[* 1]

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

PRESENT: HON. EILEEN BRANSTEN J.S.C. PART 3

Index Number : 600691/2008

FIVE STAR

VS.

MAINCO ELEVATOR CORP.

SEQUENCE NUMBER : 003

QUASH SUBPOENA; FIX CONDITIONS

INDEX NO. 600691/08

MOTION DATE 11/10/09

MOTION SEQ. NO. 005

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
AUG 10 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8-5-10

HON. EILEEN BRANSTEN J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

----------X

FIVE STAR MECHANICAL CORP.,

Plaintiff,

-*against*-

MAINCO ELEVATOR CORP.,

Defendant.

----------X

Index No. 600691/08
Mtn. Seq. Nos.: 002, 003
Mtn. Date: 11/10/09

EILEEN BRANSTEN, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

In this case, plaintiff Five Star Mechanical Corp. ("Five Star"), a subcontractor, seeks to recover $126,194.18, plus interest, from defendant Mainco Elevator Corp. ("Mainco"), its general contractor, for its work on construction projects at the Port Authority Bus Terminal and Concourse Village in the Bronx.

In motion sequence number 002, Five Star moves, pursuant to CPLR 3212, for summary judgment against Mainco on breach of contract and account stated theories. In motion sequence number 003, Five Star moves, pursuant to CPLR 2304, to quash two subpoenas on the ground that discovery has been completed.

BACKGROUND

The following factual background is taken from Five Star's Rule 19-a Statement of Material Facts[1] and the affidavits filed by the parties.

---

[1] Mainco failed to submit a responsive statement as required by Rule 19-a (b). Thus, for purposes of this motion, the facts set forth in Five Star's Rule 19-a Statement are deemed to be true (22 NYCRR 202.70).

The Port Authority of New York and New Jersey (the "Port Authority") hired Mainco as a general contractor on a construction project at the Port Authority Bus Terminal known as Contract BT-314 (Five Star's Rule 19-a Statement ("Statement"), ¶ 1; Phillip J. McHugh Affidavit in Support of Motion for Summary Judgment ["McHugh Aff."], ¶ 2; John O'Sullivan Affidavit ["O'Sullivan Aff."], ¶ 3). Subsequently, in or around January 2000, Mainco retained Five Star as a subcontractor to complete "punch list" items that needed to be finished at the bus terminal (McHugh Aff., ¶ 3). Five Star and Mainco did not enter into a written contract for the punch list work (*id.*, ¶ 7). However, the parties agreed that Five Star would complete the "punch list" work on a time and materials basis, plus 10% for overhead and an additional 10% for profit (*id.*, ¶ 11). Mainco did not disclose to Five Star the terms and conditions of its contract with the Port Authority, or provide a copy of its contract with the Port Authority (*id.*, ¶¶ 8, 9).

In or around March 2002, Five Star completed the punch list work at the bus terminal (*id.*, ¶ 12). On March 18, 2002, Five Star submitted an invoice (invoice number 0222) for materials and labor in the amount of $42,525.89, of which Mainco only paid $20,495.20, leaving an unpaid balance of $22,030.69 (*id.*, ¶¶ 12, 13, Ex. 2; Statement, ¶ 10). Five Star resubmitted this invoice to Mainco on numerous occasions since March 18, 2002 (McHugh Aff., ¶ 14). Mainco never objected to this invoice, and, in fact, promised to pay the unpaid balance to Five Star (*id.*, ¶ 15; Statement, ¶ 11).

After Five Star completed the punch list work, Mainco continued to use Five Star to complete additional work at the Port Authority Bus Terminal and on another job at Concourse Village in the Bronx (McHugh Aff., ¶ 16; Statement, ¶ 12). Five Star submitted invoices to Mainco on April 15, 2002 (invoice number 01-21, for work on the Port Authority Police Station purge system), March 26, 2004 (invoice number 0323, for installation of hatch covers at the elevator motor room at Concourse Village), April 15, 2004 (for work for PACC 12, fire alarm system at Port Authority Bus Terminal, and work at PACC 15[2]), and June 24, 2004 (invoice number 0601, for work at PACC 15), for a total of $109,500.19 (Statement, ¶ 13; Exs. D-I to Five Star's Motion).

Five Star's subcontractor, William P. Press, was subsequently paid $5,336.70 directly by Mainco (Statement, ¶ 22).

Mainco never complained about the quality of Five Star's work (McHugh Aff., ¶ 40; O'Sullivan Aff., ¶¶ 6, 11; Affidavit of Louis Esposito ["Esposito Aff.], ¶ 6).

Five Star submitted time and material work sheets to the Port Authority on-site representative at the end of each day (McHugh Aff., ¶ 39). The Port Authority signed off on the work sheets daily (*id.*, ¶ 40). Five Star also provided copies of time and material work sheets to Mainco, at least monthly (*id.*).

---

[2] The three invoices dated April 15, 2004 are not numbered.

Five Star filed its complaint in March 2008, seeking recovery of unpaid fees on theories of account stated, breach of contract, unjust enrichment and quantum meruit. Mainco answered and asserted a counterclaim against Five Star, alleging that Mainco was damaged by Five Star's failure to submit appropriate documentation, including certified payroll records and cancelled checks.

At oral argument on October 22, 2009, the court granted Five Star's motion to quash subpoenas to take depositions of John O'Sullivan and William Massip, the former president and former employee of Mainco (October 22, 2009 Oral Argument Tr., at 14-15).

Pending Motion

In support of its motion for summary judgment, Five Star argues that it satisfactorily performed under their agreements, and submitted seven invoices to Mainco for the completed work. According to Five Star, Mainco not only retained the invoices without objection, but on numerous occasions assured Five Star that it would pay pursuant thereto. Five Star contends that it is thus entitled to summary judgment on both breach of contract and account stated theories.

Mainco counters that Five Star failed to comply with a condition precedent to payment by failing to submit certified payroll records. Mainco asserts that, when it began negotiations with Five Star, it made clear that Five Star would be hired in accordance with Mainco's time and materials agreement with the Port Authority. According to Mainco, the general contract

provides payment protocols as conditions precedent to payment of Mainco. Mainco contends that its payment to Five Star was, therefore, contingent upon receipt of certified payroll records. Mainco further contends that it timely objected to Five Star's demands for payment in a letter dated December 20, 2006[3], from Jorge Lee, Mainco's branch controller to Five Star. The letter states:

> "We have made numerous requests to your company, asking you to provide certified payroll reports for the above referenced job.
>
> Once again the Port Authority of NY and NJ are requiring this documentation with the intention to close this job and make final payment to Mainco.
>
> If these documents are not provided to us by December 28, 2006 and processed for payment, Mainco will not receive payment for this work.
>
> In the event Mainco is forced to take less money or is denied payment, Mainco will make equal adjustments to any balances owed to you or look for restitution for overpayments"

(Ephraim J. Fink Affirmation in Opposition to Summary Judgment ["Fink Affirm."], Ex. I). Mainco also submits an affidavit from Jorge Lee, Mainco's branch controller, who was responsible for accounting records, assets, and collections from May 1999 through February 2009[4] (Affidavit of Jorge Lee ["Lee Aff."], ¶ 3). Lee states that the "Port Authority required

---

[3] The letter dated December 20, 2006 only references Contract BT-314 (Fink Affirm., Ex. I).

[4] Mainco represents that it is no longer in business, and that it was sold to another company in early 2009.

all the subcontractors to regularly and routinely submit copies of invoices as well as certified payroll records" (*id.*, ¶ 5 [emphasis in original]). According to Lee, Five Star "never submitted the requisite certified payrolls that were necessary for Mainco to get paid by the Port Authority which would allow Mainco to pay Five Star" (*id.*, ¶ 7 [emphasis in original]).

In 2006, Lee attended weekly meetings with John O'Sullivan, Mainco's president (*id.*, ¶ 9). As a result of those weekly meetings, Lee requested the certified payroll records from Five Star in the December 20, 2006 quoted above (*id.*, ¶ 10). Mainco never received a response to this letter (*id.*, ¶ 12). Consequently, Lee alleges that Mainco was forced to take a $231,960.00 loss on the project (*id.*).

ANALYSIS

The standard for summary judgment standards is well settled. On a motion for summary judgment, the proponent of the motion must establish its claim or defense "sufficiently to warrant the court as a matter of law in directing judgment in [its] favor" (CPLR 3212 [b]). "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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). Once the proponent

of the motion has made a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate, through admissible evidence, the existence of a factual issue requiring a trial of the action (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 553 [1st Dept 2003], *affd* 3 NY3d 295 [2004]). "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact" (*Cabrera v Rodriguez*, 72 AD3d 553, 554 [1st Dept 2010]).

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 [1st Dept 1993] [internal quotation marks and citation omitted]). The agreement is an acceptance of an amount due on an account that has been rendered (*Interman Indus. Prods. v R. S. M. Electron Power*, 37 NY2d 151, 153-154 [1975]; *M & A Constr. Corp. v McTague*, 21 AD3d 610, 611 [3d Dept 2005]). In order to establish an account stated, there must be a mutual examination of the claims of the respective parties, a balance struck, an agreement either express or implied that the balance is correct, and that the party against whom it is found will pay it (*Bank of New York-Del. v Santarelli*, 128 Misc 2d 1003, 1004 [County Ct, Greene County 1985]).

"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 and object to it, if objection there be. Silence is deemed acquiescence and warrants enforcement of the implied agreement to pay" (*Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431 [4th Dept 1979]). If the party receiving the account fails to dispute its correctness or completeness, that party, by its silence, is bound by it, "unless fraud, mistake or other equitable considerations are shown" (*Peterson v Schroder Bank & Trust Co.*, 172 AD2d 165, 166 [1st Dept 1991] [internal quotation marks and citation omitted]). An agreement may also be implied where the debtor makes partial payment on the bills (*see e.g. Cook & Assoc. Realty, Inc. v Chestnutt*, 65 AD3d 937, 938-939 [1st Dept 2009] [client's partial payments on brokerage firm's invoices warranted recovery on account stated]; *Battista v Radesi*, 112 AD2d 42 [4th Dept 1985] [wine distributor's partial payment to wholesaler without objection, acknowledged amount due under agreement with wholesaler, thus establishing an account stated]; *Parker Chapin Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 378 [1st Dept 1977] [where debtor made partial payment on account, such payment constituted acknowledgment of validity of bill, thereby establishing it as an account stated]). However, "[t]here can be no account stated where no account was presented or where any dispute about the account is shown to have existed" (*Abbott, Duncan & Wiener v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995]).

A party meets its initial burden of establishing entitlement to judgment as a matter of law on its cause of action based upon an account stated where it shows that invoices were sent to the defendant using a regular office mailing procedure (*Morrison Cohen Singer & Weinstein, LLP v Brophy*, 19 AD3d 161, 162 [1st Dept 2005]) and "by establishing, with admissible evidence, the receipt and retention of bills without objection within a reasonable time" (*LD Exch. v Orion Telecom. Corp.*, 302 AD2d 565 [2d Dept 2003]), or partial payment of the bills (*Risk Mgt. Planning Group, Inc. v Cabrini Med. Ctr.*, 63 AD3d 421 [1st Dept 2009]; *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]).

In the instant case, Five Star has made a prima facie showing of entitlement to summary judgment based upon an account stated. Five Star submits an affidavit from Phillip J. McHugh, the sole officer, director, and shareholder of Five Star. McHugh states that Five Star performed under the oral agreements with Mainco and submitted seven invoices to Mainco for the work, totaling $126,194.18, at least four years prior to commencing this action (McHugh Aff., ¶¶ 12-34; Exs. B, D-I to Five Star's Motion).[5] Five Star also puts forth

---

[5] With respect to the invoice dated April 15, 2004 in the amount of $36,185.82, Five Star states that its electrical subcontractor, William P. Press, was paid directly by Mainco (McHugh Aff., ¶ 18). Therefore, the amount due and owing on this invoice is $30,849.12, not $36,185.82 (*id.*; Ex. D to Five Star's Motion). The court notes that the invoice dated March 21, 2006 only requested that Mainco pay the previously submitted seven invoices (Ex. C to Five Star's Motion).

affidavits from John O'Sullivan and Louis Esposito, the former president and vice president of Mainco. O'Sullivan and Esposito acknowledge that Five Star performed work for Mainco in a timely and workmanlike manner, that the invoices for that work were submitted to Mainco on numerous occasions and that Five Star was entitled to be paid for the completed work (O'Sullivan Aff., ¶¶ 6, 7-8; Esposito Aff., ¶¶ 6, 9-10). O'Sullivan states that Mainco requested that Five Star await payment until Mainco was paid under its general contract with the Port Authority (O'Sullivan Aff., ¶ 9). According to O'Sullivan, the Port Authority delayed payment to Mainco based upon inadequate documentation and further claimed that Mainco's billing was inflated (*id.*, ¶ 10). O'Sullivan stated that the Port Authority's failure to pay Mainco was not in any way related to the work performed by Five Star at the bus terminal (*id.*, ¶ 11). O'Sullivan further states that, on more than one occasion, he assured Five Star that it would be paid for the invoices (*id.*, ¶ 12). O'Sullivan attempted to negotiate a settlement with the Port Authority, but the negotiations proved unsuccessful because Mainco's corporate parent refused to provide an acceptable adjustment to the Port Authority (*id.*, ¶ 13). Additionally, with respect to the invoices dated March 18, 2002 and April 15, 2002, Mainco made partial payments on these bills, and, therefore, acknowledged the validity of the bills (McHugh Aff., ¶¶ 13, 23; Exs. B, E to Five Star's Motion).

Mainco's contention that payment was contingent upon the submission of certified payroll records is without merit. An "account stated cannot be made an instrument to create

liability where none otherwise exists . . ." (*Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 485 [1st Dept 1991]). "[A] condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (*IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 214 [2009] [internal quotation marks and citation omitted]; *see also Klewin Bldg. Co., Inc. v Heritage Plumbing & Heating, Inc.*, 42 AD3d 559, 560 [2d Dept 2007]; Restatement [Second] of Contracts § 224). Here, Mainco has not submitted any evidence, other than its attorney's affirmation, indicating that submission of certified payroll records was a condition precedent to payment under their agreements (*cf. Enviroclean Servs., LLC v CEM, Inc.*, 12 AD3d 1042, 1043 [4th Dept 2004] [no "account stated" where terms of subcontract made payment contingent upon owner's acceptance of subcontractor's work]). It is well settled that "[a]n attorney's affidavit is of no probative value on a summary judgment motion *unless* accompanied by documentary evidence which constitutes admissible proof" (*Adam v Cutner & Rathkopf*, 238 AD2d 234, 239 [1st Dept 1997]).

In reply, Five Star submits an affidavit from McHugh indicating that when Mainco hired Five Star for the Port Authority Bus Terminal job, Mainco did not impose any conditions to payment other than that Five Star perform the work in a good and workmanlike manner (Phillip J. McHugh Reply Affidavit in Support of Motion for Summary Judgment ["McHugh Reply Aff."], ¶ 3). McHugh further states that Mainco paid Five Star prior to

March 2004, without requiring certified payrolls or other documentation, except for the documentation which he provided to the Port Authority on a daily basis and to Mainco on a monthly basis (*id.*, ¶ 5). He states that at no time did Mainco demand that Five Star qualify as a subcontractor on its Port Authority job (*id.*, ¶ 8). Although Mainco was aware that Five Star used subcontractors to perform portions of the work, Mainco never asked Five Star's subcontractors to sign a contract with it, or qualify as subcontractors with the Port Authority (*id.*, ¶ 9). McHugh also notes that Five Star's subcontractors, who had not been paid for over two years after their work had been accepted, were disinclined to provide any additional documentation which had not been previously requested by Mainco (*id.*, ¶ 12). Assuming that payment under the general contract was conditioned upon submission of certified payroll records, that does not make payment under Five Star's agreements with Mainco subject to the same condition.

Furthermore, Mainco's letter dated December 20, 2006 does not constitute a timely objection to Five Star's seven invoices, the latest of which is dated June 24, 2004 (or approximately two and a half years before). Courts have held that retention of invoices without objection for even six months is unreasonable (*see Risk Mgt. Planning Group*, 63 AD3d at 421 [failure to object for, in some cases, over three years created an account stated]; *American Express Centurion Bank v Williams*, 24 AD3d 577, 577-578 [2d Dept 2005] [retention of account statements for over one year established an account stated]; *Healthcare*

Capital Mgt. v Abrahams, 300 AD2d 108 [1st Dept 2002] [objections made 10 months and six months after the fact insufficient to withstand summary judgment]; *Kramer, Levin, Nessen, Kamin & Frankel v Aronoff*, 638 F Supp 714, 720 [SD NY 1986] [failure to object to law firm's bills for period of three years amounted to implied acquiescence to account]).

For the above reasons, the court finds that an account stated arose as a matter of law as to Five Star's seven unpaid invoices, for a total of $126,194.18, as follows: the invoices dated March 18, 2002 ($22,030.69), April 15, 2002 ($48,998.77), March 26, 2004 ($4,084.30), April 15, 2004 ($30,849.12, $1,210, and $16,626.30) and June 24, 2004 ($2,395). Prejudgment interest runs at the statutory rate from the date of each invoice (*Music Sales Corp. v Mark Music Serv.*, 194 AD2d 470, 471 [1st Dept], *lv denied* 82 NY2d 662 [1993]; *see also* CPLR 5001 [b]).

Accordingly, it is

ORDERED that the motion (sequence number 002) of plaintiff Five Star Mechanical Corp. for summary judgment is granted on the third, eighth, thirteenth, eighteenth, twenty-third, twenty-eighth and thirty-third causes of action in favor of plaintiff Five Star Mechanical Corp. and against defendant Mainco Elevator Corp., the causes of action are severed and all other causes of action are rendered moot, and the Clerk shall enter judgment against defendant Mainco Elevator Corp. in the amount of $126,194.18, together with

interest to be calculated by the Clerk of the Court from the following dates until the entry of judgment as follows:

a) 9% interest on $22,030.69, as of March 18, 2002;

b) 9% interest on $48,998.77, as of April 15, 2002;

c) 9% interest on $4,084.30, as of March 26, 2004;

d) 9% interest on $30,849.12, as of April 15, 2004;

e) 9% interest on $1,210, as of April 15, 2004;

f) 9% interest on $16,626.30, as of April 15, 2004;

g) 9% interest on $2,395, as of June 24, 2004;

and interest thereafter at the statutory rate, together with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion (sequence number 003) of plaintiff Five Star Mechanical Corp. to quash subpoenas is granted in accordance with the decision dictated on the record of October 22, 2009.

This constitutes the decision and order of the court.

Dated: New York, New York
August 5, 2010

ENTER:

Hon. Eileen Bransten, J.S.C.