

Darius Toraby Architects, P.C. v St. Barnabas Hosp. Corp.
2006 NY Slip Op 30651(U)
June 21, 2006
Supreme Court, New York County
Docket Number: 105340/05
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Herman Cahu

PART 49

Index Number : 105340/2005
DARIUS TARABY ARCHITECTS
vs
ST. BARNABAS HOSPITAL
Sequence Number : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 3/6/06
MOTION SEQ. NO. 001
MOTION CAL. NO. 6

_____ 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

FILED

JUN 26 2006

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

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

Dated: 6/28/06 Herman Cahu
J.S.C.

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: IAS PART 49

-----X
DARIUS TORABY ARCHITECTS, P.C.,

Plaintiff,

-against-

Index No. 105340/05

ST. BARNABAS HOSPITAL CORPORATION,

Defendant.

-----X
CAHN, J.

This is an action to recover fees of plaintiff architect, for work performed for the defendant tenant. The complaint's second cause of action is for an account stated. Plaintiff now moves for partial summary judgment.

This motion for partial summary judgment, turns on whether defendant's claimed protest, when it received plaintiff's statement of account, was sufficient to raise a defense on the claim for an account stated.

The complaint alleges two causes of action: the first, in quantum meruit, is not relevant to the instant motion. In the second cause of action, for an account stated, plaintiff alleges that it rendered statements to defendant between August 9, 2001 and May 4, 2004 for payment of architectural work, labor and services it provided to defendant; that the statements rendered created an account stated with defendant with an account balance of \$128,674.06; that upon receipt of the account stated, defendant failed to object, and retained plaintiff's statements for an unreasonable length of time without making payment, entitling plaintiff to judgment on its claim in the amount sued for.

FILED

JUN 26 2005
COUNTY CLERK

In support of the motion, plaintiff asserts that defendant made payment for services rendered in the years 2001 and 2002, but that no payments were made for invoices dated June 9, 2003 through May 3, 2004; that on March 1, 2004, plaintiff sent defendant a summary of the amount due on the outstanding invoices; and that on May 3, 2004, plaintiff sent the defendant a list of all outstanding bills. Plaintiff claims that it never received any response or complaints from defendant with respect to services performed by the plaintiff, or disbursements incurred.

Defendant opposes the motion, claiming that it “voiced numerous issues” with plaintiff throughout the period that plaintiff worked for defendant, that one of these objections, regarding work that needed to be done on certain windows, was voiced at weekly meetings with plaintiff, and that defendant has had clear disagreements with plaintiff’s invoices.

Defendant claims that on October 30, 2003, it wrote a letter to the “owner’s representative” asking him to communicate its displeasure with excessive fees, rejecting invoices issued for the design and supervision of additional facade construction work, and stating that defendant had taken further steps to register its dispute with plaintiff with a government agency involved in the project. Defendant has not offered any proof as to whether these objections were ever communicated to plaintiff by the “owner’s representative.”

Defendant also claims that on October 6, 2004, counsel sent a letter objecting to an

earlier demand letter from plaintiff's counsel.

An account stated is an account that has been balanced and rendered, with an assent to the balance, either express or implied. *Parker, Chapin, Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375 (1st Dept 1977).

To succeed on this motion for partial summary judgment, plaintiff must demonstrate that defendant failed to object to or protest the accuracy of the invoices within a reasonable period of time after receipt. *Kaye, Scholer, Fierman, Hays & Handler, LLP v L.B. Russell Chemicals, Inc.*, 246 AD2d 479 (1st Dept 1998). Whether a bill has been held without objection for more than a reasonable time is ordinarily a question of fact, unless only one inference is rationally possible, when it becomes a question of law. *Yannelli, Zevin & Civardi v Sakol*, 298 AD2d 579 (2nd Dept 2002).

Defendant claims that its oral objections to plaintiff's invoices at weekly meetings and its two writings addressed to this issue raise issues of fact regarding the existence of timely and valid objections to plaintiff's invoices, sufficient to defeat summary judgment.

An examination of the facts and the law, however, proves otherwise.

Whether a transaction constitutes an account stated is a question of law. *Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165 (1st Dept 1991). The receipt and retention of bills without objection is sufficient to create an account stated. *Rockefeller Group, Inc. v Edwards & Hjorth*, 164 AD2d 830 (1st Dept 1990). Evidence of an oral objection to an account rendered is sufficient to rebut an inference of an implied

agreement to pay the stated amount, on a motion for summary judgment. *Sandvoss v Dunkelberger*, 112 AD2d 278 (2nd Dept 1985). However, defendant must offer specific, rather than general, allegations of protest. *Id.*

Where an account is rendered showing a balance due, the party receiving it must examine it and object within a reasonable time, as silence will be deemed to be acquiescence. *Peterson v IBI Schroder Bank & Trust Co.*, 172 AD2d 165, *supra*.

Oral objections to a rendered account have been found to defeat a motion for summary judgment where the defendant specified the name of the person to whom the oral protest was made, and the substance of the conversation. *Diamond & Golomb, P.C. v D'Arc*, 140 AD2d 183 (1st Dept 1988). As Justice York stated in *Fensterstock & Partners, LLP v Shapiro*, 7 Misc3d 1002(A), “conclusory oral statements without stating whom and when and the substance of the conversation one spoke to are insufficient to defeat summary judgment *Levinson v Gottlieb*, 309 AD2d 668 [1st Dept 2003]; *Shea and Gould v Burr*, 194 AD2d 369 [1st Dept 1993].” Here, defendant has failed to identify to whom the alleged oral protests were addressed at weekly meetings, and the substance of any conversations, other than the reference to unacceptable drawings for windows in a project which defendant concedes was originally estimated at \$100,000.

The only other alleged objections asserted by defendant are the two writings, one addressed to an “owner’s representative” in March 2003, the other an attorney’s response to a demand for payment in October 2004. Since there is no proof of who the “owner” is,

or whether the objections raised in the defendant's letter to the owner's representative were ever communicated to the plaintiff, this fails to establish that an objection to plaintiff's account was timely interposed in 2003.

Defendant does not identify which of plaintiff's demands for payment its counsel was responding to by letter dated October 6, 2004. The last demand alleged by plaintiff is that of May 3, 2004, when plaintiff sent defendant a list of its outstanding bills and the total amount due. Thus, defendant's counsel responded to plaintiff's last demand five months after the demand was sent.

Defendant's objection to plaintiff's demand, five months after it was last made, is unreasonable as a matter of law. *See Ellenbogen & Goldstein, P.C. v Brandes*, 226 AD2d 237 (1st Dept 1996).

The motion for partial summary judgment is, therefore, granted.


Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment is granted, and plaintiff shall have judgment against defendant on the second cause of action for \$128,674.06, with interest from May 4, 2004, plus costs and disbursements, and it is further

ORDERED that the clerk may enter judgment accordingly.

Dated: June 21, 2006

ENTER:



J.S.C.

FILED
JUN 26 2006
COUNTY CLERK
NEW YORK