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FILED AND ENTERED  
ON JULY 2011  
WESTCHESTER  
COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
COMMERCIAL DIVISION**

**Present: HON. ALAN D. SCHEINKMAN,  
Justice.**

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NSC ABATEMENT SERVICES, INC.,

Plaintiff,

Index No. 5215/10

-against-

Motion Seq. #'s 001, 002  
Motion Date: May 6, 2011

SNS ENERGY DISTRIBUTION CORP., BAIN  
MECHANICAL SERVICES, INC., and  
STEWART N. SCHWARTZ,

**DECISION, ORDER  
AND PARTIAL JUDGMENT**

Defendants.

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Scheinkman, J:

Defendants Stuart Schwartz (“Schwartz”)<sup>1</sup> and Bain Mechanical Services, Inc. (“Bain”) move for summary judgment dismissing the Complaint as against them (Motion Seq. #1). Plaintiff NSC Abatement Services Inc. (“Plaintiff” or “NSC”) does not oppose the motion as asserted by Bain but opposes the motion as asserted by Schwartz.

Plaintiff moves for an order granting it summary judgment (Motion Seq. #2) on the causes of action asserted in its Complaint and dismissing the counterclaim asserted by SNS Energy Distribution Corp. (“SNS”) for damages including lost profits based on Plaintiff’s alleged breach in connection with its performance on a project located at 341 10<sup>th</sup> Street, Brooklyn, New York (the “341 10<sup>th</sup> Street Project”).

**FACTUAL AND PROCEDURAL BACKGROUND**

This action was initiated by Plaintiff’s filing of its Summons and Complaint on February 12, 2010. It arises out of asbestos abatement work Plaintiff allegedly performed on behalf of SNS on five separate projects (1) a project located at 2040 Bruckner Blvd., Bronx, N.Y. (the “Bruckner Project”); (2) the 341 10<sup>th</sup> Street Project; (3) a project located at 351 Maine

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<sup>1</sup>Based on the papers submitted, it appears that the correct spelling of Defendant’s first name is Stuart.

Avenue, Rockville Centre, N.Y. (the “Rockville Centre Project”); (4) a project located at 675 Lincoln Avenue, Brooklyn, N.Y. (the “Lincoln Avenue Project”); and (5) a project located at Remedeer Houses, Brooklyn, N.Y. (the “Remedeer Project”).

Plaintiff claims that it entered into subcontracts for the work it performed on these projects and that it completed its work: (1) in connection with the Bruckner Project on or about July 31, 2006 and is owed the sum of \$24,600 together with interest from 7/31/06; (2) in connection with the 341 10<sup>th</sup> Avenue Project on or about August 14, 2006 and is owed \$47,260 together with interest from 8/14/06; (3) in connection with the Rockville Centre Project on or about March 20, 2008 and is owed the sum of \$17,260.00 together with interest from 3/20/08; (4) in connection with the Lincoln Avenue Project on or about April 14, 2008 and is owed the sum of \$17,600.00 together with interest from 4/14/08; and (5) in connection with the Remedeer Project on or about March 20, 2008 and is owed \$6100.00 together with interest from 3/20/08 (Affirmation of Kevin J. Hotter, Esq. dated April 4, 2011 [“Hotter Aff.”], Ex. A [“Verified Complaint”] at ¶¶ 6-40).

Plaintiff asserts breach of contract causes of action with regard to each project separately (the First through Fifth Causes of Action), a cause of action for *quantum meruit* for the outstanding balance alleged to be due on all five projects (the Sixth Cause of Action), a cause of action for unjust enrichment for the outstanding balance due on these projects (the Seventh Cause of Action) and an Eighth Cause of Action seeking to have Schwartz held personally liable on these contracts based on his entering into the contracts on behalf of a dissolved corporation. The allegations relevant to this cause of action are that from SNS’s incorporation in 1994 until June 30, 2004, SNS was a New York corporation with its place of business located in Amityville, New York and that on June 30, 2004, the New York State Department of State dissolved SNS by proclamation for failure to pay franchise taxes (Verified Complaint at ¶¶ 3,4). Plaintiff alleges that as SNS’s Chief Operating Officer, Schwartz knew or should have known that SNS had been dissolved at the time it entered into the contracts with Plaintiff (2006-2008) and that by entering into the contracts on behalf of SNS, Schwartz represented that SNS was an existing corporation (*id.* at ¶¶ 56-59). As such, Plaintiff contends that SNS should be held personally liable on these contracts (*id.* at ¶ 60).

On or about April 20, 2010, Defendants served a Verified Answer and Counterclaim which denied the material allegations of the Complaint, asserted nine affirmative defenses, and interposed a counterclaim based on Plaintiff’s alleged breach in connection with the 341 10<sup>th</sup> Street Project in failing to timely and properly perform all of its obligations. Defendants assert that Plaintiff’s breach resulted in (1) the imposition of 19 violations issued by the NYS Department of Environmental Protection and/or New York City’s Environmental Control Board (the “violations”) as well as a criminal investigation damaging SNS in the amount of \$150,000 (Hotter Aff., Ex. B [“Verified Answer”] at ¶¶ 38-41), and (2) the loss of a business relationship with its customer Stellar Management causing SNS to lose profits in the amount of \$2 million (Verified Answer at ¶ 42).

The Court held a Preliminary Conference in this matter and signed a Preliminary Conference Order on June 25, 2010 calling for the completion of discovery on February 3, 2011. At a conference held on February 4, 2011, the Court granted a one month extension to the discovery schedule and adjourned the Trial Readiness Conference to March 2, 2011. At the Trial Readiness Conference on March 2, 2011, while counsel stated that there were still a

few remaining discovery items outstanding, the Court determined that to the extent discovery remained it had been waived, and, therefore, the Court certified the case as trial ready and signed a Trial Readiness Order which set a schedule for summary judgment motions. These motions ensued.

**A. Defendant Schwartz's Contentions in Support of His Motion and in Opposition to Plaintiff's Motion**

In support of his motion, Schwartz submits an affidavit wherein he avers that with regard to the work performed by NSC on the five projects, SNS hired Plaintiff and the invoices concerning such were only directed to SNS because "it was the only corporation (or individual) which hired the services of the Plaintiff and agreed to pay for the services rendered" and therefore, Bain is improperly sued herein (Affidavit of Stuart Schwartz, sworn to March 28, 2011 ["Schwartz Aff.,"] at ¶ 5). With regard to Schwartz's liability for the services provided by NSC, Schwartz avers:

The basis of naming your deponent as an individual Defendant is based on the dissolution of SNS Energy Distribution Corp. prior to engaging the services of the Plaintiff. At the time, [Schwartz] acted on behalf of the corporate Defendant, [he] had no personal knowledge that it was dissolved by the State of New York. At the present time, [Schwartz is] in the process of reinstating said corporation, ab initio, and all tax returns and franchise fees have been paid to the State of New York, NYS Department of Taxation & Finance. Documentation of this fact is annexed ... as Exhibit "D" and [Schwartz is] informed that the State will ... reinstate SNS ... with its original tax identification number 11-3353611. Thus, the reinstatement of the corporation is purely administrative and no prejudice will result to the Plaintiff (Schwartz Aff. at ¶ 6).

In his affidavit in further support of his motion and in opposition to Plaintiff's motion, Schwartz avers that on April 11, 2011, he was successful in having SNS reinstated by the State of New York *nunc pro tunc* and as such, it is "considered 'active' as a New York domestic business corporation continuously since August 17, 1994" (Affidavit of Stuart Schwartz in Further Support of Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, sworn to April 25, 2011 ["Schwartz Reply Aff.,"]). In further support of his position, Schwartz attaches as Exhibit G to this affidavit a document which he says he obtained from the NYS Department of State Division of Corporation's website on April 12, 2011 which shows SNS's status as an active corporation.

In opposition to Plaintiff's motion for summary judgment, Schwartz avers that Plaintiff performed no work on the Lincoln Avenue and Remedeer Projects, and, therefore, no money is due on those projects. With regard to the 341 10<sup>th</sup> Street Project, Schwartz contends that Plaintiff used illegal workers which caused the issuance of the violations. Furthermore, relying on Defendant's Supplemental Answers to Plaintiff's First Set of Interrogatories, annexed as Ex. E to his affidavit, Schwartz avers that it lost Stellar Management as a customer (Schwartz Aff. at ¶ 7). According to Schwartz, "[t]he issues raised in plaintiff's motion for summary judgment raise factual issues which are presented in the defendants'

motion for summary judgment regarding the reasons why payments were not made on the individual projects. These reasons serve as material issues of facts to deny the plaintiff's motion for summary judgment requesting payment on these projects" (Schwartz Reply Aff. at ¶ 4).

Defendants' opposition is silent as to the Bruckner and Rockville Centre Projects. Further, based on Defendants' answers to Plaintiff's interrogatories, SNS is conceding that Plaintiff fully performed on the Bruckner and Rockville Centre Projects and that it is not claiming that any credit is due for any corrective work that had to be performed (Schwartz Aff., Ex. E at Answers 6 [a], [c], 7 [a], [c] 8 [a], [c] and 9[a], [c]).

Accordingly, as set forth below, the Court shall grant Plaintiff summary judgment as to the Bruckner and Rockville Centre Projects – *i.e.*, the First and Third Causes of Action.

**B. *Plaintiff's Contentions in Support of its Motion and in Opposition to Defendants' Motion***

In support of its motion, Plaintiff submits a Commercial Division Rule 19-a Statement of Material Facts, an Affidavit from Pablo Berhau, Plaintiff's President, an affirmation from its counsel, Kevin J. Hotter, Esq. and a Memorandum of Law. And in opposition to Defendants' motion, Plaintiff submits an affirmation in opposition from its counsel and an affidavit from Pablo Berhau.

In his moving affidavit, Mr. Berhau attaches what he contends were the contracts for the Bruckner and Rockville Centre projects but which, on their face, appear to be only unsigned proposals provided by Plaintiff to Defendant (Affidavit of Pablo Berhau, sworn to April 4, 3011 ["Berhau Aff."], Ex. C [Bruckner Project], Ex. I [Rockville Centre Project], Ex. K [Lincoln Ave. Project], Ex. L [Remedeer Houses Project], Ex. O [341 10<sup>th</sup> Street Project]). In any event, whether they are contracts or unsigned proposals, Berhau avers that the amounts reflected in the proposals were the amounts that Plaintiff and SNS agreed NSC would be paid for the work performed. Berhau proceeds to itemize, project by project, the agreed price, Plaintiff's full performance, and SNS's failure to voice objections or identify any deficiencies. Berhau also avers that SNS never contested or objected to any of the billings NSC submitted to SNS from 2006 to 2010, which he attaches as Exhibits E-G, J, L, N and P. He avers that NSC is owed in connection with the Bruckner Project, the principal sum of \$24,600 and that NSC is owed in connection with the Rockville Centre Project, the principal sum of \$17,260.

In support of the work performed and the parties' agreement as to the Lincoln Avenue and the Remedeer Projects, Berhau attaches the proposals on each of the projects which he contends reflect the agreed-upon prices for the work performed. He avers that the work was performed, and he attaches the invoices and demand letters provided to SNS with regard to the work Plaintiff performed on these projects. He asserts that (1) SNS did not timely contest or object to any of NSC's billings for the services performed, and (2) SNS has failed to pay for the amounts due for the work performed on those projects (Berhau Aff. at ¶¶ 17-32, and Exs. K, F, G, H, M, and N).

