

5

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 19**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

**WATCHDOG ADVERTISING INC. and  
WATCHDOG ADVERTISING INC. a/a/f  
RAINBOW ADVERTISING SALES CORP.  
d/b/a CABLEVISION ADVERTISING SALES,**

**Motion Sequence # 001, # 002  
Submitted June 29, 2007**

**Plaintiff,**

**-against-**

**INDEX NO: 10290/06**

**MIGIZZI INC. d/b/a PET'S WAREHOUSE INC.,**

**Defendant.**

**The following papers were read on these motions:**

<b>Notice of Motion.....</b>	<b>1</b>
<b>Notice of Cross-Motion.....</b>	<b>2</b>
<b>Reply Affirmation and in Opposition.....</b>	<b>3</b>
<b>Reply Affirmation.....</b>	<b>4</b>

Defendant, MIGIZZI INC. d/b/a PET'S WAREHOUSE INC. (hereinafter referred to as "PET'S"), moves for an order, pursuant to 22 NYCRR §202.21, vacating plaintiff's Note of Issue and Statement of Readiness on the ground that discovery is not yet complete. Plaintiffs, WATCHDOG ADVERTISING INC. and WATCHDOG ADVERTISING INC. a/a/f RAINBOW ADVERTISING SALES CORP. d/b/a CABLEVISION ADVERTISING SALES (hereinafter referred to as "CAS"), opposes the motion and cross-moves for an order

granting it summary judgment in the amount of \$42,168.89, for services rendered for placement of radio, television and print advertisements on behalf of PET'S. The motion and cross-motion are determined as follows:

CAS' Response to Demand for Bill of Particulars and Combined Demands (Exhibit "A" to defendant's cross-motion), consists of an unexplained pile of invoices, newspaper advertisements, and data sheets. At the very least, the Court finds that this response certainly fails to satisfy the purpose of a bill of particulars, which, in part, is to amplify the pleadings (*Moran v Hurst*, 32 AD3d 909, 822 NYS2d 564 [2<sup>nd</sup> Dept. 2006]) and, therefore, supplementation is required. Under these circumstances, the statement in plaintiff's Certificate of Readiness, that the bill of particular is completed, is incorrect. As a note of issue may be vacated where a material fact in the Certificate of Readiness filed therewith is incorrect (22 NYCRR §202.21[e]; *Garofalo v Mercy Hospital*, 271 AD2d 642, 706 NYS2d 477 [2<sup>nd</sup> Dept. 2000]; see also, *Hochberg v Maimonides Medical Center*, 37 AD3d 660, 831 NYS2d 439 [2<sup>nd</sup> Dept. 2007]), PET'S motion for such relief is granted.

With respect to the cross-motion, it is well settled that summary judgment is the procedural equivalent of a trial (*S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A. 1974]). The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment, as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see, *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 (C.A. 1986); *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 (C.A. 1980)). Only after the movant makes its *prima facie* showing, does the burden shift to the

opponent, who must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v Prospect Hosp, supra*; *Zuckerman v City of New York, supra*). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient (*Zuckerman v City of New York, supra*).

An account stated assumes the existence of some indebtedness between the parties, or an express agreement to treat a statement of debt as an account stated (*Grinnell v Ultimate Realty, LLC, 38 AD3d 600, 832 NYS2d 244*[2nd Dept. 2007]). However, discrete invoices do not evidence a mutually agreed upon balanced account (*Peterson v IBJ Schroder Bank & Trust Co., 172 AD2d 165, 567 NYS2d 704* [1<sup>st</sup> Dept. 1991]).

Herein, CAS' papers do not suffice. The cross-moving papers do not contain the required affidavit by a person with knowledge of the facts (CPLR §3212[b]). While plaintiffs correct this oversight with the reply affidavit of Roy Zeidman, Mr. Zeidman never explains how plaintiffs' invoices add up to the alleged balance due of \$42,168.89. Nor is plaintiff's balance sheet (Exhibit "B" to the reply papers) self-explanatory. Overall this Court is compelled to conclude that CAS has failed to make out a *prima facie* case of an account stated, and for this reason their cross-motion for summary judgment is denied. Accordingly, it is hereby

**ORDERED**, that PET'S motion for an order striking the Note of Issue and Certificate of Readiness is granted; and it is further

**ORDERED**, that the parties shall appear for a Preliminary Conference on October 10, 2007, at 2:30 P.M. in Differentiated Case Management Part (DCM) at 100 Supreme

Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125; and it is further

**ORDERED**, that CAS' cross-motion for summary judgment is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 6, 2007

TO: Stanley B. Katz, Esq.  
Attorney for Plaintiff  
434 Broadway, Suite 900  
New York, NY 10013

McGreevy & Henle, LLP  
Attorneys for Defendant  
131 Union Avenue  
Riverhead, NY 11901

  
WILLIAM L. MARCA, J.S.C.  
**ENTERED**

SEP 10 2007  
**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

watchdog-migizzi&petwarehouse,#01,#02/vacate