Financial Med. Sys., Inc. v Nassau Health Care Corp.
2013 NY Slip Op 34103(U)
October 9, 2013
Supreme Court, Nassau County
Docket Number: 602645-12
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	TRIAL/IAS PART: 16
FINANCIAL MEDICAL SYSTEMS, INC.,	NASSAU COUNTY
Plaintiff,	Index No: 602645-12
-against-	Motion Seq. No. 1 Submission Date: 8/21/13
NASSAU HEALTH CARE CORP.,	
Defendant.	
----------x	

The following papers having been read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affidavit in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Reply Memorandum of Law in Further Support.....x

This matter is before the Court for decision on the motion filed by Defendant Nassau Health Care Corp. ("NHCC" or "Defendant") on June 10, 2013 and submitted on August 21, 2013. For the reasons set forth below, the Court 1) grants the branch of Defendant's motion seeking dismissal of the Second, Third and Fourth Causes of Action in the Complaint; and 2) denies the branch of Defendant's motion seeking dismissal of the First Cause of Action, with the caveat that any claims prior to December 21, 2006 are time-barred by the six year statute of limitations set forth in CPLR § 213(2).

BACKGROUND

A. Relief Sought

Defendant moves for an Order, pursuant to CPLR §§ 3211(a)(1) and (7), 1) dismissing Plaintiff Financial Medical System, Inc.'s ("FMS" or "Plaintiff") Second Cause of Action for

account stated; 2) dismissing Plaintiff's Third and Fourth Causes of Action for quantum meruit and unjust enrichment; and 3) dismissing Plaintiff's First Cause of Action for breach of contract to the extent that it relates to Plaintiff's recovery of $742,497.22 in alleged damages related to its on-site personnel's salaries and benefits.

Plaintiff Nassau Health Care Corp. ("NHCC" or "Plaintiff") opposes the motion.

B. The Parties' History

The Complaint (Ex. A to Keane Aff. in Supp..) alleges as follows:

FMS is a New York corporation. NHCC ("Hospital") is a New York public benefit corporation with its principal place of business at 2201 Hempstead Turnpike, East Meadow, New York. Pursuant to a Billing, Collection and Services Agreement dated February 1, 2003 ("Original Agreement"), as amended in 2005, 2006, 2007, 2008, 2009, 2010 and 2011 (collectively with the amendments, "Agreement") (Ex. A to Compl.), FMS provided various services and on-site personnel to NHCC, for which FMS has not been paid and/or reimbursed.

Pursuant to the Agreement, FMS was to provide administrative services to NHCC which included, but were not limited to, 1) exclusive billing and collection services, 2) exclusive coding services, 3) credentialing services, 4) training services to healthcare providers, and 5) other administrative services. In addition, pursuant to the Agreement, FMS provided on-site personnel whose compensation was to be reimbursed by NHCC.

The Agreement included a detailed Fee Schedule pursuant to which NHCC agreed to pay FMS: 1) Monthly Fixed Fees, 2) Reimbursement for On-Site Personnel, 3) Bonuses, and 4) Reimbursement for Postage and Charge Ticket and Encounter Forms. Pursuant to the Agreement, the Monthly Fixed Fees began at $115,000 and steadily increased to an amount totaling, but not to exceed, $155,000. Compensation for the services provided by FMS' on-site personnel was not included in the Monthly Fixed Fee but, rather, was specifically required by a different provision in the Agreement. In addition, the Agreement contained provisions for 1) FMS to receive a bonus if it collected certain sums, and 2) NHCC to reimburse FMS for postage and the cost of charge ticket and encounter forms.

Plaintiff alleges that it performed its obligations under the Agreement and submitted timely invoices to Defendant. Plaintiff alleges that the revenues it collected entitled Plaintiff to bonuses which Defendant failed to pay. Plaintiff also alleges that it did not receive from

Defendant the reimbursements for the salaries and unemployment benefits for the On-Site Personnel it provided. Plaintiff alleges that, as of November 2012, NHCC owed FMS at least $852,574.27 ("Amounts Owed") for services rendered and fees and bonuses earned by FMS pursuant to the Agreement, but NHCC has withheld payment, disputing its obligation to pay the Amounts Owed.

The Complaint contains four (4) causes of action: 1) breach of the Agreement by Defendant for failing to pay Plaintiff the Amounts Owed for services provided by Plaintiff to Defendant under the Agreement, 2) account stated based on the allegation that on or about May 31, 2012, an account was stated with NHCC in the sum of $852,574.27 for services rendered and fees owed under the Agreement to which Defendant never objected, and Defendant has failed to satisfy that obligation, 3) *quantum meruit* based on the allegation that Plaintiff substantially performed its obligations under the Agreement and Defendant has breached its obligations under the Agreement by withholding payments due to Plaintiff, and 4) unjust enrichment by Defendant which has improperly retained the benefit of the services and personnel provided by Plaintiff, for which it has not made payment.

