New York Law Journal

Outside Counsel

MONDAY, NOVEMBER 22, 2010

# New Use for an Old Tool: Collecting Rent With an Account Stated

BY ADAM LEITMAN BAILEY AND DOV TREIMAN

At least since Abraham and Lot's shepherds parted ways over a land grazing dispute,1 Western Civilization's literature has been full of accounts of monetary and property disputes. Litigators across the United States have produced some astounding excuses from debts. Debt avoidance probably burgeoned after the federal abolition of debtors' prisons in 1833. Indeed, nothing has spawned disputes over money like fights over real estate. Commercial leasing litigation has become an art form and in states like New York, attorneys have, as a result of technicalities, suffered non-paying tenants remaining in possession for years.2 Against that background, two New York seated courts have refurbished an old weapon for property owners to use in their battles against commercial tenants unjustifiably failing to pay rent.

Apparently, the new millennium represents the first appearance of cases whereby courts have recognized accounts stated in commercial tenancy transactions. While the tenancy relationship has evolved throughout the years from mostly simple neighborly transactions to complex commercial lease agreements, one fact remains constant: that some tenants just will not pay their rent.

While there do not appear to be any studies analyzing the damage to the overall national economy due to the waste of resources entailed in landlords having to chase after unjustifiably unpaid rents, one must account for the loss of productivity engendered by the stress and anxiety landlords incur trying to meet their bills despite their faltering income streams. This lack notwithstanding, anecdotal evidence suggests that the societal costs are indeed enormous. Although the account stated doctrine is no panacea, this rejuvenated weapon re-appearing in this millennium in this guise should reduce those ails.

**What Is Account Stated?**

"Account stated" may be defined as the doctrine that allows a creditor to establish entitlement to payment from a debtor when the creditor proves merely that the debtor has received bills from the creditor and has retained them without objecting to them within a reasonable period of time.3

*Adam Leitman Bailey*

*Dov Treiman*

Its basic elements are: (1) a showing of mutual assent between the parties to the account, as to the correct balance; (2) a promise by one of the parties to pay that balance; and (3) a previous debtor-creditor relationship between the parties.4

The existence of an account stated depends on the particular circumstances of the parties' relationship and looks to their prior transactions.5 Originally rooted in the practice of merchants and trade dealings,6 it has permeated the marketplace, applying to numerous credit relationships including attorney's fees,7 insurance policies,8 and commissions.9

As such, an account stated is a potent tool for creditors claiming nonpayment because it erects a presumption in favor both of existence of the debt and the balance owed, leaving little room for the debtor's possible grounds for dispute.

The rarely found express showing of mutual assent and the debtor's promise to satisfy the debt would be ideal for the creditor, but the law also implies accounts stated through partial payment.10 Indeed, most importantly, partial payment establishes that there is a creditor/debtor relationship.

In account stated litigation, there are no bright lines to establish a "reasonable time" for the debtor to object to the accounting. While one week is evidently too little and two years too much, things measured in months are questions of mixed law and fact where the court has substantial latitude. However, when one is dealing with either extremely protracted or extremely brief periods, the court can rule that the time is too long or short as a matter of law.11

**Account Stated for Commercial Leases.** Applying account stated to commercial leases is a bit different from the traditional application because normally the doctrine is invoked to settle a dispute over the amount owed. Unlike the origin of account stated where no written contract was in place, in commercial tenancies there is almost always a written lease, providing both evidence of the parties' contractual relationship and its details, including payment terms and the parties' corresponding rights and remedies. While tenants sued on claims of nonpayment of rent often dispute the amount owed by trying to connect it to some purported nonperformance by the landlord, an account stated can eliminate such matters as defenses to rent, leaving them only as potential counterclaims where, often, they simply collapse.

Most nonpayment cases occur as a result of the commercial tenant's inability or unwillingness to pay rent. Accounts stated assist landlords in getting around baseless and frivolous claims.

While each monthly invoice or billing statement is a separate account stated, later invoices do not vitiate the effect of earlier ones.12 The original lease is still the primary basis for liability and the account stated does not replace it, but rather merges those prior obligations.13 New York courts also apply the doctrine of account stated to unitemized bills.14

Ubiquitous in American commercial leases are provisions passing along various operational expenses to the tenant, including wages paid to building staff, real property tax, and maintenance and repairs among other things. While the "fixed rent" reserved in a lease rarely needs more calculation than reference to the lease itself, these items of so-called "additional rent" often require the assistance of certified public accountants, both to impose and to verify.

Therefor, many commercial leases containing these clauses contain additional clauses referred to as "pay now, fight later." With such a clause, a tenant who questions the accuracy but immediately pays an additional rent bill could hardly be held bound by the doctrine of account stated. However, the other prong of the doctrine, "reasonable time" then kicks in to establish when a

tenant who decides to "fight later" has picked the fight simply too late.15 Even if there is a timely protest of the amount, there must be specificity to the protest for the tenant to elude a finding of account stated.

Once an account stated has met all its qualifications, it is enforceable at law, but subject to equitable defenses such as fraud or mistake. However, neither fraud nor mistake can be used to attack the accounting methodology underlying an account stated.16 It can only attack specific items in the account and show how when the accepted accounting methodology is applied to them, they were incorrectly calculated.

For example, if a lease calls for additional rent based on 3 percent of the tenant's profits, without an account stated, the tenant could argue that the term "profits" means "net profits." If, however, there is an account stated and the landlord had used "gross profits" to effect that calculation, the tenant cannot argue that it should have been net profits instead. The tenant can at most argue that the gross profits were lower than what the landlord calculated. There would still be an account stated, but the landlord's recovery would be lower if the tenant presented convincing evidence of the lower number.17

**Defenses to an Account Stated**. A tenant may refute an account stated upon showing that the landlord has failed to establish its basic elements or by proving fraud or mistake.18 However, "self-serving, bald allegations of oral protests are insufficient to raise a triable issue of fact as to the existence of an account stated."19 The tenant must have set forth specific, not general, allegations of protest in support of its position, as they related to whom and when the objections to the rent invoices were made.20 Such determinations are made based on the factual circumstances and relationship of the parties. For example, an affidavit citing specific oral objections to the invoice's accuracy a month after receiving it has been found sufficient to defeat an account stated.21

Naked denials of ever receiving the invoice are insufficient to invalidate an account stated.22 If the landlord is able to show the invoices were mailed using the regular office mailing procedure it is sufficient to establish a presumption of their receipt.23 To overcome this presumption, the tenant must prove those office procedures were not followed or are so careless that it can reasonably be assumed the invoice was never mailed.24

It can be difficult to get a good witness from a client who will competently testify to mailroom procedures sufficient to convince a judge that the mailing really took place. In this regard, certified mail, return receipt requested has proven enormously unreliable. Therefore, clients should use nationally recognized overnight couriers requiring a signature or fax transmissions to obtain reliable proof of receipt.

**Preemptive Drafting Measures**. Landlords also have the option to include a provision in the lease that preemptively creates an account stated after a certain amount of time. The provision could read:

> Tenant's failure to object to a statement, invoice or billing within x amount of time after receipt shall constitute tenant's acquiescence. Tenant shall be required to provide Landlord with a specific and detailed list of Tenant's objections at the time Tenant makes its objection to Landlord. The statement, invoice or billing shall be an account stated between Landlord and Tenant."25

Such lease provisions will ease the landlord's burden of proof.26

**Collecting Rent**

In Villency v. Carp,27 a New York judge granted summary judgment to a landlord suing in a plenary action to recover rent on an account stated. The parties had stipulated to satisfy the debt and the defendants signed personal guaranties. The principals defaulted on the stipulation and filed for bankruptcy. The landlord then sent an account stated to each guarantor defendant individually, demanding payment. Defendants did not object to receiving the invoices or to their accuracy, but argued that they were not actively involved in the business and did not transact business with the landlord in their individual capacities. The court discredited the defense, finding the reasoning "weak and inexcusable." Because defendants signed the original lease as well as the stipulation containing the personal guaranties, they were held personally liable on the account stated.

Had defendants instead argued that the account stated was the first ever bill they had received in their personal capacities after years of the principal debtor's dealing with the creditor, it would have been more interesting. This case also makes clear that contrary to common misconceptions, the account stated need not be as part of a series of bills which had predecessors to the account stated. In normal landlord-tenant dealings, it would however be part of such a sequence.

However, plaintiff established an account stated as a matter of law by showing that invoices were mailed using regular office procedure, received by defendants, and retained without objection for a reasonable period of time. Even on almost unique facts, this case points to a potent weapon generally available to landlords.

**Defensive Account Stated**

The principle of account stated works to a landlord's advantage not only as an offensive weapon to assert and make good on a claim of rent, but to defend against a claim of overpayment. In In re Rockefeller,28 the Federal District Court sitting in Manhattan applied account stated to bar a tenant from seeking reimbursement for supposed overpayment of additional rent.29 The tenant filed suit for over $7 million in overpayment resulting from alleged miscalculations, but the tenant had waited until 1995 to challenge stated accounts for a lease covering years 1989 through 1993. Two years were, according to the court, well beyond a reasonable time to challenge the bills.

