STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

MICRO-LINK, LLC,

Plaintiff,

MEMORANDUM DECISION

vs.

Index No. 7983/07

THE TOWN OF AMHERST,
COUNTY OF ERIE, NEW YORK

Defendant

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT LLP**
David Pellegrino, Esq., of Counsel
John E. Greene, Esq., of Counsel
Attorneys for Plaintiff

TOWN ATTORNEY
TOWN OF AMHERST, NEW YORK
J. Matthew Plunkett, Esq., of Counsel
Attorneys for Defendant

CURRAN, J.

The instant matter came before the court upon a motion by Defendant Town of Amherst to dismiss all of the causes of action in the Complaint under Town Law § 65 (3). Upon due consideration, the Court grants the motion in part.

BACKGROUND AND PROCEDURAL HISTORY

In February 2000, the Town of Amherst entered into a contract with Plaintiff concerning the management of the Town's Waste Water Treatment Facility, Plant 16 (*see* Plunkett Affid., Exhibit A [hereinafter the Contract]). The Contract required that Plaintiff assume management control of Plant 16 for a three-year period with an automatic renewal for another three years, but only if the Town realized certain savings per year. Plaintiff was to be paid twenty-five percent (25%) of the gross savings to the Town, or the difference between "base cost", as calculated by the Contract, and "net cost" (*see* Watkins Affid. ¶ 2 & Contract ¶ 4).

The crux of the instant dispute between the parties involves the time frame in which invoices had to be submitted to the Town. The relevant paragraph of the Contract states in pertinent part:

> The Town shall be invoiced on a monthly basis beginning thirty (30) days after the Commencement Date and continue [sic] every thirty (30) days thereafter. All fees shall be paid forty-five (45) days after each invoice. Past due billings exceeding forty-five (45) days shall be subject to an additional charge of 1.5% per month, equivalent to APR of 18%. In the event it becomes necessary for [Plaintiff] to institute any collection efforts, [Plaintiff] shall be entitled to recover any cost and expenses including reasonable attorneys' fees.

(Contract ¶ 4). The commencement date was February 10, 2000 (see Plunkett Affid., Exhibits A & B).

According to the First Amended Verified Complaint, Micro-Link regularly submitted invoices between the commencement of the Contract and December 2005 (*see* Plunkett Affid. Exhibit H [1st Amended Complaint] ¶ 8). According to Micro-Link, the Town

paid each invoice, but would withhold payment for particular items it questioned; the parties then "agreed", outside of the Contract, that "if they could not resolve any issue over these identified items, they would refer the particular item to the former Town of Amherst Controller, Dr. Lawrence Southwick, for arbitration" (*id*.). The Contract does not provide for arbitration over disputed invoices, and the Town disputes that such a procedure existed; the position of elected Comptroller was eliminated as of January 2004 and Dr. Southwick no longer worked for the Town after that time (*see* Plunkett Reply Affid. ¶ 5, Memo of Law at 1-2).

By its terms, the Contract was to terminate on February 10, 2006. On December 5, 2005, then-Town Supervisor Susan Grelick sent a letter advising Plaintiff that the Contract would not be renewed (*see* Plunkett Affid., Exhibit B). At the time of termination, billings of $231,074.97 from various invoices previously submitted by Plaintiff had not been paid (hereinafter the pre-2006 disputed claims) (*see* Plunkett Affid., Exhibit H ¶¶ 8-9). Although the parties do not detail the savings to the Town those billings allegedly represent, it is clear that the billings were made in invoices for the months of February 2002 through January 2005 on which the Town had made only partial payments (*see* Plunkett Reply Affid. ¶ 7 & Exhibit A).

At a meeting of the Town Board on February 6, 2006, a resolution was introduced concerning "[r]ecovery of monies wrongfully paid" to Micro-Link; that resolution did not pass. Rather, the Board approved an amended resolution to require the Town to "hire a forensic auditor" (*see* Watkins Affid., Exhibit 2, at p. 9).

At the request of the Town Board, the State Comptroller's office conducted a review and issued a report on the operation of the Town's Waste Water Treatment Plant in

2004 and 2005. The Report advised that "Town Officials should pursue all available avenues to recover overpayments resulting from the operation of [Micro-Link's] contract" (*see* Plunkett Affid., Exhibit J at 17). The State Comptroller based his criticism in part on the calculation of "savings" under the contract: i.e., the difference between "base" costs and "net" costs, which the Comptroller indicated were calculated in such a way that Micro-Link was ensured of getting paid (*see id.* at pp. 13-14). In addition, the State Comptroller concluded that Micro-Link's operation of the plant saved little. "In fact, the President of Micro-Link readily admitted to us that his accomplishments were limited to reducing landfill costs" (*see id*. at p. 16). The Report further stated:

> Town officials did not follow sound business practices and failed to protect the interests of the taxpayers when they entered into an agreement with Micro-Link to operate the [Waste Water Treatment Plant]. The contract is severely weighted in favor of Micro-Link and there can be little doubt that a reasonable person should have recognized that this contract would result in unnecessary costs to taxpayers. We find it difficult to identify any cost savings, other than a reduction in landfill costs, that we can attribute to Micro-Link's work that would justify the total amount paid, pursuant to the contract. The contract also contains many ambiguities and inconsistencies.

(Plunkett Affid., Exhibit J, at p 5).

At a Town Board meeting on March 20, 2006, the Board considered a motion concerning Micro-Link's invoices. The Minutes state:

> A motion was made by Councilmember Kindel, seconded by Councilmember Ward, to approve "Resolution: Update of Activities to Retrieve Monies Paid to Or Stop Future Payments To Micro-Link as follows:
> BE IT KNOWN that the pellet project in conjunction with Micro-Link has come under justified scrutiny and has caused concern for the Amherst Taxpayers; and

> BE IT KNOWN that on December 5, 2005, a resolution to have an independent audit of the pellet project was defeated by a vote of 4-3 and in February of 2006 a new resolution was presented and passed by a vote of 7-0 to call for an outside audit of the pellet project; and
> BE IT KNOWN that on March 7, 2006, the New York State Comptroller's Office concurred with the concerns of payments made and still owed to Micro-Link and their recommendation number 5 states, "Town officials should pursue all available avenues to recover overpayments resulting from the operation of this contact [sic]";
> NOW THEREFORE BE IT RESOLVED that, since a month has expired since the passage of the February resolution instructing the Town Attorney to investigate the recovery of funds, **this Town Board calls upon the Town Attorney's office to immediately respond as to the status of the recovery of funds**, and
> BE IT FURTHER RESOLVED THAT THE Town Board directs the Supervisor and the Town Comptroller **not to process or pay any outstanding claims** from Micro-Link against the Town of Amherst until the Town Board makes a final decision and reviews **all such claims that are to be made and have been made**

(Watkins Affid., Exhibit 3 at 13 [capital letters in original, emphasis supplied]). Mr. Watkins was present at that meeting and addressed the Board (*see id;* Exhibit 3 at 2).[1]

In addition, Mr. Watkins alleges that, in February or March of 2006, he met personally with Town Supervisor Satish Mohan. Mr. Watkins asserts that the Town Supervisor informed him that the Town Board would be retaining forensic accountants to review all of Plaintiff's prior invoices and that, absent the identification of any problems, Plaintiff would be paid "all outstanding amounts" upon completion of the audit (Watkins Affid. ¶¶ 8-9). In

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[1] At an April 3, 2006 meeting of the Town Board, Mr. Watkins again appeared and addressed the Board on "Engineering Bid Items # 1 & 2 and over payment to Micro-Link" (*see* Plunkett Affid., Exhibit C).

response, the Town notes that only the Town Board can approve payment of claims and invoices (*see* Plunkett Reply Affid. ¶¶ 6 & 16).

Nonetheless, between March and November of 2006, Plaintiff did not submit any further invoices to the Town. The Town's papers are silent concerning the results of the audit, as is the remainder of the record before the Court. According to Plaintiff, it has not received any word or documents from the Town concerning the audit. Although Mr. Watkins alleges that he was told the results would be available at a Town Board meeting on September 11, 2006, the Board instead went into closed session to hear the report (*see* Watkins Affid. ¶¶11 - 12). Since that date, Plaintiff has received no notice of rejection of its invoices and no further payments (*see id*. ¶¶13, 15).

Plaintiff submitted one invoice to the Town in November 2006.[2] Following that, Plaintiff submitted a verified Notice of Claim on December 8, 2006, demanding payment of the "[t]otal due as of November 13, 2006", listing invoices submitted between January and March 2006, for services during the months of February and March of 2005; the invoice submitted in November 2006, for services during the month of April 2005; plus late charges and attorneys fees, for a total of $71,043.46 (*see* Plunkett Affid., Attachments to Exhibit F).