In response to Defendants' counterclaim with regard to the 341 10<sup>th</sup> Street Project, Berhau avers that the agreed price for the work to be performed was \$47,260, that

NSC completed its work on or about August 14, 2006 and provided an invoice to SNS on or about that date to which SNS never objected, and that NSC has not been paid to date for the work performed (*id.* at ¶¶ 33-37). Further, that NSC has never been provided any documentation substantiating (1) SNS's claim that it has suffered \$150,000 in damages as a result of the 19 violations that were issued to NSC and to the owner of the Project – Stellar Management, and (2) SNS's claim of \$2 million in lost profits. Berhau further avers, on information and belief, that “all violations assessed against Stellar during the 341 10<sup>th</sup> Street Project have been resolved”; however, given the fact that this assertion is based on information and belief and Berhau fails to provide the basis for his belief, this averment is without evidentiary support (*id.* at ¶ 34).

Berhau contends that SNS must nevertheless have been satisfied with NSC's performance on the 341 10<sup>th</sup> Street project since that project occurred in 2006, yet SNS hired Plaintiff in 2008 to perform the Rockville Centre, Lincoln Avenue and Remedeer Houses Projects (*id.* at ¶¶ 44-45).

In support of the assertion of Schwartz's personal liability, Berhau avers that “[a]t the time these contracts were entered into between NSC and SNS, defendant Stuart Schwartz was the President of SNS ... [and] [a]ccording to a certificate of dissolution dated March 2, 2011 from the State of New York, Department of State, SNS was dissolved by proclamation on June 30, 2004 pursuant to the Tax Law and such dissolution has not been annulled” (*id.* at ¶ 50).

In his affirmation, Mr. Hotter attaches the pleadings as well as the proposals, invoices, and demand letters relied upon by Berhau as well as a Certification by Daniel Shapiro, First Deputy Secretary of State that provides that based on the records of the New York State Department of State, SNS was incorporated on August 17, 1994 and was dissolved by proclamation of the Secretary of State published on June 30, 2004 pursuant to the Tax Law and that as of the date of his certification on March 2, 2011, that dissolution had not been annulled (Affirmation of Kevin J. Hotter, Esq. dated April 4, 2011, Ex. Q).

The arguments made in Plaintiff's opposition papers are similar to the ones set forth in its moving papers, *i.e.*, (1) Defendants' failure to object to invoices means that Plaintiff has established an account stated, (2) the fact that violations were issued does not establish NSC's breach of contract on the 341 10<sup>th</sup> Street Project, and (3) Schwartz's personal liability based on his entering into a contract on behalf of a dissolved corporation. In counsel's affirmation in opposition, Plaintiff makes the additional points that Defendant's motion should be denied because Defendant's moving papers fail to include a Rule 19-a Statement and a Memorandum of Law (Affirmation in Opposition of Kevin J. Hotter, Esq. dated April 21, 2011 [“Hotter Opp. Aff.”] at ¶ 7). And while not opposing Bain's motion, counsel makes clear that it is opposing an award of sanctions for naming Bain because counsel did offer to discontinue the action against Bain to facilitate settlement discussions but never heard back from Defendants' counsel. And to support counsel's good faith belief for suing Bain, counsel relies on Berhau's affidavit wherein he avers to the confusion over which one of Schwartz's companies had actually hired Plaintiff.

Berhau's affidavit in opposition largely rehashes the points he makes in his moving affidavit. In opposition to Defendants' motion for an award of sanctions for suing Bain,

Berhau avers that at some point during Plaintiff's performance of the contracts, he was "told by Stuart Schwartz that he was both an officer of Bain, and the chief executive officer of SNS and PEG" and he "was unsure as to which one of Stuart Schwartz's three companies were going to pay NSC ... [and] began to question which company NSC was really working for and whether SNS, Bain and PEG were alter egos of one another" (Affidavit of Pablo Berhau in Opposition, sworn to April 21, 2011 at ¶ 13). He also asserts that NSC was paid by the three different companies for the work performed on the contracts at issue in this litigation and he attaches as Ex. B to his affidavit, copies of checks signed by Bain and PEG made payable to NSC.

As its legal argument, Plaintiff contends that it has established *prima facie*, the contracts entered into between Plaintiff and SNS and its full and satisfactory performance under those contracts. Plaintiff further points out that with regard to the Bruckner and Rockville Centre Projects, SNS has not claimed that NSC failed to perform or failed to satisfactorily perform. With regard to the Lincoln Avenue, Remedeer Houses and 341 10<sup>th</sup> Street Projects, Plaintiff argues that it has established that it invoiced SNS for the work performed on these projects in 2006 and 2008 and that SNS never timely objected to those invoices. Accordingly, Plaintiff asserts that SNS' belated, conclusory and unsubstantiated interrogatory response that NSC failed to perform "all work" on the [Lincoln Avenue], Remedeer Houses and 341 10<sup>th</sup> Street projects is not supported by documentary evidence" (Pltf's Mem. of Law at 5). Plaintiff claims that SNS's receipt and retention of NSC's invoices without objecting to them within a reasonable time entitles NSC to a judgment on an account stated (*id.*).

Plaintiff argues that SNS's counterclaim for lost profits is without merit because to recover for lost profits, it must be demonstrated that the loss of profits was fairly within the contemplation of the parties to the contract at the time it was made and the damages must be capable of measurement with reasonable certainty. According to Plaintiff, "SNS has failed to meet the burden of proof established by the Court of Appeals for recovery of loss of profits" because (1) it has not provided evidence showing a long-standing business relationship with Stellar and that the business relationship was lost due to the violations issued against the Project rather than for some other reason; (2) it has failed to provide evidence that it was within the contemplation of the parties that NSC's entry into a contract for \$47,000 would render it liable for \$2 million in lost future profits; and (3) the lost profits are not capable of measurement with reasonable certainty; instead, they are highly speculative since the award of future contracts is "subject to a multitude of variables" (Pltf's Mem. of Law at 7). Further that the remainder of Defendant's counterclaim must be dismissed since "SNS has failed to provide any documentation to substantiate its claims that it has suffered damages in excess of \$150,000 by having to pay costs, expenses, fines and attorneys' fees due to these violations" (*id.* at 8).

Relying on the evidence of the dissolution of SNS by proclamation in 2004 which had not yet been annulled, Plaintiff argues that since Schwartz "acted on behalf of SNS when it was dissolved, he is personally liable for the obligations that he incurred on behalf of SNS" (*id.* at 9).

### **C. Plaintiff's Reply in Further Support of Its Motion**

In further support of its motion, Plaintiff submits an a Reply Affirmation from its counsel, Kevin J. Hotter, Esq. In his affirmation, Mr. Hotter argues that Defendants have failed

to provide evidence sufficient to raise a triable issue of fact because not only do Defendants fail to submit a response to Plaintiff's Rule 19-A Statement of Material Facts rendering such facts to be deemed admitted pursuant to 22 NYCRR 202.70 Rule 19-a ( c), they only provide a conclusory affidavit that is unsupported by documentary evidence (Reply Affirmation of Kevin H. Hotter, Esq. dated April 28, 2011 ["Hotter Reply Aff." at ¶¶ 3-4). The remainder of Hotter's Affirmation is a rehash of the arguments Plaintiff made in its moving papers concerning the lack of evidence to sustain SNS's counterclaim for lost profits and its claim for \$150,000 in damages. In further support of Plaintiff's claim against Schwartz individually, Plaintiff cites to legal authority holding such officers individually liable on contracts entered into on behalf of dissolved corporations even when the corporation is later reinstated (Hotter Reply Aff. at ¶ 11).

### **THE LEGAL STANDARDS ON A MOTION FOR SUMMARY JUDGMENT**

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Med. Ctr.*, 64 NY2d 851, 643-644 [1985]; *Cendant Car Rental Group v Liberty Mutual Ins. Co.*, 48 AD3d 397, 398 [2d Dept 2008]; *Martinez v 123-16 Liberty Avenue Realty Corp.*, 47 AD3d 901 [2d Dept 2008]; *St. Luke's-Roosevelt Hosp. v American Tr. Ins. Co.*, 274 AD2d 511 [2d Dept 2000]; *Greenberg v Manlon Realty, Inc.*, 43 AD2d 968 [2d Dept 1974]).

Once the moving party has made a *prima facie* showing of entitlement of summary judgment, the burden of production shifts to the opponent, who must go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Tillem v Cablevision Sys. Corp.*, 38 AD3d 878 [2d Dept 1007]). A party opposing summary judgment may not rest on mere conclusions or unsupported assertions (*Sun Yau Ko v Lincoln Sav. Bank*, 99 AD 2d 943 [1st Dept 1984], *aff'd* 62 NY2d 938 [1984]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Pierson v Good Samaritan Hosp.*, 208 AD2d 513, 514 [2d Dept 1994]).

The court's main function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The role of the Court is to determine if *bona fide* issues of fact exist, and not to resolve issues of credibility. As the Court stated in *Knepka v Tallman* (278 AD2d 811 [4th Dept 2000]):

Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint ... Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present credibility issues for trial .... (*id.* at 811; *see also Yaziciyan v Blancato*, 267 AD2d 152 [1st Dept 1999] ["The deponent's arguably inconsistent testimony elsewhere in his deposition merely

presents a credibility issue properly left for the trier of fact”).

On the other hand, a party cannot successfully oppose summary judgment by offering an affidavit which reverses his or her prior deposition testimony for the purpose of avoiding the consequences of that testimony (*Colucci v AFC Constr.*, 54 AD3d 798 [2d Dept 2008]; *Israel v Fairharbor Owners, Inc.*, 20 AD3d 392 [2d Dept 2005]; *Smith v Taylor*, 279 AD2d 566 [2d Dept 2001], *lv denied* 96 NY2d 711 [2001]; *Bloom v La Femme Fatale of Smithtown, Inc.*, 273 AD2d 187 [2d Dept 2000]). But, this rule does not apply where the affidavit is not directly contradictory of the prior deposition testimony (see *O’Leary v Saugerties Cent. School Dist.*, 277 AD2d 662 [3d Dept 2000], amplifies the prior testimony (*Castro v New York City Tr. Auth.*, 52 AD3d 213 [1st Dept 2008], or provides a potentially meritorious explanation for any consistency (see *Mickelson v Babcock*, 190 AD2d 1037 [4th Dept 1993] [plaintiff claimed that she suffered from amnesia at time of deposition but had recovered memory by time of affidavit]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8 [1960]; *Sillman v Twentieth Century Fox Film Corp.*, *supra*). In reviewing a motion for summary judgment, the Court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is “even arguably any doubt as to the existence of a triable issue” (*Baker v Briarcliff School Dist.*, 205 AD2d 652, 661-662 [2d Dept 1994]).

### **DEFENDANTS’ FAILURE TO FOLLOW COMMERCIAL DIVISION RULE 19-a**

The Court will first address, the effect, if any, on Defendants’ failure to (1) serve/file a Rule 19-a statement in support of their motion, and (2) serve/file a response to Plaintiff’s Commercial Division Rule 19-a Statement.

Commercial Division Rule 19-a provides that in connection with any motion for summary judgment, the Court may direct that the moving party attach “a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried” (22 NYCRR § 202.70, Rule 19-a[a]). Although this Court’s Practice Guide to the Commercial Division requires that a Rule 19-a statement accompany any motion for summary judgment, it also provides the effect of the failure to provide this statement or a response thereto shall be left to the Court’s discretion. In prior Decisions, this Court has overlooked this defect in a moving party’s papers and will similarly do so here to the extent the affidavits submitted by Defendants contain facts supporting Defendants’ affirmative motion.

With regard to Defendants’ failure to serve/file a response to Plaintiff’s Rule 19-a Statement, the Rule provides that if such a statement is submitted, the party opposing the motion is required to submit a document responding to each numbered paragraph and subdivision c of Rule 19-a provides that “[e]ach numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered

paragraph in the statement required to be served by the opposing party” (22 NYCRR § 202.70, Rule 19-a[c]).

Despite the commanding language of Rule 19-a( c), it is evident that the courts have discretion as to how strictly to enforce the Rule. The Appellate Division, First Department has stated:

We reject defendants’ argument that plaintiff’s failure to provide a fully supported counter-statement of disputed facts in opposition to defendants’ motion for summary judgment, in accordance with Rule 19-a of the Commercial Division of the Supreme Court (22 NYCRR 202.70), required the court to deem defendant’s statement of material facts admitted. While the rule gives a motion court the discretion to deem facts admitted, the court is not required to do so. There was sufficient evidence in the record to raise triable issues of fact and the court was not compelled to grant summary judgment solely on the basis of blind adherence to the procedure set forth in Rule 19-a (*Abreu v Barking and Assoc. Realty, Inc.*, 69 AD3d 420, 421 [1st Dept 2010]).

Here, Plaintiff’s Rule 19-a statement rests largely on the averments made by Berhau in his affidavit concerning the agreed price for the work to be performed by Plaintiff, Plaintiff’s due performance, Plaintiff’s issuance of invoices to Defendant which were not timely contested and Defendants’ default in failing to pay for the work performed. These factual contentions have been largely rebutted by the affidavit<sup>2</sup> submitted by SNS’s President, Schwartz, wherein he states that no work was performed on the Lincoln Avenue and Remedeer Houses Projects and that NSC’s use of illegal workers on the 341 10th Street Project resulted in numerous violation issued and the loss of its customer Stellar Management (Schwartz Aff. at ¶ 7).

The Court notes that summary judgment motions are often supported by voluminous, if not dense, submissions of affidavits and supporting documents, such as contracts, invoices, correspondence, and other materials. The evident purpose of Rule 19-a (which was based on a federal rule counterpart) is to make it easier for the Court to identify what facts are contested and what facts are not. The absence of a Rule 19-a statement thus adds to the burdens of the Court and delays the disposition of the motion.

In this case, the motions for summary judgment are not particularly complex and, while the submission of Rule 19-a statements by Defendants would have been helpful, their absence has not materially impacted the Court’s review of the submitted papers. Accordingly, the Court shall exercise its discretion and excuse Defendants’ for their failure in submitting either a Rule 19-a Statement or a Response to Plaintiff’s Rule 19-a statement, though the Court will take Defendants’ failure to comply with Rule 19-a into account in apportioning the costs of these motions. Defendants further are strongly advised to follow the Commercial

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<sup>2</sup>The affidavit is further buttressed by Defendants’ Supplemental Responses to Plaintiff’s First Set of Interrogatories (Schwartz Aff., Ex. E)

Division Rules in all future submissions to the Court.

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

As noted previously, the only two defendants moving for summary judgment are Bain and Schwartz. Because Plaintiff has not opposed the branch of the motion which seeks the dismissal of the Verified Complaint as against Bain and has only opposed it to the extent Bain is seeking sanctions, the Court shall dismiss the Complaint as against Bain. However, given Schwartz's averments concerning the representations made to him as well as the fact that Bain paid Plaintiff for some of the work it performed on these contracts, the Court shall deny Bain's request for an award of sanctions. That said, because of Defendants' failure to submit a Rule 19-a statement the dismissal of the action as to Bain shall be without costs.

The crux of Schwartz's motion is that he was ignorant of the dissolution of SNS at the time he entered into the agreements on behalf of SNS, in any event, SNS has been restored *nunc pro tunc* as an active corporation since its date of incorporation in 1994 – in essence – no harm no foul. Plaintiff's opposition rests largely on lower court decisions, the most recent of which is from 1999, standing for the proposition that an individual defendant may be held personally liable when he enters into contracts on behalf of corporations after the corporations were dissolved even if those corporations are later reinstated.<sup>3</sup> It is Plaintiff's position (as alleged in its Verified Complaint and in its opposition papers) that Schwartz as the President of SNS knew (or should have known) that the SNS had been dissolved at the time it entered into the contracts and that by entering into such contracts on behalf of SNS when it was dissolved, misrepresented that SNS was a duly-existing corporation.

Turning to the law on a corporate officer's individual liability on contracts entered into after the dissolution of a corporation by proclamation by New York State's Department of State for failure to pay franchise taxes, the Court finds the controlling precedent to be different from that which has been represented by Plaintiff. The Appellate Division, Second Department has held that

[a] dissolved corporation has no existence, either de jure or de facto, except for a limited de jure existence for the sole purpose of winding up its affairs .... Generally, a person who 'purport[s] to act on behalf of a corporation which [has] neither de jure not a de facto existence' is 'personally responsible for the obligations which he incur[s]' (*Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666, 667, 537 N.Y.S.2d 177).<sup>4</sup> Nonetheless, an individual who has 'no actual

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<sup>3</sup>In this regard, Plaintiff relies on *Poritsky v Wachtel*, 176 Misc 633 [Sup Ct Putnam County 1941]; *Annicet Assoc., Inc. v Rapid Access Consulting, Inc.*, 171 Misc 2d 861 [Sup Ct Rockland County 1997]; and *WorldCom, Inc. v Sandoval*, 182 Misc 2d 1021 [Sup Ct NY County 1999]).

<sup>4</sup>As noted by the Appellate Division, Second Department, the individual liability of the corporate officer in that case was based on the fact that "there had been no nullification of the certificate of dissolution and the individual continued to act on behalf of the corporate defendant without making any effort to repay the franchise taxes owed" (*Flushing Plaza*

knowledge of the dissolution,' and thus has not 'fraudulently represented the corporate status' of the dissolved entity, will not be held personally liable for the obligations undertaken by the entity while it was dissolved (*Bedford Hills Supply v. Hubert*, 251 A.D.2d 438, 674 N.Y.S.2d 404). Furthermore, as a general rule, when a dissolution is annulled, the entity's corporate status is reinstated *nunc pro tunc*, and contracts entered into during the period of dissolution are "retroactively validated" (*Flushing Plaza Assoc., #2 v Albert*, 31 AD3d 494, 495, 818 N.Y.S.2d 252, quoting *Lorisa Cap. Corp. v. Gallo*, *supra* at 113, 506 N.Y.S.2d 62) (*Lodato v Greyhawk N.A., LLC*, 39 AD3d 496, 497 [2d Dept 2007]).

In *Lodato*, the Second Department affirmed the decision of the Supreme Court which had declined to apply two of the cases cited by Plaintiff (see *Lodato v Greyhawk N.A., LLC*, 10 Misc 3d 418 [Sup Ct Kings County 2005], *affd* 39 AD3d 496 [2d Dept 2007]).

Given the controlling law, the Court finds that Schwartz has satisfied his *prima facie burden* by providing evidence that at the time he entered into the agreements with Plaintiff, he had no knowledge that SNS was dissolved and that once he learned of SNS's dissolution, he acted to have SNS reinstated *nunc pro tunc* by paying the requisite back taxes.<sup>5</sup>

Schwartz has also provided documentary evidence showing that SNS has been restored to active status through his attachment of a copy of a printout from the New York State Department of State website showing SNS as an entity formed on August 17, 1994 with a current entity status as "ACTIVE" (Schwartz Reply Aff., Ex. G).<sup>6</sup>

In opposition to Schwartz's *prima facie* showing, Plaintiff has provided evidence creating a triable issue of fact over whether Schwartz should be held individually liable based on his knowledge (or imputed knowledge given his role as SNS's president) of SNS's dissolution given that he was President of SNS at the time of the agreements in 2006-2008

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*Assoc. #2 v Alpert*, 31 AD3d 494 [2d Dept 2006]).

<sup>5</sup>The Court notes that in fact, it was not until April 2011 that SNS was reinstated and this action was commenced almost a year earlier in May 2010.

<sup>6</sup>Because Schwartz represented in his moving affidavit that he was in the "process" of having the corporation reinstated, the Court understands that the document could not have been obtained in time for submission in support of the motion. Nevertheless, the Court is cognizant that Plaintiff has not the opportunity to respond to the document as it was first offered on reply. Further, there is a question as to whether the document has been sufficiently authenticated (see *Tener Consulting Serv., LLC v FSA Main*, 2009 NY Slip Op 50857[U], 23 Misc 3d 1120[A] [Sup Ct Westchester County 2009] [Scheinkman, J.]). But, in the end, it does not matter much since, even if the document is considered and is authentic, there are issues of fact which require the denial of Schwartz's motion.

and that the dissolution had occurred a couple of years earlier in 2004.<sup>7</sup>

Accordingly, Schwartz's motion for summary judgment shall be denied as there are triable issues of fact concerning Schwartz's knowledge of SNS's dissolution and, accordingly, whether he fraudulently represented it as an existing corporation at the time SNS and Plaintiff entered into their agreements.

### **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

As noted previously, SNS has not opposed Plaintiff's motion with regard to the Bruckner and Rockville Centre Projects and, accordingly, the Court shall grant Plaintiff's motion to the extent it establishes SNS's liability on those projects and that the damages to be awarded are \$24,600, with interest from July 31, 2006, for the Bruckner Project and \$17,260, with interest from March 20, 2008, on the Rockville Centre Project. Plaintiff's papers make out a *prima facie* case for both liability and damages on these two projects and no opposition has been tendered. However, because Defendants have asserted a counterclaim which is not being dismissed herein (see below), which seeks damages in an amount greater than the damages Plaintiff seeks in connection with these two projects, the Court shall stay the entry of judgment pending the ultimate resolution of this action (see, e.g., *222 Bloomingdale Road Assoc. v NYNEX Prop. Co.*, 250 AD2d 668 [2d Dept 1998]; *Conant v Schnall*, 33 AD2d 326 [1st Dept 1970]).

In order to establish the right to summary judgment on a breach of contract cause of action, plaintiff must show, *prima facie*, (1) the existence of a contract, (2) due performance of the contract by plaintiff, (3) breach of the contract by defendant, and (4) damages resulting from the breach (*Coastal Aviation, Inc. v Commander Aircraft Co.*, 937 F Supp 1051, 1060 [SD NY 1996], *affd* 108 F3d 1369 [2d Cir 1997]). The Court finds that Plaintiff established, *prima facie*, all four elements for its breach of contract causes of action in connection with the Lincoln Ave., Remedeer and 341 10<sup>th</sup> Street Projects.

