

PROPOSED TENTATIVE

On September 14, 2023, plaintiff LVNV Funding, LLC, as assignee from Credit One Bank (plaintiff), filed a limited civil action complaint on standard Judicial Council forms against defendant Barry Radjabi in common count (open book, an account stated in writing, for money had received, for money lent, and for money paid, loan out, and expended to defendant). Plaintiff asks for damages of \$1,516.61 (the amount owed on by plaintiff on the original credit account), Plaintiff has attached billing statements issued by the original creditor Credit One Bank (one from September 15, 2019, and one from April 15, 2020). It appears defendant defaulted in April 2020, which is the date of the last entry into the account based on exhibits attached to the pleading, meaning the four-year statute of limitations applies per Code of Civil Procedure section 337, subdivision (b). The complaint was timely filed on August 14, 2023. (*Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 966.) Plaintiff is asking in the complaint for the principal debt owed by plaintiff of \$1,516.61. Defendant filed an answer on September 6, 2023, in which he admitted the truth of every statement in the operative pleading; he has not submitted a specific denial or any affirmative defense. He asks only for one thing in the answer: “That we go to mediation to talk about a settlement plan.”

Plaintiff has filed a statutory motion for judgment on the pleadings (pursuant to Code of Civil Procedure, § 438), asking the court to award damages of \$1,516.61, and costs of \$721.24 (as the prevailing party). The motion is barebones, consisting of the following documents: 1) Notice of Motion (a page and a ¼); 2) a memorandum of point and authorities (2 pages); 3) a declaration from attorney Robert Kayvon, detailing his efforts to satisfy the statutory meet and confer obligations; 4) a notice of nonappearance and request to submit on plaintiff’s written submissions, which is permitted pursuant to California Rules of Court, rule 3.1304(c) [a party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance]; 5) a proposed order (filed on November 22, 2024); and 6) a proposed judgment (also filed on November 22, 2024). No opposition has been filed.

A statutory motion for judgment on the pleadings (Code Civ. Proc., § 438) is an appropriate means of obtaining an adjudication of the rights of the parties if those rights can be determined as a matter of law from the face of the pleading attacked. This motion is filed after the answer. A plaintiff’s motion for judgment on the pleadings (as here) is analogous to a plaintiff’s demurrer to an answer and is evaluated by the same standards. The motion should be denied if the pleadings (the complaint and answer) raise a material issue or set up an affirmative matter constituting a defense. “The determination of the sufficiency of the answer requires an examination of the complaint because its adequacy is with reference to the complaint it purports to answer.” (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 733; see *People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 499; accord, *Allstate v. Kim W.* (1984) 160 Cal.App.3d 326, 220-331.)

Plaintiff has pleaded common count causes of action only. Technically, “[a] common count is not a specific cause of action . . . ; rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness” (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394.) Plaintiff has identified five types of common count in the operative pleading – “account stated,” “open book account,” “money had and received,” “for money lent,” and “money paid, laid out and expended.” (See, e.g., 4 Witkin, Cal. Proc. (6th ed. 2024) §§ 563, 567 to 571 [detailing the common counts for fixed amounts, open book account, including money had and received, money lent, and account stated].) The court need focus only on one for only one need be adequately pleaded to support plaintiff’s motion for judgment on the pleadings. The court will focus on an account stated as form of common count.

“An account stated is ‘an agreement, based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing.’” (*Professional Collection Consultation, supra*, 8 Cal.App.5th at p. 968 (*Lauron*).) To make out a claim for account stated a plaintiff must allege: “(1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or implied, on the amount due from the debtor to the creditor; [and] (3) a promise by the debtor, express or implied, to pay the amount due.” (*Zinn v. Fred R. Bright Co.* (1969) 271 Cal. App.2d 597, 600.) “When an account stated is ‘assented to, either expressly or impliedly, it becomes a new contract.’ . . . Accordingly, an action on an account stated is not based on the parties’ original transactions, but on the new contract under which the parties have agreed to the balance due.” (*Ibid*; see *Professional Collection Consultants, supra*, 23 Cal.App.5th at p. 691.) “‘[A]n element essential to render the account stated is that it receive the assent of both parties, but the assent of the party sought to be charged may be implied from his conduct.’ [Citation.] For example, ‘[w]hen a statement is rendered to a debtor and no reply is made in a reasonable time, the law implies an agreement that the account is correct as rendered.’” (*Lauron, supra*, 8 Cal.App.5th at p. 968.)

The court grants plaintiff’s motion for judgment on the pleadings, without leave to amend. The motion was timely (i.e., 30 days before the initial trial date – in fact, no trial date has been set). (Code Civ. Proc., § 438(e).) Service of the motion was proper. Further, it appears plaintiff has satisfied its meet and confer obligation through the declaration of attorney Robert Kayvon, as required per Code of Civil Procedure section 439, subdivision (a).) Attorney Kayvon indicates he attempted “numerous telephone calls” to plaintiff, and on January 23, 2024, he mailed a letter to plaintiff addressing the motion for judgment on the pleadings. Plaintiff has not replied to any communication.

Significantly, plaintiff has successfully pleaded a common count based on an account stated. It has adequately pleaded previous transactions between the parties establishing the relationship of debtor and creditor; an agreement, express or implied, on the amount due from the debtor to the creditor; and a promise by the debtor, express or implied, to pay the amount. (*Leighton v. Forster* (2017) 8 Cal.App.5th 467, 491 [elements of account stated].) Defendant unconditionally admitted that he owes the amounts alleged in the complaint for the reasons articulated therein without qualification, and does not allege any specific denials or advance any possible affirmative defense (Code Civ. Proc., § 438 (c)); nor has he demanded a bill of particulars.¹ Further, defendant has not filed opposition. All elements of an account stated are present. Under the circumstances, it appears there is no reasonable possibility a defense thereto can be articulated. (See, e.g., *Va. G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852.) The fact defendant requests mediation so that he can work out a “settlement” does not create any issues in dispute. (See, e.g., *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1093 fn. 1 [a creditor is entitled to pursue its own economic interests in a transaction].)

The court grants plaintiff’s motion for judgment on the pleadings without leave to amend. The court will sign the proposed order.

The court’s inquiry is not done. Plaintiff requests costs of \$721.24, in both the memorandum of points and authorities and in its proposed judgment, requesting a total judgment amount of \$2,237.85 (i.e., principal of \$1516.61 and costs of \$721.24).

The court will address two issues associated with plaintiff’s costs’ request. First, as a general rule, a costs requests is made per California Rules of Court, rule 3.1700 *as a post-judgment request/procedure*. Some cases, however, have permitted the order/judgment itself to include costs (filed contemporaneously with the order granting a motion), concluding that this procedure satisfies the requirement of a post-judgment request. (*Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1709-1710; *Wagner v. Shapona* (1954) 123 Cal.App.2d 451, 463-464, overruled on another ground in *Neff v. Ernest* (1957) 48 Cal.2d 628, 634.) Other cases, by contrast, require a separately filed post-judgment motion (pursuant to California Rules of Court, rule 3.1700). (*Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1797-1798.) For efficiency, the court will follow *Miller v. Provost* and allow plaintiff to submit a request for costs as part of the motion for judgment on the pleadings order.

Even with that said, however, plaintiff has failed to explain, let alone *justify*, costs of \$721.41, which is its burden to do. “The established procedure for recovering costs allowed under [Code of Civil Procedure] section 1032 is to file a costs memorandum, supported by a

¹ Code of Civil Procedure section 454 provides that a debtor may request a bill of particulars, which is a detailed account of the transactions and the nature, following a request by debtor.

verified statement of counsel. ([Code Civ. Proc.] § 1034, subd. (a)[California Rules of Court, rule 3.1700(a)(1) [a prevailing party who claims costs must serve and file a memorandum of costs].) In such cases, “if the items on a verified cost bill appear proper charges, they are prima facie evidence that the costs, expenses and services therein listed were necessarily incurred’ and ‘[t]he normal procedure to challenge individual items is by a motion to tax costs.’ (*Rappennecker v. Sea-Land Service, Inc.* (1979) 93 Cal.App.3d 256, 266 [.]” (*Neeble-Diamond v. Hotel California By the Sea, LLC* (2024) 99 Cal.App.5th 551, 555-556; see also *612 South LLC v. Laconic Limited Partnership* (2010) 184 Cal.App.4th 1270, 1285 [once prevailing party satisfies its prima facie burden, the burden shifts to the party seeking to tax costs to show why there were not reasonable or necessary].)

Plaintiff has not submitted a memorandum of costs with a verified statement of counsel. (*Jones v. Dunrichob* (1998) 63 Cal.App.4th 1258, 1266-1267 [a verified memorandum of costs is prima facie evidence of the necessity and reasonableness of costs that appear to be proper charges on their face].) Further, even if the court (as noted above) is willing to allow plaintiff to request costs without meeting the requirements of California Rules of Court, rule 3.1700, and allow in its place a declaration from counsel that explains and justifies the costs, no such declaration has been offered. The declaration that plaintiff has submitted from counsel addresses plaintiff’s meet and confer obligations *only*; it is entirely silent as to costs. Plaintiff in the end simply requests costs of \$721.41 in the memorandum of points and authorities, without explanation, justification, evidence, and/or attorney verification. Plaintiff must still present prima facie evidence that justifies the costs requests as the prevailing party, and that has not been done. As a result the court is left with no choice but to deny the plaintiff’s request for costs of \$721.41 in its entirety. The court will redact all references to costs and award the principal of \$1,516.61 only, and sign the proposed judgment.

Summary

Plaintiff will not appear today, per California Rules of Court, rule 3.1304(c). Defendant has not filed opposition, and it seems unlikely he will appear at the hearing. The court grants plaintiff’s motion for judgment on the pleadings, as plaintiff has alleged an uncontested basis for common count (account stated), as defendant simply admits the debt in the answer, without creating any issues to resolve. The court will therefore sign and enter the proposed order. The court will follow *Miller v. Provost*, and permit plaintiff to forego a post-judgment motion requesting costs as the prevailing party. Nevertheless, plaintiff has failed to file a memorandum of costs, or otherwise failed to present prima facie evidence supporting the requests for costs of \$721.41 in any way (plaintiff simply asks for the total costs without any explanation, justification, and/or attorney verification). Accordingly, the court is left with no choice but to deny the costs’ request in its entirety. The court awards a total judgment to plaintiff of \$1,516.61 only (all references to costs in the proposed judgment will be redacted). The court directs the

clerk to send to the parties the court's written order, the signed order granting the motion for judgment on the pleadings, and notice of the redacted entry of judgment.