SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM
Justice

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INDEX NO. 654872/2016
MOTION SEQ. NO. 002

CRAVEN CORPORATION,

Plaintiff,

- v -

ZOCDOC, INC., CYRUS MASSOUMI, JENNIFER WELSH, NETTA SAMROENGRAJA

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 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, 90, 91, 92, 93, 94, 95, 96, 97, 98

were read on this motion to/for JUDGMENT - SUMMARY.

Gerald Lebovits, J.:

Plaintiff Craven Corporation moves, pursuant to CPLR 3212, for summary judgment on its third cause of action for breach of contract against defendant Zocdoc, Inc. Defendant cross-moves, pursuant to CPLR 7503 (a), for an order compelling arbitration and dismissing the complaint, or in the alternative, for summary judgment. For the reasons set forth below, plaintiff's motion and defendant's cross-motion are denied.

BACKGROUND

Plaintiff provides consulting and project management services related to the planning, design and buildout of commercial office space (affirmation of plaintiff's counsel, exhibit 1, complaint, ¶ 1). On or about February 1, 2016, defendant retained plaintiff to assist it in the leasing and construction of new office space (the Relocation Project) (*id.*, ¶ 4). Plaintiff proceeded to identify and assess locations suitable to defendant's needs; vet design professionals and other consultants; and create a budget and schedule for the Relocation Project (the Pre-Construction Services) (*id.*). Plaintiff claims that it performed such work for four months while the parties negotiated the final terms of a written contract (*id.*, ¶¶ 6 and 9).

On March 2, 2016, plaintiff furnished defendant with a copy of its standard project management agreement by email (affidavit of David Trinin [Trinin] [Trinin aff], exhibit G at 1). In response, defendant's former employee, Jennifer Welsh (Welsh), suggested that plaintiff work under defendant's standard consulting agreement, and plaintiff agreed (Trinin aff, exhibit I at 1).

The parties discussed certain amendments to the form document that Welsh had exchanged (Trinin aff, exhibit J at 1), and those amendments were incorporated into the document (Trinin aff, exhibit M at 3-11).

According to the final version of the document, the payment schedule provided for a lump sum fee of $210,000, inclusive of plaintiff's Pre-Construction Services "to tour and evaluate potential locations for the period February 1, 2016 through May 31, 2016," to be paid in monthly installments (Trinin aff, exhibit O at 10-11). The payment provision also provided for the recovery of fees if the agreement was terminated. The relevant portion of the provision provides:

> "Should this Agreement be terminated prior to July 31, 2017 the fee for preconstruction services will be payable at a cost of fifteen thousand ($15,000.00) dollars per month, but not in excess of the Total Project Fee. Should the Term extend beyond July 31, 2017 the fee is fifteen thousand ($15,000.00) per month from August 1, 2017 (pro-rated for partial months) until [defendant] terminates this Agreement, if prior to the expiration of such Term, but in no even shall this Agreement extend beyond September 30, 2017 without [defendant's] express written approval."

(*id.* at 11).

Plaintiff signed the document (the Consulting Agreement) on May 19, 2016, and returned a signed copy to defendant by email the same day (Trinin aff, exhibit O at 1). Defendant did not give plaintiff a fully-executed copy of the Consulting Agreement. After one of plaintiff's principals, Stephen G. Chapman (Chapman) sent defendant an invoice (Trinin aff, exhibit Q at 1), defendant's chief financial officer Nettana Samroengraja responded that "no fees [were] owed" because defendant had "decided to work with another firm" (Trinin aff, exhibit R at 1). When pressed for payment, Samroengraja responded, "[defendant] never agreed or signed [the Consulting Agreement]" (Trinin aff, exhibit T at 1).

Plaintiff commenced this action asserting claims for breach of contract and unjust enrichment.[1] It seeks $60,000 in monetary damages as well as its costs and attorney fees.

DISCUSSION

Plaintiff moves for summary judgment on the third cause of action on the ground that defendant breached the Consulting Agreement by failing to pay the termination fee for the Pre-Construction Services. The fact that the Consulting Agreement is unsigned is no bar to recovery. Trinin, one of plaintiff's principals, avers that Welsh negotiated the terms of the Consulting Agreement and approved the final version of that document. In addition, Welsh, Samroengraja,

[1] The first cause of action for fraud, the second cause of action for conversion and theft of trade secrets, and the claims against the individual defendants were dismissed in a decision and order of the undersigned dated June 26, 2017.

and others were aware that plaintiff performed the Pre-Construction Services, as shown in the numerous emails among them (Trinin aff, ¶¶ 8, 11 and 14).

