Silverson, Pareres & Lombardi, LLP v New York Healthcare Ins. Co., Inc.
2020 NY Slip Op 34121(U)
December 8, 2020
Supreme Court, New York County
Docket Number: 650790/2019
Judge: Debra A. James
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES, *Justice* — PART IAS MOTION 59EFM

---X

SILVERSON, PARERES & LOMBARDI, LLP,

Plaintiff,

- v -

NEW YORK HEALTHCARE INSURANCE COMPANY, INC. and RISK RETENTION GROUP,

Defendants.

---X

INDEX NO. 650790/2019

MOTION DATE 02/27/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 36

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

ORDER

Upon the foregoing documents, it is

ORDERED that motion of plaintiff Silverson, Pareres & Lombardi, LLC for summary judgment (motion sequence 002) is denied; and it is further

ORDERED that counsel are directed to submit a proposed preliminary conference order or competing proposed preliminary conference order to 59nyef@nycourts.gov and NYSCEF on February 7, 2021.

DECISION

In this action to recover unpaid attorney's fees, plaintiff Silverson, Pareres & Lombardi, LLP (hereinafter, the law firm or plaintiff) moves, pursuant to CPLR 3212, for an order granting

it summary judgment against defendant New York Health Insurance Company, Inc., Risk Retention Group. The law firm brings causes of action against the defendant for account stated, breach of contract and unjust enrichment.

Background

Plaintiff law firm (the law firm) states that the defendant authorized a third-party claims administrator, ESIS Proclaim, to hire and retain its legal services from 2015 to 2018 (amended complaint New York St Cts Elec Filing System [NYSCEF] Doc No. 11 ¶¶ 6-9). The law firm sent invoices for its work to ESIS and defendant would issue payment (id. ¶ 8). The law firm alleges that defendant has failed to pay invoices totaling $121,858.48 for its legal defense work in four underlying cases, (1) Coffey v Klein, et al., under index number 004552/2017, in Supreme Court, Suffolk County, with a balance owed of 35,149.00; (2) Mahadeo v Jamaica Hospital, et al., under index number 707783/2015, in Supreme Court, Queens County, with a balance owed of $52,859.13; (3) Potenza as Executrix v Medford, et al., under index number 070959/2014, in Supreme Court, Suffolk County, with a balance owed of $3,850.35; and (4) Coleman, as Administratrix v Eastchester Rehab., under index number 22737/2012, in Supreme Court, Bronx County, with a balanced owed of $30,000.00 (id. ¶¶ 11, 23, 31, 37, 45).

Defendant states that due to overbilling and duplicate billing, it timely objected to and rejected the invoices sent by the plaintiff (Robert Schuck aff, NYSCEF Doc No. 29 ¶ 3). Moreover, it alleges that two of the underlying cases, the law firm invoiced, the Potenza and Coleman actions, were related to work for another carrier (*id.* ¶ 4).

Arguments

Plaintiff argues that it is entitled to summary judgment on its cause of action sounding in account stated. It argues that defendant's partial payment on some invoices evidence a fee agreement between the parties, and because neither defendant, nor its agent, ESIS Proclaim, objected to its invoices, it is entitled to recover based upon an account stated (affirmation in support, NYSCEF Doc No. 23 ¶¶ 25-27). Plaintiff maintains that the invoices annexed to its motion evidence the law firm's performance of legal services on behalf of defendant and defendant's subsequent failure to pay for said services entitles it to summary judgment on its claim for breach of contract (id. ¶ 31). Lastly, plaintiff claims that the defendant was unjustly enriched when it received the legal services of the law firm but withheld the legal fees rightfully owed (id. ¶ 35).

Defendant counters, as a threshold matter, that plaintiff failed to attach the legal fee agreement as required pursuant to 22 NYCRR § 1215, and did not attempt to arbitrate or mediate the

fee dispute before commencing this action, pursuant to 22 NYCRR § 137.6 (a)(1) (affirmation in opposition, NYSCEF Doc No. 28 ¶¶ 5, 16). It also points to the invoices annexed to plaintiff's motion papers, which only refer to two underlying cases, Potenza and Coleman, neither of which have corresponding invoices (id. ¶ 8). Defendant argues that these deficiencies alone warrant denial of plaintiff's summary judgment motion. As to the merits, defendants rely upon the affidavit of Robert Shuck, a managing member of New York Health Insurance Company, Inc, Risk Retention Group, who states that he and his employees and agents timely objected to the invoices at issue (NYSCEF Doc No. 29 ¶ 3).

In reply, plaintiff proffers the affidavit of ESIS Proclaim Vice President, Carl Ferdenzi, who states that the invoices at issue were sent to defendant's third-party administrator ESIS Proclaim, where they were approved by individuals handling the claims file, and then sent to defendant for payment (Carl Ferdenzi aff, NYSCEF Doc No. 33 ¶¶ 1, 5-6). The invoices were sent by plaintiff to ESIS Proclaim on a quarterly basis during the years 2014-2018, and reflect services rendered during each quarter (*id.* ¶ 3, 5). Ferdenzi affirms the balance owed of $121,858.48 for the four underlying matters claimed (*id.* ¶ 11).

DISCUSSION

It is well-established that to obtain summary judgment under CPLR 3212 (b), the movant must put forth "proof in admissible form" to "establish [a] cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in the [movant's] favor" (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1067 [1979]). If the movant "fails to meet this initial burden, summary judgment must be denied 'regardless of the sufficiency of the opposing papers'" (Voss v Netherlands Ins. Co., 22 NY3d 728, 734 [2014], quoting Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [emphasis omitted]). Once the movant meets this initial burden, then the burden shifts to the opposition to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues (De Lourdes Torres v Jones, 26 NY3d 742, 763 [2016]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, the role of the court is that of issue-finding, not issue-determination (Insurance Corp. of N.Y. v Central Mut. Ins. Co., 47 AD3d 469, 472 [1st Dept 2008]). The court will view the evidence in the light most favorable to the nonmoving party, and give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*Vega*, 18 NY3d at 503 [2012] [internal quotation and citation

omitted]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 [1st Dept 2002]).

A plaintiff can establish its prima facie entitlement to summary judgement on an account stated claim by producing "documentary evidence showing that defendant received and retained the invoice without objection" (Miller v Nadler, 60 AD3d 499, 499 [1st Dept 2009]). In order to defeat summary judgment, a defendant may present "evidence of an oral objection, with some specificity, to [the] account rendered" (Collier, Cohen, Crystal & Bock v MacNamara, 237 AD2d 152, 152 [1st Dept 1997]). However, "self-serving, bald allegations of oral protests [are] insufficient to raise a triable issue of fact as to the existence of an account stated" (Darby & Darby v VSI Intl., 95 NY2d 308, 315 [2000]).

"A key element of a prima facie account stated claim is evidence that [the plaintiff] delivered one or more invoices for the amount claimed to defendant, so that he received them" (Commissioners of State Ins. Fund v Kassas, 5 Misc 3d 1012[A], 2004 NY Slip Op 51337(U)*1-*2 [Civil Ct, NY County 2004]). When a plaintiff fails to establish that the invoices at issue were properly addressed and mailed, there should be no presumption of receipt (Morrison Cohen Singer & Weinstein, LLP v Brophy, 19

AD3d 161, 161 [1st Dept 2005] [Court reversed summary judgment grant on an account stated claim due to the plaintiff's failure to submit evidence of a regular office mailing procedure and the dates when the disputed invoices were allegedly mailed]). Here, plaintiff failed to establish that the defendant received or retained the invoices. The documentary evidence submitted is incomplete since it failed to annex the full and proper invoices for the account stated or establish which invoices were partially paid by the defendant. Moreover, plaintiff's attempt to cure its moving paper's deficiencies with the submission of the affidavit from Ferdenzi is improper and cannot be considered by the court (Yeum v Clove Lakes Health Care & Rehabilitation Ctr., Inc., 71 AD3d 739, 739 [2d Dept 2010] [the plaintiff's "prima facie burden cannot be met by evidence submitted for the first time in its reply papers"]). Thus, plaintiff has failed to set forth the facts giving rise to the account stated claim. Accordingly, plaintiff's motion for summary judgment on the cause of action for an account stated is denied, regardless of the sufficiency of the opposition papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

Plaintiff also contends that is it entitled to summary judgment on its breach of contract claim. The elements of a claim for breach of contract are "the existence of a contract, the plaintiff's performance pursuant to the contract, the

defendant's breach of its contractual obligations, and damages resulting from the breach (Meyer v New York-Presbyterian Hosp. Queens, 167 AD3d 996, 997 [2d Dept 2018], lv denied, 33 NY3d 908 [2019]). A contract requires definiteness as to the terms of the agreement (Cobble Hill Nursing Home v Henry & Warren Corp., 74 NY2d 475, 482 [1989], rearg denied 75 NY2d 863 [1990], *cert denied* 498 US 816 [1990]). "Unless a court can determine what the agreement is, it cannot know whether the contract has been breached, and it cannot fashion a proper remedy" (Marlio v McLaughlin, 288 AD2d 97, 99 [1st Dept 2001], lv denied 98 NY2d 607 [2002] [internal quotation marks and citation omitted]). Here, although plaintiff alleges that defendant breached the contract, no contract is annexed to the motion. While plaintiff attempts to argue that a contract did in fact exist by submitting invoices, the invoices were addressed to a third-party administrator. Likewise, there is no contract between the third-party administrator and the law firm annexed. Plaintiff's papers are insufficient to establish that a contract existed. Accordingly, plaintiff's motion for summary judgment on its breach of contract claim must also be denied.

Finally, as a general rule, a plaintiff may not maintain a cause of action for unjust enrichment or quantum meruit if a valid, enforceable contract governs the same subject matter (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388

[1987] ["The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"]; Goldstein v CIBC World Mkts. Corp., 6 AD3d 295, 296 [1st Dept 2004] ["A claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter"]). Since the viability of unjust enrichment and quantum meruit depend upon the resolution of the breach of contract issues, a grant of summary judgment here is improper at this time. Therefore, summary judgment on plaintiff's cause of action sounding in unjust enrichment and quantum meruit shall be denied as premature at this juncture.

12/8/2020
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART	☐ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE	