| **Invesco Group Servs., Inc. v AST Fund Solutions, LLC** |
| --- |
| 2023 NY Slip Op 32538(U) |
| July 24, 2023 |
| Supreme Court, New York County |
| Docket Number: Index No. 653581/2022 |
| Judge: Margaret A. Chan |
|  |
|  |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

----------X

Invesco Group Services, Inc.

Plaintiff,

- v -

AST Fund Solutions, LLC

Defendant.

**INDEX NO.** 653581/2022

**MOTION DATE** 11/07/2022

**MOTION SEQ. NO.** 004

**DECISION + ORDER ON MOTION**

----------X

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 131, 137, 149

were read on this motion to/for DISMISS

Upon the foregoing documents, the motion to dismiss the complaint is denied.

Plaintiff Invesco Group Services, Inc. (Invesco) brings this action alleging that defendant AST Fund Solutions, LLC (AST) breached the the parties' contract and overcharged Invesco for the certain services. AST now moves to dismiss Invesco's complaint pursuant to CPLR 3211(a)(1) and (7). Invesco opposes the motion based on the doctrines of account stated and voluntary payment.

## BACKGROUND[1]

In 2019, Invesco's parent company acquired OFI Global Asset Management, Inc. (OFI). As part of the acquisition process, OFI entered into an Engagement Letter with AST on February 7, 2019 (the Agreement) for AST to provide proxy solicitation services (the Project) (NYSCEF # 2 – Complaint ¶¶ 1, 14). Pursuant to the Agreement, the parties agreed on a fee schedule setting out estimated costs associated with the Project (the Fee Schedule) (*id.*, ¶¶ 2, 9, 15, 16). The Fee Schedule also set out different categorizations for the telephone campaign undertaken by AST as part the Project, as well as corresponding costs.

After three months of collecting proxies for the shareholder vote on the Acquisition, AST provided OFI with four invoices for its work (NYSCEF # 2, ¶ 24).

[1] Unless otherwise noted, the following facts are based on the allegations in the Complaint, which for the purpose of this motion must be accepted as true, and the documentary evidence submitted by the parties.

Although the original invoices did not provide the details necessary to ascertain overcharges, OFI promptly paid them in full (NYSCEF # 2, ¶¶ 23-24).

OFI merged with Invesco in December 2019 (*id.*, ¶ 9). Invesco decided to do a "deeper dive" in its review and investigation of the invoices (*id.*, ¶ 25). Invesco now alleges that AST misled OFI and Invesco into overpaying for its services. Invesco alleges that AST applied charges for unsuccessful calls; mischaracterized the type of calls; and failed to charge calls in accordance to the fee schedule.

Following Invesco's review and investigation, Invesco approached AST in December 2020 to seek repayment of the overcharges (*id.*, ¶ 33, NYSCEF # 81). AST refused to reimburse Invesco for any of these purported overcharges (NYSCEF # 2, ¶¶ 32-34). Eventually, after over a year, Invesco commenced this action seeking AST's repayment of at least $25 million (NYSCEF # 2, ¶¶ 35-41). AST now moves to dismiss the Complaint, arguing that (1) AST has established an account stated and Invesco may not reopen the account, and (2) the doctrine of voluntary payment bars the Invesco's claim.

## DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corat*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff . . . can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]).

"In those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference" (*Morgenthow & Latham v Bank of NY. Co., Inc.*, 305 AD2d 74, 78 [1st Dept 2003]). And under CPLR 3211(a)(1), a party may move to dismiss a cause of action when "a defense is founded upon documentary evidence." However, dismissal based on documentary evidence under CPLR 3211(a)(1) may result "only where 'it has been shown that a material fact as claimed by the pleader ... is not a fact at all and ... no significant dispute exists regarding it'" (*Acquista v NY Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001] [internal citation and quotation omitted]).

### 1. Defense of Account Stated

AST argues that OFI's full and prompt payment of each of its four invoices without raising any objections for a period of eighteen months establishes an "account stated" and bars Invesco's claim (NYSCEF # 64 at 11). Next, AST also

contends that OFI's approval and prompt payment of the invoices bar Invesco's claim (*id.* at 13). In opposition, Invesco argues that AST did not provide the necessary details in its invoices in order for Invesco to determine the areas in which overcharges may have occured or the extent of the overcharges (NYSCEF # 2, ¶ 23). Additionally, Invesco maintains that AST's account stated defense is inapplicable because AST falsified its invoices to OFI (NYSCEF # 137 at 7-13).

"An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due" (*Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431 [4th Dept 1979]). Such "an agreement may be implied where a [debtor] retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account." (*Am. Express Centurion Bank v Cutler*, 81 AD3d 761, 762 [2d Dept 2011]). This doctrine can be asserted both affirmatively as a cause of action, or as a defense against reopening of a paid account (*see An-Jung v Rower LLC*, 173 AD3d 488 [1st Dept 2019]; *Atsco Footwear Holdings, LLC v KBG, LLC*, 2020 WL 1852639, at *1 [Sup Ct, NY County, Apr. 9, 2020], *affd*, 193 AD3d 493 [1st Dept 2021]).

Under the account stated doctrine, a party who receives and retains a bill without objection for a reasonable period of time will be "bound by them as accounts stated unless fraud, mistake or other equitable considerations [are] shown" (*Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745, 746 [1st Dept 1983]), citing *Fink, Weinberger, Fredman, Berman & Lowell v Petrides*, 80 AD2d 781 [1st Dept 1981]). What constitutes a "reasonable time depends on the circumstances of the case.

Here, AST contends that the time period of eighteen months that the Invesco held on to the invoices without objection sufficiently establishes an account stated. AST claims that the First Department has "repeatedly found an account stated" for invoices held for less time that eighteen months (NYSCEF # 64 – MOL at 12 citing to *WebMD LLC v Aid in Recovery, LLC*, 166 AD3d 447, 448 [1st Dept 2018] [account stated established where invoices without objection were held for more than five months]; *Musical Elecs., Ltd v U.S. Elecs., Inc.*, 74 AD3d 691, 692 [1st Dept 2010] [account stated established for note for over 15 months without objection]; *Spectra Audio Rsch, Inc. v 60-86 Madison Ave. Dist. Mgmt. Ass'n, Inc.*, 267 AD2d 23, 24 [1st Dept 1999] [same])

Conversely, Invesco responds that this defense cannot survive as there are misrepresentation and falsification involved. According to Invesco, OFI did not overpay because of its own mistake but due to the purposeful misrepresentations of AST (NYSCEF # 137, at 12).

Generally, when a party retains a bill without objecting within a reasonable period, they are bound to it by the account stated doctrine. However, this defense

only applies "unless fraud, mistake or other equitable considerations were shown" (*Rosenman*, 93 AD2d at 746) or when "no equitable considerations to the contrary [are] present" (*Marino v Watkins*, 112 AD2d 511, 513 [3d Dept 1985]). Thus, allegations of fraud or mispresentations can preclude this defense. In other words, an account stated claim "can always be opened upon proof of mistake or fraud." (*In re Rockefeller Ctr. Props.*, 241 BR 804, 822-26 [Bankr SD NY 1999], *affd*, 266 BR 52 [SD NY 2001], affd, 46 F Appx 40 [2d Cir 2002]).

Here, as alleged, Invesco could not have known whether the invoices accurately reflected the work done without conducting its own inquiry. Indeed, AST's invoices only list the most expensive category of without supplying any other details. The invoices do not categorize the type of calls, and whether they were made with a life operator. Although AST suggests that the invoices were never intended to categorize the calls, it nevertheless acknowledges that the highest rate was charged (NYSCEF # 149 at 7). The absence of any indication as to whether the charged calls were with or without a live operator supports an inference that there was an attempt to conceal or misrepresent the work done (*LLT International, Inc. v MCI Telecommunications Corp.*, 69 F Supp 2d at 516-517 [SD NY 1999] [agreeing with finding that improper billing practices concealed by the consultant precluded the application of account stated]; *see also Preferred Health Care Ltd. v Empire Blue Cross & Blue Shield*, No. 94 Civ 9326, 1997 WL 160489 at *5 [SD NY April 7, 1997] [defendant's allegations that plaintiff was overcharging and setting forth expenses which defendant had not incurred and which defendant had no way of discovering until it reviewed plaintiff's records were sufficient allegations that "fraud, mistake or other equitable considerations exist."]). Thus, absent Invesco's deep dive review and investigation of the invoices, Invesco would not have been able to determine whether the charges for these line items were accurate (NYSCEF # 2, ¶¶ 25-30).

AST's motion to dismiss the complaint based on the account stated defense is denied.

**2. Defense of Voluntary Payment**

AST next seeks to dismiss the Complaint under the voluntary payment doctrine, arguing that Invesco, as a sophisticated party, is barred from recovery by its payment and lack of diligence. Specifically, AST argues that OFI had full knowledge of the facts, and the alleged overcharges were apparent on the face of AST invoices. As AST puts it, OFI's failure to exercise any diligence or make any inquiry before paying AST's invoices for the Project bars Invesco's claim (NYSCEF # 64 at 14-17). In opposition, Invesco argues that there was lack of full disclosure by AST, and therefore OFI's payments were made without full knowledge of the facts and under circumstances where the invoices did not accurately reflect the services rendered.

"[T]he voluntary payment doctrine ... bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dubrow v Herman & Beinin*, 171 AD3d 672, 673 [1st Dept 2019], citing *Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 525 [2003]). Although the doctrine can be overcome by timely protest, the onus is on a party that receives what it perceives as an improper demand for money to "take its position at the time of the demand, and litigate the issue before, rather than after, payment is made" (*DRMAK Realty LLC v Progressive Credit Union*, 133 AD3d 401, 403 [1st Dept 2015], citing *Gimbel Bros. v Brook Shopping Ctrs.*, 118 AD2d 532, 535 [2d Dept 1986]).

The above notwithstanding, New York courts have rejected application of the voluntary payment doctrine in cases where a plaintiff made payment without full knowledge of the facts. For example, in *Dubrow*, the court rejected defendant attorney's voluntary payment doctrine because "defendant failed to establish that plaintiff had full knowledge of the relevant facts, such as the number of hours spent by defendants in connection with their representation of him" (157 AD3d at 621). Similarly, in *BLT Steak LLC v Liberty Power Corp., LLC*, the First Department rejected application of the voluntary payment doctrine because there was no evidence that "plaintiffs made the payments with full knowledge of the facts that would have enabled them to conclude that they were being overcharged by defendants due to a hidden margin fee" (172 AD3d 458 [1st Dept 2019]; *see also Rite Aid of New York Inc. v Chalfonte Realty Corat*, 105 AD3d 470, 470 [1st Dept 2013]; *Kirby McInerney & Squire, LLP v Hall Charne Burce & Olson, S.C.*, 15 AD3d 233 [1st Dept 2005] [voluntary payment doctrine did not apply where "the overpayments were clearly made to defendants based on a mistake of fact, namely, the amount of fees actually owed by plaintiff to defendants"]).

Such is the case here for largely the same reasons supporting denial of AST's motion to dismiss premised on the account stated doctrine. Specifically, as previously explained, Invesco alleges that AST misrepresented the services it was offering based on the agreed upon rates in the Fee Schedule (NYSCEF # 2, ¶¶ 26-31). Invesco further maintains that AST did not disclose that it misrepresented its services rendered in its bills (*id.*, ¶¶ 5-7). That AST purportedly did not charge for a majority of the unsuccessful calls was done to avoid raising Invesco's suspicion (*id.*, ¶¶ 27, 28).

AST's reliance on *Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 525 [2003]) and *Westfall v Chase Lincoln First Bank*, 258 AD2d 299 (1st Dept 1999) to counter Invesco's argument is unavailing. In *Dillon*, the invoices were clear that late payment of the invoices is subject to a late fee however it was characterized as service charge or late fee (100 NY2d at 525). Similarly, in *Westfall*, the court applied voluntary payment doctrine because there was no mistake of fact since plaintiff voluntarily paid the additional fee without protest or inquiry (258 AD2d at 299, 300). Conversely, in the case at bar, Invesco's allegations support a

reasonable inference that it had no way to know from the invoices whether the charges were falsely categorized.

Accordingly, because Invesco's allegations sufficiently plead that Invesco made payments without full knowledge about the overcharges, AST's motion to dismiss premised on the voluntary payment doctrine is denied.[2]

## CONCLUSION

Based on the foregoing, it is

ORDERED that defendant AST Fund Solutions, LLC's motion to dismiss the complaint is denied; and it is further

ORDERED that defendant AST Fund Solutions, LLC serve an Answer to the Complaint within 20 days of the entry of this order; and it is further

This constitutes the Decision and Order of the court.

7/24/2023
DATE

MARGARET A. CHAN, J.S.C.

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

[2] AST's documentary evidence also does not conclusively support a different conclusion. The documentary evidence submitted, including the press release, defendant's invoices, OFI's payments and emails between the parties do not flatly contradict the allegations, as is required under CPLR 3211(a)(1). Nor do they show, in any event, that plaintiff made payment with full knowledge about the overcharges as discussed above (*Morgenthow*, 305 AD2d at 78 [stating that to prevail a CPLR 3211(a)(1) motion to dismiss, the legal conclusions and factual allegations in the complaint must be "flatly contradicted by documentary evidence" such that "they are not presumed to be true or accorded every favorable inference"]).