

**Xerox Corp. v Panam Mtge. & Fin.
Servs., Inc.**

2008 NY Slip Op 33421(U)

December 18, 2008

Supreme Court, New York County

Docket Number: 600535/08

Judge: Carol R. Edmead

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

PRESENT: CAROL EDMEAD
Justice

PART 35

XEROX

INDEX NO. 600535/08

MOTION DATE 11/14/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

PANAM

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff pursuant to CPLR § 3211 dismissing defendant's affirmative defenses is granted; and it is further

ORDERED that the motion by plaintiff pursuant to CPLR § 3212 for summary judgment on the theory of account stated in its favor and against defendant for the full amount sought in the complaint is denied; and it is further

ORDERED that the motion by plaintiff pursuant to CPLR § 3212 for summary judgment on the theory of breach of contract in its favor and against defendant is denied; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 12/18/08


CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

_____x
XEROX CORPORATION,

Plaintiff,

Index No. 600535/08

-against-

PANAM MORTGAGE & FINANCIAL SERVICES, INC.,

Defendant.

_____x
EDMEAD, J.S.C.

DECISION/ORDER

FILED
DEC 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this action, plaintiff Xerox Corporation ("plaintiff") seeks damages for defendant's alleged breach of an equipment lease agreement and failure to pay accounts stated. Plaintiff now moves the Court pursuant to CPLR § 3211 to strike the affirmative defenses of defendant Panam Mortgage & Financial Services, Inc. ("defendant"). Plaintiff additionally moves pursuant to CPLR § 3212 for summary judgment in favor of plaintiff and against defendant.

Background

On or about November 11, 2003, plaintiff and defendant entered into a written lease agreement whereby defendant leased a photocopier and related equipment from plaintiff for a period of sixty months, with a periodic base charge of \$380.64 (the "first lease"). According to defendant, the copier repeatedly malfunctioned and therefore defendant asked plaintiff for a more durable replacement copier. According to plaintiff, on or about March 30, 2005, plaintiff and defendant entered into a new written lease agreement for a different copier and related equipment for a period of sixty months, with a periodic base charge of \$813.99 and with a trade-in allowance of \$4,970.00 (the "second lease"). It is undisputed that, on or about April 15, 2005,

defendant replaced the original copier with a different model. Thereafter, defendant began making monthly payments to defendant of approximately \$882 through May of 2007, after which payments ceased. On or about November 7, 2007, defendant sent a letter to plaintiff "opting out of the above-referenced lease contract number # 703328195."¹ The letter additionally stated, "Due to the troubled mortgage market, Panam is unable to make its payments and is preparing to go out of business. As such we request that you kindly contact us in order to make arrangements to pick up the equipment immediately."

Thereafter, plaintiff commenced this action for breach of the second lease. On or about March 25, 2008, defendant served its answer, which consisted of 16 affirmative defenses.

Plaintiff's Contentions

In support, plaintiff submits an affidavit from its litigation specialist, Anita McGovern ("McGovern"), who states that the copier was delivered to defendant pursuant to the second agreement, that dated invoices were sent to defendant on said dates, and that defendant made payments through May 2007 in accordance with the invoices under the second agreement. As a result of defendant's default in payments, "all of the obligations of defendant, due and to become due under the Lease, were accelerated and became immediately due and payable," for the amount indicated on the invoices attached to the complaint, plus interest and costs in collection, pursuant to paragraph 12(B). Further, payment of the accounts stated has been demanded but has not been made, and no objection has been made to the accounts stated. Despite sending the invoices and "repeatedly" demanding payment of the amounts due and owing from defendant, defendant failed to pay such amount, citing "bad times in the industry" as reason for its nonpayment.

¹This Court could not locate any "Lease #" on either the first or second lease.

Plaintiff further contends that each of defendant's affirmative defenses lacks merit. Specifically, plaintiff contends that it clearly apprised defendant of the claims against it; thus, it did not fail to state a claim upon which relief could be granted. Plaintiff disputes defendant's lack of jurisdiction defense by asserting that its affidavit of service on the defendant is *prima facie* proof of proper service and that defendant has failed to adequately dispute the content or veracity of the affidavit. Moreover, because defendant failed to move for judgment on the ground of improper service within 60 days after pleading such, defendant has waived that objection.

