SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM

Justice

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UAP NORTH AMERICA LTD.,

Plaintiff,

- v -

SOHO PROPERTIES INC. and 560 SEVENTH AVENUE OWNER, LLC,

Defendants.

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INDEX NO. 150685/2018

MOTION DATE 04/03/2019

MOTION SEQ. NO. 003

DECISION AND ORDER

NYSCEF Doc Nos. 40–43 and 47–60 were read on this motion to dismiss.

Motion by Defendants Soho Properties Inc. ("Soho") and 560 Seventh Avenue Owner, LLC ("Owner") pursuant to CPLR 3211 (a) (1) and (7) to dismiss the amended complaint of Plaintiff UAP North America Ltd. ("UAP") as against Soho is denied.

UAP initially sued Soho, only, alleging breach of contract and account stated causes of action. UAP then amended its complaint to add Owner as a second defendant, and Defendants now moves to dismiss as to Soho, arguing that Owner, not Soho, contracted with UAP, and that Soho has no liability to UAP. As discussed herein, the Court finds that the documentary evidence submitted in support of the motion does not conclusively establish a defense to UAP's asserted claims for breach of contract or account stated. The Court finds further that UAP has a cause of action as to those two claims.

BACKGROUND

Plaintiff UAP commenced the instant action on January 23, 2018, by e-filing a summons and complaint. This short-form, five-paragraph complaint named Soho as the sole defendant and alleged causes of action sounding in breach of contract and account stated for the sum of $21,775.00, plus interest from June 30, 2016. On April 5, 2018, Soho interposed an answer.

On May 31, 2018, Plaintiff filed motion seq. 001 for leave to amend the complaint to add Owner as a defendant. That motion was withdrawn without prejudice and refiled on July 18, 2018, as unopposed motion seq. 002 for the same relief, which was granted.

On November 28, 2018, Defendants Soho and Owner e-filed the instant pre-answer motion seq. 003 pursuant to CPLR 3211 (a) (1) and (7) to dismiss the amended complaint as against Soho. Defendants argue, in sum and substance, that the Professional Services Agreement is by and between UAP and Owner, only, that Soho is not a party to it, and that Soho never itself contracted to pay, or otherwise guaranteed payment, of the $21,775.00 at issue. The seq. 003 notice of motion set a return date of February 8, 2019, and stated that, pursuant to CPLR 2214, answering affidavits, if any, were required to be served at least seven days before the return date.

Defendants annexed portions of Plaintiff's motion papers in seq. 002—UAP's affirmation in support and exhibits 5 and 6 thereto—in support of their motion in seq. 003.

In motion seq. 002, Plaintiff argued that UAP is a construction design firm that entered into an agreement with Soho, as Developer and Managing Agent, to provide designs for a project known as the Dream Hotel, located at 560 Seventh Avenue, New York, New York. The Professional Services Agreement states that it is by and between "560 Seventh Avenue Owner, LLC, having its office at c/o Soho Properties, Inc., 31 West 27th Street, Suite 9A, New York, New York 10001 [as Owner] and UAP . . . [as Professional]." (NYSCEF Doc No. 27 [Professional Services Agreement] at 2.) The Professional Services Agreement as annexed to seq. 002 was signed by Owner and UAP on January 5, 2016. (*Id.* at 14.) Specifically, the first signature line states, "OWNER: 560 SEVENTH AVENUE OWNER, LLC." Directly underneath the Owner signature line, which bears a stylized signature, the name "Sharif El-Gamal" is handwritten in a "Print Name" blank, with the title "Managing Partner" handwritten in a "Print Title" blank. The second signature line then states, "PROFESSIONAL: UAP NORTH AMERICA LTD." Directly underneath the UAP signature line, which bears a different stylized signature, the name "Ben Tait" is handwritten in a "Print Name" blank, with the title "President UAP North America" handwritten in a "Print Title" blank.

Notably, although the Professional Services Agreement's signature page is dated January 5, 2016, the first page of the Professional Services Agreement bears a header that states "THSH Draft 8/5/15," and the first paragraph states that it was "made as of August 5, 2015." Further, throughout the Professional Services Agreement, reference is made to an "Exhibit A." The annexed "Exhibit A" is titled "Dream Hotel, Fee Proposal – Design Phase, Soho Properties, 3 August, 2015, Revision 5" followed by, "UAP Ref: C4057A." (*Id.* at 15.) Exhibit A is signed by UAP, only—as described below, there was a signature line for Soho, but not for Owner, and the Soho signature line is unsigned.

Section 4.1 of the Professional Services Agreement states, in relevant part, that "[UAP's] fees shall be paid in accordance with Exhibit A, and paid within thirty (30) days after receipt by Owner of [UAP]'s monthly invoice." (*Id.* at 5.) As is relevant here, the "FEES" section of Exhibit A lists as six-to-eight week "Concept Design" line item at a fee of $35,000, "[e]xclud[ing] taxes." (*Id.* at 18.) On the following page, a "Payment Schedule (Phase A Only)" lists, in row 1, "Week 3 of Phase A, $15,000 + taxes," and, in row 2, "On completion of Phase A, $20,000 + taxes." Directly below that is a section titled "Authorization" with two signature blocks that each include a signature lines and a blank for a handwritten date. The first signature block is titled "Client." The Client signature line is captioned "Soho Properties" and is blank; the date is also blank. The second signature block is titled "Consultant." The Consultant signature line is captioned "UAP" and appears to have been signed by Ben Tait based upon the signature, which matches the signature on page 14 of the Professional Services Agreement. The Consultant signature is dated January 5, 2016, the same as the signatures on page 14.

Plaintiff has annexed two invoices on UAP letterhead to its motion in seq. 002. (NYSCEF Doc No. 28 [Invoices].) Both invoices state, "Bill to 560 Seventh Avenue Owner, LLC, c/o Soho Properties, Inc., 31 West 27th Street, Suite 9A, New York, New York 10001." The first invoice is dated October 31, 2015, is numbered C4057A, and is for "Dream Hotel

Design Work, C4057A, 50% Concept Design" in the amount of $15,000.00, plus sales tax of $1331.25, for a total balance due of $16,331.25. The second invoice is dated December 31, 2015, is numbered C4057A/1, and is for "Dream Hotel Design Work, C4057A, 100% Concept Design" in the amount of $20,000.00, plus sales tax of $1775.00, for a total balance due of $21,775.00.

Plaintiff further argued in seq. 002 that Soho proposed a payment plan in April 2016 to pay an outstanding amount to Plaintiff of $21,775.00 on June 30, 2016, but the amount was never paid. The letter containing the alleged payment plan is dated April 29, 2016, is on Soho letterhead, and is to "Qiba" from "Ricky Gautier, Soho Properties, Project Manager." (NYSCEF Doc No. 23 [Payment Plan] [Plaintiff's exhibit 2 in seq. 002].)[1] The Payment Plan letter states,

> "We appreciate the patience that your team has shown while we continue to work towards the completion of our construction financing. Following our phone call on Thursday, April 28, 2016, I have attached the agreed upon payment plan. When the time comes, we look forward to continuing our work with your team."

Page 2 of the Payment Plan is headed, on the left side, with "Project: 560 Seventh Avenue; Tracking: UAP Invoices," and, on the right side, with a logo bearing the name "sohoproperties." Directly below the header, the "Consultant" is listed as being UAP and is followed by UAP's address. Directly below that address block, an "Invoice Summary" table lists Invoice #C4057A as dated 10/31/16 and as being in the amount of $16,331.25 and lists Invoice #C4057A/1 as dated 12/31/16 and as being in the amount of $21,775.00. A subsequent "Payment Plan" table lists a $16,331.25 "payment" as dated 5/23/16 in row 1 and a $21,775.00 "payment" as dated 6/30/16 in row 2.

Plaintiff conceded in its papers on motion seq. 002 that "the Professional Services Agreement that Plaintiff entered into was actually executed by [Owner], the owner entity of the hotel in question. . . . In fact, the invoices sent to [Soho] were actually forwarded to 560 SEVENTH AVENUE OWNER, LLC, c/o Soho Properties, Inc." (NYSCEF Doc No. 22 [Affirmation of Turman in Seq. 002] ¶ 7.) Plaintiff then argued in sum and substance that, pursuant to the Professional Services Agreement and the Invoices, Owner is a necessary party and should be joined in the action.

On November 13, 2018, this Court issued a short-form decision and order, dated November 1, 2018, granting Plaintiff's unopposed motion seq. 002 for leave to amend to add Owner as a defendant. Plaintiff e-filed the amended summons and complaint on November 16, 2018. The amended complaint is virtually identical to the original complaint, adding only one new paragraph indicating that Owner is a foreign corporation authorized in New York and is the owner of the property located at 560 Seventh Avenue, New York, New York.

As previously mentioned, on November 28, 2018, Defendants Soho and Owner e-filed the instant pre-answer motion seq. 003 pursuant to CPLR 3211 (a) (1) and (7) to dismiss the amended complaint as against Soho. Thereafter, on February 7, 2019, one day before the seq.

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[1] Although Defendants annexed the Professional Services Agreement and Invoices from seq. 002 to their moving papers in seq. 003, Defendants elected not to attach exhibit 2, the Payment Plan. This conspicuous omission is discussed more fully below.

003 return date of February 8, 2019, as designated on the notice of motion, Plaintiff e-filed an affirmation in opposition, an affidavit in opposition from UAP director Kevin Davey, and eight exhibits, which include a copy of the Professional Services Agreement, six exhibits containing emails and correspondence from 2016 and 2017, and an article from the Commercial Observer.

Plaintiff argues in its opposition papers that Soho is a Real Estate Corporation that is the managing entity of 560 Seventh Avenue Owner LLC, an entity that Soho owns, controls, and operates. (Affirmation of Turman ¶ 4.) Plaintiff further argues that Soho is also the developer of the Dream Hotel project. (*Id.* ¶ 5.) Plaintiff then argues that Soho, while doing business as Owner, entered into an agreement with UAP for UAP to provide designs for the project. (*Id.* ¶ 6.) Plaintiff annexes a copy of the Professional Services Agreement in reference to this "agreement." Plaintiff further argues that "[t]he Agreement is signed by [El-Gamal], managing partner on behalf of [Owner]." (*Id.*)

Plaintiff concedes that Owner, not Soho, signed the Professional Services Agreement. Plaintiff argues, in sum and substance, that Soho has failed to address in its moving papers certain communications involving Davey, Gautier, and El-Gamal demonstrating that Soho "was acknowledging financial responsibility for the [Professional Services Agreement]," and that UAP "should be allowed to establish [in this case] that defendant Soho is in fact responsible for the outstanding amount of $21,775.00 to Plaintiff." (*Id.* ¶¶ 16, 17.)

UAP director Kevin Davey states in his affidavit in opposition that, "on January 5, 2016, [Soho], at [Soho]'s request, while doing business as [Owner], entered into an agreement with Plaintiff for Plaintiff to provide designs for the Project. The Agreement is signed by Sharif El-Gamal [], 'Managing Partner' on behalf of [Owner]. . . . El-Gamal is also the Chairman and [CEO] of [Soho]." (Aff of Davey ¶ 6.) Davey further states that UAP always dealt exclusively with Soho. (*Id.* ¶ 7.) Davey then states that Soho told UAP in April 2016 that "they needed time to complete their construction financing for the Project, so [Soho] requested a payment plan for the outstanding amount of $38,106.25 due Plaintiff. Plaintiff agreed to said Plan." (*Id.* ¶ 8.)

