

**Young Adult Inst., Inc. v National Inst. for People
with Disabilities of N.J.**

2020 NY Slip Op 32513(U)

July 29, 2020

Supreme Court, New York County

Docket Number: 652203/2018

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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YOUNG ADULT INSTITUTE, INC.

Plaintiff,

INDEX NO. 652203/2018

MOTION DATE N/A

- v -

MOTION SEQ. NO. 002

THE NATIONAL INSTITUTE FOR PEOPLE WITH
DISABILITIES OF NEW JERSEY,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 76, 77

were read on this motion for SUMMARY JUDGMENT.

This is a dispute between two not-for-profit entities that provide services for people with developmental disabilities in, respectively, New York and New Jersey. The question is whether certain payments made by Young Adult Institute, Inc. (“YAI”) to, or on behalf of, The National Institute for People with Disabilities of New Jersey (“NIPD”) must be repaid. YAI says the payments were loans or “advances” made under a Management Agreement that must be repaid, while NIPD insists that the payments were instead investments, forgiven loans, unauthorized advances, or outright gifts. Both sides now seek summary judgment.

For the reasons explained below, YAI’s motion is granted and NIPD’s motion is denied. YAI provided compelling evidence – including NIPD’s own records and the testimony of YAI and NIPD witnesses – demonstrating that the amounts in dispute were loans or advances “due to YAI,” and that repayment was not forgiven. After a thorough review of the record, the Court concludes that NIPD has failed to present admissible evidence to raise a genuine issue of material fact to rebut YAI’s prima facie entitlement to repayment.

BACKGROUND

Under the parties' 2010 management agreement (the "Management Agreement"), YAI provided a plethora of services as "contract manager" for NIPD. YAI essentially managed and operated the finances of NIPD, authorized to serve as NIPD's "manager of all business, management, fiscal, personnel, fundraising, planning, and program functions and services of [NIPD]", "conduct[ing], supervis[ing], and coordinat[ing] the day-to-day fiscal and/or operational function of [NIPD]", and more (YAI Statement of Material Facts ["SMF"] ¶7; *see* Management Agreement §3).

YAI contends (but NIPD disputes) that as part of this wide-ranging role, YAI regularly incurred expenses and advanced funds on behalf of NIPD, so that NIPD could carry out its day-to-day activities without interruption. According to YAI, NIPD's Board of Directors was kept fully apprised of and approved these expenses and advances, which came to comprise NIPD's debt to YAI – referenced in NIPD's financials as "Due to YAI" (YAI SMF ¶35). Until Fiscal Year 2015, NIPD repaid this debt to YAI (*id.* ¶47). But beginning in Fiscal Year 2015, NIPD failed to repay the full debt owed to YAI from the previous year and started to accrue its current debt to YAI, which has never been repaid (*id.* ¶48).

YAI initiated this action on May 7, 2018, by filing a Summons and a Motion for Summary Judgment in Lieu of Complaint under CPLR 3213 (NYSCEF 1). YAI principally argued that summary judgment awarding it the sum of \$1,183,332.00 was warranted under the Management Agreement, and as confirmed by NIPD's audited financial statements approved by its Board of Directors (YAI SMF ¶101). The Court (Bransten, J.) denied YAI's motion on the ground that the Management Agreement "was not an instrument for the payment of a sum of money only," and deemed YAI's moving papers the Complaint in this action (NYSCEF 30 at 7;

YAI SMF ¶103). Nine months of discovery ensued, including extensive document production and multiple depositions by both sides (YAI SMF ¶104).

DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Ostrov v Rozbruch*, 91 AD3d 147 [1st Dept 2012]).

If the threshold showing is made by the movant, “[the party] opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman*, 49 NY2d at 562; see *Glassman v Weinberg*, 154 AD3d 407, 408 [1st Dept 2017] [“[D]efendant’s vague and unsubstantiated allegations . . . [were] insufficient to raise an issue of fact”]; *Cabrera v Rodriguez*, 72 AD3d 553, 554 [1st Dept 2010] [“Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact”]).

I. YAI is Entitled to Summary Judgment

A. Breach of Contract

YAI is entitled to summary judgment on its claim for breach of contract, based on the unpaid “Due to YAI” debt. “To make a prima facie case on its breach of contract claim, plaintiff had to demonstrate the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Belle Light. LLC v Artisan Constr. Partners*

LLC, 178 AD3d 605, 606 [1st Dept 2019] [granting summary judgment on breach of contract claim]; *Yonkers Ave. Dodge, Inc. v BZ Results, LLC*, 95 AD3d 774, 774 [1st Dept 2012] [prima facie entitlement to summary judgment demonstrated by plaintiffs submission of copy of the parties' agreement, billing records, and testimony from an officer of plaintiff demonstrating that plaintiff fulfilled its obligations and had not received payment]).

YAI has established a prima facie case for breach of contract. To begin with, the record shows that YAI was contractually authorized to incur expenses on NIPD's behalf and then expect repayment for those expenses. By its terms, the 2010 Management Agreement gave YAI broad control over NIPD's management and financial operations, including authorizing YAI "to make withdrawals from [NIPD's bank account] for payments necessary to carry on the business of [NIPD]" (NYSCEF 38 §3). Indeed, Section 3(e) of the Management Agreement appoints YAI as NIPD's "true and lawful attorney in fact," "[i]n order to perform its obligations under [the] Agreement" (*id.*). And those obligations were expansive. YAI was contracted to (among other things) "serve as NIPD/NJ's manager of all business, management, fiscal, personnel, fundraising, planning and program functions and services of NIPD/NJ" (*id.*). "[A]s compensation for performing its services," YAI received Management Fees "in accordance with" an approved ratio value methodology, which did not cover actual costs or advances of funds incurred by YAI (*id.* §4).

NIPD executives confirmed that YAI exercised broad authority to cover NIPD's expenses in the course of its work. NIPD's Chairman, Davey Willans, testified that YAI "[b]asically . . . provide[d], under the management agreement, all necessary managerial oversight function, bar none" (YAI SMF ¶10, quoting Willans Dep. at 33:12-16). And NIPD's Treasurer, Dhaval Sheth, testified that the Management Agreement "g[ave] YAI the authority to incur

expenses and act to satisfy NIPD’s financial obligations” (YAI SMF ¶26, quoting Sheth Dep. at 21:23-22:4; *see* Thomas Dep. at 29:22-24 [“[I]f YAI is paying on behalf of [NIPD] to a vendor, they would reimburse YAI for those expenses”]). Apparently, there were no aspects of NIPD’s financial obligations over which YAI did *not* have authority (*id.* ¶11, quoting Sheth Dep. at 20:9-21:2). As Mr. Sheth explained, YAI provided “a line of credit for NIPD,” paying for NIPD’s expenses when NIPD lacked the funding to do so (*id.*; *see also id.* ¶25, quoting Willans Dep. 61:7-12, 62:9-19 [“If there was a cash flow issue . . . that would be considered part of the management agreement that [YAI] agreed to take – to pay the bills[.]”]). It was understood that when NIPD could not repay those amounts to YAI in full, the resulting “shortfall” was “why we have a due-to-YAI balance” (*id.*).

The Bylaws of NIPD do not provide otherwise. NIPD points to a provision in the Bylaws that states, “the corporation shall neither borrow nor make loans of its money, nor shall any note or evidence of indebtedness be issued in its name. . . . [and] [a]ny authorization to make a loan shall be specific and receive the approval of a majority of trustees at any given meeting” (NYSCEF 41 [NIPD Mot. for S.J.] [ellipses in original]). According to NIPD, because the NIPD Board “has never specifically approved a resolution to borrow money from YAI,” the Due to YAI debt is invalid (*id.*). But the Bylaws only require specific authorization to “*make* a loan,” while “authorization to borrow money may be general” (YAI SMF ¶34). And YAI has shown that the NIPD Board did provide such general authorization to borrow, repeatedly (*id.* ¶¶36-41).