Plaintiff also asserts that defendant's affirmative defense of no contractual relationship between the parties is "ridiculous," as demonstrated by the copy of the second lease between the two parties, which was attached to plaintiff's complaint. Plaintiff disputes defendant's affirmative defense that payments were made in full by pointing out that defendant cannot show that the attached invoices from plaintiff to defendant have been paid.

Plaintiff contends that defendant's affirmative defenses of fraud and duress should be stricken, as defendant has failed to provide evidence of either. Regarding defendant's "mutual mistake" defense, plaintiff asserts that there was no mistake on its part, and that defendant's actions of executing the lease, in addition to accepting and using the leased equipment, demonstrate that it also intended to enter into the lease.

Plaintiff contends that it is not aware of any existing "conditions subsequent" that could have provided a basis for such a defense to this action. Plaintiff further contends that defendant's affirmative defense that it has fulfilled all of its obligations under the lease should be stricken in light of the unpaid invoices to which defendant did not object. Plaintiff also asserts that

defendant cannot cancel the lease at its whim.

Further, defendant's affirmative defense that plaintiff failed to fulfill its obligations under the lease to defendant lacks merit because plaintiff delivered the equipment which was the subject of the lease to defendant, and defendant made multiple payments for said equipment before defaulting.

Plaintiff contends that defendant's assertion that plaintiff failed to provide timely notice of default is untrue; plaintiff repeatedly, *via* telephone and invoice, demanded payment from the defendant since June of 2007.

Plaintiff also argues that there is no basis for defendant's affirmative defense of unconscionable conduct, which, in any event, "has little applicability in the commercial setting." Plaintiff asserts that unconscionability requires a demonstration of both procedural and substantive unconscionability. As such, plaintiff notes that defendant has failed to demonstrate that the *process* of entering into the lease was unconscionable, as defendant had numerous options in terms of the company it could have leased from in addition to the equipment it could have leased. Furthermore, defendant has not demonstrated that the *terms* of the lease unreasonably favored plaintiff.

In addition, plaintiff contends that defendant's affirmative defense alleging that granting plaintiff relief would result in unjust enrichment is without merit, as plaintiff only seeks the benefit of the bargain made between the parties. Plaintiff also contends that defendant's affirmative defense that plaintiff failed to mitigate its damages is unsubstantiated, noting that it is defendant's burden to prove that the damages could have been mitigated.

Defendant's Opposition

Defendant contends that, although it entered into the first lease in November 2003, it never entered into the second lease, and that the second lease is not genuine, but rather fabricated by the plaintiff. It was not until this action was commenced that defendant discovered this fraudulent agreement. In an affidavit by defendant's president Balram Kakkar ("Kakkar"), Kakkar attests that the signature appearing on the first page of the second lease attached to the plaintiff's complaint is not his signature, and that defendant did not authorize anyone to sign this document on its behalf. In further support, defendant notes the following discrepancies in the second lease: first, the date of March 31, 2005, is stamped on the first page of the second lease; yet, the handwritten date appearing next to Kakkar's alleged signature, which was not witnessed, is March 30, 2005; second, the phone number next to Kakkar's alleged signature is not his phone number; third, the date stamped on the balance of the pages to the second lease is December 9, 2005, almost nine months after the purported second lease was allegedly executed by Kakkar.

Defendant also asserts that, after receipt of the replacement copier in April of 2005, plaintiff began billing defendant \$890.73. Defendant states that it assumed that this new "lease"² was "premised on a modification of an earlier shipped defective copier that was subsequently replaced." Defendant argues that plaintiff failed to properly account for the return of the first copier. According to defendant, plaintiff represented that it would give defendant a credit for the 16 months defendant already paid under the first lease and that "the new lease would be for the remaining term of the 60 months or for an additional 44 months." Defendant asserts that it paid

²Although defendant denies signing the second lease, it acknowledges the existence of a second agreement that began when the new copier was received, and refers to this agreement as a "lease" in its opposition papers.

for the replacement copier until June of 2007, the point at which it began to regularly break down. Although defendant asked plaintiff to remove the "useless and disruptive" machine, plaintiff "refused to pick up the machine or respond" to defendant's request. Defendant claims that it acquired a photocopier from a different company in September of 2007 and that it continued to request that plaintiff remove its machine. Defendant is willing to pay for the copier through the period that it actually used the copier and the copier properly worked.

Plaintiff's Reply

Plaintiff contends that defendant fails to raise a triable issue of fact sufficient to overcome plaintiff's motion for summary judgment. Plaintiff asserts that defendant's contention that it did not sign the second lease is belied by the fact that defendant made payments thereunder.

Plaintiff additionally contends that, even if defendant had not signed the second lease, as a matter of law the lease was ratified by defendant's payments that had continued for more than two years. Furthermore, defendant's assertion that it believed its payments were under the initial lease is belied by the fact that the payments were made for an amount that was consistent with the second lease.

Plaintiff also denies that defendant asked plaintiff to remove the photocopier because it was defective; rather, defendant, as stated in its letter to plaintiff dated November 7, 2007, requested that plaintiff pick up the equipment because the troubled mortgage market prevented it from being able to make the required payments.

Plaintiff further contends that defendant's argument that the second lease was a forgery is flawed; the first lease, which defendant acknowledges as valid, also contains a similar discrepancy between the date stamped and date handwritten next to defendant's signature.

Finally, plaintiff argues that, as per paragraph 11 of the lease and Comment 1 to UCC § 2A-527, it was under no duty to mitigate its damages by picking up the equipment from defendant.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the “cause of action . . . has no merit” (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212[b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the

existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, *supra* at 562). Opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Breach of Contract

To establish a cause of action for breach of contract, plaintiff must establish the making of an agreement, the performance by that party, breach by the other party, and resulting damages (see *Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court New York County 2006], *citing Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). The essential terms of the parties’ purported contract, including the specific provisions of the contract upon which liability is predicated, must be established ((*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071 *citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; and *Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]). The plaintiff must establish the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract or by attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v Silliker, Inc.*,

11 Misc 3d 1072, 816 NYS2d 693 (Supreme Court New York County 2006] citing *Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [1987] and accord *Valley Cadillac Corp. v Dick*, 238 AD2d 894, 894 [1987]).

Plaintiff's submission of the March 2005 contract signed by both parties, in addition to the invoices and billing records thereunder, constitutes sufficient evidence to make a *prima facie* showing of defendant's liability for breach of the second lease. Consequently, the burden shifts to the defendant to provide evidence sufficient to raise a triable issue of fact to rebut plaintiff's *prima facie* showing of entitlement to summary judgment under this theory.

In defense, defendant argues that the signature of its representative on the second lease was forged. In support, defendant offers an affidavit of its representative whose name appeared on the signature line of the second lease attesting that the signature was not his, in addition to evidence of date and phone number discrepancies on the lease.

The Court of Appeals has asserted that "[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 384 [2004]). For example, in *Seaboard Surety Co. v The Earthline Corp.* (262 AD2d 253, 253 [1st Dept 1999]), the First Department held that a "detailed affidavit" was sufficient to raise a triable issue of fact regarding the issue of forgery, which is consistent with *Banco Popular*, as it was more than a "bald assertion." Furthermore, the Court noted that "discrepancies on the face of the notary's acknowledgment" added support to the claim of forgery (*id*). Similarly in *Orix Financial Services, Inc. v Laronga* (2007 WL 2236593 [Sup Ct NY County 2007]), the Supreme Court stated that an averment that the signature was not that of the affirmant sufficiently raised an issue

of fact regarding the alleged forgery, where defendant submitted copies of his signature in further support of his forgery claim. Evidently, defendant provided more than a conclusory assertion of forgery. Likewise, the Supreme Court in *Alvidrez v Roberto Coin, Inc.* (791 NYS2d 344 [Sup Ct NY County 2005]) applied *Banco Popular* to a case of alleged forgery in which the alleged signer averred that the signature was not hers. The plaintiff submitted an affidavit attesting that her mother (who allegedly signed the contract) was not in the country where the contract was allegedly signed on or around the date of the contract. The court held that this was sufficient evidence to support plaintiff's mother's averment that the signature was not hers and rebut the opposing party's *prima facie* case that plaintiff's mother had signed the contract.

In the case at bar, defendant's president, Mr. Kakkar, attests that the signature on the second lease submitted by plaintiff is not his. As a bald assertion of forgery is not enough to rebut plaintiff's *prima facie* case that the lease was agreed to by defendant (*Banco Popular, supra*), the Court must examine the additional allegations to determine whether an issue of fact exists as to whether defendant agreed to the terms of the second lease, on which plaintiff's complaint rests. In addition to his "bald conclusion" regarding his signature, he further attests that (1) date stamped on the first page is different from the date appearing next to his purported signature, (2) the typed telephone number appearing next to his purported signature was not his, and (3) the dates appearing on several pages of the second lease post date his purported signature.

Defendant's argument that the discrepancy between the signature date and date stamped on the first page of the contract is proof of a forged signature is inconsequential, given that the same date discrepancy appears on the initial lease, which defendant acknowledges as valid.

As to defendant's claim that the typed phone number is not his, such discrepancy, in and

of itself, is insufficient to raise an issue of fact as to whether defendant agreed to the second lease at this juncture.

However, the post dated pages of the second lease (*i.e.*, those dated December 9, 2005) is unexplained by plaintiff. Yet, these post dated pages contain paragraphs that address the plaintiff's obligation to resell the leased equipment in the event of a default by lessee, which pertains to the issue of mitigation as well as the plaintiff's right to accelerate the second lease in the event of a default. Thus, as to defendant's allegation that it is relieved from liability under either lease due to plaintiff's failure to remedy the copier's defective condition, the issue of the date discrepancy on the additional pages of the lease (those dated December 9, 2005) is relevant. Further, to the extent plaintiff relies on the additional, post dated pages to support the sums sought in the complaint and in this motion, such additional pages, dated after defendant purportedly signed the first page of the second lease, are insufficient to support plaintiff's claim. Therefore, the branch of plaintiff's motion for summary judgment on its breach of contract claim is denied, at this juncture.

Account Stated

Plaintiff also asserts that defendant is liable on a theory of account stated. 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 (*see* 1 NY Jur, Accounts and Accounting, §§ 5-7). In the case of an existing indebtedness, the agreement may be implied as well as express (*cf. Gurney, Becker & Bourne v Benderson Dev. Co.*, 47 NY2d 995, *revg* 62 AD2d 1165). 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 or to procure someone to examine it for him, and object if he disputes its correctness (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165, 167, 567 NYS2d 704, 705 [1st Dept 1991]). If he admits it to be correct it becomes a stated account and is binding on both parties (*Rodkinson v Haecker*, 248 NY 480 [1928]). However, “[t]he rule that an account which has been rendered and to which no objection has been made within a reasonable time should be regarded as admitted by the party charged as prima facie correct assumes that there exists some indebtedness owing between the parties . . .” (*Gurney, Becker & Bourne, Inc., v Benderson Development Co., Inc.*, 47 NY2d 995, 996 [1979]). Thus, while the retention of invoices without objection *may* be deemed an acquiescence, situational factors must be taken into account to determine whether the plaintiff’s *prima facie* account stated claim has been made (*Interman Industrial Products, Ltd., v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 154 [1975]; *Newburger-Morris Co. v Talcott*, 219 NY 505, 511 [1916]; *see also Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355 [2001]).

In the case at bar, plaintiff submitted an affidavit of its employee attesting to evidence in the form of copies of a signed equipment lease, invoices, billing and payment records showing an amount due and owing, and indicating that such invoices were sent to defendant and not objected to by the defendant. Additionally, plaintiff alleges that defendant was in possession of a photocopier owned by plaintiff and had been paying for said copier in accordance with the second lease and monthly invoices for several months before defaulting. Additionally, defendant sent plaintiff a letter opting out of a lease between the parties because of financial difficulties after having failed to pay several invoices. Thus, plaintiff has made a *prima facie* showing of an

account stated claim.

In opposition, defendant does not deny that it received the invoices, or claim that it disputed the amount of any of the invoices. “The very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness ... so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained” (*Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 153-54 [1975], quoting *Newburger-Morris Co. v Talcott*, 219 NY 505, 512 [1916]). There is no indication that defendant ever objected to the amount due under any of the invoices sent by plaintiff prior to submission of its answer dated March 25, 2008. Defendant does dispute, however, the underlying indebtedness, including the validity of the lease submitted by plaintiff, which includes the length of the agreement and the parties’ rights and remedies in the event of a default, and the acceptability of the photocopier that was the subject of the agreement. Thus, the Court must examine the evidence on the record regarding the facts and circumstances surrounding the invoices to ascertain whether they can be deemed an account stated.

As discussed above, defendant did not meet its burden in providing evidence to rebut plaintiff’s *prima facie* showing that the first page of the lease, which contained the price term and length of the agreement, was valid. Additionally, defendant had been paying plaintiff the amounts stated on the monthly invoices through May of 2007, which closely resembled the amount reflected on the first page of the second lease. Furthermore, defendant did not dispute plaintiff’s assertion that similar invoices were mailed to it through December 2007 or that defendant mailed plaintiff a letter in November of 2007 attempting to “opt out” of the lease. Therefore, the record supports a finding for an account stated claim in the amount reflected in the

unpaid monthly invoices that through November 2007.

However, the final invoice from plaintiff to defendant, dated December 22, 2007, for an amount of \$18,680.77, appears to arise from the additional, post dated pages of the lease containing the acceleration clause and the rights and remedies of the parties in the event of a default. In the absence of any explanation regarding these date discrepancies, this Court cannot conclude that plaintiff is entitled to the accelerated damages underlying the December 22, 2007, invoice.

Plaintiff's reliance on *Edison Stone Corp. v 42nd Street Development Corp.* (145 AD2d 249 [1989]) for the proposition that defendant ratified the entire second lease by making payments at the agreed upon price for over two years, is misplaced. *Edison Stone* concerned a dispute alleging economic duress, with no allegations that the promissory note at issue was a forgery or had not been agreed to, in full, at the time. While defendant can be said to have ratified the higher price term associated with the replacement copier by virtue of payments made, the *price* term is not disputed by defendant.

Based on the above, the Court concludes that plaintiff established its account stated claim in the amount reflected in the November 2007 invoice. However, because this Court cannot conclude that defendant signed a contract that included a right to accelerate the second lease in the event of a default, summary judgment in favor of plaintiff for the full amount sought in the complaint and as sought in its motion is denied.

Collection Costs, and Attorney's Fees

Similarly, to establish its right to costs associated with the collection of these payments and attorney's fees in the event of a default by lessor, plaintiff relies on paragraph 12 of the

second lease. As discussed above, in the absence of an explanation regarding the significant date discrepancies, this Court cannot find that this lease was entered into by the parties in March of 2005. Thus, plaintiff cannot rely on these provisions to establish its right to collection costs and attorney's fees.

Affirmative Defenses

Furthermore, the Court notes that defendant's submissions do not address the branch of plaintiff's motion seeking dismissal of defendant's affirmative defenses.³ Because defendant fails to oppose plaintiff's motion to strike the affirmative defenses raised by defendant, each of defendant's affirmative defenses is hereby denied without discussion (*see Marine Midland Bank, N.A. v Virginia Woods, Ltd.*, 574 NYS2d 485 [Sup Ct NY County 1991]). Plaintiff has established entitlement to recover from defendant the sum of its seven unpaid monthly invoices from June through December submitted to defendant without objection, plus interest (CPLR § 5001; *see Darby & Darby, PC v VSI International, Inc.*, 95 NY2d 308 [2000]), on the theory of account stated.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff pursuant to CPLR § 3211 dismissing defendant's affirmative defenses is granted; and it is further

ORDERED that the motion by plaintiff pursuant to CPLR § 3212 for summary judgment

³ Plaintiff failed to specifically address defendant's thirteenth affirmative defense (numbered by defendant as a second paragraph 8) asserting that plaintiff's claims were barred by the doctrine of equitable estoppel. Notably, the defendant provided no evidence or factual allegations to support the defense in either its initial answer or opposition to plaintiff's motion.


on the theory of account stated for the full amount requested in its favor and against defendant is denied; and it is further

ORDERED that the motion by plaintiff pursuant to CPLR § 3212 for summary judgment on the theory of breach of contract in its favor and against defendant is denied; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 18, 2008



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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