

At an IAS Comm Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of January, 2007

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

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YORK HUNTER SERVICES, INC.,

Plaintiff(s),

- against -

Index No. 36315/05

BROOKLYN HISTORICAL SOCIETY, et.al.,

Defendant(s).

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The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 - 3
Opposing Affidavits (Affirmations) _____	4 - 5
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Transcript dated October 4, 2006</u> _____	6

Upon the foregoing papers, defendant Brooklyn Historical Society (BHS or defendant) moves for an order: (1) pursuant to CPLR 3025 (b), granting leave to amend its answer, and (2) pursuant to CPLR 3212, granting summary judgment against plaintiff York Hunter Services, Inc. (York Hunter).

Facts and Procedural Background

York Hunter commenced this action seeking to recover the sum of \$197,004.05 allegedly due as reimbursement for insurance costs paid on behalf of BHS and to foreclose on a mechanic's lien. In its answer, BHS interposed ten affirmative defenses, three counterclaims and a demand for attorneys' fees.

More specifically, effective October 1, 1999, BHS entered into a Construction Management Agreement (CMA), pursuant to which plaintiff agreed to serve as construction manager for the renovation, restoration and improvement of BHS's building at 128 Pierrepont Street in Brooklyn. In connection with the project, York Hunter incurred various expenses which BHS was contractually obligated to pay. Insurance premiums were among the reimbursable expenses (CMA at para 4.05 [d]). As is also relevant herein, Section 5.01 of the CMA required that York Hunter "shall submit monthly to Owner a Project application for payment . . . for . . . Reimbursable Expenses . . . paid during the period covered by Construction Manager's application . . .".

BHS originally budgeted insurance premiums for the project at \$75,000. Between June 22, 2000 and March 16, 2003, York Hunter submitted invoices to BHS for insurance premiums totaling \$86,331.14, which invoices were paid. Following completion of the project in March or April 2003, on December 17, 2003, York Hunter submitted an additional invoice for \$197,004.05 for insurance premiums. By letter dated July 13, 2004, BHS refused to pay the invoice because the expenses at issue had not been billed

monthly, as required pursuant to the CMA, and because the backup documentation provided was insufficient. In response, by letter dated August 17, 2004, York Hunter advised BHS that “billing adjustments were inadvertently not billed on a monthly cycle due to staff reductions and business retractions.”

On February 26, 2004, York Hunter filed and subsequently served a notice of mechanic’s lien in the amount of \$265,315.99. On February 24, 2005, an extension of lien was filed. On November 29, 2005, a notice of pendency was filed in connection with the commencement of the instant action, along with a partial release of lien in the amount of \$68,311.94, leaving a balance due and owing of \$197,004.05. By order dated February 22, 2006, the lien was further extended pursuant to Lien Law § 17 for an additional period of one year.

Defendant’s Request for Leave to Amend its Answer

Defendant seeks leave to amend its answer to interpose an affirmative defense alleging that York Hunter’s claims are barred because the invoices received and paid constitute an account stated. In support of its request, BHS contends that the parties have not exchanged any documents, taken any depositions, or otherwise engaged in any disclosure, so that York Hunter will suffer no prejudice if its request is granted. Plaintiff does not oppose this branch of the motion.

It is beyond dispute that permission to amend pleadings should be freely given (CPLR 3025 [b]; *see generally Edenwald Contracting Co. v New York*, 60 NY2d 957,

959 [1983]). Accordingly, such leave shall be granted, provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*see Santori v Met Life*, 11 AD3d 597, 598 [2004], citing *Ortega v Bisogno & Meyerson*, 2 AD3d 607 [2003]; *AYW Networks v Teleport Communications Group*, 309 AD2d 724 [2003], *appeal dismissed* 1 NY3d 566 [2003]; *Leszczynski v Kelly & McGlynn*, 281 AD2d 519 [2001]).

Inasmuch as plaintiff does not oppose BHS's request for leave to amend and the arguments raised by York Hunter in opposition to that branch of the motion seeking summary judgment address the cause of action interposed in the amended pleading, leave to amend is granted. Accordingly, the proposed amended answer, in the form annexed to the moving papers, is deemed served *nunc pro tunc*, and the remainder of this decision is addressed to the amended pleading.

Defendant's Request for Summary Judgment

In support of that branch of its motion seeking summary judgment, BHS contends that plaintiff is not entitled to recover the money demanded in the December 2003 invoice because the expenses at issue had not been billed monthly, as required pursuant to the CMA, and because the prior bills rendered and paid by defendant constitute an account state to which plaintiff is bound. BHS also argues that it is entitled to summary judgment dismissing the lien on the grounds that insurance premiums may not be the subject of a mechanic's lien and because the lien filed by York Hunter is valid for only one year, and

hence has expired.

In opposition, York Hunter argues that it submitted monthly bills to BHS pursuant to the relevant provision of the CMA, but that the additional insurance costs demanded in the December 2003 invoice were discovered during the course of an internal audit. York Hunter thus argues that its account should be modified due to its mistake.

Account Stated

“An account stated is nothing more or less than a contract express or implied between the parties. It is an agreement which they have come to, regarding the amount due on past transactions” (*Rodkinson v Haecker*, 248 NY 480, 484-485 [1928]). A party meets the “initial burden of establishing its entitlement to judgment as a matter of law on its cause of action based upon an account stated by establishing, with admissible evidence, the receipt and retention of bills without objection within a reasonable time” (*LD Exch. v Orion Telcomms.*, 302 AD2d 565 [2003], citing *Jovee Contr. v AIA Envtl.*, 283 AD2d 398 [2001]; *Sullivan v REJ*, 255 AD2d 308 [1998]; see generally *Sullivan v REJ*, 255 AD2d 308 [1998]; *Parola v Lido Beach Hotel*, 99 AD2d 465 [1984]; *Fink, Weinberger, Fredman, Berman & Lowell v Petrides*, 80 AD2d 781 [1981]).

However, an “[a]ccount stated, even when pleaded as a defense or proved on the trial, is not conclusive as a settlement, if mistake or other equitable considerations are shown to impeach it” (*Hopwood Plays v Kemper*, 263 NY 380, 385 [1934], citing *Rodkinson*, 248 NY at 484; *Hoover v Neill*, 77 W Va 470 [1915]; accord *James Talcott*,

Inc. v United States Tel. Co., 52 AD2d 197, 201 [1976]). The burden of impeaching such an account for fraud or mistake rests upon the party who seeks to repudiate it. An account rendered becomes an account stated, enforceable as a contractual agreement between the parties, when its correctness is assented to by the receiving party. (See *Little v McClain*, 134 App Div 197 [1909].)

The failure to promptly contest an account or act to correct an error precludes the reopening of an account stated based upon mistake. (See *Sea Modes v Cohen*, 309 NY 1,4,[1955] reh denied 309 NY 807 [1955]; *In re Rockefeller Center Properties*, 46 Fed Appx 40, 2002 WL 31085954 (2d Cir), *aff'g* 266 BR52 (SDNY 2001), *aff'g* 241 BR804 (US Bankruptcy Ct, SDNY, 1999); *Robinson v Miller*, 210 App Div 450 (1st Dep't, 1924). This is particularly true where knowledge of the mistake is exclusive to the party seeking modification. (*Sea Modes v Cohen*, *supra*; *cf James Talcott, Inc. V. United States Telephone Co.*, *supra*.)

Although the caselaw does not arbitrarily preclude correction of honest mistakes in accounts stated, equity will not intervene where the debtor has performed in reliance on the creditor's representations and had no way of knowing or verifying the accuracy of such representations. Here, York Hunter was in exclusive control of the insurance bills accruing on the renovation project. Over a two-year period, it billed defendant and, in reliance on those bills, defendant made payment. It was not until nine months after construction had been completed that the alleged errors were made known to defendant BHS. The excuse offered by plaintiff is that its staff had been significantly reduced over the course of the contractual period. Such failure to perform competently in a timely manner is also the basis of defendant's counterclaims. As defendant argues, had it been aware of the substantial additional insurance costs as they accrued, it may have been able to act to curb such costs. Although the alleged facts suggest that plaintiff will suffer a loss and defendant a windfall as a result of plaintiff's error, in the circumstances where defendant is without fault or responsibility for plaintiff's errors, the equities favor defendant. See *City of Lawrenceville v Ricoh Electronics, Inc.*, 174 Fed Appx 491, 2006 WL 839074 (11th Cir), a case factually analogous to that herein, in which the court found that plaintiff's lack of due diligence in creating the underbilling upon which defendant relied precluded reformation of the erroneous account stated. Plaintiff's complaint must be dismissed.

Moreover, plaintiff's failure to comply with the terms of the CMA provide an independent basis to grant defendant's motion.

The CMA

““It is the primary rule of construction of contracts that when the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations”” (*In re Matco-Norca*, 22 AD3d 495, 496 [2005], quoting *Weisberger v Goldstein*, 242 AD2d 622, 623 [1997], quoting *Slamow v Delcol*, 174 AD2d 725 [2d Dept 1991], *affd* 79 NY2d 1016 [1992]; *accord Masters v 14-22 Leonard St. Assocs.*, 11 AD3d 380, 381 [2004] [it is well settled that a written agreement which is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms]). “The rules of construction of contracts require [the court] to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect” (*Muzak v Hotel Taft*, 1 NY2d 42, 46 [1956], citing 1 Restatement, Contracts, § 235, subd. [c]; *Fleischman v Furgueson*, 223 NY 235 [1918]; *Rentways v O'Neil Milk & Cream Co.*, 308 NY 342, 347 [1955]; *accord Columbus Park v Department of Housing Preservation & Dev.*, 80 NY2d 19, 31 [1992], *recons denied* 80 NY2d 925 [1992] [a construction which makes a contract provision meaningless is contrary to basic principles of contract interpretation]; *Two Guys from Harrison-N.Y. v S.F.R. Realty Assocs.*, 63

NY2d 396, 403 [1984] [in construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless]). "Whether an agreement is ambiguous is a question of law for the courts." (*Kass v Kass*, 91 NY2d 554, 566 [1998], citing *Van Wagner Adv. v S & M Enters.*, 67 NY2d 186, 191 [1986]; accord *9394 LLC v Farris*, 10 AD3d 708, 709-710 [2004], *lv denied* 4 NY3d 705 [2005]).

Applying the above general principals of law to the facts of this case, the court finds that the terms of the CMA entered into between plaintiff and defendant are clear and unambiguous. In applying Section 5.01 of that agreement, the court concludes that York Hunter's failure to submit accurate monthly invoices for the cost of insurance premiums allegedly owed to it by BHS as required therein precludes it from recovering premiums claimed to be due as early as 2001.

In *Welding Services, Inc. v Consolidated Edison Co.* (1993 No. 91 Civ 8007 [1993]), decided by the District Court for the Southern District of New York, the purchase order at issue required that "Welding Services, Inc. shall submit daily time sheets to Con Edison's contract supervisor for verification. Time sheets shall be submitted to material control weekly" and that "invoices shall be submitted weekly for work completed during such period." In holding that the failure to present contemporaneous time sheets and weekly invoices in compliance with contract barred recovery upon some of plaintiff's claims, the court reasoned that:

"The Purchase Order plainly requires WSI to submit time sheets and invoices in a timely manner and, as a matter of

common sense, the enforcement of these provisions is crucial to a time and materials contract. As Con Edison points out, ‘without daily time sheets and weekly invoices on a time and material contract, Con Edison would have no way to control the costs it is incurring and manage its budget.’”

Similarly, in the case of *Chicago Southshore & Southshore Bend Railroad v Itel Rail Corporation* (658 NE2d 624, 632 [1995]), the Indiana Appellate Court interpreted a provision of a lease providing that “Lessee shall submit to Lessor a monthly report in complete AAR format for all sums due to Lessee from Lessor for such calendar month,” in conjunction with the AAR rules that required all repair bills to be submitted within twelve months after the repair. Therein, the court held that since the lease agreement unambiguously required that defendant submit monthly bills, plaintiff was not entitled to recover unpaid expenses incurred over the thirty-five month term of the lease that were not billed in accordance with the terms of the lease. The court noted that the purpose of the contractual provisions was to afford an opportunity to challenge such bills within a reasonable time.

This Court concludes that the CMA should be similarly interpreted, since the clear intent of Section 5.01 was to afford BHS the opportunity to monitor its costs as the project progressed, a right that would be defeated if York Hunter were now permitted to succeed on its belated demand for payment.

Validity of the Lien

The Lien Law serves the dual purpose of providing security for laborers and materialmen and providing notice and a degree of certainty to subsequent purchasers (*see e.g. Venture v Sicoli & Massaro*, 77 NY2d 175, 181 [1990]). Pursuant to of Lien Law § 3, a contractor:

“who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . or materials upon the real property improved.”

It is well settled that the burden of proving entitlement to recovery of a lien lies with the lienholder (*see e.g. Brainard v County of Kings*, 155 NY 538, 543-545 [1898]; *Strober Bros. v Kitano Arms*, 224 AD2d 351, 353 [1996]; *Falco Constr. v P & F Trucking*, 158 AD2d 510 [1990]).

Inasmuch as this Court has determined that York Hunter’s demand for an additional payment for insurance premiums is unsustainable, the lien based upon such claims must be vacated. The court therefore does not reach the issue of whether the lien was properly filed in the first instance.

Conclusion

For the foregoing reasons, BHS's motion is granted in its entirety and the plaintiff's complaint is dismissed. The lien is vacated. BHS's counterclaims are severed. The parties shall appear before this Court for conference in Commercial Division, Room 756 on February 21, 2007 at 2:30 p.m.

The foregoing constitutes the decision and order of this court.

E N T E R,

J. S. C.