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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 600075/2008

R.P.I. PROFESSIONAL SERVICES

VS

KELLY SERVICES

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 12/9/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of plaintiff R.P.I. Professional Alternatives Inc. for an order, pursuant to CPLR §3212, for summary judgment on an account stated against defendant Kelly Services Inc. is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 1/19/10

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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R.P.I. PROFESSIONAL ALTERNATIVES INC.,

Plaintiff,

-against-

KELLY SERVICES INC.,

Defendant.

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Index No. 600075/08

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiff R.P.I. Professional Alternatives Inc. ("plaintiff") seeks to recover $35,275.61 against defendant Kelly Services Inc. ("defendant") for, *inter alia*, breach of contract and an account stated.

Plaintiff now moves for an order, pursuant to CPLR §3212, granting it summary judgment against defendant on an account stated.

Background

Plaintiff, a temporary employment staffing agency, alleges that on or about May 16, 2004, at defendant's request, it provided defendant with temporary labor ("temps"). In its motion, plaintiff relies on the affidavit of Allen Gutterman ("Mr. Gutterman"), plaintiff's president, in arguing that it has established a *prima facie* entitlement to summary judgment (*see* the "Gutterman Affd."). Plaintiff provides copies of 13 invoices it allegedly mailed to defendant, totaling $54,044.76 (*see* the "Invoices"). Mr. Gutterman attests that, to his personal knowledge and according to the business records maintained in his office, defendant failed to either protest or object to the Invoices. Mr. Gutterman further attests that defendant made partial payment on

the Invoices in the amount of $18,769.15. Therefore, plaintiff is entitled to judgment against defendant for $35,275.61.

In opposition,[1] defendant argues that plaintiff has failed to prove an account stated, because defendant "does not and has never" assented to the $35,275.61 that plaintiff alleges is outstanding. Defendant contends that it has produced evidence that "gives rise to a genuine issue of fact as to whether defendant was required to pay plaintiff for time that was not approved by defendant's client, General Electric ("GE")."

Although plaintiff was made aware that defendant required substantiation in the form of approvals from GE before paying any amounts alleged to be due and owing, to date plaintiff has failed to provide defendant with such substantiation, defendant argues. Defendant further contends that it disclaimed liability for substantially the entire amount contained on the Invoices. On or about January 18, 2006, Marvin Moran ("Mr. Moran"), plaintiff's former Accounts Receivable Manager, sent to Sandra Losier ("Ms. Losier"), defendant's Manager of Supplier Relations, an e-mail containing a spreadsheet of unpaid invoices (*see* the "January 18, 2006 E-mail from Mr. Moran").[2] Defendant alleges that, as per Mr. Moran's request, Ms. Losier responded by sending to Mr. Moran charts indicating the specific check numbers by which any invoiced amount was paid (*see* the "Charts"). Citing the Charts, defendant contends that it has

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[1]The Court notes that defendant first argues that plaintiff cannot sustain its breach of contract claim because plaintiff has failed to prove the existence of a contract; however, plaintiff is not seeking summary judgment on its breach of contract claim.

[2]The Court notes that the January 18, 2006 E-mail does not contain a copy of the spreadsheet. Defendant notes in its opposition: "This spreadsheet was not produced to [defendant] in discovery."

already paid plaintiff $26,490.95 in connection with time that was approved by GE.[3] However, defendant denied "any obligation for time that was not approved by GE." Mr. Moran responded to Ms. Losier on January 24, 2006, seeking more information as to the unpaid Invoices (*see* the "January 24, 2006 E-mail from Mr. Moran"). In response, Ms. Losier e-mailed Mr. Moran that same day, explaining that defendant could not process payments for any amounts that were not authorized by GE (*see* the "January 24, 2006 E-mail from Ms. Losier"). Thus, defendant argues, plaintiff cannot prove its claim "because of these timely objections."

Defendant further argues that plaintiff failed to provide any evidence that defendant actually received and retained the disputed Invoices. Citing the July 8, 2009 deposition of Mr. Gutterman (the "Gutterman Dep."), defendant contends that Mr. Gutterman "stipulated" that he had no personal knowledge of whether the Invoices were ever sent to or received by defendant.

In reply, plaintiff first argues that defendant's opposition fails to include an affidavit by anyone with personal knowledge. Instead, defendant provides an affidavit and brief in opposition from Michael D. Ridenour ("Mr. Ridenour"), defendant's attorney (see the "Ridenour Affd."). Accordingly, plaintiff argues, any allegations regarding correspondence between Ms. Losier and Mr. Moran, as well as Mr. Ridenour's recitation of arguments against plaintiff's Invoices are hearsay and must not be considered by the Court.

Second, plaintiff argues that defendant does not refute that it received, retained and failed to protest the Invoices. Plaintiff contends that in defendant's Supplemental Responses to Plaintiff's Interrogatories (the "Supplemental Responses"), defendant admitted that it does not

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[3]The Court notes that the Charts to which defendant cites in support of its allegation – also cited as Exhibit A to defendant's Supplemental Responses to Plaintiff's First Set of Interrogatories – contain no figures as to the amounts defendant allegedly paid plaintiff. The Charts only identify the "invoices that have been fully paid by check" and invoices that have "not been paid due to lack of proper support and/or approval."

have any information or proof as to any protest or objection made to plaintiff s Invoices. The Ridenour Affd. cannot refute defendant's prior sworn admission, plaintiff argues.

Plaintiff further argues that defendant failed to show that any such objection was made within a reasonable time of receiving plaintiff's Invoices; defendant did not object to the Invoices until litigation ensued. The alleged correspondence between Ms. Losier and Mr. Moran contains no denial of the receipt of the Invoices and no objection to same. Further, the correspondence is dated January 24, 2008,[4] which is 3 years after the last invoice was generated, and 2 years after Mr. Moran's letter to defendant demanding payment of plaintiff's Invoices. The Charts to which defendant cites were created and furnished to plaintiff's counsel in the discovery process; they were not produced to plaintiff prior to this litigation. Therefore, the Charts do not constitute a timely objection, plaintiff argues. Similarly, defendant's Supplementary Responses provide no evidence of a timely objection.

Finally, plaintiff argues that defendant misrepresents Mr. Gutterman's deposition testimony. Mr. Gutterman did not state that he had no personal knowledge of whether the Invoices were sent to or received by defendant. He specifically stated that "other than through normal practice," he did not have any further information as to the sending of the Invoices. Plaintiff further contends that Mr. Gutterman recited the standard operating procedure in plaintiff's office for sending Invoices to defendant. Plaintiff refers to a reply affidavit from Mr. Gutterman, in which Mr. Gutterman reiterates that the standard operating procedure was followed (see the "Gutterman Reply Affd."). Based upon the Gutterman affidavits, defendant's admissions, and defendant's failure to oppose plaintiff's motion in any admissible form, plaintiff

[4]The Court notes that e-mails between Ms. Losier and Mr. Moran contain 2006 dates.

is entitled to summary judgment, plaintiff argues.

Discussion

Summary Judgment

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman* at 563; *Prudential Securities Inc. v Rovello*, 262 AD2d 172, 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the

proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562).

Account Stated

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, if any, in favor of one party or the other (*see* 1 NY Jur, Accounts and Accounting, §§5-7). It is well settled that where an account is made up and rendered, the one who receives it is bound to examine it, and if the accounting is admitted as correct, it becomes a stated account and is binding on both parties, the balance being the debt which may be sued for and recovered by law (*Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745 [1st Dept 1983]; *see also Ruskin, Moscou, Evans, & Faltischek, P.C. v FGH Realty Credit Corporation.*, 228 AD2d 294, 295 [1st Dept 1996] ["Defendant's receipt and retention of the plaintiff law firm's invoices seeking payment for professional services rendered, without objection within a reasonable time, gave rise to an actionable account stated, thereby entitling the plaintiff to summary judgment in its favor"]).

An agreement also may be implied if the debtor makes a partial payment (*Levisohn, Lerner, Berger & Langsam v Gottlieb*, 309 AD2d 668, 668 [1st Dept 2003], *lv denied* 1 NY3d 509 [2004]; *Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355, 356 [1st Dept 2001]). The partial payment is considered acknowledgment of the correctness of the account (*Parker Chapin Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375 [1st Dept 1997]; *Rik Shaw Assoc. v Bronzini Shops*, 22 AD2d 769 [1st Dept 1964]).

Here, plaintiff has established *prima facie* showing of an account stated. Attached to the Gutterman Affd. are copies of the 13 Invoices, along with time sheets, reflecting the work of various temps and dating from May 16, 2004 through January 30, 2005. Each Invoice is addressed to defendant and contains the temp's name, weeks worked, assignment, rate, and total due to plaintiff. Mr. Gutterman attests that the Invoices were processed and mailed to defendant, pursuant to the "standard operating procedure" of plaintiff's office:

> The invoice is automatically generated with the client's billing address imprinted on it. Once the invoice is generated, it goes to the account manager for approval. Upon approval, the account manager advises the billing invoice coordinator [in this case, Mr. Moran], and the billing invoice coordinator places the invoice in a window envelope, and places the envelope in the outgoing mailbox, which is emptied and taken to the post office at the end of the day by our mail clerk. A copy of the invoice is then kept in the client's physical and electronic file.
> (Gutterman Affd., ¶ 6)

Mr. Gutterman further attests that according to the business records maintain in his office by Mr. Moran, plaintiff followed the standard operating procedure in mailing the 13 Invoices to defendant (Gutterman Affd., ¶ 7).

Plaintiff also demonstrates that defendant failed to timely object to the Invoices. Mr. Gutterman attests that, "to my personal knowledge, and pursuant to the business records maintained in my office, defendant did not protest or object to the Invoices" (Gutterman Affd., ¶ 8). The Court also notes that in response to plaintiff's discovery demand for any protest or objection to plaintiff's Invoices, defendant states that it "is not presently aware of any information responsive to this Interrogatory" (Supplemental Responses, p. 6). Finally, Mr. Gutterman attests that, based on the business records maintained in plaintiff's office by Mr. Moran, defendant made partial payments on six of the Invoices, totaling $18,769.15, leaving a balance due of $35,275.61 (Mr. Gutterman Affd., ¶ 7).

As plaintiff has demonstrated that defendant received, retained without objection, and made partial payment on the Invoices, plaintiff has made a *prima facie* case for summary judgment in its favor. However, defendant raises an issue of material fact as to whether defendant timely objected to the Invoices.[5]

As a threshold issue, it is well settled that the "affidavit or affirmation of an attorney, *even if he has no personal knowledge of the facts*, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form,' *e.g.*, documents, transcripts. Such an affidavit or affirmation could also be accepted with respect to admissions of a party made in the attorney's presence" (*Zuckerman* at 563) (emphasis added). Therefore, contrary to plaintiff's argument, the sole fact that Mr. Ridenour has no personal knowledge of the facts herein is not fatal to defendant's submissions.

The Ridenour Affd. relies on defendant's Supplemental Responses, the Gutterman Dep., and the January 2006 e-mail exchange between Ms. Losier and Mr. Moran. The Supplemental Responses, which are signed by Ms. Losier and dated June 18, 2009, and the Gutterman Dep. clearly are in admissible form (*see e.g. Fair Price Medical Supply, Inc. v St. Paul Travelers Ins. Co.*, 16 Misc 3d 8, 9, 838 NYS2d 848, 848 - 849 [1st Dept 2007] [holding that "defendant's verified answers to the interrogatories constituted admissions of a party, which are admissible as evidence"]; *Bigelow v Acands, Inc.*, 196 AD2d 436, 439 [1st Dept 1993]). Further, the January 2006 e-mails between Ms. Losier and Mr. Moran were discussed and presented as "Defendant's

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[5]The Court notes that defendant's argument that Mr. Gutterman had no personal knowledge of whether the Invoices *were ever sent to or received by* defendant lacks merit. Defendant does not deny receiving the Invoices in its Supplemental Responses. Further the Charts appended to defendant's Supplemental Responses as Exhibit A clearly identifies the Invoices as the same 13 Invoices on which plaintiff seeks to recover herein. Therefore, defendants' own submissions support that it received plaintiff's Invoices.

Exhibit 4" during the Gutterman deposition (Gutterman Dep., pp. 71-72, 86). Therefore, the e-mails also are admissible.

As to the merits of defendant's arguments, the record establishes that defendant was aware of its obligations to provide plaintiff with proper documentation along with its Invoices. At his deposition, Mr. Gutterman stated that "my job is just to send [defendant] the invoices *with the substantiated time sheets* and to get paid" (Gutterman Dep., p. 73) (emphasis added). When asked what he meant by "substantiated time sheets," Mr. Gutterman explained that he meant a record of hours worked, *approved by GE.*

Further, the e-mails between Ms. Losier and Mr. Moran demonstrate that defendant objected to the Invoices and that plaintiff was aware of defendant's objections. In the January 18, 2006 E-mail to Ms. Losier, Mr. Moran writes:

> [W]e have some payment issues concerning the attached invoices and time sheets. We have devoted tremendous amounts of time reviewing deposits and remittance copies for payments made by GE Kelly Services for the months of May 2004 through April 2005. *We are sorry to say that the attached invoices remain unpaid to date*. Attached you will find a spreadsheet containing unpaid invoices to date. Please annotate the spreadsheet with any payment information you find. If the invoices are not paid, please process them for payment.
> If GE cannot provide us with a payment date, we will have no choice but to forward this to our Attorney's [*sic*] immediately.
> (emphasis added)

In response, Ms. Losier provided Mr. Moran with an annotated spreadsheet that clearly identifies the Invoices that defendant paid in full (including the check numbers of the payments), paid in part, and rejected outright because of insufficient documentation (see the Charts). Mr. Moran responded to Ms. Losier's submission as follows: "I'll be doing another audit using your check numbers. Would it be possible to give me a time frame on when we should anticipate payment on the open items with no check numbers? Thank you so much for your prompt attention" (January

24, 2006 E-mail from Mr. Moran). Ms. Losier responded *via* e-mail the same day: "The items that do not have check numbers have not been received. We would need you to send us Kelly timecards for those weekendings [*sic*]. Once these are received we will have to request that the branch get approval from GE before we can process them for payment" (January 24, 2006 E-mail from Ms. Losier). There is no evidence in the record that plaintiff ever sent defendant the missing time cards. Therefore, the record establishes that plaintiff was aware of defendant's objections to the Invoices.

Contrary to plaintiff's argument, the evidence in the record is inconclusive as to whether defendant's objections were untimely. The unpaid Invoices date from September 2004 through January 2005, and the e-mail exchange between Ms. Losier and Mr. Moran took place in January 2006. If the evidence demonstrated that defendant had objected to the Invoices a year or more after receiving them, then such an objection would be untimely (*see e.g. Healthcare Capital Management, LLC v Abrahams*, 300 AD2d 108, 108 [1st Dept 2002] [holding that buyers did not object within a reasonable time to sellers' invoices, where they objected to one bill 10 months after it was sent and to another six months after it was sent]). However, it is not clear from the e-mails whether January 24, 2006 was the first time defendant objected to the Invoices. The January 18, 2006 E-mail from Mr. Moran indicates an ongoing dialogue between plaintiff and defendant regarding billing issues. Mr. Moran begins his e-mail: "*Over the last several years*, your diligent efforts have been instrumental in helping us resolve many staffing or *billing issues* that have taken place at [defendant]" (emphasis added). Mr. Moran does not elaborate as to the nature of those "billing issues," nor is it clear from the e-mail whether "over the last several years" defendant made timely objections to the disputed Invoices. Further, the Charts contain no

dates indicating exactly when plaintiff rejected the Invoices; the charts only contain the dates and numbers of the Invoices, the name of the temp, and comments as to why the Invoices were rejected (Charts, p. 2). As the evidence in the record is insufficient to demonstrate whether defendant's objections were untimely, an issue of material fact exists defeating plaintiff's *prima facie* case for summary judgment in its favor.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of plaintiff R.P.I. Professional Alternatives Inc. for an order, pursuant to CPLR §3212, for summary judgment on an account stated against defendant Kelly Services Inc. is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 19, 2010

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD