

<b>Andrews Intl., Inc. v Interstate Materials Corp.</b>
2013 NY Slip Op 33049(U)
November 13, 2013
Supreme Court, New York County
Docket Number: 653480/2011
Judge: Andrea Masley
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

DR. ANDREA BRASLEY  
JUDGE

PRESENT: \_\_\_\_\_  
*Justice*

PART 43

Index Number : 653480/2011  
ANDREWS INTERNATIONAL, INC.  
vs  
INTERSTATE MATERIALS CORP.  
Sequence Number : 001  
SUMMARY JUDGEMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

*granted. See annexed decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 11/13/13

*[Signature]* \_\_\_\_\_, J.S.C.

- CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

ANDREWS INTERNATIONAL, INC.,

*Plaintiff,*

*-against-*

INTERSTATE MATERIALS CORP. and  
INTERSTATE INDUSTRIAL CORP.,

*Defendants.*

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DECISION/ORDER

HON. ANDREA MASLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Motion for Summary Judgment	1
Exhibits	2
Affirmation in Opposition	3
Reply	4

In this action to recover \$105,851.07 with interest against defendant Interstate Materials Corp. and \$51,671.57 against defendant Interstate Industrial Corp. for services rendered, plaintiff Andrews International, Inc. moves pursuant to CPLR 3212 for summary judgment.

Plaintiff is a licensed private investigator that provided security guard services to defendants at construction sites.

The court ordered depositions by October 19, 2012. Plaintiff timely filed a Note of Issue consistent with the order.

Initially, the movant has the burden on a motion for summary judgment to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "When reviewing a motion for summary judgment the focus of the

court's concern is issue finding, not issue determination, and the affidavits should be scrutinized carefully in the light most favorable to the party opposing the motion." *Goldstein v County of Monroe*, 77 AD2d 232, 236 (4th Dept 1980). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad*, 64 NY2d at 853. However, once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1976). Summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974).

Plaintiff alleges in the complaint that it provided security guard services from January 27, 2008 through February 20, 2011, that the services were accepted by defendants, and that a balance in the total amount of \$157,522.64 has not been paid.

Jim Wood, plaintiff's president and records keeper, swears that plaintiff sent security guards to two construction sites in New York City belonging to defendants. Mr. Wood states that plaintiff continued to render services without payment in the belief that defendant contractors were awaiting payment by a third party, as is common in the industry, and because the parties had a prior relationship. According to Mr. Wood, defendants made a few initial payments only, and open invoices show balances \$105,851.07 and \$51,671.57 respectively for security guard work. Plaintiff annexes four volumes of invoices, a list of partial payments, and payroll data.

Defendants do not deny any of the allegations. Rather, they contend that (1) the motion is untimely as additional discovery is required; (2) as plaintiff has not proffered a

contract, triable issues preclude summary judgment; (3) as there is no written agreement, plaintiff is barred from bringing a complaint; and (4) even if a contract existed between the parties, plaintiff has failed to mitigate. Defendants submit no affidavit of a party with knowledge, and rely solely on an affirmation of counsel, the unverified answer signed by counsel, a conference order, and plaintiff's affidavit.

In an action for breach of contract, it is plaintiff's burden to prove "(1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages." *WorldCom, Inc. v Sandoval*, 182 Misc 2d 1021, 1023 (Sup Ct, NY County 1999). The contract could be oral.

In the absence of a contract, the claim could be for quantum meruit. To state a cause of action in quantum meruit, a party must allege "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." *Soumayah v Minnelli*, 41 AD 3d 390 (1<sup>st</sup> Dept 2007).

"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. *Marino v Watkins*, 112 AD 2d 511, 512 (3d Dept 1985). An agreement between the parties can be inferred by receipt of invoices and failure to object for an unreasonable amount of time. *Jim-Mar Corp. v Aquatic Constr.*, 195 AD 2d 868, 869 (3d Dept), *leave to appeal denied*, 82 NY2d 660 (1993).

It is undisputed that the services were rendered. Mr. Wood establishes that the services were performed and accepted by the defendants. Plaintiff has also established that there was an expectation of compensation for those services and that their value was reasonable. In opposition, defendants have submitted nothing

more than an affirmation of counsel, which lacks probative value and fails to raise any triable issues of fact. Plaintiff has established quantum meruit, breach of contract and an account stated.

Defendants' contention that the motion is untimely due to outstanding discovery is without merit. The order of August 29, 2012 could not be more clear that the Note of Issue was to be filed by December 30, 2012 and EBTs completed by October 19, 2012. Defendants have not moved to compel discovery or to strike the note of issue for failure to provide requested discovery.


Based on its hundreds of pages of billing statements and invoices on two accounts, plaintiff has established damages in the amount of \$105,851.07 against Interstate Materials Corp. and \$51,671.57 against Interstate Industrial Corp.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted; and it is further

ORDERED that plaintiff shall have judgment of \$105,851.07 against Interstate Materials Corp. and \$51,671.57 against Interstate Industrial Corp. with interest from February 20, 2011, costs and disbursements.

Dated: 11/13/13

  
\_\_\_\_\_  
Andrea Masley, Supreme Court Judge