

**Radin, Glass & Co., LLP v Schwartzberg Assoc., LLC**

2007 NY Slip Op 31391(U)

May 21, 2007

Supreme Court, New York County

Docket Number: 0603939/2003

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

RADIN, GLASS & CO., LLP,  
Plaintiff,

Index No.: 603939/03

Motion Date: 01/30/07

- v -

Motion Seq. No.: 01

SCHWARTZBERG ASSOCIATES, LLC, and NEW  
ROCHELLE ADMINISTRATORS, LLC,  
Defendants.

Motion Cal. No.: 111

The following papers, numbered 1 to 5 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

4, 5

**FILED**

MAY 30 2007

NEW YORK  
COUNTY CLERKS OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers,

In this action seeking payment for accounting services, plaintiff moves for summary judgment on its cause of action for account stated. Defendant Schwartzberg Associates, LLC, (SA) opposes the motion and cross-moves for summary judgment dismissing the complaint.

New Rochelle Administrators, LLC, has not opposed plaintiff's motion for summary judgment nor has it moved for summary judgment. Therefore, the court shall grant plaintiff's motion for summary judgment on liability with respect to New

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):

\* 2 ]  
Rochelle Administrators and direct that an assessment of damages be made at the trial of this action.

Plaintiff argues that it has set forth a prima facie case of account stated. The Court of Appeals has defined account stated as follows:

As was stated nearly one hundred years ago by Chief Judge Folger, "[a]n account stated is an account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance" (Volkening v DeGraaf, 81 NY 268, 270); and in Newburger-Morris Co. v Talcott (219 NY 505, 512) Judge Cardozo wrote as follows: "the very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness, insimul computassent, so that an action to recover the balance is upon an implied promise of payment may thenceforth be maintained." Thus, while the mere silence and failure to object to an account stated cannot be construed as an agreement to the correctness of the account, the factual situation attending the particular transactions may be such that, in the absence of an objection made within a reasonable time, an implied account stated may be found (Corr v Hoffman, 256 NY 254, 266).

Interman Indus. Products, Ltd. v R.S.M. Electron Power, Inc., 37 NY2d 151, 153 -154 (1975). It is undisputed on this motion that plaintiff submitted bills to SA for accounting services rendered to certain assisted living and nursing home entities during the period from October 2000 through March 2003. SA does not deny receipt of the invoices and does not assert that it ever made any objections to the contents thereof. Nor does SA deny plaintiff's allegation that it made partial payment of the invoiced amounts

[\* 3 ]

in the sum of over one-half million dollars leaving a balance of over \$300,000 that is sought in this action.

On these facts, plaintiff has set forth a prima facie case on its account stated cause of action. The court notes that plaintiff does not allege that there is any written contract or agreement setting forth the obligation of SA to pay the plaintiff for the services provided. However, "[i]n the case of an existing indebtedness, the agreement may be implied as well as express. An agreement may be implied if a party receiving a statement of account keeps it without objecting to it within a reasonable time because the party receiving the account is bound to examine the statement and object to it, if objection there be. Silence is deemed acquiescence and warrants enforcement of the implied agreement to pay. An agreement may also be implied if the debtor makes partial payment. The partial payment is considered acknowledgment of the correctness of the account." Chisholm-Ryder Co., Inc. v Sommer & Sommer, 70 AD2d 429, 431 (4<sup>th</sup> Dept 1979) (citations omitted); see also Cohen Tauber Spievak & Wagner, LLP v Alnwick, 33 AD3d 562 (1<sup>st</sup> Dept 2006) ("Defendants received plaintiff's invoices . . . without objection, and made partial payments thereon . . . bald conclusory allegations . . . are insufficient to defeat a motion for summary judgment on an account stated"). Plaintiff's having established a prima facie

cause of action for account stated, SA's cross-motion for summary judgment on plaintiff's account stated claim must be denied.

However, plaintiff is not entitled to summary judgment on its account stated cause of action against SA because SA in response has raised triable issues of fact as to its liability. SA admits that it retained the plaintiff to perform accounting services but states that it did so only as an agent of the various assisted living and nursing home entities. SA alleges that the subject entities were owned and controlled by a joint venture that SA had invested in and that pursuant to the joint venture's contracts with the entities, SA had no responsibility for the payment of any accounting fees for work performed for the entities. Furthermore, SA submits copies of emails it alleges demonstrate that plaintiff knew that SA was merely acting as an agent and that the payments SA made upon the invoices were the payments of an agent on behalf of a disclosed principal and therefore cannot act to bind SA as agent. SA also cites the invoices submitted by plaintiff in support of its motion noting that on or about August 2002, plaintiff addressed the invoices directly to certain of the entities rather than SA. Assuming the truth of the of SA's allegations in opposition to plaintiff's summary judgment motion as supported by the deposition testimony, emails and invoices themselves, there is a triable issue of fact as to whether SA's payments served to obligate it to pay the

[\* 5]

balances sought. See Time Warner City Cable v Adelphi University, 27 AD3d 551, 553 (1<sup>st</sup> Dept 2006) ("where the circumstances raise the possibility of a principal-agent relationship, and no written authority for the agency is established, questions as to the existence and scope of the agency must be submitted to a jury"). The existence of a question of fact as to the existence of an implied agreement to pay is sufficient to rebut what would otherwise be a prima facie case of account stated. See Grinnell v Ultimate Realty, LLC, 38 AD3d 600 (2d Dept 2007) (plaintiff may not maintain a cause of action to recover on an account stated against defendant absent proof of the existence of some indebtedness between the parties, or an express agreement to treat a statement of debt as an account stated).

Therefore, the court shall deny the parties respective motions and proceed to trial of this action.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment against defendant ROCHELLE ADMINISTRATORS, LLC, is GRANTED and the amount of damages upon the claims against that defendant shall be determined at the trial of this action; and it is further

ORDERED that plaintiff's motion for summary judgment against defendant SCHWARTZBERG ASSOCIATES, LLC, is DENIED; and it is further