The "pay now, fight later" clause of the lease, like the language suggested above, had specifically required "prompt" payment or objection, making the tenant disqualified for the protections of the lease itself as well as the doctrine of account stated. It should also be noted, however, that the court found the debtor's unparticularized protest of the bills did not qualify as a sufficiently specific dispute to elude "account stated" status.

The court also noted that although the checks used to make the payments said "Paid in Protest," they were insufficiently specific to constitute effective objections to the stated accounts.

**Conclusion**

For landlords who take all of the proper steps, accounts stated are peculiarly suitable for motions for summary judgment. So, while accounts stated are a dusty old common law tool, even an ancient axe, properly polished, can prove to be truly cutting edge.

**Adam Leitman Bailey** is the founding partner and **Dov Treiman** is the landlord-tenant managing partner of Adam Leitman Bailey, P.C. **Jennifer Beyer**, an associate and former extern and summer associate with the firm, assisted in the preparation of this article.

Endnotes:

1. Genesis Ch. 13.
2. See, e.g., Candyman Reprieve, New York Daily News, 8/18/04, also available at http://www.alblawfirm.com/siteFiles/News/C5F6A47884FD43611D1F074A1B7CC447.pdf.
3. Jovee Contracting Corp. v. AIA Environment Corp., 283 A.D.2d 398 (2d Dept. 2001); 1000 Northern of New York Company v. Great Neck Medical Associates, 7 A.D.3d 592 (2d Dept. 2004).
4. 1 Am Jur 2d Accounts and Accounting §26, Lisa A. Zakolski (2010).
5. See In re Rockefeller, 2002 U.S. Dist. LEXIS 212 (S.D.N.Y. 2002).
6. See Sherman v. Sherman, 2 Vern. 276.
7. Kramer, Levin, Messen, Kamin & Frankel v. Aronoff, 638 F.Supp. 714 (S.D.N.Y. 1986).
8. American Home Assurance Co. v. Instituto Nacional de Reaseguros, 1991 U.S Dist. LEXIS 501.

(N.Y. Supp. Ct. 1945).
10. See Chisholm-Ryder Co. v. Sommer & Sommer, 421 N.Y.S.2d 455 (4th Dept. 1979).
11. In re Rockefeller, 2002 U.S. Dist. LEXIS 212 (S.D.N.Y. 2002) citing Legum v. Ruthen, 211 A.D.2d 701 (2d Dept. 1995); Kramer, Levin, supra (granting plaintiff summary judgment where defendant's three year silence regarding legal bills created an implied account stated); See also Gurney, Becker & Bournce v. Benderson Dev. Co., 47 N.Y.2d 995; Werner v. Nelkin, 206 A.D.2d 422; David, Markel & Edwards v. Solomon, 204 A.D.2d 182; Shea & Gould v. Burr, 194 A.D.2d 369.
12. 1 Am Jur 2d Accounts and Accounting §26, Lisa A. Zakolski (2010).
13. 1 Am Jur 2d Accounts and Accounting §34, Lisa A. Zakolski (2010).
14. See Kramer Levin, supra at 72; Legum v. Ruthen, 211 A.D.2d 701 (2d Dept. 1995).
15. See, in depth analysis of this infra.
16. In re Rockefeller, supra.
17. Id.
18. See Romeo v. Bimco Indus., 57 A.D.2d 947 (2d Dept. 1977).
19. 1000 Northern NY Co., supra, citing Darby & Darby v. VSI Intl, 95 N.Y.2d 308, 315 (2000).
20. Id.
21. Sandvoss v. Dunkelberger, 112 A.D.2d 278, 279 (2d Dept. 1985).
22. Kramer, Levin, Messen, Kamin & Frankel, supra at 720 citing Belmet Products Inc. v. Merit Enterprises Inc., 236 N.Y.S.2d 254 (Civ. Ct. 1963).
23. Morrison Cohen Singer & Weinstein, LLP v. Brophy, 19 A.D.3d 161, 162 (1st Dept. 2005).
24. Burr v. Eveready Ins. Co., 253 A.D.2d 650 (1st Dept., 1998).; Bronia Inc. v. Ho, 873 F.Supp. 854 (S.D.N.Y 1995)
25. See ALI- ABA Course of Study Materials, Commercial Real Estate Leases by Ronald L. Gern (May 2008).
26. See detailed discussion infra.
27. NYLJ, Feb. 2, 2010, p. 27, col. 3 (Sup. Ct. Nassau Co.). Given the importance of this decision, it is odd that the New York State Reporter has not thus far chosen to report it.
28. 2002 U.S. Dist. Lexis 212.
29. See explanation of "additional rent" supra.