

**Hoffinger Stern & Ross, LLP v Neuman**

2012 NY Slip Op 30951(U)

April 10, 2012

Supreme Court, New York County

Docket Number: 113111/09

Judge: Louis B. York

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

*LOUIS B. YORK*  
J.S.C.  
*Justice*

PRESENT: \_\_\_\_\_

PART 2

Index Number : 113111/2009  
HOFFINGER STERN & ROSS LLP  
vs.  
NEUMAN, PHILIP  
SEQUENCE NUMBER : 012  
PARTIAL SUMMARY JUDGMENT

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 *decided in accordance with the accompanying decision*

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

## FILED

APR 11 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/10/12

*Ley*, J.S.C.

**LOUIS B. YORK**  
 NON-FINAL DECISION

- 1. CHECK ONE: .....  CASE DISPOSED
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. 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: IAS PART 2

-----X  
 HOFFINGER STERN & ROSS, LLP,

Plaintiff,

-against-

Index No.

PHILIP NEUMAN, NEUMAN ASSOCIATES, LLC,  
 UNITED NATIONAL FUNDING, LLC, MAPLEWOOD  
 GARDENS, LLC, SAGE TERRACE, LLC, 5<sup>TH</sup> AVENUE  
 AT BLOOMFIELD ASSOCIATES, LLC, SAGE  
 TERRACE DEVELOPERS, LLC, CLASSIC  
 DEVELOPMENT ASSOCIATES OF CLOVE ROAD,  
 LLC, PAPER CLIP REALTY, LLC, HOWSTER  
 PARTNERSHIP, INTERVAL MANAGEMENT CORP.,  
 NEUMAN ENTERPRISES, LLC, PREMIER  
 BEVERAGES, LLC and JOHN DOES 1-20,

113111/09

**FILED**

**APR 11 2012**

Defendants.

NEW YORK  
 COUNTY CLERK'S OFFICE

-----X  
 LOUIS B. YORK, J. :

Plaintiff moves for partial summary judgment on its account stated cause of action, and for dismissal of defendants' affirmative defenses. Defendants cross-move for summary judgment dismissing plaintiff's account stated cause of action, and for dismissal of all defendants except Philip Neuman (Neuman) from this action.

This is an action for breach of contract, account stated, unjust enrichment and quantum meruit. According to the complaint, plaintiff served as the legal counsel for Neuman and the other defendants, which are entities owned and/or controlled by Neuman, or associates of Neuman. Neuman retained plaintiff beginning on July 12, 2006. For almost two years, plaintiff was the legal representative of defendants in over a dozen actions in New York and New Jersey. Plaintiff is seeking the recovery of fees for legal services performed in these actions, as well as other work done on behalf of defendants.

Plaintiff previously brought a similar action against defendants, entitled *Hoffinger Stern & Ross LLP v Neuman, et al.*, Index No. 105427/08 in this court. Plaintiff sought summary judgment against Neuman on its account stated cause of action. The court in that action held that, pursuant to Part 137 of the Rules of the Chief Administration (Rules), defendant had the right to arbitrate a fee dispute. The court therefore dismissed the action.

Plaintiff claimed that it gave Neuman thirty days written notice of his right to seek arbitration. Neuman never filed a request for arbitration. Plaintiff thereafter brought the present suit, again seeking summary judgment on the account stated cause of action, this time against defendants, jointly and severally.

In a decision dated May 5, 2010 (the May 5, 2010 decision), this court held that Neuman had waived his right to arbitrate and could be sued in court. The court severed the other defendants from the motion, holding that they each was subject to the right to arbitrate pursuant to Part 137, and was entitled to a notice to pursue arbitration. The court granted plaintiff summary judgment on the account stated cause of action and granted dismissal of defendants' affirmative defenses on the ground that they were inadequately pleaded.

Defendants sought a reargument and/or renewal of the May 5, 2010 decision, which was denied. However, on appeal, the Appellate Division, First Department, reversed the May 5, 2010 decision, holding that there was an issue of fact as to whether or not defendants objected to a bill that was issued one day before plaintiff brought the first action. The dismissal of the affirmative defenses was also reversed on the ground that plaintiff would not have been prejudiced if defendants sought leave to replead.

Plaintiff is now moving again for summary judgment on his account stated cause of

action, this time related to a single invoice, dated March 5, 2008, which he allegedly sent to defendants. He seeks the amount of \$654,651.04. Alternatively, he moves for summary judgment on another invoice, dated February 13, 2008, seeking the amount of \$583,544.55. Plaintiff is also moving for dismissal of the affirmative defenses.

Plaintiff argues, as in its prior motion, that Neuman did not respond critically or negatively to the invoices sent by plaintiff. Plaintiff claims that, because of the absence of any complaints from Neuman, Neuman accepted the terms of the March 5, 2008 invoice and is legally obligated to pay it.

