

**Andris v Moed**

2012 NY Slip Op 30398(U)

February 6, 2012

Supreme Court, Nassau County

Docket Number: 21386/10

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU: PART 13

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**PAUL P. ANDRIS,**

Plaintiff,

- against -

**DECISION AND ORDER**

Index No: 21386/10

**JENNIE MOED and MELVIN MOED,**

Motion Sequence No: 001

Original Return Date: 10-21-11

Defendants.

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**P R E S E N T :**

**HON. JOEL K. ASARCH,**  
**Justice of the Supreme Court.**

The following named papers numbered 1 to 7 were submitted on this Notice of Motion on November 9, 2011:

	<u>Papers numbered</u>
Notice of Motion, Affirmation and Affidavit	1-3
Memorandum of Law in Support	4
Affirmation and Affidavit in Opposition	5-6
Memorandum of Law in Opposition	7

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This motion by plaintiff pursuant to CPLR 3212 for summary judgment against defendant Jennie Moed in the amount set forth in the complaint, plus interest, attorneys' fees and the cost of collection, and dismissal of the affirmative defenses and counterclaims asserted in the defendant's answer,<sup>1</sup> is determined as hereinafter provided.

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<sup>1</sup>  
According to plaintiff's counsel, the action is stayed as to defendant Melvin Moed who died in January, 2010. Plaintiff continues to pursue the action as against defendant Jennie Moed only and does not plan to move to substitute the estate of the deceased in the action.

## BACKGROUND

Plaintiff, a certified public accountant, commenced this action, based on theories of professional services performed (First Cause of Action) and account stated (Second Cause of Action), to recover monies allegedly due and owing for accounting services rendered to defendant(s) during the period from July 20, 2009 through October 4, 2010. It is undisputed that plaintiff performed accounting services at defendants' request pursuant to a written engagement letter. Of the \$17,300.00 allegedly owed, plaintiff asserts that defendant Jennie Moed has made a partial payment of only \$500.

In her answer, defendant Jennie Moed has asserted five affirmative defenses including, *inter alia*, partial payment, failure of condition precedent, failure to join an indispensable party, failure to state a cause of action, lack of personal jurisdiction and lack of subject matter jurisdiction, and three counterclaims for breach of contract/fiduciary duty, declaratory relief and attorneys' fees.

In support of his motion for summary judgment, plaintiff has submitted copies of the original engagement letter<sup>2</sup> executed by the parties (July 27, 2009), as supplemented by two additional written agreements dated November 2, 2009 and January 11, 2010, as well as invoices dated December 2, 2009, July 23, 2010, and various correspondence between the parties regarding monies owed, defendant Jennie Moed's satisfaction with the quality of services rendered and her intention to pay outstanding bills.

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Plaintiff was originally retained to prepare a petition to the United States Tax Court with respect to the years 2005 and 2006. Subsequently, defendants requested that plaintiff represent them before the United States Tax Appeals Court in connection with their petition (November 2, 2009 letter).

## ANALYSIS

In order to establish an account stated, there must be a debtor/creditor relationship between the parties as to the items forming the account. *Paul, Weiss, Rifkind, Wharton & Garrison v Koons*, 4 Misc3d 447, 450 [N.Y.Sup. 2004]. An account stated is an agreement between parties to an account based on prior transactions between them with respect to the correctness of the account items and balance due. *Jim-Mar Corp. v Aquatic Const., Ltd.*, 195 AD2d 868, 869 [3<sup>rd</sup> Dept 1993] *lv to appeal den.*, 82 NY2d 660 [1993]. By retaining billing statements, and failing to object to the account within a reasonable time, the recipient of the bill implies that he or she agrees with the sender regarding the amount owed. *Stephan B. Gleich & Assoc. v Gritsipis*, 87 AD3d 216, 223 [2<sup>nd</sup> Dept 2011] (citations omitted); *Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51 [1<sup>st</sup> Dept 2004].

Plaintiff has established *prima facie* entitlement to judgment on his cause of action for an account stated and that defendant has no defense to the claim based on the evidence provided. The essentials of an account stated have been set forth and have not been adequately disputed by defendant.

In opposition to plaintiff's motion, defendant Jennie Moed has failed to provide evidence either that she is not in default or that she, at any point prior to commencement of this lawsuit, lodged objections to, or disputed, the amount owed. The gravamen of defendant's untenable defense to plaintiff's claim is that because plaintiff, in an alleged breach of contract, failed to properly review and consider documents provided to him by her, the tax matter which he was hired to resolve was transformed from a matter which should have taken no more than ten to fifteen hours to resolve into a matter that consumed seventy-two hours of billable time. As such, defendant Jennie Moed claims

she is entitled to a set-off of at least \$18,705. This claim is nothing more than a self-serving assertion inconsistent with her written praise of plaintiff's handling of her tax matter and assurances that she intended to pay the amount owed.

