

Roth Law Firm, PLLC v Sands
2010 NY Slip Op 32633(U)
September 16, 2010
Supreme Court, New York County
Docket Number: 602323/07
Judge: Joan A. Madden
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon John A. M. Jcw
Justice

PART 11

Index Number : 602323/2007
ROTH LAW FIRM, PLLC
VS.
SANDS, STEVEN BRETT
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 12/10/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order

FILED
SEP. 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: September 16, 2010

[Signature]
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: PART 11

-----X
THE ROTH LAW FIRM, PLLC,

Plaintiff,

-against-

Index No. 602323/07

STEVEN BRETT SANDS and MARTIN SCOTT
SANDS,

Defendants.

-----X
MADDEN, J.:

FILED
SEP 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

This action seeks payment for legal services allegedly rendered by plaintiff The Roth Law Firm, PLLC (plaintiff, or the Roth Firm) to defendants Steven Brett Sands and Martin Scott Sands (together, defendants, or the Sands). Plaintiff moves for an order granting it summary judgment on its causes of action for breach of contract, quantum meruit, services rendered, unjust enrichment and an account stated (motion seq. no. 004). Defendants oppose the motion and separately move for an order granting them summary judgment dismissing the amended complaint (motion seq. no 005)¹. Plaintiff opposes the defendants' motion and cross-moves for an order disqualifying the law firm of Gusrae, Kaplan, Bruno & Nusbaum, PLLC (the Gusrae Firm), as counsel for defendants, and for an order allowing it to serve and file a second amended complaint to add Harbor Consultants, Ltd. f/k/a Sands Brothers & Co. ("Harbor") as a nominal defendant.

BACKGROUND

During the relevant period, Sands Brothers was a broker-dealer registered with the National Association of Securities Dealers (the NASD), the New York Stock Exchange, Inc. (the NYSE), and the Securities and Exchange Commission (the SEC) (Amended Complaint, ¶ 13).

¹Motion seq. nos. 004 and 005 have been consolidated for disposition.

At various times, Sands Brothers had between 100 to more than 300 brokers (Roth Dep., at 76).

As a registered firm, Sands Brothers was required to file annual audited financial statements with the NASD and the SEC (*id.* at 92). Sands Brothers also filed monthly FOCUS Reports (on SEC forms), including detailed financial information, audited annually (*see* Aff. of Oseas Zuluaga, former staff accountant for Sands Brothers, ¶¶ 2-3). Sands Brothers also had its own general counsel (Roth Dep., at 91). The Roth Firm was Sands Brothers' outside counsel (*id.*).

The Sands were registered representatives of the Financial Industry Regulatory Authority Dispute Resolution, Inc. (FINRA), formerly the NASD, and were co-chairmen of Sands Brothers (Amended Complaint, ¶ 13). In late 2004, when Sands Brothers withdrew its registration, defendants ceased being principals there, and having any active participation in its affairs (*see* Affs. of Steven and Martin Sands). According to defendants, this withdrawal was precipitated by an arbitration award (the Hoge Award) for over \$3 million in a case where it was represented by the Roth Firm (*see* Aff. of Brian D. Graifman, Esq., Exh 38). Sands Brothers then changed its name to Harbor Consultants, Ltd. (Harbor), and began winding down its affairs (Aff. of Roger Bendelac, ¶¶ 1-2). Harbor currently has no assets, and is basically a corporate shell (*id.*).

From 1993 through March 2003, Sands Brothers utilized Littman Krooks & Roth, P.C. (Littman Krooks) to handle its arbitrations and litigations (Amended Complaint, ¶ 17). During that period, Richard A. Roth (Roth) ran the litigation department at Littman Krooks (*id.*).

In March 2003, Roth left Littman Krooks and started the Roth Firm (*id.*). All of the relevant litigation matters from Littman Krooks, including those underlying this case, were

transferred to the Roth Firm (*id.*), as well as the receivables for those matters, which were assigned to the Roth Firm (Roth Dep., at 115-116).

Roth testified that normally a retainer agreement is created for the client to sign (Roth Dep., at 467), but that the Roth Firm had no retainer agreement with either defendant, with Sands Brothers, or with any person or entity mentioned in the Amended Complaint (*id.* at 47, 506, 519).

When Roth started the Roth Firm, he agreed with Steven Sands to accept a \$35,000 monthly retainer, later reduced to \$25,000 per month (*id.* at 134,135, 137, 835-837); (Steven Sands Dep., at 87).² The monthly retainer was generally paid with smaller payments that would add up to the retainer amount (Amended Complaint, ¶ 20; Roth Dep., at 820, 823-824, 835). Roth also testified that the monthly retainer was a minimum to be applied against the hourly fees (Roth Dep., at 835-836).

Roth maintains that he represented Sands Brothers and affiliates in approximately 150 matters (*id.* at 85). This suit involves 18 underlying matters (*see* Amended Complaint, ¶¶ 9, 25; *see* Exh 1). Sands Brothers is named in each of them as defendant or respondent. The Sands are named in some of them (*id.*, ¶ 25). Defendants maintain that they were “gratuitously named” in the matters based on their positions at the brokerage firm (Steven Sands Aff., ¶ 5; Martin Sands Aff., ¶ 3). Steven Sands testified that he was “a main defendant” in the arbitrations, but subsequently denied that plaintiff represented him personally (Steven Sands Dep., at 46, 87). In

²Defendants’ argument that the excerpts from the deposition transcript of Steven Sands cannot be considered as they were not submitted for review by Steven Sands or his counsel as required by CPLR 3116(a) is without merit insofar as an unsigned transcript of a party can be used by the opposing party as an admission in support of a motion for summary judgment (*see. Morkchik v. Trinity School*, 257 AD2d 534 (1st Dept 1999)).

contrast, Roth contends that he represented defendants personally and that defendant were subject to personal liability and attaches Statement of Claims in some of the matters for which he seeks attorneys fees and points to allegations of fraud and other wrongdoing by the defendants (Roth Affidavit, ¶ 7, Exhibits B through E). Plaintiff also submits an arbitration award in which defendants were held jointly and severally liable for \$1.2 million (*Id.*, Exhibit F).

The record indicates that during the period of representation, plaintiff prepared and forwarded monthly invoices broken down by each representation (Amended Complaint, ¶ 5; *see* Graifman Aff., Exhs 11-28). The Littman Krooks balances for litigation matters carried over to the Roth Firm's invoices (Roth Dep., at 412-413, 678, 685-686, 801). Roth discussed the bills with Steven Sands on an regular basis and spoke to Martin Sands about the bills (*id.*, at 105-109; Sands dep., at 86, 87). Roth testified that defendants agreed to be personally liable for the outstanding legal fees identified in the complaint (*id.*, at 105-110, 123; Roth Aff. ¶ 14).

Roth testified that when he represented multiple parties in the same matter, he could not differentiate from the invoices the work that he did for one party versus the other (Roth Dep., at 843-844.). However, he also maintained that the defendants agreed and understood that they were jointly and severally liable for Roth's legal bills (Roth Aff. ¶ 13). Alan Goddard, a former broker employed by Sands Brothers who was named as a respondent in an arbitration, had the same understanding as Roth regarding the arrangement for paying the Roth firm's legal bills (Goddard Aff. ¶ 2 [stating that Steven Sands explained to him that "anyone and everyone who was named as a respondent, whether they are a broker, research analyst, supervisor or even the President, was jointly and severally liable for all legal fees"]). However, Steven Sands and Martin Sands both state that they never agreed to be personally liable for she legal fees sought in

this action (Steven Sands Aff. ¶ 6, Martin Sands Aff. ¶ 4).

Roth maintains that the invoices were delivered to Steven Sands and that he never objected to the amounts (Roth Aff. ¶ 15). Mafupu Pokane, who worked for plaintiff during the relevant periods and whose primary responsibility involved creating and forwarding monthly invoices to clients, states that she personally gave Steven Sands bills on a monthly basis, and that she heard discussions with Roth and Steven Sands regarding payment of the bills, and that Steven Sands did not object to the amount of the bills or the time entries but simply did not want to pay. (Pokane Aff. ¶'s 10, 12). Steven Sands denies receiving the invoices (Steven Sands Dep., at 84-85).

During the period of representation up until March 2006, the invoices for legal services were addressed to Sands Brothers, and then sometimes changed to be directed to others, but not to the Sands individually (*see Graifman Aff.*, Exhs 11-28). According to Roth and Pokane, the invoices were addressed to a person or entity based on Steven Sands' instruction (Roth Aff., ¶ 21, 22; Pokane Aff. ¶ 9). Roth states that Steven Sands told him that it did not matter who the invoice was addressed to since "if he could not get a broker to foot the bill...[he] was paying them from his own monies from his other entities and/or from monies from one of his broker/dealers" (Roth Aff., ¶ 22).

In March 2006, which was two months after plaintiff sent a letter dated January 20, 2006, formally withdrawing as counsel for defendants, plaintiff began to address the invoices to defendants (*see Amended Complaint*, ¶ 32). Roth maintains, however, that as of March 2006, the Roth firm had still not "fully withdrawn" as counsel for defendants (Roth Aff., ¶ 23).

With one exception noted below, the checks for payment of the invoices were not

received from the individual defendants, but rather from Sands Brothers or from several entities related to defendants. (*see* Exh 4 to the Amended Complaint [sample copies of checks payable to “The Roth Law Firm”]; Pokane Aff, ¶ 5). According to Pokane, at the end of the month she would total the amounts of the checks and then receive instructions from Roth on how “to apply those payments to the many matters in which the firm represented Sand Brothers and/or Martin and Steven Sands” (Pokane Aff., ¶ 5). Roth maintains that the checks from the other entities were used to pay the defendants’ personal obligations (Roth Aff., ¶ 14). According to Roth when he asked Steven Sands about using funds from entities unrelated to the ongoing litigations to pay legal fees, Mr. Sands informed him that “[I]t’s my money’ or ‘The funds are coming out of my management fee” (*id.*).

At his deposition, Steven Sands testified that the entities paid plaintiff legal fees as plaintiff was performing work for them (Steven Sands Dep., at 71). In his reply affidavit, Steven Sands states that the payment from these entities was in the nature of a retainer so that plaintiff could represent them in the event they were named as respondents in an arbitration (Steven Sands, Reply Aff., ¶ 4).

Plaintiff submits a copy of one personal check from Steven Sands dated January 25, 2005, which is made payable to “Rich Roth,” not the “The Roth Law Firm” and asserts that this represents payment to “the Roth Firm” (Amended Complaint, Exhibit 3). Steven Sands asserts that the \$2,500 was a personal loan to Richard Roth, and did not represent payment to the Roth Firm (Steven Sands Aff., ¶ 7; Steven Sands dep. 24, 25)). Roth denies this assertion and states that the money was for legal services rendered by the Roth Firm and was deposited into the firm’s operating account (Roth Aff., ¶ 17).

On January 9, 2006, Roth sent defendants a memorandum entitled "Outstanding Indebtedness," which stated that "as you are aware, there are numerous matters in which we represented you both personally but for which we were not fully paid," and listed by matter the amounts defendants owed to plaintiff, describing the matters, and indicating that defendants owed plaintiff approximately \$1.495 million in overdue legal fees (*id.*, ¶ 30; *see* Exh 6). Defendants did not object to the memorandum or call Roth (*id.*, ¶ 31). By letter dated January 20, 2006, the Roth Firm formally withdraw from representation in all Sands-related matters (*id.*, ¶ 32).

In addition to claims based on the defendants' refusal to pay plaintiff's legal fees, plaintiff has asserted a cause of action for tortious interference with contract. This cause of action alleges that defendants have interfered with plaintiffs' agreement to collect \$100,000 in legal fees from Daniel Klibanoff (Klibanoff), their former adversary, in connection with plaintiff's successful representation of Sands Brothers and two of its brokers in an arbitration proceeding brought by Klibanoff. The details of this claim are discussed more fully below in connection with the court's discussion of defendants' motion to dismiss this claim.

Plaintiff filed this action on July 16, 2007. Defendants moved to dismiss. By decision and order dated April 11, 2008, this court granted the motion to dismiss in part. Specifically, this court dismissed plaintiff's fraud-based claims (sixth, seventh, eighth and ninth causes of action) and the intentional tort claim (eleventh cause of action). The court also dismissed plaintiff's requests for punitive damages and for attorney's fees incurred. The Amended Complaint asserts the following remaining causes of action: breach of contract (first cause of action); services rendered (second cause of action), account stated (third cause of

action), quantum meruit (fourth cause of action), tortious interference with contract against Steven Sands (fifth cause of action), unjust enrichment (eighth cause of action), and piercing the corporate veil (tenth cause of action).

The Amended Complaint seeks an amount exceeding \$1,500,000, except for the fifth cause of action for tortious interference with contract, which seeks an amount exceeding \$250,000.

DISCUSSION

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." (*Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 852 [1985]). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Breach of Contract

Plaintiff argues that it is entitled to summary judgment on the breach of contract claim, as the undisputed evidence establishes that it rendered services on a monthly basis, and that bills were generated and hand-delivered and mailed to Steven Sands on a monthly basis. Moreover, plaintiff asserts that defendants have produced no evidence that the bills were unreasonable, or that they did not know of or understand the bills.

In opposition, defendants argue, *inter alia*, that as there was no written retainer agreement, the breach of contract claim must be dismissed in accordance with 22 NYCRR

1215.1, otherwise known as the “letter of engagement rule,” which requires attorneys to provide all clients with a written letter of engagement explaining the scope of legal services, the fees to be charged, billing practices to be followed, and the right to arbitrate a dispute under Part 137 of the Rules of the Chief Administrator (*see* 22 NYCRR 1215.1 [b]) .

It is not disputed that there is no written engagement letter, retainer agreement or other document between plaintiff and defendants as required under 22 NYCRR 12.15.1. The Roth Firm argues that the exception to the engagement letter rule found under 22 NYCRR § 1215.2 (b) applies since its “services are of the same general kind rendered and paid for by the client.” However, the record is insufficient to establish that this exception applies. First, even if the record arguably shows that Roth performed the same general kind of work at Littman Krooks for defendants, there is no evidence in the record that defendants personally paid for these services. Moreover, Roth testified that there was no written retainer agreement between Littman Krooks and the defendants or Sands Brothers (*compare Silver Huntington Enterprises, LLC v. Davidoff & Malito, LLP*, 15 Misc3d 266, 266-267 [Sup Ct NY Co. 2006])[holding that defendant law firm made a prima facie showing that services it rendered to its client were the same kind as previously rendered and paid for by the client, particularly as there was a written retainer agreement for its earlier representation of the client]).

In addition, the prior services were performed by Littman Krooks, and not the Roth Firm, and, while Roth is employed at both firms, he is not the plaintiff in this action (*see Constantine Cannon LLP v. Parnes*, 7/29/10, NYLJ 42, col. 1 [allegations that attorney rendered the same services to client were insufficient to provide an exception to the engagement letter rule, since attorney was associated with a different law firm when he rendered the services and

was not a party to the action]).

Accordingly, in the absence of a written retainer agreement or other writing complying with the requirements of 22 NYCRR 1215.1, the breach of contract claim must be dismissed (*see Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54 [2d Dept 2007] [affirming lower court's determination that law firm's failure to obtain a written retainer agreement barred its claim for breach of contract, and granting summary judgment dismissing that cause of action]; *see also Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487 [1st Dept 2009] [dismissing claims for attorney's fees against individual defendant, as opposed to corporate defendant where, among other things, defendant did not sign or receive retainer agreement]).

Plaintiff's Quasi-Contract Claims (Services Rendered, Quantum Meruit, Unjust Enrichment)

Plaintiff's failure to comply with the letter engagement rule does not preclude it from seeking to recover legal fees for the services rendered on behalf of defendants in quantum meruit, or on the basis of other similar quasi-contractual theories such as its claims for services rendered and unjust enrichment (*see Miller v Nadler*, 60 AD3d 499 [1st Dept 2009]; *Seth Rubenstein, P.C. v. Ganea*, 41 AD3d 54).

To prevail on a claim for quantum meruit claim, a "plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (*Fulbright & Jaworski, LLP v Carucci*, 63 AD3d at 489. Moreover, when as here, there is no retainer agreement "the attorney may recover only in quantum meruit to the extent that the fair and reasonable value of legal services can be established'" (*id.*, at 60; *see also Barry*

Mallin & Assocs. P.C. v Nash Metalware Co., Inc., 18 Misc 3d 890, 896 [Civil Ct, NY County 2008] [rejecting quantum meruit claim where attorney had no signed engagement letter and billing entries were “too imprecise” in light of attorneys’ burden and responsibility “to avoid the court having to speculate or surmise this information (citation omitted)”].

Plaintiff asserts that “[d]efendants agreed to pay to the Roth Law Firm its hourly rate and to reimburse the [the Roth firm] for any out-of-pocket disbursements incurred on behalf of Defendants,” and that “[d]efendants were aware that [the Roth firm] performed said legal services rigorously and incurred out-of-pocket expenses with the expectation of payment by Defendants pursuant to the relationship of the parties” (Pl Mem., at 13-14). Specifically, the affidavits of Roth and Mr. Goddard state that the defendants agreed and understood to be jointly and severally liable for the Roth firm’s legal bills. Moreover, the Sands were named individually in some of the matters at issue in this action and in at least one matter, the Sands were found to be jointly and severally liable. Thus, while there is evidence to support plaintiff’s position, defendants have controverted this evidence as they have denied that they agreed to be personally liable for the legal fees. Moreover, while the invoices provide detailed billing entries, the majority of them are not addressed to the defendants but rather to the Sands Brothers and other entities. In addition, with one exception discussed below, the checks used to pay for the legal services were not paid by defendants but were from the accounts of Sands Brothers, and various entities allegedly controlled by the defendants. Accordingly, the documentary evidence is insufficient to establish defendants’ personal liability for legal bills.

That being said, however, defendants have not demonstrated that they are entitled to summary judgment dismissing the claim for quantum meruit. In support of their motion for

summary judgment defendants argue that they are entitled to summary judgment as the Roth Law Firm has not established the reasonable value of its services, citing *Fulbright & Jaworski, LLP v Carucci* (63 AD3d 487, *supra*). In *Fulbright & Jaworski, LLP v Carucci*, the First Department dismissed claims for attorney's fees against an individual defendant, as opposed to a corporate defendant, for failure to state a claim. The law firm had addressed the invoices to the individual defendant in care of the corporate defendant at the corporate office, and did not differentiate amounts allegedly owed by the individual as opposed to the corporation. (*id.* at 488-489). The First Department dismissed the quantum meruit claim on the grounds that "there are simply no allegations supporting the last three elements as the claim relates to [the individual defendant]" and that plaintiff failed to "allege facts from which any of these elements reasonably can be inferred" (*id.* at 489). Specifically, the Court found that "[w]ith respect to the latter element [reasonable value of the services] ... plaintiff did not differentiate the amounts allegedly owed by [the individual defendant] for the services plaintiff claims it performed for him, on the one hand, and the amounts owed by [the corporation] for the services plaintiff performed for it" (*id.*).

In this case, while Roth testified that in its invoices, the Roth Firm did not differentiate amounts owed by defendants from those owed by Sands Brothers, as discussed above, there is also evidence that defendants agreed to be held jointly and severally liable for legal fees incurred for the matters in which the Roth Firm represented defendants and their companies. This evidence, if accepted, could result in defendants being held liable for the entire amount regardless of whether they amounts were owed by them personally or their company.³ Moreover, although

³Defendants' alternative argument that the claim is in the nature of a guarantee and thus barred by the statute of frauds, is unavailing since there is evidence, as discussed above, that defendants agreed to be directly liable for the legal fees incurred by Sands Brothers.

during the period of representation at issue, the invoices were addressed to Sands Brothers, and later, to other individuals and/or entities, plaintiff submits evidence that the invoices were addressed this way at the specific request of Steven Sands. Under these circumstances, it cannot be said as a matter of law that the claim for quantum meruit claim must be dismissed.

Likewise, there are issues of fact precluding summary judgment dismissing the unjust enrichment claim. To prevail on a claim of unjust enrichment, the plaintiff must establish that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against good conscience and equity to permit the other party to keep what is sought to be recovered (*Cruz v McAneney*, 31 AD3d 54, 59 [2d Dept 2006]). “[T]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered” (*Mandarin Trading Ltd. v. Wildenstein*, 65 AD3d 440, 453 [1st Dept 2009], quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421, *rearg denied* 31 NY2d 709 [1972], *cert denied* 414 US 829 [1973]).

Here, the record contains sufficient evidence that the Roth Firm performed legal services for defendants personally at their request and for their benefit such that to permit defendants to retain the benefit of such legal services without payment would be against good conscience and equity (*compare, Heller v. Kurz*, 228 AD2d 263 [1st Dept 1996])[affirming trial court's dismissal of unjust enrichment claim as against individual defendant when complaint alleged that the services were performed for the corporate defendant and at the corporate defendant's request even though the individual defendants benefitted from those services]).

3. *Account Stated*

Plaintiff contends that an account stated exists in this case because “bills were forwarded

each and every month for each and every matter upon which this action is based,” and “[n]ot once did either Steven Sands or Martin Sands object” (Pl Mem., at 10).

““An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other”” (*Shea & Gould v Burr*, 194 AD2d 369, 370 [1st Dept 1993] [citation omitted]). Under this cause of action, the receipt and retention of an account, without objection, within a reasonable period of time, or an agreement to make partial payment, gives rise to an account stated (*Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2001]; *Blegen v Paul K. Rooney, P.C.*, 269 AD2d 264 [1st Dept], *lv denied* 95 NY2d 761 [2000]).

Plaintiff argues that the record is sufficient to establish an account stated as it has submitted evidence that the invoices were received by Steven Sands, that he admits he discussed the bills with Roth regularly, he did not object to the bills and signed checks from his own companies to pay the bills, satisfying the partial payment requirement. Moreover, plaintiff asserts that Steven Sands’ bald denial of receipt is insufficient to raise an issue of fact.

Defendants oppose the motion, arguing that, at the very least, there are triable issues of fact as to the identity of the debtor as the invoices are not addressed to defendants. Defendants also urge that summary judgment dismissing this claim is warranted as an account stated “cannot be used to create liability where none otherwise exists” (*M. Paladino, Inc. v J. Lucchese & Son Contr. Corp.*, 247 AD2d 515, 516 [2d Dept 1998]), and “may not be utilized simply as another means to attempt to collect under a disputed contract” (*Martin H. Bauman Assocs., Inc. v H & M Intl. Transport, Inc.*, 171 AD2d 479, 485 [1st Dept 1991]).

Here, the record raises triable issues of fact regarding whether the legal fees were owed by either Sands Brothers or defendants individually thus precluding a grant of summary judgment in favor of either party. Notably, defendants deny they agreed to be personally liable for the legal bills. In addition, none of the documentary evidence --which includes invoices addressed to Sands Brothers and/or various entities apparently controlled by defendants and later to defendants individually and checks indicating that the invoices were paid by Sands Brothers, the various entities apparently controlled by defendants' and perhaps once by Steven Sands--establishes that the defendants personally agreed to pay the debt. Under these circumstances, summary judgment is properly denied on the account stated claim (*see Butowsky v. RWG Support Services, Inc.*, 1997 WL 72149 [SD NY 1997][denying summary judgment on account stated claim as against individual defendant when documentary and other evidence was insufficient to establish whether the legal fees sought were owed by the individual or corporate defendant]; *compare, Marchi Jaffe Cohen Crystal Rosner & Katz v. All-Star Video Corp.*, 107 AD2d 597 (1st Dept 1985)[granting summary judgment on account stated claim where documentary evidence showed that one of the individual defendants expressly acknowledged receipt of legal bills on behalf of the company, and behalf of herself, and the other individual defendant and acknowledged the individual defendants' liability]; *Brown Rudnick Berlack Israels LLP v Zelmanovitch*, 11 Misc 3d 1090[A], *5 [Sup Ct Kings Co. 2006][granting summary judgment dismissing account stated claim where there was no evidence that individual defendant, who was chairman of a company, agreed to be held liable for legal bills and had not made any personal payment of the bills])

4. *Piercing the Corporate Veil/Alter Ego Claim*

The amended complaint asserts a cause of action to pierce the corporate veil (Amended Complaint, ¶¶ 121-127), alleging upon “information and belief” that the defendants exercised dominion and control over Sands Brothers and related entities (*id.*, ¶ 122), such that the defendants should be held responsible and liable for the debts of Sands Brothers (*id.*, ¶ 125).

A party seeking to pierce the corporate veil must establish that “(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury” (*Matter of Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 [1993]).

Thus, even in the presence of domination and control, the corporate form cannot be disregarded without a showing of fraud or that the misuse of corporate form led to avoidance of obligations:

Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance ... [P]laintiffs have failed to show that, even if MKI dominated Bathnotice, that control resulted in some fraud or wrong mandating disregard of the corporate form ... An inference of abuse does not arise from this record where a corporation was formed for legal purposes or is engaged in legitimate business. There is no showing that through its domination MKI misused the corporate form for its personal ends so as to commit a fraud or wrongdoing or avoid any of its obligations.

* * *

Under these circumstances, it cannot be said that MKI has perverted “the privilege [of doing] business in a corporate form”

(*TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339-340 [1998][citation omitted]).

Indeed, "courts should permit veil-piercing only under 'extraordinary circumstances'" (*EED Holdings v Palmer Johnson Acquisition Corp.*, 228 FRD 508, 512 [SD NY 2005] [citations omitted]; *accord Bravado Intl. Group Merchandising Servs., Inc. v Ninna, Inc.*, 655 F Supp 2d 177 [ED NY 2009]).

Here, there is no contention that there was anything improper in Sands Brothers operating in its corporate form as a broker-dealer. Nor is there any suggestion that such business form was intended to and was "used to commit a fraud or wrong against the plaintiff" (*Matter of Morris v New York State Dept. of Taxation and Finance*, 82 NY2d at 141). Moreover, plaintiff fails to present any evidence, even after the opportunity for full discovery, that there was any commingling of funds between the Sands and Sands Brothers, or that the corporate form here was used to commit a fraud or wrong against the Roth Firm.