In support of its motion, Defendant provides a copy of the Agreement (Ex. C to Keane Aff. in Supp.), Plaintiff's June 6, 2012 email and attached invoice (*id.* at Ex. D) (*see* Compl. at ¶¶ 33 and 52), and the December 17, 2012 letter from Defendant to Plaintiff (*id.* at Ex. E) in which Defendant disputed the amounts owed to Plaintiff (*see* Compl. at ¶ 39). Defendant submits that this documentary evidence defeats Plaintiff's claims.

Section 1.4 of the Agreement provides, in pertinent part, as follows:

> FMS agrees to assign certain of its employees as are approved by, designated by, and acceptable to NHCC to perform certain FMS Services on-site at one or more of the Facilities as requested by NHCC (hereinafter, "On-Site Personnel"). These On-Site Personnel shall be employees of FMS and receive compensation and benefits from FMS, notwithstanding their assignment to work on-site at a NHCC Facility. Compensation, including the mutually agreed to salary and cost of benefits attributable to the On-Site Personnel ("Compensation") for the services provided by the On-Site Personnel will not be included in the Monthly Fixed Fee set forth in Section A of Schedule 4, and shall be reimbursed to FMS pursuant to Section B of Schedule 4...All FMS invoices for reimbursement of costs, as set forth in this paragraph, shall be supported with sufficient and appropriate documentation and data and such invoices and documentation shall be subject to audit by NHCC.

Section B of Schedule 4 of the Agreement, titled "Reimbursement For On-Site Personnel," provides as follows:

> Beginning as of the Effective Date, NHCC agrees to pay FMS on the first day of each month, mutually agreed amounts to reimburse FMS for the cost of the On-Site Personnel (as more specifically described in Section 1.4) for the prior month. It is anticipated that during the Term of the Agreement, NHCC may approve, designate and accept substitute and/or additional On-Site Personnel and their respective salaries.
>
> In addition to reimbursement of Salary, NHCC will reimburse FMS a mutually agreed to percentage of each Salary for fringe benefits and payroll expenses.
>
> Contract Amendment # 6 provides as follows at page 2, paragraph 1:
>
> Except as otherwise noted hereafter, the terms of the Original Agreement and all subsequent Amendments are hereby extended as of the effective date of this CONTRACT AMENDMENT #6 for an additional one (1) year period that shall commence on February 1, 2010 and end on January 31, 2011.

On June 6, 2012, Jeanne Morris ("Morris"), Plaintiff's Chief Financial Officer, sent an email to the Hospital regarding FMS' internal close-out audit for the Agreement (Ex. A to Keane Aff. in Supp.). In that email, FMS acknowledged that it had never billed the hospital for On-Site Personnel, but was now invoicing the Hospital for the first time for salary reimbursement for 2003 to 2011. The June 6, 2012 email provides, in pertinent part, as follows:

> Finally, we had not billed NUMC for salary reimbursement for all of the On-Site Personnel (see, February 1, 2003 Billing, Collections and Services Agreement, Page 3, Section 1.4). Consequently, we are invoicing those amounts as part of our final close. We apologize for the inconvenience and for the fact that this small reimbursement comes on a single invoice and therefore appears sizeable. The total amount of the salary reimbursement is $742,497.22, the invoice is also attached to this email.

Defendant submits that FMS also provided the Hospital, for the first time in the June 6, 2012 email, a breakdown for the alleged salaries paid to On-Site Personnel, which included a 15% mark-up for fringe benefits. No time sheets, W-2 forms or other employee records were provided with that email, and no justification for the 15% mark-up was provided. Defendant notes that the Complaint states that the Hospital disputed the amounts allegedly owed by refusing to tender payment of the invoiced amounts. Specifically, paragraphs 34 and 35 of

the Complaint allege that NHCC "withheld payments from FMS" and "refused to make a payment for the amounts owed to FMS."

In opposition, Paul Abrams ("Abrams"), the President of FMS, affirms that, pursuant to the Agreement, FMS conducted employee interviews and made decisions regarding individuals designated as FMS employees at NHCC facilities. FMS provided On-Site Personnel to NHCC from 2003 through 2011, and the salaries and benefits for these employees were paid from FMS' payroll. In addition, NHCC/NUMC occasionally conducted its own interviewing and hiring of individuals to be On-Site Personnel. NHCC hired these individuals and determined their salary, but FMS paid their salary and benefits. With respect to employees interviewed and hired by FMS, department heads for FMS and NHCC discussed, and agreed to, salary ranges.

