SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 16**
CORONA FUEL CORP.,	**NASSAU COUNTY**
Plaintiff,	**Index No: 10306-11**
	Motion Seq. No: 1
	Submission Date: 3/13/12
-against-	
SATNAM HOLDING, INC.,	
Defendant.	
----------x	

Papers Read on this Motion:

Notice of Motion, Affirmation in Support,
Affidavit in Support and Exhibits.....x
Affidavits in Opposition and Affirmation in Opposition.....x
Reply Affirmation, Reply Affidavit and Exhibits.....x

This matter is before the court on the motion by Plaintiff Corona Fuel Corp. ("Corona" or "Plaintiff") filed February 9, 2012 and submitted March 13, 2012. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3212, granting Plaintiff summary judgment against Defendant Satnam Holding, Inc. ("Satnam" or "Defendant"), together with interest from November 29, 2010 to present, plus costs, disbursements and attorney's fees.

Defendant opposes Plaintiff's motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. B to Spano Aff. in Supp.) alleges as follows:

First Cause of Action

On or about November 29, 2010, Defendant and Plaintiff entered into an agreement

pursuant to which Plaintiff was to provide deliveries of gasoline to Defendant. Plaintiff provided gasoline deliveries at the specific request of Defendant, on an ongoing basis, from November 29, 2010 through January 25, 2011. The agreed upon price for those deliveries totaled $171,312.53. There is due and owing from Defendant to Plaintiff a past due balance for gasoline deliveries in the sum of $171,312.53. These transactions were consummated without the extension of credit to Defendant and, therefore, are not considered consumer credit transactions. As a result of Defendant's failure to pay the balance owed, despite Plaintiff's demand, Plaintiff has incurred damages in the sum of $171,312.53.

Second and Third Causes of Action

The second cause of action incorporates the allegations in the first cause of action, and alleges that Plaintiff has been unjustly enriched in the amount of $171,312.53. The third cause of action alleges that Plaintiff rendered statements of account to Defendant, which Defendant never disputed, and seeks the sum of $171,312.53 under the theory of account stated.

In his Affidavit in Support, Michael Sobel ("Sobel"), the owner of Corona, affirms the truth of the allegations in the Complaint regarding the parties' agreement, Plaintiff's delivery of gasoline to Defendant, and Defendant's failure to pay for that gasoline. Sobel provides invoices ("Invoices") (Ex. A to Sobel Aff. in Supp.) which reflect the delivery of gasoline by Plaintiff during the relevant time period, the cost of those deliveries, and the fact that Defendant was billed for those deliveries. Sobel affirms that there is now due and owing from Defendant to Plaintiff the sum of $171,312.53 and seeks judgment in that amount, with interest from November 29, 2010 to the present, along with costs, disbursements and attorney's fees.

In opposition, Sarvjit Singh ("Sarvjit") affirms that he is an officer of Satnam, which operates a gasoline station located at 219-25 Merrick Boulevard, Laurelton, New York ("Station"). Sarvjit denies Plaintiff's allegations regarding the delivery of gasoline to Defendant, and denies owing money to Plaintiff. Sarvjit submits that discovery regarding the account history of the deliveries is appropriate.

Sarvjit affirms that Plaintiff has never previously made a written demand for payment of the Invoices, and avers that Defendant has never seen the Invoices. Beginning in January of 2005, Plaintiff began delivering gasoline to Defendant at the Station. Defendant, in return, would pay for the gasoline delivery prior to Plaintiff making the next delivery. As more deliveries and payments were made by and between Plaintiff and Defendant, Plaintiff began collecting payments for deliveries of gasoline on a weekly or bi-weekly basis. On some

occasions, Plaintiff would come to the Station to pick up payment for gasoline delivered. On other occasions, Defendant went to Plaintiff's office to make payments for gasoline delivered. Defendant made payments by cash or check. For each delivery, whether it be on an individual, weekly or bi-weekly basis, Plaintiff and Defendant would add the total amount of money due to Plaintiff, and Defendant would make payment by cash, and the remaining balance would be paid by check. Plaintiff would then apply the cash and check payments to the deliveries that Plaintiff made to Defendant.

Sarvjit affirms, further, that Plaintiff never supplied Defendant with an account history, and Defendant never requested an account history from Plaintiff. Therefore, Defendant assumed that it paid for each delivery of gasoline that Plaintiff made. Sarvjit also affirms that in January of 2011, his manager went to Plaintiff's office to make payment and gave Plaintiff $10,000 in cash towards outstanding deliveries. Plaintiff allegedly took the payment but refused to deliver gasoline to Defendant, alleging that Defendant owed over $175,000.

Harjinder Singh ("Harjinder") affirms that he has been the manager of Satnam since 2005, and has transacted business with Sobel. He avers that in 2005, Satnam paid for a delivery from Plaintiff prior to the next delivery. Over the last few years, however, Plaintiff granted Defendant additional time to pay for deliveries, which payments were always in the form of cash and check. Plaintiff would either come to the Station to pick up the money or Harjinder would go to Plaintiff's office to pay for deliveries. There was no set time that the payments were made. Rather, Plaintiff would call Harjinder in advance and advise him that Plaintiff would come to the Station the next day, or following day. When Plaintiff came to the Station, Harjinder would pay him by cash and check for past deliveries.

Harjinder affirms that he has never seen Plaintiff provide an account history, and Harjinder never requested such an account history. In January of 2011, Harjinder went to Plaintiff's office to make a payment, and provided Plaintiff with $10,000 in cash. After Plaintiff accepted the cash payment, he advised Harjinder that Plaintiff would not make any more deliveries to Satnam because Satnam owed money to Plaintiff.

In reply, Sobel affirms that he has been a wholesaler of gasoline and petroleum products since 1992, and the president of Corona since its formation in 1994. Sobel affirms that Corona is a wholesaler of unbranded gasoline products. He explains the purchasing process which involves Corona orally contracting with an independent trucker to load the product and deliver it to one or several different gasoline stations that has placed an order.

Sobel affirms that in his initial dealings with Defendant, Defendant would pay for the preceding delivery prior to the following delivery and payments were made approximately every other day. As the parties developed a business relationship, the time period for delivery was extended by mutual agreement to once a week, and then every other week. Defendant's manager called, on a daily basis, to obtain prices and order deliveries, and Sobel then called the trucker to arrange for delivery. The trucker delivered the product, the Defendant's agent or manager signed the trucking manifest to reflect that the delivery was made, and the Defendant accepted the delivery.

The Invoices included the trucking manifest, which is signed or initialed by the person who accepted the delivery, as well as the terminal manifest which reflects that product was pumped from the terminal to the truck and reflects the total amount of product that was loaded onto the truck, which was subsequently delivered to the Station. Sobel provides the trucking manifests and terminal manifests that accompanied the Invoices (Ex. D to Sobel Reply Aff.).

After each delivery, Plaintiff met with Harjinder, usually at the Station, and demanded payment for outstanding deliveries. Harjinder regularly stated that he was unable to pay for all the deliveries and the parties would agree that he could make partial payment, and the remaining sums owed became accounts receivable. The next time that Plaintiff went to the Station, he demanded payment for the accounts receivable and provided bills for subsequent deliveries. Sobel affirms that, towards the end of the parties' business relationship, the deliveries were made but not paid for. At the time of the last payment of $10,000, Sobel gave Harjinder all sixteen (16) outstanding invoices.

Sobel describes as "erroneous" (Sobel Reply Aff. at ¶ 6) Sarvjit's claim that Plaintiff never previously made a written demand for payment of the Invoices and that Defendant has never seen the Invoices. Sobel affirms that Plaintiff made a written demand in a letter dated May 19, 2011 (Ex. E to Sobel Reply Aff.) for the sum of $171,312.53, which included copies of the unpaid Invoices.[1]

C. The Parties' Positions

Plaintiff submits it has demonstrated its right to judgment by providing the Invoices and Sobel Affidavit which establish that deliveries of gasoline were made to Defendant who failed to pay for those deliveries. Plaintiff contends, further, that Defendant has failed to demonstrate the

[1] Sobel affirms that the first paragraph of the letter contains an error in that the word "October" should be "November."

existence of a material fact defeating Plaintiff's right to summary judgment.

Defendant opposes Plaintiff's motion, submitting that Defendant has asserted valid defenses and presented triable issues of fact. Defendant asserts that there was no written contract between Plaintiff and Defendant and that the Invoices, without additional evidence such as a written contract or account history, constitute an insufficient basis on which to award relief to Plaintiff. In addition, Defendant denies ever seeing the Invoices, and submits that it should have the opportunity to review the Invoices and supporting documentation.

In reply, Plaintiff reaffirms its position that Plaintiff has failed to establish a meritorious defense. Plaintiff submits, *inter alia*, that 1) the Statute of Frauds is inapplicable because the parties' oral contract was an at-will arrangement that could be ended at any time and, therefore, was capable of being performed within one (1) year; and 2) the affirmative defense of Plaintiff's failure to mitigate damages is without merit in light of Plaintiff's prior demands for payment. Plaintiff also contends that Defendant's claim that it never saw the Invoices is belied by Plaintiff's letter dated May 19, 2011 which included copies of the Invoices.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v.*

Furia, 116 A.D.2d 694, 695 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia*, *supra*.

A party establishes a *prima facie* case for an account stated by proving that the defendants received and retained bills for services rendered to the defendants without objection. *Nebraskaland, Inc. v. Best Selections, Inc.*, 303 A.D.2d 662 (2d Dept. 2003); *Herrick Feinstein LLP v. Stamm*, 297 A.D.2d 477 (1st Dept. 2002). There can be no account stated where no account was presented or where any dispute about the account is shown to have existed. *Abbott, Duncan & Wiener v. Ragusa*, 214 A.D.2d 412 (1st Dept. 1995), citing *Waldman v. Englishtown Sportswear*, 92 A.D.2d 833, 836 (1st Dept. 1983).

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d.

C. Application of these Principles to the Instant Action

The Court denies Plaintiff's motion based on the Court's conclusion that there exist issues of fact, including the significance of the Invoices on which Plaintiff relies but which Defendant has denied seeing in the past, that preclude summary judgment. Plaintiff suggests that the Court should reject, as disingenuous, Defendant's denial regarding the Invoices in light of the fact that Plaintiff provided copies of the Invoices with its May 2011 demand letter. The Court, however, gleans that Defendant intended to communicate that it denied seeing the Invoices at the time they were sent by Plaintiff, not that Defendant has never seen them prior to the filing of this motion. The Court is not addressing the plausibility of Defendant's denial in this regard, but rather concludes that summary judgment is inappropriate at this juncture in light of that denial, which the Court cannot reject as a matter of law.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on June 4, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY
May 1, 2012

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
MAY 08 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE