

**Gomez Elec. Contr., Inc. v Urban League  
of Northeastern NY, Inc.**

2009 NY Slip Op 30145(U)

January 27, 2009

Supreme Court, Albany County

Docket Number: 1621-01

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

GOMEZ ELECTRICAL CONTRACTORS, INC.,

Plaintiff,

-against-

**DECISION and ORDER**  
**INDEX NO. 1621-01**  
**RJI NO. 01-02-070681**

URBAN LEAGUE OF NORTHEASTERN NY, INC.,  
THE COMMONS, LLC, NEW COVENANT  
CHARTER SCHOOL, ADVANTAGE SCHOOLS, INC.,  
AARON R. DARE,

Defendants.

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Supreme Court Albany County All Purpose Term, January 21, 2009  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

Plaintiff commenced this action seeking payment for electrical supplies it provided, and services it performed, in repairing temporary classrooms for New Covenant Charter School in

1999. Despite a procedurally “confused background”<sup>1</sup> issue was joined by defendants New Covenant Charter School (hereinafter “NCCS”) and Advantage Schools, Inc. (hereinafter Advantage”). Discovery has been completed, a note of issue filed and a trial date set. Both NCCS and Advantage now bring motions for summary judgment seeking dismissal of plaintiff’s complaint against it. Because NCCS failed to demonstrate their entitlement to judgment as a matter of law on plaintiff’s breach of contract and unjust enrichment claims, that portion of their motion for summary judgment is denied. NCCS did demonstrate, however, their entitlement to judgment as a matter of law dismissing plaintiff’s account stated cause of action against it. Similarly, Advantage also demonstrated its entitlement to judgment as a matter of law, with plaintiff failing to raise an issue of fact relative to any of its causes of action. Accordingly, Advantage’s summary judgment motion is granted in its entirety.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). “To succeed on a motion for summary judgment, the movant is required to establish its entitlement to judgment as a matter of law by demonstrating that there are no questions of fact, shifting the burden to the nonmovant to raise a question of fact requiring a trial.” (Lynch v. Liberty Mut. Fire Ins. Co., \_\_ NYS2d \_\_ 2009 WL 37382 [3d Dept. 2009]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 [1988]). A movant fails to meet their burden however, by merely “pointing to gaps in... proof”, the movant’s obligation on the motion is an affirmative one. (Antonucci v. Emeco Industries,

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<sup>1</sup> Quoting from the Decision and Order of McCarthy, J., dated September 29, 2006, which references the Decision and Order of McCarthy, J., dated June 28, 2006, both discussing the procedurally “confused” commencement of this action.

Inc., 223 AD2d 913, 914 [3d Dept.1996]). In opposing a motion for summary judgment, one must produce “evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). Moreover, all evidence must be viewed in the light most favorable to the opponent of the motion. (Amidon v. Yankee Trails, Inc., 17 A.D.3d 835 [3d Dept. 2005]; Crosland v. New York City Transit Auth., 68 NY2d 165 [1986]).

#### Breach of Contract Cause of Action

“The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage”. (Clearmont Property, LLC v. Eisner, \_\_ NYS2d \_\_, 2009 WL 138769 [3d Dept. 2009][citing Hecht v. Components Intern., Inc., 22 Misc3d 360 [Sup. Ct. Nassau Co. 2008]).

NCCS failed to affirmatively disprove, as a matter of law, plaintiff’s breach of contract cause of action.

NCCS’ motion focuses on contract “formation”, claiming that plaintiff cannot prove that NCCS entered into a contract with plaintiff. Plaintiff’s president’s deposition testimony (hereinafter “Gomez deposition”) establishes that plaintiff did not specifically know whether or not it was contracting with NCCS at the time of contract formation. The Gomez deposition demonstrates that defendant Aaron Dare (hereinafter “defendant Dare”) was plaintiff’s contact person in forming this contract. According to the Gomez deposition defendant Dare was the president, chair, or effectively in charge of The Urban League of Northeastern NY, Inc., The

Commons, LLC and NCCS. The Gomez deposition does not establish, however, that defendant Dare was not acting in his capacity as NCCS's chair, when plaintiff's contract was formed. Plaintiff's confusion over who it contracted with, does not necessarily prove, as a matter of law, that plaintiff did not contract with NCCS because, at that time, defendant Dare was its chair. Nor did NCCS affirmatively demonstrate that they did not contract with plaintiff. No affidavit was submitted nor documentary evidence introduced establishing that plaintiff and NCCS had no contract. NCCS demonstrated that plaintiff's initial billing for the work it performed was addressed to The Urban League of Northeastern NY, Inc., The Commons, LLC and in a rejected bill to NCCS. Such billing implies that plaintiff's contract was not with NCCS. However, such billing occurred after the contract was fully performed and is not determinative of the parties intent at the time of contract formation. Accordingly, NCCS has not demonstrated its entitlement to judgment as a matter of law, and its motion for summary judgment dismissing plaintiff's breach of contract cause of action is denied.

Advantage, however, did demonstrate its entitlement to judgment as a matter of law dismissing plaintiff's breach of contract cause of action against it.

Advantage demonstrated that plaintiff had no direct contact with it at the time of contract formation, as set forth in the Gomez deposition. The Gomez deposition also demonstrates that defendant Dare had no position with Advantage, as he was neither an "employee or representative of Advantage". As set forth above, the plaintiff made their contract with defendant Dare, in his role with The Urban League of Northeastern NY, Inc., The Commons, LLC, NCCS or individually. Plaintiff made no contract with Advantage who, from the Gomez deposition, appears only to be involved as the entity he understood as ultimately paying for the

plaintiff's work. Similar to the limitations on a subcontractor's suit against parties it is not in privity with (IMS Engineers-Architects, PC v. State, 51 AD3d 1355 [3d Dept. 2008]), here, because Advantage demonstrated as a matter of law that no privity of contract exists, plaintiff's breach of contract claim against Advantage must be dismissed.

With the burden shifted, plaintiff failed to demonstrate the existence of a triable issue of fact. Plaintiff submits the affidavit of its president (hereinafter "Gomez Affidavit"), who now claims that Advantage was partners with either NCCS or defendant Dare. Plaintiff claims liability attached to Advantage due to such partnership. Significantly, neither plaintiff's complaint nor its bill of particulars set forth a theory of liability based upon an alleged partnership. However, "even an unpleaded defense may be invoked to defeat a summary judgment motion". (Sheils v. County of Fulton, 14 AD3d 919 [3d Dept. 2005]). To demonstrate the partnership, plaintiff introduced a portion of NCCS' formation application, NCCS' charter and an unsigned undated "management contract" purportedly between Advantage and "the Albany Charter School, Inc.". Plaintiff does not claim that Advantage drafted or submitted NCCS' formation application or otherwise admitted that a partnership existed. The NCCS application names Advantage under the "Applicant's partners" subsection, but fails to explain what legal relation that entails. From such document, the Gomez Affidavit speculates that a partnership existed between defendant Dare or NCCS and Advantage, sufficient for contractual liability to attach to Advantage. Mere speculation, however, does not create an issue of fact. (Zuckerman, supra).

Moreover, the additional documentary evidence submitted by plaintiff fails to support its partnership theory. NCCS' charter allows for it to partner with a management company, but does

not require such partnership nor specifically establish that Advantage was its partner. Moreover, the undated unsigned “management contract” does not partner Advantage with any of the named defendants herein. On this record plaintiff failed to demonstrate a partnership existed by any indicia thereof. (Cleland v. Thirion, 268 AD2d 842, 843 [3d Dept. 2000][“intent of the parties... joint control and management... sharing of the profits... [and] losses, and whether there was a combination of property, skill or knowledge”]). Accordingly, plaintiff failed to raise a genuine issue of fact requiring a trial, and Advantage’s motion for summary judgment dismissing plaintiff’s breach of contract cause of action against it is granted.

#### Unjust Enrichment Cause of Action

Plaintiff’s second theory of recovery, unjust enrichment, requires it to “show that (1) defendant was enriched (2) at plaintiff’s expense, and (3) that ‘it is against equity and good conscience to permit... defendant to retain what is sought to be recovered’”. (Clark v. Daby, 300 AD2d 732 [3d Dept. 2002][quoting Lake Minnewaska Mtn. Houses v Rekis, 259 AD2d 797, 798 [3d Dept. 1999]). Moreover, the Court of Appeals stated: “Courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant’s conduct was tortious or fraudulent.” (Paramount Film Distrib. Corp. v State of New York, 30 NY2d 415, 421 [1971], cert denied 414 US 829).

Similar to NCCS’s breach of contract argument, again NCCS argues that it did not “request” or “agree to pay for” plaintiff’s services. However, as set forth above, NCCS failed to demonstrate, as a matter of law, that defendant Dare, in his capacity as chair of NCCS, did not

request plaintiff to perform the electrical work or agree to pay for it. Accordingly, NCCS' motion for summary judgment dismissing plaintiff's unjust enrichment cause of action is denied.

Likewise, Advantage also moves for summary judgment dismissing plaintiff's unjust enrichment cause of action against it, arguing that it never assented to plaintiff's electrical work. Again as set forth above, Advantage demonstrated, as a matter of law, that it had no contact with plaintiff at the time of contract formation. Advantage affirmatively demonstrated that plaintiff's services were not performed for it "resulting in [Advantage's] unjust enrichment" (Clark, supra at 732) and plaintiff raised no genuine issue of fact. Accordingly, Advantage's motion for summary judgment dismissing plaintiff's unjust enrichment cause of action against it is granted.

#### Account Stated Cause of Action

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due." (J.B.H., Inc. V. Godinez, 34 AD3d 873, 874 [3d Dept. 2006], quoting Jim-Mar Corp. v. Aquatic Const., Ltd., 195 A.D.2d 868 [3d Dept.1993] lv. denied 82 NY2d 660 [2000]) While such an agreement may arise from the retention of an account for "an unreasonable amount of time without objection... a cause of action for account stated will fail [w]here either no account has been presented or there is any dispute regarding the correctness of the account". (Id. at 874-75).

On this record both NCCS and Advantage have demonstrated, as a matter of law, that an account has not been stated. Both defendants demonstrated that neither received an invoice that was not objected to within a reasonable amount of time. Advantage demonstrated, by the Gomez deposition and documentary submissions, that when it was billed it rejected the invoice. NCCS


demonstrated that defendant Dare, in his capacity with NCCS, rejected plaintiff's initial invoice. There was simply no agreement, implied or otherwise, between plaintiff and either of these defendants relative to the billing herein.

Plaintiff, in turn, raised no issue of fact relative to its account stated claim. The Gomez affidavit, and the affidavit of William Clay, allege that representatives of NCCS and Advantage told plaintiff that it would be paid for the services it rendered. However, plaintiff admits that no one ever stated NCCS or Advantage would make such payment. Accordingly, plaintiff has failed to raise an issue of fact, and its account stated causes of action against both NCCS and Advantage are dismissed.

All papers, including this Decision and Order, are being returned to the attorney for the defendant Advantage. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: January 27, 2009  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated December 2, 2008, Affidavit of John Liguori, dated December 2, 2008 with attached Exhibits "A" - "Z".
2. Notice of Motion, dated December 2, 2008, Affidavit of Christopher Meyer, dated December 2, 2008 with attached Exhibits "A" - "M".
3. Affidavit of Joseph Gomez, dated January 9, 2009, Affidavit of William Clay, dated January 8, 2009, with Exhibits "A" - "E".
4. Affidavit of John Liguori, dated January 20, 2009.
5. Affidavit of Christopher Meyer, dated January 20, 2009.