However, in opposition to Plaintiff's motion, Defendants have provided evidence (through Schwartz's affidavit and Defendants' Verified Answer) creating triable issues of fact regarding whether: (1) Plaintiff performed any work at all on the Lincoln Ave. and Remedeer Projects such that Defendants are in breach by failing to pay Plaintiff the sums it claims are due; and (2) Plaintiff breached its performance obligations in connection with the 341 10<sup>th</sup> Street Project based on Plaintiff's use of illegal aliens. According to Defendants' supplemental interrogatory responses, Plaintiff's acts caused 19 violations and fines to be imposed on the projects by New York City's Environmental Control Board (fines of \$28,000) and New York State's Department of Environmental Protection (\$800) (see Defs' Interrogatory Response 24, Schwartz Aff., Ex. E). In addition, Defendants contend that they had to pay Silver Wolf Environmental \$5600 for completion or corrective work in connection with the 341 10<sup>th</sup> Street

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<sup>7</sup>Plaintiff aptly argues that "[a] corporation's president is charged with overseeing the day-to-day operations of their company and such responsibility would obviously include knowing whether the company has either failed to file required franchise tax reports or pay franchise taxes for two consecutive years" (Hotter Opp. Aff. at ¶ 4).

Project. While Plaintiff is correct that Defendants have not submitted any documentary evidence in support of their assertions, documentary proof is not required and an affidavit from a person with personal knowledge of the facts may be sufficient to raise triable issues of fact in opposition to a motion for summary judgment (see, e.g., *Butler v Helmsley-Spear, Inc.*, 198 AD2d 131 [1st Dept 1993]) unless the statements are wholly conclusory or flatly contradicted by prior deposition testimony or other party admissions (*Amplo v Milden Ave. Realty Assoc.*, 52 AD3d 750 [2d Dept 2008]).

The Court notes that although not pleaded in Plaintiff's Verified Complaint, Plaintiff has also sought summary judgment based on an account stated. A court may consider granting summary judgment on the basis of an unpleaded cause of action where the proof supports such a cause and if the opposing party has not been misled to its prejudice<sup>8</sup> (*Boyle v Marsh & McLennan Companies, Inc.*, 50 AD3d 1587 [4th Dept 2008], *lv denied* 11 NY3d 705 [2008]; *Town of Putnam Valley v Sacramone*, 16 AD3d 669 [2d Dept 2005]; *John William Costello Assoc., Inc. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *lv dismissed* 62 NY2d 942 [1984]).

To state a cause of action for account stated, a party must allege the other party's receipt and retention of the subject statement of account without proper objection within a reasonable period of time (see, e.g., *Loheac v Children's Corner Learning Ctr.*, 51 AD3d 476 [1st Dept 2008]; *Ruskin, Moscou, Evans & Faltischek, P.C. v FGH Realty Credit Corp.*, 228 AD2d 294, 295 [1st Dept 1996]; *Citibank [SD] N.A. v Jones*, 272 AD2d 815 [3d Dept 2000], *lv denied* 95 NY2d 764 [2000]). This is predicated on the view that where an account is prepared and rendered, a person who receives it is bound to examine it; if the recipient fails to object within a reasonable time, the recipient becomes bound by the account, absent fraud, mistake or other equitable considerations (see, e.g., *Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745, 746 [1st Dept 1983]).

To satisfy its *prima facie* burden on a motion for summary judgment, the moving party must show that invoices were sent to a client using a regular office mailing procedure (*Morrison Cohen Singer & Weinstein LLP v Brophy*, 19 AD3d 161, 162 [1st Dept 2005]) and

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<sup>8</sup>The Court does not see any prejudice to addressing this argument since it was prominently displayed in Plaintiff's moving papers. For example in its Memorandum of Law at p. 4-5, Plaintiff argues that its invoices for the Lincoln Ave., Remedeer and 341 10<sup>th</sup> Street Projects were provided in 2006 and 2008 and as established in the Berhau Affidavit, SNS has not timely contested or objected to any of NSC's billings for services provided under these contracts. Accordingly, under New York law, "SNS' receipt and retention of NSC's invoices for services rendered without properly objecting to the invoices in a reasonable amount of time entitles NSC to judgment on an account stated" (Pltf's Mem. Of Law at 5). In the Berhau Affidavit, Berhau avers to providing SNS with multiple copies of invoices for the work it performed on all of the projects except for the 341 10<sup>th</sup> Street Project and that SNS did not timely contest or object to any of NSC's billings for the services provided (Berhau Aff. at ¶¶ 6-7, 12-13, 18-19, 24-25). With regard to the 341 10<sup>th</sup> Street Project, Berhau only avers to having given an invoice on the date it completed the work (August 14, 2006) and that SNS did not timely contest or object to such invoice (Berhau Aff. at ¶¶ 30-31).

either (1) that such invoices were received and retained without objection within a reasonable time (*LD Exchange v Orion Telecom. Corp.*, 302 AD2d 565 [2d Dept 2003]) or (2) there was a partial payment of the invoices. Retention of bills for a substantial period of time (*i.e.* anywhere from 5 months to a year) without objection has been found sufficient to establish retention for an unreasonable amount of time as a matter of law (*Healthcare Cap. Mgt., LLC v Abrahams*, 300 AD2d 108 [1st Dept 2002]; *Bracken & Margolin, LLP v Schambra*, 270 AD2d 221 [2d Dept 2000]; *Thaler & Gertler, LLP v Weitzman*, 282 AD2d 522 [2d Dept 2001]; *Shea & Gould v Burr*, 194 AD2d 369 [1st Dept 1993]; *Darius Toraby Architects PC v St. Barnabas Hosp. Corp.*, NYLJ, Jul. 5, 2006, at 26, col 1 [Sup Ct NY County]; *Jim-Mar Corp. v Aquatic Constr. Ltd.*, 195 AD2d 868 [3d Dept 1993], *lv denied* 82 NY2d 660 [1993]).

Here, while Berhau avers that he “provided” the invoices to SNS, Plaintiff provides no proof either from the person who mailed them that they were properly addressed and placed in a U.S. mail repository on a given date or that they were mailed using a standard office mailing procedure (Berhau Aff. at ¶¶ 6, 12, 18, 24 and 30). Accordingly, Plaintiff has not met its *prima facie* burden on its unpleaded cause of action for an account stated and its motion for summary judgment shall be denied (*Morrison Cohen Singer & Weinstein LLP, supra*).

Finally, Plaintiff moves for summary judgment dismissing Defendants’ counterclaim on the grounds that Defendants have failed to provide any evidence supporting damages in the amount of \$150,000 as a result of Plaintiff’s use of undocumented workers. Plaintiff also seeks dismissal of Defendants’ counterclaim to the extent it seeks \$2 million in lost profits due to the alleged loss of Stellar Management.

To recover damages for lost profits in a breach of contract case, “a [party] must establish that such damages were actually caused by the breach, that the ‘particular damages were fairly within the contemplation of the parties to the contract at the time it was made’ and that the alleged loss is ‘capable of proof with reasonable certainty’” (*Awards.com LLC v Kinko’s Inc.*, 42 AD3d 178, 183 [1st Dept 2007], *quoting Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]). “Where a contract is silent on the subject, courts employing a ‘common sense’ approach, must determine what the parties intended by considering ‘the nature, purpose and particular circumstances of the contract known by the parties ... as well as ‘what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it was assumed, when the contract was made’” (*id.* at 183-184). Here, in support of its motion for summary judgment, Plaintiff established, *prima facie*, that the \$2 million in lost profits (*i.e.*, SNS’s loss of Stellar Management as its client) based on Plaintiff’s use of undocumented workers was not fairly within the contemplation of the parties at the time the contract. Plaintiff has further established, *prima facie*, that these damages are not capable of calculation with reasonable certainty. In opposition to Plaintiff’s motion, Defendants have failed to provide any proof creating a triable issue of fact that the \$20 million in lost profits were fairly within the contemplation of the parties at the time they entered into the contract. Defendants have also failed to provide any proof creating a triable issue of fact that the loss of Stellar Management was the result of the 19 violations being issued against the Project or even how the figure of \$2,000,000 in lost profits was arrived at. Indeed, Defendants have provided no evidence as to their profits on prior business dealings with Stellar Management, let alone the profits on future business deals they allegedly lost as a result of Plaintiff’s breach. Accordingly, Defendants have failed to create a

triable issue of fact concerning Defendants' right to collect lost profits from Plaintiff in the event it is determined that Plaintiff was in breach. Indeed, given the many variables at play in any award of a construction contract, an award of such lost profits would be entirely speculative. Accordingly, this Court shall grant summary judgment to the extent of dismissing Defendants' counterclaim seeking \$2 million in lost profits (*Awards.com LLC, supra*; *Kenford Co. v County of Erie*, 67 NY2d 257 [1986]; *Brauner v Columbia Broadcasting Sys., Inc.*, 221 AD2d 306 [2d Dept 1995]; *Goodstein Contr. Corp. v City of N.Y.*, 80 NY2d 366 [1992]). Finally, the Court disagrees that it was incumbent on Defendant to prove the \$150,000 in actual damages in order to sufficiently oppose Plaintiff's motion for summary judgment, and, accordingly, that branch of Plaintiff's motion shall be denied.

### CONCLUSION

The Court has considered the following papers in connection with these motions:

- 1) Notice of Motion for Summary Judgment dated March 31, 2011; Affidavit of Stuart Schwartz, sworn to March 28, 2011, together with the exhibits annexed thereto;
- 2) Affirmation of Kevin J. Hotter, Esq. in Opposition dated April 21, 2011 together with the exhibits annexed thereto; Affidavit of Pablo Berhau, sworn to April 21, 2011;
- 3) Affidavit of Stuart Schwartz in further Support of Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment sworn to April 25, 2011 together with the exhibit annexed thereto;
- 4) Notice of Motion dated April 4, 2011; Rule 19-a Statement of Material Facts dated April 4, 2011; Affirmation of Kevin J. Hotter, Esq. dated April 4, 2011 together with the exhibits annexed thereto; Affidavit of Pablo Berhau, sworn to April 4, 2011;
- 7) Memorandum of Law in Support of Plaintiff NSC Abatement Services, Inc.'s Motion for Summary Judgment dated April 4, 2011;
- 8) Reply Affirmation of Kevin J. Hotter, Esq. dated April 28, 2011.

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion for summary judgment by Defendants Stuart Schwartz and Bain Mechanical Services, Inc. is granted, without costs, only to the extent that the Verified Complaint as asserted against Bain Mechanical Services, Inc. is dismissed, but in all other respects, the motion, including the request for an award of sanctions, is denied; and it is further

ORDERED that the motion for summary judgment by Plaintiff NSC Abatement

Services, Inc. is granted only to the extent of establishing the liability of Defendant SNS Energy Distribution Corp. with regard to Plaintiff's First and Third Causes of Action with respect to the project at 2040 Bruckner Boulevard, Bronx, New York for the sum of \$24,600, with interest from July 31, 2006 and with respect to the project at 351 Maine Avenue, Rockville Centre, New York, in the sum of \$17,260, with interest from March 20, 2008, but in all other respects, Plaintiff's motion is denied; and it is further

ORDERED that the judgment with regard to the above-referenced award of summary judgment shall be stayed pending the determination of Defendants' Counterclaim; and it is further

ORDERED that counsel are directed to appear for a conference on August 25, 2011, at 9:30 a.m., the purpose of which is to schedule a trial date in this action, which conference shall not be adjourned without the further order of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
July , 2011

E N T E R :

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Alan D. Scheinkman  
Justice of the Supreme Court

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