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

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GETTRY MARCUS STERN & LEHRER, CPA, P.C.,

Plaintiff,

- against -

ADAMBA IMPORTS INTERNATIONAL, INC.,

Defendant.

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DECISION AND ORDER

Index No: 14826/11

Motion Sequence No: 001
Original Return Date: 12-14-11

P R E S E N T :
HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 8 were submitted on this Notice of Motion on January 26, 2012:

	Papers numbered
Notice of Motion and Affirmation in Support	1-2
Memorandum of Law	3
Affidavit and Affirmation in Opposition	4-5
Reply Affidavits (2) and Memorandum of Law	6-8

The motion by defendant Adamba Imports International, Inc. ("Adamba") for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the three causes of action set forth in the complaint is decided as follows:

This is an action to recover damages for breach of contract, *quantum meruit* and an account stated. Between March 17, 2010, and May 15, 2010, plaintiff, Gettry Marcus Stern & Lehrer, CPA, P.C. ("Gettry"), performed accounting services for Adamba.

Background

Adamba was a party to an arbitration in Poland in which it was seeking to recover expenses it incurred during a five year period marketing the Luksusowa Vodka brand.

On or about March 16, 2010, Adamba engaged plaintiff to perform accounting services in connection with the then-pending arbitration ("engagement agreement"). The engagement agreement provided, in pertinent part, as follows:

> "We estimate that our fees for these services will be $25,000, but could be higher. The fee estimate is based on anticipated cooperation from your personnel and the assumption that unexpected circumstances will not be encountered during the engagement. If significant additional time is necessary, we will discuss it with you and arrive at a new fee estimate before we incur the additional costs. Our invoices for these fees are payable on presentation.
>
> Our fee for these services will be based upon the amount of time required at our standard hourly billing rates plus out-of-pocket expenses.
>
> * * *
>
> We will require a retainer of $10,000 at the execution of this agreement and before commencing any professional services pursuant to this agreement. This retainer will be applied towards our final invoice at the completion or termination of this agreement. This retainer is not intended to be an estimate of the total cost of the work performed."

While the engagement agreement contained an estimate of projected accounting fees (such estimate being based on the services specified by Adamba to be rendered), the engagement agreement did not, by its own terms, "cap" or limit the accounting fees to be due Gettry.

Adamba paid Gettry the retainer of $10,000.

On April 12, 2010, Gettry, by one of its principals, hand delivered to Mr. Bak, the President of Adamba, a detailed invoice dated April 9, 2010 for services rendered for the period March 15,

2010 to March 31, 2010 in the amount of $23,815.

At such time, Gettry advised Mr. Bak that the time expended has already exceeded the $25,000 estimated as stated in the engagement agreement and that further work by Gettry was required in order to finish the project and issue its report. Mr. Bak reviewed the invoice in the presence of the Gettry principal. Gettry then also communicated to Mr. Bak that Gettry could not provide, under the circumstances, a specific dollar estimate to complete the engagement due to the changing parameters of the assignment. Mr. Bak then responded, in sum and substance, that he needed to get the assignment done. In reliance thereof, Gettry continued to perform the required work.

On May 6, 2010, Gettry transmitted its invoice dated May 6, 2010 to Adamba for the additional sum of $94,423.75. Gettry also invoiced $529.02 in reimbursable Federal Express expense in shipping the final report to Poland.

As of May 6, 2010, plaintiff claims that Adamba owed the sum of $23,815.00 plus $94,423.75 plus $529.02, for a total of $118,767.77. In addition to the $10,000 retainer paid to Gettry by Adamba on November 15, 2010, Adamba paid to Gettry the additional sum of $15,000.00.

In support of its dismissal motion, defendant relies upon one email dated May 7, 2011 from Adam Bak, President of Adamba, to Andrew P. Ross, a Partner at Gettry Marcus Stern & Lehrer, CPA, P.C., which states as follows:

> "You prepared a proposal back on the 16th of March for the project and quoted twenty five thousand, but that the project costs could be higher. I received your email yesterday requesting an additional one hundred and eight thousand dollars and now I am not accepting this 'additional charge' for the following reason. It is your obligation to inform Adamba that there would be these project/cost overruns in this amount. It would of been then my decision to accept or decline this "change order." From a business and

> common sense point of view, I would be able to accept a 15% overrun/tolerance, but not a 5 fold change order in project cost.
>
> If you accept my offer for a total project cost of thirty thousand then we can close out this discussion, otherwise I am ordering David DeBenedetti to withdraw your work from my court presentation. I didn't pick up your call because I was too disappointed and upset at this situation. I am leaving the country for an overseas trip, please respond via email."

Defendant now moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7).

The Instant Motion to Dismiss

To succeed on a motion pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez,* 84 NY2d 83 [1994]; *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.,* 11 NY3d 146 [2008]; *1191 Richmond Ave. Associates, LLC v G.L.G. Capital, LLC*, 60 AD3d 1021 [2nd Dept 2009].

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the Court must determine whether, from the four corners of the pleading, "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Salvatore v Kumar,* 45 AD3d 560 [2nd Dept 2007], *lv to app den.* 10 NY3d 703 [2008], quoting *Morad v Morad*, 27 AD3d 626, 627 [2nd Dept 2006]). Further, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]; *Leon v Martinez, supra* at 87-88). Notably, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining

a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Crepin v Fogarty*, 59 AD3d 837 [3rd Dept 2009]; *Farber v Breslin*, 47 AD3d 873 [2nd Dept 2008]).

Contrary to Adamba's contentions, the complaint states a valid cause of action for breach of contract as it "specifies the terms of the agreement, the consideration, the performance by plaintiff and basis of the alleged breach of the agreement by defendant." *Furia v Furia*, 116 AD2d 694 [2nd Dept 1986].

The cause of action based upon an account stated is equally sufficient to withstand a dismissal motion. "An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*Landau v Weissman*, 78 AD3d 661 [2nd Dept 2010], quoting *Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869 [3rd Dept 1993]; *see Cameron Engineering & Assoc., LLP v JMS Architect & Planner, P.C.*, 75 AD3d 488 [2nd Dept 2010]). "The agreement may be express or . . . implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances" (*Jim-Mar Corp. v Aquatic Constr., supra* at 869; *see Jovee Contr. Corp. v AIA Envtl. Corp.*, 283 AD2d 398, 400 [2nd Dept 2001]). "Whether a bill had been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible" (*Landau v Weissman, supra,* quoting *Yannelli, Zevin & Civardi v Sakol*, 298 AD2d 579, 580 [2nd Dept 2002] [internal quotation marks omitted]; *see Shelly v Skief*, 73 AD3d 1016 [2nd Dept 2010]; *Epstein v Turecamo*, 258 AD2d 502, 503 [2nd Dept 1999]; *Legum v Ruthen*, 211 AD2d 701, 703 [2nd Dept 1995].

The *quantum meruit* cause of action [the Complaint's Second Cause of Action] has been

withdrawn [paragraph "39" of Singer Affirmation submitted in opposition to motion].

Accordingly, in view of the foregoing, and after due deliberation, it is

ORDERED, that the defendant's motion to dismiss is **denied** as to the remaining two causes of action [the Complaint's First and Third Causes of Action]; and it is further

ORDERED, that counsel for the Plaintiff and for the Defendant shall appear in the DCM Part of this Court at 100 Supreme Court Drive, Mineola, New York **on April 26. 2012** at 9:30 for a Preliminary Conference.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
March 19, 2012

ENTER:

JOEL K. ASARCH, J.S.C.

Copies mailed to:

Law Offices of Singer & Robinson. LLP
Attorneys for Plaintiff

Law Office of Aaron Siri, Esq.
Attorneys for Defendant