

**Alison Brod Pub. Relations, Inc. v Duwop, LLC**

2010 NY Slip Op 30239(U)

January 29, 2010

Supreme Court, New York County

Docket Number: 107645/09

Judge: Joan M. Kenney

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

PRESENT: JOAN M. KENNEY, JSC  
*Justice*

PART 8

Index Number : 107645/2009  
**ALISON BROD PUBLIC RELATIONS**  
VS.  
**DUWOP LLC.D/B/A**  
SEQUENCE NUMBER : 002  
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

**FILED**  
FEB 03 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION.**

Dated: 1/29/10

*Joan M. Kenney*  
**JOAN M. KENNEY** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 8

-----X  
ALISON BROD PUBLIC RELATIONS, INC.,

Plaintiff,

- against -

DUWOP, LLC D/B/A DUWOP COSMETICS,

Defendant.  
-----X

KENNEY, JOAN, M., J.,

**For Plaintiff:**  
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Index No.: 107645/09

**DECISION &  
ORDER**

**FILED**  
FEB 03 2010  
NEW YORK  
COUNTY CLERKS OFFICE

Papers considered in review of the motion seeking summary judgment and cross motion:

<b>Papers</b>	<b>Numbered</b>
Notice of Motion, Memorandum of Law, Affidavit and Exhibits	1-8
Notice of Cross Motion, Affirmation, Affidavit and Exhibits	9-13
Affirmation and affidavit in Opposition to Cross Motion and Exhibits	14-17

**PROCEDURAL POSTURE**

In this breach of contract action, plaintiff, Alison Brod Public Relations, Inc. (ABPR) moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor. The complaint sets forth the following causes of action: (1) breach of contract (first cause of action); (2) account stated (second cause of action); and (3) unjust enrichment (third cause of action).

Defendant, Duwop, LLC d/b/a Duwop Cosmetics (Duwop), opposes the motion and cross-moves, pursuant to CPLR 3025 (b), for an order granting Duwop permission to serve an amended answer with counterclaims.

Based on the reasons set forth below, the motion for summary judgment is granted and the

cross motion is denied.

### **FACTUAL BACKGROUND**

On January 16, 2007, the parties entered into an agreement wherein plaintiff agreed to provide public relations services by outreaching to national magazine beauty editors and celebrities on Duwop's behalf, for the purpose of promoting the Duwop cosmetic brand. Defendant, in turn, agreed to pay plaintiff for those services. According to plaintiff, as of December 1, 2008, a total of \$26,860.20 remained due from Duwop for the public relations services plaintiff provided. Despite repeated requests, Duwop has failed to pay any portion of the money to plaintiff.

Pursuant to the Agreement, all invoices which are past due by more than 30 days are subject to 1.5% interest per month.

In its complaint, plaintiff seeks damages in the amount of \$26,860.20 plus prejudgment interest, as well as costs and disbursements. Subsequent to the commencement of the action, Duwop made an \$18,000.00 payment to plaintiff, leaving \$8,860.20 still owed to plaintiff.

### **DISCUSSION**

In order to grant summary judgment, the movant must proffer admissible evidence to make a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to show the absence of any material issue of fact (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Once the moving party has made this showing, the burden is on the opposing party to demonstrate "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]; *Zuckerman*, 49 NY2d at 560). "If there is any doubt as to the existence of a triable issue, the motion should be denied"

(*Grossman v Amalgamated Hous. Corp., Inc.*, 298 AD2d 224, 226 [1st Dept 2002]).

In order to establish a prima facie case on a breach of contract claim, plaintiff must show proof of a contract, performance by one party on the contract, a breach by the other party and damages as a result (*Flomenbaum v New York Univ.*, — AD3d —, 2009 NY Slip Op 08975 [1<sup>st</sup> Dept 2009]). Where the plain language of the contract establishes obligations on the other party that have not been met, summary judgment is warranted (*Bartfield v RMTS Assocs., LLC*, 283 AD2d 240 [1<sup>st</sup> Dept 2001]). Here, there is no dispute that the parties had a contract.

Plaintiff claims that it fulfilled all terms under the contract, and that defendant breached the contract by failing to make the required payments for invoices up through December 1, 2008 (*see* Notice of Motion, Exs. B and C). Duwop counters, however, that plaintiff did not fully perform under the contract, in that plaintiff failed to deliver approximately \$10,000 worth of jewelry gifts to editors of various publications. A review of the record reveals that, while defendant submits e-mails of the proposal for the jewelry gifts, and its expenditure on the jewelry, both of which post-date December 1, 2008, these items do not support its claims that plaintiff did not perform under the contract. Duwop offers no evidence, other than its own self-serving affidavit, that plaintiff did not perform under the contract. Duwop's offering is insufficient to defeat summary judgment on this ground.

Even if the court were to hold that summary judgment is not warranted on the breach of contract claim, summary judgment is warranted on the account stated claim. "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" (*Shea & Gould v Burr*, 194 AD2d 369, 370 [1<sup>st</sup> Dept 1993] [internal quotation marks and citation omitted]). The rule is that either the receipt and retention of an account, without

objection within a reasonable period of time, or partial payment, gives rise to an account stated (*Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1<sup>st</sup> Dept 2004]).

Here, while Duwop claims it objected to the itemization of the bills beginning in the fall of 2008, there is no dispute that defendant subsequently made a partial payment of \$18,000.00 to plaintiff.

Summary judgment is, therefore, granted in favor of plaintiff, and a money judgment in the amount of \$8,860.20 together with interest, costs, expenses and disbursements is herein awarded.

In light of the foregoing, the court need not address the remainder of plaintiff's arguments and the cross motion seeking to amend the answer is denied as moot.

**CONCLUSION**

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the sum of \$8,860.20, with interest as prayed for at the rate of 1.5% per annum from the date of December 1, 2008, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate of 9%, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the cross motion by defendant Duwop, LLC d/b/a Duwop Cosmetics is denied.

Dated: January 29, 2010

ENTER:

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FEB 03 2010  
NEW YORK  
COUNTY CLERK'S OFFICE  
*JMM*  
J.S.C.