

**Patterson Dental Supply Inc. v Tribeca Dental  
Studio, P.C.**

2019 NY Slip Op 33406(U)

November 13, 2019

Supreme Court, New York County

Docket Number: 159491/2017

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 159491/2017

PATTERSON DENTAL SUPPLY INC.,

MOTION DATE 08/27/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

TRIBECA DENTAL STUDIO, P.C.,

DECISION + ORDER ON MOTION

Defendant.

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NYSCEF Doc Nos. 30-42 were read on this motion for summary judgment.

Motion by Plaintiff Patterson Dental Supply Inc. pursuant to CPLR 3212 for an order striking the answer of Defendant Tribeca Dental Studio, P.C. i/s/h/a Tribecca Dental Studio P.C. and granting Plaintiff summary judgment against Defendant in the sum certain of \$54,220.43, plus interest from October 9, 2016, at the statutory rate, together with costs and disbursements is granted.

BACKGROUND

Plaintiff commenced the instant action on October 25, 2017, by e-filing a summons and complaint. The complaint alleges two causes of action for breach of contract and account stated, respectively, based upon the amount of \$54,220.43 due and owing to Plaintiff for its sale and delivery of goods and services to Defendant on October 9, 2016, at the request of Defendant pursuant to a contract of sale and statements of account sent from Plaintiff to Defendant. On December 15, 2017, Defendant interposed its answer, consisting of a general denial as to the substance of the complaint along with two affirmative defenses: that the Defendant paid the amount due and that the goods and services sold were defective and that Plaintiff agreed to replace them but did not. The second affirmative defense states "[t]hat the Plaintiff and the Defendant had a contractual agreement for the Plaintiff to furnish goods and services to the Defendant" and that there was an "account stated between the Plaintiff and the Defendant" but that it was "incorrect and not collectable." (Canals affirmation, exhibit C ¶¶ 3, 10, 12.)

Upon the completion of discovery and the filing of the note of issue, Plaintiff timely filed the instant motion pursuant to CPLR 3212 for an order striking the answer of Defendant and granting Plaintiff summary judgment against Defendant in the sum certain of \$54,220.43, plus interest from October 9, 2016, at the statutory rate, together with costs and disbursements. Plaintiff states by its affidavit from Credit Manager Sheila R. Dionisopoulos that Plaintiff is a distributor of dental supplies to dentists and Defendant operates a dental office. Plaintiff argues that it entered into an agreement with Defendant on October 9, 2016, to sell certain goods and services to Defendant and that Plaintiff fully performed its obligations under the contract by providing the goods and services. Plaintiff argues that it sent invoices to Defendant at its address,

54 Warren Street, New York, New York 10007, and that the invoices were not returned as undeliverable. Plaintiff argues that the invoices have not been paid in full. Plaintiff further argues that the affirmative defenses of Defendant are “baseless.” (Aff of Dionisopoulos ¶ 14.)

Plaintiff has annexed in support of its motion 182 pages consisting of 2016 invoices and two years of statements of account between Plaintiff and Defendant. (Canals affirmation, exhibit A.) Defendant’s address is given as “Nina Izhaky DDS, 54 Warren Street, Tribeca Dental Studio, New York, NY 10007-1078.” The invoices and statements of account refer to Defendant with a customer number/account number of 728559579. The first 136 pages of exhibit A consist of dozens of invoices dated January 12, 2016, to September 15, 2016, and reflect various sales of goods and services from Plaintiff to Defendant.

The two years of monthly statements of account submitted are dated January 9, 2015, to January 9, 2017. Each statement provides the closing date, previous balance, payments, credits, service charges, new charges, and a total due. The statements indicate that payment is due upon receipt. The statements show line items together with dates, document numbers, descriptions, and amounts due per item. Certain statements reflect the issuance of credits by Plaintiff to Defendant which served to reduce the total due.

Partial payments of amounts due by Defendant are reflected on the statements with closing dates of: January 9, 2015 (\$500.00 on a previous balance of \$6,426.65); February 9, 2015 (\$500.00 on a previous balance of \$8,785.79); March 9, 2015 (\$500.00 on a previous balance of \$9,131.01); April 9, 2015 (\$1,500.00 on a previous balance of \$8,318.66); May 9, 2015 (\$1,500.00 on a previous balance of \$9,075.91); June 9, 2015 (\$2,000.00 on a previous balance of \$12,277.48); July 9, 2015 (\$7,750.00 on a previous balance of \$11,993.64); September 9, 2015 (\$8000.00 on a previous balance of \$16,640.91); October 9, 2015 (\$7,500.00 on a previous balance of \$19,135.18); November 9, 2015 (\$4,500.00 on a previous balance of \$14,572.90); December 9, 2015 (\$4,500.00 on a previous balance of \$17,481.90); January 9, 2016 (\$6,000.00 on a previous balance of \$23,463.73); February 9, 2016 (\$1,500.00 on a previous balance of \$26,005.04); March 9, 2016 (\$7,500.00 on a previous balance of \$37,087.61); April 9, 2016 (\$6,000.00 on a previous balance of \$43,092.61); May 9, 2016 (\$3,000.00 on a previous balance of \$47,388.52); July 9, 2016 (\$4,500.00 on a previous balance of \$57,823.94); and August 9, 2016 (\$4,500.00 on a previous balance of \$58,293.60). No further payments from Defendant to Plaintiff are reflected in the statements submitted, and as of the final statement provided, the total due from Defendant to Plaintiff is listed as \$54,220.43.

Plaintiff has submitted Defendant’s answers to interrogatories, made by President of Tribeca Dental Studio, P.C. Nina Izhaky. (Affirmation of Canals, exhibit E.) As is relevant here, the response to interrogatory #3 states that “[s]ince the opening of the Defendant’s Dental Practice in 2008, the plaintiff rendered services and supplied goods to the Defendant.” The response to interrogatory #8 states that “Defendant disputed the invoices of the Plaintiff as they were received for repair services not do[n]e in [a] timely manner or which did not correct the problem, or which supplied wrong or defective parts.” The responses to interrogatories state that Defendant had requested certain credits or adjustments to the bills from time to time and Plaintiff agreed to issue them. As to the specifics of such amounts, the response to interrogatory #18 states that “[t]he credit amounts that were given or promised to be given but were not given are

reflected on the invoices and records in possession of the Plaintiff.” As to the specifics of any credit allegedly requested by Defendant and agreed to by Plaintiff but not issued, Plaintiff argues that Plaintiff has no such record. (Aff of Dionisopoulos ¶ 11.)

On July 15, 2019, Defendant e-filed a fully executed stipulation requesting an adjournment of the return date of the motion from July 16, 2019, to July 30, 2019. (NYSCEF Doc No. 41.) The court then adjourned the motion to July 30, 2019 based on the stipulation.

On July 30, 2019, Defendant e-filed an Affirmation of Actual Engagement and Adjournment Request, a copy of an email from Defendant to Plaintiff requesting an adjournment of the return date of the motion to August 27, 2019, and a copy of a proposed stipulation to that effect partially executed by Defendant, only. (NYSCEF Doc No. 42.) Based on the foregoing, the court adjourned the return date of the motion to August 27, 2019, as reflected in eCourts. (See <https://iapps.courts.state.ny.us/webcivil/FCASCaseInfo?parm=Appearance&index=rms2dJlCzhHG%2FV7EDqSxyg%3D%3D&county=pKUuA0vJ1TDootJDnT692g%3D%3D&civilCaseId=DJ83w5hUw22Ply%2FEkQZIKA%3D%3D>, last accessed November 13, 2019, at 1:28 p.m.) Opposition papers were due on Monday, August 19, 2019, and reply papers, if any, were due on Monday, August 26, 2019. Defendant did not submit any opposition papers; the last document e-filed in the instant action is the July 30, 2019 request to adjourn the motion.

### DISCUSSION

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form.” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) “The proponent of a summary judgment motion 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 University Medical Center*, 64 NY2d 851, 853 [1985].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Id.*) “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

Based on the papers submitted, the Court finds that Plaintiff is entitled to judgment as a matter of law on its first cause of action alleging breach of contract. The essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages.” (*Liberty Equity Restoration v Maeng-Soon Yun*, 160 AD3d 623, 626 [2d Dept 2018].) Here, it is undisputed based on the answer of Defendant, the interrogatories, and the invoices and statements submitted that there was a contract between Plaintiff and Defendant whereby

Defendant ordered goods and services from Plaintiff, Plaintiff provided the ordered goods and services, Plaintiff issued statements demanding payment for the delivered goods and services, and Defendant made periodic partial payments on the amount due, which continued to balloon over the two-year period reflected in the statements submitted, as the cost of new orders far outpaced the partial payments made by Defendant to Plaintiff. To the extent that the invoices and statements stated unambiguously that payment was due upon their receipt, and as the Credit Manager of Plaintiff has indicated that Plaintiff fully performed under the contract by providing the goods and services order, and that \$54,220.43 now remains due and owing to Plaintiff from Defendant, the Court finds that Plaintiff has shown prima facie entitlement to judgment as a matter of law on its first cause of action for breach of contract.

The Court finds further that Plaintiff is entitled to judgment as a matter of law on its second cause of action alleging an account stated. As the Appellate Division, First Department, has said:

“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 separate items composing the account and the balance due, if any, in favor of one party or the other. In this regard, receipt and retention of plaintiff’s accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, gives rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor. Further, an attorney may contract with his client on the cost of his past or future services, and an account stated may exist between them.”

(*Shea & Gould v Burr*, 194 AD2d 369, 370 [1st Dept 1993].) “Where an account is rendered showing a balance, the party receiving it must, within a reasonable time, examine it and object, if he disputes its correctness. If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown.” (*Shaw v Silver*, 95 AD3d 416, 416 [1st Dept 2012].) “It is not necessary to establish the reasonableness of the fee since the client’s act of holding the statement without objection will be construed as acquiescence as to its correctness.” (*Id.* at 416–417; *see also Emery Celli Brinckerhoff & Abady, LLP v Rose*, 111 AD3d 453, 454 [1st Dept 2013], *lv denied* 23 NY3d 904 [2014].)

“The very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained.” (*Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st Dept 2002].) An account stated is “independent of the underlying agreement.” (*Duane Reade v Cardinal Health, Inc.*, 21 AD3d 269, 269–270 [1st Dept 2005].)

A plaintiff may show prima facie entitlement to summary judgment on an account stated theory by demonstrating that a defendant either retained plaintiff’s bills without objection or made partial payment on them. (*See Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004] [reiterating that “either retention of bills without objection or

partial payment may give rise to an account stated”]; cf. *Shea & Gould*, 194 AD2d at 370; *Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355, 356 [1st Dept 2001].)

Here, Plaintiff sent monthly statements to Defendant over a two-year period, and Defendant made partial payment on nearly all the statements, up to and including the last payment of \$4,500.00 made on the previous balance of \$58,293.60. Any disputes referenced in exhibit E are not sufficiently specific to raise a genuine issue of material fact.

Moreover, it is not appropriate for the Court to look to the affirmative defenses submitted in the answer of a defendant where “the defendant[] never raised th[eir] affirmative defense[s] in [] opposition papers and, thus, by their failure to do so, waived [them].” (*New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756, 757 [2d Dept 2013].) Here, Defendant has submitted no opposition to the motion. As such, the Court deems the affirmative defenses waived, and the unopposed application to strike the answer of Defendant is granted.

The court granted Defendant two adjournments to the return date of the motion, and the second adjournment was granted without the affirmative consent of Plaintiff in a stipulation. Nevertheless, Defendant failed to submit any opposition to the instant motion, which was marked fully submitted, no opposition on August 27, 2019. Now, two and a half months later, Defendant has failed to come forward before the Court with any submission whatsoever or to proffer any excuse as to its failure to file opposition papers. It would have been for Defendant in opposition to the instant motion to attempt to raise a genuine issue of material fact in response to Plaintiff’s prima facie showing of entitlement to judgment as a matter of law. This was not done.

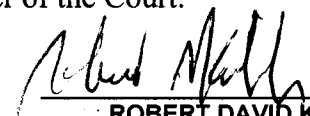
**CONCLUSION**

Accordingly, it is

ORDERED that the motion by Plaintiff Patterson Dental Supply Inc. pursuant to CPLR 3212 for an order striking the answer of Defendant Tribeca Dental Studio, P.C. i/s/h/a Tribeca Dental Studio P.C. and granting Plaintiff summary judgment against Defendant is granted, and Plaintiff shall, within 10 days of the NYSCEF filing date of the decision and order on this motion, serve a copy of this order with notice of entry on Defendant and on the clerk, who is directed to enter judgment in favor of Plaintiff and against Defendant in the amount of \$54,220.43, together with interest at the rate of 9% per annum from the date of October 9, 2016, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

The foregoing constitutes the decision and order of the Court.

11/13/2019  
DATE

  
ROBERT DAVID KALISH, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE