

**Corona Fuel Corp. v 1st Petroleum, Inc.**

2012 NY Slip Op 30237(U)

January 13, 2012

Sup Ct, Nassau County

Docket Number: 010304-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**CORONA FUEL CORP.,**

**Plaintiff,**

**-against-**

**1ST PETROLEUM, INC.,**

**Defendant.**  
-----x

**TRIAL/IAS PART: 16  
NASSAU COUNTY**

**Index No: 010304-11**

**Motion Seq. No: 1  
Submission Date: 11/17/11**

**The following papers having been read on this motion:**

**Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits.....x**

This matter is before the Court for decision on the motion filed by Plaintiff Corona Fuel Corp. ("Plaintiff") on September 27, 2011 and submitted on November 17, 2011. For the reasons set forth below, the Court grants Plaintiff's motion to the extent that the Court grants Plaintiff judgment on the first cause of action in the Verified Complaint and awards Plaintiff judgment against Defendant 1ST Petroleum, Inc. ("Defendant") in the amount of \$116,799.73, plus interest thereon from September 14, 2009, and costs.

**BACKGROUND**

**A. Relief Sought**

Plaintiff moves for an Order, pursuant to CPLR § 3215, granting Plaintiff judgment in favor of Plaintiff and against Defendant, plus costs and disbursements.<sup>1</sup>

Defendant has not answered or appeared in this action, and has submitted no response to

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<sup>1</sup> Although Plaintiff's notice of motion reflects that Plaintiff also seeks counsel fees, the Affirmation and Affidavit in Support make no reference to counsel fees, and Plaintiff makes no reference to any agreement, statute or court rule that would authorize such an award in this action. *See, e.g., Blair v. O'Donnell*, 85 A.D.3d 954 (2d Dept. 2011) (under the general rule, legal fees and disbursements are incidents of litigation, and the prevailing party may not collect them from the unsuccessful party unless an award is authorized by agreement between the parties, statute, or court rule).

Plaintiff's motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to Spano Aff. in Supp.), which contains three (3) causes of action, alleges as follows:

First Cause of Action

On or about September 14, 2009, Defendant and Plaintiff entered into an agreement pursuant to which Plaintiff was to provide deliveries of gasoline and diesel fuel to Defendant. Plaintiff provided gasoline and diesel fuel deliveries at the request of Defendant on an ongoing basis from September 14, 2009 through February 9, 2010. The agreed-upon price for these services totaled \$116,799.73 (One Hundred Sixteen Thousand Seven Hundred Ninety-Nine Dollars and Seventy-Three Cents). There is due and owing from Defendant to Plaintiff a past due balance ("Balance") for those deliveries of \$116,799.73. Despite due demand, Defendant has failed and refused to pay Plaintiff the Balance. As a result, Plaintiff seeks damages in the amount of \$116,799.73, plus interest thereon from September 14, 2009.

Second Cause of Action

Plaintiff alleges that Defendant has been unjustly enriched in the sum of \$116,799.73 as a result of its failure to pay the Balance owed. Plaintiff seeks damages in the amount of \$116,799.73, plus interest thereon from September 14, 2009.

Third Cause of Action

Plaintiff rendered statements of account to Defendant, which Defendant never disputed. As a result, an account stated has been created between Plaintiff and Defendant in the sum of \$116,799.73, no part of which has been paid by Defendant, despite Plaintiff's demand. Plaintiff seeks damages in the amount of \$116,799.73, plus interest thereon from September 14, 2009.

In his Affidavit in Support, Michael Sobel ("Sobel"), the owner of Plaintiff corporation, affirms the truth of the allegations in the Complaint including those regarding the parties' agreement, Plaintiff's performance and Defendant's failure to pay the Balance owed. In addition, the Complaint is verified by Sobel.

In his Affirmation in Support, Plaintiff's counsel affirms that Defendant was served with the Summons and Complaint by service on Nick Altinbis, an authorized agent of Defendant on July 18, 2011. Plaintiff provides a copy of the applicable Affidavit of Service (Ex. B to Spano Aff. in Supp.). In addition, on August 22, 2011, Plaintiff's counsel mailed a letter to the

Defendant (*id.* at Ex. C) advising Defendant of its default and of Plaintiff's intention to seek a default judgment against Defendant. Defendant has not answered, appeared or moved in this action, and the time to do so has expired.

On October 17, 2011, an individual who identified himself as Eric Altinbas, and provided an address that is identical to that of the Defendant, appeared before the Court. At Mr. Altinbas' request, the Court adjourned the return date of the instant motion to November 17, 2011 to allow Defendant time to retain counsel. Since that date, no attorney has entered an appearance on behalf of Defendant and Defendant has interposed no answer or response to the instant motion.

### C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to judgment by presenting proof of service of the Summons and Complaint, and proof of the claim through the Verified Complaint and Sobel Affidavit which establish the parties' agreement, as well as an account stated between the parties, Plaintiff's performance, Defendant's default and the amount due.

No attorney has entered an appearance on behalf of Defendant, and Defendant has interposed no answer or response to the instant motion.

## RULING OF THE COURT

### A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

### B. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694, 695 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

A party establishes a *prima facie* case for an account stated by proving that the defendants received and retained bills for services rendered to the defendants without objection. *Nebraskaland, Inc. v. Best Selections, Inc.*, 303 A.D.2d 662 (2d Dept. 2003); *Herrick Feinstein LLP v. Stamm*, 297 A.D.2d 477 (1st Dept. 2002). There 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 A.D.2d 412 (1st Dept. 1995), citing *Waldman v. Englishtown Sportswear*, 92 A.D.2d 833, 836 (1<sup>st</sup> Dept. 1983).

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d.

### C. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion to the extent that the Court grants Plaintiff judgment against Defendant on the first cause of action in the Complaint alleging Defendant's breach of the parties' agreement. Plaintiff has presented proof of service of the Summons and Complaint on the Defendant. In addition, Plaintiff has provided affidavits setting forth the facts constituting the claim, the default, and the amount due, and has made a *prima facie* showing of a cause of action for breach of contract against Defendant, the defaulting party. Plaintiff has established its right to judgment on the first cause of action by establishing the existence of a contract between the parties, Plaintiff's performance under the contract by delivering the fuel, Defendant's breach of the contract by failing to make required payments, and resulting damages in the form of the unpaid Balance.

The Court denies Plaintiff's motion for judgment on the second cause of action, alleging an account stated, in light of the fact that the Court has not been provided with copies of the bills for services rendered to the Defendants. The Court denies Plaintiff's motion for judgment on the third cause of action, based on unjust enrichment, in light of Plaintiff's allegation that there

existed an express contract between the parties. The Court also denies Plaintiff's application for disbursements and attorney's fees, given the absence of any agreement between the parties, statute, or court rule that authorizes such an award.

Accordingly, the Court grants Plaintiff judgment against Defendant on the first cause of action in the Verified Complaint in the sum of \$116,799.73, plus interest thereon from September 14, 2009, and costs.

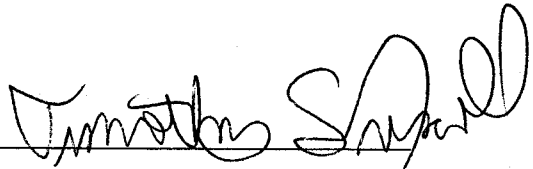
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Submit judgment on ten (10) days notice.

ENTER

DATED: Mineola, NY  
January 13, 2012

  
HON. TIMOTHY S. DRISCOLL

J.S.C.

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**ENTERED**  
JAN 24 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE