

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D30246
Y/prt

_____AD3d_____

Argued - December 10, 2010

JOSEPH COVELLO, J.P.
RANDALL T. ENG
CHERYL E. CHAMBERS
L. PRISCILLA HALL, JJ.

2009-11249
2009-11250

DECISION & ORDER

Pryor & Mandelup, LLP, respondent, v
Stephen J. Sabbeth, et al., appellants.

(Index No. 10124/06)

Robinson Brog Leinwand Greene Genevese & Gluck, P.C., New York, N.Y. (John D. D'Ercole of counsel), for appellants.

Pryor & Mandelup, LLP, Westbury, N.Y. (Marc A. Stein of counsel), respondent pro se.

In an action, inter alia, to recover damages for breach of contract and on an account stated for legal fees, the defendants appeal from (1) an order of the Supreme Court, Nassau County (Iannacci, J.), entered October 28, 2009, which granted those branches of the plaintiff's motion which were for summary judgment on the first cause of action against the defendant Stephen J. Sabbeth to recover damages for breach of an oral contract and on the fourth cause of action against the defendant Spectrum Resources, Ltd., formerly known as Sabbeth Industries, Ltd., to recover on an account stated for legal fees and (2) a judgment of the same court dated November 2, 2009, which, upon the order, is in favor of the plaintiff and against the defendant Stehen J. Sabbeth on the first cause of action in the principal sum of \$160,000, and in favor of the plaintiff and against the defendant Spectrum Resources, Ltd., formerly known as Sabbeth Industries, Ltd., on the fourth cause of action in the principal sum of \$42,652.65.

ORDERED that the appeal from the order is dismissed, without costs or disbursements; and it is further,

ORDERED that the judgment is modified, on the law, by deleting the first decretal

March 1, 2011

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paragraph thereof awarding damages on the first cause of action in the principal sum of \$160,000; as so modified, the judgment is affirmed, without costs or disbursements, that branch of the plaintiff's motion which was for summary judgment on the first cause of action is denied, the first cause of action is severed, and the order is modified accordingly.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

The plaintiff, a law firm, established its prima facie entitlement to judgment as a matter of law on its first cause of action to recover damages for breach of an oral contract, by submitting the affirmation of Robert L. Pryor, a partner of the plaintiff, stating that the defendant Stephen J. Sabbeth promised to pay the plaintiff \$160,000 if he recovered on a certain fire insurance policy. In opposition to the plaintiff's prima facie showing, the defendants raised a triable issue of fact by submitting Sabbeth's affidavit, wherein he denied making that promise. "On a motion for summary judgment the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine" and "[a]ny conflict in the testimony or evidence presented merely raise[s] an issue of fact" (*6243 Jericho Realty Corp. v AutoZone, Inc.*, 27 AD3d 447, 449; *see also Chase v Skoy*, 146 AD2d 563). Therefore, the Supreme Court should have denied that branch of the plaintiff's motion which was for summary judgment on its first cause of action to recover damages for breach of an oral contract.

The plaintiff demonstrated its prima facie entitlement to judgment as a matter of law on its fourth cause of action based upon an account stated for legal fees by submitting evidence "that the defendants received and retained, without objection, the invoices that the plaintiff sent them seeking payment for professional services rendered" (*Thaler & Gertler v Weitzman*, 282 AD2d 522, 523; *see Ziskin Law Firm, LLP v Bi-County Elec. Corp.*, 43 AD3d 1158, 1159; *Sullivan v REJ Corp.*, 255 AD2d 308; *Werner v Nelkin*, 206 AD2d 422, 422-423). In opposition, the defendants failed to raise a triable issue of fact. Therefore, the Supreme Court properly granted that branch of the plaintiff's motion which was for summary judgment on its fourth cause of action based upon an account stated for legal fees.

COVELLO, J.P., ENG, CHAMBERS and HALL, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court