[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Habilis Design, LLC,

- v -

Hirtenstein et al.

INDEX NO. 113988/09

MOTION DATE

MOTION SEQ. NO. 04

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

AUG 25 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 8/24/11

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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HABILIS DESIGN, LLC,

Plaintiff,

Index No.:
113988/2009

-against-

MICHAEL HIRTENSTEIN and INTERNATIONAL FIDELITY INSURANCE COMPANY,

Defendants.

----------X

LOUIS B. YORK, J.:

Plaintiff Habilis Design, LLC moves, pursuant to CPLR 3212, for an order granting partial summary judgment on its second and third causes of action, and dismissing defendant Michael Hirtenstein's (defendant) first counterclaim.[1] According to plaintiff, defendant now owes $78,057.76 for plaintiff's services provided to decorate and design defendant's apartment. Defendant disputes the fee and alleges that, among other things, plaintiff breached its contract.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff is an interior design and decorating firm located in New York, New York. Aaron Kirsten (Kirsten) is a principal of plaintiff. On April 7, 2009, Kirsten provided a proposal to defendant for the performance of interior decorating and design

[1] This action proceeds against Michael Hirtenstein as the sole defendant.

services. Defendant was soon to be leasing a penthouse apartment in New York.

The proposal given to defendant in April 2009 was a standard contract used by the American Society of Interior Designers. Pursuant to the contract, plaintiff was to provide the following design services:

> a survey of the existing conditions, determine design preferences, an initial design study, preparation of drawings to illustrate designs, preparation of interior design concepts which included "color schemes, interior finishes, wall coverings, floor coverings, ceiling treatments, lighting treatments and window treatments," layouts showing furniture and furnishings, schematic plans for proposed cabinet and other installation work.

Kirsten Affidavit, ¶ 7.

Plaintiff, according to the contract, was able to purchase decorating items and act as an intermediary on defendant's behalf. The contract states the following with respect to purchasing on behalf of clients, in pertinent part:

> Merchandise and Interior Installations to be purchased through Designer will be specified in a written Proposal prepared by Designer and submitted in each instance for Client's written approval. Each Proposal will describe the item and its price to Client (FOB point of origin) ("Client Price"). The Client Price for each item of Merchandise and Interior Installations includes a fee for services rendered in this phase of the Project.
>
> ***
>
> No item can be ordered by Designer until the Proposal has been approved by Client, in writing, and returned to Designer with full payment. Delivery, shipping, handling charges, applicable taxes, are payable when the item is ready for delivery to and/or installation at Client's residence, or to a subsequent supplier for

further work upon rendition of Designer's invoice. Plaintiff's Exhibit C, at 4. Additionally, pursuant to the contract, plaintiff was to receive a non-refundable deposit prior to commencing services.

On April 15, 2009, defendant made some revisions to the contract and sent it back to plaintiff. On April 16, 2009, defendant's proposed revisions were incorporated into the contract. On April 28, 2009, defendant e-mailed Kirsten that he was accepting the proposal. Specifically, defendant e-mailed, in pertinent part:

> Aaron, e-mail me and lacey the agreement and ask her to print and I will sign and get it back to you with a check today. Thanks for all the effort without even having this ... .
> As for the furniture layouts, can you possibly get it to me by today/tomorrow since we may be off to capri on thurs for a long weekend and I want to really lock things up by then? Also can you include an inventory of all the furniture, art, rugs, etc and what pieces you want to use and what ones you think shouldn't be there.

Plaintiff's Exhibit D.

According to Kirsten, after this e-mail, he "purchased numerous items" on behalf of defendant and completed the project around mid-June 2009. ~~Kirsten Affidavit, ¶ 9.~~ On June 15, 2009, defendant moved into the apartment. Kirsten contends that after the defendant moved in, defendant requested that Kirsten purchase some minor additional items.

