

<b>Caring Professionals, Inc. v Landa</b>
2015 NY Slip Op 30232(U)
February 3, 2015
Supreme Court, Kings County
Docket Number: 504434/13
Judge: Martin M. Solomon
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS  
Commercial Part 10**

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**CARING PROFESSIONALS, INC.,**

**Plaintiff(s)**

**Index no. 504434/13**

**-against-**

**DECISION/ORDER**

**BENJAMIN LANDA, ESTATE OF JENO GUTTMAN  
by its Executors LOUIS GUTTMAN and RYVKIE  
GOLDBERGER, EXCELLENT HOME CARE  
SERVICES, LLC,**

**Defendant(s)**  
-----X

**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion for summary judgment**

<b>PAPERS</b>	<b>NUMBERED</b>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Replying Affidavits</b>	<b>3</b>
<b>Sur-Reply Affidavits</b>	

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Plaintiff brings this action for, inter alia, breach of contract, failure to pay for services and account stated. Plaintiff is a provider of nurses, home health aides and personal care aides, whose services were allegedly provided to the defendant Excellent Home Care Services, LLC.. Plaintiff alleges these services were provided to defendant pursuant to an agreement dated July 1, 2009. The terms of this agreement are not set forth in the submissions other than that plaintiff was to provide these services and defendant LLC was to pay for them.

Defendants answered the complaint. The answer contained a number of affirmative defenses. Most relevant to the instant motion, is the Sixth Affirmative defense that plaintiff failed "to provide properly licensed home health care aides..."

Plaintiff now moves for summary judgment on its cause of action for account stated. The invoices at issue are not annexed to the moving papers. Exhibit C to the motion is intentionally omitted and offered for in camera review, to protect patient confidentiality.

A notation for Exhibit “C” indicates that “The nearly 7900-page spreadsheet showing the invoices sent from Plaintiff to Defendant for the Relevant Period between March 2009 and July 2013, Exhibit C, is incorporated herein by reference...” The attorneys for the parties have stipulated that “...the contents of [this spreadsheet] are not in dispute...”

Plaintiff also submits two documents as Exhibit “D”. Both these documents are titled “Cash Receipt Journal” and both purport to show payments made by the defendant LLC from March 1, 2009 through April 30, 2013. One shows a notation “Contract: zExcellent Home Care” and the second shows a notation “Contract: Excellent Home Care Services”.

The first Journal (zExcellent) contains 154 entries, the bulk of which occurred in 2010 and 2011. There are seven entries from 2009, five entries from 2012 and none from 2013. The logic behind the organization of this journal is difficult to follow. The entries appear by month and day, thus the years are intermixed and haphazard. There is little pattern to the payment record. In 2010 payments were made approximately every ten days to two weeks, more or less. In 2011 payments were made approximately every week to ten days, more or less. The entries from 2009 and 2012 are too few and scattered for any real pattern to emerge.

The second Journal (Excellent) contains seventeen entries. These run from September 2011 through May of 2012, with a single entry in March of 2013.

In support of the motion, plaintiff submits the affirmation of Miriam Sternberg, president of plaintiff. She asserts that from March 14, 2009 through July 31, 2013 plaintiff provided and billed for \$23,631,104.47 for services and payments of \$16,732,488.22 were made, leaving a balance of \$6,898,616.25.

In opposition, defendant submits copies of letters showing that in the summer of 2007 there was a request made on the defendant LLC for information regarding the credentials and licenses of a number of entities, including plaintiff, in connection with an investigation by the office of the Attorney General. The affidavit of Benjamin Landa, a member of the defendant LLC, asserts that the Medicaid reimbursement of the LLC was reduced by approximately \$6,500,000.00 “as a result of the unlicensed personnel and services provided by Plaintiff...”

Among defendant’s submissions is an email from an accountant that puts the reduction at approximately \$6.2 million. Defendant asserts that it is entitled to offset these reductions against any amounts claimed by plaintiff.

Anticipating this defense, the affirmation of Ms. Sternberg asserts that there was no finding of wrongdoing by plaintiff made by the Attorney General in connection with this investigation. There is, however, no documentation included with the submissions to support this. To the extent plaintiff asserts that no penalty was assessed against it in connection with the investigation, may be besides the point, if in fact defendant LLC was penalized for plaintiff’s misconduct.

Turning to analysis, it is worthwhile to review the well traveled, settled law on summary

judgment and the less often used law on account stated.

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd. (b)), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. (b)). (*Zuckerman v. City of New York*, 49 N.Y.2d 557, at 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). "A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986])." (*Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 790 N.E.2d 772, 760 N.Y.S.2d 397, 2003 N.Y. Slip Op. 13923 [2003]).

It is also worthwhile to note that "[i]t is not the court's function on a motion for summary judgment to assess credibility" (*Silva v. FC Beekman Assoc., LLC*, 92 A.D.3d 754, 756, 938 N.Y.S.2d 583, quoting *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 631, 665 N.Y.S.2d 25, 687 N.E.2d 1308; see *A Dan Jiāng v. Jin-Liang Liu*, 97 A.D.3d 707, 948 N.Y.S.2d 675). (*Garcia v. Stewart*, 120 A.D.3d 1298, 993 N.Y.S.2d 90, 2014 N.Y. Slip Op. 06172 [2d Dept., 2014]).

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*Jim-Mar Corp. v. Aquatic Constr.*, 195 A.D.2d 868, 869, 600 N.Y.S.2d 790 [1993] [citations omitted], lv. denied 82 N.Y.2d 660, 605 N.Y.S.2d 6, 625 N.E.2d 591 [1993]; accord *Antokol & Coffin v. Myers*, 86 A.D.3d 876, 877, 927 N.Y.S.2d 723 [2011]; *J.B.H., Inc. v. Godinez*, 34 A.D.3d 873, 874, 823 N.Y.S.2d 576 [2006]). ...Notably, ... [the] firm in question need not "establish the reasonableness of the fee since the client's act of holding the statement without objection will be construed as acquiescence as to its correctness" (*O'Connell & Aronowitz v. Gullo*, 229 A.D.2d at 638, 644 N.Y.S.2d 870; see generally *Levine v. Harriton & Furrer, LLP*, 92 A.D.3d 1176, 1178, 940 N.Y.S.2d 334 [2012]; *J.B.H., Inc. v. Godinez*, 34 A.D.3d at 874–875, 823 N.Y.S.2d 576). (*Whiteman, Osterman & Hanna, LLP v. Oppitz*, 105 A.D.3d 1162, 963 N.Y.S.2d 432, 2013 N.Y. Slip Op. 02433; quoted with approval, *In re Lawrence*, --- N.E.3d ----, 24 N.Y.3d 320, 2014 WL 5430622, 2014 N.Y. Slip Op. 07291).

"[A] plaintiff establishes its prima facie entitlement to judgment as a matter of law on its cause of action "to recover on an account stated by tendering sufficient evidence that it generated account statements for the defendant in the regular course of business, that it mailed those statements to the defendant on a monthly basis, and that the defendant accepted and retained these statements for a reasonable period of time without objection, and made partial payments

thereon.” (Citibank (South Dakota), N.A. v. Keskin, 121 A.D.3d 635, 993 N.Y.S.2d 343, 2014 N.Y. Slip Op. 06553 [2d Dept., 2014]).

The submissions show that the arrangement between the parties was not an account stated, within the classic definition of the term. The nearly 7900 page spreadsheet showing invoices and 171 payments clearly can not match invoices to payments one to one, this is to say that each invoice did not generate a payment. This is more in the nature of a running or mutual account, which shares attributes with an account stated.

A "mutual" account is "one in which two parties have agreed to a course of dealings in which each periodically furnishes something to the other, each keeping a running account of credits and debits in the expectation that the party in whose favor a balance exists will send the other a bill from time to time" (Siegel N.Y. Prac § 50, at 72 [5th ed]; see Green v. Disbrow, 79 N.Y. 1 [1879]). Michael Serrapica, CPA, PLLC v. J.A.F. Associates 36 Misc.3d 139(A), 957 N.Y.S.2d 265 (Table), 2012 WL 3139788 (N.Y.Sup.App.Term), 2012 N.Y. Slip Op. 51450(U)

Both an account stated and a mutual account arise out of an agreement, express or implied, that one party will provide goods and/or services and issue invoices and the other party will make payments. In either case, acceptance and retention of the invoices for a reasonable period without objection precludes the receiving party from objecting to the correctness of the items or the balance due.

In this case, the attorneys for the parties stipulated to that defendant LLC does not dispute the accuracy of the spreadsheets showing the invoices sent to the defendant LLC. Thus, plaintiff has established its claim for \$6,898,616.25 in connection with these invoices.

This, however, does not end the inquiry. Defendants have interposed a defense in the nature of an offset or setoff that does not go to the accuracy or correctness of the invoices from March 14, 2009 through July 31, 2013. Indeed, the offset does not arise directly out of the transactions that occurred during this period. It arises from prior dealings between the parties and is only related to plaintiff's claims by virtue of the long term relationship between the parties. Indeed, plaintiff's submissions go to some lengths to highlight these last points.

While Ms. Sternberg affirmation attempts to refute and cast doubt on the legitimacy of the offset claim, as previously noted, there is no documentary evidence supporting her assertion that the Attorney General's investigation exonerated the plaintiff. Her assertion that the charge backs to defendant LLC were not the result of plaintiff's conduct is directly refuted by the Landa affidavit which asserts that they were.

Because defendants' counterclaim does not arise directly from plaintiff's claim, plaintiff's motion for summary judgment does not shift the burden of proof to defendants in connection with its counterclaim. Defendants have not cross moved for summary judgment on this defense; it is only plaintiff's motion for summary judgment that is before this court.

For this reason, in order to prevail, plaintiff must conclusively establish that there is no

merit to the counterclaim, while defendants need only show that there is a material issue of fact in regard to the counterclaim. Under the circumstances, the conflict between the Steinberg affirmation and the Landa affidavit presents an issue of credibility that can not be determined by way of a motion for summary judgment.

For the foregoing reasons, the motion for summary judgment is granted only to the extent that plaintiff has established its claim for \$6,898,616.25, however entry of any judgment must await determination of defendants' defense of offset, which can not be determined on the instant motion.

The motion for summary judgment is granted only to the extent indicated.

Dated:

2/3/15

  
Hon. Martin M. Solomon  
J.S.C.

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