

**J.D. Masters Plumbing & Heating, Inc. v Thirty Six E.  
L.L.C.**

2019 NY Slip Op 31103(U)

April 22, 2019

Supreme Court, New York County

Docket Number: 160175/2015

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 160175/2015

J.D. MASTERS PLUMBING & HEATING, INC.,

MOTION DATE 11/26/2018

Plaintiff,

MOTION SEQ. NO. 003

- v -

THIRTY SIX EAST L.L.C., MACANDREWS & FORBES INCORPORATED

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents and for the reasons set forth on the record (4/22/2019), the plaintiff's motion for summary judgment is granted to the extent of its second cause of action for an account stated in the sum of \$14,602.86 and otherwise denied in its entirety.

The Relevant Facts and Circumstances

JD Masters Plumbing & Heating, Inc. (JD Masters) asserts that Thirty Six East L.L.C. (Thirty-Six LLC) and MacAndrews & Forbes Incorporated (M&F, Thirty-Six LLC, together with M&F, hereinafter, the Defendants) owe the cost of labor and materials for the following seven projects performed at 35-37 East 62nd Street, New York, New York (the Premises): (1) pipe fittings - \$190.53, (2) bookshelves - \$7147.64, (3) waterfall pump - \$2,071.35, (4) waterfall water line - \$3,086.61, (5) waterfall adjustments - 2,106.73, (6) dressing room - \$9,444.91 and (7) water filtration system - \$17,267.58. The record indicates that the plaintiff issued invoices for each of the seven projects except for the water filtration system, for which the record indicates that only a proposal was provided (NYSCEF Doc. Nos. 73, 85, 77, 81, 87, 88, 91).

JD Masters asserts three causes of action against the Defendants: (1) breach of contract (first cause of action), (2) account stated (second cause of action) and (3) quantum meruit (third cause of action)1 (NYSCEF Doc. No. 34). JD Masters now moves for summary judgment under CPLR § 3212 on its three causes of action.

1 For the avoidance of doubt, the third cause of action in the plaintiff's Amended Complaint is not identified as "quantum meruit" per se. Rather, the Amended Complaint alleges that the Defendants have been "unjustly enriched." See NYSCEF Doc. No. 34, ¶¶ 66, 68. However, this court refers to the plaintiff's third cause of action as one for quantum meruit in accordance with the plaintiff's arguments in its motion for summary judgment. See NYSCEF Doc. No. 92.

On a motion for summary judgment, the movant “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]. The opposing party must then “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” that its claim rests upon. *Zuckerman v New York*, 49 NY2d 557, 562 [1980].

## **Plaintiff’s Motion for Summary Judgment**

### **1. First Cause of Action (Breach of Contract)**

JD Masters argues that the elements for breach of contract are met as it adduced evidence that the parties entered into a contract, there was performance by JD Masters, the Defendants did not pay and JD Masters suffered damages as a result. In opposition, the Defendants argue that the plaintiff fails to establish its cause of action on breach of contract because there are genuine issues of material fact. A claim for breach of contract requires (i) the existence of a valid contract, (ii) the plaintiff’s performance, (iii) the defendant’s breach, and (iv) resulting damages. *Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-46 [1st Dept 2016]. The plaintiff’s claim for breach of contract fails because there are material issues of fact regarding whether the contract was in fact performed, whether JD Masters’ services were terminated and whether it caused certain damages (explained more fully below). Accordingly, the plaintiff’s motion for summary judgment on its first cause of action for breach of contract is denied.

### **2. Second Cause of Action (Account Stated)**

The plaintiff argues that it is entitled to an account stated in the sum of \$24,047.77 because the Defendants retained six invoices without objection. The Defendants argue that the plaintiff fails to establish its cause of action for an account stated because the plaintiff does not cite to a series of transactions that occur prior to the claims at issue and the Defendants objected to the alleged account stated. An account stated is the parties’ agreement to an account based on their prior transactions with respect to the correctness of the account items and balance due. *Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 [1st Dept 2007]. There is no account stated where a party shows that there is a dispute about the alleged account. *Farley v Promovision Video Displays Corp.*, 198 AD2d 122, 123 [1st Dept 1993].

The plaintiff has established entitlement to summary judgment under an account stated for five projects it performed: the pipe fitting, bookshelves, waterfall pump, waterfall water line and waterfall adjustments. With respect to these five projects, the plaintiff submitted work orders and invoices reflecting the amount owed and no objection was timely made by the Defendants. To the extent that the Defendants dispute this work was authorized by Robert Solano, M&F’s former Facilities Manager, this court finds that Mr. Solano held himself out as having the requisite authority on behalf of the Defendants when he approved and signed the corresponding work orders (*See* NYSCEF Doc. Nos. 72, 84, 76, 80, 86). Accordingly, the plaintiff’s motion for summary judgment is granted in part on its second cause of action for an account stated

regarding the pipe fitting, bookshelves, waterfall pump, waterfall water line and waterfall adjustments in the sum of \$14,602.86.

The plaintiff is not entitled to summary judgment for its work on the dressing room and water filtration system because it failed to eliminate material issues of fact regarding these two projects. In his affidavit in opposition, Vice-President and Creative Director for M&F, Brian Callahan, alleged that the plaintiff did not perform the dressing room work properly, "which caused water from the floor above to spill into the dressing room through a disconnected waste line" (NYSCEF Doc. No. 95, ¶ 13). After this incident, Mr. Callahan asked the plaintiff to leave immediately and advised that the plaintiff was not to be paid for this work. *Id.* The Defendants' dispute over the account related to the dressing room work raises a material issue of fact that cannot be resolved on summary judgment. In regards to the water filtration system, the plaintiff failed to eliminate material issues of fact regarding its claim for the alleged work performed and equipment purchased when the plaintiff only adduced evidence of a proposal for this project (NYSCEF Doc. No. 88). Accordingly, the plaintiff's motion for summary judgment on its second cause of action for an account stated is denied with respect to the plaintiff's work on the dressing room and water filtration system.

### 3. Third Cause of Action (Quantum Meruit)

In order to establish a claim in quantum meruit, the claimant must establish (i) the performance of services in good faith, (ii) the acceptance of the services by the person to whom they are rendered, (iii) an expectation of compensation, and (iv) the reasonable value of the services." *Martin H. Bauman Assoc., Inc. v H & M Intl. Transp., Inc.*, 171 AD2d 479, 484 [1st Dept 1991]. The plaintiff's claim in quantum meruit fails because there remain material issues of fact regarding the reasonable value of services rendered by the plaintiff. Accordingly, the plaintiff's motion for summary judgment on its third cause of action for quantum meruit is denied.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted to the extent of its second cause of action regarding the plaintiff's invoiced work on the pipe fitting, bookshelves, waterfall pump, waterfall water line and waterfall adjustments in the sum of \$14,602.86 and otherwise denied in its entirety; and it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the defendants and upon the Clerk of the Court within thirty (30) days of the filing of this order; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the plaintiff and against the defendants in the amount of \$14,602.86, together with interest at the rate of 9% per annum from the date of June 25, 2014 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs. The plaintiff shall have execution thereof; and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that the parties shall appear at 60 Centre St, Courtroom 238 for a pre-trial conference on June 5, 2019 at 11:30 am.



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4/22/2019

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	<input type="checkbox"/>
				OTHER	
				REFERENCE	