Abrams affirms that, as part of Contract Amendment # 4 to the Agreement, executed March 31, 2008, FMS bargained for and received an expanded entitlement to On-Site Personnel Reimbursements. In addition to monthly reimbursement payments for the salaries of the On-Site Personnel, NHCC agreed to reimburse FMS for a percentage of each Salary for fringe benefits and payroll expenses and any costs due to filing of unemployment benefits by On-Site Personnel. As part of the negotiations for Contract Amendment # 6, executed February 1, 2010, FMS did not agree to relieve NUMC of its obligation to reimburse FMS for the salaries and benefits of its On-Site Personnel.

Abrams affirms that NHCC was always "fully aware" (Abrams Aff. in Opp. at ¶ 19) that it was receiving FMS On-Site Personnel at its facilities to perform certain services, and FMS never deviated from the determined salary ranges. Abrams affirms that FMS regularly invoiced NUMC for some of the On-Site Personnel Reimbursements for salary.[1] Abrams provides copies of 1) FMS Invoice No. 06-12-5200, submitted to NUMC for Salary Reimbursement for the period ending December 1, 2006 (Ex. 1 to Abrams in Opp.), and 2) FMS Invoice No. 07-01-5254, submitted to NUMC for Salary Reimbursement for the period ending January 1, 2007 (*id.* at Ex. 2). Abrams affirms that these invoices are samples of the invoices that FMS regularly sent to NUMC for On-Site Personnel Reimbursements. Abrams also affirms that on June 6, 2012, he was copied on an email from FMS' Chief Financial Officer which included an attached invoice

[1] Abrams affirms that NHCC is the successor in interest to Nassau University Medical Center ("NUMC"), and NHCC has assumed all obligations of NUMC relative to its contracts and agreements with FMS.

dated May 31, 2012. Abrams affirms that the May 31, 2012 invoice was made in the ordinary course of FMS' business, and was sent to NUMC for the On-Site Personnel reimbursements it was entitled to under the Agreement. Abrams affirms that NUMC did not reimburse FMS for the outstanding $742,497.22 owed to FMS for On-Site Personnel Reimbursements under the Agreement.

C. The Parties' Positions

Defendant submits that, 1) pursuant to Section 1.4 of the Agreement, Defendant agreed to be responsible for mutually agreed-to salary and benefits for on-site personnel, if any, which had to be substantiated with concurrent documentation for Defendant's review; 2) Section B of Schedule 4 of the Agreement, titled "Reimbursement for On-Site Personnel," reiterated that Defendant's mutual agreement and approval was required for any On-Site Personnel's salaries or fringe benefits, and provided that the Hospital was only responsible for reimbursing FMS for the prior month's invoiced expenses; and 3) Defendant's right to review documents and approve salaries and benefits incurred by FMS for On-Site Personnel, and its obligation to pay only for the prior month's invoiced bill, generally remained unchanged until February 1, 2010, when the parties executed Contract Amendment # 6 which contained a new Amended Schedule 4 which deleted the provision entitling FMS to reimbursement for On-Site Personnel.

Defendant submits that 1) Plaintiff's account stated claim cannot proceed because it is duplicative of its breach of contract claim, and because there is a written Agreement governing the parties' dispute; 2) alternatively, Plaintiff's account stated claim cannot proceed in light of the fact that a) the Complaint acknowledges that the Hospital refused to pay the amounts demanded, and formally objected to the amount owed in its letter dated December 17, 2012; b) the parties never had an underlying agreement or understanding as to the amounts owed, and no such agreement could have existed in light of the fact that Plaintiff failed to seek reimbursements for On-Site Personnel until June of 2012, nine years after execution of the Agreement, and provided no documentation in support of its request; and c) Plaintiff conceded that the submission of a single invoice violated the Agreement's provision regarding monthly billing for On-Site Personnel and the need for the Hospital's agreement to such charges; 3) the Court should dismiss the quasi-contractual causes of action for quantum meruit and unjust enrichment because the Agreement governs the parties' dispute; 4) the Court should dismiss

Plaintiff's breach of contract claim because Plaintiff has failed to comply with certain conditions precedent in the Agreement, specifically the Hospital's notice of, and agreement to, the amounts owed for the On-Site Personnel; 5) dismissal of Plaintiff's contract claim is particularly appropriate where, as here, Defendant is a municipal entity in light of case law holding that a party dealing with a municipal entity must abide by all laws, rules and other requirements before seeking to enforce an agreement with that entity; and 6) even if the Court permits Plaintiff to proceed with its breach of contract claim, the Court should direct that a) any claims prior to December 21, 2006 are time-barred by the six year statute of limitations set forth in CPLR § 213(2); and b) any claims after February 1, 2010 are contractually excluded in light of the fact that the parties mutually agreed in writing to eliminate FMS' "purported" right to reimbursement for On-Site Personnel (D's Memo. of Law in Supp. at p. 19). Thus, Defendant submits, the Court should limit FMS' breach of contract claim to the three-year time period between December 21, 2006 and January 31, 2010.

