

E.M. Rinehart, Inc. v Zawacki, Everett, Gray & McLaughlin

2008 NY Slip Op 32490(U)

September 9, 2008

Supreme Court, New York County

Docket Number: 0601119/2005

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

E.M. RINEHART

INDEX NO. 601119/05

MOTION DATE 2/29/08

- v -

MOTION SEQ. NO. 003

ZAWACKI

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The instant motion (sequence 003) and cross motion are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion by plaintiff E.M. Rinehart, Inc. a/k/a Rinehart for summary judgment on liability is denied; and it is further

ORDERED that the cross motion by defendant Zawacki, Everett, Gray & McLaughlin for summary judgment dismissing the complaint is denied.

FILED
SEP 12 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/9/08


CAROL EDMEAD J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

-----X
E.M. RINEHART, INC. a/k/a RINEHART,

Plaintiff,

-against-

Index No. 601119/05

ZAWACKI, EVERETT, GRAY & McLAUGHLIN,

Defendant.

-----X
HON. CAROL R. EDMEAD, J.S.C.:

FILED
SEP 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

This is a legal malpractice action brought by E.M. Rinehart, Inc. (Rinehart), an automobile dealership, against Zawacki, Everett, Gray & McLaughlin (Zawacki). Zawacki represented Rinehart in a breach of contract action in federal court, captioned *ADP Leasing v E.M. Rinehart, Inc.*, 02-CV-2748 (the underlying action). Rinehart alleges that default judgments were entered against it as a result of Zawacki's failure to adequately defend it in the underlying action, and that it was therefore required to pay in excess of \$136,000 to satisfy the judgments.

Rinehart now moves, pursuant to CPLR 3212, for summary judgment on the issue of liability. Zawacki opposes and cross-moves for an order granting summary judgment dismissing the complaint.

FACTUAL BACKGROUND

The following facts are gleaned from the submissions of the parties. Rinehart is an automobile dealership doing business in Stroudsburg, Pennsylvania, which trades as Chrysler Dodge of the Poconos, Pleasant Valley Motors, Inc., Rine Motors, Inc. and Gray Chevrolet Cadillac of the Poconos. William Rinehart is Rinehart's president. ADP Dealer Services, Inc.

(ADP), a Delaware corporation, is a computer hardware and software provider. Rinehart first began doing business with ADP in 1985 in order to manage accounting, inventory, payroll, and automobile parts for the dealership.

On October 31, 1995, Rinehart entered into Master Equipment Lease Agreement No. 23027 with ADP to lease certain computer hardware and software equipment (Gates Affirm., Exh. 3, Master Equipment Lease Agreement). The agreement contained a 60-month payment term in one of the schedules annexed thereto, which was initialed by William Rinehart as Rinehart's president (*id.*, Exh. 3, Schedule 1 to Master Equipment Lease Agreement). Pursuant to the agreement, the failure to pay an installment of rent constitutes an event of default (*id.*, Exh. 3, Master Equipment Lease Agreement, § XIII-Events of Default).

The Master Equipment Lease Agreement states that:

[U]pon the occurrence of any Event of Default, or at any time thereafter, Lessor may, in its sole discretion [choose] any one or more of the following: (i) terminate this Lease; (ii) declare all sums due, or to become due hereunder for the full term of the Lease, immediately due and payable; (iii) demand that Lessee (and Lessee agrees that it will) return any or all Equipment to Lessor in the condition required by §VI of the Agreement

(*id.*, Exh. 3, Master Equipment Lease Agreement, § XIV-Remedies). The agreement also contains a New York choice-of-law clause (*id.*, Exh. 3, § XXIII-Jurisdiction; Governing Law and Service of Process).

On June 30, 1995, Rinehart entered into Master Services Agreement No. 03219052 with ADP to provide software licenses and software support services (*id.*, Exh. 3, Master Services Agreement, § 1-Scope of Agreement). The Master Services Agreement contained an 84-month term in its schedules (*id.*, Exh. 3, Master Services Agreement, Equipment Purchase Schedule,

Software License Schedule).

The Master Services Agreement provides that:

Should Client (i) fail to pay when due any sum of money due hereunder or pursuant to any of the Schedules hereof, (ii) default in the performance of any of its obligations under this Agreement or any of the Schedules hereto . . . then, in any such event, ADP, at its option, may, upon written notice thereof, (A) terminate this Agreement and/or any or all of the Schedules hereto, (B) declare all amounts due and to become due under this Agreement (including in particular Paragraph 18 [b] below) and/or any or all of the Schedules hereto immediately due and payable

(*id.*, Exh. 3, Master Services Agreement, § 18-Default by Client; Remedies Upon Default). The Master Services Agreement contains a New Jersey choice-of-law clause (*id.*, Exh. 3, Master Services Agreement, § 21-General [H]).

On February 1, 2002, ADP commenced the underlying action in the United States District Court for the Eastern District of New York, asserting six causes of action. However, only the first and second causes of action are relevant here. The first cause of action alleged that Rinehart breached the Master Equipment Lease Agreement by failing to make monthly renewal payments and by otherwise failing to perform its obligations pursuant to that agreement and its schedules. ADP sought judgment in the amount of \$45,747.74 on this cause of action, including taxes, late charges, and a purchase option. The second cause of action alleged that Rinehart breached the Master Services Agreement by failing to pay ADP for services rendered. ADP further claimed that Rinehart otherwise failed to perform its obligations under the agreement and its schedules. ADP sought judgment in the amount of \$53,767.89 on the second cause of action, including taxes and late charges. A default judgment was entered against Rinehart sometime thereafter for failure to answer the complaint.

In April 2002, Rinehart retained Zawacki by signing a retainer agreement and paying

Zawacki \$3,000. Maurizio Savoiaro, a Zawacki partner, was the primary attorney responsible for representing Rinehart (Savoiaro Aff., ¶ 1). Zawacki thereafter contacted ADP's counsel, Charles Gruen, which resulted in the default judgment being set aside on consent (Savoiaro Dep., at 19). Zawacki interposed an answer on May 17, 2002, denying the allegations of the complaint, and asserting nine affirmative defenses: (1) fraud, constructive fraud, and fraud in the inducement; (2) unconscionability; (3) impossibility; (4) that ADP failed to perform its contractual obligations; (5) that ADP failed to mitigate its damages; (6) laches; (7) breach of the covenant of good faith and fair dealing; (8) that the contracts are interrelated and must be interpreted together; and (9) unclean hands (Gates Affirm., Exh. 5).

On May 24, 2002, ADP filed initial interrogatories and a demand for production of documents. The production of documents was to be turned over to ADP by June 24, 2002. After Zawacki failed to respond to either of these discovery demands, on October 31, 2002, ADP moved for sanctions. In an order dated December 5, 2002, Magistrate Judge William D. Wall declined to order sanctions, and instead required Zawacki to respond to all outstanding discovery by December 31, 2002. The parties were also directed to participate in a telephone status conference with the court on January 10, 2003. The December 5th order warned Rinehart that “[f]ailure to comply with this order may result in the imposition of sanctions pursuant to [Federal Rules of Civil Procedure] [FRCP] Rule 37” (Gates Affirm., Exh. 9).

At the January 10th telephone conference, Zawacki admitted that it had not complied with the December 5th order. Magistrate Judge Wall permitted ADP to move for sanctions pursuant to FRCP Rule 37 during that conference. ADP later moved for sanctions, which was not opposed by Rinehart. In an order dated January 24, 2003, the court ordered sanctions in the form of

reasonable costs and fees. In addition to imposing sanctions, Magistrate Judge Wall stated that the court would give Rinehart one final extension of time to respond to the outstanding discovery obligations by February 7, 2003. The January 24th order also stated that:

The defendants are also warned that failure to comply by [February 7, 2003] will result in the imposition of a sanction pursuant to Rule 37, in the form of a recommendation that a default judgment be entered against them. They have consistently refused to meet their obligations and offered no explanation whatsoever for their failures. Under these circumstances, the sanction of default will be justified. The plaintiffs shall inform the court by letter if the defendants fail to comply with this order.

(*id.*).

After Zawacki again failed to comply with discovery, Magistrate Judge Wall issued a Report and Recommendation dated March 12, 2003 to United States District Judge Leonard D. Wexler, recommending that a default judgment be entered against Rinehart (Gates Affirm., Exh. 11). Having received no objections, Judge Wexler adopted the Report and Recommendation in a Memorandum and Order dated April 29, 2003 (Gates Affirm., Exh. 10).

Thereafter, on May 23, 2003, a default judgment was entered against Rinehart on the first cause of action in the amount of \$45,747.74, plus interest, together with taxed costs for a total amount of \$45,965.24 (Gates Affirm., Exh. 11). A default judgment was also entered on the second cause of action in the amount of \$53,767.89, with interest and taxed costs for a total amount of \$53,985.39 (*id.*).

At some point in October 2003, Mr. Rinehart received the judgments from ADP, at which point he called Savoiaro to inquire what they were. Zawacki represented to Rinehart that it would make an application to vacate the default judgments. Zawacki prepared an affidavit from an ADP account representative, Wayne Oplinger, which supported some of Rinehart's defenses

(Savoiaro Dep., at 73). However, the motion was never filed. According to Savoiaro, the motion was never filed because Rinehart had no viable legal defenses and settlement/mediation was the best option (*id.* at 76). In the meantime, ADP moved to enforce the judgment in Pennsylvania, where Rinehart does business. At that point, Rinehart retained a Pennsylvania attorney, Marc R. Wolfe, Esq., to discuss the judgment and his legal options. Wolfe contacted Zawacki to investigate the default judgment and to advise Rinehart of its rights (Wolfe Aff., ¶¶ 3-7). Wolfe recommended that Rinehart retain another Pennsylvania attorney, Barry Cohen, Esq., to attempt to stay execution of the judgments in Pennsylvania (*id.*, ¶ 8). Cohen settled the judgment for Rinehart (Cohen Aff., ¶ 5).

DISCUSSION

Rinehart argues that a prima facie case of “gross” legal malpractice is made out by Zawacki’s: (1) failure to defend the underlying action, which resulted in default judgments in excess of \$125,000; (2) failure to respond to interrogatories and discovery and inspection; (3) failure to advise Rinehart to obtain new counsel or seek to withdraw as counsel; and (4) failure to appeal or move to vacate the default judgments.

To support its position, Rinehart submits the deposition testimony of Savoiaro, who admitted that Zawacki never responded to ADP’s interrogatories or demands for discovery (Savoiaro Dep., at 41). Savoiaro stated that he never appealed or filed a motion to vacate the default judgments (*id.* at 60). Additionally, he never informed Rinehart that he could not defend the underlying action, nor did he seek to be removed as counsel (*id.* at 53, 54).

Rinehart also submits an affidavit from its president, William Rinehart, in which he states that ADP substantially breached the agreements by failing to provide adequate and proper

equipment, charging improper and excessive late fees and charges, overbilling after the contract had expired, and refusing to acknowledge the return of equipment at the end of the contract (Rinehart Aff., ¶ 3). According to Mr. Rinehart, the company was entitled to certain credits and refunds from ADP for overpayments and improper charges (*id.*, ¶ 7).

Rinehart proffers an affidavit from Wolfe, who states that, in mid-October 2003, he was advised that a default judgment had been entered against Rinehart, and that he immediately called Savoiaro to discuss steps to be taken to vacate the default judgments and prevent execution thereon (Wolfe Aff., ¶ 3). Wolfe states that Savoiaro promised to take all necessary action to prevent execution by ADP (*id.*, ¶ 4). Wolfe later wrote to Savoiaro on October 21 and 22, 2003, requesting that he move to vacate the default judgments (Gates Affirm., Exhs. 13, 14). In another affidavit, Cohen states that he was retained in or about November 2003 in order to stay execution of the default judgments (Cohen Aff., ¶ 2). Lastly, Wolfe and Cohen opine, based upon their professional experience, that Zawacki's conduct fell below the standard of professional care in such matters (Wolfe Aff., ¶ 9; Cohen Aff., ¶ 4).

In opposition and in support of its own motion, Zawacki contends that Rinehart cannot show that it would have prevailed in the underlying action. First, Rinehart was in default of both the Master Equipment Lease Agreement and Master Services Agreement for failure to make monthly payments. Mr. Rinehart admitted at his deposition that Rinehart made late payments and withheld certain payments (Rinehart Dep., at 73). And, Rinehart's failure to comply with the contracts cannot be excused for Mr. Rinehart's failure to read the contracts. Second, Rinehart's Pennsylvania attorneys, Wolfe and Cohen, had sufficient time to vacate the default judgments, since they were retained in October and November 2003, and had until May 2004 to vacate the

judgments.

Zawacki also contends that Rinehart has not established what the standard of professional care is in similar matters. The basis for plaintiff's claim of legal malpractice is not so obvious that a jury can determine liability without expert testimony. Although Wolfe and Cohen opine that Zawacki's conduct fell below the standard of care, these attorneys participated in the defense of the underlying matter and should not be permitted to submit evidence as experts.

In reply, Rinehart asserts that Zawacki did not serve proper notice of its cross motion pursuant to CPLR 2215. In addition, Rinehart contends that ADP breached the agreements by failing to give credits for defective equipment and for equipment which Rinehart returned to ADP, as evidenced by a bill of lading (Rinehart Reply Aff., ¶ 9; Gates Reply Affirm., Exh. 15). According to Mr. Rinehart, ADP changed the payment due date from the 20th of the month to the 10th of the month without Rinehart's permission, and considered all payments to be late thereafter (Rinehart Reply Aff., ¶ 9). Rinehart also submits an affidavit from a former ADP account representative, Wayne Oplinger, who states that ADP often lengthened the terms of software license/service contracts to a term that was longer than that presented to the client in the proposal (Oplinger Aff., ¶ 2).

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the motion's opponent to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Legal malpractice is an attorney's failure to exercise reasonable skill and knowledge commonly possessed by a member of the legal profession (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303-304 [2001]). An attorney may be held liable for ignorance of the rules of practice, failure to comply with conditions precedent to suit, or his neglect to prosecute or defend an action (*Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1st Dept 1990]). To succeed on a claim for legal malpractice, the plaintiff must show: (1) the negligence of the attorney; (2) that the attorney's negligence was a proximate cause of the loss sustained; and (3) that the plaintiff was damaged as a result of the attorney's actions (*Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 682 [1st Dept 2007]; *Bishop v Maurer*, 33 AD3d 497, 498 [1st Dept 2006], *affd* 9 NY3d 910 [2007]; *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 128 SCt 1696 [2008]).

In order to prove proximate causation, the plaintiff must establish a "case within a case" – that "but for" the alleged negligence, the plaintiff would have prevailed in the underlying action, or would not have sustained any "ascertainable damages" (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]). "A plaintiff's burden of proof in a legal malpractice action is a heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation" (*Lindenman v Kreitzer*, 7 AD3d 30, 34 [1st Dept 2004]). The First Department has stated that:

[o]nly after the plaintiff establishes that he would have recovered a favorable judgment in the underlying action can he proceed with proof that the attorney engaged to represent him in the underlying action was negligent in handling that

action and that the attorney's negligence was the proximate cause of the plaintiff's loss since it prevented him from being properly compensated for his loss.

(*id.*).

On a plaintiff's motion for summary judgment in a legal malpractice case, the plaintiff "will be entitled to summary judgment in a case where there is no conflict at all in the evidence, the defendant's conduct fell below any permissible standard of due care, and the plaintiff's conduct was not really involved" (*Selletti v Liotti*, 22 AD3d 739, 740 [2d Dept 2005]). On the other hand, for a defendant to succeed on a motion for summary judgment, evidence must be presented establishing that the plaintiff is unable to prove at least one of the elements of legal malpractice (*Ippolito v McCormack, Damiani, Lowe & Mellon*, 265 AD2d 303 [2d Dept 1999]).

Rinehart's Motion

The court turns to the issue of whether Rinehart would have prevailed in the underlying action.¹ The Master Equipment Lease Agreement and Master Service Agreement are governed by New York and New Jersey law, respectively. To recover for breach of contract, the plaintiff must prove: (1) the existence of an agreement, (2) performance by the plaintiff, (3) the defendant's failure to perform, and (4) resulting damages (*see Noise In The Attic Prods., Inc. v London Records*, 10 AD3d 303, 307 [1st Dept 2004], citing *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]; *Murphy v Implicito*, 392 NJ Super 245, 265, 920 A2d 678, 689 [NJ Super 2007] ["(t)o establish a breach of contract claim, a plaintiff has the burden to show that the parties entered into a valid contract, that the defendant failed to perform his obligations under the contract, and that the plaintiff sustained damages as a result"]). A party breaches if it fails to

¹As discussed *infra*, given the issues of fact as to proximate cause, the court need not determine whether Rinehart's motion should be denied for failing to submit an expert opinion.

make payment in accordance with the terms of the contract (*Republic Natl. Bank of N.Y. v Olshin Woolen Co.*, 304 AD2d 401, 402 [1st Dept 2003]; *Zulla Steel, Inc. v A & M Gregos, Inc.*, 174 NJ Super 124, 129, 415 A2d 1183, 1186 [NJ Super 1980]).

Where one party breaches a material term of an agreement, the non-breaching party is excused from continuing to perform under the agreement (*Matter of Roberts v Borg*, 35 AD3d 617, 618 [2d Dept 2006]; *Weinstock v Handler*, 254 AD2d 165, 169 [1st Dept 1998]; *Nolan by Nolan v Lee Ho*, 120 NJ 465, 472, 577 A2d 143, 146 [1990]; *Duall Bldg. Restoration, Inc. v 1143 E. Jersey Ave., Assoc., Inc.*, 279 NJ Super 346, 364, 652 A2d 1225, 1234 [NJ Super 1995]).

In the underlying complaint, ADP alleged, in the first cause of action, that Rinehart breached the Master Equipment Lease Agreement by failing to make monthly renewal payments. In the second cause of action, ADP asserted that Rinehart was in breach of the Master Services Agreement for failure to pay charges for services rendered.

As noted above, the failure to pay any installment of rent constitutes an event of default under both the Master Equipment Lease Agreement and Master Services Agreement (Gates Affirm., Exh. 3, Master Equipment Lease Agreement § XIII-Events of Default; Master Services Agreement § 18-Default by Client; Remedies Upon Default). Upon the occurrence of an event of default, ADP was entitled to declare all amounts due under the terms of the agreements (*id.*, Exh. 3, Master Equipment Lease Agreement § XIV; Master Services Agreement § 18).

In the instant case, Rinehart has failed to meet its burden on summary judgment. Mr. Rinehart asserts that ADP breached the agreements by failing to provide adequate equipment, charging improper and excessive fees, overbilling Rinehart after expiration of the contract, and refusing to acknowledge that it had returned equipment. However, this evidence does not

establish that Rinehart would have prevailed in the underlying action as a matter of law. Mr. Rinehart's vague affidavit has not conclusively demonstrated that ADP breached the agreements. No evidence has been offered when these events occurred.

In any event, Zawacki has raised an issue of fact as to whether Rinehart was in breach of the Master Equipment Lease Agreement and Master Services Agreement. According to Mr. Rinehart's deposition testimony, Rinehart withheld certain payments pursuant to the contracts because ADP had provided defective equipment (Rinehart Dep., at 73, 74). The failure to pay an installment of rent constitutes an event of default under these agreements.

Furthermore, the court is not persuaded that Rinehart's Pennsylvania attorneys, Wolfe and Cohen, had sufficient opportunity to protect Rinehart's rights as a matter of law. Where successor counsel, retained for the same purposes, has sufficient time and opportunity to protect the client's rights, the initial attorney cannot be liable for legal malpractice (*Somma v Dansker & Aspromonte Assoc.*, 44 AD3d 376, 377 [1st Dept 2007]; *Golden v Cascione, Chechanover & Purcigliotti*, 286 AD2d 281, 281-282 [1st Dept 2001]). This is because any alleged negligence of the outgoing attorney could not have been the proximate cause of the injury (*Kozmol v Law Firm of Allen L. Rothenberg*, 241 AD2d 484, 485-486 [2d Dept 1997]). For instance, in *Golden (supra)*, the Court held that outgoing counsel's alleged negligence was not the proximate cause of any injury. The plaintiff's personal injury claim remained viable for two and a half years after outgoing counsel was substituted (*Golden*, 286 AD2d at 281). In *Katz v Herzfeld & Rubin, P.C.* (48 AD3d 640 [2d Dept 2008]), the plaintiffs discharged counsel and hired new counsel five months before settling the action. The plaintiffs subsequently sued their original counsel for legal malpractice. As in *Golden*, the Court held that outgoing counsel did not proximately cause

plaintiffs' injury, since "subsequent counsel had a sufficient opportunity to protect the plaintiffs' rights by pursuing any remedies it deemed appropriate on their behalf" (*id.* at 641).

