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Walter Boss, Inc. v Roncalli Frgt. Co., Inc.
2018 NY Slip Op 51891(U)
Decided on November 8, 2018
Supreme Court, Suffolk County
Hudson, J.
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Decided on November 8, 2018

Supreme Court, Suffolk County

Walter Boss, Inc., PINES PROPANE CORP., and PINES AND POOLS, INC., Plaintiffs,

against

Roncalli Freight Company, Inc. d/b/a COASTLINE FREIGHT, PINES COMMERCIAL PROPERTIES, LLC, PINES OPERATIONS, LLC, and PINES ACQUISITION HOLDINGS, LLC, as Successor in Interest by Merger to PINES COMMERCIAL PROPERTIES, LLC and PINES OPERATIONS, LLC, Defendants.

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James Hudson, J.

The matter at hand is a trial arising from a dispute between the Plaintiff and Defendant companies over the sums purportedly owed for services rendered to each other over a course of years. The non-jury trial took several days of testimony and the presentation of evidence. The Court would be remiss if it did not commend Ms. Donnenfeld, Ms. Blair and Mr. Stern for the able manner in which each of them presented arguments on behalf of their respective clients. Their written Briefs were thoughtful, scholarly and matched only by their skill in the Courtroom. Just as the learned Tribonian warned us that *multitudo imperitorum perdit curiam**, the Court is ever mindful, indeed grateful, for the converse observation-excellent practitioners uphold the judicial forum.

Plaintiffs originally had five causes of action. The first claim was against Pines Commercial Properties LLC, Pines Operations LLC, Eric Von Kuersteiner and Anthony Roncalli for goods and services provided. The second sounded in breach of contract arising from a purported oral settlement of claims that Boss Inc. *et al.* had against the Defendants in

return for $140,000.00 in shipping credits from Coastline Freight. The third claim was for damages resulting in increased costs to the Boss Parties as a result of procuring alternative shipping providers. The fourth claim was for an injunction preventing the Defendant Roncalli Freight d/b/a Coastline Freight from refusing to carry the Plaintiffs' goods and personnel and finally a fifth cause of action seeking damages for the alleged wrongful detention of Plaintiffs' goods. By the time of trial, however, all but the first and second causes of action against the Defendants were resolved. Mr. Von Kuersteiner and Mr. Roncalli are no longer being sued in their individual capacities. Plaintiff requests the Court grant judgment against the remaining Defendants for:

(1) breach of the settlement agreement in the amount of $140,000.00 less Coastline Credit received ($70,689.27 per Plaintiffs' Exhibit 33) for a total of $63,310.73 plus interest since July 3rd, 2012; or (2) In the event that the Court does not find the settlement agreement enforceable, "then for breach of contract for goods and services provided in the amount of $219,141.67 less offset for rent in the amount of $84,677.42 for a total of $134,464.25 plus interest since January 11, 2010."

The Defendants' counterclaims are for breach of contract, an account stated and for storage and service fees. Specifically, the Defendants argue that the sum of $125,418.27 is due to Roncalli Freight from Walter Boss Inc., and $86,620.19 due to Roncalli Freight from Pines Propane Corp. (Defendants' Exhibits D and C) for unpaid shipping, servicing and storage costs for a total of $214,038.46.

The salient testimony and evidence consisted of the following:

Mr. Walter Boss was the first witness called for the Plaintiffs. Upon observing his demeanor and listening to his answers, the Court found him to be in all respects a forthright and hence credible witness. The Court also heard the testimony of Ms. Karen Boss, and Mr. Steven Young. For the Defense, the witnesses consisted of Mr. Von [*2]Kuersteiner and Ms. Patricia Napolitano.

The Court will discuss and analyze the evidence initially as it applies to the claims of the Plaintiffs.

Mr. Boss is the sole owner of Walter Boss Inc., a construction company. He is also the sole owner of Pines Propane Corp. and Pines and Pools Inc. These shall be referred to

collectively as "The Boss Parties." In order to operate his businesses, Mr. Boss required the transportation of sundry materials to Fire Island from Sayville. He utilized Tony's Barge Service and Coastline Freight (d/b/a of Roncalli Freight which acquired Coastline Freight Inc.).

There came a time in 2003 through 2004 that he started doing business with Mr. Eric Von Kuersteiner and Mr. Anthony Roncalli. They were the principals of the Defendants Pines Commercial Properties, LLC and Pines Operations, LLC (hereinafter referred to as the "EVK Parties"). One aspect of Mr. Boss' interaction with the Defendants involved work on a building known as "The Pavilion." Mr. Boss detailed that he performed a considerable amount of work for the Defendants. This was substantiated *via* a series of invoices (Plaintiffs' Exhibit 64) which totaled $219,141.67 between the years 2004 and 2010. Although Defense Counsel, during cross-examination skillfully attempted to cast doubt as to the veracity of the invoices, we find that they withstand scrutiny and substantiate Mr. Boss' testimony. During the direct testimony of Mr. Von Kuersteiner (Transcript 04/29/2016, pp.112-114), he attempted to challenge the bill under Invoice No.3762 (Plaintiffs' Exhibit 64). He claimed that this was for work performed on installing a swimming pool at the Hotel Ceil. The construction work had to be redone because it was in violation of FIPPOA Code. This was rectified by another company's services for completion and incurred a $7,600.00 cost to the Defendants. As described *infra*, the Court was less than persuaded by Mr. Von Kuersteiner's testimony.

Between 2004 and 2009 the Boss companies provided construction and maintenance services (as well as materials) for the Defendants and the realty they controlled. The properties were extensive, consisting of buildings located at 126 Beachill, 28 Fire Island Blvd., 428-9 Ocean, Aqua Gym, Bay Bar LLC, Pines Bamboo LLC, Blue Whale Restaurant LLC, Hotel Ceil LLC, Maximus Construction, EVK Pavilion LLC, Staff House, Strip Mall and Yacht Club, Pines Commercial Properties LLC, and Pines Operations LLC (Stipulated Facts, para 9). At the same time, The Boss Parties were using the services of Coastline Freight and occupying office space in an EVK Parties owned property, specifically a location owned by Rohan Holdings LLC, owned by Mr. Von Kuersteiner and Mr. Roncalli, beginning January 1st, 2005. The rent was originally $20,000.00 per year. The Landlord, Helm's Deep Holdings LLC, raised the rent to $60,000.00 *per annum* (Plaintiffs' Exhibit 44). The Plaintiffs refused to pay this at which point a notice to terminate was sent to Mr. Boss (Plaintiffs' Exhibits 45 and 46). When the written lease terminated on January 1st, 2006, the tenancy

continued on a [*3]month to month basis (Stipulated Facts, para 11). With the passage of time, a misunderstanding arose between the Boss Parties and the EVK Parties as to the value of their respective services. The Boss Parties did not pay any rent between 2006 and 2010.

The Parties met January 11th, 2010. The Boss Parties prepared a letter and spread sheet detailing their claims for moneys owed for services and offset for rent. Mr. Boss claimed he was owed $248,468.76. It is undisputed that a formal written agreement was never entered into. Mr. Boss testified that it was his understanding that when the EVK Parties divested themselves of their holdings on Fire Island, his businesses would get paid. At the time the properties were sold, Mr. Von Kuersteiner stated that the Plaintiffs owed outstanding rent in the amount of $141,662.00 (Testimony 4/28/2016, p.89 line 12). Mr. Von Kuersteiner also testified, *inter alia*, that Plaintiffs owed the Defendants Pine Operations LLC, Pines Commercial Properties LLC and Pine Acquisition Holdings LLC a sum of $39,177.00 (4/28/2016 transcript, p.127 line 25 and p.133 line 20).

On September 29th, 2010, Mr. Boss and Mr. Von Kuersteiner met to discuss the dispute over the purported monies owed between the two factions. Mr. Von Kuersteiner stated the meeting was " to get a final number that we could agree on for what was allegedly due to the Walter Boss companies" (4/29/2016 ,Transcript p.91). By the time of the September 2010 meeting, the EVK Parties had sold all of their commercial properties (4/29/2016 ,Transcript p.91). This narrowed the possibility of interaction between the Parties to the services of Roncalli Freight *vis-à-vis* shipping for the Boss companies. It is undisputed that no settlement was reached at the September 2010 meeting. On the following day, Mr. Von Kuersteiner made a settlement offer in writing to the Plaintiffs (Plaintiffs' Exhibit 16). This offer, by its terms, was conveyed on behalf of Von Kuersteiner and Roncalli individually and on behalf of Pines Operations LLC and subsidiaries as well as Pines Commercial Properties and subsidiaries. Roncalli Freight was not mentioned in the document. Indeed, the sum due and owing Coastline was stated separately. Mr. Boss rejected this offer (Plaintiffs' Exhibit 18). He did, however pay the outstanding shipping charges for Coastline on January 5th, 2011 (Plaintiffs' Exhibits 19 and 20). From that point onward, the Boss entities could not use Coastline on a credit basis. They were required to pay cash for each shipment (Transcript 4/27/2016, p.3 and 4/28/2016 pp.11-12). The testimony of Ms. Patricia Napolitano shed little light on the amount of the disputed claims. Ms. Napolitano was the bookkeeper for Roncalli Freight. Additionally, she performed other bookkeeping duties for the EVK Parties at Mr. Von Kuersteiner's behest.

Tasked with reconciling the accounts of Roncalli with the claims of the Boss Parties, she dutifully attempted same. In comparing the records, however:

" we could just never balance because every time they gave me a new ledger there were either invoices that were on there that was off all of a sudden. New invoices appeared with an older date. Invoices with the same number that had, all of a sudden, a different amount. It was very tedious.

Q. To the best of your knowledge, Miss Napolitano, was the reconciliation ever [*4]completed?

A. That could never be completed. Never " (Transcript 4/29/2016, p.10).

The Parties met again in May of 2011. Mr. Boss, Ms. Boss and Eric Von Kuersteiner were present (Testimony of Mr. Boss 4/27/2016, Transcript pp.4-5). Mr. Boss stated that Mr. Von Kuersteiner and himself agreed to resolve the outstanding dispute over the Boss entities services for $140,000.00 in shipping credits to be provided by Coastline (Transcript 4/27/2016, pp.5-7). This claim is substantiated by Ms. Boss' testimony (Transcript 4/28/2016, pp.12-14). The transcript of Mr. Boss, however, contains two additional important points: (1) Some claims were left unresolved (4/21/16 transcript pp.40-41); and (2) additional language was added to a proposed written agreement which was not signed (4/27/2016 transcript, pp.42-43).

Mr. Von Kuersteiner denies that this agreement was reached. The shipping credit of $140,000.00 was, according to him, part of an attempted resolution, not an admission of contractual liability (Kuersteiner transcript 4/28/2016, p.129). He also said that the Boss entities owed Pines Commercial Properties $39,177.00 (***Id.*** p. 133). Mr. Kuersteiner also averred that Karen Boss had interfered with Roncalli's operations which caused a 50% decrease in revenue to that company (***Id.*** pp.134-135). During his testimony, Mr. Von Kuersteiner claimed that the offer was conditioned on the Boss entities observing " the rules of the FIPPOA [and that] Karen [Ms. Boss] would stop interfering with our business (Transcript 4/28/ 2016, pp. 96-97). Mr. Von Kuersteiner also indicated that Walter Boss Inc. *et*

al. was cut off from shipping on Roncalli Freight because the outstanding bills were not paid. (Transcript 4/28/2016, pp.118-127).

In observing Mr. Kuersteiner on the witness stand and applying the Court's presumed powers of discernment, we found his recall of the interactions with Mr. Boss to be faulty to the point where it has been discarded in our analysis of the proof (***Morales v. Inzerra,* *98***AD3d 484, 485, 949 N.Y.S.2d 433, 436 [2nd Dept. 2012]). To quote the Bard of Avon, Mr. Von Kuersteiner " remember[ed] with advantages." (Henry V Act 4 Scene III).

Ms. Blair, as attorney for the EVK Parties sent a letter to Mr. Boss in May of 2012 offering to settle claims in a proposed written agreement (Plaintiffs' Exhibit 30). This was to be a $60,000.00 Coastline credit in place of the $140,000.00 credit. Defendants also took the position that Coastline was separate entity and outside of the settlement. Mr. Boss' understanding was that his contract (as he deemed it) with Mr. Von Kuersteiner was for Coastline to off-set monies that the Boss Parties were owed by Pines Commercial Properties LLC and Pines Operations LLC. On July 3rd, 2012, Roncalli Freight stopped accepting shipments from the Boss Parties and would not accept shipping by Walter Boss Inc. and Pines Propane Corp., until accounts were brought current.

Significantly, Walter Boss testified that neither Walter Boss Inc., Pines Propane Corp., nor Pines and Pools ever did work for Roncalli Freight Company (Transcript [*5]4/27/2016 p.45). Mr. Steven Young also testified to the same effect (Transcript 4/28/2016, p.69).

The Court will now discuss the evidence pertaining to Defendants Counterclaims.

Roncalli Freight Company, Inc. was incorporated on July 22nd, 2009. Its shareholders were Eric Von Kuersteiner and Anthony Roncalli. Roncalli Freight Company, Inc. acquired the assets of Coastline Freight & Charter on March 10th, 2010 and commenced operations on April 1st, 2010.

The proof adduced at trial included monthly statements containing bills for freight shipping were sent from Roncalli to Walter Boss Inc. and Pines Propane Corp. on and between the dates of July 1st, 2012 to April of 2016. These total $212,038.00 (Von Kuersteiner's Testimony 4/28/2016, p.105). Mr. Young stated that no objections were received concerning them (Transcript 4/28/2016, p.67). Ms. Napolitano, whom we found to be

credible, also testified that neither Walter Boss Inc. nor Pines Propane Corp. ever objected to the monthly bills/invoices sent to them (Transcript 4/29/2016, p.16).

On August 1st, 2012, Roncalli Freight Company d/b/a Coastline Freight, sent Walter Boss Inc. an invoice for storage fees, unpaid shipping charges and service fees. Defendants' Exhibit "D" manifested an outstanding bill for $125,418.27 from Walter Boss Inc. and Defendant's Exhibit "C" was for $86,620.19 from Pines Propane Corp. for a total of $214,038.46. On direct examination, Ms. Boss admitted that Boss entities received invoices from Roncalli Freight (Transcript 4/27/2016, p.14).

Defendants' Exhibit "I" is a Coastline Freight credit application which reads in part:

"All freight charges are payable upon invoicing. In the event of default of payments by customer, customer further agrees to pay reasonable attorney fees, collection fees and expenses necessary for the collection of any sums due in addition to the balance owed. A service charge of 2% per month will be added on all past due balances."

Neither Walter Boss Inc. nor Pines Propane Corp. paid for freight shipping from May 2011 through June 2012. This caused the Defendant Roncalli to stop shipping for the Plaintiffs (Testimony of Eric Von Kuersteiner 4/28/2016, p.104). Mr. Von Kuersteiner also stated that the Plaintiffs never objected to any of the bills (***Id.*** p. 105). Mr. Von Kuersteiner also indicated that the Plaintiffs Walter Boss Inc. and Pines Propane Corp. never performed any services nor provided any products for the Defendant Roncalli Freight Company (***Id.*** at p.107). Moreover, Mr. Kuersteiner stated that he had incurred $66,227.00 in legal fees as a result of attempting to collect the unpaid balance of the shipping charges (***Id.*** at p.11).

Prior to addressing the Plaintiffs' argument in favor of its Causes of Action we will consider a contention by Ms. Blair, regarding certain documentary exhibits by the Plaintiffs (specifically Exhibits 62, 63 and 64).

Defense Counsel argues that the Plaintiffs' exhibits are insufficient proof as to any [*6]sums allegedly due to them from the Defendants. In support of this contention, Counsel relies on the holding in ***Bath Medical Supply, Inc. v. Utica Mut. Ins. Co.***, 23 Misc 3d 141(A), 889 N.Y.S.2d 881 [App Term 1st, 11th and 13th JDs 2009] Wherein the Court stated:"At trial, 'it remained Plaintiffs' burden to proffer evidence in admissible form, *i.e.*, by introducing into evidence the claim form[s] in question by, *inter alia*, calling a witness to lay

a foundation for the admissibility of the claim form[s] as ... business record[s], which plaintiff failed to do. Accordingly, in light of Plaintiffs' failure to establish the admissibility of its claim form[s] as...business record[s], plaintiff did not establish a *prima facie* case and defendant was entitled to judgment dismissing the complaint' (***Bajaj v. General Assur. Co.***, 18 Misc 3d 25, 28-29 [App Term, 2d & 11th Jud Dists 2007] [citation omitted]; *see also* ***Art of Healing Medicine, P.C. v. Travelers Home & Mar. Ins. Co.***, 55 AD3d 644 [2008])."'

Defendants also cite to ***Johnson v. Lutz***253 NY 124 (1930) which interpreted the precursor statute to CPLR 4518 stating the well settled rule that proffered business records should be precluded unless the Court finds:

" that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind." (***Id.***125-126).

Ms. Blair relies on the aforementioned authority to call into question the admissibility of the documents prepared by the Boss Parties. Although Counsel showed inconsistencies in some of the documentation submitted by Plaintiffs during the course of the proceeding, the Court is ultimately satisfied that its ruling in admitting the Exhibits as business records was correct (***Fed. Exp. Corp. v. Fed. Jeans, Inc***., 14 AD3d 424, 425, 788 N.Y.S.2d 113, 113 (1st Dept. 2005); ***Plymouth Rock Fuel Corp. v. Leucadia, Inc***., 117 AD2d 727, 728, 498 N.Y.S.2d 453, 454 [2nd Dept. 1986]). We will not revisit the evidentiary rulings made at trial.

Plaintiffs' claim the existence of an oral agreement with the Defendants and cite to ***Kramer v. Greene***142 AD3d 438,36 N.Y.S.3d 448 [1st Dept. 2016]; ***Matter of Express Industries & Term Corp. v. N.Y.S. Dept. of Transp***. 93 NY2d 584, 693 N.Y.S.2d 857 [1999]; and ***Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp***., 74 NY2d 475, 548 N.Y.S.2d 920 [1989]. Specifically, Ms. Donnenfeld contends that:

"The actions of the EVK Parties and the Boss Parties subsequent to the May 2011 meeting demonstrate that an agreement was reached - EVK's extension of a $140,000.00 shipping

credit in exchange for the Boss Parties forbearance in pursuing their claims in [*7]Court or otherwise" (Post Trial Memo, p.16).

She also asks the Court to consider the testimony of Mr. Steve Young (responsible for billing for Coastline Freight) who said that the Boss Parties were permitted to ship without payment between May of 2011 and June of 2012 (Transcript 4/28/16, pp.51-52). It has also been clearly established that Mr. Von Kuersteiner was aware of this state of affairs (Transcript 4/28/16, pp.102-103).

