DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT : CIVIL PART ONE

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FRED N. PERRY, ESQ.,

Index No. 43128/10

Plaintiff,

Present:

-against- **Hon. Terence P. Murphy**

LYNN WOSLEGER,

Defendant.

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The following named papers were submitted on this motion.

papers numbered

Notice of Motion w/annexed supporting papers.....1
Notice of Cross-Motion to Dismiss w/annexed supporting papers.....2
Affirmation in Opposition w/annexed supporting papers.....3
Defendant's Affirmation in Opposition w/annexed supporting papers....4

The plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment in its favor in the sum of $1,022.00 plus interest from June 6, 2005. The plaintiff further moves for an order dismissing defendant's affirmative defenses and counterclaims and for an order pursuant to 22 NYCRR 130.11 imposing sanctions on defendant and defense counsel. The defendant opposes the plaintiff's motion and cross moves for an order dismissing the plaintiff's complaint. The defendant also seeks an award of attorney's fees, costs and sanctions pursuant to 22 NYCRR 130-1.1 -1.3 as well as relief pursuant to the Fair Debt Collection Act. The plaintiff submits a reply to defendant's opposition and opposes defendant's cross motion. The defendant submits an Affirmation in further support of its cross motion to dismiss the complaint.

The plaintiff commenced this action on or about October 2010 to recover $1,022.00 allegedly due and owing from plaintiff's successful petition to Nassau County to have defendant's property taxes reduced. The plaintiff claims that the defendant contractually agreed to pay the plaintiff based upon the first year's property tax savings derived from the reduced assessment. The plaintiff's first cause of action is based upon a breach of contract. The second cause of action is based upon an account stated. The third

cause of action is for unjust enrichment.

The defendant interposed an answer asserting three affirmative defenses and one counterclaim. The first affirmative defense is that this action is barred by the statute of limitations. The second is that there is no privity of contract between the plaintiff and defendant. The third is that the plaintiff failed to name an indispensable party. The defendant's counterclaim alleges that plaintiff's lawsuit is frivolous because the plaintiff allegedly failed to investigate the facts and circumstances surrounding this matter prior to instituting this lawsuit.

The plaintiff filed a Reply to defendant's counterclaim and asserted several affirmative defenses.

I. Plaintiff's Motion for Summary Judgment

In particular, the plaintiff contends that on or about January 2004, a retainer agreement was executed by Edward H. Murphy, the original homeowner of record for the property 25 Heyward Lane, Rockville Centre, New York. In July 2004, the defendant, Lynn Wosleger and her husband, purchased the property from Mr. Murphy for $950,000.00 [*see, Contract of Sale, Defendant's Exhibit "B"*].

Thereafter, the plaintiff contends that the defendant signed a "takeover" agreement [*see, Plaintiff's Exhibit "A"*], whereby plaintiff agreed to file grievances for the April 2004 and April 2005 final rolls. The "takeover" agreement obligated defendant to pay 50% of the first year's tax savings for the total assessment reduction obtained for each protest year filed.

The plaintiff was successful in reducing defendant's property taxes by $1,071.00 as defendant's taxes were reduced from $6,960.00 to $5,889.00. Although fully paid and not an issue in this case, the plaintiff filed a petition seeking a reduction for the April 2005 final roll pursuant to the takeover agreement. The plaintiff appeared at a hearing on May 26, 2006, and was able to further reduce the assessed value of the defendant's property. Due to a lag time, a refund was available from Nassau County due to defendant's overpayment of her taxes.

On January 17, 2007, the Nassau County Treasurer's Office sent plaintiff a letter and refund check. The check was made payable to Fred Perry, Esq for "Gerald & Lynn Woselger in the amount of $629.89". The check was sent to the plaintiff because he was the representative at the hearing. On or about August 1, 2007, the plaintiff issued a check to the defendant drawn on his IOLA account for the overpayment of the 2005 taxes. The

amount due the plaintiff for the successful 2005 grievance was $310.00. The plaintiff deducted his fee and remitted the $319.89 representing the balance to defendant.

The defendant deposited the check into her account and thus according to plaintiff, received the benefit of his services. The plaintiff contends that the defendant cannot be allowed to acknowledge the agreement when it inures to her benefit and disavow its existence when it requires payment. The plaintiff further contends that the defendant has been unjustly enriched. She paid taxes on the reduced assessment obtained from October 2004 through July 2005 and received a refund for a further reduction for the October 2005 through July 2006 tax bills. Based upon the foregoing, the plaintiff moves for summary judgment.

Summary judgment is drastic relief – it denies one party the opportunity to go to trial. Thus, summary judgment should only be granted where there are no triable issues of fact (*see, Andre v. Pomeroy*, 35 NY2d 361 [1974]). The focus for the Court is on issue finding, not issue determining (*see, Hantz v. Fishman,* 155 AD2d 415 [2d Dept 1989]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidence to demonstrate the absence of any material issues of fact. Failure to make such a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see, Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact, which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

The plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law. The plaintiff's motion, however, is nonetheless denied as the defendant has demonstrated the existence of triable issues of fact. In opposition to the motion and in support of defendant's cross motion to dismiss the complaint, the defendant annexes the affidavit of Lynn Wosleger. Mrs. Wosleger alleges, *inter alia*, that she never signed any "take over" agreement in place of Edward Murphy's contractual liability to Mr. Perry (*see, Wosleger affidavit ¶24*).

Notably, Ms. Wosleger's signature does appear on a copy of a document entitled "Retainer" with "Takeover" handwritten along the top of the document. (*see, Ptf. Ex. "A"; Def. Ex. "C"*). It appears to be an agreement between the Plaintiff and Mr. Edward H. Murphy, for tax reduction filing services. Ms. Wosleger's apparent signature is at the

bottom of the agreement without any counter-signature appearing. As pointed out by defense counsel, no date appears next to the alleged signature of Ms. Wolseger. The only date that appears on the document is the crossed out date "Jan.2004 with the date Feb 2004 written over it. As further pointed out by defense counsel, the residential contract of sale was not executed until April 20, 2004. Thus, defense counsel contends that his client would not have obligated herself to a "takeover" agreement prior to purchasing the subject property.

In any event, as Ms. Wosleger denies ever signing any agreement with the plaintiff or having any conversation with the plaintiff to the effect that she would assume or take over any contract with the prior owners, the plaintiff's motion for summary judgment must be denied as triable issue[s] exist precluding a summary disposition of this matter.

II Defendant's Cross Motion to Dismiss the Complaint

The defendant moves pursuant to CPLR 3211 on the ground that the court is without jurisdiction to entertain the instant matter since the plaintiff seeks the equitable relief of an unjust enrichment. This court does not have jurisdiction over matters seeking equitable or injunctive relief except to the extent permitted by statute (*see, World Realty Corp. v. Consumer Sales, Inc.*, 9 Misc 3d 136[A] [App Term, 2d Dept 2005]), and no statutory exception is applicable here. However, defendant entirely disregards the fact that at the heart of the plaintiff's complaint is a breach of contract cause of action pursuant to which it seeks money damages. As such, this portion of defendant's cross motion is denied.

Turning to the branch of the defendant's cross motion seeking dismissal of plaintiff's complaint, it is well settled that in considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged as true and make a determination as to whether the facts alleged are within any cognizable legal theory (*see, Holmes v. Gary Goldberg & Co., Inc.*, 40 AD3d 1033 [2d Dept 2007]). The non-moving party is afforded "the benefit of every possible inference" (*see, Goshen v. Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *quoting Leon v. Martinez*, 84 NY2d 83, 87 [1994]). Therefore, if the pleading contains factual allegations which taken together manifest any cause of action cognizable at law, the motion must be denied (*see, Natural Organics, Inc. v. Smith*, 38 AD3d 628 [2d Dept 2007]).

The Court finds that the plaintiff's complaint sufficiently alleges a breach of contract cause of action. Accordingly, the portion of defendant's cross motion to dismiss upon failure to state of cause of action is denied.

The defendant further moves to dismiss the plaintiff's second cause of action which is based upon the theory of an account stated. 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 account items and the balance due. The agreement may be implied from the retention of the account rendered for an unreasonable period of time without objection and from the surrounding circumstances.

"[T]he 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"(*see, R.A. Assocs. v. Lerner*, 265 AD2d 541 [2d Dept 1999]; *quoting Newburger-Morris Co. v. Talcott*, 219 NY 505, 512 [1916]; *see also Interman Indus. Prods. v. R.S.M. Electron Power*, 37 NY2d 151 [1975]).

The plaintiff's complaint sufficiently alleges that invoices were sent, and that said invoices were retained without protest or objection. Accordingly, defendant's cross motion to dismiss the plaintiff's second cause of action is denied.

III Plaintiff's Motion to Dismiss Defendant's Counterclaim

The portion of the plaintiff's motion to dismiss the defendant's counterclaim, upon the ground that this action is frivolous is denied, at this time.

IV Attorney's Fese and Sanctions

Lastly, both parties seek sanctions, costs and attorney's fees. Attorney's fees are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, by statute or court rule (*see, A.G. Maintenance Corp. v. Lezak*, 69 NY2d 1 [1986]; *Hooper v. AGS Computers*, 74 NY2d 487 [1989]; *Chapel v. Mitchell,* 84 NY3d 345 [1994]).

Pursuant to 22 NYCRR 130-1.1[a] a Court may impose, at its discretion, " ... financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct ... " (*see,* 22 NYCRR 130-1.1[a]; *see also Bello v. New Eng. Fin.*, 2004 NY Slip Op 50520U, 12). Conduct is frivolous under 22 NYCRR 130-1.1©:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false."

Both plaintiff's motion and defendant's cross motion for sanctions are denied. Neither party has set forth evidence of frivolous conduct on the part of the plaintiff or his attorney or defendant or his attorney.

SO ORDERED:

Terence P. Murphy
District Court Judge

Dated:

cc: Stern & Stern, P.C. Attorneys for the Plaintiff
Michael B. Palillo, P.C., Attorney for the Defendant