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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 112912/2008

GALLET DREYER & BERKEY, LLP

VS.

ISOSPACE, INC.

SEQUENCE NUMBER : 002

DISMISS

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

on this motion to/for

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

FILED
MAY 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby ✓

ORDERED that the motion of plaintiff Gallet Dreyer & Berkey, LLP for an order, pursuant to CPLR §3212, granting it summary judgment against defendants IsoSpace, Inc. f/k/a LiQ, Inc., Abbas Shah and Alan Nathan for recovery under breach of contract and an account stated is granted; and it is further

ORDERED that the Clerk may enter judgment in favor of plaintiff, and against defendants, in the sum of $27,655.93, together with interest at a rate of 9% from February 27, 2009 through and including the date of entry of judgment in the sum of $27,655.93 to be calculated by the Clerk, plus costs to be calculated by the Clerk upon an appropriate bill of costs; and it is further; and it is further

ORDERED that the motion of plaintiff for an order, pursuant to CPLR §3212, granting it summary judgment against defendants for recovery under the theory of *quantum meruit* is denied; and it is further

ORDERED that defendants' motion to dismiss plaintiff's Complaint is denied; and it is further

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

That constitutes the decision and order of the Court.

Dated: 5/20/09

HON. 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

GALLET DREYER & BERKEY, LLP,

Index No. 112912/08

Plaintiff,

-against-

DECISION/ORDER

ISOSPACE, INC. f/k/a LIQ, INC., ABBAS SHAH, and ALAN NATHAN,

Defendants.

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiff Gallet Dreyer & Berkey, LLP ("plaintiff") seeks to recover overdue legal fees from IsoSpace, Inc. f/k/a LiQ, Inc. ("IsoSpace"), Abbas Shah ("Mr. Shah") and Alan Nathan ("Mr. Nathan") (collectively "defendants"), *pro se*.

Plaintiff now moves for an order granting summary judgment, pursuant to CPLR §3212, against Messrs. Shah and Nathan, and attorneys' fees, costs and disbursements it incurred on defendants' behalf and in connection with bringing this action,[1] on the ground that there are no triable issues of fact (Motion Sequence 001).

By separate motion, defendants move to dismiss plaintiff's Complaint on the grounds that IsoSpace is now defunct and that Messrs. Shah and Nathan are not personally liable for IsoSpace's debts (Motion Sequence 002). Both motions are consolidated for joint disposition.

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[1] Plaintiff's additional request for attorneys' fees incurred in connection with bringing this action is denied. Plaintiff is not entitled to an award of an attorney's fees absent an agreement between the parties, statutory authorization, or court rule (*see Crispino v Greenpoint Mortg. Corp.*, 769 NYS2d 553 [2d Dept 2003] *citing Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-492, 549 NYS2d 365; *Glatter v. Chase Manhattan Bank*, 239 AD2d 68, 669 NYS2d 651), and plaintiff failed to cite any agreement, statute, or rule in its motion papers.

Plaintiff's Motion[2]

At all times relevant herein, IsoSpace was a Delaware corporation. Mr. Shah was its CEO, and Mr. Nathan was its vice president.

Pursuant to a written retainer agreement dated January 30, 2006 (the "Retainer Agreement"), defendants retained plaintiff to perform legal services. As set forth in the Retainer Agreement, defendants retained the legal services of plaintiff with respect to the lawsuit captioned *Hui Jin v Isospace, Inc., Abbas Shah and Alan M. Nathan*, New York Supreme Court, Index No. 100575/2006 (the "Jin matter") "and to undertake such further matters that [defendants] request, and [plaintiff] agree, to undertake" (Retainer Agreement, p. 1).

Mr. Shah and Mr. Nathan each signed the Retainer Agreement individually, and thereby agreed to be personally liable for the attorneys' fees, costs and disbursements for the legal representation by plaintiff. Pursuant to the Retainer Agreement, and at defendants' request, plaintiff agreed to provide legal services on two additional matters, specifically defendants' general corporate matters and the defense in a lawsuit captioned *Kevin B. Connolly v Isospace, Inc. v Isospace, Inc. f/k/a LiQ, Inc.*, New York Supreme Court, Index No. 600732/2007 (the "Connolly matter"), in which Mr. Shah and Mr. Nathan faced potential personal liability under the New York Labor Law. As principals of IsoSpace, Mr. Shah and Mr. Nathan derived a benefit from the representation.