On June 22, 2009, defendant e-mailed Kirsten that he was

satisfied with plaintiff's services. The e-mail states the following:

> Also, christina and I wanted to thank you, not just by paying your bills, but more personally....would you and your boyfriend like to stay in bridgehampton this coming weekend with us and a few friends? They may even be possible new business. Also, I want to redesign my yard so maybe you want to get involved some how?

Plaintiff's Exhibit F.

On June 27, 2009, defendant's fiancé, Christina Hale (Hale) arrived at defendant's home unexpectedly and allegedly found Kirsten involved in a sexual encounter with another man. Defendant immediately terminated plaintiff's services at this point. Kirsten followed up with an e-mail to defendant apologizing for his behavior. Hale states that after the incident with Kirsten she "never again felt comfortable in that office or the Apartment." Hale Affidavit, ¶ 11. Hale continues that due to her discomfort, she and defendant moved out of the apartment.

On July 7, 2009, plaintiff delivered an invoice to defendant in the amount of $78,057.76. The invoice lists, in detail, the merchandise purchased on defendant's behalf, the design fees and other expenses. The expenses were mostly for purchases and services provided prior to June 27, 2009, with a few items being listed as being purchased on June 29, 2009.

Defendant did not respond to this invoice. On August 18,

2009, plaintiff filed a mechanic's lien against the premises. On October 1, 2009, plaintiff filed a complaint with five causes of action, including foreclosure of the bond, breach of contract, account stated, unjust enrichment and quantum meruit. On October 22, 2009, defendant arranged for the discharge of the lien by filing a bond.

In August 2010, defendant answered the complaint and set forth a counterclaim that plaintiff "willfully exaggerated the amount for which it claimed a lien within the meaning of Lien Law 39-a." Plaintiff's Exhibit B, ¶ 22. Defendant is seeking to be reimbursed for the fees he incurred in discharging the lien. He then filed a motion to dismiss the complaint.

On July 1, 2010, this court issued an order dismissing plaintiff's first cause of action. The court noted that plaintiff claimed to have filed the mechanic's lien in error, and that it is no longer pursuing the action to foreclose the mechanic's lien. The court denied the part of the defendant's motion seeking to dismiss the other causes of action.

Now, plaintiff moves, pursuant to CPLR 3212, for an order granting summary judgment on its second and third causes of action, and also on defendant's first counterclaim.

Plaintiff contends that it performed its services pursuant to a contract, and that it is therefore entitled to its fees. Plaintiff disputes the events that occurred on June 27, 2009,

however, it maintains that, even if something inappropriate took place, this did not negate the defendant's responsibility to pay the invoice.

Defendant contends that Kirsten's deposition is still outstanding, and that this should preclude summary judgment at this time. Defendant further alleges that there are triable issues of fact that remain with respect to the account stated and the breach of contract causes of action. Additionally, defendant contends that all of plaintiff's causes of actions may be barred since plaintiff is not licensed as a home improvement contractor.

DISCUSSION

I. Summary Judgment:

"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 (1st 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 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). The function of the court is one of issue finding, not issue

determination. *Ferrante v American Lung Assn.*, 90 NY2d 623, 630 (1997).

II. Breach of Contract:

Defendant argues that plaintiff failed to meet its burden with respect to the breach of contract cause of action, and, as such, plaintiff should not be granted summary judgment. Specifically, defendant alleges that plaintiff relies on a single invoice, without providing any evidence that it purchased items for the apartment. Defendant also contends that plaintiff has not provided proof that, pursuant to the contract, defendant approved in writing any of the purchases for merchandise. Defendant further maintains, among other things, that Kirsten's alleged misconduct has "materially" breached the agreement, including the "implied covenant of good faith and fair dealing." Defendant's Memorandum of Law, at 8.

Plaintiff claims that it performed the services pursuant to the agreement and that it is entitled to its fees. Defendant did not object to these fees once it received the invoice. Plaintiff further maintains that defendant's admission via e-mail that plaintiff is entitled to its fees thereby ratifies the amounts given on the invoice.

The elements of a breach of contract claim are: (1) the existence of a valid contract (2) performance of the contract by the injured party; (3) breach by the other party; and (4)

resulting damages. *Morris v 702 East Fifth Street HDFC*, 46 AD3d 478, 479 (1st Dept 2007), citing *Furia v Furia*, 116 AD2d 694 (2d Dept 1986).

As previously mentioned, the purchasing section of the contract provides that prior to purchase, items must be submitted to the client for written approval. The recorded e-mails provided to the court appear to demonstrate that plaintiff informed defendant about the items it intended to purchase and then received verification from defendant via e-mail. However, there is no documentation verifying that defendant had an opportunity to see the costs of the merchandise before the purchase or had an opportunity to agree in writing. Moreover, in support, defendant states that plaintiff "was not authorized to order any items unless I had approved its proposal in writing and on this motion, Habilis presents no evidence that I had approved in writing purchases of any of the items for which it seeks compensation." Hirtenstein Affidavit, ¶ 11.

In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion." *People v Grasso,* 50 AD3d at 544, citing *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). Due to this discrepancy between whether or not plaintiff complied with the purchasing section of the contract, summary judgment cannot be granted on this cause of

action at this time.

III. Account Stated:

Plaintiff argues that it is able to recover against defendant on the basis of the account stated. Plaintiff states that it provided an invoice to defendant in the amount of $78,057.76, none of which has been paid. Although defendant received this invoice, he allegedly did not object to it.

An account stated is defined as follows:

> [A]n account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance ... Judge Cardozo wrote that the very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness, *insimul computassent*, so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained.
>
> The receipt and retention of an account, without objection, within a reasonable period of time, coupled with an agreement to make partial payment, gives rise to an account stated entitling the moving party to summary judgment in its favor [internal quotation marks and citations omitted].

Morrison Cohen Singer & Weinstein, LLP v Ackerman, 280 AD2d 355, 355-356 (1st Dept 2001).

Applying the above law to the facts at hand, the court finds that the plaintiff is able to set forth a cause of action for an account stated. The record indicates that plaintiff provided most of the interior decorating services pursuant to its contract with defendant prior to defendant moving into the apartment on June 15, 2009. An e-mail conversation between defendant and

Kirsten detailed defendant's satisfaction with plaintiff's work and his intent to pay the bill. Evidently defendant did pay the nonrefundable deposit prior to the start of plaintiff's services. It is undisputed that plaintiff's services were terminated on June 27, 2009. On July 7, 2009, defendant received an invoice from plaintiff. He did not pay this invoice nor voice any complaints with the invoice. In fact, defendant did not respond in any way to the invoice until he answered plaintiff's complaint in August 2010.

Defendant's arguments for why an account stated is not present are unavailing. For instance, defendant claims that he objected to the account stated in writing. Defendant is referring to the blank e-mail he sent to Kirsten which solely had "Ywhsnxjxjjs" as its subject line. Defendant's Exhibit B. Defendant claims that he sent Kirsten this e-mail, "concerning Habilis' invoice and its conduct." Defendant's Memorandum of Law, at 12. This vague e-mail, with simply a meaningless subject heading, does not demonstrate any objection to the invoice. Even if it could possibly be seen as an objection, it was sent in September 2010, which was over a year from the receipt of the invoice.

Defendant also argues that plaintiff cannot prevail on an account stated since plaintiff sent the bill after the relationship deteriorated. However, the cases cited to by

defendant, which include *Bernstein v Tisch* (102 AD2d 778, 779 [1st Dept 1984]), do not bolster defendant's case. In *Bernstein v Tisch*, where an interior decorator was fired before rendering his bill, the Court did not find that there was an account stated because the account stated was only an approximation, and not accurate. Moreover, the Court noted that the "defendants terminated plaintiff's services before completion." *Id.* In the present case, the record indicates that plaintiff performed the bulk of the services prior to being terminated and that the plaintiff and defendant maintained a good relationship prior to this point. Plaintiff submitted a detailed invoice, not an approximation, to defendant, who did not dispute this invoice.[2]

IV. Defendant's First Counterclaim:

Defendant argues that he should be permitted to recover the fees he incurred as a result of discharging the mechanic's lien, previously filed by plaintiff. Plaintiff seeks to have this counterclaim dismissed.

There is no longer a lien on the property. The court has already determined in the prior motion that the plaintiff's first cause of action to foreclose on the property is dismissed. The court also noted that plaintiff admitted to filing the mechanic's

[2]Apparently some of the charges on the invoice occurred after plaintiff was undisputedly fired. As such, these charges are not a part of the payment owed to plaintiff.

lien in error, and as such, it was not a "willful" exaggeration of the lien. Accordingly, defendant cannot show any basis for retrieval of the fees incurred, and the plaintiff is granted summary judgment dismissing the first counterclaim.

V. Outstanding Discovery:

Defendant argues that the plaintiff's motion is premature since Kirsten has not yet been deposed. However, defendant cannot defeat summary judgment on the account stated cause of action by claiming a lack of discovery. Defendant has not shown that any facts exist, especially regarding Kirsten's alleged conduct, which cannot be stated at this time, which would defeat summary judgment. *Frierson v Concourse Plaza Associates*, 189 AD2d 609, 610 (1st Dept 1993), citing CPLR 3212 (f).

VI. Plaintiff's Status as Home Improvement Contractor:

Defendant argues that the motion for summary judgment should be denied since plaintiff may have been required to be licensed as a home improvement contractor prior to providing services to defendant. *See e.g. Gordon v Adenbaum*, 171 AD2d 841, 841 (2d Dept 1991) ("It is well settled that not being licensed to practice in a given field which requires licensure precludes recovery for the services performed, either pursuant to contract or in quantum meruit [internal quotation marks and citations omitted]").

This court previously noted that plaintiff "does not appear

to exceed professional offerings of an interior designer" and would not require a home improvement license. *See Habilis Design LLC v Hirtenstein,* 2010 WL 2897840, 2010 NY Misc LEXIS 3238 (Sup Ct, NY County 2010). It noted that plaintiff's work might not constitute statutory home improvement, and aligned plaintiff's situation with that of *Frank v Sobel* (38 AD3d 229, 230 [1st Dept 2007]). The Court in *Frank v Sobel* stated the following:

> If it is indeed established that plaintiff supervised the implementation of his own designs for aesthetic purposes, and never performed or supervised any services that required the expertise of a licensed professional, the fact that he is not a licensed architect or home improvement contractor would not bar recovery of his fee.

Id. at 230.

This court has already sufficiently addressed the parties' contentions in the prior motion to dismiss, and does not find that any new evidence has been set forth by defendant to allege that plaintiff may not recover for its fees due to a lack of license. For instance, defendant's conclusory allegations, such as the fact that plaintiff may have been involved in the contractors' work, are not enough to defeat the motion for summary judgment.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff Habilis Design, LLC's motion for summary judgment on its account stated cause of action is

granted, and such a claim is severed. However, the invoice total is $78,057.86. But Exhibit E to the plaintiff's moving papersincluded six items that were purchased on June 29, 2009, two days after plaintiff was fired. The amount of those purchases must be deducted from the total. They add up to $2,894.90. Therefore, the Clerk of the Court is directed to enter judgment in favor of Habilis Design, LLC, and against defendant Michael Hirtenstein in the amount of $75,162.96 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 portion of plaintiff's action seeking summary judgment dismissing defendant's first counterclaim is granted; and it is further

ORDERED that the portion of plaintiff's action seeking summary judgment on the breach of contract cause of action is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 8/24/11

FILED

AUG 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

J.S.C.

LOUIS B. YORK J.S.C.