YAI has also established the other elements of its breach of contract claim. It is undisputed that YAI fully performed all of its obligations under the Management Agreement (YAI SMF ¶28; *see* NIPD Resp. to YAI SMF ¶28 [“Defendant does not disagree.”]). It is also undisputed that YAI did in fact incur expenses on NIPD’s behalf. And until Fiscal Year 2015,

NIPD promptly repaid those expenses (YAI SMF ¶39; NIPD Resp. to YAI SMF ¶39; NYSCEF 51). After NIPD stopped doing so, NIPD’s Board “acknowledge[d] that there was a liability to YAI” (YAI SMF ¶80 [referencing September 2017 Board minutes]; NIPD Resp. to YAI SMF ¶80). At a Board meeting on June 20, 2016, NIPD’s Chairman explicitly acknowledged both the existence of NIPD’s Due to YAI debt (then approximately \$1 million) and the fact that such debt had not previously been written off or forgiven by YAI. Indeed, at the same Board meeting, Mr. Willans asked YAI’s CEO if YAI would forgive the Due to YAI debt (*id.* ¶77; *see id.* ¶81, quoting Willans Dep. 185:3-6 [“I still acknowledge we have a debt.”]). As to the amount owed, NIPD has not raised any specific inaccuracy or mistake in the records documenting the Due to YAI debt, despite having access to those records for years (*see id.* ¶59, quoting Sheth Dep. at 57:5-58:7).

In sum, YAI has shown that it was authorized to incur expenses on NIPD’s behalf with the expectation of repayment, that it incurred those expenses, and that it was not repaid. YAI thus makes out a prima facie claim for breach of contract.

In response, NIPD fails to raise a triable issue of fact about its obligation to repay the Due to YAI debt (*RCA Corp. v Am. Standards Testing Bur., Inc.*, 121 AD2d 890, 891 [1st Dept 1986] [“[B]are, conclusory averments are insufficient as a matter of law to demonstrate a real defense requiring a trial.”]). NIPD strains to characterize the YAI expenses as “investments” in NIPD, despite the absence of any documentary evidence describing the arrangement that way. Instead, NIPD relies mainly on an affidavit by Mr. Willans insisting that a pair of former YAI executives, Joel and Phil Levy, once assured him that NIPD “did not have to worry about paying back these advances, and that YAI was not going to force [NIPD] to repay such advances” (NYSCEF 35 ¶19 [Willans Aff.]). Neither party has located the Levys in this case, however, and there is no

writing manifesting such intent on YAI's part. This kind of unsupported hearsay evidence is insufficient to raise a triable issue of fact (*Arnold Herstand & Co., Inc. v Gallery: Gertrude Stein, Inc.*, 211 AD2d 77, 79 [1st Dept 1995] [denying summary judgment motion where “plaintiff’s entire case presently rests on this incompetent evidence” and the speaker “has never even been deposed”]; *Siegel v Terrusa*, 222 AD2d 428, 428 [2d Dept 1995] [“The opposition accordingly fell far short of the evidentiary showing needed to defeat a motion for summary judgment since the existence of a factual issue may not be established by the hearsay information of one who had no personal knowledge of the facts.”]).

Even if the hearsay statements were credited, they still fail to raise triable issues of fact. First, the statements were purportedly made years before the debt in question started to accrue, and the Levys’ alleged forbearance concerned only NIPD’s obligation to repay then-existing debt (YAI SMF ¶¶89-91; NYSCEF 35 ¶17 [“[We] asked both Joel Levy and Phil Levy whether [NIPD] was obligated or legally bound to repay *these advances* to YAI.”] [emphasis added]). Second, applying the statements prospectively, to forgive all future NIPD debts, conflicts with the parties’ course of conduct. Until Fiscal Year 2015, NIPD promptly repaid YAI the full amount it owed, including the management fee and reimbursement for all expenses and advances (YAI SMF ¶47). NIPD does not explain this inconsistency.

Therefore, YAI’s motion for summary judgment is **Granted**.

B. Account Stated

YAI is also entitled to summary judgment on its separate claim for an account stated. “[A]n account stated is an agreement, independent of the underlying agreement, regarding the amount due on past transactions” (*Duane Reade v Cardinal Health, Inc.*, 21 AD3d 269, 269-70 [1st Dept 2005]; *Unisol, Inc. v Kidron*, 180 AD3d 570, 571 [1st Dept 2020] [noting “account

stated claim is independent of its breach of contract claim”). “[E]ither retention of bills without objection or partial payment may give rise to an account stated” (*Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]; *WebMD LLC v Aid in Recovery, LLC*, 166 AD3d 447, 448 [1st Dept 2018] [granting summary judgment on account stated claim where “[d]efendant not only retained the invoices without objection for more than five months, but also paid some of them”). “[B]ald conclusory allegations of fraud, mistake and other equitable considerations are insufficient to defeat a motion for summary judgment’ on an account stated” (*Cohen, Tauber Spievak & Wagner, LLP v Alnwick*, 33 AD3d 562 [1st Dept 2006], quoting *Liddle, O'Connor, Finkelstein & Robinson v Koppelman*, 215 AD2d 204 [1st Dept 1995]).

The evidence shows that for years, the NIPD Board received financial information from YAI outlining then-current “Due to YAI” debt without objection, and in fact repaid such amounts to YAI. At quarterly meetings, the NIPD Board reviewed packets of financial information provided by YAI as contract manager, and had the opportunity to challenge or question the amounts YAI was incurring on its behalf (YAI SMF ¶74, citing Sheth Dep. at 53:19-54:3 [“The package is presented to the entire board, so every board member has a right to ask about any of the amounts or questions.”]; see NIPD Resp. to YAI SMF ¶74 [not disputing statement]). NIPD regularly repaid YAI for these expenses (YAI SMF ¶39; NIPD Resp. to YAI SMF ¶39; NYSCEF 51).

NIPD fails to raise a triable issue of fact on the account stated claim, relying on many of the same arguments discussed in Part A, *supra*, in connection with the breach of contract claim. NIPD’s conclusory assertion that the account stated claim fails because “[it] is not indebted to [YAI]” is unavailing (*Alnwick*, 33 AD3d at 562).

Therefore, YAI’s motion for summary judgment is **Granted**.

C. Unjust Enrichment

The finding in Part A, *supra*, that a valid contract exists between the parties concerning YAI’s payments precludes YAI’s alternative theory of unjust enrichment (*Belle Light. LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019] [“Due to the existence of contracts . . . the court should have denied plaintiff’s motion for summary judgment on its second cause of action, which was for unjust enrichment.”]). Therefore, the branch of YAI’s motion seeking summary judgment on the unjust enrichment claim is **Denied**.

The Court has considered NIPD’s other arguments and finds them to be without merit.

II. NIPD’s Motion for Summary Judgment is Denied

For the reasons stated above, NIPD’s motion seeking summary judgment dismissal of this action is **Denied**.

* * * *

Accordingly, it is

ORDERED that NIPD’s motion for summary judgment is DENIED; it is further

ORDERED that YAI’s cross-motion for summary judgment is GRANTED with respect to the claims for breach of contract and an account stated, and DENIED with respect to the claim for unjust enrichment; it is further

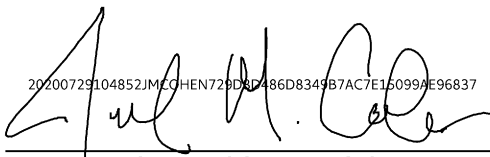
ORDERED that the Clerk of the Court is directed to enter judgment in favor of Plaintiff Young Adult Institute, Inc. and against Defendant The National Institute for People with Disabilities of New Jersey in the amount of \$1,183,000.00, together with interest at the statutory rate from June 30, 2017 until the date of the Decision and Order on this motion, and thereafter at

the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of the Court.

7/29/2020

DATE

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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: