[* 1]

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

PRESENT: HON. SHIRLEY WERNER KORNREICH Justice PART 54

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Index Number : 602588/2005
N.Y.C. WATER WORKS
VS
PIERPOINT MORGAN
Sequence Number : 001
SUMMARY JUDGMENT

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

FILED
JUL 19 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

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

Dated: 7/12/07

HON. 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: PART 54

----------X

NYC WATER WORKS, LLC.,

Plaintiff,

-against-

THE PIERPONT MORGAN LIBRARY, PACE PLUMBING CORP., NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, JOHN DOE #1 through JOHN DOE #10 inclusive,

Defendants.

----------X

Index No.: 602588/05

DECISION ORDER and JUDGMENT

KORNREICH, SHIRLEY WERNER, J.:

This action arises from defendants' alleged breach of a construction contract and failure to pay an account stated. Plaintiff seeks summary judgment against defendant Pace Plumbing Corp., ("Pace"), a declaration that the mechanic's lien against Pace is valid, and a dismissal of Pace's counterclaims.

I. *Background*

Plaintiff, by its President Samuel Foley, avers the following. Defendant Pace hired plaintiff to perform construction work at the Morgan Pierpont Library located at 229 Madison Avenue, New York, New York (the "Project"). Plaintiff provided Pace with a written proposal (the "Proposal") at defendant's request on February 6, 2004. The Proposal included the following terms:

> We propose hereby to furnish material and labor - complete in accordance with specifications below, for the sum of ONE HUNDRED THIRTY NINE THOUSAND AND FIVE HUNDRED [DOLLARS] ($139,500.00)....
> Payment to be made as follows: NET 30 DAYS.
> Certifications will not be released until all payments have been made in full.

Note: This proposal may be withdrawn by us if not accepted within - 30 - days
We hereby submit specifications and estimates for:
...the following installations:

MADISON AVE:	1-10" EXHCI COMBINED SEWER
	1-SEWER PLUG
	1-6" DIP FIRE SERVICE
E. 37 ST.:	1-8" EXHCI COMBINED SEWER
	1-6" DIP FIRE SERVICE
	1-4" DIP DOMESTIC SERVICE

...Quote Subject to review of Approved plans and Specifications.

"See Pace P.O." was handwritten and circled on the Proposal. The Proposal also contained a separate section of small type, which included the following terms:

> "Payments not made in accordance with the terms above are subject to a service charge of 1 ½ % per month on outstanding balanced [*sic*]". In addition to the above service charge, owner/agent agrees that if N.Y.C. Water works, Inc. is required to institute legal action of any type or recover the amounts due hereunder that owner/agent shall pay all necessary and reasonable cost of collection, including but not limited to legal fees, service of process, court costs, etc.

The Proposal included an "Acceptance of Proposal" section, which was not signed by plaintiff or Pace.

Defendant Pace, by its President Andru Coren, avers the following. Pace was retained by F.J. Sciame Construction Corp. to perform plumbing work at the Project. In February 2004, Pace began discussing with plaintiff the subcontracting of the sewer work at the Project. Pace had previously worked with plaintiff on several projects. Plaintiff presented Pace with the Proposal, which Pace did not sign. Pace and plaintiff continued discussions regarding the Project, including the fact that the job must use union labor and would require substantial overtime due to time limitations; plaintiff's work was to be completed within several months.

On March 24, 2004, Pace issued a purchase order (the "Purchase Order") to plaintiff. The Purchase Order stated the single price of $187,000 for the following installations:

On Madison Avenue:
1 - 8" Extra heavy cast iron combined sewer
1 - Sewer plug
1 - 6" Ductile iron pipe fire water service
On East 37th Street
1 - 10" Extra heavy cast iron combined sewer
1 - 6" Ductile iron pipe fire water service
1 - 4" Ductile iron pipe domestic water service
2 - plug old water services (4" & 2 ½").

The Purchase Order included terms requiring the use of union labor for all installations and overtime as required by the Department of Environmental Protection and the Department of Transportation Bureau of Highway Operations. The bottom of the Purchase Order stated "Please send 1 copies [*sic*] of your invoice." The Purchase Order did not include any other terms referring to payment. On January 4, 2005, Pace issued a second purchase order (the "2005 Purchase Order") to plaintiff for the installation of a riser spur on top of the public sewer at the Project for $15,000. The 2005 Purchase Order stated that "[t]his PO is in addition to the PO #128735 dated March 24, 2004" and also included the same terms requiring union labor and overtime as the Purchase Order.

Plaintiff began work at the Project pursuant to both purchase orders on January 15, 2005. It invoiced Pace on January 30, 2005 for work done on January 15, 16, 22, 23, 29, and 30, noting that $65,000 of the Project work was completed. The invoice did not include any payment terms or a payment deadline. On February 23, 2005, plaintiff sent Pace a handwritten statement of the following "outstanding issues":

1) Requisition #1 65,000 payment status
2) Change orders in writing - EXHCI, Wtr Plug, Wtr Xtension
3) W. 37 St. sidewalk bluestone slabs - already cracked! Landmark? Not our restoration!

Plaintiff asked Pace to "advise on the following ASAP." Plaintiff continued working and

submitted a second invoice to Pace for $45,000 on February 26, 2005. The invoice indicated that plaintiff had worked on February 5, 12, 13, 19, and 26 and included a $15,000 credit for Pace, leaving the invoice balance at $30,000. Like the first invoice, the second invoice did not include any payment terms or a payment deadline. Pace paid $25,000 on March 10, 2005 and $55,000 on April 12, 2005. It avers that it intended to pay plaintiff in full upon completion of all work in the Purchase Order. Plaintiff avers that Pace did not dispute the accuracy of either invoice, but did not pay the balance despite defendant's employee Barry Goldman stating on repeated occasions that "he would see what he could do to process payments."

Pace further avers that in March 2005, several issues arose regarding the 37th Street side of the Project. Plaintiff was concerned that its work would kill a tree and damage stones on the sidewalk, so it requested that the owner and/or general contractor provide indemnification for any damage. The owner and general contractor denied the indemnification request, and in approximately April 2005, plaintiff refused to continue working despite repeated requests from Pace. Defendant Pace also became aware that plaintiff was using nonunion labor, thereby violating the terms of the Purchase Order. As a result, the general contractor backcharged Pace $1,778.

On April 21, 2005, Pace's attorneys sent plaintiff a letter advising plaintiff that if it did not recommence work at the Project within three days, Pace would terminate the Purchase Order and remove plaintiff from the Project. The letter stated that if Pace was forced to do so, it would seek to hold plaintiff liable for its damages, including the cost of completing the Purchase Order work. The letter also stated that plaintiff had completed $108,750 of work attributable to Madison Avenue and had been paid $80,000. Subject to plaintiff continuing to work on the

Project, Pace was willing to place the remaining $28,750 attributable to Madison Avenue in escrow to be released upon receipt of all applicable paperwork, filings and sign offs. The monies attributable to East 37th Street would be paid upon completion of all work and paperwork and the receipt of all applicable sign offs.

Despite Pace's letter, plaintiff failed to recommence work. On May 3, 2005, Pace's attorneys wrote a second letter to plaintiff, terminating plaintiff from the Project because of its failure to recommence work and its use of nonunion labor. The letter stated that Pace intended to backcharge plaintiff's account for the cost of completing the Purchase Order work along with any other damages Pace suffered as a result of plaintiff's default. Pace hired a new subcontractor to complete the work at a cost in excess of the Purchase Order price. Plaintiff filed a lien for $30,000 on May 25, 2005 and a summons and complaint to foreclose on the lien on July 12, 2005. Pace bonded the lien on July 11, 2005. In addition, Pace made two counterclaims against plaintiff for damages, believed to be in excess of $240,000, resulting from plaintiff's alleged breach of contract.

Plaintiff and defendant Pace both present short excerpts of the parties' examinations before trial without providing sufficient context. In one excerpt, plaintiff, by its President Samuel Foley, testified to the following. The Proposal and the Purchase Order were the two documents plaintiff and Pace worked off of for the Project. Before beginning work on the Project, Mr. Foley discussed the terms of payment with Pace's employee, Barry Goldman. Around the time the Purchase Order was negotiated, the payment period was negotiated up from the 30 days in the Proposal to 45 days, at the latest 60 days, although much of plaintiff's work had "net 30" as the term of payment. Pace had failed to pay plaintiff in an expeditious manner on

prior projects, but plaintiff had completed all previous work.

Defendant Pace, by its employee Barry Goldman, testified to the following. All of the terms of the proposal remained the same other than the price. In previous dealings with plaintiff, plaintiff would invoice Pace for work. Mr. Goldman did not recall if he had discussed payment requests with Mr. Foley between March 10 and April 12, and he never told Mr. Foley that any amounts in his invoices were unreasonable.

Additionally, Pace, by Mr. Goldman, avers the following. Mr. Goldman did not discuss the legal terms contained in the Proposal or payment terms with plaintiff. He only discussed with plaintiff the work to be performed and the price to be paid for the Project. During his examination before trial, when Mr. Goldman testified that all of the terms of the Proposal remained the same other than the price, he meant that plaintiff and Pace had agree on the scope and price of work to be performed by plaintiff.

Finally, Pace, by its President Andru Coren, testified to the following. He was responsible for communicating an oral rejection of a payment request to plaintiff, but did not remember having a conversation with plaintiff regarding one particular payment request. He had no independent recollection of when plaintiff stopped performing work. Pace had previously hired plaintiff to work on other projects. On previous projects, Pace had paid plaintiff progress payments based on requisitions for portions of the work. Mr. Coren was not certain if progress payments was the practice for all projects plaintiff performed for Pace, since plaintiff had not done that many projects for Pace and payment in that method would be at his discretion.

II. *Conclusions of Law*

To prevail on a motion for summary judgment pursuant to CPLR 3212, 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. Citybank Corp.*, 100 N.Y.2d 72, 81 (2003). Once the movant has made a prima facie showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial. *Zuckerman v. New York*, 49 N.Y.2d 557, 560 (1980). CPLR 3212(e) also provides that partial summary judgment may be granted and that the court may direct at its discretion either that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action or that the entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action. Plaintiff seeks summary judgment on the basis of an account stated and a breach of contract.

A. *Account stated*

The receipt and retention of an invoice, without objection within a reasonable period of time or with partial payment, gives rise to an account stated entitling the moving party to summary judgment in its favor. *Shea & Gould v. Burr*, 194 A.D.2d 369, 370-371 (1st Dept. 1993); *Morrison Cohen Singer & Weinstein, LLP v. Ackerman*, 280 A.D.2d 355, 356 (1st Dept. 2001). However, evidence of an objection, oral or written, to an account rendered is sufficient to rebut the inference of an implied agreement to pay. *Shea & Gould v. Burr*, 194 A.D.2d at 371.

In the instant action, plaintiff sent defendant Pace two invoices, and Pace paid the first in full and made a partial payment on the second. Pace then sent a letter to plaintiff stating that there was an outstanding balance of $28,750, which would be paid provided plaintiff completed its work and submitted the required paperwork. Pace provides no evidence that it objected to either invoice at any time. Therefore, plaintiff is entitled to an account stated in the amount of

$28,750.

B. *Breach of contract*

The existence of a contract between plaintiff and defendant Pace is not disputed; however, the parties disagree as to the terms of the contract. A contract requires an offer and an acceptance. Restatement (2nd) of Contracts § 22(1). When an acceptance varies the terms of the original offer, it is not an acceptance, but a counteroffer, which rejects and terminates the original offer. Restatement § 39; *Homayouni v. Banque Paribas*, 241 A.D.2d 375, 376 (1st Dept. 1997). The acceptance of a counteroffer establishes the counteroffer as the contract, superseding the original offer. *Homayouni v. Banque Paribas*, 241 A.D.2d at 376. However, a counteroffer can incorporate terms from the original offer by using language such as "as per quotation" to refer to the offer. *Matter of Wachusett Spinning Mills (Blue Bird Silk Mfg. Co.)*, 7 A.D.2d 382, 383-384 (1st Dept. 1959).

Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to decide without resort to extrinsic evidence. *Ruttenberg v. Davidge Data Sys. Corp.*, 215 A.D.2d 191, 192 (1st Dept. 1995). The question of whether an ambiguity exists must also be ascertained from the face of the contract without considering extrinsic evidence. *Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 199 (2001). An omission is not an ambiguity; the court cannot rewrite the terms of the agreement under the guise of interpretation. *Id.*; *Ruttenberg v. Davidge Data Sys. Corp.*, 215 A.D.2d at 197.

Plaintiff made an offer in its Proposal, which was not accepted by Pace. Instead, Pace made a counteroffer in its purchase orders, which varied from the Proposal with regard to the scope, price, and method of the work. While the Proposal referred to the Purchase Order, neither

purchase order referred to the Proposal. The purchase orders thus served as a rejection of the Proposal, and plaintiff accepted the terms of the purchase orders by beginning work on the Project. While the purchase orders did not include terms of payment, neither party disputes the interpretation of the existing terms. Therefore, the lack of payment terms alone does not render the contract ambiguous.

When the parties in a construction contract do not establish their own payment terms, New York General Business Law § 756-a provides default terms, which call for the payment of interim invoices submitted at the end of every billing cycle. In the absence of an agreement by the parties as to a billing cycle, the billing cycle is the calendar month within which the work is performed. Gen Bus § 756-a(1). A contractor or subcontractor must approve or disapprove the charges on an invoice within twelve business days, and approved charges must be paid seven days after receiving the necessary funds from the owner. Gen Bus § 756-a(2)(a)(ii), (3)(b)(ii). Neither payment made by Pace met these deadlines: there was a gap of more than a month between the first invoice and the first check and between the second invoice and the second check. If a subcontractor does not receive timely payment, General Business Law § 756-b permits the subcontractor to suspend performance without breaching the contract. However, the subcontractor must provide written notice and an opportunity to cure ten days prior to the suspension. There is no evidence that plaintiff notified Pace in writing before terminating work at the Project.

Although not a part of the written contract, the testimony of both parties indicates that payment terms may have been discussed during contract negotiations. Assuming, arguendo, that the parties had an oral agreement regarding the payment terms, plaintiff has not established the

terms of that agreement or that Pace breached the agreement, entitling plaintiff to terminate its work. In contrast, it is undisputed that plaintiff did not complete the work outlined in the purchase orders. Pace also alleges that plaintiff breached the contract by using nonunion labor. However, Pace has not yet provided evidence of when and how plaintiff breached the contract and what damages resulted from the breach. Questions of fact remain as to whether plaintiff or Pace breached their contract. Therefore, summary judgment is not appropriate as to Pace's counterclaims. Although plaintiff's claim and Pace's counterclaims are not inextricably interwoven, a determination that Pace's counterclaims are meritorious could negate the judgment in plaintiff's favor. Accordingly, it is

ORDERED that partial summary judgment is granted in favor of plaintiff in the amount of $28,750 with interest from February 26, 2005; and it is further

ORDERED that plaintiff's motion for summary judgment as to defendant Pace Plumbing Corp.'s counterclaims is denied; and it is further

ORDERED that summary judgment as to the validity of the mechanic's lien and its foreclosure is denied pending the determination of Pace's counterclaims; and it is further

ORDERED that the parties are to appear in Part 54 on July 30, 2007 for a status conference.

Dated: July 12, 2007

J.S.C.