In opposition, Plaintiff submits that 1) the June 6, 2012 email and invoice, as well as the December 17, 2012 letter, do not constitute documentary evidence within the meaning of CPLR § 3211(a)(1); 2) the Court should disregard the affirmation in support of Defendant's counsel, both because it does not constitute documentary evidence within the meaning of CPLR § 3211(a)(1), and because it does not properly establish the foundation for the admissibility of the invoice that Defendant received and rejected; 3) even if the Court considers this evidence, dismissal is not warranted because the documentary evidence does not utterly refute or definitively dispose of Plaintiff's claims, *e.g.*, because the June 6, 2012 email and attached invoice arguably represents the last in a series of FMS invoices submitted to NHCC for salary reimbursement, and the December 2012 letter from Defendant's counsel does not establish Defendant's objection to the invoice, but rather establishes the objection of Defendant's counsel; 4) there is no condition precedent foreclosing FMS' entitlement to On-Site Personnel Reimbursement; neither Section 1.4 of the Agreement nor Section B of Fee Schedule 4 specifically states that reimbursement for On-Site Personnel is conditioned on express notice to NHCC containing documentary evidence "that passes an NHCC audit and pre-approval process" (P's Memo. of Law in Opp. at p. 13); 5) Plaintiff's interpretation of the Agreement, that FMS is entitled to reimbursement of salaries and benefits for its On-Site Personnel pursuant to the

invoice attached to the June 2012 email in an amount incorporating the 15% mark-up for fringe benefits, is reasonable and supported by the Agreement and its amendments; 6) the omission of the contract's amended fee schedule provision pertaining to Reimbursement of On-Site Personnel did not relieve Defendant of its responsibility to reimburse FMS, and paragraph 1 of Contract Amendment # 6 supports the conclusion that Section 1.4 of the Original Agreement was still in effect; 7) the Complaint properly alleges a claim for account stated, and Plaintiff's objections lack merit in light of the fact that a) the issue of whether Defendant's objection to the account was timely is a question of fact not properly resolved on a motion to dismiss; b) the June 6, 2012 email and attachment do not constitute admissible evidence on the issue of whether FMS provided NHCC with underlying documentation substantiating the actual expenses for the On-Site Personnel and obtained NHCC's approval; and c) the account stated claim remains viable even though the Complaint alleges that the account was stated pursuant to an agreement of the parties; and 8) the quantum meruit and unjust enrichment causes of action are viable, notwithstanding the existence of the Agreement, where, as here, the parties dispute whether the Agreement continued to apply to FMS' claim for reimbursements in light of the language in the sixth, seventh and eighth amendments.

In reply, Defendant submits *inter alia* that 1) the Court may consider the June 2012 email and attachment, and December 2012 letter, both because they are documents that are integral to Plaintiff's claims and because Plaintiff cannot exclude evidence to which Plaintiff refers, and on which Plaintiff relies, in the Complaint; 2) the June 2012 email and attachment constitute documentary evidence, as they are unambiguous and authentic, as evidenced by the fact that Abrams authenticates those documents in his affirmation in opposition to Defendant's motion; 3) the cause of action for account stated is not viable in light of FMS' failure to follow proper billing protocol of monthly invoices, and in consideration of the fact that the Hospital could not have mutually agreed to salaries that were never billed or invoiced to the Hospital; and 4) the Court must dismiss the quantum meruit and unjust enrichment claims because there is a contract governing the parties' dispute, and there is no issue regarding the enforceability of that contract.

RULING OF THE COURT

A. Standards for Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case. *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 84-85 (2d Dept. 2010), quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22. Affidavits, however, are not documentary evidence. *Fontanetta v. John Doe 1*, 73 A.D.3d at 85 citing, *inter alia*, *Berger v. Temple Beth-El of Great Neck*, 303 A.D.2d 346, 347 (2d Dept. 2003). To be considered documentary, evidence must be unambiguous and of undisputed authenticity. *Fontanetta v. John Doe 1*, 73 A.D.3d at 86, citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22.

A motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Applicable Contract Principles

The Court must construe a contract in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. *MHR Capital Partners v. Presstek*, 12 N.Y.3d 640, 645 (2009). A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties. To determine whether a writing is unambiguous,

language should not be read in isolation because the contract must be considered as a whole. Ambiguity is determined within the four corners of the document; it cannot be created by extrinsic evidence that the parties intended a meaning different than that expressed in the agreement and, therefore, extrinsic evidence may be considered only if the agreement is ambiguous. Ambiguity is present if language was written so imperfectly that it is susceptible to more than one reasonable interpretation. *Critelli v. Commonwealth Land Title Insurance Co.*, 98 A.D.3d 556, 557 (2d Dept. 2012), quoting *Brad H. v. City of New York*, 17 N.Y.3d 180, 185-186 (2011) (citations and internal quotation marks omitted).

C. 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 v, Furia*, 116 A.D.3d at 695). Pursuant to CPLR § 213(2), the statute of limitations for breach of contract is 6 years. In New York, a breach of contract cause of action accrues at the time of the breach. *Ely-Cruikshank Co., Inc. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993), citing *Edlux Constr. Corp. v. State of New York*, 252 App. Div. 373, 374 (3d Dept. 1937), aff'd 277 N.Y. 635 (1938), and *Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 550 (1979).

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 basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in good conscience should be paid to the plaintiff. *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012), *rearg. den.*, 19 N.Y.3d 937 (2012), citing *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011), quoting *Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421 (1972), *reh. den.*, 31 N.Y.2d 709 (1972), *cert. den.*, 414 U.S. 829

(1973). Unjust enrichment is not a catchall cause of action to be used when others fail. Rather, it is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. *Corsello v. Verizon New York, Inc.,* 18 N.Y.3d at 790. An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim. *Id.* at 790-791 citing, *inter alia*, *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388-389 (1987).

To state a claim in *quantum meruit*, a claimant must establish 1) the performance of the services in good faith, 2) the acceptance of the services by the person to whom they are rendered, 3) an expectation of compensation therefor, and 4) the reasonable value of the services. *Geraldi v. Melamid*, 212 A.D.2d 575, 576 (2d Dept. 1995). Where an express agreement exists between the parties, the rights and liabilities, as between them, should be determined based on a breach of contract theory. *Apfel v. Prudential-Bache Sec., Inc.*, 81 N.Y.2d 470, 479 (1993).

Where there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute in issue, a plaintiff may proceed upon a theory of quasi-contract as well as breach of contract, and will not be required to elect his or her remedies. *Plumitallo v. Hudson Atlantic Land Company, LLC*, 74 A.D.3d 1038, 1039 (2d Dept. 2010), quoting *Hockman v. LaRea*, 14 A.D.3d 653, 654-655 (2d Dept. 2005), and citing *AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 A.D.3d 6 (2d Dept. 2008) and *Zuccarini v. Ziff-Davis Media*, 306 A.D.2d 404, 405 (2d Dept. 2003).

D. Application of these Principles to the Instant Action

The Court grants Defendant's motion to dismiss the Second Cause of Action, alleging an account stated, in light of the fact, *inter alia*, that 1) the Complaint acknowledges that the Hospital refused to pay the amounts demanded, and formally objected to the amount owed in its letter dated December 17, 2012; and 2) Plaintiff conceded, in its June 2012 email, that the submission of a single invoice violated the Agreement's provision regarding monthly billing for On-Site Personnel and the need for the Hospital's agreement to such charges. The Court concludes that it is appropriate to consider the June 2012 email and attachment, and December 2012 letter, in part because Plaintiff has relied on those documents in its Complaint, and in its affidavit in opposition. The Court grants Defendant's motion to dismiss the Third and Fourth Causes of Action, for unjust enrichment and quantum meruit, because there is a contract, specifically the Agreement, that governs the parties' dispute.

The Court denies Defendant's motion to dismiss the First Cause of Action, alleging breach of contract, with the caveat that any claims prior to December 21, 2006 are time-barred by the six year statute of limitations set forth in CPLR § 213(2). Plaintiff has sufficiently alleged that Defendant breached the Agreement and the Court cannot conclude, at this juncture, that the Agreement, including its amendments, unambiguously requires contemporaneous notice to Defendant of FMS' charges for On-Site Personnel, and Defendant's approval of those charges, as a condition precedent to Plaintiff's right to reimbursement for On-Site Personnel salaries and benefits.

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 November 7, 2013 at 9:30 a.m.

ENTER

DATED: Mineola, NY
October 9, 2013

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