

<b>Tempesta v M&amp;J Commodity Brokerage Corp.</b>
2008 NY Slip Op 30959(U)
April 1, 2008
Supreme Court, New County
Docket Number: 0601079/2005
Judge: Jane S. Solomon
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PRESENT: HON. JANE S. SOLOMON  
*Justice*

PART 55

**EDWARD TEMPESTA d/b/a ARROW RECYCLING**

INDEX NO. 601078/2006  
MOTION DATE 01 - 29 - 2008  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

- v -

**M&J COMMODITY BROKERAGE CORP.**

The following papers, numbered 1 to 13 were read on this motion to/for summary judgment

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

Answering Affidavits - Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

1-4  
5-8  
9-13

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion **is decided together with the motion made under sequence 005 in accordance with the annexed memorandum decision and order.**

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

**FILED**  
APR 03 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 4/1/08

JANE S. SOLOMON  
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 : IAS PART 55

-----X

EDWARD TEMPESTA d/b/a ARROW RECYCLING,

Plaintiff,

INDEX NO. 601079/2005

-against-

M&J COMMODITY BROKERAGE CORP.,

DECISION AND ORDER

Defendant.

**FILED**  
APR 03 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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JANE S. SOLOMON, J.

Under motion sequence no. 004, plaintiff of Edward Tempesta Inc. moves, pursuant to CPLR § 3212 (a), for summary judgment dismissing defendant's counterclaims, and defendant M&J Brokerage Corp. cross-moves for summary judgment on its counterclaims. Under motion sequence no. 005, plaintiff moves, pursuant to CPLR § 3025(b), for leave to amend its answer to defendant's counterclaims so as to assert the affirmative defense of the statute of frauds.

Defendant's counterclaims were filed on May 23, 2005, and plaintiff filed its answer thereto on June 7, 2005. Plaintiff filed its note of issue on March 30, 2007. By interim order, dated September 10, 2007, this court granted plaintiff summary judgment on its complaint.

In support of its instant motion, which argues that defendant's counterclaims must fail because of the lack of a written agreement between the parties, plaintiff adduces the September 9, 2006 examination before trial of Michael Appel, the president of defendant. Mr. Appel testified that he had no written agreement covering the matters addressed in defendant's counterclaims. That fact was known to plaintiff before the

commencement of this action, and plaintiff has not explained why it did not raise the statute of frauds in its answer to the counterclaims. Where, as here, a party is in possession of the relevant knowledge but allows discovery to be completed, and subsequently moves to amend its pleading, without "any semblance of an excuse for the delay," such motion should be denied. Bert G. Gross & Co. v Damor Realty Corp., 60 AD2d 541, 541 (1st Dept 1977); see also Prince v O'Brien, 256 AD2d 208 (1st Dept 1998); Smith v Hercules Constr. Corp., 274 AD2d 467 (2d Dept 2000).

Turning to the motion and cross motion for summary judgment, defendant's counterclaims, which seek recovery in quantum meruit and for unjust enrichment, are predicated on its claim that it enabled plaintiff to take over some of the accounts of non-party General Industrial Services Corp. (Industrial) when that company went out of business. A party claiming in quantum meruit must show the reasonable value of services that it performed in good faith and with the expectation of compensation therefore, and that the services were accepted by the person to whom they were rendered. Smalley v Dreyfus Corp., 40 AD3d 99 (1st Dept 2007), rev'd on other grounds 10 NY3d 55 (2008). A party claiming unjust enrichment must show that another party has been unjustly enriched at its expense, J.E. Capital, Inc. v Karp Family Assoc., 285 AD2d 361 (1st Dept 2001), and that it would be "'against equity and good conscience to permit the [other party] to retain what is sought to be recovered'." Sperry v Crompton Corp., 8 NY3d 204, 215 (2007), quoting Paramount Film Distrib. Corp. v State of New York, 30 NY2d 415, 421 (1972), cert denied 414 US 829 (1973).

[\* 4]

Plaintiff's contention, that it made no oral agreement with defendant to pay it a fee or commission for Industrial's customer list or accounts, is irrelevant to defendant's counterclaims, neither of which depends upon the existence of a contract. Michael Appel, the president of defendant, testified at his deposition that, on September 15 or 16, 2003, he gave Mr. Tempesta Industrial billing sheets showing the identity and addresses of Industrial's customers, the days of the week that their garbage was picked up, the number of bags typically collected, and the weekly charge for pickup, that he subsequently provided other services that aided plaintiff in taking on Industrial's former customers, and that he expected to be recompensed therefor according to the carting industry practice.

Edward Tempesta, the president of plaintiff, testified at his deposition that he received no customer lists from defendant. He acknowledged, however, that on September 14 or 15, 2003, Mr. Appel called to inform him that Industrial would cease doing business on September 15, 2003. He also acknowledged that, on the day that he received that call, he met with a number of Industrial's drivers, paid them for their work that day, and told them that they were now working for him. He stated that he had probably learned where to meet those drivers from Mr. Appel. On September 16, 2003, on the basis of the call from Mr. Appel, he called the Business Integrity Commission of the City of New York (Commission) to tell them that he was picking up Industrial's customers. That same day, the Commission granted plaintiff and a related company temporary permission to service Industrial's former

customers. Finally, for purposes of this discussion, Mr. Tempesta testified that, at the time of his deposition, he was earning a profit of approximately six per cent on the former Industrial accounts that he still retained, and that he would not have been earning that profit but for Mr. Appel's phone call telling him that Industrial was going out of business.

Accordingly, defendant is entitled to summary judgment, as to liability, on its claim for quantum meruit. However, inasmuch as defendant has not shown that the benefit that it conferred on plaintiff occasioned any expense on its part, defendant's unjust enrichment claim will be dismissed.

Finally, in the interim order of September 10, 2007, I misinterpreted what the parties mean by "points", as that term is used in the carting industry. A "point" is a multiplication factor of one month's billing, not, as I thought, a percentage of one month's billing, so a commission of "two points" is equal to two month's billing. The error does not change the result of the decision, however, which left open the amount of M&J's potential set-off on its counterclaim. Since the amount M&J is entitled to recover is not clear from the papers, that question is referred to a Special Referee. Accordingly, it is hereby

ORDERED that, in motion sequence no. 005, plaintiff's motion to amend its answer is denied; and it is further

ORDERED that, in motion sequence no. 004, plaintiff's motion to dismiss defendant's counterclaims is granted to the extent that defendant's claim of unjust enrichment is dismissed; and it is further

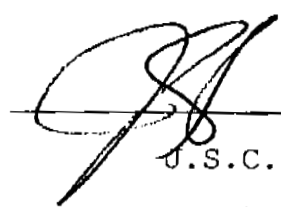
ORDERED that defendant's cross motion for summary judgment on its counterclaims for quantum meruit is granted as to liability, and the issue of how much plaintiffs owes on that claim, including interest, is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that entry of judgment shall be held in abeyance pending the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403; and it is further

ORDERED that a copy of this order with notice of entry shall be served by hand within 45 days on the Referee Clerk (Room 119M) to arrange a date for the reference to a Special Referee.

Dated: April / , 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.  
*(Faint text below signature)*

**FILED**  
APR 03 2008  
COUNTY CLERK'S OFFICE  
NEW YORK