

**I.J. Peiser's Sons, Inc. v MacAndrews & Forbes Holdings Inc.**

2013 NY Slip Op 32267(U)

September 18, 2013

Sup Ct, NY County

Docket Number: 156728/12

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

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

**HON. JOAN A. MADDEN**

J.S.C.

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

PART 4

Index Number : 156728/2012  
I.J. PEISER'S SONS INC  
vs.  
MACANDREWS & FORBES HO  
SEQUENCE NUMBER : 001  
DISMISS

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 *deferred in accordance with the annexed decision and order.*

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

Dated: September 18, 2013

*[Signature]*  
\_\_\_\_\_, J.S.C.  
**HON. JOAN A. MADDEN**  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 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: PART 11

-----X  
I.J. PEISER'S SONS, INC.,

Plaintiff,

INDEX NO. 156728/12

-against-

MACANDREWS & FORBES HOLDINGS INC., and  
WESTCHESTER FIRE INSURANCE COMPANY,

Defendants.

-----X

JOAN A. MADDEN, J.:

Defendant MacAndrews & Forbes Holdings, Inc. (hereinafter "MacAndrews") moves for an order pursuant to CPLR 3211 dismissing the Second Cause of Action for quantum meruit and the Third Cause of Action for an account stated, on the grounds that they fail to state a claim against MacAndrews. Plaintiff opposes the motion.

This is an action to recover the sum of \$27,418.72, as the balance due and owing for labor and materials plaintiff alleges it provided to defendant MacAndrews in connection with a construction project at 36 East 63<sup>rd</sup> Street, New York, New York. Codefendant Westchester Fire Insurance Company issued a Lien Discharge Bond to discharge plaintiff's mechanic's lien. The complaint asserts three causes of action against MacAndrews: a First Cause of Action for breach of contract, a Second Cause of Action for quantum meruit and a Third Cause of Action for an account stated. In lieu of answering, defendant MacAndrews is moving to dismiss the Second and Third Causes of Action. Co-defendant Westchester Fire Insurance Co. has answered, but submits no papers responding to the motion.

In support of dismissal, defendant MacAndrews argues that the account stated claim does not satisfy the pleading requirements, as it does not plead that the statements of account were retained for an unreasonable time or that the parties had an agreement as to the amount due. Defendant MacAndrews further argues the quantum meruit claim must be dismissed, since plaintiff also asserts a breach of contract claim.

Plaintiff opposes the motion, arguing that it is entitled to plead in the alternative, claims for breach of contract and quantum meruit. Plaintiff also argues the invoices alone are sufficient to establish an account stated, and the fact that the first invoice was sent on August 23, 2011 indicates prima facie that an unreasonable amount of time passed without objection.

On a pre-answer motion to dismiss addressed to the sufficiency of the pleadings, the complaint must be liberally construed, and the Court must accept all allegations as true and accord them the benefit of every favorable inference to determine whether they come within the ambit of any cognizable legal theory. See Cron v. Hargro Fabrics, 91 NY2d 362, 366 (1998); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC, 19 AD3d 273 (1<sup>st</sup> Dept 2005); DeMicco Bros., Inc. v. Consolidated Edison Co., 8 AD3d 99 (1<sup>st</sup> Dept 2004). In determining a motion to dismiss for failure to state a cause of action, the test is simply whether the proponent of the pleading has a cause of action, not whether the pleading has stated one. Leon v. Martinez, 84 NY2d 83, 88 (1994); Wiener v. Lazard Freres & Co., 241 AD2d 114 (1<sup>st</sup> Dept 1998).

First, as to defendant's objections to the quantum meruit claim, defendant is correct that generally, a plaintiff cannot recover for quantum meruit while simultaneously alleging the existence of an express contract covering the same subject matter. See Tesser v. Allboro

Equipment Co., 302 AD2d 589 (2<sup>nd</sup> Dept 2003); West End Interiors, Ltd v. Aim Construction & Contracting Corp., 286 AD2d 250 (1<sup>st</sup> Dept 2001). However, where as here, a bona fide dispute may arise as to the existence of a contract, plaintiff is not required to elect its remedies and may plead both breach of contract and quantum meruit as alternative theories of recovery, at least at this pleading stage of the action. See Ellis v. Abbey & Ellis, 294 AD2d 168 (1<sup>st</sup> Dept), lv app den 98 NY2d 612 (2002); Wilmoth v. Sandor, 259 AD2d 252 (1<sup>st</sup> Dept 1999); Waldman v. Englishtown Sportswear, Ltd., 92 AD2d 833 (1<sup>st</sup> Dept 1983).

Second, as to defendant's pleading objections to the account stated cause of action, CPLR 3013 requires that the statements in a pleading be sufficiently particular to give the court and the parties notice of the transactions and occurrences to be proved, and the material elements of each cause of action. See Trinity Products, Inc. v. Burgess Steel LLC, 18 AD3d 318 (1<sup>st</sup> Dept 2005). Here, liberally construing the complaint in plaintiff's favor, the court concludes that it is sufficiently particular to give notice of the material elements of the claim for an account stated, i.e. that defendant received and retained invoices or statements of account without objection within a reasonable time, or made partial payment on the invoices or statements of account. See Jaffe v. Brown-Jaffe, 98 AD3d 898 (1<sup>st</sup> Dept 2012); American Express Centurion Bank v. Cutler, 81 AD3d 761 (2<sup>nd</sup> Dept 2011); Morrison Cohen Singer & Weinstein, LLP v. Waters, 13 AD3d 51 (1<sup>st</sup> Dept 2004); Manhattan Telecommunications Corp v. Best Payphones, Inc., 299 AD2d 178 (1<sup>st</sup> Dept 2002), lv app den 100 NY2d 507 (2002). Notably, the complaint alleges that plaintiff "earned the amount of \$91,374.35," and the invoices and statements sent to MacAndrews "showed a balance due and owing from M&F [MacAndrews] to Peiser's in the amount of \$27,418.72." To the extent defendant MacAndrews argues that the account stated cause of

action should be dismissed for failure to state a cause of action, that argument is likewise without merit.

Thus, for the foregoing reasons, neither the Second Cause of Action for an account stated nor Third Cause of Action for quantum meruit, is subject to dismissal.

Accordingly, it is

ORDERED that the motion by defendant MacAndrews & Forbes Holdings, Inc. to dismiss the Second and Third Causes of Action is denied; and it is further

ORDERED that defendant MacAndrews & Forbes Holdings, Inc. shall serve and file its answer within 20 days of the date of this decision and order; and it is further

ORDERED that the preliminary conference previously scheduled for September 26, 2013 is adjourned to October 24, 2013 at 9:30 am, in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

DATED: September 18, 2013

ENTER:

  
\_\_\_\_\_  
J.S.C.