Here, there are issues of fact as to whether Cohen was retained to vacate the default judgments. According to Wolfe and Cohen, after they were retained by Rinehart, Zawacki was still expected to move to vacate the default judgments in federal court in New York (Wolfe Aff., ¶ 4; Cohen Aff., ¶ 2; *see also* Rinehart Reply Aff., ¶¶ 13-17). Nonetheless, Mr. Rinehart testified that Cohen "attempted to get the case reopened, probably in both stages. I mean, he [Cohen] was the mover" (Rinehart Dep., at 90). Thus, the issue of proximate cause is for the jury (*see Marshal v Hochberg*, 37 AD3d 559, 560 [2d Dept 2007] [issue of fact as to whether subsequent counsel's duties broadly encompassed the services for which defendants were retained]).

Accordingly, Rinehart's motion must be denied.

Zawacki's Cross Motion

Initially, the court rejects Rinehart's contention that Zawacki's cross motion was improperly made. After a motion has been made, CPLR 2215 permits a party to cross-move for relief at least three days prior to the time at which the motion is noticed to be heard (*see also* Siegel, NY Prac § 249 [4th ed 2005]). Zawacki's cross motion was made within the time required by CPLR 2215. Therefore, the court shall consider Zawacki's cross motion for summary judgment.

There are issues of fact as to whether Rinehart would have been successful in the underlying action. While Mr. Rinehart testified at his deposition that Rinehart withheld certain payments pursuant to the agreement, Rinehart also states that ADP breached the agreements by

providing defective equipment, failing to provide certain credits, and by failing to credit returned equipment. No evidence has been presented to conclusively establish either ADP or Rinehart's breach under the Master Equipment Lease Agreement or Master Services Agreement. In addition, there are factual issues as to the amount of credits that Rinehart was entitled to under the agreements (*see Coyne Elec. Contrs. v Kalikow Constr. Corp.*, 134 AD2d 399, 401 [2d Dept 1987]).

And, there are further issues of fact as to whether Rinehart's Pennsylvania attorneys were retained to vacate the default judgements. Mr. Rinehart testified as follows:

They [Cohen's firm] handled the judgment, the resolution of the judgment. Mr. Cohen also negotiated with ADP seeking relief of the judgment, tried to mitigate the value of the judgment, *and attempted to get the case reopened, probably in both stages*. I mean, he was the mover, understanding that Mr. Savoiaro had to do the technicals in New York.

(Rinehart Dep., at 90 [emphasis supplied]). But Wolfe and Cohen all claim that it was understood that Zawacki would move to vacate the default judgments (Wolfe Aff., ¶ 4; Cohen Aff., ¶ 2; *see also* Rinehart Reply Aff., ¶¶ 13-17).

Further, Zawacki's assertions that Rinehart did not provide documents raise issues of fact as to Rinehart's contributory negligence (*see Arnav Indus. Inc. Retirement Trust*, 96 NY2d at 305 n 2; *Barnett v Schwartz*, 47 AD3d 197, 205 [2d Dept 2007]).

As a result, Zawacki's cross motion is also denied.

CONCLUSION

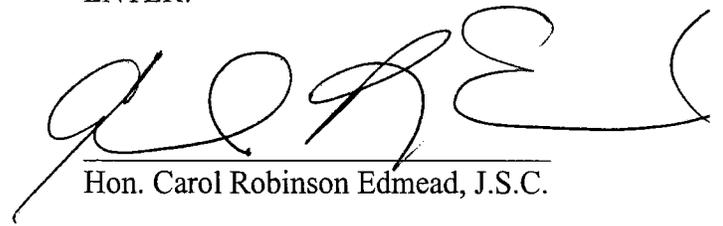
Based upon the foregoing, it is hereby

ORDERED that the motion by plaintiff E.M. Rinehart, Inc. a/k/a Rinehart for summary judgment on liability is denied; and it is further

ORDERED that the cross motion by defendant Zawacki, Everett, Gray & McLaughlin for summary judgment dismissing the complaint is denied.

Dated: 9/9/08

ENTER:



Hon. Carol Robinson Edmead, J.S.C.

CAROL EDMEAD
J.S.C.

FILED
SEP 12 2008
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