The Defense argues that the proof adduced at trial cannot sustain a finding that an oral contract was entered into between the Boss Parties and the EVK Parties for a $140,000.00 shipping credit. Ms. Blair, draws our attention to the email exchange between the Parties (Plaintiffs' Exhibits 25 and 28) demonstrating that counter proposals were rejected and thus, she posits, a settlement agreement was never finalized. The testimony of Mr. Young indicates that the reason Boss Inc. and Pines Propane were still allowed to ship despite outstanding balances was because of ongoing negotiations between "Eric and Walter" (4/28/2016 Transcript, pp.51-52). The Court must note, however, that we found Mr. Young's demeanor on the stand to be very poor and indicative of a bias against Mr. Boss. This limited the usefulness of his statements.

In support of this contention, Ms. Blair cites to numerous authority. They shall be set forth and discussed *ad seriatim (**More v. New York Bowery Fire Ins. Co.***, 130 NY 537,545-547, 29 N.E. 757 [1892]):

"There must be actual acceptance, or there is no contract . [a] party cannot be held to contract where there is no assent. Silence operates as an assent and creates an estoppel only when it has the effect to mislead" ***S.S.I. Inv'rs Ltd. v. Korea Tungsten Min. Co.***, 80 AD2d 155, 157-58, 438 N.Y.S.2d 96 (1st Dept. 1981), *aff'd*, 55 NY2d 934, 434 N.E.2d 242 [1982]) held that:" [When] all the essential terms and conditions of an agreement have been set forth in informal written memoranda and all that remains is their translation into a more formal document, such an agreement will be capable of specific performance" (***Brause v Goldman***, 10 AD2d 328, 332, affd 9 NY2d 620). Here, however, all the essential terms and conditions have not been memorialized in the informal writings between Plaintiff and Defendant KTM. Plaintiff's bid was not accepted and, thus, there was no mutual assent as to the purchase price for this real property. In this posture there certainly was not, nor could there have been, a complete meeting of the minds. "[When] the parties have clearly expressed an intention not to be bound until their preliminary negotiations have culminated in the execution of a formal contract, they cannot be held until that event has occurred. The necessary finality of assent is lacking"

(***Brause v Goldman,*** *supra*, p.332). The cumulative effect of the correspondence and conduct of these parties can only be categorized as indicative of an intent to conduct further negotiations. Since no formal contract was subsequently entered into, no binding legal relationship was ever established."

In ***Gomez v. Bicknell***, 302 AD2d 107, 116, 756 N.Y.S.2d 209 (2nd Dept.2002):

"Silence, absent a duty to speak, cannot constitute an acceptance" (*see* ***Matter of Albrecht Chem. Co. (Anderson Trading Corp.)***, 298 NY 437, 440; ***Josephine & Anthony Corp. v Horwitz***, 58 AD2d 643; ***Karlin v. Avis***, 457 F2d 57, 61-62 [2d Cir], cert denied 409 US 849; ***L.B. Kaye Assoc., Ltd. v. Jews for Jesus***, 677 F Supp 160, 166, *affd* 854 F2d 1314 [2d Cir]; cf. ***J.P.A. Realty v Citi Fin. Mtge. Co.***, 293 AD2d 447***; Russell v Raynes Assoc. Ltd. Partnership***, 166 AD2d 6, 15)."

Defense Counsel urges the Court to apply the holding in ***Trevor v. Wood***, 36 NY 307, 310 (1867): "The mere determination of the mind unacted on can never be an acceptance." (***Id.***p.310).

Ms. Blair also cites a case containing the expression of the brightest stars in the judicial firmament: ***Sokoloff v. Nat'l City Bank of New York***, 239 NY 158, 170, 145 N.E. 917 (1924), in which the immortal Cardozo, speaking for a unanimous Court containing such luminaries as Judges Hiscock, Pound, McLaughlin, Crane, Andrews and Lehman, in turn quoted Oliver Wendell Holmes' declaration in ***O'Donnell v. Clinton***, 145 Mass. 461 'Assent in the sense of the law is a matter of overt acts, not of inward unanimity in motives, design or the interpretation of words' (***Holmes, J., O'Donnell v. Clinton***, 145 Mass. 461; ***White v. Corlies***, 46 NY 467; 1 Williston, Contracts, § 95; Anson, Contracts, § 34).

Defense Counsel's citation to the rule in ***Trevor v. Wood,*** *supra* actually argues her rival's cause. In addition to the passage of the opinion cited by Defense Counsel, the learned Court goes on, however, to state:

"Where the offer is by letter the usual mode of acceptance is by the sending of a letter announcing a consent to accept; where it is made by a messenger a determination to accept returned through him or sent by another would seem to be all the law requires if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties; keeping silence under certain circumstances is an assent to a proposition; anything that shall amount to a manifestation of a formed determination to accept,

communicated or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract." (***Id.*** at 310).

The critical issue for the Court to determine is whether a contract was entered into between Mr. Boss and Mr. Von Kuersteiner on behalf of their respective companies to settle the billing dispute in return for a $140,000.00 credit. Interestingly, both the Defendants' claim that the absence of a writing is fatal to their adversaries claim of a contract's existence.

The subject agreement, by its terms, does not offend the Statute of Frauds (General Obligations Law § 5-701). We also find that the terms of the agreement as described by Mr. Boss are not vague but instead definite and certain enough to be enforced (***Joseph [*8]Martin, Jr., Delicatessen, Inc. v. Schumacher***, 52 NY2d 105, [1981]; compare ***Canzona v. Atanasio***, 118 AD3d 837, 989 N.Y.S.2d 44 [2nd Dept. 2014]).

The case of ***Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp***., *supra*, cited by the Plaintiffs' sagely guides us in this regard. The Court opined:

"Before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear (1 Williston, Contracts § 47, at 153-156 [3d ed. 1957]). The conclusion that a party's promise should be ignored as meaningless "is at best a last resort" (***Cohen & Sons v Lurie Woolen Co.***, 232 NY, at 114, 133 N.E. 370, *supra*)." (***Id.*** at 483).

The terms agreed upon herein were simple but clear. A $140,000.00 credit for the Boss Parties in return for forbearance of litigation against two of the EVK Parties. This is readily enforceable.

The question then becomes whether Mr. Boss and Mr. Von Kuersteiner's intent was to wait for a written agreement before they would contractually bound. As illustrated in the case of to ***Kowalchuk v. Stroup***, 61 AD3d 118, 121, 873 N.Y.S.2d 43 (1st Dept. 2009) cited by Plaintiffs:

"'It is well settled that, 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'" (***Jordan Panel Sys. Corp. v. Turner***

Constr. Co., 45 AD3d 165, 166 [2007], quoting ***Scheck v. Francis***, 26 NY2d 466, 469-470 [1970])."