Davey has attached as exhibit 2 to the affidavit a copy of the April 29, 2016 Payment Plan discussed previously. Davey has further attached an email, dated April 28, 2016, from Davey to Gautier and El-Gamal, cc'ing Tait and Quba Qiu from UAP, with the subject "Dream Hotel – Invoice payment schedule," that says,

> "Hi Sharif / Hi Ricky
> "Thanks for joining the call this morning.
> "Just to confirm that you'll send us a letter today that confirms the payment schedule below agreed on this morning's call.
> "Invoice No: C4057A – Will be paid before May 22nd, 2016.
> "Invoice No: C4057A1 – Will be paid before June 30th, 2016.
> "Many thanks for consideration and we are very excited to bring the Dream hotel art façade to fruition."

The attached reply email is from Gautier to Davey and Qiu, cc'ing Tait and El-Gamal, and states, "Hello Kevin / Quba, Following our call yesterday, please find attached a letter confirming the payment plan discussed."

Davey indicates in his affidavit that the Payment Plan required the payment of $16,331.25 by May 23, 2016, and the payment of $21,775.00 by June 30, 2016. Davey then states that "[t]he payment of $16,331.25 was made within the time frame." (Aff of Davey ¶ 10.)

Davey then details, as supported by the annexed correspondence, that no payment was made toward the June 30, 2016 amount. Specifically, Gautier advised UAP on or about June 22, 2016, to June 27, 2016, that El-Gamal would have to return from a financing roadshow before Gautier could confirm that payment would be made. (*Id.* ¶ 11.) Plaintiff then emailed El-Gamal on October 22, 2016, asking if the final payment could be made. On October 24, 2016, El-Gamal replied and told Plaintiff that "we are weeks away from closing out the construction loan looking forward to connecting then." On November 9, 2016, Plaintiff replied and again requested payment, but there was no reply. (*Id.* ¶ 12.)

Davey then states that he advised Gautier and Soho on January 20, 2017, that no further time for payment could be given and that payment had to be made by the end of the month. Plaintiff also stated that it had provided all required services pursuant to the Professional Services Agreement. In reply, on January 26, 2017, Gautier wrote,

> "As you stated below, there is no question about UAP's performance during the first phase of the project. The work produced by your team met our expectations and were a testament to the reputation of the firm that we have come to know. You are correct, it is our responsibility and expertise to attain financing for our development; thus, we can share with you how difficult the process is for this asset class. A ground-up, high-end, boutique, lifestyle hotel in New York City is the most difficult asset class to secure financing for. We have worked with numerous lenders and have taken steps to revise the building in order to attain the financing we need.
>
> "We have looked at all of our available resources and can offer you the following – a payment in the amount of $5,000 by the end of the month. This payment would be considered a settlement for the outstanding balance on our account. In order to provide this, we are truly using the final resources currently available to us.
>
> "However, to be clear, this is **not** the route that we would like to take, but it is the only solution that we are able to offer at the moment. We would prefer that you continue to be patient with us as we work towards closing the financing for our project. Once we receive funds from our lender, we will be able to bring our account up to current **in full**. Again, we can assure you that the open balance will be paid, we just ask that you continue to cooperate with us throughout this crucial period in the project."

(Davey aff, exhibit 5, at 1.)

On April 6, 2017, Davey sent Soho, to the attention of El-Gamal and Gautier, a demand letter requesting full payment of the $21,775.00 within 15 days. The subject line of the letter was "RE: Demand for Payment under the Dream Hotel Agreement between UAP North America Ltd. [] and Soho Properties, Inc. ('Client') dated August 5th 2015 (the 'Agreement') relating to the project located at 560 Seventh Avenue (the 'Project')." (Davey aff, exhibit 6, at 1.) The letter indicated that copies of the Invoices were attached. On April 20, 2017, having not received payment, Davey sent Soho a follow-up letter stating, among other things, that "UAP hereby demands that Client pay all remaining unpaid invoices by May 20th, 2017, as per verbal agreement during the conference call on April 20, 2017. Attendees of that call were Sharif El-Gamal, Pierre Richard Gautier and Kevin Davey." (Davey aff, exhibit 7, at 1.)