Defendants failed to pay plaintiff pursuant to the terms of the Retainer Agreement. Accordingly, plaintiff commenced this action alleging breach of contract, *quantum meruit* and an

[2]Information is taken from plaintiff's motion, which comprises an affirmation from attorney David T. Azrin and a Memorandum of Law ("MOL").

account stated, and seeking recovery of its attorneys' fees, costs and disbursements.

Plaintiff contends that its claim is conclusively established by documentary evidence and, as such, summary judgment is warranted, as there is no triable issue of fact. The Retainer Agreement plainly evidences the personal obligation of both Mr. Shah and Mr. Nathan for the attorneys' fees, costs and disbursements incurred on behalf of IsoSpace. The Retainer Agreement covered the Jin matter and such other matters that defendants requested and that the firm agreed to undertake. There is no dispute that defendants also requested that the firm provide legal representation for the Connolly matter and other general matters. Therefore, defendants are personally liable under the terms of the Retainer Agreement. Plaintiff further contends that the total due plaintiff is $27,655.93 for legal services rendered on their behalf from January 3, 2006 through September 17, 2008. Accordingly, the Court should grant plaintiff's motion in its entirety.

Defendants' Motion[3]

Citing their Answer, defendants oppose the motion for summary judgment and move to dismiss the Complaint.

First, defendants contend that plaintiff's allegation that IsoSpace is a "Delaware corporation, having its principal place of business located at 111 Broadway, Room 809, New York, New York 10006" is false (citing Complaint ¶ 2). Defendants allege that IsoSpace, Inc. is a defunct Delaware corporation that ceased all operations in 2007, and no longer has a place of business.

[3]Motion Sequence #002 comprises an affidavit in opposition by Mr. Nathan ("opp.") and defendants' Answer.

Second, citing Complaint ¶ 7, defendants deny plaintiff's allegation that Mr. Shah and Mr. Nathan "specifically agreed to be personally liable for the attorneys' fees, costs and disbursements incurred, both individually and on behalf of IsoSpace." Mr. Nathan states that he "never offered to undertake personal responsibility for any or all legal costs incurred by IsoSpace. I was only an officer of the corporation and therefore, not the alter ego of the company and have no personal financial obligations for the IsoSpace Inc's indebtedness."[4]

Third, defendants contend that they do not recall any of the details described in Complaint, ¶¶ 9-10, wherein plaintiff alleges the following:

> Defendants requested, and Plaintiff agreed, that Plaintiff represent Defendants with respect to the Jin Matter. During the period between March 1, 2006 through August 31, 2008, plaintiff performed work, labor and services, in the nature of professional legal services, and incurred disbursements in connection therewith, in accordance with the Agreement with Defendants and at the special instance and request of Defendants with respect to the Jin Matter, having an agreed price of $13,904.09, including late fees, of which only $13,000.00 has been paid despite due demand, leaving an unpaid balance due of $904.09.
> Defendants requested, and Plaintiff agreed, [that] Plaintiff represent Defendants with respect to general corporate matters. During the period between June 1, 2006 through August 31, 2008, plaintiff performed work, labor, and services, in the nature of professional legal services, and incurred disbursements in connection therewith, in accordance with the Agreement with Defendants and at the special instance and request of Defendants with respect to general corporate matters, having an agreed price of $924.41, including late fees, none of which has been paid despite due demand, leaving an unpaid balance due of $924.41.

Fourth, referring to Complaint ¶ 11, Mr. Nathan states that he does not recall ever having agreed to a specific price of $30,257.61 for plaintiff's services in connection with the Connolly matter .

Fifth, Mr. Nathan contends that all of the amounts referred to in Complaint, ¶¶ 12-13

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[4]In their Answer, defendants specifically allege that Mr. Nathan "only agreed to be responsible as an officer of IsoSpace Inc." (Answer, p. 1).

($27,655.93, plus any additional late fees on the unpaid principal balance) relate to legal issues involving IsoSpace, Inc. "As an employee [and Vice President] of the corporation, I did not bear any personal responsibility for paying corporate bills" Mr. Nathan contends. At the time, IsoSpace was struggling to avoid going out of business and was attempting to negotiate a sale of the assets of the business. IsoSpace failed to complete a sale of the business and eventually had to close its doors in 2007, with no remaining financial assets, defendants allege.

Sixth, referring to Complaint, ¶¶ 15-16, Mr. Nathan contends that he is in no way responsible for personally paying plaintiff's claims because all of plaintiff's invoices were submitted to IsoSpace. Mr. Nathan further contends that any personal checks that he may have made out to plaintiff were temporary short-term loans to IsoSpace and were authorized by IsoSpace, Inc., "although to date I have not been reimbursed."[5]

Plaintiff's Opposition

Plaintiff contends that defendants' conclusory statement that they do not recall having assumed personal responsibility for the legal fees incurred is insufficient to overcome the documentary evidence submitted by plaintiff, which clearly indicates the individual liability of both Mr. Shah and Mr. Nathan. Plaintiff argues that defendants do not (and cannot) deny these facts: Defendants retained the law firm of Gallet Dreyer & Berkey, LLP to represent them; Mr. Shah signed the Retainer Agreement on behalf of himself individually and as president of IsoSpace, and Mr. Nathan signed the Retainer Agreement individually; and legal services were performed, and fees and costs were incurred, pursuant to the Retainer Agreement. Moreover,

[5]In their Answer, defendants specifically state: "These loans were authorized and accepted as such by Mr. Shah acting in his capacity as the CEO of IsoSpace, Inc."

defendants do not dispute the amount owed, set forth in plaintiff's moving papers.

Further, defendants' claim that the fact that IsoSpace ceased its operations, no longer has any place of business and is a defunct company, does not relieve Mr. Shah and Mr. Nathan of their respective individual liability for the fees incurred, as they agreed to be personally responsible when they each signed the Retainer Agreement, plaintiff argues.

Plaintiff further argues that there can be no dispute that Mr. Shah signed individually, because he expressly designated that he was signing the agreement "individually." Accordingly, summary judgment should be entered against Mr. Shah individually. Mr. Nathan likewise signed on behalf of himself individually, because he signed above his individual name only, with no indication that he was signing in a representative capacity. The courts have repeatedly held that summary judgment must be entered against an individual defendant in such circumstances, plaintiff contends.

Analysis

Summary Judgment

It is well settled that where a plaintiff 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 NYS2d 738, 739 [1993]; *Winegrad v New York Univ Med. Ctr.*, 64 NYS2d 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 NYS2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NYS2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2D 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [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]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

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 NYS2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [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* at 562). The defendant "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 NYS2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient

(Alvord and Swift v Steward M. Muller Constr. Co., 46 NYS2D 276, 281-82 [1978]; *Fried v Bower & Gardner*, 46 NYS2D 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NYS2D 910, 912 [1978]; *Mallad Const. Corporation. v County Fed. Sav & Loan Assn.*, 32 NYS2D 285, 290 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2D 347 [1st Dept 1998]).

Breach of Contract

Plaintiff's first cause of action alleges breach of contract. It is well settled that where a party employs an attorney under an express valid contract stipulating the compensation the attorney is to receive for his services, the stipulated method of compensation must generally control both the attorney and the client (7 NY Jur 2d Attorneys at Law §194; *Ransom v Ransom*, 147 AD 835 [1st Dept 1911] [holding that absent any proof of fraud, misrepresentation, undue influence or other contractual infirmities, a written employment contract between a plaintiff attorney and his client would govern the attorney's compensation for his services]). To state a cause of action for breach of contract, the proponent of the pleading must specify the making of an agreement, the performance by that party, breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071[A], 2006 NY Slip Op 50497[U] [Sup Ct, 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 alleged" (*Volt Delta Resources LLC v Soleo Communications Inc.*, *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]). Further, a complaint alleging breach of contract must set forth 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 [Sup Ct, New York County 2006)] *citing Chrysler Capital Corporation. v Hilltop Egg Farms, Inc.*, 129 AD2D 927, 928 [3d Dept 1987], *accord Valley Cadillac Corporation. v Dick,* 238 AD2D 894, 894 [4d Dept 1987]).

Here, plaintiff has established a *prima facie* case that defendants breached the Retainer Agreement. First, plaintiff provides a copy of the Retainer Agreement, which opens with the salutation "Dear Mr. Shah and Mr. Nathan." The Retainer Agreement goes on to state in the first paragraph:

> This retainer letter with Gallet Dreyer & Berkey, LLP shall document our agreement to represent and *defend each of you* in the lawsuit filed by Hui Jin, styled Hui Jin v Isospace, Inc., Abbas Shah, and Alan M. Nathan, Index No. 100575/06, and to undertake such further matters that you request, and we agree, to undertake.
> (Retainer Agreement, p. 1) (*emphasis added*)

The Retainer Agreement also details the fees for plaintiff's services and indicates that " you will also be responsible for all expenses incurred during our representation" (*id.*). Finally, the Retainer Agreement is signed by "Abbas Shah, individually and on behalf of Isospace" and "Alan Nathan" (Retainer Agreement, p. 2).

In their opposition, defendants argue that as "employees of IsoSpace," Mr. Shah and Mr. Nathan bear no personal responsibility for IsoSpace's debts. However, the Retainer Agreement clearly indicates that the legal services were performed by plaintiff for the benefit of Mr. Shah, personally and in his capacity as CEO of IsoSpace, and to Mr. Nathan, personally. "It is a cardinal rule of contract construction that a court should 'avoid an interpretation that would leave contractual clauses meaningless'" *(150 Broadway N.Y. Associates, L.P. v Bodner*, 784 NYS2D

63, 66 [1st Dept 2004], *quoting Two Guys from Harrison-N.Y. v S.F.R. Realty Assocs.*, 63 NYS2D 396, 403 [1984]). Further, the signatures on a contract "must be read, like any other portion of the instrument, not in isolation, but in the context of the instrument as a whole" (*150 Broadway NY Associates, L.P. v Bodner*, 784 NYS2D 63, 66 [1st Dept 2004]).

At the time Mr. Shah and Mr. Nathan signed the contract, Mr. Shah was the CEO of IsoSpace, and Mr. Nathan was the vice president. Generally, "officers or agents of a corporation are not liable on its contracts if they do not purport to bind themselves individually" (*PNC Capital Recovery v Mechanical Parking Systems, Inc.*, 283 AD2D 268, 270 [1st Dept 2001], *lv dismissed* 96 NYS2D 937 [2001], *appeal dismissed* 98 NYS2D 763 [2002]). However, if the clear, unambiguous terms of the agreement indicate a personal obligation for a debt, then the officer signing the agreement can be held personally liable (*PNC Capital Recovery v Mechanical Parking Systems, Inc.* at 270); *see also 150 Broadway N.Y. Associates, L.P. v Bodner* at 67 ["Our decision in [*PNC Capital Recovery*] illustrates the principle that the presence or absence of a reference to corporate office above or below a person's signature on an instrument does not necessarily determine the capacity in which the person signed the instrument"]).

Here, the Retainer Agreement makes clear that plaintiff agreed to represent Mr. Shah and Mr. Nathan as individuals, as well as IsoSpace. The Retainer Agreement is addressed to Mr. Shah and Mr. Nathan, and indicates that representation is in connection with a case in which IsoSpace is a named defendant. Mr. Shah signed the Retainer Agreement "individually" and in his capacity as an officer of IsoSpace, thus binding IsoSpace as well. Finally, while Mr. Nathan signed the agreement without indicating that he was signing in his capacity as an officer of IsoSpace, the terms of the agreement make clear that plaintiff was representing Mr. Nathan in his

personal capacity. Thus, plaintiff has established the existence of an agreement, in the form of the Retainer Agreement, that was personally binding on Mr. Shah and Mr. Nathan, as well as IsoSpace.

Second, plaintiff establishes that it performed services for defendants, pursuant to the Retainer Agreement. Plaintiff alleges that it provided legal services for defendants in the Jin matter from March 1, 2006 through August 31, 2008 (Complaint, ¶¶ 6-9); in the Connolly matter from November 1, 2006 through August 31, 2008 (Complaint, ¶¶ 11-12); and "with respect to general corporate matters" from June 1, 2006 through August 31, 2008 (Complaint, ¶ 10). As defendants do not contest that plaintiff performed these services in their opposition, plaintiff has demonstrated the absence of any triable issue of fact as to its performance under the Retainer Agreement.

Third, plaintiff establishes that defendants breached their duty to plaintiff by not paying plaintiff the full amount it was owed for its services. Plaintiff contends that defendants acknowledged the debt owed to plaintiff by making periodic partial payments on the account since the end of the relationship. Specifically, defendants made periodic partial payments to plaintiff on April 25, 2006, August 15, 2006, October 12, 2006, March 27, 2007, May 8, 2007 and June 6, 2007. Defendants have not made any payments on the account since June 2007, plaintiff contends (Complaint, ¶ 12).

In their opposition, defendants allege that they do not "recall any of the details" of their agreement to pay plaintiff for their services (opp., p. 1). However, they do not dispute plaintiff's claim that they failed to pay plaintiff for all of its services. As mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to overcome a motion for

summary judgment, defendants have failed to demonstrate that a triable issue of fact exists *(Alvord and Swift v Steward M. Muller Constr. Co)*. Thus, plaintiff has demonstrated the absence of any triable issue of fact as to defendants' breach of the Retainer Agreement.

Finally, plaintiff establishes that as a result of defendant's breach it suffered damages of $27,655.93, plus any additional late fees on the unpaid principal balance, which continue to accrue at the rate of 1½ percent per month (Complaint, ¶ 13).

Therefore, plaintiff's motion for summary judgment for *breach of contract* is granted.

Quantum Meruit

Plaintiff's alternative cause of action for recovery under the theory of *quantum meruit* is dismissed. The existence of a valid and enforceable written contract precludes a *quantum meruit* claim (*Kushner Studios Architecture and Design v Sendowski*, 23 Misc 3d 127 [N.Y. Sup. App. Term, 1st Dept 2009 *citing ClarkFitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] and *Sheiffer v Shenkman Capital Mgt., Inc.*, 291 AD2d 295 [2002]). "Without in some manner removing the express contract from the picture in the normal fashion (rescission, abandonment, etc.) it is not possible to ignore it and proceed in *quantum meruit*" (*Katz v American Mayflower Life Ins. Co. of New York*, 14 AD3d 195, 788 NYS2d 15 [1st Dept 2004] *citing La Rose v Backer*, 11 AD2d 314, 320, 203 NYS2d 740 [1960], *amended* 11 AD2d 969, 207 NYS2d 258 [1960], *affd.* 11 NY2d 760, 226 NYS2d 695 [1962]).

Given that the record establishes that defendants are liable to plaintiff pursuant to a written contract, *i.e.*, the Retainer Agreement, which governs the relationship between the parties, the branch of plaintiff's motion for recovery under *quantum meruit* is denied.

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). It is well settled that where an account is made up and rendered, the one who receives it is bound to examine it, and, if the accounting is admitted as correct, it becomes a stated account and is binding on both parties, the balance being the debt which may be sued for and recovered by law (*Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745 [1st Dept 1983]; *see also Ruskin, Moscou, Evans, & Faltischek, P.C. v FGH Realty Credit Corporation.*, 228 AD2d 294, 295 [1st Dept 1996] ["Defendant's receipt and retention of the plaintiff law firm's invoices seeking payment for professional services rendered, without objection within a reasonable time, gave rise to an actionable account stated, thereby entitling the plaintiff to summary judgment in its favor"]).

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 [1st Dept 1991]). If the party receiving the account fails to dispute its correctness or completeness, that party, by its silence, is deemed to have acquiesced and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown (*Peterson v IBJ Schroder Bank & Trust Co*, 172 AD2d 165, 167 [1st Dept 1991]).

An agreement also may be implied if the debtor makes partial payment. The partial

payment is considered acknowledgment of the correctness of the account (*Parker Chapin Flattau & Klimpl v Daelen Corporation.*, 59 AD2d 375, 399 NYS2d 222 [1st Dept 1997] [where defendant made partial payment of an account, such payment constituted an acknowledgment of the validity of the bill, thereby establishing it as an account stated]; *Rik Shaw Assoc. v Bronzini Shops*, 22 AD2d 769 [1st Dept 1964]).

Here, plaintiff has also established *prima facie* evidence of an account stated. In its Complaint, plaintiff alleges that during the course of the representation beginning January 1, 2006 and thereafter, plaintiff sent to defendants its invoices and statements of account, reflecting the sums then due and owing by defendants to plaintiff. The invoices and statements were duly rendered by plaintiff and received by defendants without objection, thus causing an account to be taken and stated between the parties for a current unpaid balance of $27,655.93. Accordingly, there is now due and owing from defendants to plaintiff the sum of $27,655.93, plus interest at the rate of 9% per annum. Defendants acknowledged the debt owed to plaintiff by making periodic partial payments on the account since the end of the relationship. Specifically, defendants made periodic partial payments to plaintiff on the account on April 25, 2006, August 15, 2006, October 12, 2006, March 27, 2007, May 8, 2007 and June 6, 2007. By reason of the foregoing, plaintiff alleges that defendants are indebted to plaintiff in the amount of $27,655.93, plus interest at the rate of 9% per annum (Complaint, p. 4).

Defendants do not deny receiving the invoices and statements; nor do they deny that they made partial payments to plaintiff on the debt owed (*Ruskin, Moscou, Evans, & Faltischek, P.C. v FGH Realty Credit Corporation*; *Parker Chapin Flattau & Klimpl v Daelen Corp.*). Thus, plaintiff has sufficiently established that it is due $27,655.93, plus interest at the rate of 9% per

annum from plaintiff. Therefore, plaintiff's motion for summary judgment for an account stated is granted.

Defendants' Motion to Dismiss

Based on the above, defendants' argument that Mr. Shah and Mr. Nathan cannot be held personally liable for the amounts due under the Retainer Agreement lacks merit, and dismissal of the Complaint on this ground is denied.

Further, defendants' argument that IsoSpace cannot be held liable under the Retainer Agreement and that summary judgment cannot be granted against IsoSpace, because it is now defunct, lacks merit. Defendants cited no caselaw in support of its claim that summary judgment should not be granted on the basis that IsoSpace is defunct. In any event, defendants failed to provide any proof that IsoSpace is defunct. Moreover, the Court notes that IsoSpace is not represented by counsel. Indeed, the assets of a corporation constitute a trust fund for the payment of its debts (*Parent v Amity Autoworld, Ltd.*, 15 Misc 3d 633, 832 NYS2d 775 [N.Y. Dist. Ct. 2007] *citing Bartlett v Drew*, 57 NY 587 [1874]). "After the return of an unsatisfied execution against the defunct corporation, a creditor may maintain an action against a shareholder to reach assets received by him" (*Parent v Amity Autoworld, Ltd., supra*). Therefore, defendants failed to establish, as a matter of law, any basis to dismiss the Complaint as against IsoSpace.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of plaintiff Gallet Dreyer & Berkey, LLP for an order, pursuant to CPLR §3212, granting it summary judgment against defendants IsoSpace, Inc. f/k/a LiQ, Inc., Abbas Shah and Alan Nathan for recovery under breach of contract and an account

stated is granted; and it is further

ORDERED that the Clerk may enter judgment in favor of plaintiff, and against defendants, in the sum of $27,655.93, together with interest at a rate of 9% from February 27, 2009 through and including the date of entry of judgment in the sum of $27,655.93 to be calculated by the Clerk, plus costs to be calculated by the Clerk upon an appropriate bill of costs; and it is further; and it is further

ORDERED that the motion of plaintiff for an order, pursuant to CPLR §3212, granting it summary judgment against defendants for recovery under the theory of *quantum meruit* is denied; and it is further

ORDERED that defendants' motion to dismiss plaintiff's Complaint is denied; and it is further

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

That constitutes the decision and order of the Court.

Dated: May 20, 2009

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

HON. CAROL EDMEAD