

**Kate Howard of NY, Inc. v Herman**

2013 NY Slip Op 31512(U)

July 10, 2013

Sup Ct, New York County

Docket Number: 156708/2012

Judge: Eileen A. Rakower

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

**PRESENT: Hon. EILEEN A. RAKOWER**

**PART 15**

*Justice*

KATE HOWARD OF NEW YORK, INC. d/b/a as  
CHANTECLAIRE,

Plaintiff,

- v -

INDEX NO. 156708/2012  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

DENNIS HERMAN & LINDA HERMAN,

Defendants.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for/to

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answer — Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

**Cross-Motion: Yes X No**

Defendants bring this motion for summary judgment pursuant to CPLR §3212, (a) dismissing the plaintiffs claims of breach of contract; (b) granting defendant’s summary judgment in the amount of \$2,140.00 on their counterclaim of overcharge; and (c) granting legal fees on defendant’s counterclaim for sanctions.

Plaintiff Kate Howard of New York, Inc. d/b/a as Chanteclair is an interior decorator and home design business. Mary Katherine Shantz is the President and Ira Schantz is the Vice President of Kate Howard of New York, Inc. d/b/a Chanteclair. Defendants are husband and wife who reside in New York County.

In or about February, 2010, defendants retained plaintiff to provide interior decoration services for a home they were buying in Boca Raton, Florida.

Defendants and their daughter had previously retained plaintiff for interior decoration services in New York City.

Defendants move for summary judgment seeking to dismiss Plaintiffs claims as against them, and also for summary judgment on their counterclaim for overcharges. Plaintiffs oppose.

To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound. (22 NY Jur 2d, Contracts 9). The meeting of the minds must include agreement on all essential terms. (*Id.*).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970], *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

In support of its motion, defendants attach: the affidavit of defendant Dennis Herman, the summons and complaint, defendant's answer and counterclaim, plaintiff's reply to defendant's answer and counterclaim, an email dated November 11, 2011 from plaintiff to defendants; an email dated July 23, 2012; an email dated July 24, 2012 with bills dated July 23, 2012; and a December 17, 2012 email from plaintiff to defendants, a fax dated June 23, 2010 enclosing a \$5,000 consultation invoice.

In opposition, Plaintiff provides: the affidavit of Mary Katherine Shantz, the President of Kate Howard of New York, Inc. d/b/a Chanteclaire; the Affidavit of Ira Schantz, the Vice President of Kate Howard of New York, Inc. d/b/a

Chanteclair; and email correspondence between Linda Herman and Mary Katherine Schantz from early December 2011.

According to the sworn affidavit of Dennis Herman, “[w]ith regard to our Florida house, we had an oral agreement with plaintiff to pay plaintiff a design fee of \$5,000 and also agreed to pay plaintiff a fee equal to 100% mark-up of the cost of furniture and other items that plaintiff recommended and that we actually ordered through the plaintiff.” Mr. Herman paid the \$5,000 dollar fee. Furniture bills were generated and paid. Mr. Herman states that

the day after plaintiff acknowledged that our furniture bill was “paid in full,” on July 24, 2012, they sent me another bill for \$59,608.07. The new bill, for the first time, sought \$59,608.07 of purported consulting fees and research fees for time that they supposedly spent in 2010 and 2011. The new bill also sought commissions for renovations in our Florida House, having nothing to do with the furniture purchases for which we retained plaintiff. Plaintiff was never retained to consult for kitchen appliances, plumbing fixture selection, and/or roof tile selection.

Mary Katherine (nee, Howard) Shantz provides an affidavit, stating that “we were originally retained to simply redecorate the house, but Defendants instead did a substantial renovation and requested our services well beyond normal decoration.” She contends that the parties

agreed that Plaintiff would charge Defendants a fee for design services provided to Defendants for permanent fixtures and construction at their home such as the design of the extension for the master bedroom, and the bathrooms, kitchen, interior and exterior doors, tile, flooring, exterior paint colors, countertops, moldings and roof.

Defendant attaches a November 11, 2011 email from plaintiff’s principal Mary Katherine Shantz which states, “I made an exception for your project, but

this is my general term sheet... As you can see from my email that term sheet did not apply to your project but was only sent to you to show what my terms are for all my other clients.” The email further states, “I have enclosed random invoices & acknowledgments to show you that my word to you was my bond and true”. The attached invoices only show charges for furniture but not for research or consultation. The additional charges are contained in the July 24, 2012 bill.

“Where the terms of an oral agreement between disputing parties are at issue, a trial is the only remedy.” (*John Treiber Agency, Inc v. Spartan Concrete Corp.*, 268 AD2d 506, 701 NYS2d 666 [2<sup>nd</sup> Dept 2000]). As the agreement in dispute was an oral agreement and the parties dispute what was said in that agreement, a material issue of fact exists, precluding summary judgment.

Plaintiff asserts that, despite demand for production of documents, Defendants have failed to satisfy discovery requests, and discovery is not complete.

Pursuant to CPLR §3212(f), the court may deny a motion for summary judgment “should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated.”

With regard to the \$2,140 overcharge demanded by defendants, plaintiff admits that “the amount we charged Defendants (net of increases or decrease in prices since the time the furniture was first ordered) exceeded our normal 100% markup by \$2,140; this is roughly 1 % +/- of the total cost of the furniture defendants purchased for his home and the freight in connection therewith.” Plaintiff states that the reason for the differences from the original quote prices was “due to Defendants’ delay in finalizing their orders of furniture once they decided to renovate rather than simply redecorate their Florida home.”

In light of the fact that the exact terms of the agreement are in dispute and discovery remains outstanding, summary judgment on the counterclaim is premature.

Wherefore, it is hereby,

ORDERED that defendant’s motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

**Dated:** July 10, 2013



**HON. EILEEN A. RAKOWER J.S.C.**

**Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION**

**Check if appropriate:  DO NOT POST  REFERENCE**