintiff as its new exclusive energy broker (Blake affidavit, ¶¶16,18).

Plaintiff approached defendant to negotiate a new contract for Hudson and defendant offered an "unwind/rewind contract" for Corpus (*id.*, ¶¶18-19; Kirk affidavit, ¶17). Plaintiff maintains that on or about December 3, 2012, defendant and Corpus "unwound" their prior contract and entered into a new "Retail Energy Service Agreement" with a January 10, 2013 start date (the 2013 Heinsight Contract), which plaintiff brokered and was entitled to receive commissions in the sum of $404,550.61 for its services. (Sullivan Supporting Affirmation, Exhibit L; Blake affidavit, ¶¶ 20, 24; Kirk affidavit, ¶20).

Plaintiff maintains that after defendant paid $82,216.58 to plaintiff for the first year's commission under the 2013 Heinsight Contract, defendant breached that contract by failing to pay the remaining balance of commissions in the sum of $322,334.03 (Blake affidavit, ¶¶ 21-24; Kirk affidavit, ¶¶ 21-24).

Defendant now moves to dismiss the amended complaint and plaintiff moves for summary judgment on its cause of action for breach of contract. Defendant relies upon certain provisions of a July 16, 2012 "Sales Partnership Agreement" (2012 Partnership Agreement) between the parties, which provided, among other things, that plaintiff would identify potential retail electric consumers for defendant (Plaintiff's Statement of Facts, ¶9).

Section 5.3 of the 2012 Partnership Agreement provided that:

> [Defendant] *shall not be* responsible for payment of Fees to [Plaintiff] for any Customer Agreement signed by a Customer *not identified by* [*Plaintiff*] *and not introduced to* [*Defendant*] *by* [*Plaintiff*] (emphasis added).

Section 5.5 of the 2012 Partnership Agreement provided that:

> [Defendant] will pay [Plaintiff] the Fee for renewals or subsequent Customer Agreements between Customer and [Defendant]
> ...
> (Sullivan Supporting Affirmation, Exhibit K).

Defendant maintains that since Evolving introduced Corpus to defendant under the 2010 Evolving Contract and that Corpus was an existing customer when the 2013 Heinsight Contract was executed, plaintiff is not entitled to commissions. Defendant also contends, among other things, that the causes of action for unjust enrichment and quantum meruit are barred by the parties' written agreement.

Plaintiff argues in support of the motion for summary judgment and in opposition to defendant's motion that the 2013 Heinsight Contract nullified the 2010 Evolving Contract, in accordance with industry practice and that defendant ratified such action by its first-year payment of $82,216.58. As such, plaintiff maintains that it is entitled to partial summary judgment on its breach of contract claim because defendant repudiated its contractual obligation to pay the balance of the commissions owed under the 2013 Heinsight Contract.

DISCUSSION

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this prima facie showing, the motion must be denied (*id.*). Once the movant meets its

burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). "[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; *see also Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

***First Cause of Action* (Breach of Contract)**

The first cause of action alleges that defendant breached the contract by failing to pay plaintiff the commissions plaintiff earned under the 2012 Partnership Agreement and the 2013 Heinsight Contract (Amended Complaint, ¶¶5-8, 21-22).

"[A] party seeking to recover under a breach of contract theory must prove that a binding agreement was made as to all essential terms . . . [, there must be] sufficiently definite terms and the parties must express their assent to those terms" (*Silber v New York Life Ins. Co.*, 92 AD3d 436, 439 [1st Dept 2012]; *see also Carione v Hickey*, 133 AD3d 811, 811 [2d Dept 2015]).

Generally, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms . . . [and extrinsic evidence] is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties' agreement and the best evidence of the parties' agreement is their written contract (*Greenfield v Philles Records,* 98 NY2d 562, 569

[2002]). In other words, "[c]ourts will give effect to the contract's language and the parties must live with the consequences of their agreement [and] [i]f they are dissatisfied . . . , the time to say so [is] at the bargaining table" (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 424 [2013] [internal quotation marks and citation omitted]; *see also McFarland v Opera Owners, Inc.*, 92 AD3d 428, 428-429 [1st Dept 2012]; *Crane, A.G. v 206 W. 41st St. Hotel Assoc., L.P.*, 87 AD3d 174, 180 [1st Dept 2011]).

"To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation . . . by examining the entire contract . . . as a whole [and] in deciding the motion, [t]he evidence will be construed in the light most favorable to the one moved against" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017] [internal quotation marks and citations omitted]). Also, "[t]he parties' course of performance under the contract, or their practical interpretation of a contract for any considerable period of time, is the most persuasive evidence of the agreed intention of the parties" (*Warberg Opportunistic Trading Fund L.P. v GeoResources, Inc.*, 151 AD3d 465, 471 [1st Dept 2017]).

The portion of defendant's motion that seeks summary judgment dismissing the plaintiff's breach of contract cause of action must be viewed from the same standard under which disputed facts are accepted from the non-movant's perspective. Here, plaintiff asserts that the 2010 Evolving Contract was "unwound" by the July 2013 Heinsight Contract according to industry practice and that defendant ratified such action by forwarding an $82,216.58 payment in January 2013.

Even if the 2010 Evolving Contract was "unwound," the terms of the 2012 Partnership Agreement required plaintiff to establish that it "identified . . . and introduced" Corpus as a customer to receive a commission (Sullivan Supporting Affirmation, Exhibit K). The 2012

Partnership Agreement explicitly stated that commissions were excluded where plaintiff did not identify and introduce a customer (*id.*). The language of the 2012 Partnership Agreement is unambiguous (*see Ozdemir v Caithness Corp.*, 285 AD2d 961, 963-964 [3d Dept 2001], *lv. denied* 97 NY2d 605 [2001] and the court may not rewrite the parties' agreement or vary its terms (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 422; *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Rather, it must enforce the parties' explicit understanding as set forth in their written agreement.

Plaintiff has not established a practice for "any considerable period of time" that would warrant a claim that "[t]he parties' course of performance under the contract" renders the contract's terms ambiguous (*Warberg Opportunistic Trading Fund L.P. v GeoResources, Inc.*, 151 AD3d 465, 471 [1st Dept 2017]). The contention that defendant ratified the plaintiff's understanding must fail since "[r]atification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it" (*Allen v Riese Org., Inc.*, 106 AD3d 514, 517 [1st Dept 2013]).

However, plaintiff maintains that defendant promptly asserted that the 2012 Partnership Agreement did not require defendant to pay any further commissions. Since there is no dispute that Evolving identified and introduced Corpus to defendant, plaintiff cannot establish its claim for commissions under the 2012 Partnership Agreement or the 2013 Heinsight Contract. Therefore, defendant is granted summary judgment dismissing the breach of contract claim.

***Second Cause of Action* (Unjust Enrichment)**

"[U]njust enrichment is not a catchall cause of action to be used when others fail [but] [i]t is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). "The essence

of unjust enrichment is that one party has received money or a benefit at the expense of another which, in good conscience, ought to be returned" (*Carriafielo-Diehl & Assoc., Inc. v D & M Elec. Contr., Inc.*, 12 AD3d 478, 479 [2d Dept 2004]). However, "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]; *see also Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]). Also "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out the same subject matter" (*id.* at 388; *see also L.E.K. Consulting LLC v Menlo Capital Group, LLC*, 148 AD3d 527, 528 [1st Dept 2017]). Therefore, this cause of action must be dismissed since there is a written agreement between the parties.

***Third Cause of Action* (Quantum Meruit)**

"The elements of a cause of action sounding in quantum meruit are (1) performance of services in good faith, (2) acceptance of services by the person to whom they are rendered, (3) expectation of compensation therefor, and (4) reasonable value of the services rendered" (*Evans-Freke v Showcase Contracting Corp.*, 85 AD3d at 962, 962 [2d Dept 2011]. Similarly, this cause of action must be dismissed since the parties' written agreement precludes recovery for this quasi-contract claim (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, supra at 388-389; *L.E.K. Consulting LLC v Menlo Capital Group, LLC, supra* at 528).

***Fourth Cause of Action* (Constructive Trust)**

The elements of a claim for the imposition of a constructive trust are: "(1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment" (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *see also Evans v Rosen*, 111 AD3d 459, 459 [1st Dept 2013]; *Kalmon Dolgin Affiliates, Inc. v Tonacchio*, 110 AD3d 848, 851 [2d Dept 2013]). The

relationship between the parties is merely contractual and there is no evidence of "a confidential or fiduciary relationship" between the parties (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *see also Evans v Rosen*, 111 AD3d 459, 459 [1st Dept 2013]) to warrant the imposition of a constructive trust. Therefore, this cause of action is dismissed.

***Fifth Cause of Action* (Common Law Fraud)**

A cause of action for fraud requires that a plaintiff must "prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]; *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]). However, this cause of action must be dismissed since it is premised upon plaintiff's contention that defendant did not intend to fulfill its contractual obligation, which is merely a restatement of a breach of contract claim (*see Arnon Ltd (IOM) v Beierwaltes*, 125 AD3d 453, 453 [1st Dept 2015]; *Beta Holdings, Inc., v Goldsmith*, 120 AD3d 1022, 1023 [1st Dept 2014]).

Plaintiff's Claim for Punitive Damages

A claim for punitive damages must allege "a pattern of misconduct aimed at the public" (*Roconova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 615 [1994]; *see also Gedula 26, LLC v Lightstone Acquisitions III, LLC*, 150 AD3d 583, 584 [1st Dept 2017]; *Britt v Nestor*, 145 AD3d 544, 545 [1st Dept 2016]). Here, the claim must fail since the alleged conduct concerns a private dispute, which does not constitute a pattern of conduct generally aimed at the public (*see Roconova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]; *see also Gedula 26,*

LLC v Lightstone Acquisitions III, LLC, 150 AD3d 583, 584); *Britt v Nestor*, 145 AD3d 544, 545 [1st Dept 2016]).

Accordingly, it is

ORDERED that defendant's motion for summary judgment to dismiss plaintiff's complaint is granted (motion sequence 004), and the complaint is dismissed in its entirety, with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's motion for summary judgment on its cause of action for breach of contract (motion sequence 005) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
June 13, 2019

ENTER:

Hon. Tanya R. Kennedy
J.S.C.

HON. TANYA R. KENNEDY