Ten more invoices were submitted to the Town in late December 2006.[3] A

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[2] Invoice Number 0405, dated November 13, 2006, covered the amounts owed for April 2005 (*see* Plunkett Affid., Attachments to Exhibit H [1st Amended Verified Complaint])

[3] Invoices 0505 through 0206, dated December 28, 2006, covered the amounts owed for May 2005 through February 2006. Note that the December 2005 bill was a negative number, i.e. $16,814.85 owed by Micro-Link to the Town (dated December 29, 2005). The bills covering January through February 10, 2006 were dated December 29, 2006 (*see* Plunkett Affid. Exhibit H & Attachments).

second verified Notice of Claim was submitted on February 22, 2007, with respect to those invoices (covering services from May 2005 through February 10, 2006); plus, the amounts demanded in the first notice of claim; the pre-2006 disputed amounts of $231,074.99; and, attorneys fees and late charges, for a total of $516,648.89 (*see* Plunkett Affid., Attachments to Exhibit H).

On August 17, 2007, Plaintiff filed a Summons with Notice, which was served upon the Town on September 12, 2007 (*see* Plunkett Affid., Exhibit D). Plaintiff demanded $516,648.89, plus late charges from February 12, 2007, interest, collection costs and attorneys' fees. A Complaint was served in October 2007 (*see id*. Exhibit F); the Town answered and counterclaimed for overpayments of $617,290.00 (*see id*., Exhibit G); and a First Amended Verified Complaint was served November 7, 2007 (Amended Complaint) (*see* Plunkett Affid. ¶12 & Exhibit H).

In the Amended Complaint, Plaintiff asserts three causes of action: for breach of contract, an account stated and unjust enrichment. In answering the Amended Complaint, the Town raised three affirmative defenses: failure to state a cause of action in that Plaintiff failed to file a written Notice of Claim as required by Town Law § 65 (3); statute of limitations; and allegations that the Town had not retained Plaintiff's invoices without objection and, therefore, that Plaintiff was not entitled to judgment for an account stated (*see* Plunkett Affid., Exhibit G). The Town also restated its counterclaim for overpayments under the Contract, but did not

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Additional relevant facts and assertions will be discussed in connection with the Court's analysis, *infra*.

otherwise challenge the validity of the Contract. Thereafter, the Town moved to dismiss the Amended Complaint in its entirety.

THE PARTIES' CONTENTIONS

When considering a motion to dismiss based upon a statute of limitations under CPLR 3211 (a) (5), a court should not dismiss the complaint as time-barred unless it is "conclusively established when the causes of action accrued" (*Dabb v NYNEX Corp.*, 262 AD2d 1079 [4th Dept 1999]; *see also Airco Alloys Div., Airco Inc. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 80-81 [4th Dept 1980]). In considering a motion to dismiss for failure to state a claim under CPLR 3211(a)(7), the Court must "liberally construe the complaint . . . and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion," according to Plaintiff "the benefit of every possible favorable inference" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002] [internal quotation marks omitted]). Nonetheless, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" (*Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 233-234 [1st Dept 1994]; *see also Stewart v New York City Transit Auth.*, 50 AD3d 1013, 1014 [2nd Dept 2008]).

Under Town Law § 65 (3), a notice of claim must be filed within six (6) months following the accrual of a cause of action. The Town Law states specifically:

> . . . no action shall be maintained against a town upon or arising out of a contract entered into by the town unless the same shall be commenced within eighteen months after the cause of action thereof shall have accrued, **nor unless a written verified claim**

> **shall have been filed with the town clerk within six months after the cause of action shall have accrued** . . .

(Town Law § 63 [3] [emphasis supplied]).

The notice of claim requirement is a condition precedent to the maintenance of a contract action against a Town, and the provision is strictly construed, meaning that the Court has no discretion to extend the time to permit a late notice to be filed *(see County of Rockland v Town of Orangetown*, 189 AD2d 1058 [3rd Dept 1993], *lv denied* 82 NY2d 733 [1993]; *Franza's Universal Scrap Metal, Inc. v Town of Islip*, 89 AD2d 843, 844 [2nd Dept 1982]).

Plaintiff contends that its contractual claims did not accrue until September 11, 2006 at the earliest (*see* Plaintiff's Memo of Law at 2, 9). On that day, the Town advised Plaintiff's principal Mr. Watkins that the forensic accountants were to report the findings of their audit of Plaintiff's invoices, pursuant to the resolution passed in March of that year (*see* Watkins Affid. ¶ 12). At the board meeting held that date, the Board went into executive session to hear the report (*id*.). Neither at that meeting nor at any time since, Plaintiff alleges, has it received any word about the results of the audit and the intended treatment of its outstanding invoices; nor has Plaintiff received any further payments (*id*. ¶¶12-13).

With respect to the invoices Plaintiff submitted in November 2006 and December 2006, Plaintiff asserts that they were accepted without dispute (*see* First Amended Verified Complaint ¶¶15-18). Therefore, Plaintiff asserts that the Notice of Claim filed on December 6, 2006 (covering the invoices submitted in January through February 2006 and the invoice submitted in November 2006), and the second Notice of Claim submitted on February 22, 2007 (with respect to invoices dating from December 2006 and the pre-2006 disputed

claims), were both timely, as was the filing of the Summons and Complaint (*see* Plaintiff's Memo of Law at 9-10). Further, Plaintiff contends that it was entitled to rely on statements of the Town Supervisor, that its invoices would be paid in full if the forensic accountants found no problems (*see* Watkins Affid. ¶ 9). The Plaintiff also contends that, contrary to the Town's argument, the claims could not have accrued on February 20, 2006 at the termination of the contract, given that the process involved in determining the invoices made it impossible to quantify the claims for up to 11 months after the month to which the charges applied (i.e. savings were realized by the Town) (*see* Memo of Law at 11-12, Watkins Affid. ¶¶3-5).

Finally, Plaintiff contends that it did not submit until November and December of 2006 its invoices for the months of April 2005 through the termination of the contract because the Town "previously indicated that the Town would not process or pay claims by Micro-Link pending final decision" by the auditors (Watkins Affid. ¶ 11). The Court notes, however, that the March 20, 2006 resolution ordered the Town Supervisor and the Town Comptroller "not to process or pay any outstanding claims from Micro-Link against the Town of Amherst until the Town Board makes a final decision and reviews all such claims **that are to be made** and have been made" (*see* Watkins Affid., Exhibit 3, at p. 13 [emphasis supplied]). Mr. Watkins was in attendance at that meeting (*see id.*, at p. 2)

For its part, the Town asserts that the pre-2006 disputed claims accrued no later than the termination of the contract on February 10, 2006, and the Notice of Claim filed in February 2007 was untimely as to those claims. Second, the Town asserts that Plaintiff should have known no later than the March 20, 2006 Town Board Resolution that the rest of its claims would be rejected, as the Resolution evidenced that the Town had serious reservations about

Plaintiff's billing and was considering its own legal action. Thus, any Notice of Claim filed more than six (6) months later, or after September 20, 2006, was untimely.

The Town's current Comptroller, Darlene Carroll asserts that the necessary journal detail for Plaintiff to compute its invoices was available on a monthly basis, except for the month of December (see Carroll Affid. ¶¶4-6), and thus the Town asserts that it did not, as Plaintiff contends, frustrate Plaintiff's ability to submit the remaining invoices, from April 2005 through February 2006, until after September 2006. Finally, the Town asserts that anything the Town Supervisor may have said to Plaintiff's principal could not extend the time of accrual of the claims, because communications with town officials regarding payments of outstanding fees cannot substitute for a timely Notice of Claim.

CONCLUSIONS

A. Breach of Contract

In contract law, generally, a cause of action accrues at the time of the breach (*see John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550 [1979]; *see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402-403 [1993]). In other words, "[w]here a cause of action is asserted to recover a sum of money owed pursuant to a contract, the cause of action accrues when the plaintiff possesses a legal right to demand payment" (*Verizon New York Inc. v Sprint PCS*, 43 AD3d 686, 687-688 [1st Dept 2007] [McGuire, J., in dissent], *citing Swift v New York Med. College*, 25 AD3d 686, 687 [2nd Dept 2006]). However, a plaintiff may not extend a statute of limitations merely by holding off in making its demand (*see State of New York v City of Binghamton*, 72 AD2d 870, 871 [3rd Dept 1979]; *see Town of Brookhaven v MIC Property and Cas. Ins.*, 245 AD2d 365 [2nd Dept 1997], *lv denied* 92 NY2d 806 [1998]).