In response, defendant contends that the present dispute falls within the scope of the arbitration provision found in paragraph 12 of a prior agreement, dated September 23, 2014, between the parties (the Services Agreement) (Samroengraja aff, exhibit A at 3). The relevant portion of that provision reads as follows:

> "Any controversy, dispute or claim arising out of or related to this Agreement that cannot be resolved by informal and good-faith negotiations between authorized representatives of the parties shall be settled by final and binding arbitration to be conducted by an arbitration tribunal in the State, City and County of New York, NY pursuant to the rules of the American Arbitration Association."

(Samroengraja aff, exhibit A at 3).

Although the Services Agreement involved an eight-month project at defendant's office at 568 Broadway (*id.* at 21), it also governed "future Project Assignments" awarded to plaintiff (*id.* at 1). Any future project assignment would be "added in the form of an amendment" to the Services Agreement and would be subject to its terms and conditions (*id.*). Because the Relocation Project qualified as a future project assignment, defendant urges the court to dismiss the complaint and order the parties to arbitration.

In addition, defendant submits that the timeliness of its motion and the issue of whether the Consulting Agreement supersedes the Services Agreement should be addressed in arbitration. According to Rule R-7 of the AAA Commercial Arbitration Rules and Mediation Procedures, an arbitrator has the power to determine the scope or validity of the arbitration agreement and "the existence or validity of a contract of which an arbitration clause forms a part" (affirmation of defendant's counsel, exhibit D at 5).

In the alternative, defendant argues for summary judgment in its favor. On the breach of contract claim, defendant presents three arguments in support of dismissal. First, defendant contends that the unsigned Consulting Agreement cannot be enforced because the Services Agreement contains a provision that proscribes modification of that agreement unless the change was mutually agreed to in a writing between the parties. The subject language implicates General Obligations Law § 15-301 (1), which bars oral modifications of a written agreement provided that the agreement contains a "provision to the effect that it cannot be changed orally." Samroengraja avers that Welsh is not a corporate officer, and, therefore, had no ability to bind defendant to the Consulting Agreement (Samroengraja aff, ¶ 12), whereas Samroengraja had the authority to execute the Consulting Agreement on defendant's behalf. Because defendant never consented to the change by signing the Consulting Agreement, there can be no contract between the parties.

Next, defendant argues that there is no breach when a party fully performs its obligations before a written agreement is reached. Here, plaintiff performed the Pre-Construction Services

prior to executing the Consulting Agreement. However, key provisions of the Consulting Agreement, including plaintiff's fee, were still being negotiated after plaintiff had executed it.

Finally, defendant argues that plaintiff agreed to provide the Pre-Construction Services for free. In the proposal submitted February 11, 2016, plaintiff suggested that it would furnish "all Pre-Construction services at no cost due to our loyalty and relationship with [defendant], which represents a savings of $45,000-$60,000" (Samroengraja aff, exhibit B at 21). Additional emails sent to Welsh indicate that plaintiff would not begin billing defendant for its work until June 1, 2016 (affidavit of Michael Bogart, exhibit A at 1 and exhibit B at 1).

As to the fourth cause of action for unjust enrichment, defendant argues that existence of the written Services Agreement precludes recovery. Additionally, plaintiff may not maintain the unjust enrichment claim because it agreed to forego payment for the Pre-Construction Services.

Plaintiff, in reply, argues that defendant waived its right to pursue arbitration by participating in this litigation, and by failing to raise the issue of arbitration by way of an affirmative defense in its answer. Plaintiff also maintains that the Services Agreement is inapplicable to the present dispute. Trinin states in a reply affidavit that the Services Agreement involved a separate project to remedy building and fire code violations at defendant's office at 568 Broadway (Trinin reply aff, ¶ 8). The Relocation Project involved a larger, more complex project in a new space (*id.*, ¶ 11). Trinin also states that, based on past practice, Welsh had authority to bind defendant. Plaintiff dealt almost exclusively with Welsh, who negotiated the terms for both the Services Agreement and the Consulting Agreement (*id.*, ¶¶ 7 and 13). Furthermore, it was Welsh "who communicated with [plaintiff] and requested [plaintiff] to perform services for Defendant" (*id.*, ¶ 6), and it was "[defendant who] requested that [plaintiff] provide a separate written proposal for [defendant's] proposed relocation project" (*id.*, ¶ 10). Lastly, plaintiff argues that it performed the Pre-Construction Services in good faith for which it was not paid.

Defendant, in reply, argues that it never waived its right to pursue arbitration because plaintiff never placed the Services Agreement before the court. Plaintiff only exchanged the document in discovery in September 2017. Therefore, there can be no prejudice to plaintiff from the delay. Defendant repeats its claim that the Services Agreement applies to this action.

A. Defendant's Cross-Motion to Compel Arbitration and Dismiss the Complaint

The court must first determine whether the parties entered into a valid agreement to arbitrate, and if so, whether the dispute falls within the scope of that agreement (*see Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 7 [1980]; *accord Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975]). "Where there is no substantial question whether a valid agreement was made or complied with . . . the court shall direct the parties to arbitrate" (CPLR 7503 [a]). But if the parties dispute "whether an obligation to arbitrate exists, the general presumption in favor of arbitration does not apply" (*Matter of TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 202 [1st Dept 2015] [internal quotation marks and citation omitted]).

The court finds that the parties did not agree to arbitrate this dispute. The Consulting Agreement contemplated a different and substantially larger project than what was described in the Services Agreement. Although the Services Agreement provided a method of awarding plaintiff future work by way of an amendment, the documentary evidence suggests that the parties negotiated a new contract for the Relocation Project, as opposed to adding the Relocation Project to the existing Services Agreement.

In addition, the "right to arbitration may be modified, waived or abandoned" (*Cusimano v Schnurr*, 26 NY3d 391, 400 [2015] [internal quotation marks and citation omitted]). Defendant waited more than two years before seeking to compel arbitration. During that time, it actively participated in this ligation by moving for dismissal under CPLR 3211, without making any reference to the arbitration provision in the Services Agreement, and by engaging in discovery, including appearing before the court at a preliminary conference and at a compliance conference. Defendant also failed to raise arbitration as an affirmative defense in its answer. And although defendant alleges plaintiff was delinquent in not producing the Services Agreement until discovery, a review of the complaint reveals that plaintiff did not intend to rely on the Services Agreement in this action. Further, it is likely that defendant was in possession of that agreement even before plaintiff exchanged it. Thus, any purported delay in defendant moving to compel arbitration cannot be attributed solely to plaintiff's actions. Therefore, even if the Services Agreement governs this dispute, defendant has waived its right to seek arbitration (*see Poole v West 111th St. Rehab Assoc.*, 82 AD3d 647, 647 [1st Dept 2011]; *Ryan v Kellogg Partners Inst. Servs.*, 58 AD3d 481, 481 [1st Dept 2009]; *Grenadeir Parking Corp. v Landmark Assoc.*, 294 AD2d 313, 313 [1st Dept 2002], *lv dismissed* 99 NY2d 553 [2002]). As for defendant's assertion that an arbitrator should determine whether defendant waived its right to arbitration, that argument fails, as it assumes that the parties agreed to arbitrate this dispute in the first place.

Consequently, defendant's cross-motion, insofar as it seeks to compel arbitration and dismiss the complaint on that ground, is denied.

B. Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

A movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the pleadings and other proof, such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

As an initial matter, the court excuses defendant's failure to submit the pleadings on its cross-motion (*see Pandian v New York Health & Hosps. Corp.*, 54 AD3d 590, 591 [1st Dept 2008]). The failure to attach the pleadings to a motion for summary judgment as mandated by CPLR 3212 [b] is a fatal procedural defect that requires denial of the motion (*see Weinstein v Gindi*, 92 AD3d 526, 527 [1st Dept 2012]). This procedural defect, though, may be overlooked "when the record is 'sufficiently complete'" (*Washington Realty Owners, LLC v 260 Wash. St., LLC*, 105 AD3d 675, 675 [1st Dept 2013] [citation omitted]). In this instance, the pleadings were included in plaintiff's motion (*see Guaman v 1963 Ryer Realty Corp.*, 127 AD3d 454, 456 [1st Dept 2015]). Defendant also corrected this defect by annexing the pleadings to its reply (reply affirmation of defendant's counsel, exhibits B and C).

1. The Third Cause of Action (Breach of Contract)

To sustain a cause of action for breach of contract, plaintiff must prove the existence of a contract, plaintiff's performance, defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). In the absence of a binding, enforceable agreement, a breach of contract claim will be dismissed (*see Luxor Capital Group, L.P. v Seaport Group LLC*, 148 AD3d 590, 590 [1st Dept 2017], *lv denied* 30 NY3d 905 [2017]). Therefore, an enforceable contract between the parties is key to maintaining the claim.

The existence of an enforceable, binding contract requires the following elements: "an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound" (*Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade*, 98 AD3d 403, 404 [1st Dept 2012], *affd* 20 NY3d 1082 [2013] [internal quotation marks and citation omitted]). An offer "must be plain and clear enough to establish the intended terms of the proposed contract" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 104 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]), and there must be a clear and unequivocal acceptance of those terms (*see Thor Props., LLC v Willspring Holdings LLC*, 118 AD3d 505, 507 [1st Dept 2014]). In addition, "'[a] meeting of the minds must include agreement on all essential terms'" (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 59 [1st Dept 2015] *affd* 31 NY3d 100 [2018], quoting *Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). But "[i]f an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" (*Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *rearg denied* 75 NY2d 863 [1990], *cert denied* 498 US 816 [1990]).

As is relevant in this action, a written contract need not be signed to be binding on the parties. An unsigned written contract may be enforced "provided its subject matter does not implicate a statute" and "there is objective evidence establishing that the parties intended to be bound" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 368-369 [2005], *rearg denied* 5 NY3d 746 [2005]).

The objective evidence presented by plaintiff appears to establish the existence of an enforceable contract. Plaintiff's February 11, 2016, proposal for the Relocation Project and the subsequent email correspondence between the parties discussing the terms of a written contract resulted in the Consulting Agreement, which defendant's in-house counsel prepared. Therefore, contrary to defendant's assertion, the email exchanges reflect more than an unenforceable draft

or proposal (*see Oui Cater, Inc. v Lantern Group, Inc.*, 71 AD3d 555, 555 [1st Dept 2010] [finding that emails merely expressed the parties' intention to enter a written contract at a later date, thereby refuting the plaintiff's claim that the parties had entered into a binding contract]). Chapman signed the final version of the Consulting Agreement containing the revisions plaintiff had proposed, and he returned the executed copy to plaintiff. Samroengraja and others knew of, and worked with, plaintiff on the Pre-Construction Services (*see* Trinin aff, exhibit E at 1 and exhibit K at 2), before Samroengraja claimed that there was no contract. Furthermore, plaintiff demonstrated that it performed the Pre-Construction Services according to the Consulting Agreement.

Defendant's argument that General Obligations Law § 15-301 bars the breach of contract claim lacks merit. The relevant section of the statute reads:

> "1. A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent."

Paragraph 12 of the Services Agreement states, in part, that "[t]his Agreement shall not be waived, modified, or amended unless mutually agreed upon in writing by both parties" (Samroengraja aff, exhibit A at 6). Therefore, absent a writing signed by both parties, there can be no modification to the Services Agreement (*see Atalaya Special Opportunities Fund IV LP v James Crystal, Inc.*, 112 AD3d 490, 491 [1st Dept 2013]). But defendant has not established that the Services Agreement is the controlling, operative document in this dispute. Trinin's averments and the parties' correspondence disprove defendant's contention that the Consulting Agreement was a mere extension or amendment of the existing Services Agreement, because they show that the parties discussed entering into a new contract for an entirely different project. The draft Consulting Agreement, presented by Welsh and drafted by defendant's in-house counsel, does not mention the Services Agreement.

The argument that Welsh lacked the authority to bind defendant also fails. An agent may bind a principal to a contract by way of actual authority, implied actual authority, or apparent authority. With regards to actual authority, "the scope of an agent's actual authority is determined by the intention of the principal or, at least, by the manifestation of that intention to the agent" (*Wen Kroy Realty Co. v Public Natl. Bank & Trust Co.*, 260 NY 84, 89 [1932]). Implied actual authority depends on a principal's verbal or other actions to the agent "which reasonably give an appearance of authority to conduct the transaction" (*Greene v Hellman*, 51 NY2d 197, 204 [1980]). Apparent authority turns on the "words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (*Hallock v State of New York*, 64 NY2d 224, 231 [1984]). The agent's actions and statements must be such that it was reasonable for a third party to have relied on that agent's appearance of authority (*id.* at 231). Furthermore, a third party's reliance on an agent's misrepresentations must be based on "some misleading conduct on the part of the principal" (*id.*). In some circumstances, a principal's acquiescence in an agent's conduct or actions may be sufficient to show that the conduct was authorized or affirmed or that the agent

was authorized to perform similar acts in the future (*see* Restatement [Second] of Agency § 43 [1] and [2]).

Plaintiff has demonstrated that it reasonably relied on Welsh's representations that was authorized to act for defendant. Because Welsh was defendant's exclusive contact on the Services Agreement, it was reasonable for plaintiff to rely on its past dealings with Welsh in discussing the Relocation Project with her. Moreover, Samroengraja was aware of plaintiff's performance of the Pre-Construction Services. Email exchanges reveal that Samroengraja had asked plaintiff for documents and had introduced Trinin to her "finance partner on this project" (Trinin aff, exhibit C at 6-13 and exhibit K at 2). Nothing in the evidence presented suggests that Samroengraja told plaintiff that Welsh lacked the requisite authority.

Finally, defendant submits that plaintiff cannot recover because it had agreed to provide the Pre-Construction Services for free. But plaintiff's offer to perform the Pre-Construction Services for no compensation was made in anticipation of receiving a lump sum fee for its work on the Relocation Project. In fact, the payment schedule expressly stated that the lump sum fee included the Pre-Construction Services (Trinin aff, exhibit O at 11).

Nevertheless, plaintiff's motion is denied as defendant has raised a triable issue of fact about whether the parties entered into an enforceable contract. Although the "the terms of a contract [do not] need [to] be fixed with absolute certainty" (*Kolchins v Evolution Mkts. Inc.*, 31 NY3d 100, 107 [2018] [internal quotation marks and citation omitted]), there must be a "meeting of the minds with respect to a material term of the contract, namely plaintiff's compensation" (*John Anthony Rubino & Co., CPA, P.C. v Swartz*, 84 AD3d 599, 599 [1st Dept 2011]). As noted earlier, plaintiff agreed to forego payment for the Pre-Construction Services because its fee for those services would be included in its lump sum fee for the entire Relocation Project. Less than three weeks after plaintiff returned a signed copy of the Consulting Agreement, Trinin proposed a new fee structure. In an email to Samroengraja dated June 7, 2016, Trinin suggested that the "[Consulting Agreement] remains intact" if plaintiff chose to relocate its office to 195 Broadway (Samroengraja aff, exhibit G at 1). If, however, plaintiff wished to expand at its current location at 568 Broadway, Trinin wrote, "[plaintiff] proposes a fee of $12,000 per month for the twelve month project and a one-time payment of $30,000 or 50% of the agreed upon break up charge for the pre-construction work already completed" (*id.*). Trinin further wrote, "[h]opefully this arrangement satisfies all parties . . . and we eagerly await your direction" (*id.*). Plaintiff's attempt to modify the fee structure implies that there was no agreement as to this material term, especially where the termination fee was contingent upon which location defendant chose for the Relocation Project. Thus, defendant has raised a triable issue of fact on whether there was an agreement on plaintiff's compensation.

Consequently, plaintiff's motion and defendant's cross-motion for summary judgment on the third cause of action for breach of contract are denied.

2. The Fourth Cause of Action (Unjust Enrichment)

To state a claim for unjust enrichment, "plaintiff must show that (1) the other party was enriched; (2) at that party's expense; and (3) that it is against equity and good conscience to

permit [the other party] to retain what is sought to be recovered" (*Kramer v Greene*, 142 AD3d 438, 442 [1st Dept 2016] [internal quotation marks and citation omitted]). Plaintiff may plead both breach of contract and quasi-contract as alternative theories of recovery where "there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute at issue" (*Hochman v LaRea*, 14 AD3d 653, 654-655 [2d Dept 2005]). But where a valid and enforceable written contract governing the subject matter exists, plaintiff is precluded from recovery on a quasi-contract claim (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

As with the third cause of action, defendant has not demonstrated that a binding, enforceable written contract exists to warrant dismissal of the unjust enrichment claim. Also an unjust enrichment claim is equitable in nature (*see Loeuis v Grushin*, 126 AD3d 761, 765 [2d Dept 2005]). Here, plaintiff agreed to forego payment for the Pre-Construction Services in anticipation of receiving a lump sum fee for its overall work, and this facet of plaintiff's proposal was incorporated into the Consulting Agreement (Trinin aff, exhibit O at 11). Plaintiff performed the Pre-Construction Services, and defendant benefited from plaintiff's work.

Thus, defendant's cross-motion for summary judgment dismissing the fourth cause of action for unjust enrichment is denied.

3. The Unpled Cause of Action (Account Stated)

Finally, to the extent plaintiff asserted an unpled claim for an account stated, defendant contends that this claim should be dismissed. Defendant argues that Samroengraja received, promptly objected to, and disclaimed payment within four days of receiving Chapman's August 26, 2016 invoice (Samroengraja aff, exhibit K at 1). But plaintiff did not plead a claim for an account stated, and a pleading must be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" (CPLR 3013). Likewise, plaintiff has not moved to amend its complaint to assert such a claim. Therefore, the court will not entertain whether an unpled cause of action for an account stated is viable.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the third cause of action and defendant's cross motion for summary judgment dismissing the complaint are denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 7, Room 345, 60 Centre Street, New York, New York, on December 12, 2018, at 10:00 a.m.

9/17/2018
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE