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SHORT FORM ORDER **Index Number: 003003/2013**

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present:
Honorable **EMILY PINES**
J. S. C.

Original Motion Date: 4-5-2013
Motion Submit Date: 4-9-2013
Motion Sequence Date: 001 MOTD

_____X

MAILMEN, INC.,

Plaintiff,

-against-

CREATIVE CORPORATE BUSINESS SERVICES, INC.,

Defendant.

_____X

Attorney for Plaintiff
Lazer, Aptheker, Rosela & Yedid, PC
By: Amilia Lister - Sobotkin, Esq.
Melville Law Center
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Melville, New York 11747-2712

Attorney for Defendant
Neal DeYoung, Esq.
Sharma & DeYoung, LLC
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ORDERED that the defendant's motion for an order dismissing the complaint pursuant to CPLR 3211 is granted to the extent that the first and fourth causes of action are dismissed; and it is further

ORDERED that the defendant is directed to serve and file an answer pursuant to CPLR 3211 (f); and it is further

ORDERED that counsel for movant shall serve a copy of this Order with Notice of Entry upon counsel for plaintiff pursuant to CPLR 2103(b)(l), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court; and it is further

ORDERED that the parties are directed to appear in Part 46, at One Court Street, Second Floor, Courtroom Two, Riverhead, New York on Monday, September 9, 2013 at 11:00 a.m. for a preliminary conference.

The plaintiff commenced this action against the defendant by the filing of a Summons and Verified Complaint on January 23, 2013. According to the Complaint, the plaintiff entered into a Vendor Agreement with the defendant on January 1, 2009, whereby the plaintiff agreed to provide the defendant with services including warehousing, office space, printing, and collating. In return, the defendant agreed to pay a fixed fee of $111,856 per month and additional line item fees. The contract term would run through January 31, 2012. During the term of the Vendor Agreement, the defendant entered into a contract with non-party Computershare Shareowner Services, Inc.,[1] whereby the defendant provided Computershare with direct mailing goods and services through January 31, 2012. At the expiration of the contract between the defendant and Computershare, the defendant and Computershare extended their contract for an additional year to January 31, 2013. At the expiration of the Vendor Agreement, the complaint alleges that the parties operated on the understanding that their agreement would also be extended an additional year. The complaint further alleges that the parties continued to perform under the terms of the Vendor Agreement after the initial term expired on January 31, 2012. Subsequently, in or around August or September 2012, the defendant's President contacted the plaintiff's principal and requested a reduction in the fixed fees, which the plaintiff declined. The defendant continued to accept the plaintiff's services, however stopped paying. The complaint is silent regarding when the defendant's payments stopped[2] and alleges that the defendant owes the plaintiff the amount of $399,576.29 plus interest.

The Complaint alleges five causes of action. The first cause of action alleges breach of contract. The second cause of action alleges an account stated. The third cause of action alleges unjust enrichment. The fourth cause of action alleges quantum meruit,

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[1] The defendant's counsel affirms that the defendant's contract was originally with Bank of New York Mellon, doing business as Mellon Investor Services, LLC, which was subsequently acquired by Computershare Shareowner Services, Inc. ("Computershare").

[2] The defendant's counsel affirms that the plaintiff seeks the payment of fixed fees from November 2012 through January 31, 2013.

and the fifth cause of action alleges that the defendant solicited employees of the plaintiff in violation of the contract and seeks a permanent injunction enjoining the defendant from hiring or soliciting any employees of the plaintiff.

The defendant now moves to dismiss the Complaint pursuant to CPLR 3211. In support, the defendant submits, *inter alia*, the complaint and a copy of the contract. The defendant contends that the contract expired on January 31, 2012. Therefore, the defendant argues that the plaintiff is foreclosed from seeking the fixed fees inasmuch as the parties did not memorialize their intent to extend the Vendor Agreement in writing as required by Paragraphs 22 and 23. The defendant disputes the allegation that an implied-in-fact contract was formed, in that the contract made no provision for an oral extension or renewal. Therefore, the defendant argues, that the plaintiff may not sue on the expired contract for claims arising after the expiration of the contract. The defendant also contends that the implied-in-fact contract is invalid inasmuch as it violates the Statute of Frauds. The defendant further contends that the fifth cause of action for an injunction should be dismissed inasmuch as the six month restrictive covenant preventing the defendant from hiring the plaintiff's employees ended on July 1, 2012. The defendant also contends that the plaintiff should be barred from seeking unjust enrichment and quantum meruit inasmuch as the plaintiff itself violated Paragraph 15 (a) of the Vendor Agreement by soliciting business from Computershare in January, 2013 and April, 2013.

The Vendor Agreement provides, in part,

> 15. Non-Solicitation
> (a) As long as the Services are being performed, and for a period of twelve (12) months following the date that all services have ceased being performed, Vendor shall neither directly nor indirectly, on its own or in combination with others, knowingly solicit business from CCBS which relates to CCBS's shareholder services business.
>
> 22. Amendment
> No amendments, modifications or waivers of this Agreement or any of its provisions shall be binding upon either party unless made in writing and signed by both parties. No waiver of breach of, or default under, any provision of this Agreement will be deemed a waiver of

> any other provision, or of any subsequent breach or defaults of the same provision of this Agreement.
>
> 23. Entire Agreement
> This Agreement constitutes the entire agreement between the parties and supersedes all previous agreements, promises, proposals, representations, understandings and negotiations whether written or oral, between the parties respecting the subject matter hereof.

In opposition, the plaintiff submits, *inter alia*, its attorney's affirmation, the personal affidavit of Michael R. Vignola, the Verified Complaint, and a copy of the Vendor Agreement. The plaintiff claims that the documents presented by the defendant do not qualify as proper documentary evidence as contemplated by the CPLR,[3] and should not be considered by the Court. In addition, the plaintiff contends that it has adequately pled the existence of an implied-in-fact contract, and that the Statute of Frauds does not bar enforcement of the implied-in-fact contract inasmuch as the implied contract was performed within one year.

Mr. Vignola avers, *inter alia*, that he is the Vice President and Director of Sales for the plaintiff. He states that the defendant used the goods and services provided by the plaintiff to fulfill its upstream contractual obligations to Computershare. He annexes invoices for the Plan I Fixed Fee from January 1, 2012 through October 2012, and the corresponding payments by the defendant. He states that after speaking with principals of the defendant in September 2012, the defendant continued to request services and paid the Plan I Fixed Fee until November 2012. Mr. Vignola states that the plaintiff continued to invoice the defendant for the Fixed Fees for the months of November 2012 through January 2013.

It is well settled that in "reviewing a motion to dismiss under CPLR 3211, the allegations of the complaint are deemed to be true. The pleading will be deemed to allege whatever may be implied from its statements by reasonable intendment and the court must give the pleader the benefit of all favorable inferences that may be drawn from the

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[3] CPLR 3211 (a) (1) provides that documentary evidence are those that are unambiguous and of undisputed authenticity.

complaint." *Dunn v Gelardi*, 59 AD3d 385, 872 NYS2d 528 (2d Dept 2009) (internal quotations omitted). A complaint adequately states a cause of action for breach of contract when it alleges (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract; and (4) damages as a result of the breach. *JP Morgan Chase v J.H. Electric*, 69 AD 3d 802, 893 NYS2d 237 (2d Dept 2010). An account stated arises when one party sends another party a bill for payment of a sum certain, and the recipient fails to object to the bill within a reasonable time (*Shea & Gould v Burr*, 194 AD2d 369, 370, 598 NYS2d 261 [1st Dept 1993]). By failing to object, the recipient of the bill signifies that it agrees with the sender regarding the amount owed (*id.*). The elements of a cause of action sounding in unjust enrichment are allegations that the defendant was enriched at the plaintiff's expense and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. *Anaesthesia Assoc. Of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 873 NYS2d 679 (2d Dept 2009).

Contract language which is clear and unambiguous must be enforced according to its terms. *See W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 (1990); *McCabe v Witteveen*, 34 AD3d 652, 825 NYS2d 499 (2d Dept 2006); *Manzi Homes, Inc. v Mooney*, 29 AD3d 748, 816 NYS2d 130 (2d Dept 2006). An enforceable contract requires a definite agreement between two parties, which may be gleaned from the words and conduct of the parties. Where parties continue to perform after a contract expires, the courts look to the conduct of the parties to determine whether the terms of the written contract continue to apply. However, in the absence of an intent of the parties to be bound, no contract can be formed. Where parties to an agreement do not intend it to be binding upon them until it is reduced to writing, and signed by both of them, they are not bound and may not be held liable until it has been written and signed. *Scheck v Francis*, 26 NY2d 466, 469-470, 311 NYS2d 841 (1970).

A quasi-contract claim is not a contract claim at all, but rather an equitable claim that in the absence of a written contract is designed to prevent unjust enrichment and is enforceable under equitable theories. *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388, 521 NYS2d 653 (1987). The claim for quantum meruit is a device for the prevention of unjust enrichment of one party at the expense of another. *Id.*

The party seeking an injunction must establish (1) a likelihood of success on the

merits, (2) the movant will suffer irreparable harm in the absence of an injunction and (3) a balancing of the equities favors the granting of an injunction. *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 552 NYS2d 918 (1990); *Doe v Axelrod*, 73 NY2d 748, 536 NYS2d 44 (1988); *Olabi v Mayfield*, 8 AD3d 459, 778 NYS2d 311 (2d Dept 2004).

Turning to the branch of the motion to dismiss the first cause of action alleging breach of contract, giving the pleadings the required liberal construction, the Court finds that a plain reading of the Vendor Agreement reveals that it expired by its terms on January 31, 2012. The alleged extension was not in writing as required by Paragraph 22. Therefore, the first cause of action is dismissed.

Turning to the branch of the motion to dismiss the second cause of action, accepting the allegations in the light most favorable to the plaintiff, the Court finds that the plaintiff has stated a cause of action for an account stated. The plaintiff alleges in the complaint that it rendered periodic statements to the defendant setting forth the services provided and the amount of payment due. The complaint further alleges that the defendant accepted the statements without objection or protest. In addition, the complaint alleges that the defendant has not paid for the services it received and has also failed to pay line item fees for certain goods and services supplied to it by the plaintiff. Therefore, based on the circumstances presented, the branch of the motion seeking to dismiss the second cause of action is denied.

Turning to the branch of the motion which seeks to dismiss the third and fourth causes of action which allege unjust enrichment and quantum meruit, the documentary evidence fails to "resolve all factual issues as a matter of law and conclusively dispose of the plaintiff's claim." CPLR 3211 (a) (1); *Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437, 736 NYS2d 605 (2d Dept 2002). The Court finds that an implied contract exists and under equitable principles, the plaintiff may seek equitable relief in the absence of a contract. However, the claims are duplicative. *Anaesthesia Assoc. Of Mount Kisco v Northern Westchester Hospital Center*, *supra*. Contrary to the defendant's contention, the Statute of Frauds is not implicated since the implied contract was performed within one year. Therefore, the fourth cause of action is dismissed as duplicative.

The branch of the motion seeking to dismiss the fifth cause of action seeking a

permanent injunction is denied. The documentary evidence submitted by the defendant fails to "resolve all factual issues as a matter of law, and conclusively dispose of the plaintiff's claim." CPLR 3211 (a) (1); *Trade Source, Inc. v Westchester Wood Works, Inc.*, *supra*.

Accordingly, the motion to dismiss the complaint is granted to the extent that the first and fourth causes of action are dismissed.

Dated: July 15, 2013
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.