

**Volunteers of Am.-Greater N.Y., Inc. v 317 Aladdin  
Hotel Corp.**

2014 NY Slip Op 32120(U)

August 4, 2014

Sup Ct, New York County

Docket Number: 650499/2013

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

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

-----X  
VOLUNTEERS OF AMERICA-GREATER NEW  
YORK, INC.,

Plaintiff,

-against-

317 ALADDIN HOTEL CORP., d/b/a ALADDIN  
HOTEL LLC and/or ALADDIN HOTEL,

Defendants.

-----X  
SHIRLEY WERNER KORNREICH, J.:

DECISION & ORDER

Index No. 650499/2013

Plaintiff Volunteers of America-Greater New York, Inc. (VOA), moves for: 1) summary judgment on its three causes of action; and 2) dismissal of the five affirmative defenses and single counterclaim of defendant 317 Aladdin Hotel Corp. (Aladdin). The complaint contains three causes of action, numbered here as in the verified complaint (Complaint): 1) breach of contract; 2) quantum meruit; and 3) account stated. Aladdin’s answer contains a counterclaim for breach of contract by “Javelin” and the following affirmative defenses, numbered here as in the verified answer (Answer): 1) failure to state a cause of action; 2) denial of all allegations in the VC not specifically denied; 3) laches and estoppel; 4) unclean hands; and 5) breach of contract.

*Background*

Aladdin manages the Aladdin Hotel (Hotel) in Manhattan, in which it provides transitional housing for the homeless under an agreement it has with the New York City Department of Homeless Services (DHS). Aladdin and VOA entered into a Memorandum of Understanding for six months commencing on March 14, 2011 (MOU) and ending on September

14, 2011. Doc 7, Ex A.<sup>1</sup> In the event of any serious breach of the MOU, the parties were required to give written notice and allow ten days for cure, after which, if not cured “to the satisfaction of” the notifying party, it could issue a written notice to terminate the agreement. *Id.*, Art 4. The fourth “Whereas” clause provided that the MOU “is not enforceable at law”. *Id.*, p 1.

Pursuant to the MOU, the “Contractor”, Aladdin,<sup>2</sup> was to set aside 153 units in the Hotel for homeless adult families referred by DHS and provide office space for VOA. *Id.*, Art 1. Aladdin was obligated to: provide front desk coverage; security; intake; housekeeping; maintenance; utilities; linens; toiletry kits; extermination; garbage removal; evictions; and transfers of residents. *Id.* Several of these responsibilities were to be performed “as agreed upon with [DHS].”<sup>3</sup> *Id.*

The MOU also contained the following provision:

All operations of the Facility shall be conducted in accordance with policies and procedures established by [DHS] and by the New York State Office of Temporary and Disability Assistance (“OTDA”) Regulations Part 900 and the Aladdin’s operational plan (“Operational Plan”) once a contract is established between [DHS] and [VOA].

*Id.*, Art 1(J). The parties agree that no contract was established between DHS and VOA. There is no copy of Aladdin’s “Operational Plan” in the record. Both parties concur that it was DHS’s practice to contract with either the facility or the social service provider for each transitional housing facility.

VOA’s obligations under the MOU, *inter alia*, were to provide case management services; meet with residents at least bi-weekly to develop independent living skills so the

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<sup>1</sup> References to “Doc” refer to documents filed in the New York State Electronic Filing System.

<sup>2</sup> There is no definition of “Contractor” in the MOU, but on the signature page, one party signed under the word “CONTRACTOR” and the other signed under the word “PROVIDER”, which is defined on page 1 as VOA. Hence, the court infers that “Contractor” refers to Aladdin. Doc 7, Ex A.