Plaintiff states that Neuman commenced a separate action against plaintiff and three of its attorneys, alleging malpractice, breach of contract and breach of ethical obligations. According to plaintiff, this action was simply a method of harassing plaintiff and prolonging plaintiff's action. Neuman's suit was eventually discontinued, through stipulation, with prejudice.

Plaintiff argues that the affirmative defenses in the answer to its complaint in the present action were asserted as claims in the complaint in Neuman's discontinued action. Because of the alleged similarity of the affirmative defenses here and the claims in the discontinued action, plaintiff contends that the affirmative defenses should be dismissed on res judicata grounds. Plaintiff argues that the stipulation of discontinuance would preclude the bringing of those affirmative defenses in the present action which were directly raised in the discontinued action. Moreover, plaintiff argues that the stipulation would extend and apply to all claims arising out of the same transactions which could have been asserted by Neuman, but were not.

In opposition, defendants dispute any res judicata effect on the affirmative defenses through the filing of the stipulation. They state that their defenses are separate from any claims

related to the discontinued action.

Defendants not only oppose the motion granting partial summary judgment to the account stated cause of action, but cross-move for dismissal of the entire cause of action. Defendants assert their earlier defenses: that Neuman had rejected the invoices as inconsistent; that plaintiff had disregarded agreed-upon arrangements by the parties; that the invoices were vague and cursory; and that there were disputes regarding the nature, terms and conditions of the arrangements for the payment of fees. Now, defendants aver that, through its past conduct, plaintiff has failed to establish a claim for an account stated, and that this claim should be dismissed altogether.

In their cross motion, defendants contend that all defendants save Neuman should be dismissed from this action. Defendants state that plaintiff did not comply with this court's order to serve notice to arbitrate on all the non-Neuman defendants prior to bringing litigation. Due to plaintiff's failure to comply, defendants seek dismissal.

In opposition to the cross motion, plaintiff assert some procedural grounds for dismissal. First, plaintiff states that, in accordance with a Preliminary Conference Order (PCO), dated March 2, 2011, the court held that a note of issue had to be filed by August 19, 2011, and dispositive motions were due within 60 days of the filing of the note of issue. Plaintiff filed the note of issue on August 18, 2011, and its summary judgment motion on October 14, 2011. Plaintiff states that the service of opposition papers were due on October 28, 2011. On November 1, 2011, plaintiff notified defendants' counsel of defendants' default in responding to its motion. According to plaintiff, defendants' counsel requested an adjournment, and asserted that opposition papers would be served on plaintiff by noon on November 15, 2011. The parties

thereafter executed a stipulation, which was submitted to the court, providing that defendants agreed to waived their right to file opposition papers if they were not served by the abovesaid time and date.

Plaintiff asserts that defendants' counsel served plaintiff belated papers, on 4:59 p.m. on November 15. The papers included the cross-motion. Defendants' counsel allegedly informed plaintiff that they were unaware of the due time. Defendants' counsel also deny that there was a default on their part. Plaintiff seeks to enforce the terms of the stipulation, and demands that the cross motion and opposition papers be rejected as a matter of law.

Second, plaintiff argues that the cross motion should be rejected pursuant to CPLR 3212 (a). Plaintiff states that the papers were served beyond the time prescribed in the PCO. Based upon plaintiff's interpretation of the statute, in the absence of good cause, the cross motion must be denied. Even if this court were to consider the cross motion, plaintiff claims that the cross motion should be denied due to defendants' failure to append the pleadings, pursuant to CPLR 3212 (b).

Plaintiff argues that, in the event that the court still considers the cross motion, the cross motion should be denied, as there are no merits to the motion for an order dismissing the account stated cause of action. Plaintiff reaffirms its arguments for granting summary judgment on its claim as well as for the dismissal of the affirmative defenses. Plaintiff disputes the cross motion to dismiss the non-Neuman defendants, contending that these defendants are totally controlled by Neuman and lack separate identities, and, thus, are not subject to a right to demand arbitration.

In a reply affirmation, defendants assert that their counsel had forgotten the due time to serve the cross motion; that the five-hour delay was a minor matter; that courts can exercise their

7]

discretion in deciding whether to accept late motions; and that the issues in the cross motion relate back to those issues in plaintiff's motion. Although defendants do not mention any good cause exception related to their untimely cross motion, they state that the court is entitled to take judicial notice on those factors already known to both sides and the court. Defendants argue that there is enough merit in their cross motion to counter the issues in plaintiff's motion.

The court shall first decide whether or not to dismiss the cross motion. As the court is permitted the discretion to set a time limit for moving for summary judgment between 30 to a maximum of 120 days, the PCO allowed for a 60-day limit. Whereas, pursuant to the PCO, defendants were tardy in opposing plaintiff's motion for summary judgment, the parties chose to execute a stipulation extending defendants' time to respond to plaintiff. "[T]he parties, with the court's consent, were free to chart a procedural course that diverted from the path established by the CPLR." *Corchado v City of New York*, 64 AD3d 429, 429 (1<sup>st</sup> Dept 2009). The cross motion was admittedly served five hours later than the time limit of the stipulation.

As held in *Brill v City of New York*, (2 NY3d 648 [2004]), untimely motions can be upheld upon a showing of good cause. The Court of Appeals held that "good cause" under CPLR 3212 (a) "requires a showing of good cause for the delay in making the motion- a satisfactory explanation for the untimeliness- rather than simply permitting meritorious, nonprejudicial filings, however tardy." *I.d.* at 652 .

Defendants refer to *Grande v Peteroy*, (39 AD3d 590 [2d Dept 2007]), which held that an untimely cross motion for summary judgment "may be considered by the court where ... a timely motion for summary judgment was made on nearly identical grounds." In that case, the court decided "that the issues raised by the untimely motion or cross motion are already properly



before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause (*see* CPLR 3212 [a]) to review the untimely motion or cross motion on the merits.” *I.d.* at 591-2; *see also Ianello v O’Conner*, 56 AD3d 684, 685-6 (2d Dept 2009).

The court finds that defendants are precluded from relying on the *Grande* decision. They had the option of raising this issue when they failed to make a timely cross motion pursuant to the PCO. Once they assented to the stipulation, they were bound to strictly comply with its terms. In the absence of any other assertion of good cause, defendants cannot bring their untimely cross motion. Therefore, the cross motion for summary judgment is denied. The court will consider defendants’ opposition to plaintiff’s motion, as plaintiff have not been prejudiced by the delay.

The court will concern itself with plaintiff’s motion. “The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1<sup>st</sup> Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produ[cing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

“An account stated is an account balanced and rendered with an assent to the balance either expressed or implied.. ... There can be no account stated where no account was presented

[\*9]

or where any dispute about the account is shown to have existed (citation omitted).” *Abbot, Duncan & Wiener v Ragusa*, 214 AD2d 412, 413 (1<sup>st</sup> Dept 1995). “An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account.” *American Express Centurion Bank v Cutler*, 81 AD3d 761, 762 (2d Dept 2011).

Here, as in the previous motion, plaintiff raises similar arguments, though it concentrates on only one invoice. And defendant assumes the same position as previously. As the court examines the record, it finds that, with respect to the March invoice, there is no evidence of Neuman objecting or questioning the nature or amount of this invoice. The court will grant partial summary judgment to plaintiff.

The next part of the motion deals with the dismissal of the affirmative defenses. The earlier motion sought to dismiss them on the ground that they were inadequately pleaded. This time, plaintiff moves for dismissal due to res judicata, relating the defenses to those claims brought by defendant in their discontinued suit against plaintiff. This suit never reached the trial level, of course, but the court confirmed its discontinuance, with prejudice. Such a discontinuance raises a presumption that it will have a res judicata effect in a future litigation on similar or identical causes of action. *See North Shore-Long Island Jewish Health System, Inc. v Aetna US Healthcare, Inc.*, 27 AD3d 439, 440 (2d Dept 2006).

“In New York, res judicata, or claim preclusion, bars successive litigation based upon the ‘same transaction or series of connected transactions’ (*see* Siegel, NY Prac section 447 [4<sup>th</sup> ed]) if (i) there is a judgment on the merits by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or privity with a party

who was (*see Gramatan House Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]; Weinstein-Korn-Miller, NY Civ Prac 5011.08 [2d ed]).” *People v Applied Card Systems, Inc.*, 11 NY3d 105, 122 (2008), cert denied *Cross Country Bank, Inc. v New York*, 555 US 1139 (2009).

“The doctrine of res judicata operates to preclude the reconsideration of claims actually litigated and resolved in a prior proceeding, as well as claims for different relief against the same party which arise out of the same factual grouping or transaction, and which should have or could have been resolved in the prior proceeding.” *James M. v City of New York*, 69 AD3d 634, 635 (2d Dept 2010).

While the general rule that a stipulation of discontinuance “with prejudice” is afforded res judicata effect and will bar litigation of the discontinued causes of action, the language “with prejudice” is narrowly interpreted when the interests of justice, or the particular equities involved, warrant such an approach. *See Pawling Lake Property Owners Association, Inc., v Greiner*, 72 AD3d 665, 667 (2d Dept 2010). This court finds that the rule in *North Shore*, as narrowly read, does not apply to affirmative defenses which do not seek affirmative relief. Res judicata does not apply in this case.

Accordingly, it is

ORDERED that plaintiff’s motion for partial summary judgment is severed and granted with respect to the invoice dated March 5, 2008; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Philip Neuman in the amount of \$654,651.04, together with interest prayed for allowable by law at a rate of 9% per annum fro the date of the commencement of this action until the date of entry of judgment, as calculated by the Clerk, and thereafter at the

statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's motion to dismiss the affirmative defenses in the answer is denied; and it is further

ORDERED that defendants' cross motion for summary judgment is denied.

DATED: 4/10/12

ENTER

**FILED**

*Lly*  
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J.S.C.

**APR 11 2012**

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