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

PRESENT: EMILY JANE GOODMAN Justice PART 17

Index Number : 111147/2008
KATSELNIK & KATSELNIK
VS.
SILVERMAN, ALEXANDER
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per attached decision and order per Motion Memorandum

FILED
OCT 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/13/09

EMILY JANE GOODMAN J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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KATSELNIK & KATSELNIK, INC.
d/b/a K&K CONSTRUCTION,

Plaintiff,

- against -

Index No. 111147/2008

ALEXANDER SILVERMAN,

Defendant.

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EMILY JANE GOODMAN, J.S.C.:

In this action to recover $65,779 that is allegedly owed for construction management services, defendant moves for an order dismissing the complaint, pursuant to CPLR 3211 (a) (1), (3) and (7), on the grounds that a defense is founded upon documentary evidence, that plaintiff lacks legal capacity to sue and that the complaint fails to state a cause of action.

FACTUAL ALLEGATIONS

Plaintiff Katselnik & Katselnik, Inc. d/b/a K&K Construction, which is engaged in the business of general contracting and construction management, allegedly performed general contracting services at premises located at 200 East 65th Street, New York, New York (the Premises), which are owned by defendant Alexander Silverman. Plaintiff allegedly performed the services in a timely and satisfactory manner, between approximately September 2005 and May 2006, and claims that it is owed an outstanding balance for its services in the amount of $65,779. The complaint asserts three causes of action -- each seeking damages in the foregoing amount -- which allege an account stated, breach of the parties' quasi-contract and a claim in quantum meruit.

DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "We accept the facts as alleged in the complaint as true [and] accord plaintiffs the benefit of every possible favorable inference ..." (*id.*). However, "allegations consisting of bare legal conclusions, as well as factual claims that are inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration" (*Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]). A dismissal is

warranted under CPLR 3211 (a) (1) "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d at 88). "In assessing a motion under CPLR 3211 (a) (7), ... the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.* [citation and internal quotation marks omitted]).

Although the complaint alleges that plaintiff performed the contracting services at the Premises, defendant has submitted extensive documentary evidence which demonstrates that his written communications concerning the services in question were with an entity named Katselnik & Katselnik Group, Inc. (K&K Group)[1], and contained no mention of plaintiff. Plaintiff and K&K Group were related at the time of the events alleged in the complaint in that: they maintained their offices at the same location; they shared some of the same personnel; K&K Group performed certain administrative services for plaintiff; and Arkadi Katselnik, the president of plaintiff, is the father of Leon Katselnik, the president of K&K Group (*see* Arkadi Katselnik Affid., ¶¶ 3, 12-14; Leon Katselnik Affid., ¶¶ 3-6).

Defendant's documentary evidence includes copies of: (1) a "construction management services agreement proposal" dated August 29, 2005, which was issued by K&K Group to defendant, and which proposed that K&K Group, as "Construction Manager," would perform a list of enumerated services at the Premises (*see* Silverman Affid., Ex. B [hereinafter, the Services Agreement Proposal]); (2) a letter addressed by defendant to K&K Group, dated September 13, 2005, which stated that a check for $25,000 was being enclosed therewith as a deposit for the work to be performed at the Premises (*see id.*, Ex. C); (3) a $25,000 check which was allegedly enclosed with the foregoing letter, and which was made payable by defendant to K&K Group (*see id.*); (4) a letter addressed by defendant to K&K Group, dated October 10, 2005, which stated that various documents which were to be used in connection with the work at the Premises -- e.g., the "filed permit," "[p]lans filed with the department of buildings," a "[b]uilding architects letter," etc. -- were

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[1]It appears that Katselnik & Katselnik Group, Inc. does business under the name K&K Group, and that those names are used interchangeably to refer to the same entity.

enclosed therewith (*see id.*, Ex. D)[2]; (5) a work "proposal #2130R.2" dated October 18, 2005, which was issued by K&K Group to defendant, and which proposed that K&K Group would perform the work that was set forth therein for a sum of $407,785 (*see id.*, Ex. E [hereinafter the Work Proposal]); and (6) 11 work "change orders," dated from December 22, 2005 through April 14, 2006, which were issued by K&K Group to defendant, and which indicated that defendant should sign and return copies of the change orders to K&K Group if defendant "wish[ed] K&K Group to proceed with the ... work" that was itemized in the change orders (*see id.*, Ex. F).

Defendant has also submitted a copy of a letter, dated April 5, 2007 (the Collection Letter), which he received from Boris Sorin, an attorney who sought to collect the allegedly outstanding balance of $65,779 on K&K Group's behalf. Sorin, who also represents plaintiff in this action, asserted in the Collection Letter that:

> On or about October 18, 2005 [i.e., the date of the Work Proposal] you entered into an agreement with K&K [Group] to serve as the general contractor for the interior renovation of the [Premises]. ... K&K [Group] provided you with the cost of the project, totaling ... $407,785 ... . Your acceptance of the proposal is memorialized in a letter, dated September 13, 2005, wherein you enclosed a check in the amount of ... $25,000 ... "as a good faith deposit for the work to be performed in the [Premises]." ... Further evidence of your acceptance can be found in your letter, dated October 10, 2005, where you provide[d] K&K [Group] with a copy of the following documents for the renovation: filed permit, plans with the department of buildings, alteration agreement, building architect's letter, building rules and regulations and a response to the building's architect's letter. ... K&K [Group] subsequently completed all work in a timely and satisfactory manner.
>
> On or about January 10, 2007, K&K [Group] provided you with a statement summarizing the open balance on your account. ... As you will note, you still owe K&K [Group] ... $65,779 ... plus interest.

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[2]The two letters which defendant allegedly sent to K&K Group are not the type of documents which would ordinarily constitute documentary evidence sufficient to support a CPLR 3211 (a) (1) motion. However, plaintiff's counsel wrote a letter to defendant, dated April 5, 2007, which corroborates that defendant's letters were received by plaintiff and/or K&K Group (*see* Silverman Affid., Ex. G), and defendant's letters -- in conjunction with the remainder of defendant's documentary evidence -- establish that defendant's dealings with regard to the contracting services which were performed at the Premises were with K&K Group rather than with plaintiff.

(*See id.*, Ex G, at 1-2.[3]) Thus, Sorin asserted in the Collection Letter -- almost one year after the contracting services at the Premises had been completed -- that defendant had entered into an agreement with K&K Group for the performance of the contracting services, that K&K Group was the entity which had performed the services, and that defendant owed the outstanding balance of $65,779 to K&K Group.

Plaintiff now asserts that it performed all of the contracting services at the Premises, and that, although the Work Proposal identified K&K Group as the entity which would perform the services, that was due merely to a clerical error in the drafting of that document.[4] However, plaintiff's assertion of clerical error is simply not credible. The Work Proposal named K&K Group instead of plaintiff not once but twice, both in the letterhead, and also in a statement which indicated that defendant should sign and return a copy of the Work Proposal to K&K Group if he "wish[ed] K&K Group to proceed" with the work set forth in the proposal (*see id.*, Ex. E). The Work Proposal also indicated that it was authored by Leon Katselnik, the president of K&K Group, rather than by a representative of plaintiff.

Moreover, the Work Proposal is consistent with all of the other written communications between the parties in omitting any mention of plaintiff, and in indicating that K&K Group was the entity which was performing the contracting services at the Premises. The Services Agreement Proposal was not only written on K&K Group letterhead, but also: specifically defined the term "Construction Manager" thereunder to mean K&K Group; assigned certain construction management responsibilities to K&K Group by name; indicated that defendant should sign and return a copy of

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[3]The Collection Letter, after initially establishing "K&K Group" as a defined term which shall mean Katselnik & Katselnik Group, Inc., does not use that defined term at all, but repeatedly uses the term "K&K" which is not defined in the letter. The undefined term "K&K" was presumably used in error, and intended to mean Katselnik & Katselnik Group, Inc. (*see* Silverman Affid., Ex. G).

[4]Plaintiff has commenced another action in this court (*Katselnik & Katselnik, Inc. v Silverman*, index no. 111148/2008) in which it seeks to recover payment that is allegedly owed for contracting services performed at other residential premises. In that action, K&K Group was named as the contractor in a "form of agreement" for the performance of contracting work, and -- there, as here -- plaintiff asserts that the naming of K&K Group as the contractor, instead of plaintiff, was a mistake, and the result of a clerical error in the drafting of the document.

that proposal to K&K Group as a means of signifying that "K&K Group ... [was] authorized to proceed with the work as described [therein]"; and included a blank line for countersignature by K&K Group, indicating that it, rather than plaintiff, was the entity which would acknowledge defendant's acceptance of that proposal (*id.*, Ex. B). The 11 work change orders were written on K&K Group letterhead, included statements that "[w]e" -- presumably meaning K&K Group, since the change orders contained no mention of plaintiff -- "propose to do [the work set forth therein] ...," and indicated that defendant should sign and return a copy of the change orders to K&K Group if he "wish[ed] K&K Group to proceed with the [itemized] work" (*id.*, Ex. F).

Plaintiff concedes that all of the invoices for the services that were performed at the Premises were issued by K&K Group, and that all of the payments for the services were paid to and received by K&K Group. According to plaintiff, that was merely because K&K Group performed administrative services on plaintiff's behalf, which included the billing of, and the collection of payment from, plaintiff's clients. The invoices are not part of the documentary evidence which defendant has submitted in support of his motion. Nevertheless, K&K Group's issuance of the invoices and receipt of payments in its name were consistent with all of the other written communications between the parties in indicating to defendant that he had entered into an agreement with K&K Group for the provision of contracting services, and that K&K Group, rather than plaintiff, was providing those services.

Although Sorin asserted in the Collection Letter that K&K Group was the entity which had entered into an agreement with defendant, which had performed the agreement, and which was owed the allegedly outstanding balance of $65,779, this action was brought by plaintiff, instead of by K&K Group, and does not assert a claim for breach of contract. According to defendant, plaintiff brought this action -- despite the fact that K&K Group was the entity which entered into the contract with defendant and performed the contract -- because, at the time when K&K Group performed the contracting services at the Premises, it did not have the home improvement contractor's license that is required by Administrative Code of City of NY § 20-387 (a).[5] Therefore, defendant contends,

[5]Administrative Code § 20-387 (a) provides that "[n]o person shall solicit, canvass, sell, perform or obtain a home improvement contract as a contractor or salesperson from an owner

K&K Group could not prevail on a claim seeking the money that is allegedly owed. Plaintiff does not maintain that K&K Group had such a license at the time when the contracting services were performed at the Premises, but has submitted evidence that ***it*** had such a license at that time (*see* Sorin Affirm., ¶ 10 and Ex. D). Plaintiff would presumably be unable to assert a viable claim against defendant for breach of contract, inasmuch as plaintiff has not alleged facts which would indicate either: (1) that it, rather than K&K Group, entered into a contract with defendant; or (2) that, insofar as K&K Group entered into a contract with defendant, plaintiff has standing to assert a cause of action for breach of that contract, for example, as a third-party beneficiary of the contract, or as an undisclosed principal on whose behalf K&K Group, acting as plaintiff's agent, entered into the contract (*see e.g. Aymes v Gateway Demolition Inc.*, 30 AD3d 196, 196 [1st Dept 2006]).

Plaintiff's first cause of action alleges that defendant is liable on the theory of an account stated, because plaintiff rendered invoices to defendant which stated accounts between them, and because defendant received and retained those invoices without objection. However, "[a]n 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" (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 [1st Dept 2007] [citation and internal quotation marks omitted]). "An account stated assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated," and "cannot be used to create liability where none otherwise exists" (*id.* at 251 [citation and internal quotation marks omitted]).

Defendant's documentary evidence conclusively establishes that it was K&K Group, not plaintiff, which: submitted proposals and cost estimates to defendant for the contracting services that were performed at the Premises; submitted change orders to defendant detailing changes in the scope of the work to be performed; and requested defendant's authorization for K&K Group, rather than plaintiff, to proceed with all of the work and services involved. Additionally, while the complaint alleges that plaintiff rendered the invoices which are the basis for its account stated claim, plaintiff concedes, in its papers in opposition to the instant motion, that K&K Group was the entity

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without a license therefor."

which issued all of those invoices to defendant and which received all of defendant's payments for the contracting services that were performed at the Premises (*see* Sorin Affirm., ¶¶ 18-19; Arkadi Katselnik Affid., ¶¶ 16-17; Leo Katselnik Affid., ¶¶ 16-17).

Inasmuch as all of defendant's dealings with respect to the contracting services that were performed at the Premises were with K&K Group rather than with plaintiff, there could be no agreement between defendant and plaintiff, based upon prior transactions between them, with respect to the correctness of the account items and balance due in connection with those services. Nor could there be any indebtedness between defendant and plaintiff, or any agreement between them to treat a statement of account as an account stated. The enforcement of plaintiff's account stated claim would create a liability as between those parties which does not otherwise exist, and the claim must, therefore, be dismissed.

The second and third causes of action, which assert quasi-contractual claims sounding in unjust enrichment and/or quantum meruit, are also dismissed. The second cause of action alleges that defendant is liable for breach of a quasi-contract which existed between the parties because: plaintiff conferred a benefit upon defendant by performing contracting services at defendant's request; defendant accepted the benefit of plaintiff's services; and it would be inequitable for defendant to retain that benefit without paying the agreed-upon value of the services. The third cause of action alleges that defendant is liable in quantum meruit because: plaintiff rendered contracting services for defendant's benefit in good faith; defendant accepted the benefit of plaintiff's services; plaintiff and defendant shared an expectation that plaintiff would be compensated for the services rendered; defendant has been unjustly enriched in the amount of the $65,779 which he allegedly owes to plaintiff; and it would be against equity and good conscience to permit defendant to retain that amount.

In order to prevail on either an unjust enrichment or a quantum meruit claim, plaintiff would have to establish, inter alia, that it had a reasonable expectation that it would be compensated by defendant for its performance of the services which are the subject of the claim (*see e.g. Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487, 489 [1st Dept 2009] [quantum meruit]; *Estate of Goth v Tremble*, 59 AD3d 839, 841-842 [3d Dept 2009] [quantum meruit and unjust enrichment]; *Rowley,*

Forrest, O'Donnell & Beaumont, P.C. v Beechnut Nutrition Corp., 55 AD3d 982, 983 [3d Dept 2008] [quantum meruit]; *MT Prop., Inc. v Ira Weinstein & Larry Weinstein, LLC*, 50 AD3d 751, 752 [2d Dept 2008] [unjust enrichment]). Plaintiff would also have to establish that the services "were performed *for the defendant* ... . It is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery" (*Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 [1st Dept 2002] [citations and internal quotation marks omitted, emphasis in original, discussing unjust enrichment]; *see also General Sec. Prop. & Cas. Co. v American Fleet Mgt., Inc.*, 37 AD3d 345, 346 [1st Dept 2007] [quantum meruit]; *Liberty Marble v Elite Stone Setting Corp.*, 248 AD2d 302, 304 [1st Dept 1998] [unjust enrichment]; *Heller v Kurz*, 228 AD2d 263, 264 [1st Dept 1996] [quantum meruit]).

Defendant's documentary evidence conclusively establishes that plaintiff could not have had a reasonable expectation that it would be compensated by defendant for the performance of the contracting services at the Premises -- even if plaintiff was the entity which performed those services -- because defendant's dealings relating to the performance of the services were with K&K Group rather than with plaintiff. The documentary evidence also conclusively establishes that -- even if plaintiff performed the services in question -- it did not do so for or at the behest of defendant, with whom it was not directly dealing, but for or at the behest of K&K Group. Accordingly, plaintiff would be required to look to K&K Group rather than to defendant for recovery, and plaintiff's second and third causes of action are dismissed.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 13, 2009

ENTER:

J.S.C.