

**JAMPP, Ltd. v Cupcake Digital, Inc.**

2019 NY Slip Op 33176(U)

October 15, 2019

Supreme Court, New York County

Docket Number: 655481/2017

Judge: Margaret A. Chan

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without prejudice for lack of proof of the claim (NYSCEF Doc. No. 14 – Decision and Order of this court dated July 20, 2018).

A status conference was scheduled on January 30, 2019. Neither party appeared nor notified the court of the reason of the nonappearance, hence, the court dismissed the complaint without prejudice (NYSCEF Doc. No. 15 – January 30, 2019 Order).

On July 12, 2019, JAMPP brought a motion to vacate the dismissal of the matter and restore the case to the court's pretrial calendar and moved for a default judgment against defendant (NYSCEF Doc. Nos. 16 and 18). Defendant has not appeared in this action by filing an answer to the complaint, or submitting opposition to the instant motion for default, which was timely filed. The time within which defendant may answer or otherwise move to respond to the complaint has expired and has not been extended.

### **Motion to Vacate Dismissal and Restore Action**

CPLR 3404 provides that “a case in the supreme court or a county court marked off or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute.”

Since the court dismissed the matter without prejudice on January 30, 2019, and plaintiff timely filed its motion to vacate dismissal on July 7, 2019 (NYSCEF Doc. No 18 – Affirmation in Support at ¶¶10-17), plaintiff has thus complied with the one-year requirement of CPLR 3404. Accordingly, plaintiff's motion to vacate dismissal and to restore this action is granted.

### **Motion for Default Judgment**

The court now turns to the default judgment portion of plaintiff's motion on its claim for account stated. “An account stated is an agreement between [the] parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance” (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 [1st Dept 2007] [citing *Jim-Mar Corp. v Aquatic Construction*, 195 AD2d 868, 869 [3d Dept 1993]). Receipt, retention, and failure to object to an invoice coupled with partial payment gives rise to an account stated (*see Shea & Gould v Burr*, 194 AD2d 369, 371 [1st Dept 1993]; *see also Rosenman Colin Freund Lewis & Cohen v Edelman*, 160 AD2d 626, 626 [1st Dept 1990]). However, partial payment is not necessary to give rise to account stated – mere retention without objection is sufficient (*see Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51, 51 [1st Dept 2004]). However, “[a]n account stated assumes the existence of some indebtedness between the parties, or an agreement to treat the statement as an

account stated. It cannot be used to create liability where none otherwise exists” (*Ryan Graphics*, 39 AD3d at 251).

As to the substance of plaintiff’s claim, the parties entered into an agreement on September 23, 2014, whereby JAMPP would conduct a marketing campaign for Cupcake in exchange for payment by defendant (NYSCEF Doc. No. 19 – Terms & Conditions). According to JAMPP’s Managing Director, Diego Meller, JAMPP was to perform mobile marketing services to obtain user acquisitions for Cupcake’s mobile application, iStoryTime (NYSCEF Doc. No. 17 – Affidavit of Meller at ¶3). Per the agreement, JAMPP was to perform this service from September 2014 onwards and until notification by defendant’s representative that Cupcake wanted to pause or stop the service (NYSCEF Doc. No. 19 – Terms & Conditions). The agreement stated that Cupcake was to pay \$2.75 for each installation generated by plaintiff (NYSCEF Doc. No. 17 – Affidavit of Meller at ¶4; NYSCEF Doc. No. 19 – Insertion Order).

JAMPP provided the services required under the agreement for a period of three months. During January 2015, JAMPP generated 9,289 user acquisitions for a total amount of \$25,544.75 due on March 4, 2015 (NYSCEF Doc. No. 17 – Affidavit of Meller at ¶5; NYSCEF Doc. No. 20). During February 2015, JAMPP generated 8,390 user acquisitions for a total amount of \$23,072.50 due on April 1, 2015 (NYSCEF Doc. No. 17 – Affidavit of Meller at ¶6; NYSCEF Doc. No. 21). Finally, during March 2015, JAMPP generated 19,189 user acquisitions for a total amount of \$52,769.75 due on June 3, 2015 (NYSCEF Doc. No. 17 – Affidavit of Meller at ¶7; NYSCEF Doc. No. 22). No payment was forwarded by defendant regarding services provided by JAMPP during these months, thus constituting a breach of the agreement.

On March 31, 2016, JAMPP mailed Cupcake a statement of the account in the sum of \$101,387.00 (NYSCEF Doc. No. 17 – Affidavit of Meller at ¶9; NYSCEF Doc. No. 22). Since defendant has not forwarded payment of the overdue invoices, JAMPP sustained \$101,387.00 in damages and seeks this amount, plus costs and interests from Cupcake.

Plaintiff’s motion is granted, and it is entitled to damages plus costs and interest. As for the calculation of statutory interest, CPLR 5001(b) states that “[i]nterest shall be computed from the earliest ascertainable date the cause of action existed” and that “[w]here such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date”. Here, plaintiff failed to show any ascertainable damages before the due date of the first unpaid invoice, namely March 4, 2015 (NYSCEF Doc. No. 20). Defendant’s final unpaid invoice was due on June 3, 2015 (NYSCEF Doc. No. 22). The June 3, 2015 date is a reasonable intermediate date from which plaintiff’s claims became due and owing. Accordingly,

prejudgment interest at the statutory rate of nine percent per annum on the damages shall accrue from June 3, 2015 until entry of judgment.

Accordingly, it is hereby ORDERED that plaintiff JAMPP, Ltd.'s motion to vacate the dismissal and restore the action is granted; it is further

ORDERED that plaintiff JAMPP, Ltd.'s motion for default judgment pursuant to CPLR § 3215 against Cupcake Digital, Inc. is granted; it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the plaintiff JAMPP, Ltd. and against Cupcake Digital, Inc. in the amount of \$101,387.00, plus statutory interest at the statutory rate of 9% from June 3, 2015, to the date of the entry of the default judgment, costs and disbursements to be calculated by the clerk upon submission of an appropriate bill of costs; it is further

ORDERED, that a copy of this Decision and Order with notice of entry is to be served on all parties within 15 days of entry of this order and proof of service is to be filed with the New York County Clerk within 15 days of said service; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment as written.

This constitutes the Decision and Order of the court.

*MARGARET A. CHAN*  
**MARGARET A. CHAN, J.S.C.**

10/15/2019  
DATE

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MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
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"/> REFERENCE