In opposition to defendants' motion for summary judgment, plaintiff asserts that the wrong committed by defendants involved the exercise of domination and control over Sands Brothers to deprive creditors of moneys by transferring corporate assets to a new entity, and commingled their personal assets with corporate funds. Specifically, plaintiff asserts that "Steven and Martin Sands engaged in a fraudulent scheme to defraud Sands Brothers' creditors (including the plaintiff by transferring its assets to another of its wholly-controlled entities, Sands Brothers International (now known as [Laidlaw])" (Pl Opp Mem., at 20; *see also* Roth Aff., ¶¶ 35-37). Plaintiff's opposition refers to the filing by Sands Brothers of its Broker Dealer Withdrawal form (Form BDW), when it withdrew as a broker-dealer in October 2004, and the Sands ceased being principals of the firm (Steven Sands Aff., ¶10; Martin Sands Aff., ¶ 6). At that point, Roger Bendelac became the sole director of Sands Brothers, in charge of winding

down its affairs (Bendelac Aff., ¶¶ 1- 2).

In support of this claim, plaintiff relies on a complaint by the NASD Department of Enforcement against Sands Brothers and Steven Sands (*see* Roth Aff., Exh N), as well as the Order Accepting Offer of Settlement (*see id.*, Exh O). Plaintiff contends that these documents are evidence of the fact that defendants “had and continue to have domination and control over Sands Brothers” and “that such domination and control was used to wrongfully and fraudulently leave Sands Brothers without assets upon which it could pay its creditors, including monies owed to the Plaintiff” (Pl Opp Mem., at 21).⁴

Furthermore, it should be noted that the NASD complaint did not concern the issue of fraud, but rather, whether a Rule 1017 notice seeking approval for transfer of customer accounts, was, or was not, required to be filed with the regulators (*see* NASD Complaint, ¶¶ 21-22; *see* Bonaventura Aff., ¶ 9). As the titles of the claims there state (NASD Membership and Registration Rule 1017 Violation, Registration Violation, Failure to Amend Form U-4), they

⁴However, as set forth in the affidavit of Robert J. Bonaventura, the president and chief executive officer of Sands Brothers International, once Sands Brothers filed its Form BDW withdrawing as a broker-dealer, its licensed Registered Representatives could no longer service their client's accounts (Bonaventura Aff., ¶ 4). Such accounts therefore had no value to Sands Brothers (*id.*, ¶ 5). Bonaventura asserts that the introduction of the accounts from Sands Brothers to Sands Brothers International also known as Laidlaw was “the appropriate thing to do under the circumstances,” and that Sands Brothers was able to create value for itself by having Laidlaw agree to pay to Sands Brothers compensation in the form of ticket charges for transactions arising out of the accounts transferred (*id.*, ¶ 7). In such form, value was created to Sands Brothers on assets that otherwise had no value to it (*id.*, ¶¶ 5, 8). Arguably consistent with Bonaventura's affidavit is Roth's statement before Justice Moskowitz in connection with the Klibanoff matter, that Sands Brothers and Laidlaw were “totally separate” entities (Griman Reply Aff., Exh F, at 89). At that time, Roth was seeking to collect on the Klibanoff settlement agreement that was signed by him for Sands Brothers and others, but not signed by Laidlaw and others. Roth argued that the contract was severable, and that Laidlaw was “totally separate” from Sands Brothers (*id.*).

were for technical rule violations. Thus, rather than allegations of fraud, the NASD action concerned the issue of whether the proper regulatory procedure had been followed in completing the transaction.

Plaintiff also contends that defendants commingled personal and corporate funds when they “partially paid said invoices out of their own management fees from other of their managed entities” (Pl Opp Mem., at 18). While there is evidence that other entities did pay plaintiff on behalf of the Sands Brothers, the payments to the Roth Firm by other entities is not sufficient alone to support an alter-ego argument between the Sands and Sands Brothers (*see Sysco Food Service of Metro NY v Jekyll & Hyde Inc.*, ___ F Supp 2d ___, 2009 WL 4042758, * 3, n1 [SD NY 2009] [dismissing alter-ego claim based on allegation that defendants intermingled their assets and liabilities, without allegation which corporation took funds from which, noting that evidence of two defendant entities paying invoices that were sent to others was not part of complaint, and even if they were, “it would not ‘add sufficient clarity to allege alter ego liability (citation omitted)’”]).

Under these circumstances, the piercing the corporate veil/alter ego claim must be dismissed as there is no evidence in the record that defendants used their domination and control over Sands Brothers to commit a wrong that would support such a claim (*see Do Gooder Productions, Inc. v American Jewish Theatre, Inc.*, 66 AD3d 527, 528 [1st Dept 2009] [evidence was insufficient to warrant piercing defendant’s corporate veil for the purpose of holding individual defendant personally liable, absent evidence demonstrating the individual defendant’s “wrongdoing in utilizing corporate funds for his personal use or in commingling funds”]; *see also Smith v Delta Intl. Mach. Corp.*, 69 AD3d 840 [2d Dept 2010]).

As the cause of action to pierce the corporate veil is being dismissed, plaintiff's cross motion to amend the complaint to add Harbor as a nominal defendant in connection with such cause of action is denied as moot (*see Rite Aid of New York, Inc. v R.A. Real Estate, Inc.*, 40 AD3d 474 [1st Dept 2007] [where motion to dismiss third-party complaint was granted, motion to amend third-party complaint denied as moot]).

5. *Tortious Interference*

As previously stated, the claim for tortious interference arises out of plaintiff's efforts to obtain \$100,000 in legal fees from Daniel Klibanoff in connection with plaintiff's representation of Sands Brothers and two of its brokers. The claim is asserted only against Steven Sands, and is based on his refusal to execute the Legal Fees Agreement (*see Amended Complaint*, ¶ 67).

The first Klibanoff arbitration (Klibanoff I) was filed against Michael Lichtenstein, Alan Goddard, two brokers at Sands Brothers, and Sands Brothers (*id.*, ¶ 42). The Roth Firm represented the respondents in Klibanoff I (*id.*).

The second arbitration (Klibanoff II) was filed against Steven Sands, Martin Sands and Sands Brothers International, now known as Laidlaw & Co. (UK) Ltd. (Laidlaw), after denial of the motion of the claimants in Klibanoff I to amend their statement of claim to add them as respondents (*id.*, ¶ 44). David A. Gehn, Esq. of the Gusrae Firm represented the respondents in Klibanoff II.

Walter F. Becker, Jr., Esq. served as lead counsel for claimants in both Klibanoff arbitrations. The arbitration panel in Klibanoff I eventually dismissed claimants' claims in their entirety, and expressly denied the parties' respective requests for attorneys' fees (12/12/05

Award, at 6 [Graifman Aff., Exh 30]).

Before the panel issued its decision regarding attorneys' fees, Roth and Becker negotiated a tentative agreement under which, for mutual releases of the parties, Klibanoff was to pay \$100,000 of the Roth Firm's legal fees (Amended Complaint, ¶ 47).

Subsequently, Becker became afraid that Laidlaw would sue his clients, and decided to add the Klibanoff II respondents to the Legal Fees Agreement (Amended Complaint, ¶ 49). On January 3, 2006, Becker e-mailed Roth, providing a revised draft of the Legal Fees Agreement that added the respondents in Klibanoff II, including the Sands, as parties for their counsel to sign (*id.*, *see* Exh 14). Becker stated that he had spoken with Gehn, who stated that his clients "will agree" to a settlement (*see id.*). After the Klibanoff II respondents indicated that they would agree to the Legal Fees Agreement, Roth, on behalf of the respondents in Klibanoff I (the two brokers and Sands Brothers), and counsel for Klibanoff executed the agreement (*id.*, ¶ 49; *see* Exh 15).

On January 23, 2006, in connection with finalizing the settlement papers, Klibanoff signed an Affidavit of Judgment of Confession for the payment to plaintiff of \$100,000 in attorney's fees (*id.*, ¶¶ 48, 49; *see* Exh 16), which Becker provided to Roth to hold in escrow pursuant to and pending the fully executed settlement agreement (*id.*, Exh 15, at 4, ¶ C).

After the Klibanoff II respondents, including Steven Sands, indicated that they would agree to the revised Legal Fees Agreement, the parties then forwarded a copy of the agreement to Gehn for execution on behalf of his clients. However, Steven Sands refused to sign the agreement asserting via a letter from Gehn to Roth dated January 25, 2006, that his clients had not been previously aware of the settlement agreements and requesting certain information.

Neither Sands Brothers, nor the Sands, ever provided express written consent, and none of the remaining parties to the proposed agreement signed off. Without the sign-off of the respondents in Klibanoff II, Becker informed Roth that the proposed agreement was considered null and void (*see* April 28, 2006 letter from Becker to Roth [Amended Complaint, Exh 23]).

When plaintiff subsequently sought to enforce the confession of judgment signed by Klibanoff, arguing that the proposed agreement with the Klibanoff II parties was severable from the agreement with the Klibanoff I parties, a new round of litigation began in this court, in the state court in Alabama and before the NASD (Amended Complaint, ¶¶ 58-59). Although Klibanoff sought to vacate the judgment, he encountered a host of procedural issues (*id.*, ¶¶ 60-65). Klibanoff finally paid Roth a settlement to alleviate the Judgment by paying \$70,000 to the Roth Firm (Roth Dep., at 941-942).

Defendants move for summary judgment dismissing this claim on the grounds that as Steven Sands did not sign the Legal Fees Agreement, there was no binding contract as is necessary for a tortious interference claim and that Steven Sands' economic interest in the Legal Fees Agreement also bars the claim.

In opposition to the motion, plaintiff argues that the agreement "is severable between Mr. Klibanoff and the Klibanoff I respondents, on the one hand, and Mr. Klibanoff and the Klibanoff II respondents, on the other" (Pl Opp Mem., at 25). Thus, plaintiff asserts, "Steven Sands, as a Klibanoff II respondent, was not a party to the agreement in which he interfered," and consequently, his "intentional interference ... was not justified by any legitimate economic interest" (*id.*).

A binding contract is an essential element to a claim for tortious interference with

contract (*see e.g. Herman & Belnin v Greenhaus*, 258 AD2d 260 [1st Dept 1999] [dismissing claim for tortious interference on ground that there was no binding contract]; *accord Sonnenschein v Douglas Elliman-Gibbons & Ives*, 274 AD2d 244 [1st Dept 2000], *affd* 96 NY2d 369 [2001]). In this case, there was no binding agreement, as the Legal Fees Agreement at issue was not executed by the Klibanoff II respondents. The Legal Fees Agreement has signature lines for the Walter Becker, Esq., as attorney for the Klibanoff claimants, Richard Roth, Esq., as attorney for the Klibanoff I respondents (i.e. Alan Goddard, Michael Lichtenstein and Sands Brothers & Co., Ltd.), and David Gehn, Esq., as attorney for the Klibanoff II respondents (i.e. Steven Sands, Martin Sands and Laidlaw & Co) (*see* Exhibit 15). The agreement is signed by Becker and Roth but not but Gehn. Notably, the first paragraph of the Legal Fees Agreement defines the parties to the agreement to include the Klibanoff II respondents.

Plaintiff's argument that the Legal Fees Agreement is severable as to the Klibanoff I and Klibanoff II respondents is rejected as it is clear that the agreement contemplated that it would be agreed to and executed by all the parties identified in it. Furthermore, the agreement contains a merger clause stating that there are no other agreements or understandings and that it cannot be modified except in writing signed by all parties.⁵

⁵The merger clause, contained in paragraph 8 of the agreement, provides that:

There are no other agreements or understandings with respect to the subject matter of this Agreement. Any and all prior discussions, agreement or understandings, whether oral or in writing, are merged into and subsumed by this Agreement ... This Agreement may not be modified in any matter [*sic*] except in a writing signed by each of the Parties that are in any way affected by such modification

In sum, as the Legal Fees Agreement was conditioned upon the Klibanoff II respondents signing it and that condition failed to occur, the Legal Fees Agreement was not a binding contract (*Pober v. Columbia 160 Apartments Corp.* [1st Dept 1999]). Since a binding contract is an essential element of a tortious interference claim, defendants are entitled to summary judgment dismissing this cause of action, and the court need not reach the issue of whether Steven Sands had an economic interest in the proposed agreement.

PLAINTIFF'S CROSS MOTION FOR DISQUALIFICATION

Plaintiff cross moves for an order disqualifying Gusrae, Kaplan, Bruno & Nusbaum, PLLC ("the Gusrae firm") as counsel for defendants pursuant to the witness as advocate rule in the New York Code of Professional Responsibility DR 5-102,⁶ now Rule 3.7 of the Rules of Professional Conduct.

In support of its cross motion, plaintiff submits Roth's affirmation⁷ in which he states that various attorneys at the Gusrae firm will be called as witnesses for plaintiff since they represented the defendants as additional or subsequent counsel to the Roth Firm and "were privy to dozens of meetings about the matters [at issue here] and the failure of defendants to pay their legal fees" (Roth Affirmation, ¶ 10). He also states that attorneys at the Gusrae firm "knew that at all times both Steven Sands and Martin Sands knew they were personally responsible for bills. They know because they too threatened to sue Steven Sands and Martin Sands personally for

⁶ By decision and order dated April 15, 2008, the court denied a previous disqualification motion by plaintiff without prejudice to renewal.

⁷ Defendants argue that the unsworn statements of Roth in his affirmation should be rejected as Roth is an interested party. However, in reply, Roth submits an affidavit in which he adopts and incorporates the paragraphs in his affirmation.

invoices due to them" (*id.*, ¶ 8). Roth states that he knows this to be the case because "they told me" and he specifically refers to a matter in which the Gusrae firm, including Martin Kaplan, a current litigation partner at the firm, "had numerous conversations with Steve Sands and threatened to sue him for defendants refusal to pay their bills" (*id.*, ¶ 10). Roth refers to a conversation he had with Mr. Kaplan in which he informed Roth of his negative opinion of the defendants and that "they had a modus operandi of not paying legal fees...[and] also threatened to sue [defendants] individually" (*id.*, ¶ 8).

Roth also states that "the Gusrae firm's members are witness to numerous conversations between Steven Sands and [plaintiff]" (*id.*, ¶ 11). He further states that "I had conversations with David Gehn, Marty Kaplan, Martin Russo and Brian Graifman, all current litigation partners at the Gusrae Firm about many matters upon which this suit is based. Those conversations related to the work that [the Roth firm] was performing on those matters, strategies in connection with the matters, billing the client, disbursements and the fact that money was due and owing. [The Roth firm] is seeking fees in those very matters" (*id.*, ¶ 12).

Roth points to specific matters identified in the Amended Complaint for which plaintiff is seeking legal fees in which both plaintiff and the Gusrae firm represented defendants. According to Roth, in the *Huang* and *Beus* litigations, the two firms worked as co-counsel and appeared together in court and at arbitration hearings. In the *Keilly* matter, the two firms also worked as co-counsel. He also points to the *Jasmine* and *Hog* matters in which the Gusrae firm took over plaintiff's representation. In addition, Roth refers to the *Rogerto-Fosatti* litigation in which the defendants allegedly retained the Gusrae firm without informing Roth on the eve of trial and then settled the matter "behind [the Roth's firm's] back" (*id.*, ¶ 13). Plaintiff contends that with

respect to “most of the matters mentioned in the Amended Complaint ...the Gusrae firm either worked alongside [the Roth firm] as co-counsel or became subsequent counsel [and that] as such the Gusrae firm worked very closely with me and has firsthand knowledge of conversations relating to the issues in the action, the work my firm performed and many other items in which no one else has knowledge,” and that each of the partners in the firm will be called to testify at trial and this testimony will be adverse to their clients (*id.*, ¶ 15).

Roth also asserts that David Gehn, Esq., who is a litigation partner at the Gusrae firm, represented Steven Sands during the period that Sands is alleged to have tortiously interfered with the Legal Fees Agreement, and discovery has revealed that Mr. Gehn wrote various emails and other communications relating to Sands’ interference with the agreement. However, as the tortious interference claim has been dismissed, Mr. Gehn’s testimony as it relates to this claim is not needed. Likewise, while Roth states that he is entitled to testimony from lawyers at the Gusrae firm as it relates to the defense of unclean hands, since such defense relates to the tortious interference claim, any such testimony would not be part of the case.

Defendants oppose the cross motion, arguing that plaintiff has not met its burden of showing that defendants will be prejudiced by any testimony by an attorney from the Gusrae firm and that even if the court determines that the testimony of an attorney from the firm is necessary, such a finding does not warrant the disqualification of the entire firm (*see Sokolow, Dunard, Mercadler & Carreras, LLP v. Lacher*, 299 AD2d 64 [1st Dept 2002][finding that trial court erred in finding that disqualification extended to entire law firm]).⁸ Defendants, however, fail to submit

⁸With respect to this argument, it should be noted that if it is shown that one or more attorneys from the Gusrae firm may be called as a witness to give testimony that may be prejudicial to defendants on a significant issue, it would be improper to allow the Gusrae firm to

an affidavit from a person with knowledge denying the facts as alleged by Roth, or challenging Roth's position that the knowledge obtained by the Gusrae firm while working with the Roth firm would be adverse to their clients' interest.

It is well-settled that "the disqualification of an attorney is a matter that rests within the sound discretion of the court" (*Flores v. Willard J. Price Associates, LLC*, 20 A.D.3d 343, 344 [1st Dept. 2005]). The Rules of Professional Conduct (formerly the New York Code of Professional Responsibility) serve as a general guide in considering disqualification motions (*see S & S Hotel Ventures Limited Partnership v 777 S. H. Corp.*, 69 NY2d 437 [1st Dept 1987]).

Under the advocate witness rules contained in the Rule 3.7 of The Rules of Professional Conduct,⁹ an attorney is prohibited from acting as an advocate before a tribunal where he or

continue to represent defendants and to limit the disqualification to the attorney witness(es) (*see, Tatalovic v. Nightlife Enterprises, L.P.*, 69 AD3d 439 [1st Dept 2010])[affirming trial court's determination that law firm for defendants should be disqualified when plaintiff "sufficiently established that a member of the subject firm would be a witness and provide testimony that may be prejudicial to the client" on a significant issue where the member represented defendants in the transaction at issue and prepared the promissory note that was purportedly invalid and a forgery]; *see also* Rule 3.7 (b).

⁹Rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.29) provides that:

(a) a lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless: (1) that testimony relates solely to an uncontested issue; (2) the testimony relates solely to the nature and value of legal services rendered in the matter; (3) disqualification of the lawyer would work substantial hardship on the client; (4) the testimony will relate solely to a formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or (5) the testimony is authorized by the tribunal.

(b) a lawyer shall not act as advocate before a tribunal in a matter if: (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client and it is apparent that the testimony may be prejudicial to the client; or (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

another attorney from his firm is likely to be called as a witness on a significant issue other than on behalf of its client, where it is apparent that the testimony may be prejudicial to the client.

“Disqualification...during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants [and] denies a party’s right to representation by the attorney of its choice” (*S & S Hotel Ventures Limited Partnership v 777 S. H. Corp.*, 69 NY2d at 443 [citations omitted]).” The right to counsel is “a valued right [and] any restrictions must be carefully scrutinized (*id.*). Furthermore, where the rules relating to professional conduct are invoked not at a disciplinary proceeding but “in the context of an ongoing lawsuit, disqualification...can create a strategic advantage of one party over another”(*id.*); *see also*, *Broadwhite Associates v. Truong*, 237 AD2d 162, 163 [1st Dept 1997][noting that unless movant meets heavy burden of showing disqualification is warranted, such a motion should be considered as an effort to obtain strategic advantage]).

Thus, the party seeking disqualification “carries a heavy burden of identifying projected testimony of the advocate-witness and demonstrating how it would be ‘so adverse to the factual assertions or account of the events offered on behalf of the client as to warrant his disqualification.’” (*Broadwhite Associates v. Truong*, 237 AD2d 162, 163 [1st Dept 1997], *quoting*, *Martinez v. Suozzi*, 186 AD2d 378, 379 [1st Dept 1992]). In addition, “[u]nder New York law, the mere fact that an attorney was involved in the transaction at issue, or that his proposed testimony would be relevant or highly useful is insufficient to warrant disqualification; rather, the crucial inquiry is whether the subject testimony is necessary, taking into account such factors as the significance of the matter, the availability of other evidence and the weight of the testimony.” *Brooks v. Lewin*, 48 AD3d 289 [1st Dept], *lv dismissed in part and denied in part*, 11

NY3d 826 [2008]).

The issues in this action, in which the two remaining claims based on quasi-contract and for an account stated, concern whether the defendants agreed to be personally liable for payment of attorneys fees to the Roth firm. Notably, defendants have not challenged the amounts charged by the Roth firm for its services¹⁰ and does not claim that Roth firm did not adequately perform its services or committed malpractice. The court does not find Roth's allegations that the Gusrae attorneys knew that Steven and Martin Sands were personally liable because they [the Gusrae firm] threatened to sue Steven and Martin Sands personally for monies due to their [the Gusrae] firm as a persuasive argument in favor of disqualification. However, a sufficient basis for disqualification may potentially exist in light of Roth's statements regarding numerous meetings with the Gusrae firm where the Roth's firm's legal fees and legal issues were discussed, together with the Roth and Gusrae firms' joint and subsequent representation in various matters, particularly in absence of proof from the Gusrae firm denying knowledge or information material to the issues herein. (*Moses & Stinger, LLP v. S&S Machinery Corp.*, 251 AD2d 271 [1st Dept], *lv dismissed*, 92 NY2d 1024 [1998])[granting plaintiff's motion to disqualify defendants' attorney writing that he was "engaged as co-counsel in the litigation that gave rise to the bills at issue [and therefore] his testimony would likely be necessary"]; *Falk v. Gallo*, 73 AD3d 685 [2d Dept

¹⁰While defendants argue in connection with the quantum meruit claim that the plaintiff will not be able to prove the reasonable value of its services, this argument is based on the failure of the invoices to differentiate the amounts owed by defendants and the amounts owed by the Sands Brothers, and not based on an argument that the amounts charged by plaintiff were not reasonable in light of the services rendered. Moreover, the testimony of defendants' counsel would not be crucial to demonstrating the reasonable value of plaintiff's services since such value can be established with other evidence including billing records and pleadings and other documents evidencing the work performed by plaintiff on behalf of defendants.

2010][trial court properly disqualified plaintiff's attorney since he was the only person, other than the parties, "who had knowledge of any discussion regarding the terms of the oral agreement underlying this litigation, he is 'likely to be a witness on a significant issue of fact'"][quoting rule 3.7].

Notably, the documentary evidence, including the invoices and checks used to pay the fees, are insufficient to resolve these issues so that if the defendants' attorneys have knowledge that the Sands agreed to be personally liable that testimony may not be merely useful and relevant but crucial (*compare World Hill Ltd. v. Sternberg*, 25 Misc3d 1224[a][Sup Ct NY Co. 2009][denying motion to disqualify plaintiffs' counsel on the ground he represented plaintiffs and defendants in negotiating agreement at issue action when there was no showing that the agreement was ambiguous or incomplete).

However, on this record, the court cannot fully evaluate the significance of the testimony of defendants' attorneys, if any, since absent from plaintiff's submission is any statement regarding the specifics of such testimony, including whether any attorney at the Gusrae firm has knowledge that Steven and Martin Sands agreed to be personal liable for the Roth firm's fees. Likewise, Roth's statement that the testimony will be adverse and prejudicial to defendants is conclusory and as such is arguably insufficient to warrant the Gusrae firm's removal (*Haberman v. City of Long Beach*, 298 AD2d 497, 499 [2d Dept 2002]). At the same time, the Gusrae firm does not deny Roth's allegations that attorneys in the Gusrae firm were privy to dozens of meetings where legal issues and the failure of the Sands to pay the Roth firm's legal bills were discussed, or that the testimony of lawyers from the firm will be adverse or prejudicial to their clients. Significantly, the Gusrae firm fails to submit affidavits from the attorneys who

participated as co-counsel or subsequent counsel denying knowledge of the unpaid fees or specifically denying knowledge as to whether the Sands agreed to be personally responsible for the fees.

Given the sensitivity of this issue, and as plaintiff intends to call attorneys from the Gusrae firm as witnesses, the court is requiring further submissions. Specifically, as directed below, plaintiff shall submit a further affidavit from Roth which shall address the specifics of projected testimony from defendants' counsel, and identify the attorneys expected to give such testimony, and how such testimony will be adverse to the Sands' defense of the remaining claims seeking to recover in quasi contract and based on an account stated. The Gusrae firm shall respond by submitting affidavits from the attorneys with knowledge of the projected testimony identified by Roth.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment (motion seq. no. 004) is denied; and it is further

ORDERED that defendants' motion for summary judgment (motion seq. no. 005) is granted to the extent of dismissing plaintiff's claims for breach of contract (first cause of action), tortious interference with contract (fifth cause of action) and piercing the corporate veil (tenth cause of action); and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that plaintiff's cross motion to amend the amended complaint to add Harbor Consultants, Ltd. f/k/a Sands Brothers & Co. as a nominal defendant is denied; and it is further.

ORDERED that plaintiff's cross motion to disqualify the Gusrae firm as counsel for

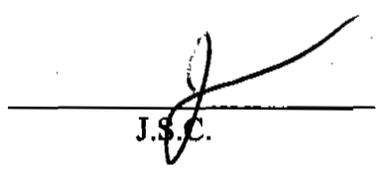
defendants is held in abeyance pending the further submissions specified above; and it is further

ORDERED that on or before October 4, 2010, plaintiff shall serve on counsel for defendants his further affidavit in support of its cross motion to disqualify defendants' counsel, and provide the original to Part 11, room 351, 60 Centre Street, New York, NY, together with an affidavit of service; and it is further

ORDERED that on or before October 18, 2010, defendants shall serve plaintiff with their response to plaintiff's further affidavit and provide the original to Part 11, room 351, 60 Centre Street, New York, NY, together with an affidavit of service; and it is further

ORDERED that a pre-trial conference will be held in Part 11, room 351, 60 Centre Street, New York, NY on November 4, 2010 at 4:00 pm.

Dated: September 16/2010



J.S.C.

FILED
SEP 21 2010
NEW YORK
COUNTY CLERK'S OFFICE