

**CRA Intl., Inc. v Gristede's Foods, Inc.**

2009 NY Slip Op 32707(U)

November 7, 2009

Supreme Court, New York County

Docket Number: 600834/09

Judge: Marilyn Shafer

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

PRESENT: MARILYN SHAFER

PART 8

Justice

Index Number : 600834/2009  
**CRA INTERNATIONAL INC**  
 VS.  
**GRISTEDE'S FOODS INC**  
 SEQUENCE NUMBER : 001  
 SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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 *decided*  
*pursuant to attached Mem*

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

**FILED**  
 NOV 18 2009  
 NEW YORK  
 COUNTY CLERK'S OFFICE

Dated: 11/7/09

MARILYN SHAFER  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 8

-----x  
CRA INTERNATIONAL, INC.,

Plaintiff,

Index No.: 600834/09

-against-

GRISTEDE'S FOODS, INC., GRISTEDE'S  
OPERATING CORP., NAMDOR INC., CITY  
PRODUCE OPERATING CORP., and  
GRISTEDE'S FOODS NY, INC.,

Defendants.

-----x  
**MARILYN SHAFER, J.:**

**BACKGROUND**

Plaintiff CRA International, Inc. moves, pursuant to CPLR 3212, for summary judgment in the amount of \$123,863.99. Defendants (collectively, Gristede's) cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

On or about September 16, 2005, Gristede's general counsel received an e-mail from plaintiff's vice-president, which provided an estimate of \$40,000.00 for plaintiff's services in the preparation of an expert report for a complex legal matter in which Gristede's was involved. According to Gristede's, it hired plaintiff based on this estimate.

Plaintiff provided the services, and sent two invoices, one in November 2005 for \$98,807.27, and one in January 2006 for \$25,056.72, for a total of \$123,863.99 for services rendered.

DECISION  
**FILED**  
NOV 18 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Gristede's general counsel affirms that, upon receipt of the invoice, he immediately objected to the bill as being far in excess of the estimate. The general counsel further stated, without contradiction, that plaintiff failed to obtain Gristede's approval for the added expense. In November, 2006, the general counsel sent an e-mail to plaintiff reiterating his objections to the amount of the bill. Cross Motion, Ex. A.

Gristede's admits that it received the services requested from plaintiff, but maintains that it never agreed to pay more than \$40,000.00 for the work performed. In its reply, plaintiff requests, at a minimum, partial summary judgment in the amount of \$40,000.00, pursuant to CPLR 3212 (e), based on Gristede's acknowledgment of this amount.

#### **DISCUSSION**

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt

as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff's motion for summary judgment, based on an account stated, must fail. "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 [internal quotation marks and citation omitted]." *Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 (1<sup>st</sup> Dept 2002). In the instant matter, there is evidence that Gristede's did timely inform plaintiff that it was disputing the amount of the invoice, and so summary judgment based on an account stated is precluded. *RPI Professional Alternatives, Inc. v Citigroup Global Markets Inc.*, 61 AD3d 618 (1<sup>st</sup> Dept 2009).

Similarly, Gristede's cross motion for summary judgment is denied.

Although admitting that it agreed to pay plaintiff "no more" than \$40,000.00, based on the estimate provided by plaintiff, Gristede's contends that no contract was ever formed, because there was no meeting of the minds, at least beyond the \$40,000.00 estimate.

"In determining whether a contract exists, the inquiry centers upon the parties' intent to be bound, i.e., whether there was a 'meeting of the minds' regarding the material terms of the transaction. A contract must

be definite in its material terms in order to be enforceable. Although a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable, a price term is not necessarily indefinite because the agreement fails to specify a dollar figure, or leaves fixing the amount for the future, or contains no computational formula [internal quotation marks and citations omitted]."

*Henri Associates v Saxony Carpet Company, Inc.*, 249 AD2d 63, 66 (1<sup>st</sup> Dept 1998).

"A contract does not necessarily lack all effect merely because it expresses the idea that something is left to future agreement [internal quotation marks and citation omitted]." *Conopco, Inc. v Wathne Ltd.*, 190 AD2d 587, 588 (1<sup>st</sup> Dept 1993). However, questions of fact exist as to whether, under the particular circumstances of the instant case, the parties did reach a mutual understanding, and, if so, whether a final bill that was three times the amount of the estimate was "not within the contemplation of the parties when they contracted and was not warranted, so that [plaintiff]'s conduct constituted a breach." *Henri Associates v Saxony Carpet Company, Inc.*, 271 AD2d 293, 295 (1<sup>st</sup> Dept 2000).

However, since Gristede's does admit that it received the work requested from plaintiff, and further admits that it had agreed to pay the estimated price for such work, plaintiff is entitled to partial summary judgment in the amount of \$40,000.00. CPLR 3212 (e).

**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that defendants' cross motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that plaintiff's motion is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendants in the amount of \$40,000.00, together with interest as prayed for allowable by law [at the rate of \_\_\_ % per annum from the date of January 9, 2006] until entry of judgment, as calculated by the Clerk of the Court, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue.

Dated: 11/7/09

ENTER:

**MARILYN SHAFER**

**J.S.C.**

Marilyn Shafer, J.S.C.

**FILED**

NOV 18 2009

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