

<b>Laurence A. Pagnoni &amp; Assoc. v One Stop Senior Servs.</b>
2007 NY Slip Op 31337(U)
May 15, 2007
Supreme Court, New York County
Docket Number: 0100018/2007
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **SHIRLEY WERNER KORNREICH**  
J.S.C.

PART 54

Index Number : 100018/2007

LAURENCE A.PAGNONI &

vs

ONE STOP SENIOR SERVICES

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 100018/2007

MOTION DATE 3/12/07

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2-4  
(5)

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**  
MAY 25 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

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

Dated: 5/18/07

SHIRLEY WERNER KORNREICH  
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

-----X  
LAURENCE A. PAGNONI & ASSOCIATES,

Plaintiff,

Index No.:100018/2007

-against-

**DECISION and  
ORDER**

ONE STOP SENIOR SERVICES,

Defendant.

-----X  
**KORNREICH, SHIRLEY WERNER, J.:**

**FILED**  
MAY 25 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Laurence A. Pagnoni & Associates, Inc. ("LAPA") moves for summary judgment, pursuant to CPLR 3212, and seeks to recover \$28,602.91 for an account stated against its former client, defendant One Stop Senior Services ("OSSS"). LAPA contends that (1) it established an account stated based upon monthly invoices that it sent to OSSS during the period of August 2006 through November 2006 (the "Invoices") and a "Statement of Account," dated November 13, 2006; and (2) OSSS failed to object to the Invoices and the Statement of Account until it filed its February 2007 answer in this action. OSSS claims that its president and executive director timely objected to LAPA's Invoices, and thus, opposes LAPA's motion for summary judgment.

*I. Factual and Procedural Background*

*A. Movant's Proof*

Laurence A. Pagnoni, LAPA's president, avers that LAPA offers management and development services to the not-for-profit sector. On May 1, 2005, LAPA entered into a consultant contract with OSSS, a non-profit corporation in New York City that provides free services to the elderly in order to help them live safely and independently in their own homes, by

which LAPA would provide fundraising services to OSSS. Under the contract, LAPA formulated a three-year development plan (the "Plan") and corresponding annual budgets "to increase OSSS' philanthropic revenues from individual donors and private and corporate foundations." OSSS' Board of Directors approved this Plan on July 27, 2005.

LAPA's claim of an account stated is based upon Invoice Numbers 16, 17 and 18 sent to OSSS on August 1, September 1 and October 1, 2006, respectively. Additionally, after being terminated by OSSS on November 9, 2006, LAPA submitted a prorated Invoice for November 2006 (Invoice 19) that covered the first eight days of November. LAPA contends that OSSS neither objected to nor paid these Invoices. For instance, Mr. Pagnoni's executive assistant, Dwayne Sampson, avers that he called OSSS' executive director, Ruth-Ellen Simmonds, on November 6, 2006 to seek payment for the Invoices. According to Mr. Sampson, Ms. Simmonds did not object to any Invoice during their conversation, but rather she stated "OSSS was having a cash flow problem," and that LAPA "ought to know when the money would be available."

LAPA further contends that on November 9, 2006, OSSS' president, Charles F. Richter, sent a written letter confirming its termination of LAPA. LAPA claims the letter contained no objection to the Invoices. Also, on the same day, LAPA provided OSSS with a letter that delineated OSSS' unpaid Invoices. LAPA maintains it never received a response to this letter. Finally, LAPA avers that on November 13, 2006, it sent another letter to OSSS, titled "Statement of Account," which demanded payment of \$28,602.91. This figure represented the amounts due on Invoices 16-18, the prorated amount for Invoice 19 and claimed late fees. LAPA asserts that for forty-five days following the delivery of the Statement of Account, it heard "absolutely nothing" in response from OSSS.

*B. Defendant's Proof*

Ms. Simmonds, OSSS' executive director, avers that OSSS is a non-profit corporation that accomplishes its mission on an operating budget of only about \$1 million a year. She alleges that during the first and part of the second year of its contractual relationship with LAPA, LAPA breached its contract by not fulfilling many of its specific tasks and obligations. For example, LAPA failed to compile a list of potential individual donors, create detailed prospect research profiles on top donors and make calls to existing donors to cultivate further donations. As a result of LAPA's "multiple failures to perform," OSSS did not receive a single dollar in individual donations in the first four months of the second year. Moreover, LAPA advised OSSS that it would compensate for its failures by generating \$15,500 in revenues during a full-scale mailing in October 2006. The mailing ultimately cost \$6,500 and raised only \$550 in revenues. Due to these circumstances, OSSS terminated its contract with LAPA on November 9, 2006.

OSSS maintains that it complained about LAPA's failure to perform throughout the period it received LAPA's Invoices and insists that it told LAPA several times during November 2006 that it would not pay the Invoices. For instance, on October 13, 2006, Ms. Simmonds e-mailed Mr. Pagnoni to set up a meeting to discuss LAPA's poor performance in fundraising. OSSS' president also e-mailed LAPA on November 2, 2006 to express his displeasure about the total lack of individual donations for that fiscal year and the state of LAPA's relationship with OSSS. Additionally, Ms. Simmonds insists that she told Mr. Sampson during their conversation on November 6, 2006 that she "did not believe LAPA deserved to be paid on the Invoices."

OSSS further asserts that during its meeting with LAPA on November 8, 2006, its president, Mr. Richter, made it clear before witnesses that OSSS would not pay the Invoices. OSSS also claims that it did not sit idle for forty-five days after receiving LAPA's Statement of

Account on November 13, 2006. In fact, Mr. Richter insists that he telephoned Mr. Pagnoni on or about November 15, 2006 and offered to pay LAPA a certain amount of the Invoices in an effort to avoid litigation. Mr. Pagnoni neither accepted nor rejected the settlement offer during the November 15<sup>th</sup> call, but rather rejected the offer via e-mail to Mr. Richter on November 17, 2006. According to Mr. Richter, Mr. Pagnoni's e-mail was inaccurate, as it treated OSSS' refusal to pay as a "simple cash flow problem" instead of acknowledging that OSSS' cash flow situation "was the result of LAPA's failure to perform under its contract." OSSS contends that it received another e-mail from LAPA on December 27, 2006 regarding the status of the Invoices. However, before OSSS had a chance to respond, LAPA served it with papers on January 3, 2007.

## II. *Conclusions of Law*

To prevail on a motion for summary judgment, the movant must establish a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to demonstrate the absence of any material issue of fact. *Giuffrida v. Citibank Corp.*, 790 N.E.2d 772, 778 (2003). Once a prima facie showing is made, the burden then shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues that require a trial. *Zuckerman v. New York*, 404 N.E.2d 718 (1980).

Plaintiff LAPA's motion for summary judgment on an account stated theory fails for three reasons. First, there can be no account stated where any dispute about the account is shown to have existed. *See Abbott v. Ragusa*, 214 A.D.2d 412, 413 (1<sup>st</sup> Dept. 1995). Second, evidence of an oral objection, with some specificity, to an account rendered is sufficient to debunk any inference of an implied agreement to pay the stated amount. *See Collier v. MacNamara*, 237 A.D.2d 152 (1<sup>st</sup> Dept. 1997). Third, defendant OSSS raised an issue of fact as to whether it objected to the account stated within a reasonable time. *See Wm. H. Clark Mun. Equip., Inc. v.*

*Town of La Grange*, 170 A.D.2d 831(3<sup>rd</sup> Dept. 1991).

Defendant's affidavits prove that a dispute of an account stated exists between OSSS and LAPA. This evidence sets forth specific, as opposed to general, allegations of protest in support of OSSS' position, as it relates to whom and when OSSS objected to LAPA's Invoices. *See 1000 N. of N.Y. Co. v. Great Neck Med. Assocs.*, 7 A.D.3d 592, 593 (2<sup>nd</sup> Dept. 2004). For example, OSSS claims its agents expressed to LAPA on two separate occasions during November 2006 that OSSS would not pay the Invoices. Furthermore, OSSS contends that, on or about November 15, 2006, its president offered to pay LAPA a portion of the Invoices in order to avoid litigation.

Not only is a dispute between OSSS and LAPA apparent, but also OSSS has set forth alleged justification for refusing to pay LAPA's Invoices. *See Abbott*, 214 A.D.2d at 413 (defendant's objections to quality of work performed by plaintiff was sufficient to defeat plaintiff's motion for summary judgment on account stated). OSSS maintains that LAPA was aware of its disappointment in LAPA's fundraising performance since October 13, 2006. Additionally, OSSS contends that it made several attempts throughout November 2006 to notify LAPA of its displeasure with their contractual relationship and its refusal to pay the Invoices. OSSS insists that it explained to LAPA that OSSS' refusal to pay the Invoices was not "a simple cash flow problem," but rather "the result of LAPA's failure to perform under its contract."

Finally, LAPA's motion for summary judgment fails because OSSS has presented evidence that it objected to the account stated within a reasonable amount of time after it received the Invoices. *See Wm. H. Clark Mun. Equip., Inc.*, 170 A.D.2d at 831 (finding no account stated where defendant consistently rejected demands for payment). Here, OSSS received its first Invoice from LAPA on August 1, 2006. OSSS avers that it first objected to

paying the Invoices on November 6, 2006, and that it alerted LAPA twice more of its objections during November 2006. Although OSSS' formal termination letter to LAPA did not mention its refusal to pay the Invoices, OSSS' alleged previous oral protests are sufficient to rebut an inference of an implied agreement to pay LAPA's account stated. *See Collier*, 237 A.D.2d at 152 (holding that objection to account stated need not be written; it may be oral). Consequently, this situation is clearly distinguishable from *Rosenman v. Neuman*, 93 A.D.2d 745, 746 (1<sup>st</sup> Dept. 1983) ("Even if defendant had received plaintiff's accounts and did not expressly assent, but failed to object to them within a reasonable time, he would be bound by them as accounts stated unless fraud, mistake or other equitable considerations were shown."). *See also Crocker Commercial Servs., Inc. v. Safdie*, 111 A.D.2d 34, 35 (1<sup>st</sup> Dept. 1985). OSSS' submissions establish material issues that require a trial. Accordingly, it is

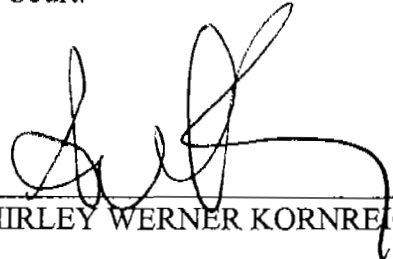
ORDERED that plaintiff's motion for summary judgment on an account stated is denied; and it is further

ORDERED that the amount of damages is to be determined at the trial of this matter.

The foregoing constitutes the Decision and Order of the Court.

Dated: May 15, 2007  
New York, New York

**FILED**  
MAY 25 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

  
SHIRLEY WERNER KORNREICH