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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 601982/2006

NIMKOFF ROSENFELD & SCHECHTER,

vs

HEBER, LEVI

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 601982/06

MOTION DATE

MOTION SEQ. NO. 001

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 ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
APR 11 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: April 5, 2007

MARTIN SHULMAN J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

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NIMKOFF ROSENFELD & SCHECHTER, LLP,

Plaintiff,

Index No.: 601982/0

-against-

DECISION/ORDER

LEVI HEBER and JEWELRY 2000, INC.,

Defendants.

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Plaintiff Nimkoff Rosenfeld & Schechter, LLP ("plaintiff" or "NRS"), moves for summary judgment on its second cause of action for an account stated. In the alternative, NRS seeks a default judgment against defendant Jewelry 2000, Inc. ("Jewelry") based upon its failure to appear by counsel as CPLR 321(a) requires.[1] Defendant Levi Heber ("Heber") and Jewelry (collectively "defendants") oppose the motion.

Plaintiff is a law firm and defendants are clients pursuant to a written retainer agreement dated June 23, 2005 (the "retainer agreement"). Exh. C to motion. Defendants do not deny receipt of NRS's invoices dated July 14, 2005, August 9, 2005, September 12, 2005, November 9, 2005, March 14, 2006 and April 27, 2006. Exh. D to motion. Plaintiff contends defendants made partial payments on the invoices and failed to object to the invoices within a reasonable period of time.

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[1] Heber initially served a *pro se* answer on behalf of himself and Jewelry. Exh. B to motion. In response to this motion, defendants now appear by counsel. Defendants do not seek to amend the answer but rather request that it be deemed properly served on behalf of both defendants. Plaintiff will not be prejudiced by Jewelry's late appearance by counsel. Accordingly, the portion of the motion seeking a default judgment against Jewelry is denied.

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1st Dept., 1984), *aff'd* 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986).

"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" [citations omitted]. *Shea & Gould v. Burr*, 194 A.D.2d 369, 370, 598 N.Y.S.2d 261 (1st Dept., 1993). Either retention of bills without objection or partial payment may give rise to an account stated. *Morrison Cohen Singer & Weinstein, LLP v. Waters*, 13 A.D.3d 51, 52, 786 N.Y.S.2d 155 (1st Dept., 2004); *Rosenman Colin Freund Lewis & Cohen v. Edelman*, 160 A.D.2d 626, 559 N.Y.S.2d 249 (1st Dept., 1990), *app. den.* 77 N.Y.2d 802, 567 N.Y.S.2d 643 (1991)(summary judgment granted on account stated cause of action where defendants received and retained plaintiff's accounts without objection within a reasonable period of time and agreed to pay a portion of the indebtedness).

Here, the parties do not dispute that after NRS sent the first invoice in July 2005, Heber contacted NRS to advise that defendants were unable to pay. Nimkoff Aff. at

¶11; Heber Opp. Aff. at ¶6. It is also undisputed that the parties discussed a payout schedule and agreement and that defendants ultimately tendered two payments of $2,000.00 each to plaintiff in July 2005 and August 2005.[2] Nimkoff Aff. at ¶¶ 11 & 12; Heber Opp. Aff. at ¶¶ 7 & 9.

Subsequently, defendants obtained other counsel and by e-mail dated September 13, 2005 Heber requested that NRS issue a final bill. Heber Opp. Aff. at Exh. B. Approximately five months after plaintiff issued the first invoice, Heber sent NRS a letter dated December 1, 2005 summarily stating: "This is to dispute the charges that you claim." *Id.*

Heber's conclusory statements that he "never remained silent as to the invoices" (Heber Opp. Aff. at ¶19) and "verbally on several occasions" voiced "concern regarding the invoices" (Heber Opp. Aff. at ¶10) are insufficient to raise a triable issue of fact. *Manhattan Telecommunications Corp. v. Best Payphones, Inc.*, 299 A.D.2d 178, 179, 749 N.Y.S.2d 246 (1st Dept., 2002), *lv. to app. den.* 100 N.Y.2d 507, 764 N.Y.S.2d 235 (2003)(self-serving, bald assertions of oral protests in unsupported affidavit were insufficient to raise a triable issue of fact as to the existence of an account stated). Here, defendants offer no evidentiary proof or specific details concerning their alleged oral dispute of NRS's invoices. *Ruskin, Moscou, Evans & Faltischek, P.C. v. FGH*

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[2] Heber claims that the parties entered into an oral agreement whereby defendants agreed to pay plaintiff $2,000.00 per month. Although Heber contends that this oral agreement constituted a new fee arrangement which replaced the written retainer agreement, the retainer agreement expressly provides that all modifications thereto must be in writing. NRS asserts that defendants reneged on their oral promise to execute a promissory note, yet nonetheless made the first two $2,000.00 payments thereunder.

Realty Credit Corp., 228 A.D.2d 294, 295, 644 N.Y.S.2d 206 (1st Dept., 1996)(denial of summary judgment on account stated claim reversed where defendant failed to submit any evidentiary proof of objections); *Levisohn, Lerner, Berger & Langsam v. Gottlieb*, 309 A.D.2d 668, 765 N.Y.S.2d 873 (1st Dept., 2003), *lv. to app. den.* 1 N.Y.3d 509, 777 N.Y.S.2d 19 (2004)(defendant's allegations of oral protests failed to identify persons with whom defendant spoke or to specify the substance of the alleged conversations).

With respect to defendants' initial response to the first invoice in July 2005, it is undisputed that the exchange between the parties focused not on any real dispute of the charges but rather the manner in which the invoices might ultimately be paid. Finally, defendants' only written objection was sent some five months after NRS issued the first invoice and is also conclusory. *Shea & Gould v. Burr*, *supra*, 194 A.D.2d at 371 (failure to object for a five month period suffices to give rise to an account stated). Under these circumstances, defendants fail to establish any triable issue of fact and plaintiff's motion for summary judgment on the second cause of action is hereby granted.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendants Levi Heber and Jewelry 2000, Inc., jointly and severally, to the extent that plaintiff is granted judgment on the second cause of action in the amount of $67,918.89, together with interest at the contractual rate of 1% per month, compounded monthly, from April 27, 2006 until the entry of judgment, as calculated by the Clerk of the Court, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission

of an appropriate bill of costs, the second cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue as to the first and third causes of action.

Counsel for the parties are directed to appear for a preliminary conference on May 8, 2007 at 9:30 am, 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
April 5, 2007

Hon. Martin Shulman, J.S.C.