

**Canon Fin. Servs., Inc. v Moonlite Courier  
Worldwide, Inc.**

2007 NY Slip Op 30015(U)

February 8, 2007

Supreme Court, New York County

Docket Number: 0112919

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

CANON FINANCIAL SERVICES, INC.,  
Plaintiff,

Index No.: 112919/05

Motion Date: 10/10/06

- v -

Motion Seq. No.: 02

MOONLITE COURIER WORLDWIDE, INC.,  
Defendant.

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED

1

2

3 - 6

**FILED**

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NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers,

The court shall deny the parties' respective motions for summary judgment.

Plaintiff seeks summary judgment on its claims for breach of contract and account stated. Plaintiff argues that defendant defaulted on its payments under an equipment lease as of March 1, 2005, and did not object to invoices showing the default.

However, the court agrees with defendant that summary determination is inappropriate under the facts presented here. As stated by the First Department "[a]n account stated is an account, balanced and rendered, with an assent to the balance

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

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

either express or implied. There can be no account stated where no account was presented or where any dispute about the account is shown to have existed." Abbott, Duncan & Wiener v Ragusa, 214 AD2d 412, 413 (1<sup>st</sup> Dept 1995). In this case, plaintiff's claim rests on a Statement of Account dated May 19, 2005, that shows a balance owed of \$40,370.03. However, defendant avers that this Statement of Account was never received, and the affidavit in support of plaintiff's motion does not state how or when this Statement was rendered to the defendant. The court notes that the Statement of Account was not in the form of the other monthly bills plaintiff submits in support of the motion. On the facts before this court, plaintiff has failed to establish that there is no issue of fact as to whether the Statement of Account dated May 19, 2005, was submitted to the plaintiff and therefore the cause of action for account stated does not lie based upon that Statement of Account. See Sisters of Charity Hosp. of Buffalo v Riley, 231 AD2d 272, 282 -283 (4<sup>th</sup> Dept 1997) ("An essential element of an account stated is an agreement regarding the amount of the balance due . . . In support of its motion, plaintiff submitted statements purporting to constitute the account. . . [P]laintiff sought summary judgment for an amount different from the amount sought in the complaint. Under those circumstances, plaintiff failed to establish that the parties agreed on the balance due. Moreover, plaintiff failed to establish that the

statements were sent to, and that a demand was made upon, defendant.").

Defendant in this case objects to specific charges in the invoices and alleges that he contacted the plaintiff's customer service department to dispute certain charges. Although plaintiff's affidavit in support of the motion states that defendant never objected to individual invoices, plaintiff does not specifically rebut defendant's contention that objections were made to plaintiff's customer service unit. Therefore, defendant's allegations of protest are sufficient to raise an issue of fact as to defendant's protest of the invoiced amount the lack of which is an essential element of the account stated cause of action. See 1000 Northern of New York Co. v Great Neck Medical Associates, 7 AD3d 592, 593 (2d Dept 2004)

("Self-serving, bald allegations of oral protests are insufficient to raise a triable issue of fact as to the existence of an account stated. . . specific, as opposed to general, allegations of protest in support of their position, as they related to whom and when their objections to the . . . invoices were made . . . were sufficient to rebut an inference of an implied agreement to pay the stated amount.").

The court shall also deny defendant's cross-motion as there are issues of fact as to whether the plaintiff has breached the lease agreement.

Accordingly, it is

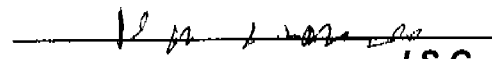
ORDERED that the motion and cross-motion are DENIED; and it is further

ORDERED that the parties are hereby directed to attend a preliminary conference on March 6, 2007, at 9:30 A.M., at the Courthouse, IAS Part 59, Room 1254, 111 Centre Street, New York, NY 10013.

This is the decision and order of the court.

**Dated:** February 8, 2007

ENTER:

  
**DEBRA A. JAMES** J.S.C.  
J.S.C.

**FILED**  
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