Defendants argue in reply that UAP's opposition is untimely, having been filed on February 7, 2019, one day prior to the return date, and UAP having not sought an adjournment. Defendants then address the merits of Plaintiff's opposition, arguing, that, as UAP has conceded that Soho is not a party to the contract giving rise to the claims in the amended complaint—the Professional Services Agreement—UAP's breach of contract cause of action and account stated cause of action flowing therefrom must be dismissed as against Soho. Defendants then argue that the communications annexed to Plaintiff's opposition papers are irrelevant, are not documentary evidence, and do not show that Soho is a party to the contract giving rise to the claims. Defendants further argue that the amended complaint is vague and conclusory, failing to state a cause of action against Soho.

As to Plaintiff's argument that Soho has acknowledged financial responsibility for Owner's liability under the Professional Services Agreement, Defendants argue that this claim "is not supported by any statue [sic] or case law." (Affirmation of Aboushi ¶ 21.) Defendants argue that Soho was "simply seeking to negotiate an alleged debt by a third party" and that there is no law under which Soho would be responsible for that alleged debt. (*Id.*) Defendants further argue that the amended complaint contains no allegations that Soho made any representations or that Plaintiff relied on any such representations as to whether Soho were responsible for the actions of Owner. Defendants reiterate that the contract was between UAP and Owner, with UAP providing services to Owner, and not Soho. Defendants also argue that the Court may not consider correspondence regarding settlement and compromise.

DISCUSSION

In the first instance, the Court will consider UAP's late opposition papers, "as there [is] no showing of prejudice, and [D]efendant[s] w[ere] able to submit reply papers on the motion." (*Serradilla v Lords Corp.*, 117 AD3d 648, 649 [1st Dept 2014].)

CPLR 3211 (a) (1) permits a party to move for judgment dismissing one or more causes of action asserted against it on the ground that a defense is founded upon documentary evidence. Dismissal under this provision "is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Alden Global Value Recovery MF, L.P. v KeyBank Natl. Assn.*, 159 AD3d 618, 621 [1st Dept 2018].) The

documentary evidence must "conclusively refute the complaint's allegations." (*Lowenstern v Sherman Square Realty Corp.*, 143 AD3d 562, 562 [1st Dept 2016].)

"On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party must be given the benefit of all favorable inferences. In assessing a motion under CPLR 3211 (a) (7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. The test of the sufficiency of a pleading is whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments." (*Hampshire Props. V BTA Bldg. and Developing, Inc.*, 122 AD3d 573, 573 [2d Dept 2014].) "'The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.'" (*Sigmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994].) "Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action." (*Kamen v Berkeley Co-op. Towers Section II Corp.*, 98 AD3d 1086, 1086 [2d Dept 2012], citing *Hartman v Morganstern*, 28 AD3d 423, 424 [2d Dept 2006].)

The Court notes that, as to the branch of the motion that was to dismiss pursuant to CPLR 3211 (a) (1), contrary to Defendants' contentions, it was Defendants' burden, not Plaintiff's burden, to submit documentary evidence. Specifically, Defendants had the burden to submit documentary evidence that conclusively establishes a defense to UAP's breach of contract and account stated causes of action. In opposition, Plaintiff was free to submit affidavits or other supporting evidence in admissible form to refute Defendants' contentions. As such, Davey's affidavit, although not "documentary evidence" pursuant to CPLR 3211 (a) (1), is properly before the Court in opposition to the motion, as are all exhibits thereto, regardless of whether any given exhibit would constitute "documentary evidence" if submitted by a defendant on its CPLR 3211 (a) (1) motion to dismiss.