The case of Spencer Trask Software & Info. Servs. LLC v. RPost Int'l Ltd., 383 F. Supp. 2d 428, 440-41 (S.D.NY 2003) stands for the principle that:

"Under New York contract law, parties may enter into a contract orally, even though they contemplate later memorializing their agreement in writing .In such a case, the mere intention to commit the agreement to writing will not prevent contract formation prior to the execution of that writing .That is, if the parties have settled on the contract's substantial terms, a binding contract will have been created, even though they also intended to memorialize it in a writing It is the intent of the parties that will determine the time of contract formation." (***Id.***at 441).

How do we ascertain the party's intent? That question is answered by the reasoning given to us in the recent case of ***Gator Hillside Vill., LLC v. Schuckman Realty, Inc.***, 158 AD3d 742 (2nd Dept. 2018) wherein the Court stated:

"[T]he existence of a binding contract is not dependent on the subjective intent of [the parties]" (***Brown Bros. Elec. Contrs. v. Beam Constr. Corp***., 41 NY2d 397, 399, 393 N.Y.S.2d 350, 361 N.E.2d 999; *see* ***Civilized People, Inc. v. Milk St. Café, Inc.***, 129 AD3d 761, 762, 10 N.Y.S.3d 611; ***Minelli Constr. Co., Inc. v. Volmar Constr., Inc***., 82 [*9]AD3d 720, 721, 917 N.Y.S.2d 687). "In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (***Brown Bros. Elec. Contrs. v. Beam Constr. Corp***., *supra* at 399; *see* Civilized People, Inc. v. Milk St. Café, Inc., *supra* at 762, 10 N.Y.S.3d 611; ***Minelli Constr. Co., Inc. v. Volmar Constr., Inc.***, *supra* at 721). "That means, simply, that the manifestation of a party's intention rather than the actual or real intention is ordinarily controlling" (***Mencher v. Weiss***, 306 NY 1, 7, 114 N.E.2d 177; *see* ***Hotchkiss v. National City Bank of NY***, 200 F. 287, 293 [S.D.NY], *affd* 201 F. 664 [2d Cir.], *affd* 231 U.S. 50, 34 S.Ct. 20, 58 L.Ed. 115).

The "expressed words and deeds" of the Parties clearly favor Mr. Boss' recall of the May 2011 meeting. After the agreement was reached, the principals of the respective Parties shook hands. Although the act of "shaking hands" does not in and of itself create a contract, the Court is not remiss in considering it as a sign of mutual assent (***Maffea v. Ippolito***, 247 AD2d 366, 367, 668 N.Y.S.2d 653, 654 (2nd Dept. 1998).

Subsequently Mr. Boss did not proceed to litigation against Pines Commercial Properties or Pines Operations LLC for services rendered. Mr. Von Kuersteiner did not bring an action for past rent. Roncalli Freight, for a time, provided shipping services for the Boss Parties, no longer demanding "cash on the barrelhead" to honor a $140,000.00 credit. All of the forgoing point, inexorably, to the conclusion that the Parties were conducting themselves as if they were contractually obligated to do so. Mr. Von Kuersteiner's subsequent behavior can be seen as an attempt to renegotiate the agreement. Since the contract had already been formed, however, he lacked the power to unilaterally renounce it. Mr. Von Kuersteiner's actions after the formation of the contract can be seen as an improper repudiation of same (***Children of America (Cortlandt Manor), LLC v. Pike Plaza Assocs., LLC***, 113 AD3d 583, 584, 978 N.Y.S.2d 323, 324 [2nd Dept. 2014]).

As noted above, the Court is satisfied that the evidence shows an oral contract was entered into at the May 2011 meeting between the principals of the Parties. The question is whether such an agreement is enforceable? It is not a "standard" executory contract wherein Mr. Boss' Companies agreed to furnish services etc. to the EVK entities in return for shipping credits on Roncalli/Coastline. Instead, it is an agreement to settle past due claims for services rendered that could be the subject of a separate lawsuit or suits. Ms. Blair points to this distinction in arguing against enforceability. Ms. Donnenfeld does not concede the difference.

Ms. Blair makes an interesting argument that the agreement in question, since it contemplates a settlement of Boss' claims which could be enforced *via* litigation, requires a writing pursuant to CPLR 2104. This Rule states:

"An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a [*10]writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk."

In support of this contention, Ms. Blair draws the Court's attention to the holding in ***Forcelli v. Gelco Corp***., 109 AD3d 244, 250, 972 N.Y.S.2d 570 (2nd Dept. 2013, Sgroi J) where the Court held:

"It is, of course, axiomatic that a letter can be considered "subscribed," since letters are usually signed at the end by the author thereof. However, email messages cannot be signed in the traditional sense. Nevertheless, this lack of "subscription" in the form of a handwritten signature has not prevented other courts from concluding that an email message, which is otherwise valid as a stipulation between parties, can be enforced pursuant to CPLR 2104. In the case of ***Williamson v Delsener***(59AD3d 291, 291 [2009]), the Appellate Division, First Department, stated that "e-mails exchanged between counsel, which contained their printed names at the end, constitute signed writings (CPLR 2104) within the meaning of the statute of frauds." In the case of ***Brighton Inv., Ltd. v Har-Zvi***(88 AD3d 1220, 1222 [2011]), the Appellate Division, Third Department, stated that "an exchange of e-mails may constitute an enforceable contract, even if a party subsequently fails to sign implementing documents, when the communications are sufficiently clear and concrete to establish such an intent" (internal quotation marks omitted)."

Ms. Blair also asks the Court to apply the rule in ***Diarassouba v. Urban***, 71 AD3d 51, 57, 892 N.Y.S.2d 410 (2nd Dept. 2009) in which the Court set forth that:

"Notwithstanding the Supreme Court's assertion that "an agreement is an agreement," a settlement agreement must still be reduced to writing in order to have binding effect on the parties. For example, in ***Van Syckle v Powers*** (106 AD2d 711 [1984]), the attorneys made an oral settlement agreement and the defendant signed all the necessary documents. Before the plaintiff signed the documents, the plaintiffs' attorney asked to hear the jury's verdict. The court informed the attorney that the verdict could not be heard if there already was a settlement and, consequently, the Plaintiff's attorney disavowed the settlement. After the jury read its verdict, which was significantly in excess of the oral settlement agreement, the plaintiff refused to sign the settlement papers. The Appellate Division, Third Department, declined to enforce the purported settlement as it had not been agreed to in writing by both parties." (***Id.*** at 58).

Counsel's reliance on ***Diarassouba*** is most telling. In addition to the passage above which was quoted in Defendant's Post Trial Memorandum, the Appellate Court had [*11]preceded the above statement by noting at page 56:

"The open-court exception to CPLR 2104 was created in order to codify the previously existing practice of enforcing oral stipulations that were made in open court in the course of judicial proceedings (*see*, ***Matter of Dolgin Eldert Corp.***, 31 NY2d at 9)."

In contrast to the case at bar, the subject matter of both ***Diarassouba*** and ***Forcelli*** were settlements of pending litigation.

We draw Counsel's attention to the particular language in Rule 2104 which indicates its limitations when it states: "relating to any matter in an *action* " (emphasis ours). The claims that the Boss Parties could make against the EVK Parties were not the subject of a pending law suit. Mr. Boss had not filed any papers to claim breach of contract for the EVK Parties' failure to compensate the Boss companies for labor and goods. This contract therefore was not to settle a lawsuit but a settlement of *potential* lawsuits.

"CPLR 2104 does not by its terms apply outside actions or special proceedings, and would seem not to be appicable to administrative proceedings unless the applicable rules or statute cross reference to CPLR rules This leaves open to possible enforcement a whole range of other agreements not within the subset. (See generally Article 5 of the General Obligations Law and the statute of frauds, GOL § 5-701)." (Rule 2104 Commentaries C2104:7. Stipulations in Arbitrations and Other Proceedings).

It has been held that CPLR 2104 is not applicable to agreements reached in an administrative proceeding (***Silverman v. McGuire***, 51 NY2d 228, 433 N.Y.S.2d 1002 [1980]). The Defendants seek to have this Court extend its reach even further, to settlements reached in pre-litigation negotiations. We decline to do so.

Therefore, the Court finds that the Plaintiffs have proven, by a fair preponderance of the credible evidence that the Boss Parties and EVK Parties entered into a binding contract as described above and in their first and second causes of action. Since Plaintiff's theory of the case was that the $140,000.00 credit was in lieu of proceeding to enforce a claim for goods and services, this subsumes the claims in the first cause of action.

We next address whether Roncalli Freight has proven the existence of a contract (and breach thereof) with the Boss Parties as alleged in the counterclaim. The Defendant Roncalli's argument is that a shipping contract between it and the Boss Parties was established in writing, *via* an account stated as well as being implied-in -fact.

To support her contention that a contract implied-in-fact has been proven, Ms. Blair cites to ***Miller v. Schloss***, 218 NY 400, 406-07, 113 N.E. 337, 338-39 (1916) wherein the learned Court stated:

"The courts recognize by the language of their opinions two classes of implied contracts. The

one class consists of those contracts which are evidenced by the acts of the parties [*12]and not by their verbal or written words - true contracts which rest upon an implied promise in fact. The second class consists of contracts implied by the law where none in fact exist-quasi or constructive contracts created by law and not by the intentions of the parties. A contract cannot be implied in fact where the facts are inconsistent with its existence, or against the declaration of the party to be charged, or where there is an express contract covering the subject-matter involved, or against the intention or understanding of the parties; or where an express promise would be contrary to law. The assent of the person to be charged is necessary, and, unless he has conducted himself in such a manner that his assent may fairly be inferred, he has not contracted (***Morse v. Kenney***, 87 Vt. 445, 89 Atl. 865; ***Mathie v. Hancock***, 78 Vt. 414, 63 Atl. 143; ***Hertzog v. Hertzog***, 29 Pa. 465; ***Earle v. Coburn***, 130 Mass. 596; ***Central Bridge Corporation v. Abbott***, 4 Cush. (Mass.) 473."

Defense Counsel also cites to the holding in ***Sarbro IX v. State Office of Gen. Servs***., 229 AD2d 910, 911, 645 N.Y.S.2d 212, 214 (4th Dept.1996) which held:

"an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience he ought not to retain and that belongs to another", as well as over quasi contract actions such as unjust enrichment or money had and received (***Parsa v. State of New York***, 64 NY2d 143, 148, 485 N.Y.S.2d 27, 474 N.E.2d 235, rearg. denied 64 NY2d 885, 487 N.Y.S.2d 1029, 476 N.E.2d 1008; see, ***Miller v. Schloss***, 218 NY 400, 406-407,)113 N.E. 337; 230; ***Park Ave. Assocs. v. State of New York***, 165 Misc 2d 920, 926-927, 630 N.Y.S.2d 855).

Sarbro IX, however, is of limited utility because the discussion of the Court was confined essentially to the jurisdiction of the Court of Claims (Court of Claims Act § 9 [2]).

The holding in ***Parsa v. State,*** 64 NY2d 143, 148, 474 N.E.2d 235, 237-38, **rearg. denied** 64 NY2d 885, 487 N.Y.S.2d 1029, 476 N.E.2d 1008; (1984) also involves claims against the State, but its language is more expansive. The Court reiterated the principles of ***Miller v. Schloss*** when it opined that:

" the courts recognize two different types of implied contract. The first, a contract implied in fact, rests upon the conduct of the parties and not their verbal or written words. It is a true contract based upon an implied promise The second type, the type claimed here for money had and received is a contract implied in law. Although the action is recognized as an action in implied contract, the name is something of a misnomer because it is not an action founded on contract at all; it is an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience he ought not to retain and that

belongs to another (***Miller v. Schloss***, *supra* at 406-407*)*. It allows plaintiff to recover money which has come into the hands of the defendant "impressed with a species of trust" (*see* ***Chapman v. Forbes***, 123 NY 532, 537, [*13]26 N.E. 3) because under the circumstances it is "'against good conscience for the defendant to keep the money'" (***Federal Ins. Co. v. Groveland State Bank***, 37 NY2d 252, 258, 372 N.Y.S.2d 18, 333 N.E.2d 334, quoting from ***Schank v. Schuchman***, 212 NY 352, 358, 106 N.E. 127). The remedy is available "if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass" (***Miller v. Schloss***, *supra*, at 218 NY p. 408, 113 N.E. 337). The action depends upon equitable principles in the sense that broad considerations of right, justice and morality apply to it, but it has long been considered an action at law (*see* ***Roberts v. Ely***, 113 NY 128, 20 N.E. 606; ***Diefenthaler v. Mayor of City of NY***, 111 NY 331, 337, 19 N.E. 48)."

In opposing the Defendants' argument Plaintiffs declare that there was no mutual assent as to the particulars of shipping. Ms. Donnenfeld relies on the holding in ***Kowalchuk v. Stroup***, *supra* and to the case of ***Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.***, *supra* where Justice Kaye, of happy memory, wrote with her usual eloquence that:

"Few principles are better settled in the law of contracts than the requirement of definiteness. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract (***Martin Delicatessen v Schumacher***, 52 NY2d 105, 109; Restatement [Second] of Contracts § 33 [1981]). The doctrine of definiteness serves two related purposes. First, unless a court can determine what the agreement is, it cannot know whether the contract has been breached, and it cannot fashion a proper remedy (*see,* ***Metro-Goldwyn-Mayer v Scheider***, 40 NY2d 1069, 1070-1071; Restatement [Second] of Contracts § 33 [2] [1981]). This is particularly significant where specific performance is sought. Second, the requirement of definiteness assures that courts will not impose contractual obligations when the parties did not intend to conclude a binding agreement (*see*, Restatement [Second] of Contracts § 33 [3] [1981])." (***Id.*** at 482).

Cobble Hillwas later discussed in ***Teutul v. Teutul***, 79 AD3d 851, 852, 912 N.Y.S.2d 664, 665 (2nd Dept. 2010) which reiterated the principles herein.

Ms. Donnenfeld argues that the evidence at trial does not support Defendant's claims of the existence of a contract between Coastline (a/k/a Roncalli Freight) and the Boss Parties. She points to the fact that every customer of Coastline (other than the Boss Parties) paid on a cash basis (Steven Young's testimony (Transcript pp.52-53) and Coastline's forbearance of finance charges. We find this to be a difference without a distinction. The facts presented before this Court demonstrate that the Defendant Roncalli Freight shipped product for the

Boss Parties and that the Plaintiffs accepted the services. This was clearly behavior consistent with assent. Especially when it is coupled with the documentary evidence (Defendants' Exhibits I and J), which placed the Plaintiffs on notice of a charge for the Defendants' services.

This is long settled law. ***In Sibbald v. Bethlehem Iron Co.***, 83 NY 378, 380 (1881), the Court held:

"This is only saying that the contract of employment may be established either by proof of an express and original agreement that the services should be rendered, or by facts showing, in the absence of such express agreement, a conscious appropriation of the labors of the broker. Indeed, the learned counsel for the defendant very fairly and justly concedes that the contract may be established in some cases "by the mere acceptance of the labors of a broker."

In short, the Defendants have proven by the fair preponderance of the evidence that the Plaintiffs " conducted [themselves] in such a manner that [their] assent may fairly be inferred" (***Tjoa v. Julia Butterfield Mem'l Hosp***., 205 AD2d 526, 526, 612 N.Y.S.2d 676, 677 [2nd Dept. 1994]quoting ***Miller v. Schloss,*** *supra*]). The existence of an implied in fact contract has been established.

Ms. Blair also contends the Defendants have proven an account stated in the amount of $212,038.00 (Defendants' Exhibits C and D).

She cites to the holding in ***Interment Indus. Prod., Ltd. v. R.S.M. Electron Power, Inc***., 37 NY2d 151, 153-54, 332 N.E.2d 859, 861 (1975), wherein Judge Gabrielli writing for a unanimous Court:

"As was stated nearly one hundred years ago by Chief Judge Folger, '(a)n account stated is an account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance' (***Volkening v. DeGraaf***, 81 NY 268, 270); and in ***Newburger-Morris Co. v. Talcott***(219 NY 505, 512, 114 N.E. 846, 848) Judge Cardozo wrote as follows: 'the very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness, *Insimul computassent*, so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained.' Thus, while the mere silence and failure to object to an account stated cannot be construed as an agreement to the

correctness of the account, the factual situation attending the particular transactions may be such that, in the absence of an objection made within a reasonable time, an implied account stated may be found (***Corr v. Hoffman***, 256 NY 254, 266, 176 N.E. 383, 388)."

Ms. Blair also cites to ***Ryan Graphics, Inc. v. Bailin***, 39 AD3d 249, 250-51, 833 N.Y.S.2d 448 (2007):

"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 AD2d 868, 869 [1993], *citing*, *inter alia*, ***Interman Indus. Prods. v R. S. M. Electron Power***, 37 NY2d 151 [1975] and ***Chisholm-Ryder Co. v Sommer & Sommer***, 70 AD2d 429 [1979]). "An account stated [*14]assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists" (***M. Paladino, Inc. v. Lucchese & Son Contracting Corp.***, 247 AD2d 515, 516 [1998], *citing* ***Gurney, Becker & Bourne v Benderson Dev. Co.***, 47 NY2d 995, 996 [1979]; *see* ***Martin H. Bauman Assoc. v. H & M Intl. Transp.***, 171 AD2d 479 [1991])."

In addition to the above authority, the law requires that in order to prevail upon a claim for an account stated, it must be proven that:

"(1) an account was presented; (2) it was accepted as correct; and (3) debtor promised to pay the amount stated" *see* ***IMG Fragrance Brands, LLC v. Houbigant, Inc***., 679 F.Supp.2d 395, 411 (S.D.N.Y.2009). "The second and third requirements (acceptance of the account as correct and a promise to pay the amount stated) may be implied if a party receiving a statement of account keeps it without objecting to it within a reasonable time or if the debtor makes partial payment." ***(Id.)*** (internal quotation marks omitted); ***(Abbas Corp. (PVT) v. Michael Aziz Oriental Rugs, Inc.***, 820 F. Supp. 2d 549, 552 [S.D.NY 2011] *citing* ***LeBoeuf, Lamb, Greene & MacRae, LLP v. Worsham***, 185 F.3d 61, 64 [2d Cir.1999]).

The case of ***Russo v. Heller***, 80 AD3d 531, 915 N.Y.S.2d 268, (1st Dept.2011) states the rule in the same manner as ***Abbas Corp***., *supra*.

The proof adduced at trial clearly supports (and proves) the Defendant Roncalli Freight's claim for an account stated. Indeed, it is unequivocal. All three defense witnesses testified that monthly bills for freight shipping were sent from Roncalli to Walter Boss Inc. and Pines Propane Corp. on and between the dates of July 1st, 2012 to April of 2016. Mr. Boss admitted to receiving them (Boss Testimony 4/27/2016, Transcript p.14). The Defense witnesses and

Mr. Boss stated that no objections were offered (Mr. Von Kuersteiner's Testimony Transcript 4/28/2016, p.105; Mr. Young's Testimony Transcript 4/28/2016, p.67; Ms. Napolitano's Testimony Transcript 4/29/2016, p.16).

Ms. Blair, in her final point, contends that the Defendants are entitled to recover Attorney fees and service and finance and storage charges based on the written contract between the Parties (Defendants' Exhibits I and J). Specifically, she asks for Attorney fees of $66,227.00 and 2% monthly service charges and storage fees as per the contract that Boss Inc. did not object to. In response to this contention, The Plaintiffs' position is that this is an inextricable part of the overall settlement agreement between the Boss Parties and the EVK Parties and should be discounted.

Despite Ms. Donnenfeld's eloquence, there is nothing in the record to indicate that Roncalli Freight was obliged to surrender its claims against the Boss Parties as part of the transaction. The Parties were silent. During the negotiations, the terms of a written [*15]contract hung over them like the Sword of Damocles. As pointed out by Ms. Blair, it is a comprehensive agreement. It cannot help but be contrasted with the oral agreement that this Court will enforce. Whereas in establishing the proof of the oral agreement took days of hearing and weighing testimony, separating the gold from the dross, the written agreement is clear and brooks no disagreement as to its intentions. To compare these two types of agreements, one look no further than the maxim *vox emissa volat litera script manet*. **

The ultimate oral Contract between the Boss Parties and the EVK Parties did not extinguish the contractual obligations that the Boss Parties had with Roncalli because the Parties did not specifically address it. "Under the standard canon of contract construction *expressio unius est exclusio alterius*, that is, that the expression of one thing implies the exclusion of the other" (***Matter of New York City Asbestos Litig***., 41 AD3d 299, 302, 838 N.Y.S.2d 76 [1st Dept.2007]). Under the circumstances of the case, the Court finds that the only reasonable way to reconcile the differing proof is to hold that it supports the creation of the two different contractual arrangements.

Accordingly, the Defendant Roncalli Freight has proven by a fair preponderance of the evidence that it enjoyed an implied in fact contract for the supply of services to the Plaintiffs Walter Boss Inc. and Pines Propane Corp. and that the Plaintiffs' breached same. Additionally, the Defendant Roncalli Freight has proven an account stated and the Plaintiffs' failure to pay as per its terms. Pursuant to the written agreement between the Parties, the Defendant

Roncalli Freight shall recover Attorney fees of $66,227.00 (as testified to) and 2% monthly service charges and storage fees.

Since the Court has found that both the Boss Parties and Roncalli have proven both the existence of respective contracts and the subsequent breach, we now must take up Ms. Blair's argument (Point III of her Post Trial Brief) that there can be no offset between any amount due to Roncalli Freight Company and any amount allegedly due Walter Boss Inc. Pine Propane Corp. and Pines and Pools, Inc. by the other EVK Parties. Defendants take the position that "any sums owed to Boss from Pines Operations and Pines Commercial Properties are separate and distinct from the amounts owed by Boss to Coastline Freight." (Plaintiffs' Exhibit 33).

The Plaintiffs in this case seek to take the liability which they owe to Roncalli Freight and off-set it against the other Corporate entities owned, in whole or in part, by Mr. Von Kuersteiner. The basis for this, as per Plaintiffs' counsel, is that the underlying contract was negotiated by Mr. Von Kuersteiner on behalf of all the Defendants.

If one were to assume, *arguendo*, that liability in favor of Boss Inc. attaches exclusively to Roncalli Freight, by what principle or theory can liability attach to a separate corporation (other than an express contractual agreement) to assume Roncalli's debt? A claim articulating *de facto* merger and successor liability is one method (***Fitzgerald v. Fahnestock & Co.***, 286 AD2d 573, 730 N.Y.S.2d 70 (1st Dept. 2001). Piercing the corporate veil is another vehicle (***Sweeney, Cohn, Stahl & Vaccaro v. Kane***, 6 AD3d 72, 75-76, 773 N.Y.S.2d 420, 423 (2nd Dept. 2004).

Ms. Blair skillfully argues that the Court must see the Corporate entities as separate and that excuses them from Roncalli's liability. The Court agrees that the various Defendant Corporations enjoy individual existence. The Corporate privilege is a formidable bastion that [*16]protects its owners from suffering personal liability (***E. Hampton Union Free Sch. Dist. v. Sandpebble Builders, Inc.***, 66 AD3d 122, 884 N.Y.S.2d 94 (2nd Dept. 2009), *aff'd*, 16 NY3d 775, 944 N.E.2d 1135 [2011]). It does not necessarily follow, however, that multiple corporations cannot be bound by a single contract.

Mr. Von Kuersteiner observed all Corporate formalities as an Officer/Owner of the Defendants. This is presumed and there is no evidence to contradict it. It is also

uncontroverted that he was endowed with the power to enter into contracts on behalf of each company.

Assuming that his actions in giving up a $140,000.00 credit from Roncalli Freight was against that company's interest, that is his prerogative subject to a shareholder's derivative suit (***Walsh v. Wwebnet, Inc.***, 116 AD3d 845, 984 N.Y.S.2d 100 [2nd Dept. 2014]). The viability of the contract with a third party is never in doubt since it is of no concern to the obligees-Walter Boss Inc., *et al.* In this particular case, it cannot be argued that the remaining Corporations were somehow strangers to the transaction. As CEO of Roncalli Freight Company, Pines Commercial Properties LLC and Pines Operations LLC, Mr. Von Kuersteiner wore three hats, and there is nothing to preclude him from wearing them simultaneously. Indeed, it is apparent that the use of Roncalli's resources to satisfy an obligation of Pines Commercial Properties and Pines Operations, could be a sage example of corporate synergy. Such informal combinations of corporate interests are unremarkable save when they rise to restraint of trade (General Business Law § 340). What the proven facts do establish, is that Mr. Kuersteiner did not just enter into an agreement solely on behalf of Roncalli. It would be *nudum pactum* since Mr. Boss' claims were against Pines Operations and Pines Commercial Property exclusively. Accordingly, the only reasonable interpretation of the May of 2011 agreement was for it to bind all the Parties. The exception being the written agreement and the shipping Contract which the Parties did not address in their negotiated settlement.

Therefore, the claims of the Boss Parties of the Counter Claim of Roncalli Freight and which have been proven as noted in this decision shall be offset against each other.

Settle Judgment.

DATED: NOVEMBER 8th, 2018

RIVERHEAD, NY

HON. JAMES HUDSON

***Acting Justice of the Supreme** Court*

*A great number of unskilled practitioners ruins a court (2 Inst.219).

** The spoken word flies and the written word remains.

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