<sup>3</sup> Aladdin’s obligations as agreed upon with DHS were all of those previously mentioned, except for intake, utilities, evictions and transfers.

families could obtain permanent housing; and maintain an updated list of local organizations and programs to facilitate the families' return to permanent housing. *Id.*, Art 2. Aladdin agreed to pay VOA a monthly fee of \$79,206.83, plus monthly expenses for "appropriate vendors for office space," including, *inter alia*, a Xerox copier. *Id.*, Art 5.

The payments made by Aladdin are not in dispute. It paid VOA \$79,206.83 for its services through November 2011, i.e., for two months after the MOU expired. The parties also agree that VOA continued to provide services without payment for the months of December 2011 through June 2012. It is undisputed that Aladdin did not pay \$350 per month for the copier for the months of June through October 2011 and December 2011 through June 2012. Four months of the copier charges were bills incurred during the term of the MOU, i.e., June through September 2011. It is established that Aladdin did not notify VOA in writing of a serious breach during the term of the MOU.

VOA sent invoices to Aladdin for December 2011 through June 2012. Doc 7, Ex B. Most of the invoices were sent the month after VOA provided services, e.g., the April bill was sent in May. *Id.* However, the March invoice was sent on May 25, 2012 and the May invoice, the last one sent, was dated November 29, 2012. *Id.*

On December 19, 2012, VOA's attorney sent a letter to Alan Lapes, Aladdin's President, with a formal demand for monthly payments of \$79,206.83 for the period November 2011 through June 2012 and the unpaid copier charges of \$350 per month for five months, June 2011 through October 2011. *Id.*, Ex D. The total amount demanded was \$556,897.87. *Id.* In April of 2013, the parties met (2013 Meeting) and Aladdin claimed that it owed nothing because DHS had imposed a substantial penalty for failure to meet targets set by DHS. *Id.*, Doc 7, Ex F.

The parties dispute who was responsible for meeting the DHS targets that resulted in the penalty and who received an April 13, 2012 letter from DHS (DHS Letter) stating that a penalty would be imposed. Doc 18. The affidavit of Alan Lapes, Aladdin's President, says that DHS imposed a penalty of half-a-million dollars on Aladdin because VOA failed to meet DHS targets for returning families to permanent housing. Doc 20, ¶¶ 11-13. Mr. Lapes annexes the DHS Letter, which was addressed to VOA and dated a year before the 2013 Meeting. The DHS Letter stated that from July through September 2011, the Aladdin Hotel's "PIP score" resulted in a loss of \$177,443, and that the losses for the first through third quarters of 2011, would be \$498,553. *Id.*, Ex 2. Mr. Lapes avers that VOA hid the DHS Letter from Aladdin, which he discovered in an investigation after DHS imposed the penalty. Doc 20, ¶13. His affidavit does not reveal when he learned of the DHS Letter and/or the penalty. VOA says that it first saw the DHS Letter at the 2013 Meeting, when Mr. Lapes gave a copy to a member of VOA's staff. Doc 29, 13. VOA points out that Aladdin stopped paying in November 2011, more than four months before the date of the DHS Letter.

VOA says that, pursuant to Article 1 of the MOU, it was Aladdin's responsibility to meet the DHS targets. According to VOA's Executive Vice-President and Chief Operations Officer, Tere Pettitt, VOA had no obligations to DHS based upon the language of the MOU, which does not refer to DHS in Article 2, entitled "Obligations of the Provider". This contrasts with Article 1, entitled "Obligations of the Contractor", which, as noted above, refers to various obligations Aladdin had to DHS. Doc 7, Ex A.

The MOU is silent on which party was to meet DHS targets. Meeting the targets is not one of Aladdin's obligations under Article 1. Article 2(F) provides that "[t]he Provider [VOA] shall prepare residents to move to and retain permanent housing." *Id.* This implies that VOA

had some responsibility to facilitate the move of families from the Hotel to permanent housing, although it does not provide expressly that VOA had to meet DHS targets. Further, the DHS Letter was addressed to VOA, which implies that DHS thought that VOA, rather than Aladdin, was responsible. On the other hand, VOA says that it first saw the DHS Letter at the 2013 Meeting, when Aladdin's President produced it.

After submission of the motion, at the court's request, the parties submitted supplemental memoranda of law to address the issues of oral contract and ratification. Doc 34, 6/3/14 Tr, pp 6-7 & 16-18.

### *Discussion*

#### *Standard of Review*

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 NY2d at 324; *Zuckerman, supra*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept. 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman, supra*,

49 NY2d, at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

#### *Breach of Contract*

The elements of a claim for breach of contract are the existence of valid contract, plaintiff's performance of its obligations thereunder, defendant's breach and resulting damages. *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 (1st Dept 2007). Here, it is clear that the parties entered into the MOU, which contains all the necessary terms to form a contract. In addition, they fully performed the MOU during its term, which shows that they believed that they had made an agreement. *Brooklyn Public Library v New York*, 250 NY 495, 501 (1929)(contract's meaning implied by conduct).

However, the monthly payments that VOA seeks are for the period after the MOU expired and the MOU provides that it cannot be enforced in an action at law. Parties may, by contract, limit the remedies available to them in the event of breach. An agreement to limit or forgo remedies is enforceable, so long as it is mutual, unequivocal and reasonable." 15-83 *Corbin on Contracts* § 83.7. As the parties agreed that the MOU could not be enforced at law, VOA cannot recover under it. In addition, the MOU expired before VOA rendered the services for which it seeks to be paid. In its supplemental memorandum, VOA argues that the MOU continued to apply because the parties continued to perform. Doc 33, Point II. However, if the MOU continued on the same terms, it would continue to be unenforceable at law.

Nevertheless, VOA has alleged breach of an oral contract for services, upon which it could potentially recover, although it is not ripe for summary judgment. To recover the monthly

fees, VOA need not rely on the MOU. The VC alleges that VOA performed services *at the request of Aladdin*:

11. Between March, 2011 through June, 2012, inclusive, Plaintiff, at the special insistence and request of Defendant performed services on behalf of the Defendant....

VC, ¶11. This is sufficient to allege that VOA's services for the months October 2011 through June 2012 were performed pursuant to an oral agreement, and the court will liberally construe the VC in that manner. CPLR 3026.

It is undisputed that Aladdin paid VOA for two months after the expiration of the MOU and accepted VOA's services until June 2012, from which it might be inferred that the parties had an oral agreement. "When the parties to a contract of doubtful meaning, guided by self-interest, enforce it for a long time by a consistent and uniform course of conduct, so as to give it a practical meaning, the courts will treat it as having that meaning, even if as an original proposition they might have given it a different one." *Brooklyn Public Library v New York*, *supra* at 501.

VOA's motion for summary judgment on the contract claim must be denied insofar as it is based on an oral agreement, but insofar as it is based on the MOU, in searching the record, it is dismissed. CPLR 3212(b). Whether there was an oral contract is a question of fact. In its verified answer, Aladdin denied the allegation that it requested VOA to perform the services for which it seeks to recover. Doc 3. The parties did not continue to perform "for a long time by a consistent uniform course of conduct." Rather, VOA performed until June 2012 and Aladdin paid VOA for two months. Hence, it cannot be determined as a matter of law that the parties had an oral agreement based upon conduct.

### *Quantum Meruit*

VOA's motion for summary judgment on its second cause of action for *quantum meruit* is denied. The existence of an express agreement, whether written or oral, governing a particular subject matter precludes recovery in *quantum meruit* for events arising from that subject matter. *Morales v Grand Cru Assoc.*, 305 AD2d 647 (2d Dept), *lv denied* 100 NY2d 510 (2003), citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987). VOA pleaded that it provided services as agreed upon by Aladdin. However, *quantum meruit* can be pleaded as an alternative to breach of contract. *Farash v Sykes Datatronics, Inc.*, 59 NY2d 500, 504 (1983). Aladdin denies that there was an agreement and argues, alternatively, that the existence of an oral contract is a question of fact. Doc 31, Aladdin's Supplemental Memorandum of Law, Point I. Hence, VOA appropriately pleaded *quantum meruit* in the alternative, as it might be determined that Aladdin is correct that there was no agreement after September 2011.

The elements of *quantum meruit* are: (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*, 41AD3d 390, 391 (1st Dept 2007). *Quantum meruit*, also referred to as quasi contract, allows a party to treat an unenforceable contract as a nullity and recover the value of the services performed at the request of the defendant. *Farash, supra* at 503-504. The theory is that it:

is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when ... the parties ... 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 .... Duty, and not a promise or agreement or intention of the person sought to be charged, defines it. It is fictitiously deemed contractual in order to fit the cause of action to the contractual remedy ....

*Miller v Schloss*, 218 NY 400, 407-408 (1916); *accord, Farash, supra*. (quasi contract as contract implied by law is not contract but an obligation imposed by law to do justice where no promise was made).

Here, it is undisputed that VOA performed case management services and Aladdin accepted them until June 2012. While Aladdin now says that the services were not performed in good faith because DHS imposed a penalty, Aladdin stopped paying VOA in November 2011, before the DHS Letter, which is dated April 13, 2012. While Aladdin urges that VOA did not plead the reasonable value of its services, that can be inferred from the fact that Aladdin paid VHS the same amount as it paid under the MOU for two months after it expired, i.e., the reasonable value was what Aladdin paid. The last element, that VOA had a reasonable expectation of payment can also be inferred from the payments Aladdin made after the expiration of the MOU.

In sum, VOA's motion for summary judgment on its second cause of action for *quantum meruit* is denied because it is a question of fact whether the parties had an oral agreement.

#### *Account Stated*

Plaintiff's motion for summary judgment on its claim for an account stated is denied. 3212(b). Where an account is rendered showing a balance, the party receiving it must examine it within a reasonable time and object if he disputes it, otherwise he is deemed to accept it by silence, in the absence of fraud, mistake or other equitable considerations. *Shaw v Silver*, 95 AD3d 416 (1st Dept 2012). Assent has been implied where there was no objection for as little as five months. *Fink, Weinberger, Fredman, Berman & Lowell, P. C. v Petrides*, 80 AD2d 781 (1st Dept 1981)(bill retained more than one year without objection); *In re Rockefeller Ctr. Props.*, 272 BR 524, 544-545 (Bankr. SDNY 2000)(collecting cases finding failure to object for five months to twenty-three months

constituted account stated); *Lockwood v Thorne*, 11 NY 170 (1854)(party did not object for nine months and made part payment); *Pedreira v Pedreira*, 34 AD3d 225 (1st Dept 2006)(failure to object for three years). However, a claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract. *Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 (1st Dept 2012); see also *Martin H. Bauman Assoc., Inc. v H & M Int'l Transport, Inc.*, 171 AD2d 479, 485 (1st Dept 1991)(account stated cannot be made instrument to create liability when none otherwise exists).

VOA's motion for summary judgment on the account stated claim is denied. The evidence demonstrates that VOA's last invoice was dated November 29, 2012. Doc 7, Ex B. VOA sent a demand letter on December 19, 2012. *Id.*, Ex D. According to a letter from VOA's counsel, dated April 14, 2013, the parties met earlier that month to discuss the amount VOA claimed it was owed. That was when Aladdin said it did not owe the money, allegedly because of the penalty. Thus, Aladdin said nothing for less than five months from the last bill, a slightly shorter period than the shortest found sufficient in the cited cases above. Also, if VOA hid the DHS Letter from Aladdin, that would be an equitable circumstance that could negate Aladdin's silence. *Shaw, supra*. Additionally, it is an issue of fact whether the parties had an oral agreement and, if they did not, the bills cannot create liability where none existed. *Martin H. Bauman Assoc., supra*. Whether VOA hid the letter from DHS or there was an oral agreement are issues of fact, which require the court to deny the motion for summary judgment on the account stated claim.

### *Affirmative Defenses & Counterclaim*

The first affirmative defense for failure to state a cause of action is dismissed. Aladdin's sole argument in support of this defense is that VOA breached the MOU. As noted above, VOA has three possible causes of action not based on the MOU.

The second affirmative defense is not an affirmative defense at all and is dismissed. It states that the defendant denies everything in the complaint that was not admitted. That is a denial, not an affirmative defense. CPLR 3018. In addition, Aladdin did not support it in opposition to the motion.

The third affirmative defense, laches and estoppel, was abandoned by Aladdin and is dismissed.

The fourth affirmative defense of unclean hands is sustained. Aladdin bases this claim on, *inter alia*, VOA's suppression of the DHS Letter. Doc 31, Defendant's Supp Memo, p 15. This could be a defense to the *quantum meruit* claim, which is equitable, and the account stated claim. *Blue Wolf Capital Fund II, L.P. v American Stevedoring Inc.*, 105 AD3d 178, 184 (1st Dept 2013) (equitable remedy unavailable to party with unclean hands); *Shaw, supra* (inequitable conduct defense to account stated).

The fifth affirmative defense, that VOA breached the MOU is dismissed. The court has granted summary judgment dismissing the claim for breach of the MOU. Breach of the MOU would only be a defense to that claim, as one of the elements of breach of contract is the plaintiff's performance of its obligations. *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 (1st Dept 2007). Furthermore, it is inconsistent with Aladdin's position to argue that the MOU is unenforceable and that VOA cannot recover under it after its expiration, on the one hand, and, on the other hand, that VOA cannot recover for services rendered after the MOU expired because it breached the MOU. Aladdin cannot have it both ways. If the MOU is not enforceable and expired before VOA rendered the services at issue, then it cannot be the basis for asserting VOA's breach.

Finally, the motion to dismiss the first counterclaim for breach of the MOU is granted. As the MOU is unenforceable against Aladdin, it also is unenforceable against VOA.<sup>4</sup> Accordingly, it is

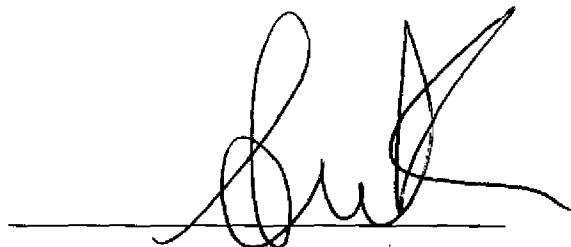
ORDERED that the motion by plaintiff Volunteers of America-Greater New York for summary judgment and to dismiss the affirmative defenses and counterclaims of defendant 317 Aladdin Hotel Corp. d/b/a Aladdin Hotel, LLC and/or Aladdin Hotel is granted to the extent of dismissing the first, second, third and fifth affirmative defenses, and the counterclaim, and is otherwise denied; it is further

ORDERED that in searching the record, plaintiff's first cause of action for breach of the MOU is liberally construed to allege breach of an oral contract, but its claim for breach of the MOU is dismissed; and it is further

ORDERED that the parties shall appear for a preliminary conference on August 26, 2014 at 11:00 a.m., in Room 228, Part 54 of the courthouse located at 60 Centre Street, New York, NY 10007.

Dated: August 4, 2014

ENTER:

A handwritten signature in black ink, appearing to be 'J.S.C.', written over a horizontal line.

J.S.C.

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<sup>4</sup> In addition, the counterclaim alleges that the MOU was breached by Javelin, not VOA. However, at oral argument, Aladdin's counsel said that this was an error and should have said that plaintiff breached the MOU. Doc 34, p 3.