STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

McNAMEE, LOCHNER, TITUS & WILLIAM, P.C.,

Plaintiff,

against

LEWIS FAMILY FARM, INC., BARBARA LEWIS and SALIM B. LEWIS,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO CHANGE VENUE AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Index No. 2184-112

BRENNAN & WHITE, L.L.P.
Attorneys for Defendants
163 Haviland Road
Queensbury, New York 12804
Tel. (518) 793-3424

## PRELIMINARY STATEMENT

On or about April 18, 2012, plaintiff brought the instant action to recover attorneys' fees for legal services rendered to the defendants between 2007 and 2011. Defendants claim they are owed, based on a theory of account stated, Two Hundred Ninety-Eight Thousand One Hundred Forty-One and 56/100 ($298,141.56) Dollars, plus interest. Alleging that the defendants retained plaintiff's invoices without objection for an unreasonable period of time plaintiff's claim they are entitled to summary judgment on a theory of account stated without any consideration for the reasonableness of the fees claimed. Defendants oppose plaintiff's motion for summary judgment as they state they made continuing objections to plaintiff's invoices, informed plaintiff that his invoices, and the reasonableness thereof, would be addressed at the conclusion of the litigation with the Adirondack Park Agency and after the Essex County Supreme Court made a determination as to plaintiff's fees application under Article 86 of the CPLR. Moreover, defendants respond that equity favors the consideration of the reasonableness of plaintiff's fees warranting the denial of summary judgment. Additionally, the unique circumstances of the instant case and the totality of the circumstances do not create a sufficient inference of acquiescence as to the plaintiff's billings, by the defendants, that would entitle plaintiff to summary judgment on the theory of account stated.

## STATEMENT OF FACTS

The pertinent facts are set forth in the accompanying affidavits and are incorporated herein by reference.

## ARGUMENT

### POINT I

CPLR § 510 sets out three grounds warranting a change of venue. Initially, CPLR § 510(1) provides for a change of venue when the county designated is improper. Ordinarily in transitory actions such as the instant case, CPLR 503 determines the proper venue based on the residences of the parties such that, except where otherwise prescribed by law, the place of trial must be in the county in which one of the parties resides or resided at the time of commencement of the action. With respect to corporations, under CPLR §503(c), a corporation is deemed a resident in the county in which its principal office is located. The Plaintiff in the instant action maintains a principal office located at 677 Broadway, Albany, New York 12201-0459. CPLR §503(a), does initially provide that the county in which either party resides is proper; however, CPLR §503(a) aslo provides the caveat that venue based on residence of either party is proper "except where otherwise prescribed by law."

Here, although CPLR §503(a) initially designates Albany County a the proper venue, case law prescribes otherwise. In *Silberstein, Awad and Miklos, P.C. v. Spencer, Maston and McCarthy, LLP*, 67 A.D.3d 772 (2nd Dept. 2009), the Second Department stated: "[A]s a general rule, the court in which an underlying action is litigated is the proper forum to determine the issue of counsel fees arising from the action." (Citing *Carbonara v. Brennan*, 300 A.D.2d. 528 (2nd Dept. 2002). The instant case seeks recovery of attorneys fees from the defendants relating to plaintiff's representation of the defendants for the prosecution of a declaratory judgment action later converted to an Article 78 proceeding against the Adirondack Park Agency, and the defense of a civil enforcement proceeding by the Adirondack Park Agency. The entire underlying action, was commenced and litigated in Essex County Supreme Court where the defendants reside and the Adirondack Park Agency is headquartered. Moreover, the issue of counsel fees was addressed by the Essex County Supreme Court pursuant to the plaintiff's application, on

behalf of the defendants, pursuant to the state's Equal Access to Justice Act. Albany county, therefore is an improper venue pursuant to CPLR §510(1) and venue should be changed to Essex County.

In addition to CPLR § 510(1), CPLR § 510(3) states that a "court, upon motion, may change the place of trial of an action where the convenience of material witnesses and the ends of justice will be promoted by the change." The decision to grant a motion based upon the convenience of witnesses and the ends of justice is left to the sound discretion of the court. Kucich v Leibowitz, 68 A.D.2d 1002 [3d Dept 1979]

It is submitted, therefore, that the convenience of witnesses and the ends of justice would be better served by a change of venue from Albany County to Essex County. As stated above and in the accompanying affidavit the instant action seeks recovery attorney fees relating to underlying litigation that occurred in Essex County. The defendants are all residents of Essex County. Non-party witnesses from the Adirondack Park Agency, including the custodian of records for the Adirondack Park Agency operate out of Ray Brook, New York. The plaintiff's own expert witness concerning attorney fees in the Essex County area, Ronald Briggs, Esq., is a resident of Essex county having a principal office in Lake Placid, NY 12946. Moreover, the issue of attorney fees and the reasonable value of such services was litigated and decided in Essex County on or about November 17, 2010, pursuant to judge Meyer's decision on the plaintiff's application for attorney fees under this state's Equal Access to Justice Act. Furthermore, it is submitted, upon information and belief, that Albany County Supreme Court maintains a busier and more congested court calendar than Essex County. Such potential court congestion coupled with the fact that the issue of attorney's fees has already been addressed by the Essex County Supreme Court implores this court to change venue to Essex County. Indeed, it is submitted that the ends of justice will promoted by such change of venue

## POINT II

### PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED AS PREMATURE

Where discovery is not yet complete, summary judgment is premature, if not inappropriate. See, *Hammond v. Alekna Const., Inc.*, 269 AD2d 773 (4th Dep't. 2000), rearg. den. 710 NYS2d 238; and *Heath v. County of Orange*, 273 AD2d 274 (2nd Dep't. 2000). Indeed, summary judgment must be "denied as premature where the opposing party has not yet had adequate opportunity to conduct discovery." *Sloane v. Repsher*, 263 AD2d 906, 907 (3rd Dep't 1999) citing *Busby v. Ticonderoga Cent. School Dist.*, 222 AD2d 882 (3rd Dep't 1995)

Defendants have had no opportunity to conduct discovery, either by written request or by oral deposition. Although Plaintiff maintains and alleges that the Defendant never objected to the monthly invoices for legal bills, defendants clearly dispute such assertions. The defendants have stated their objections to the plaintiff's claim and the absence of any acquiescence or agreements, express or implied, as to plaintiff's invoices for services rendered. As the existence of such oral objections, or lack thereof, is central to a claim for account stated, see *O'Connell and Aronowitz v Gullo*, plaintiffs should be entitled depose Mr. Privatera as to his knowledge of Mr. Lewis's objections and repeated claims that he would review the monthly invoices when the case was concluded. Similarly objections to the invoices and billing amounts were voiced to Jacob Lamme, Esq. who plaintiff should also be entitled to depose regarding his understanding of such objections. The defendants also intend to seek disclosure of plaintiff's internal records, including memos, reports and e-mails regarding communications with defendants relating to such billings, the understanding and agreements of the parties, payments for plaintiff's services, as well as the

fairness and reasonableness thereof, and the defendants' objections thereto. Discovery and disclosure of this nature must be pursued prior to any consideration of plaintiff's motion.

## POINT III

### REGARDLESS OF PREMATURITY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED DUE TO THE EXISTENCE OF TRIABLE ISSUES WITH RESPECT TO THE CLAIM OF ACCOUNT STATED

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficient to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). This standard requires that the proponent of a motion for summary judgment make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Silverman v Perlbinder, 307 AD2d 230, 762 NYS2d 386 (1st Dept 2003)

It is well settled that summary judgment is a drastic remedy that is granted only when it is clear that no triable issue of fact exists. *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974): *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986) and *Celardo v. Bell*, 222 A.D.2d 547 (2nd Dept. 1995). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). The remedy of summary judgment should not be granted where there is any doubt as to the existence of a triable issue, or where the issue is even arguable, since it serves to deprive the party of his day in court, leave should be granted only where no genuine, triable issue of fact exists. *Henderson v. City of New York*, 178 A.D. 2d 129 (1st Dep't 1991).

In deciding whether to grant summary judgment parties competing contentions must be viewed in the light most favorable to the party opposing the motion. *Cunneen v. Square Plus Operating Corporation*, 249 A.D.2d 258 (2nd Dept. 1998) and *Marine Midland Bank, N.A. v. Dino & Arties's Automatic Transmission Co.*, 1268 A.D.2d 610 (2nd Dep't 1990). If there is any doubt about the existence of a triable issue of fact or if a material issue of fact is arguable, summary judgment should be denied. *Celardo v. Bell*, 222 A.D.2d 547 (2nd Dept. 1995).When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination. *Boston v. Dunham*, 274 A.D.2d 708 (3rd Dept. 2000).

A.) **Defendants objected to Plaintiff's invoices and accounts.**

As the plaintiffs state, the Third Department has held that an attorney can recover legal fees under a theory of account stated with proof that a bill, even if unitemized, was issued to a client and held by the client without objection for an unreasonable period of time. *O'Connell and Aronowitz v Gullo*, 229 AD2d 637, 638 (3d Dept 1996). Where a client objects to the bill, however, recovery for an account stated cannot stand. At the very least oral objections to accounts, or the existence of questions of fact concerning such objections, are sufficient to warrant the denial of summary judgment on the theory of account stated. See *Ween v. Dow*, 35 A.D.3d 58, 61 (1st Dep't 2006). See also *Kaye, Scholer, Fierman, Hays & Handler*, LLP v. L.B. Russell Chems., Inc., 246 A.D.2d 479, 480 (1st Dep't 1998) (holding that "issues of fact exist as to whether defendant objected thereto, raised by, inter alia, evidence of defendant's oral communications of dissatisfaction"); Herbert Paul, P.C. v. Coleman, 236 A.D.2d 268, 269 (1st Dep't 1997)

Here, the Defendants objected to the invoices on multiple occasions. Central to the defendants' objections were the repeated statements that the invoices would be reviewed at the conclusion of the case – not before. Additionally, Defendant stated on at least two occasions "I am sick of this excess, you are running up time." The rationale for the permitting a recovery on an account stated theory is that the parties

have, by their conduct, evidenced an agreement upon the balance of an indebtedness. *Interman v. R.S.M. Electron Power*, 37 N.Y. 2d 151 153-154 (1975). As set forth in Mr. Lewis's affidavit, his conduct did not evidence an agreement upon the alleged indebtedness. Mr. Lewis was aware that an application for fees was going to be made and that the court would determine the reasonableness of such fees. Additionally, Mr. Lewis objected to the invoices by continually stating that the invoices would be reviewed and appropriate payment would be made at the conclusion of the case.

B.) **Equitable considerations particular to the instant matter warrant denial of summary judgment on the theory of an account stated.**

Plaintiff argues that it is entitled to summary judgment on a claim for attorneys fees in the amount of approximately $300,000 , plus interest, upon a theory of account stated because plaintiffs state they delivered itemized invoices to the Defendants, which Defendants allegedly retained without objection and to which defendants made partial payments until January 2009. Even assuming, arguendo, that the Defendants retained plaintiff's invoices without objection, the Defendants are bound by such accounts only in the absence of fraud, mistake, or other equitable considerations. *Rodkinson v Haecker*, 248 NY 480, 483 [1928]; *Shaw v Silver*, 95 AD3d 416 [1st Dept 2012] *Chisholm-Ryder Co., Inc. v Sommer & Sommer*, 70 AD2d 429 [4th Dept 1979](the agreement implied under the account stated doctrine is conclusive "[i]n the absence of fraud, mistake or other equitable consideration);

Beginning in August 2009, as, it is submitted, was plaintiff's intention throughout the APA action, Plaintiff commences an action against New York State under Article 86 of the CPLR - the Equal Access to Justice Act. Plaintiff sought recovery of approximately $222,000 in legal fees for their prosecution and defense of the APA action. Central to the action for legal fees was a determination of the reasonableness of the plaintiff's fees. CPLR § 8602(b). The defendant was aware of this and continually informed plaintiff that he would review the plaintiff's invoices at the conclusion of the case. In the action for fees,

the plaintiff's request for $ 222,000, the majority of which plaintiff now claims under a theory of account stated, was deemed unreasonable. Indeed, the Essex County Court stated:

> The underlying litigation, though presenting novel questions of law which received unusual media attention, involved a relatively straightforward matter of statutory construction, and was not overly complex or unique. No special legal expertise was required, and there was no discovery or evidentiary hearings. Also, the essential facts were not in dispute. Review of the clerk's records reveals that the parties repeatedly asserted the same legal arguments throughout the litigation, with little deviation or new material added during the various stages."

Moreover, the plaintiff's were assisted in their prosecution of the declaratory judgment action and the Article 86 application for fees by New York Farm Bureau which filed multiple amicus briefs on the defendant's behalf. Consequently, the Essex County Supreme Court saw fit to award only 31% of the requested fee in the Article 86 action based on its determination of the reasonableness of plaintiff's legal fees. Plaintiff now attempts to avoid the conclusiveness of such award based on the theory of account stated.

In *Newburger Morris Co. V. Talcott*, 219 N.Y. 505 (1916), Judge Cardozo wrote: There is no doubt that an account stated may sometimes result from the retention of accounts current without objection [citations omitted]. But the result does not always follow. It varies with the circumstances that surround the submission of the statements and those circumstances include, of course, the relation between the parties." A circumstance unique to plaintiff's current claim of account stated for legal fees is the existence of a prior application for the same fees under CPLR Article 86 and a judicial determination as to the reasonableness of such requested fees. In light of necessary equitable considerations, therefore, see *Chisholm*, supra, the Defendants should not be prevented, at the very least, from raising the reasonable value of such fees at trial in the instant action. Moreover, Defendants continue to maintain that they objected to invoices and that there was no agreement on or acquiescence to the balance of the

indebtedness. Equitable considerations, when viewed in totality, warrant the denial of summary judgment as there exist triable issues.

C.) **There is no sufficiently clear showing of acquiescence to plaintiff's invoices on behalf of the defendant.**

Where, after consideration of all the circumstances and evidence before the court, there is not a sufficiently clear inference of acquiescence to plaintiff's accounts or invoices, summary judgment on the theory of account stated should be denied. *Bomba v. Silberfein*, 238 A.D.2d 261 (1st Dep't 1997).

Here as stated above, plaintiffs continually objected to plaintiff's invoices and repeatedly informed the plaintiff that the invoices and bills would be reviewed at the conclusion of the case. The Defendants were also aware that the plaintiff was making an application for fees to the Essex County Supreme Court and that the Court would make a determination as to the reasonableness of plaintiff's fees. Additionally, defendant was mislead by the plaintiff as to th necessity of paying the outstanding invoices, where defendant had previously informed plaintiff that the bills would be reviewed at the conclusion of the case, before plaintiff could proceed with an Article 86 application. Furthermore, there was no discussion as to the projected fees in the APA case.

Accordingly, in light of the totality of circumstances, questions of fact exist as to whether there was a "sufficiently clear inference of acquiescence" by the defendants to the invoices and accounts which would warrant summary judgment on plaintiff's theory of account stated. The defendants did not merely retain the plaintiff's invoices without objection. The conduct of plaintiff and the circumstances of the pending fee application prevented the existence of an implied agreement as to the balance of plaintiff's agreed indebtedness. *Interman* at 153-154.

POINT IV

THE DOCTRINE OF ISSUE OF PRECLUSION SHOULD OPERATE TO BAR PLAINTIFF FROM RELITIGATING THE ISSUE OF ATTORNEY FEES.

Issue preclusion bars the relitigation of an issue which was actually and necessarily previously decided in a prior proceeding. *Ryan v. New York Telephone*, 62 N.Y.2d 494, 478 (1984).Issue preclusion is invoked where there is an identity of an issue which was necessarily decided in a prior action; and 2) there was a full and fair opportunity by the party against whom collateral estoppel is being invoked to have contested said issue. *Allied Chemical v. Niagara Mohawk Power*, 72 N.Y.2d 271(1988). Identity of parties is not required as emphasis has been placed on the identity of issue. *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 486 (1979). he doctrine of issue preclusion conserves judicial resources and prevents repetitive litigation and potentially inconsistent judgments by providing, in general, that once a particular question of fact has been decided in one administrative or judicial forum, that same question of fact may not be reopened for further litigation in the context of a subsequent administrative or judicial proceeding between the same parties (*see, e.g., Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 478 N.Y.S.2d 823, 467 N.E.2d 487" *Sun Ins. Co. of New York v Hercules Sec. Unlimited, Inc.*, 195 AD2d 24, 31 [2d Dept 1993].

It is submitted that the issue of the reasonableness of the plaintiff's fees is an issue in the current case as it relates to necessary equitable considerations. See *Chisholm*, supra. Moreover, where the defendant's did object to the plaintiff's invoices and there was a lack of implied acquiescence, the reasonable value of the plaintiff's legal services remains a triable issue unless such issue is precluded. *Compare, O'Connell and Aronowitz v Gullo*, 229 AD2d 637, 638 (3rd Dept 1996) ("it is not necessary to 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".)

This issue of the reasonable value of plaintiff's legal services, however, was directly addressed by Judge Meyer in the plaintiff's application for attorney's fees under CPLR Article 86. The Judge undertook a careful and detailed review of the plaintiff's billing records, fee requests, and expert testimony, before awarding 31% of the plaintiff's requested fee. The issue is identical to the one at hand. Moreover, the plaintiff had a full and fair opportunity to contest the reasonable value of its fees before Judge Meyer. As Judge Meyer's decisions in February 201 and November 2010 make clear, The plaintiff submitted the following papers, and the court reviewed the following papers, in support of its application for fees and in an attempt to prove the reasonable value of its fees.:

- A notice of motion, dated August 13, 2009; Affirmation of Privitera dated, August 12, 2009 with exhibits A and B; Affidavit of S.B. Lewis sworn to August 13, 2009; Memorandum of Law dated August 18, 2009.

- APA answering papers: Affirmation of Simon dated Auguat 28, 2009 with exhibits A through H; Affidavit of Cecil Wray sworn to August 24, 2009 with exhibits A through B; Memorandum of Law dated August 28, 2009.

- LFF reply papers: Privitera affirmation dated September 23, 2009 with exhibits A through G; Affirmation of Ronald Briggs dated September 23, 2009; Affidavit of Jorge Valero dated September 17, 2009; Affidavit of Howard Aubin dated September 21, 2009; Memorandum of Law dated September 22, 2009.

- Amicus curie brief of New York Farm. Bureau dated 10/05109. APA memorandum of law in opposition to Farm Bureau's amicus brief with copy of record on appeal volume III.

- Cross Motion by APA to strike: Notice of cross motion dated October 9, 2009; Affirmation of Loretta Simon dated October 9, 2009 with exhibits A through G. LFF's Opposition to Cross Motion: Affidavit of S.B. Lewis sworn to October 21, 2009; LFF memorandum of law in opposition to cross motion to strike dated October 22, 2009

- A third affirmation of John J. Privitera, Esq. dated March 4, 2010 with exhibits A through E; Second affidavit of Salim "Sandy" B. Lewis, sworn to March 8, 2010; Affirmation of Jerry Hoffman, Esq, dated February 23, 2010; Affirmation of Benjamin R. Pratt, Esq. dated February 26, 2010; Affirmation of Michael J. Cunningham, Esq, dated February 26, 2010; Affidavit of Jorge Valero sworn to

March 1, 2010; Affirmation of Jacob F. Lamme, Esq. dated March 4, 2010 with exhibit A; Affirmation of Cynthia Feathers, Esq. dated March 1; 2010; Affirmation of Loretta Simon, Esq. dated March 19, 2010 with exhibits A through I.

Thus, although the plaintiff waived, according to Judge Meyer, an evidentiary hearing, the above affirmations, affidavits, memoranda of law, and arguments make clear that the plaintiff had a full and fair opportunity to contest the issue concerning the reasonableness of the requested fees for legal services rendered between 2007 and November 2010. It is respectfully submitted, therefore, that the plaintiff should be precluded from relitigating the instant fee request.

## CONCLUSION

For all the foregoing reasons it is respectfully submitted that the plaintiff's motion for summary judgment be denied and that defendant's motion for change of venue be granted.

Dated: Queensbury, New York
September 17, 2012

Respectfully submitted,

Eric C. Schwenker
BRENNAN & WHITE, L.L.P.
Attorneys for Defendants
163 Haviland Road
Queensbury, New York 12804
(518)793-3424