SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2
Justice

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RICHARD R. BROWN ASSOCIATES PC,

Plaintiff,

- v -

JOCELYN WILDENSTEIN et al.,

Defendants.

INDEX NO. 151019/2013

MOTION SEQ. NO. 003

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this application to/for SUMMARY JUDGMENT (AFTER JOINDER)

In this action to recover for architectural services rendered, defendant Jocelyn Wildenstein (hereinafter "defendant") moves for summary judgment dismissing the complaint. Plaintiff opposes. Following oral argument, and upon a review of the papers submitted as well as the relevant statutes and case law, the motion is granted, in part.

In 2011, Richard Brown, an architect and principal of plaintiff, was introduced to defendant through a friend. (Doc. No. 29.) In August 2011, Brown and defendant discussed the possibility of plaintiff designing a large renovation of defendant's apartment at 845 United Nations Plaza, Unit 51E. Brown provided defendant with a "Standard Form of Agreement Between Owner and Architect." There is some uncertainty as to when this occurred. Brown

testified that he provided defendant with the proposed contract on August 22, 2011. (Doc. No. 33.) Defendant never signed it. Instead, in September 2011, she sent the contract to Lawrence Carnevale, an attorney, to review and edit it. The papers reveal that several revisions of the contract were exchanged between Carnevale and Brown.[1] Ultimately, defendant never signed the contract and elected not to implement Brown's plans.

Despite the fact that no contract was signed, Brown proceeded with drawing up designs as well as sourcing materials and labor. (Doc. No. 63.) Plaintiff contends that it sent defendant three invoices, dated September 1, 2011 for $17,990.50, October 2, 2011 for $39,475.75, and November 1, 2011 for $41,175.79 for the design work. (Doc. No. 67.)

Plaintiff contends that, in a telephone conversation between Brown and defendant, defendant agreed that she would accept monthly billings for work completed until a final contract was executed. Plaintiff's breach of contract claim focuses on this oral contract rather than the unsigned written contracts. Plaintiff also makes claims sounding in unjust enrichment and an account stated. The mechanic's lien foreclosure cause of action has been abandoned

A contract requires a "meeting of the minds." *Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 (2016); *see DCR Mtge. Sub I, LLC v People United Fin., Inc.*, 148 AD3d 986, 987 (2d Dept 2017). "An oral agreement may be enforceable as long as the terms are clear

[1] This Court must express its dissatisfaction with the quality and organization of the papers on both sides, which approach the limit of what this Court is willing to overlook without requiring the parties to refile. As for defendant's submissions, the affidavits are repetitive, replete with editorialization, and generally fail to set forth a timeline of events in any logical manner with adequate citations to the papers. Some of the portions of the transcripts submitted are so short that they are difficult to understand out of context. There are also multiple documents submitted together under single exhibit tabs without proper explanation or introduction. As for plaintiff's papers, none of the exhibits are adequately labeled either in NYSCEF or in the attorney affirmation introducing the exhibits, so one is required to open each one to know what the exhibit is.

and definite and the conduct of the parties evinces mutual assent 'sufficiently definite to assure that the parties are truly in agreement with respect to all material terms.'" *Kramer v Greene*, 142 AD3d 438, 439 (1st Dept 2016), quoting *Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 (1999). On the other hand, "if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed." *Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d at 451 (internal quotation marks and citation omitted); *see Moulton Paving, LLC v Town of Poughkeepsie*, 98 AD3d 1009, 1011 (2d Dept 2012); *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 (1st Dept 2010), *lv denied* 15 NY3d 704 (2010); *ADCO Elec Corp. v HRH Constr., LLC*, 63 AD3d 653, 654-655 (2d Dept 2009); *compare Gallagher v Long Is. Plastic Surgical Group, P.C.*, 113 AD3d 652, 653 (2d Dept 2014), *lv denied* 22 NY3d 865 (2014).

Here, the papers establish that the parties exchanged a written agreement that encompassed the entirety of plaintiff's services, from design to construction, and that defendant never signed the agreement. Because defendant never signed the agreement – and, indeed, made significant changes to the document before returning it to plaintiff – it can be inferred that there was no intent to be bound. This, alone, suffices to establish prima facie entitlement to dismissal of the breach of contract cause of action.

In opposition, plaintiff asserts that the contract was an oral one. That is, despite the fact that defendant refused to sign the contract, during a phone conversation, she agreed that plaintiff would begin the project and would bill defendant monthly. The papers and testimony are not consistent with the existence of an oral contract, however, since there is no indication that the parties ever sufficiently agreed to all material terms. Most notably, Brown testified that he was

under a completely mistaken impression with respect to the amount that defendant was able to spend on the project. While he initially believed that defendant could spend as much as $6 million, her budget was in fact $2.5 million. Furthermore, plaintiff billed defendant for various types of work at various hourly rates. Such a significant misunderstanding belies a claim that the parties had a meeting of the minds as to the terms of plaintiff's engagement.

During Brown's arbitration testimony, when he stated that, during a 30-minute phone conversation, defendant assented to be billed monthly, he never sufficiently detailed the scope of the pre-contract-execution work. Brown did not testify that he outlined precisely what services he would be providing before the contract was signed and that when those services would become billable. It is especially notable in this regard that Brown never followed up with defendant by email to make certain that she understood that plaintiff would begin work immediately and that there would be monthly billing until a contract was signed. Since plaintiff has failed to raise an issue of fact as to whether there was a sufficient meeting of the minds between Brown and defendant that encompassed the scope of the work to be performed prior to signing the written contract, the breach of contract cause of action must be dismissed.

"An account stated 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." *Cach, LLC v Aspir*, 137 AD3d 1065, 1066 (2d Dept 2016) (internal quotation marks and citations omitted; *see Whiteman, Osterman & Hanna, LLP v Oppitz*, 105 AD3d 1162, 1163 (3d Dept 2013); *American Express Centurion Bank v Cutler*, 81 AD3d 761, 762 (2d Dept 2011). "An account stated assumes the existence of some indebtedness between the parties, or an agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists" (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 251 [1st Dept 2007]), nor can it

"be utilized simply as another means to attempt to collect under a disputed contract" (*Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012]).

To prevail on a cause of action for an account stated, the plaintiff must show "invoices, receipt by defendant, and lack of objection by defendant for a substantial period of time." *L.E.K. Consulting LLC v Menlo Capital Group, LLC*, 148 AD3d 527, 528 (1st Dept 2017); *GPI Entertainment, LLC v Aviv Façade Solutions*, 144 AD3d 409 (1st Dept 2016); *Perine Intl. Inc. v Bedford Clothiers, Inc.*, 143 AD3d 491, 493 (1st Dept 2016). Courts have generally held that, in order to constitute assent, the invoices must be held without specific objection or protest for a period of several months. *See e.g. Abyssinian Dev. Corp. v Bistricer*, 133 AD3d 435, 436 (1st Dept 2015); *American Express Bank FSB v Najieb*, 125 AD3d 470, 471 (1st Dept 2015); *Levine v Harriton & Furrer, LLP*, 92 AD3d 1176, 1178 (3d Dept 2012); *J.B.H., Inc. v Godinez*, 34 AD3d 873, 875 (3d Dept 2006); *compare Matter Adam Props., Inc. v United House of Prayer for All People of the Church on the Rock of the Apostolic Faith*, 126 AD3d 599, 601 (1st Dept 2015).

Initially, defendant asserts that, since there was no contract, there can be no indebtedness sufficient to allow a cause of action for an account stated. This is inaccurate. Since plaintiff undeniably performed work for defendant's benefit, had defendant held onto the invoices for a sufficient amount of time, an inference may have arisen that the invoices constituted the extent of plaintiff's compensation. At the very least, a failure to object, effectively lulling Brown into believing that he would be compensated for his services, could have established an account stated.

The problem, however, is that defendant did not hold onto the invoices for a sufficient period of time. It should be noted that neither party's papers make it clear precisely when

defendant obtained the invoices. Even assuming, for the sake of argument, that the invoices were received about when they were sent, the parties' relationship broke down within a few months thereafter. The first invoice was sent in August 2011 and, by the beginning of November 2011, defendant rejected plaintiff's plains, and plaintiff stopped work and demanded payment on the invoices. Since plaintiff cannot establish that defendant retained the invoices without objection for a period of at least several months, there is no inference of assent and no cause of action for an account stated.

As for plaintiff's unjust enrichment theory, to recover for the value of services rendered on a quantum meruit basis, in the absence of an enforceable contract, a plaintiff must show that he or she "performed valuable services in good faith, . . . that the services were rendered with an expectation of compensation, and that they were accepted by [the] defendant." *Eastern Consol. Props., Inc. v Waterbridge Capital LLC*, 149 AD3d 444, 444 (1st Dept 2017); *see Home Constr. Corp. v Beaury*, 149 AD3d 699, 702 (2d Dept 2017); *Fullbright & Jaworski, LLP v Carucci*, 63 AD3d 487, 488-489 (1st Dept 2009); *Pellegrino v Almasian*, 10 AD2d 507, 509 (3d Dept 1960); *Adamo v Blohm*, 97 App Div 629 (2d Dept 1904); *cf. ADCO Elec. Corp. v HRH Constr., LLC*, 63 AD3d 653 (2d Dept 2009).

Defendant has failed to establish prima facie entitlement to summary judgment as to this cause of action. Defendant is mistaken in arguing that, merely because she did not utilize the drawings that plaintiff submitted to her, she did not accept them for purposes of unjust enrichment. *See e.g. Adamo v Blohm*, 97 App Div at 629. Contrary to her position, defendant benefited from plaintiff's services inasmuch as she was provided with a design that she could have used. Even assuming that defendant's papers satisfied her initial burden on the motion, plaintiff's opposition raised issues of fact as to the ability to a quasi contract theory. Brown's

arbitration testimony raises questions as to whether defendant requested that plaintiff spend a substantial amount of time and effort on the project. The parties had an arm's length relationship that implied an obligation to compensate plaintiff for services rendered in good faith. Although there is some uncertainty as to whether and the extent to which plaintiff's work on the project was reasonable in light of defendant's refusal to sign the contract, and the specific communications between the parties, that presents a question of fact.

As for defendant's assertion that plaintiff cannot recover because of a failure to maintain a license in New York State, she is mistaken that plaintiff was unlicensed. In reality, plaintiff's license in this State was merely changed to inactive. *Compare Park Ave. & 35th St. Corp. v Piazza*, 170 AD2d 410 (1st Dept 1991); *P.C. Chipouras & Assoc. v 212 Realty Corp.*, 156 AD2d 549 (2d Dept 1989). Plaintiff presented evidence that the necessary fees were paid to bring the license back to active status before negotiations with defendant took place. Although plaintiff's status was not officially returned to active until after negotiations with defendant commenced, this is not a basis to preclude plaintiff from compensation. *Cf. Benjamin v Koeppel*, 85 NY2d 549, 551 (1995).

Accordingly, it is hereby:

ORDERED that the motion is granted, in part, the causes of action for foreclosure of a mechanic's lien, breach of contract, and accounts stated are dismissed, and the motion is otherwise denied.

This constitutes the decision and order of the court.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

7/27/2017
DATE

HON. KATHRYN E. FREED
KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE