

PROPOSED TENTATIVE

On January 24, 2024, plaintiff LVNV Funding, LLC, as successor-in-interest to (and assignee of) WebBank (hereafter, plaintiff), filed a complaint in common count (account stated and open book account) against defendant Alisia Vitela (hereafter, defendant), alleging a debt owed of \$2,619.93. WebBank opened a credit card account for defendant, who agreed to repay “for any charges on the Account including, but not limited to, charges for purchases of good and service and/or cash advances and balance”; defendant used the account for this purpose; monthly statements were sent to defendant, which itemized all payments made and charges due on the account; the last payment made by defendant was on July 9, 2020; and after credits, defendant currently owes \$2,619.93. Plaintiff has demanded and duly performed all obligations. The first cause of action is for account stated, and the second is for open book account. Plaintiff alleges that monthly “statements were sent to Defendant which itemized all payments made and charges due on the Account.” In this regard, plaintiff has attached to the operative pleading two documents. Exhibit A is an account statement for payment due on December 15, 2019; Exhibit B is an account statement for amounts due on June 16, 2020.

Defendant filed an answer. Defendant did not offer a general denial, and did not present any affirmative defenses. Defendant in fact admits that all of the statements in the complaint are true, but alleges that 1) she made an arrangement to pay, but cannot make the payments until she is “paid on SSI and care for my son”; 2) she made a payment in July 2022 of \$200, but because “she was shot 4 times in June 2022,” she “was no longer working”; 3) she can “pay \$50 a month . . . starting in July 2024. I paid \$500 in July 2022. . . .”; and 4) asks for “court fees or attorney fees” Defendant has filed no opposition to the motion for judgment on the pleadings.

A) Legal Background

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 when common count is pleaded, as here. The 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. It can be made on the ground that the complaint states facts sufficient to constitute a cause of action against the defendant, and the “answer does not state facts sufficient to constitute a defense to the complaint.” (Code Civ. Proc., § 438, subd. (c).) 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 here has pleaded common count 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 two types of common counts – “account stated” and “open book account” – alleged in the alternative.

“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 v. Lauron* (2017) 8 Cal.App.5th 958, 968.) 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.)

“A ‘book account’ is ‘a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith’” (*Lauron, supra*, 8 Cal.App.5th at p. 969.) The creditor must keep these records in the regular course of its business and in a reasonably permanent form,” such as a book or card file. (Code Civ. Proc., § 337a.) “A book account is ‘open’ where a balance remains due on the account.” (*Lauron*, at p. 969; *Professional Collection Consultants, supra*, 23 Cal.App.5th at p. 690–691) “‘An express contract, which defines the duties and liabilities of the parties, whether it be oral or written, is not, as a rule, an open account.’ [Citation.] However, the parties may agree to treat money due under an express contract, such as a lease, as items under an open book account. [Citation.] ‘[I]n such a case, the cause of action is upon the account, not under the [express contract].’” *Id.* at p. 969.) The elements of an open book account cause of action are as follows: the existence of a financial relationship between the parties; that the creditor, in the regular course of business, kept an account of the debits and credits involved in the transactions; the debtor owes money on the account; and evidence showing the amount owed. (See CACI No. 372; *Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 708.) It is apparent

that the mere entry of dates and payments of certain sums in the credit column of a ledger or cash book under the name of a particular individual, without further explanation regarding the transaction to which they apply, may not be deemed to constitute a ‘book account’ upon which an action in *assumpsit* may be founded.” (*Tillson v. Peters* (1940) 41 Cal.App.2d 671, 679.)

B) *Merits*

The court grants the motion for judgment on the pleadings, without leave to amend. The motion was timely. (Code Civ. Proc., § 438(e).) Service of complaint had summons were personally made by a registered California process server. The motion was properly served on defendant (as evidenced by the proof of service, mailed to defendant’s address indicated in her answer). Plaintiff has satisfied its meet and confer obligation per declaration (through attorney Sarkis Karayan), indicating counsel made attempts to resolve the matter; on April 24, 2024, counsel contacted defendant by telephone, but defendant did not answer. Counsel left a call back number, but defendant has not responded. While these efforts may be less than overwhelming, they satisfy the statute. (Code Civ. Proc., § 439, subd. (a)).

Further, while the court is not impressed with defendant’s efforts to support an open book account,¹ only one cause of action need be demonstrated. and plaintiff has successfully pleaded common count based on an account stated. Plaintiff 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].) Significantly, defendant unconditionally admitted that she owes the amounts alleged in the complaint for the reasons articulated in the complaint without qualification, and does not allege any specific denials or advance any possible affirmative defense (Code Civ. Proc., § 438 (c)); nor has she demanded a bill of particulars.² Defendant in her answer advances arguments for a claim of exemption, associated with enforcement, not a defense to the liability alleged in the complaint. Finally, it appears that all payments defendant has made have been credited.³ Not insignificantly, defendant has failed to file opposition. All elements of an account stated are present, defendant has admitted the debt,

¹ Plaintiff has only demonstrated in Exhibit B the recording of transactions or the incidental keeping of accounts under an express contract, which is not itself the creation of a book account. (*Warda v. Schmidt* (1956) 146 Cal.App.2d 234, 237; see *Eloquence Corporation v. Home Consignment Center* (2020) 49 Cal.App.5th 655, 656.) Because there is sufficient evidence of an account stated to support judgment, in light of defendant’s answer, the point need not be developed further.

² 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.

³ For example, the original amount due was \$3,119.93 (Complaint, ¶ 16.) Defendant contends that in July 2022 she paid \$500; this seems to reflect the reason for the reduction to \$2,619.93, the amount currently owed, as described in the operative pleading. There are therefore no issues raised in the answer that require trial. And while defendant asks for costs or attorney’s fees, such requests would only be appropriate if defendant were the prevailing party. That is not the case, as evidenced by the motion before the court.

and defendant has advanced no defenses in the answer. Accordingly, 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 court grants the motion for judgment on the pleadings without leave to amend, and awards plaintiff damages of \$2,119.93.

The court is not done. Plaintiff requests costs in the motion and proposed order/ judgment of \$367.10, which includes filing fees of \$208.60 (before the present motion); a motion fee here of \$60; and service of process fees of \$367.10. These are all appropriate costs for the prevailing party under Civil Procedure section 1032, et seq. (Code Civ. Proc., § 1033.5, subds. (a)(1) [filing fees]; subd. (a)(4) [service of process by registered process service].) No attorney's fees have been requested.

The issue is not the reasonableness of the costs, but how the request can be made – either by a separately filed noticed motion after judgment per California Rules of Court, rule 3.1700, or contemporaneously with the motion, order and judgment. Plaintiff overlooks the issue entirely.

Some cases have permitted the motion, order/ and judgment itself to include a request for costs, determining that such request satisfies the requirement of a noticed motion (i.e., without the need for a separately filed noticed motion or memorandum of costs). (*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 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 (and to save defendant any additional cost payments), the court follow *Miller v. Provost* and award plaintiff costs of \$367.10, without the need for a post-judgment motion.

The court will sign the proposed order grant the motion for judgment on the pleadings and proposed judgment filed on May 8, 2029, awarding plaintiff a total of \$2,987.03.

The parties are directed to appear personally or by Zoom at the hearing.