In the instant motion, the Court finds that Defendants' documentary evidence submitted in support of the motion—the Professional Services Agreement by and between UAP and Owner and the Invoices—appear prima facie to conclusively establish a defense to UAP's asserted claims for breach of contract and account stated. Specifically, the parties agree that Owner and UAP signed the Professional Services Agreement and Soho did not; in fact, the signature line in Exhibit A for Soho, as Client, is blank on the copy of the agreement submitted. Further, the Invoices are addressed and billed to the exact entity name and address provided for in the Professional Services Agreement: 560 Seventh Avenue Owner, LLC, c/o Soho Properties, Inc., 31 West 27th Street, Suite 9A, New York, New York 10001, and the invoice numbers match the UAP reference number in Exhibit A to the agreement. As such, it would appear on these submissions alone that, as to this particular contract—the Professional Services Agreement—Soho is not a party, and Soho was not billed for the work done by UAP.

Nevertheless, the Court takes note of the Payment Plan submitted by Plaintiff both in seq. 002 in support of the motion for leave to amend and in seq. 003 in opposition to the instant application by Defendants. Defendants represented in their affirmation in support that "the documents attached to Plaintiff's motion to amend . . . establish that Soho [] has no obligations to

Plaintiff and should not be a party to this action. (Affirmation of Aboushi ¶ 6.) As noted previously, Defendants conspicuously omitted the Payment Plan, one of the documents originally attached to Plaintiff's motion to amend, from their moving papers in seq. 003.

Upon consideration of the full set of moving papers from Plaintiff in seq. 002, as they appear on NYSCEF and as submitted by Plaintiff in seq. 003, the Court finds that the introduction of the Payment Plan into the analysis creates an ambiguity as to whether it was Owner or Soho that "agreed upon" it with UAP. The Court observes that both the email attaching the Payment Plan and the Payment Plan itself are signed by "Ricky Gautier, Soho Properties, Project Manager." Further, emails indicate that an agreement was made over the phone on April 28, 2016, in a conversation appearing to have involved Davey, Gautier, El-Gamal, and possibly Tait and Qiu of UAP. The sum and substance of that oral agreement are unclear to the Court. Nevertheless, it was Soho that reduced the terms to a discrete writing in the Payment Plan, and any ambiguities therein must be construed as against the drafter. Moreover, Davey has alleged in his affidavit that Soho offered the Payment Plan to UAP and that UAP accepted.

Particularly on this motion to dismiss, where all facts alleged by Plaintiff are taken to be true and where Plaintiff must be afforded every favorable inference, the Court finds that the Payment Plan itself may constitute a separate promise by Soho to guaranty the payment originally due from Owner on the Professional Services Agreement, on which Owner was apparently in default. Critically, as to the first payment referenced in the Payment Plan, Davey stated that "[t]he payment of $16,331.25 was made within the time frame." It is currently unclear whether Owner or Soho made this payment, although Davey's affidavit appears to indicate that it was Soho, as in the previous sentences, Davey indicated that Soho proposed the Payment Plan. Moreover, on this motion to dismiss, the Court finds that it was for Defendants to submit something in reply to address this issue—an affidavit indicating Owner made the payment, a copy of the check—but this was not done. As such, the Court finds that Defendants have failed to meet their burden as to that branch of their motion pursuant to CPLR 3211 (a) (1).

As to the branch of the motion pursuant to CPLR 3211 (a) (7), the Court finds that the opposition submitted by Plaintiff has amplified the amended complaint sufficiently to defeat the motion.

The amended complaint states in the first cause of action for breach of contract that "[d]efendants are indebted to the plaintiff for . . . $21,775.00 . . . for work, labor and services and goods and materials provided through June 30, 2016, at the defendants' special instance and request, which sum *defendants agreed and contracted to pay*." (Amended Complaint ¶ 4 [emphasis added].) While the amended complaint does not specify how Soho or Owner agreed or contracted to pay the $21,775.00, as supplemented by the affidavit of Davey and the accompanying exhibits, the amended complaint "adequately alleges all of the essential elements of a cause of action to recover damages for breach of contract: the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." (*Hampshire Props.* at 573; *see also Junger v John V. Dinan Assocs., Inc.*, 164 AD3d 1428, 1430 [2d Dept 2018]; *25 Bay Terrace Assocs., L.P. v Public Svc. Mut. Ins. Co.*, 144 AD3d 665, 667 [2d Dept 2016]; *cf. Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233, 234 [1st Dept 1994] [dismissing a cause of action for breach of contract as too

indefinite and therefore unenforceable where the plaintiff ailed to allege, "in nonconclusory language, as required, the essential terms of the . . . contract, including those specific provisions of the contract upon which liability is predicated, whether the alleged agreement was, in fact, written or oral, and the rate of compensation].)

The Court finds that UAP has adequately alleged for the purposes of this CPLR 3211 (a) (1) and (7) motion to dismiss that Soho contracted with UAP to answer for the alleged debt of, and default by, Owner in paying UAP pursuant to the Professional Services Agreement. (*See* General Obligations Law § 5-701 [a] [2].) Whether an enforceable contract was in fact made between UAP and Soho, or whether it was written, as was the Payment Plan, or oral, as is the alleged verbal agreement referenced in Davey's April 20, 2017 letter, is a matter to be decided under the facts of this case either at trial or on a motion for summary judgment. (*See Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 425 [2013] [explaining that "a party can overcome [a no-oral modification] clause and enforce an oral modification to a written agreement by demonstrating either that the oral modification has in fact been acted upon to completion; or, where there is only partial performance, that the partial performance is unequivocally referable to the alleged oral modification" or on equitable estoppel grounds]; *Martin Roofing, Inc. v Goldstein*, 60 NY2d 262 [1983]; *Reddy v Mihos*, 160 AD3d 510, 514–515 [1st Dept 2018] [discussing consideration in the context of a promise to pay for the debt of another]; *Mot Parking Corp. v 86-90 Warren St., LLC*, 104 AD3d 596 [1st Dept 2013] [holding that the parties' oral agreement was executed, not executory, and therefore was enforceable notwithstanding a no-oral-modification clause in the underlying contract]; *Carey & Assocs. v Ernst*, 27 AD3d 261, 263–264 [1st Dept 2006].) Soho may have partially performed on a contract between Soho and UAP by paying the $16,331.25 to UAP.

The Court finds further that the submitted correspondence between UAP and Soho—regarding payment of the outstanding invoices, including, but not limited to, the statement by Soho that "we will be able to bring our account up to current **in full**. Again, we can assure you that the open balance will be paid, . . ."—sufficiently amplifies the complaint as to Plaintiff's account stated cause of action. "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 separate items composing the account and the balance due, if any, in favor of one party or the other." (*Shea & Gould v Burr*, 194 AD2d 369, 370 [1st Dept 1993].) "The very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained." (*Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st Dept 2002].) "[E]ither retention of bills without objection or partial payment may give rise to an account stated." (*Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004].)

In reply, Defendants have "failed to demonstrate that any fact alleged in the complaint was undisputedly not a fact at all," as was their burden. (*Hampshire Properties v BTA Bldg. and Developing, Inc.*, 122 AD3d 573, 573 [2d Dept 2014].) Defendants' continued argument that the amended complaint is vague and conclusory fails to account for the supplementary affidavit and exhibits submitted by Davey, which, taken together, and deeming all factual allegations to be true, allege the existence of at least two enforceable contracts between UAP and Soho for the $21,775.00 at issue.

CONCLUSION

Accordingly, it is

ORDERED that Defendants' motion is denied; and it is further

ORDERED that the parties are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, May 7, 2019, at 9:30 a.m., for a compliance conference.

The foregoing constitutes the decision and order of the Court.

4/22/2019
DATE

HON. ROBERT D. KALISH, 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