

<b>Aquent, LLC v Gross</b>
2012 NY Slip Op 33840(U)
March 30, 2012
Supreme Court, New York County
Docket Number: 108001/10
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

AQUENT, LLC,

Plaintiff,

INDEX NO.

108001/10

- v -

MOTION SEQ. NO.

003

AMIE GROSS and AMIE GROSS  
ARCHITECTS, P.C.,  
Defendants.

The following papers, numbered 1 to 3, were read on this motion by plaintiff AQUENT, LLC, for summary judgment on its complaint.

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo)

2

Replying Affidavits (Reply Memo)

3

Cross-Motion:  Yes  No

Aquent, LLC (Aquent) moves for summary judgment pursuant to CPLR 3212 on its complaint as against Amie Gross (Gross) individually and Amie Gross Architects, P.C. (AGA) (collectively, "defendants"). The herein action brought by Aquent asserts causes of action for

**FILED**

*inter alia*, breach of contract, account stated, quasi-contract, unjust enrichment and book account.

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BACKGROUND

NEW YORK  
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Aquent provided factoring and accounts receivable financing to AGA from February 7, 2007 through December 1, 2008, pursuant to a Merchant Services Agreement (Merchant Agreement), at which time Aquent alleges that the defendant's indebtedness was \$71,147.99. Defendant Gross, individually and as president of AGA, signed a personal guaranty in favor of Aquent to secure the accounts receivable financing. Aquent alleges that from December 1, 2008 through May 11, 2009 no payments were made by defendants on the account, and as a result another \$3,140.01 in additional charges accrued. However, from May 11, 2009 through March 31, 2010 Gross made payments on a sporadic basis totaling \$30,250.00 to the firm Friedman, Katz and Shapiro, Inc., as agents for Aquent, reducing defendants indebtedness to

[\* 2]  
Aquent to \$44,040.99.

Aquent claims that defendants sold their accounts receivable due from the City of New York Development of Housing Preservation and Development (HPD) to Aquent, pursuant to the Merchant Agreement, which was executed by Gross individually and AGA. According to Aquent, the Merchant Agreement guarantees defendants will repurchase if their receivable obligor defaults and sets out the method of repurchase by AGA of the accounts receivables. Aquent alleges that Gross was aware of her obligation regarding the accounts receivables, and points to Gross' deposition transcript where she acknowledges her signature on the relevant agreements executed between the parties. Gross signed the two Guaranty Agreements attached to the motion papers in her individual capacity, and the other applicable agreements were signed by Gross in her capacity as president of AGA (see Notice of Motion, exhibits 1-11).

Gross acknowledges in her deposition, her awareness of the press release which stated that AGA and HPD cut the ribbon to celebrate the completion of a newly constructed affordable housing building at 575 Fifth Avenue in South Park Slope, Brooklyn (HPD project) (see Notice of Motion, exhibit 12). Gross further acknowledges that she received monies from HPD by virtue of her work on the HPD project (*id.*). Aquent commenced the herein action because it believes that defendants' obligor paid defendants, but defendants have failed to honor their obligation to Aquent. Aquent now moves for summary judgment on its complaint against defendants and avers that in failing to assign the monies that defendants received from the HPD to Aquent, as part of AGA's accounts receivable, the defendants have been unjustly enriched and are in breach of the numerous agreements they signed with Aquent.

In support of its motion Aquent submits, *inter alia*, an Affidavit of Richard Friedman (Friedman Affidavit); Aquent's Managing Agent; the following eleven agreements signed by the parties: Merchant Agreement, Account Access Authorization Agreement, Guaranty Agreement in which Gross individually guarantees the accounts receivable financing pursuant to the

Merchant Agreement in favor of Aquent, Line of Credit Agreement, Promissory Note dated April 26, 2005 in which AGA promises to pay up to \$100,000.00, Security Agreement dated April 26, 2005, Contractor Services Agreement, Line of Credit Agreement, Guaranty Agreement in which Gross individually guarantees the accounts receivable financing pursuant to the Contractor Services Agreement in favor of Aquent, Promissory Note dated February 7, 2007 in which AGA promises to pay up to \$250,000.00, Security Agreement dated February 7, 2007; a copy of the transcript of Gross' October 14, 2010 deposition; and a document that lists each payment made by AGA to from May 11, 2009 through March 31, 2010 to the firm Friedman, Katz and Shapiro, Inc.

In opposition, defendants argue that Aquent is not entitled to summary judgment as Aquent failed to submit with its motion papers an affidavit by someone with personal knowledge, like Resource Management Partner (RMP) an administrator and representative of Aquent, or an affidavit from Aquent itself. Defendants claim that the Friedman Affidavit is insufficient because Friedman is Aquent's agent and does not have personal knowledge of the facts at issue. Defendants further proffer that AGA entered into a series of financing-related agreements with Aquent, pursuant to which Aquent disbursed certain funds to AGA and which AGA has fully repaid. The amount that defendants claim to have repaid is approximately \$253,921.50.

In reply Aquent proffers that contrary to Gross' statement, she had extensive contact with Aquent, and RMP was merely servicing Aquent's account. The reply also describes how Aquent calculates the amount of monies it demands in its complaint. Further, Aquent avers that during depositions, defendants admitted to signing the following documents: Contractor Services Agreement, Line of Credit Agreement, Guaranty Agreement, Promissory Note and Security Agreement.

#### STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of

fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

#### DISCUSSION

As a threshold matter, defendants argue that Aquent is not entitled to summary judgment as Aquent failed to submit with its motion papers an affidavit by someone with personal knowledge. The Court finds this argument unavailing and holds that the Friedman Affidavit is sufficient because Friedman is Aquent's Managing Agent.

#### Breach of Contract

Defendant AGA signed promissory notes and various security agreements, personally

guaranteed by Gross, which gave Aquent a security interest in AGA's accounts receivable. The Account Access Authorization Agreement specifies RMP as administrator and representative of Aquent. Aquent points to Section 4.4, the relevant provision of the Merchant Agreement signed by the respective parties, entitled Application of Payments, which states in pertinent part:

Merchant [AGA] is expressly prohibited from collecting any of the Receivables assigned by Merchant to Lender [Aquent] in connection with the Program directly from a Customer, but, in the event Merchant does receive or collect such receivables ("Misdirected Payment(s)"), Merchant agrees to immediately remit the same to Lender properly endorsed, no later than the next banking day. In no event shall Merchant deposit, cash or other utilize any Misdirected Payment. Merchant acknowledges and agrees that any violation of the foregoing requirements by Merchant shall be deemed an illegal conversion of Lender's funds, which Lender may report to the appropriate authorities for possible prosecution (Notice of Motion, exhibit 4).

Further, the Merchant Agreement in Section 3.1 entitled Assignment and Sale states in relevant part:

Lender agrees to purchase and Merchant agrees to assign and sell, and hereby assigns and sells to Lender as absolute owner, with full recourse, Merchant's entire interest in such of Merchant's presently outstanding Receivable as Lender determines acceptable, as well as all of Merchant's future Receivables which are in Lender's sole discretion acceptable to Lender and that are reflected by the Invoices Merchant delivers to Lender (Notice of Motion, exhibit 4).

The Court finds that Aquent has met its prima facie burden of establishing its entitlement to summary judgment as matter of law on its cause of action for breach of contract through its submission of the eleven valid and enforceable agreements signed by the parties, and Gross' deposition transcript. During her deposition Gross acknowledges her signature on all eleven of the contracts between the parties; admits that she never disavowed, cancelled or revoked any of these agreements; and acknowledges that HPD paid AGA for its work on the HPD project (see Notice of Motion, exhibit 12). Defendants, in opposition, fail to raise a triable issue of fact sufficient to defeat the herein motion. Gross' allegation that all monies have been repaid in their entirety to Aquent is not substantiated by anything on the record before the Court.

Accordingly, Aquent is entitled to summary judgment on its cause of action for breach of contract, and the amount due to Aquent shall be determined at an inquest at the conclusion of this action.

Account Stated

"An account stated is an account, balanced and rendered, with an assent to the balance either express or implied" (*Abbott, Duncan & Weiner v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995] citing *Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 153 [1975]). Furthermore, receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, gives rise to an actionable account stated (*Shea & Gould v Burr*, 194 AD2d 369, 370 [1st Dept 1993]). "[T]he very meaning of an account stated is that the parties have come together and agreed upon the balance of the indebtedness..." (*Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st Dept 2002]). However, there can be no account stated if there is any dispute about the account (see *Abbott, Duncan & Weiner*, 214 AD2d at 412).

Aquent failed to establish its entitlement to recovery based on an account stated, as the parties have not come together and agreed on the indebtedness (see *Herrick, Feinstein LLP*, 297 AD2d at 478). Even though Aquent provides a document that lists each payment made by AGA to from May 11, 2009 through March 31, 2010 to the firm Friedman, Katz and Shapiro, Inc. which indicates that defendants owe \$44,040.99 to Aquent (see Notice of Motion, exhibit 13), Aquent fails to submit evidence establishing that it sent any account statements to defendants. Further, Gross states in her deposition that outside of her Answer to the herein action, she could not remember whether she had disputed in writing owing Aquent money, however she maintained that AGA has fully repaid Aquent (see Notice of Motion, exhibit 12 pgs. 28-31). This further evidences that the parties have not agreed on the amount of indebtedness, or any indebtedness at all. Accordingly, the portion of Aquent's motion for summary judgment on its cause of action for account stated is denied.

### Quasi-Contract and Unjust Enrichment

A cause of action for unjust enrichment sounds in quasi-contract or restitution (*Edelman v Starwood Capital Group, LLC*, 70 AD3d 246, 250 [1st Dept 2009]) and is "based on the equitable principles that a person shall not be allowed to enrich himself unjustly at the expense of another" (*Banco Popular N. Am. v Lieberman*, 75 AD3d 460, 463 [1st Dept 2010], quoting *Waldman v Englishtown Sportswear*, 92 AD2d 833, 836 [1st Dept 1983]). "It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which ex aequo et bono belongs to another" (*Miller v Schloss*, 218 NY 400, 407 [1916]). A contract cannot be implied in fact where there is an express contract covering the subject matter at issue (*see id.* at 406).

Here, multiple valid contracts exist between the parties which govern the subject matter at issue. Specifically, the Merchant Agreement governs misdirected payments, wherein if AGA was paid by HPD for its work on the HPD project, the Merchant Agreement states that said payment must be remitted to Aquent. Accordingly, the portion of Aquent's motion for summary judgment on its cause of action for unjust enrichment and quasi-contract is denied (*see Miller*, 218 NY at 406).

### Book Account

Aquent's fourth cause of action for book account is not viable as, "[t]he action on a book account is purely statutory, and there is no New York statute authorizing such an action" (*Waldman*, 92 AD2d at 836 [1st Dept 1983] [internal quotations and citations omitted]). Accordingly the portion of Aquent's motion for summary judgment on its cause of action for book account is denied and this cause of action is dismissed.

### **CONCLUSION**

Upon the foregoing papers, it is

ORDERED that the portion of this motion by plaintiff AQUENT, LLC for summary judgment on its cause of action for breach of contract is granted; and it is further,

ORDERED that an inquest shall be held at the conclusion of this action assessing damages, if any, against defendants AMIE GROSS individually and AMIE GROSS ARCHITECTS, P.C. for breach of contract, and entering judgment in accordance therewith; and it is further,

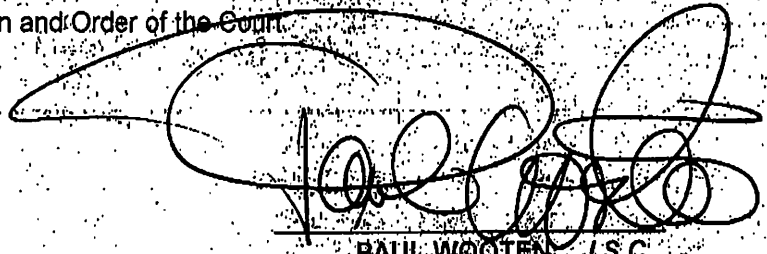
ORDERED that the portion of this motion by plaintiff AQUENT, LLC for summary judgment on its cause of action for account stated, quasi-contract and unjust enrichment is denied; and it is further,

ORDERED that the portion of this motion by plaintiff AQUENT, LLC for summary judgment on its cause of action for book account is denied and that cause of action is dismissed; and it is further,

ORDERED that counsel for AQUENT, LLC shall, within 30 days of entry, serve a copy of this order with notice of entry upon all parties and the County Clerk who is directed to enter judgment accordingly; and it is further,

ORDERED that the parties are directed to appear at a Preliminary Conference on June 6, 2012, at 2:30 p.m., in Part 7, at 60 Centre Street, Room 341.

This constitutes the Decision and Order of the Court.



PAUL WOOTEN J.S.C.

Dated: 3-30-12

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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