With contracts requiring continuing performance, such as the one at issue here, "a new breach occur[s], for statute of limitations purposes, each time the defendant fail[s] to make a required payment" (*CSEA Employee Benefit Fund v Warwick Val. Cent. School Dist.*, 36 AD3d 582, 584 [2nd Dept 2007] [permitting late filing of claim under Education Law § 3813]; *see also Town Board of Town of New Castle v Meehan*, 226 AD2d 702, 703 [2nd Dept 1996], *lv denied* 88 NY2d 811 [1996]; *Parker v Town of Clarkstown*, 217 AD2d 607 [2nd Dept 1995], *lv denied* 87 NY2d 804 [1995] [citing CPLR 206(a)]; *Franza's Universal Scrap Metal, Inc. v Town of Islip*, 89 AD2d 843, 844 [2nd Dept 1982]; *Airco Alloys Div., Airco Inc.*,76 AD2d at 80).

That the claims are against a Town government, however, adds an additional step to the analysis of when the claims accrue. Under Town Law § 65 (3), "[w]here [a] cause of action seeks to compel payment for work, labor and services rendered under a contract, the cause of action accrues when the claim is actually or constructively rejected" (*Town of Nassau v Westchester Fire Ins. Co.*, 281 AD2d 803, 804 [3rd Dept 2001]; *accord Schacker Real Estate Corp. v Town of Babylon*, 278 AD2d 221, 222 [2nd Dept 2000], *lv dismissed* 96 NY2d 745 [2001]; *Trison Contracting Inc. v Town of Huntington*, 227 AD2d 397, 398 [2d Dept 1996], *lv dismissed* 88 NY2d 1018 [1996]). In other words, under Town Law § 65 (3), a cause of action accrues when the plaintiff "should have viewed the claim as actually or constructively rejected" (*Schacker Real Estate Corp. v Town of Babylon*, 278 AD2d at 222; *accord William J. Thomann, Inc. v Auburn Enlarged City School Dist.*, 176 AD2d 1235, 1236 [4th Dept 1991]; *see also Town of Saugerties v Employers Ins. of Wausau*, 743 F Supp 112, 117-118 [NDNY 1990]; *Genesee Brewing Co. v Village of Sodus Point*, 126 Misc 2d 827, 833 [Sup Ct Wayne County

1984] [Boehm, J.], *aff'd for reasons stated* 115 AD2d 313 [4th Dept 1985] [claim against municipality accrues "when it refuses to either make payment or to resolve a dispute"]).

The above courts have looked to whether a municipality's rejection of a claim is "unambiguous" and whether it was "reasonable" to conclude that a claim had been rejected (*see, e.g., Trison Contracting v Town of Huntington*, 227 AD2d at 397; *Schacker Real Estate Corp. v Town of Babylon*, 278 AD2d at 222; *Town of Nassau v Westchester Fire Ins. Co.*, 281 AD2d at 804). The courts therefore rightfully view the determination of accrual dates under similar circumstances as a mixed question of law and fact (*see Trepuk v Frank*, 44 NY2d 723, 724-725 [1978]; *Glod v Morrill Press Div. of Engraph, Inc.,* 168 AD2d 954, 955 [4th Dept 1990]; *Mesa v United Nations Dev. Corp.*, 157 Misc 2d 362, 367 [Sup Court NY County 1993]).

In this matter, the parties have not asserted that an audit was a condition precedent to payment of the invoices and, thus, of accrual of the causes of action (*cf.* Town Law § 118 [1] [exception from audit requirement for "amounts coming due upon lawful contracts for periods exceeding one year"]; *City of New York v State*, 40 NY2d 659, 668 [1976]).[4] The

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[4] In *Memphis Construction Inc. v Village of Moravia* (59 AD2d 646 [4th Dept 1977]), a case relied upon by Plaintiff, it was a condition precedent to payment of a claim that it be first audited and approved by a Village Official (*see Memphis Construction*, 59 AD2d at 646 [Village Law § 5-524]). The Fourth Department stated that the plaintiff's cause of action did not accrue "until it [possessed] the legal right to be paid and to enforce its right to payment in court" (*Memphis Construction Inc.*, 59 AD2d at 646, quoting *City of New York v State of New York*, 40 NY2d at 668). However, the Court also stated: "That is not to say . . . that a municipality may forever frustrate potential causes simply by failing to audit submitted claims. The facts of every such case will determine whether there came a time when the claimant should have viewed his claim to have been constructively rejected, thus giving rise to the accrual of a cause of action" (*Memphis Construction, Inc.*, 59 AD2d at 646).

forensic audit voted by the Town Board in this case, however, has a different effect on the accrual of the Plaintiff's various claims, as noted *infra*.

In consideration of all of the above, the Court determines that there were three separate accrual dates for the invoices submitted.

First Category

The first category is the pre-2006 disputed claims. Those claims are for portions of invoices submitted between 2002 and 2005 which the Town had earlier refused or failed to pay, a total of $231,074.97, and that Plaintiff claimed Dr. Southwick was to arbitrate (*see* First Amended Verified Complaint ¶¶8-9; Plunkett Reply Affid. ¶¶ 6-7 & Exhibit A).

Initially, the Town has established prima facie that the pre-2006 disputed claims accrued no later than February 10, 2006, the termination of the Contract (*see Swift v New York Med. College*, 25 AD3d at 687). The Contract provides that invoices shall be submitted by Plaintiff monthly, starting 30 days after its commencement date, February 10, 2000, and paid by the Town within 45 days after submittal, or they will incur late fees (see Contract ¶ 4). Under those terms, the pre-2006 disputed claims –- stemming from alleged savings under the contract in 2002 through January 2005 –- accrued no later then early 2005.

In response to this prima facie case, Micro-Link submits the affidavit of its principal Mr. Watkins, who contends that the pre-2006 disputed claims were still awaiting arbitration by Dr. Soutwick at the time of the termination of the Contract. In fact, the State Comptroller's report notes that a former town attorney had sanctioned the arbitration of some

disputed invoices by the elected Town Comptroller Dr. Southwick between 2000 and 2002 (*see* Plunkett Affid., Exhibit J, at 14-15). However, given the fact alleged by the Town Attorney and not disputed by Plaintiff, that Dr. Southwick ceased working for the Town in 2003, Mr. Watkins' assertion that he believed that the disputed claims were still awaiting arbitration by Dr. Southwick is inherently incredible (*see Caniglia*, 204 AD2d at 233-234). In the same category is Mr. Watkins' statement that, after September 2006, he "believe[d] the [forensic] auditors confirmed that [the pre-2006 disputed claims] were in fact due to Micro-Link" (Watkins Affid ¶ 16).[5] At best, the pre-2006 disputed claims were unpaid for lengthy periods of time and had already been disputed by the Town. Once the contract termination date arrived without payment of those long overdue amounts, it was reasonable for plaintiff to conclude that those claims had been actually or at least constructively rejected by the Town (*see, e.g. Town of Nassau v Westchester Fire Ins. Co.*, 281 AD2d at 804).

The Court also determines that the forensic audit had no effect on the pre-2006 disputed claims, which had long since accrued. Thus, it did not operate as a condition precedent to the accrual of those claims. Rather, Plaintiff should have known no later than the termination of the contract on February 20, 2006, if not far earlier, that the Town had rejected those claims, some of which were then over four years old (*see Arnell Construction Corp v Village of North Tarrytown*, 100 AD2d 562, 563-564 [2nd Dept 1984], *aff'd for the reasons stated by* 64 NY2d 916 [1985]).

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[5] The Court further notes that the Town, by its silence after the March 20, 2006 resolution was passed, has not helped to clarify matters.

Plaintiff relies in part upon Mr. Watkins' meeting with the Town Supervisor, which he asserts occurred in February or March of 2006 (*see* Watkins Affid. ¶¶8-9). Mr. Watkins asserts that the Town Supervisor assured him that, if the forensic accountants found no problems with Plaintiff's prior invoices, all outstanding amounts would be paid (*id*.). However, under settled law, the fact that the Town may have been aware of the claims or even that Plaintiff discussed the claims with Town officials cannot substitute for the timely filing of a Notice of Claim (*see Walter H. Poppe General Contracting, Inc. v Town of Ramapo*, 280 AD2d 667, 668 [2nd Dept 2001]; *see also County of Rockland v Town of Orangetown*, 189 AD2d 1058 [3rd Dept], *lv denied* 82 NY2d 733 [1993] [unverified letters and discussions at certain meetings purporting to give notice of the underlying claim do not substantially comply with Town Law § 65(3)].

Therefore, the Court determines that, as a matter of law, the Notice of Claim filed in February 2007 is untimely with respect to the pre-2006 disputed claims. For the same reason, under the statute of limitations in Town Law § 65 (3), the Summons with Notice filed August 17, 2007 was untimely with respect to the pre-2006 disputed claims, because the Summons with Notice was filed more than 18 months after the termination of the contract, February 10, 2006.

Second Category

The second category of claims are those represented in the first Notice of Claim filed on December 8, 2006: including invoices submitted in January, February and March of 2006; late charges; and, attorneys' fees, but excluding invoice number 0405 dated November

13, 2006, covering the billings for the month of April 2005 (*see* Plunkett Affid., Exhibit 1 to Exhibit F)[6].

In the Court's view, it cannot be conclusively determined as a matter of law when the second category of claims accrued. It is clear that, by submitting invoices between 10 to 12 months after the month to which they applied, Plaintiff was violating the terms of the Contract. Under the contract, invoices were due every 30 days on the 10th of the month (*see* Contract ¶ 4). The Court notes that timeliness was clearly important in paying the invoices, because the Town is by Contract required to pay the invoices with 45 days or pay late fees of 18 percent annually. Further, the Contract barred any oral modifications (*see id*.¶¶4 & 5[e]).

Plaintiff appears to rely on a waiver argument, i.e. that the Town waived the contractual requirement that Plaintiff submit its invoices every 30 days (*see* Watkins Affid. ¶2). In response to the Town's assertion that Plaintiff repeatedly failed to bill the Town in compliance with the terms of the contract, Plaintiff contends that timely invoicing was impossible due to the bookkeeping practices of the Town (*see* Watkins Affid. ¶¶3-7); this the Town disputes (*see* Carroll Affid.¶¶4-7).

In the context of a motion to dismiss, given Plaintiff's allegations that the Town's accounting practices prevented it from billing in a timely manner during the periods of contractual performance from 2000 to 2006, the Court determines that there is a question of fact whether the invoices under the first Notice of Claim were untimely when submitted (with the exception of the November 2006 invoice, which falls into category three). The Town's failure or refusal to take unambiguous action on these disputed claims underscores the prevalence of

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[6] The November 2006 invoice is included in category three, *infra*.

factual issues in this record (*see, e.g. Memphis Construction v Village of Moravia*, 59 AD2d at 647). The accrual date of the remaining claims covered by the first Notice of Claim cannot be determined on this record. Therefore, the motion to dismiss the first cause of action with respect to those claims is denied.

Third Category

The third category includes the invoice dated November 2006 and the invoices submitted to the Town in December 2006, covering billings in the months of April 2005 through February 2006. Plaintiff alleges no frustration of its ability to submit those invoices due to accounting practices of the Town (*see* Watkins Affid. ¶¶ 11). According to the Town, Plaintiff could have submitted the category three invoices at any time between March and September 2006, based upon the information of the current Comptroller, that the accounting information needed by Plaintiff was readily available. Plaintiff on the other hand, claims that it did not do so because the Town had indicated that it would not process or pay its invoices pending the audit.

The parties read the March 20th Town Board Resolution in contradictory terms. The Resolution states that no claims of Plaintiff can be processed or paid until "until the Town Board makes a final decision and reviews all [of Plaintiff's] claims that are to be made and have been made". It appears that the Town Board was barring the paying of any of Plaintiff's invoices until the Board itself reviewed them, regardless of when they were submitted. However, given that this is a motion to dismiss, and the Court is required to read all submissions in the light most favorable to Plaintiff, it cannot on this record be conclusively determined that the category three invoices should have been submitted prior to the completion

of the audit or that the Notice of Claim submitted on February 7, 2007 was therefore untimely with respect to those invoices. "[W]here a triable issue of fact exists with respect to accrual of a claim, such issue should not be determined" on a motion to dismiss (*Airco Alloys Div., Airco Inc. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 80 [4th Dept 1980]). Based on the foregoing, the Town's motion on the issue of accrual of Plaintiff's claims with respect to the category three invoices is denied.

Therefore, Defendant's motion to dismiss the first cause of action for breach of contract is granted in part, but only with respect to the pre-2006 disputed claims, and is otherwise denied because it arises out of and solely pursuant to an express valid contract.

B. Account Stated

Plaintiff's second cause of action asserts an account stated. Defendant contends that no account stated arose, because Plaintiff's invoices were clearly objected to by the Town; the Town further argues that Plaintiff acknowledges such objections were made, at least with respect to the pre-2006 disputed claims.

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*Jim-Mar Corp. v Aquatic Const., Ltd.*, 195 AD2d 868, 869 [3rd Dept 1993]). "The agreement may be express or . . . implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances" (*id*.)

Initially, an action for an account stated is an action "arising out of a contract" under Town Law § 65 (3) (see *William H. Clark Municipal Equipment Inc. v Town of La Grange*, 170 AD2d 831, 832 [3rd Dept 1991]). Thus, for the same reasons that the Court

dismissed the first cause of action in part, Plaintiff's second cause of action for an account stated is dismissed with respect to the pre-2006 disputed claims, because no notice of claim was timely filed with respect to them. For the same reason, under the statute of limitations in Town Law § 65 (3), the Summons with Notice filed August 17, 2007 insofar as it asserted or could have asserted a claim for an account stated, was untimely with respect to the pre-2006 disputed claims, because the Summons with Notice was filed more than 18 months after the termination of the contract, February 10, 2006.

With respect to the second category of claims, however, as determined earlier with respect to the breach of contract cause of action, given Plaintiff's allegations that the Town's accounting practices prevented it from billing in a timely manner during the periods of contractual performance from 2000 to 2006, there is a question of fact whether the invoices under the first Notice of Claim were untimely when submitted, and thus whether any causes of action based upon those invoices had accrued prior to the expiration of the contract in February 2006. Therefore, it cannot be determined on this record whether the first Notice of Claim was timely filed with respect to an account stated cause of action on the second category of invoices.

In addition, the Court determines that Defendant has failed to establish as a matter of law that there was no account stated by Plaintiff with respect to the third category of invoices. As noted earlier, the Town's March 20 2006 resolution concerning Plaintiff's claims and its communications thereafter were equivocal. Although "mere silence and failure to object to an account stated cannot be construed as an agreement to the correctness of the account, the factual situation attending the particular transactions may be such that, in the absence of an objection made within a reasonable time, an implied account stated may be found" (*Interman*

Indus. Products, Ltd v R.S. M. Electron Power Inc., 37 NY2d 151, 154 [1975]). In any event, whether an invoice "has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible" (*Legum v Ruthen*, 211 AD2d 701, 703 [2nd Dept 1995]). The Town's failure or refusal to take unambiguous action on these disputed claims prevents a resolution of this issue as a matter of law.

Thus, the motion to dismiss is granted with respect to the second cause of action, but only on the pre-2006 disputed claims, and is otherwise denied as to that cause of action.

C. Unjust Enrichment

Plaintiff contends that its third cause of action seeking recovery for unjust enrichment is not founded "upon or arising out of a contract" within the meaning of Town Law § 65(3) and, therefore, that the section does not apply to the third cause of action (*see generally Town of Saugerties v Employers Ins. of Wausau*, 743 F Supp 112, 119 [NDNY 1990]; *Accredited Demolition Const. Corp. v City of Yonkers*, 37 AD2d 708, 709 [2nd Dept 1971]; *Rochester Genesse Regional Transp. Dist v Trans World Airlines*, 86 Misc 2d 1011, 1014 [Sup Ct Monroe Co 1976]).

"A cause of action for unjust enrichment 'accrues upon the occurrence of the wrongful act giving rise to a duty of restitution" (*Elliott v Qwest Communications Corp.*, 25 AD3d 897, 898 [3rd Dept 2006], quoting *Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.*, 192 AD2d 501, 503 [2nd Dept 1993]). It has been held that a cause of action for "money had and received," being quasi contractual, does not fall under Town Law § 65 (3) (*see*

Buchanan v. Town of Salina, 270 AD 207, 215 [4th Dept 1945]). Following that precedent, the motion to dismiss is denied with respect to the cause of action for unjust enrichment.

Therefore, Defendant Town of Amherst's motion to dismiss the first cause of action for breach of contract is granted, but only with respect to the pre-2006 disputed claims, and is otherwise denied. The motion to dismiss the second cause of action for an account stated is granted, but only with respect to the pre-2006 disputed claims, and is otherwise denied. The motion to dismiss is denied with respect to the third cause of action for unjust enrichment in its entirety.

Defendant to submit order on notice to Plaintiff.

DATED: September _____, 2008

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HON. JOHN M. CURRAN, J.S.C.