The facts lead to the inescapable conclusion that a statement of account was rendered to defendant Jennie Moed who, either expressly or impliedly, assented to it. An implicit agreement to pay, warranting summary judgment, will arise from either the absence of any objection to the bill within a reasonable time or a partial payment of the outstanding bills. *Chisolm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431 [4<sup>th</sup> Dept 1979]. An account stated may also arise from an explicit promise to pay the outstanding bill.

The fact is that defendant Jennie Moed never objected to the invoices presented and praised plaintiff's "superb expertise, tenacity and grace under fire," and assured him of her intention to pay the monies owed. Said defendant does not argue the absence of an account stated. Her only real argument is that the amount owed is inflated. Bald conclusory assertions, however, as to inflated or otherwise inappropriate fees, without supporting evidentiary proof, are insufficient to withstand a motion for summary judgment. *Thelen LLP v Omni Contracting Co., Inc.*, 79 AD3d 605, 606 [1<sup>st</sup> Dept 2010]; *Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 482 [1<sup>st</sup> Dept 2002].

It is well settled that the proponent of a summary judgment motion must establish that there is no defense to a cause of action or that the defense lacks merit sufficient to warrant the court to direct judgment in the movant's favor as a matter of law. *Bush v St. Clare's Hosp.*, 82 NY2d 738, 739 [1993]. When the proponent makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the opposing party to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action or to tender an acceptable excuse for the failure to do so.

*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986].

The counterclaims asserted by defendant Jennie Moed consist of conclusory allegations cast in general language devoid of factual support. No issue of fact is created by defendant Jennie Moed's belated attempt to denigrate the services performed based upon the unsubstantiated allegation that plaintiff made the matter more complicated than it really was resulting in exaggerated fees.

In her answer, defendant Jennie Moed fails to present more than mere conclusory statements as to her affirmative defenses. There is no recitation of facts as required by CPLR 3013 and 3018(b). Defenses and counterclaims, as those asserted herein, which merely plead conclusions of law without supporting facts are insufficient and should be stricken. *170 West Village Associates v G&E Realty, Inc.*, 56 AD3d 372 [1<sup>st</sup> Dept 2008].

Defendant's first counterclaim for breach of contract flies in the face of the evidence before the Court and fails to allege any manner in which plaintiff is in material breach of the parties' agreements or failed to perform in accordance therewith.

The second counterclaim for declaratory relief reducing the amount owed, in no event, less than \$18,705 is unsustainable in light of the finding of an account stated.

Nor is defendant's counterclaim for recovery of attorneys' fees in defense of this action viable. Attorneys' fees are not ordinarily recoverable by a prevailing party absent express statutory or contractual authority. *Gray v Hilltop Village Co-op.# Three, Inc.*, 50 AD3d 739, 741 [2<sup>nd</sup> Dept 2008]. While there is a provision in paragraph "f" of the January 11, 2010 agreement permitting the recovery of attorneys' fees "in the event that [the plaintiff has] to engage the services of an attorney to collect any outstanding balance due [plaintiff] for services rendered", defendant is not a prevailing

party and has offered no authority to support a request for an award of attorney's fees.

Accordingly, after due deliberation, it is

ORDERED, that the plaintiff's motion for summary judgment on its Second Cause of Action for an account stated against defendant Jeannie Moed in the sum of \$16,800.00 as demanded in the complaint is **granted**; and it is further

ORDERED, that the First Cause of Action for professional services rendered at the agreed price and reasonable value of \$17,700.00 is severed and continued; and it is further

ORDERED, that the Third Cause of Action based on an alleged guarantee by defendant Melvin Moed is severed and discontinued without prejudice based upon the decision of the plaintiff not to substitute the estate of the decedent herein; and it is further

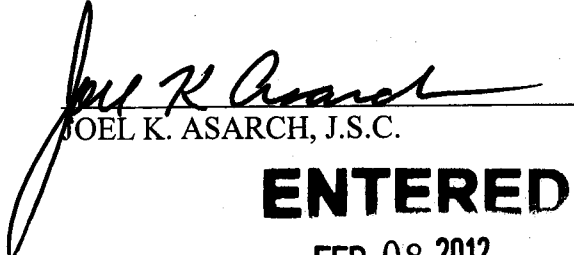
ORDERED, that as a hearing is necessary to determine the reasonableness of the attorneys' fees sought by the plaintiff in its Fourth Cause of Action, such hearing shall take place before the undersigned on **March 12, 2012 at 2:00 p.m.** at the courthouse, 100 Supreme Court Drive, Mineola, New York 11501.

The foregoing constitutes the Decision and Order of the Court.

Settle judgment on notice.

Dated: Mineola, New York  
February 6, 2012

ENTER:

  
JOEL K. ASARCH, J.S.C.

**ENTERED**  
FEB 08 2012  
NASSAU COUNTY  
6 COUNTY CLERK'S OFFICE

Copies mailed to:

Mitchell & Incantalupo, Esqs.  
Attorneys for plaintiff

Michael S. Haber, Esq.  
Attorney for defendant Jennie Moed