

**Waste Connections of N.Y., Inc. v GPB Waste NY
LLC**

2021 NY Slip Op 31832(U)

May 27, 2021

Supreme Court, New York County

Docket Number: 655128/2020

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARTHUR F. ENGORON **PART** **IAS MOTION 37EFM**

Justice

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WASTE CONNECTIONS OF NEW YORK, INC.

Plaintiff,

INDEX NO. 655128/2020

MOTION DATE 02/16/2021

MOTION SEQ. NO. 001

- v -

GPB WASTE NY LLC D/B/A FIVE STAR CARTING,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents and for the reasons set forth hereinbelow, the instant motion, pursuant to CPLR 3016(f) and 3212, by plaintiff, Waste Connections of New York, Inc., for summary judgment against defendant, GPB Waste NY LLC d/b/a Five Star Carting, is granted.

Background

Plaintiff, Waste Connections of New York, Inc., asserts the following. Plaintiff and defendant, GPB Waste NY LLC d/b/a Five Star Carting, both provide carting, waste removal, waste transfer, and recycling services in the New York Metropolitan Area. Plaintiff operates various waste transfer stations, including the 50th Street MSW Transfer Station (“the 50th Street Facility”) and the 522 Court Street Transfer Station (“the Court Street Facility”) (the 50th Street Facility and the Court Street Facility, collectively, “the Facilities”). (NYSCEF Doc. 1.)

Between January and April 2020, defendant used waste management and/or recycling services from plaintiff at the Facilities. Accordingly, plaintiff sent invoices and statements itemizing said services and charges to defendant, who accepted said invoices without objection. Since June 2020, defendant has made only one payment thereon, in the amount of \$20,000.00. Plaintiff asserts that defendant owes a \$213,708.00 balance, plus “all other recoverable late charges, costs, fees, interest and penalties.” In the instant complaint (NYSCEF Doc. 1, at 4-25), plaintiff itemizes the services that plaintiff provided to defendant and the corresponding charges. (NYSCEF Doc. 1.)

On October 8, 2020, plaintiff commenced the instant action, seeking a judgment against defendant (1) on plaintiff’s first cause of action, for account stated, and (2) on plaintiff’s second cause of action, for breach of contract, each in the amount of \$213,708.00, plus attorney’s fees, costs and disbursements, “and all other recoverable costs, fees, interest and penalties” (NYSCEF Doc. 1, at 26).

On November 19, 2020, defendant answered the instant complaint with various admissions, denials, and fourteen Affirmative Defenses (NYSCEF Doc. 4).

Plaintiff now moves, pursuant to CPLR 3016(f) and 3212, (1) for summary judgment against defendant in the amount of \$213,708.00, plus “additional accruing late charges,” interest, attorney’s fees, and costs; and (2) for an inquest into additional late charges, interest, and attorney’s fees (NYSCEF Doc. 5).

Defendant opposes plaintiff’s instant motion on three primary grounds. First, according to defendant, plaintiff’s instant motion is premature, as neither depositions nor written discovery has occurred. Defendant claims that a deposition of one of plaintiff’s principals, for example, would illuminate the details of the Work and its value. (NYSCEF Documents 14-15.)

Second, defendant asserts that plaintiff has failed to meet its burden pursuant to CPLR 3016(f). Defendant claims the following, inter alia, about the subject invoices: (1) they do not specify the services that plaintiff provided but instead repeat “MSW” without explaining said term; (2) defendant cannot properly contest them, as they do not contain descriptions of the services from which they arise; and (3) defendant did not accept their prices. (NYSCEF Documents 14-15.)

Third, defendant claims that plaintiff has failed to meet its burden pursuant to CPLR 3212, as there are issues of fact as to whether defendant is the party liable for payment of the subject invoices. On or about March 18, 2020, defendant’s parent company, non-party Armada Waste NY LLC (“Armada”), entered into an asset purchase agreement (“the Asset Purchase Agreement,” NYSCEF Doc. 16) with another waste removal services company, non-party Cogent Waste Solutions, LLC (“Cogent”). Pursuant to Sections 2.1 and 2.3 of the Asset Purchase Agreement, Cogent assumed “the obligation of the invoices and assumed the liability of any of the invoices whose payment was due after the Closing Date of March 18, 2020.” The Asset Purchase Agreement defined “Contracts” to include any “... instrument, note, commitment, undertaking, and any other agreement, commitment and legally binding agreement, whether written or oral.” Defendant thus alleges that an issue of fact exists as to whether defendant or Cogent is the proper defendant for the instant action. (NYSCEF Documents 14-15.)

In reply, plaintiff asserts, inter alia, the following (1) defendant has failed to provide an affidavit attesting to the need for discovery; (2) defendant has not attempted to cure its failure to serve a Verified Answer, which CPLR 3016(f) requires; (3) the abbreviation “MSW” on the subject invoices “carries its well-known industry meaning: Municipal Solid Waste,” of which defendant is aware; (4) defendant has not opposed the instant motion for summary judgment on the ground of an account stated, as defendant has not denied that it received the subject invoices; (5) defendant used plaintiff’s services prior to the closing of the Asset Purchase Agreement; and (6) defendant has submitted no evidence to support its claim of any parent/subsidiary relationship (NYSCEF Doc. 17).

Discussion

“[E]ither retention of bills without objection or partial payment may give rise to an account stated.” Morrison Cohen Singer & Weinstein, LLP v Waters, 13 AD3d 51, 52 (2004).

Plaintiff has made out prima facie cases for account stated and breach of contract (plaintiff's first and second causes of action) by submitting the following, among other documents: copies of the subject invoices (NYSCEF Doc. 2) the affidavit of facts of Anthony Horsi, plaintiff's District Controller (NYSCEF Doc. 9), and the affirmation of Howard L. Cogan, plaintiff's attorney (NYSCEF Doc. 6), asserting that defendant paid \$20,000.00 on the invoices. Further, in its November 19, 2020 Answer (NYSCEF Doc. 4), defendant admits plaintiff's allegations in paragraphs 8, 9, and 12 of the instant complaint, which stated:

8. Between January 2020 and April 2020 [defendant] utilized waste management and/or recycling services at the Facilities.

9. [Plaintiff] periodically sent [defendant] invoices and statements itemizing the services performed and the monetary charges therefore.

12. Since June 2020, only one payment, in the amount of \$20,000 has been made by [defendant] to [plaintiff] toward satisfying these unpaid invoices.

(NYSCEF Doc. 1.)

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d, 1062 (1993). Once the movant has met its initial burden, it then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dep't 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment").

Plaintiff has established that there are no material issues of fact in this matter, and defendant has failed to meet its burden to demonstrate that any exist. The "MSW" abbreviation on the subject invoices apparently is common parlance in the parties' joint industry and thus would not have obstructed defendant's ability to respond to said invoices with specificity. Additionally, the Work occurred between January and April 2020. Therefore, the majority of the Work occurred prior to the March 2020 Asset Purchase Agreement, which does not name defendant. In any event, defendant has failed to submit evidentiary proof of any parent-subsidary relationship that it alleges in its opposition papers, and even if defendant somehow changed its corporate status, it would still be liable. This Court finds that defendant is the proper defendant for the instant action.

"A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." Lambert v Bracco, 18 AD3d 619, 620 (2d Dep't 2005). Defendant has failed to submit an

affidavit from an individual with personal knowledge attesting to the need for specific discovery in the instant matter.

CPLR 3016(f), "Sale and delivery of goods or performing of labor or services," states the following (emphasis added):

In an action involving the sale and delivery of goods, or the performing of labor or services, or the furnishing of materials, the plaintiff may set forth and number in his verified complaint the items of his claim and the reasonable value or agreed price of each. Thereupon the defendant by his **verified answer** shall indicate specifically those items he disputes and whether in respect of delivery or performance, reasonable value or agreed price.

Defendant has failed to comply with CPLR 3016(f), as defendant has failed to serve a Verified Answer.

This Court has considered defendant's other arguments and finds them to be unavailing and/or non-dispositive. Therefore, this Court will grant plaintiff's instant motion, pursuant to CPLR 3016(f) and 3212, for summary judgment against defendant.

Conclusion

Thus, for the reasons stated hereinabove, the instant motion, pursuant to CPLR 3016(f) and 3212, by plaintiff, Waste Connections of New York, Inc., for summary judgment against defendant, GPB Waste NY LLC d/b/a Five Star Carting, is hereby granted, on plaintiff's first (for account stated) and second (for breach of contract) causes of action, in the combined amount of \$213,708.00 (two causes of action being duplicative), plus costs. Accordingly, the Clerk is hereby directed to enter judgment in favor of plaintiff and against defendant in the amount of \$213,708.00, plus costs.

Plaintiff's requests for attorney's fees, additional late charges, and interest are hereby severed, and plaintiff may obtain an inquest into said fees by presenting the Clerk with a Note of Issue with Notice of Inquest, a copy of this Decision and Order, and the payment of any necessary fees.

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5/27/2021
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

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<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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