

**TPG Architecture LLP v Biopartners at Lake
Success, Inc.**

2010 NY Slip Op 30856(U)

April 8, 2010

Supreme Court, New York County

Docket Number: 602825/2006

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 602825/2006

TPG ARCHITECTURE LLP

VS.

BIOPARTNERS AT LAKE SUCCESS,

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 ...	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>5</u>
Replying Affidavits _____	<u>6</u>

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, It is ordered that this motion + cross-motion for summary judgment are decided in accordance with the attached memorandum decision.

FILED

APR 13 2010

NEW YORK COUNTY CLERK'S OFFICE

JUDGE DORIS LING-COHAN

Dated: 4/8/10

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

[Signature]

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 36

-----X
TPG Architecture, LLP and
TPG Long Island, LLC,

Plaintiffs,

-against-

Index No.: 602825/06

Biopartners At Lake Success, Inc. and
iPark Holdings, LLC,

Motion Seq. No.: 001

Defendants.

-----X
Justice Doris Ling-Cohan:

In this action to recover fees and costs (Total Fees) for architectural services rendered (Total Services), plaintiffs TPG Architecture, LLP and TPG Long Island, LLC (together, the Architect) move, pursuant to CPLR 3212, for an order granting summary judgment against defendants Biopartners at Lake Success, Inc. (BIO) and iPark Holdings, LLC (iPark) finding them each jointly and severally liable for the Total Fees. BIO cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing all claims being asserted as against it.

BIO, a soon-to-be incorporated not-for-profit medical research facility, sought to rent space that could accommodate its medical. Negotiations were entered into between potential tenant BIO and landlord iPark as to space for BIO (Premises) in iPark's commercial building (Building). During the course of these negotiations, the Architect, iPark's in-house architect, provided the parties with preliminary, pre-development drawings (Initial Services) reflecting the possible build-out of the Premises as suitable space for BIO. At some point thereafter, the Architect submitted further drawings (Supplemental Services) of a proposed build-out of the Premises. BIO never leased or occupied the Premises.

Despite due demand, the Architect has not been compensated for either the Initial

Services, the Supplemental Services or the Total Services it performed in connection with the Premises. As such, the Architect commenced this action, asserting claims sounding in breach of contract, account stated and unjust enrichment. Defendants dispute liability as between themselves, with each claiming the other is responsible for the entire amount being sought by the Architect.

Summary judgment will only be granted if there are no material and triable issues of fact (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Once the movant has made a prima facie showing of being entitled to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

As to iPark's and BIO's contractual liability, the relevant documents support the Architect's claim as asserted against each of them. The Architect previously provided similar Initial Services to iPark as per the terms and conditions of an unsigned "Master Agreement" (Exh. A, Notice of Motion). In addition to the Master Agreement, the February 4, 2004 handwritten letter from Lynne Ward to the Architect states that iPark assures payment by it to the Architect of all of its Premises' related fees, and that iPark will seek reimbursement from BIO. Most significantly, the letter refers to the Total Fees for the Total Services. Furthermore, iPark accepted the Total Services which enhanced its ability to market the Premises to BIO.

Under the Master Agreement, the tenant is afforded an opportunity, rather than an obligation, to independently contract with the Architect for architectural services concerning the subject space. The Master Agreement is devoid of any language precluding a potential tenant from independently contracting with the Architect for pre-development architectural services,

before entering into a lease for space.

Subsequent to the Master Agreement, another agreement (Subsequent Agreement) was entered into with the Architect for Supplemental Services related to the Premises. At that time, BIO was proceeding with its pre-incorporation, pre-tenancy, planning. The Subsequent Agreement was executed by Mr. Joseph Cotter, who at the time was a principal of iPark, as well as an initial director of BIO. The fees for Initial Services rendered in connection with the Master Agreement, and the Supplemental Services rendered in connection with the Subsequent Agreement, were jointly reiterated at a post-incorporated BIO board of directors meeting (Bio Board Meeting Minutes) (Exh. E, Notice of Motion). In pertinent part, the BIO Board Meeting Minutes state that "\$122,000 in construction drawings to be paid by BIO". Significantly, the \$122,000 specifically cited in the Bio Board Meeting Minutes is the pre-discounted estimate of the Total Fees. Additionally, an August 18, 2004 BIO letter to the Architect states that "At the Board Meetings, the TPG [the Architect] payables and other costs have been minuted to ensure that there is a proper paper trail" (Exh. H, Notice of Motion) .

The conduct of iPark constitutes a ratification of the Master Agreement. The foregoing conduct of BIO constitutes a ratification of the Subsequent Agreement. Ratification of a contract can occur, as here, through intentionally accepting benefits under the contract by remaining silent or acquiescing for a period of time after the opportunity to avoid it has arisen, by acting/performing under the contract, or affirmatively acknowledging the contract (*see Jaywyn Video Productions, Ltd. v Servicing All Media, Inc.*, 179 AD2d 397, 398 [1st Dept 1992]).

Moreover, Mr. Cotter, as the pre-incorporation initial director and a post-incorporation BIO board member, and Ms. Ward, as a post-incorporation BIO board member, acted with apparent, if not actual, authority on behalf of BIO. Apparent authority arises where, as here: (1)

the principal, by words or conduct, creates an appearance of authority in the agent; and (2) the other party reasonably relies on that authority. (*see Zigabarra v. Falk*, 143 AD2d 901 (2nd Dept 1988)).

As to the Architect's first cause of action for breach of contract, the conduct of both iPark and BIO, substantiated the existence of the agreements and their failure to perform their contractual obligations under those agreements. The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by one of the parties; (3) failure to perform by the other party; and (4) resulting damage therefrom (*Noise in Attic Productions v London Records, Inc.*, 10 AD3d 303, 307 [1st Dept 2004]; *Furia v Furia*, 116 AD2d 694 [2nd Dept 1986]). In this case, iPark and BIO each entered into agreements with the Architect; the Architect performed the Total Services; iPark and BIO each failed to compensate the Architect for either the Initial Services, the Supplemental Services or the Total Services, thereby, causing the Architect to incur damages in that the Total Fees remain due and owing. Thus, plaintiffs have made a prima facie showing as to liability on their first cause of action for breach of contract, and defendants have failed to raise any factual issues to warrant that this court deny summary judgment to plaintiffs on this claim.

As to the Architect's second cause of action based upon a claim of unjust enrichment, iPark's acceptance of the Total Services, rendered by the Architect, enhanced its ability to market the Premises to BIO with the use of pre-build-out architectural drawings, and BIO's acceptance of the Total Services enhanced its ability to consider the viability of renting the Premises with the use of those same drawings. An action for restitution predicated upon unjust enrichment requires that, where, as here: (1) the defendant received services provided by the plaintiff, (2) the defendant benefitted from those services, and (3) under the principles of equity and good

conscience, the defendant should be required to pay for the services (*see Baron v Pfizer*, 42 AD3d 627 [3rd Dept 2007]; *Edelman v. Starwood Capital Group*, ___ AD3d ___, 892 NYS2d 37 [1st Dept 2009]). Neither defendants raise factual issues with respect to this claim; thus, plaintiffs are awarded summary judgment as to liability on the unjust enrichment claim.

As to the Architect's third cause of action based upon an account stated claim, it is not disputed that the Architect sent and iPark received, without contemporaneous or subsequent dispute, all inclusive invoices for the Total Services performed by the Architect as to the Premises. The invoices specifically named iPark as the vendee and addressee. The invoices were received at iPark by Ms. Lynne Ward, a principal of iPark. While Ms. Ward was also a board member of post-incorporated BIO, no evidence has been submitted to indicate that BIO ever received notice of those invoices; nor were the invoices addressed to BIO.

The mere rendering of an account does not make it a stated one; however, the receipt and retention of an account, without objection within a reasonable period of time, does make it an account stated (*Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]). Whether, on a given set of facts, the transaction amounts to an account stated is a question of law and not fact (*see Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165 [1st Dept 1991]).

Here, in opposition, iPark's representative Lynne M. Ward, does not dispute receipt of the invoices, nor the amount stated therein. Upon review of the facts and circumstances of this case, together with the applicable law, the Architect has clearly stated a claim for an account stated against iPark, which is not sufficiently disputed; thus, summary judgment is awarded in plaintiffs' favor against iPark, in the amount of \$115,475.95. However, plaintiff's claim for an account stated as against BIO fails, as insufficient proof has been supplied; thus, summary

judgment is granted in BIO's favor and the claim for an account stated is dismissed as to BIO.

In view of the foregoing, the Architect's submissions in support of its motion for summary judgment satisfy the *prima facie* showing required to warrant judgment as a matter of law, on the issue of liability as to plaintiffs' breach of contract and unjust enrichment claims. Neither BIO nor iPark has rebutted the evidence submitted by plaintiff Architect. The amount of damages is disputed in that BIO maintains that if any award is rendered against it, it should be limited to the amount of \$43,450.52, as the services arguably rendered by the Architect to BIO. Thus, the Architect is entitled to summary judgment in its favor against Bio and iPark on the issue of liability on plaintiff's claims for breach of contract and unjust enrichment.

The Architect is also entitled to summary judgment as to liability and damages against iPark on the cause of action for an account stated, and judgment shall be entered against iPark in the amount of \$115,475.95, the Total Fees claimed in this case. However, issues of fact exist as to the amount of damages iPark and BIO's are liable for on plaintiff's breach of contract and unjust enrichment claims; the amount of damages on such claims, is referred to a Special Referee to hear and determine in accordance with CPLR §4317(b).

Accordingly, it is

ORDERED that plaintiffs motion for summary judgment is granted on the issue of liability on the causes of actions for breach of contract and unjust enrichment against defendants Biopartners At Lake Success, Inc. and iPark Holdings, LLC.; and it is further


ORDERED that plaintiffs' motion for summary judgment is granted in favor of the TPG Architecture, LLP and TPG Long Island, LLC, as against iPark Holdings, LLC., on plaintiffs' cause of action based upon an account stated claim; the Judgment Clerk is directed to

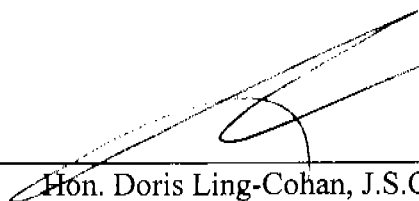
enter judgment in favor of TPG Architecture, LLP and TPG Long Island, LLC and as against iPark Holdings, LLC, in the amount of \$115,475.95, together with interest as prayed for allowable by law from August 11, 2006, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion of Biopartners At Lake Success, Inc. for summary judgment of dismissal of the complaint as asserted against it is granted to the extent that summary judgment of dismissal is awarded in favor of Biopartners At Lake Success, Inc. as to plaintiffs' cause of action for an account stated, and otherwise denied; and it is further

ORDERED that the issue of damages on plaintiffs' causes of action for breach of contract and unjust enrichment are referred to a Special Referee to hear and determine in accordance with CPLR §4317(b); and it is further

ORDERED that *within 30 days of entry of this order*, plaintiffs shall serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Judicial Support Office to arrange a calendar date for the reference to a Special Referee.

Dated: April , 2010



Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\TPG Architecture.Biopartners.wpd

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APR 13 2010
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