SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

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WASTE MANAGEMENT OF NEW YORK, LLC,

Plaintiff,

-against-

CROWN WASTE CORP., CHRISTOPHER ANTONACCI, ROBERT CARPINELLI,

Defendants.

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TRIAL/IAS PART 17

INDEX # 600862/11

Motion Seq. 1
Motion Date 2.16.12
Submit Date 4-30-12

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

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Plaintiff moves by notice of motion for the following relief: an order pursuant to CPLR 3212, granting summary judgment as against defendants Crown Waste Corp., (hereinafter Crown) and Christopher Antonacci in favor of the plaintiff; and an order pursuant to CPLR 3215, granting a default judgment as against defendant Robert Carpinelli.

On or about September 24, 2009, defendants Antonacci and Carpinelli executed a credit application with plaintiff. Pursuant to the credit application, defendants represented that they were equal partners of defendant Crown. The credit application was approved and defendant Antonacci signed an agreement called " Industrial Waste and Disposal Services Agreement." This document was executed on October 5, 2009. Simultaneously with the execution of this agreement, defendants Antonoacci and Carpinelli executed a personal guarantee.

Plaintiffs state that between October 10, 2009 and January 31, 2010, defendants requested waste disposal services from plaintiff. Attached to the motion papers are copies of invoices

purportedly sent to the defendants. Plaintiffs allege that defendants breached the agreement and the amount of $129,023.84 is due and owing, despite demand for same.

Plaintiff additionally alleges that it is entitled to 18% per annum interest as per paragraph 8 of the agreement and reasonable attorney's fees in the amount of $25,804.77.

In opposition, defendant Crown and Antonacci[1] assert that there are questions of fact which preclude summary judgment which relate to inaccurate charges for tonnage invoiced by plaintiff to defendant. Defendants additionally argue that the rate of 18% per annum interest is usurious with respect to the individual defendant Antonacci. Therefore, the contract is void and unenforceable.

Defendants contend that plaintiff's accounting is fatally flawed and cannot support summary judgment as a matter of law. Defendant argues that plaintiff's accounting does not accurately reflect payments made by corporate defendant. The court notes, however, save for a copy of one check in the amount of $16,762.98, defendants have not provided documentation with respect to any other payments made to plaintiff for the court's review.

Finally, defendant argues that the case has yet to be scheduled for a preliminary conference, discovery has not been directed by the court, nor have the parties exchanged disclosure materials. Defendant indicates that compliance with discovery by plaintiff will produce additional evidence that will controvert plaintiff's claim as contained in its complaint.

Submitted in opposition to the instant application is an affidavit of Joanie Antonacci, spouse of defendant Antonacci. She affirms that she handles the paperwork in the office and frequently questioned the invoices by phone calls to plaintiff's accountants receivable department. She explained that she did not recognize the items that had been billed and requested "back up documents." Notwithstanding her requests, the back up materials were never sent to plaintiff. She also states that "the accounting was confusing because all of the invoices that were sent to us did not appear on the statements. I repeatedly sent copies of the statements with notes that payment had been made and specified the check number of the check sent for payment on the invoice."

In reply, plaintiff asserts, *inter alia*, that defendant has failed to raise any legal arguments or facts which would set for any triable issues of fact. Plaintiff argues that defendants' conclusory statement and belief that they are "confused" by the accounting is not a triable issue of fact. Most importantly, defendant has offered no evidence to show that these invoices are not accurate; nor has defendant identified a single transaction which they claim to be incorrect. At no time does defendant offer any allegation, evidence or proof of any payment allegedly made and not credited.

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[1]The court notes that the portion of the motion with respect to defendant Carpinelli's default has been withdrawn and severed due to a pending bankruptcy proceeding.

Based on the foregoing, the decision of the court is as follows:

"It is well settled that a the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox,* 3 NY2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]; *Zuckerman v City of New York,* 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]; *Bhatti v Roche,* 140 AD2d 660, 528 N.Y.S.2d 1020 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 390 N.E.2d 298, 416 N.Y.S.2d 790 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092, 479 N.E.2d 229, 489 N.Y.S.2d 884 [1985]).

If a sufficient prima facie showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980], supra). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513, 529 N.Y.S.2d 134 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates,* 191 AD2d 631, 595 N.Y.S.2d 236 [2d Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Sillman v Twentieth Century Fox*, 3 NY2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957], supra)." *Recine v. Margolis,* 24 Misc. 3d 1244A; 901 N.Y.S.2d 902

A plaintiff establishes a breach of contract action by demonstrating the existence of a contract between the parties, performance by the plaintiff, breach by the defendant and damages resulting from the breach. (*JP Morgan Chase v J.H. Elec. of New York, Inc.*, 69 AD3d 802, 803 [2nd Dept 2010]). Contract language which is clear and unambiguous must be enforced according to its terms. (*W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

It is well settled that when sophisticated and counseled business persons set down their agreement in a clear, complete document, their writing should be enforced according to its terms. (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [quotation marks and citation omitted]). The court's role is to enforce the parties' agreement, not to create a new contract under the guise of construction. (*NML Capital v Republic of Argentina*, 17 NY3d 250, 259 [2011]).

An action on an account stated is established by proving that the defendants received and retained bills for services rendered or goods provided to defendants without objection. It 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 due. (*Citibank, N.A. v Jones*, 272 AD2d 815 [2nd Dept 2000]). It cannot, however, be used to create liability where none otherwise exists or utilized simply as another means to attempt to collect under a disputed contract. (*Ross v Sherman*, 57 AD3d 758, 759 [2nd Dept 2008]).

An account becomes stated in one of two ways: first, where the debtor expressly admits to its being correct, which makes the account binding on both parties; and second, where, instead of an express admission of the correctness of the account, the party receiving it retains the statement and makes no objection to it within a reasonable time. Silence will be construed as assent and the party will be bound by it as if it were a stated account. (*Rodkinson v Haecker*, 248 NY 480, 485 [1928]).

Applying the above principles to the case at bar, the court finds that plaintiff has made a prima facie showing of entitlement to summary judgment. It is uncontroverted that a contract exists between the parties and that defendants received the invoices. However, defendants Crown and Antonacci have raised a triable issue of fact as to whether such charges were contested as evidenced by the affidavit of Joanie Antonacci. The affiant indicated that on numerous occasions she spoke with employees in plaintiff's accounts receivable department to question the invoices received. Thus, an issue remains whether defendants, in fact, interposed objections to charges made to them.

Defendant Carpinelli has failed to answer or otherwise appear in this action despite being properly served.

Accordingly, it is

ORDERED, that plaintiff's application for an order pursuant to CPLR 3212, granting summary judgment is **DENIED** without prejudice.

ORDERED, that all parties shall appear at a preliminary conference at the supreme courthouse, 100 Supreme Court Drive, Mineola, N.Y., lower level, on June 12, 2012, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or order of this court. All parties are forewarned that failure to attend the conference may result in judgment by default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
May 9, 2012

ENTER:

HON. JEFFREY S. BROWN, JSC

ENTERED

MAY 14 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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