

<b>Mayerson Stutman Abramowitz, LLP v Rosenbaum</b>
2014 NY Slip Op 30016(U)
January 6, 2014
Supreme Court, New York County
Docket Number: 152172/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY
HON. EILEEN A. RAKOWER

PRESENT: \_\_\_\_\_ Justice

PART 15

Index Number : 152172/2013
MAYERSON STUTMAN ABRAMOWITZ,
vs
ROSENBAUM, CAROLYN DONOVAN
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_
MOTION DATE \_\_\_\_\_
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s) 1, 2, 3

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) 4, 5

Replying Affidavits \_\_\_\_\_ | No(s) 6, 7

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 1/6/14

HON. EILEEN A. RAKOWER

- 1. CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X

MAYERSON STUTMAN ABRAMOWITZ, LLP,

Plaintiff,

- against -

CAROLYN DONOVAN ROSENBAUM,

Defendant.

-----X

HON. EILEEN A. RAKOWER

Index No.  
152172/2013

**DECISION  
and ORDER**

Mot. Seq. 01

This action was commenced on March 8, 2013 by plaintiff Mayerson Stutman Abramowitz, LLP (“Plaintiff”) with the filing of a Summons and Verified Complaint on March 8, 2013. The Complaint alleges claims for account stated and breach of contract against defendant Carolyn Donovan Rosenbaum (“Defendant” or “Rosenbaum”).

On March 27, 2013, Defendant interposed an answer with affirmative defenses and counterclaims. The affirmative defenses asserted are: statute of limitations has expired, the services rendered by Plaintiff were “unnecessary, unwarranted, and duplicative,” and the services rendered were “inadequate and improperly performed.” Defendant’s first counterclaim is for breach of contract by Plaintiff in “charging Defendant unnecessary, wasteful and duplicative legal charges and expenses in the amount of \$159,536 and seeks the refund of all sums paid to Plaintiff; the second is for unjust enrichment; and the third is for misrepresentation of sums allegedly due and owing and violation of the New York Code of Professional Responsibility.

Plaintiff now moves, pursuant to CPLR §§3212, for summary judgment against Defendant, and for an award in the amount of \$61,285.68 plus interest, costs and reasonable attorneys’ fees. Additionally, Plaintiff moves to dismiss Defendant’s Counterclaims. Additionally, Plaintiff moves to dismiss Defendant’s

counterclaims.

Plaintiff submits the affidavit of Alton L. Abramowitz, which annexes a copy of the Retainer Agreement executed by Defendant, invoices submitted to Defendant for Plaintiff's legal services, ledger reflecting payments made by Defendant to Plaintiff, and a copy of a April 17, 2007 e-mail.

Abramowitz avers that the parties entered into an attorney-client relationship in August 2006 when the parties executed a written retainer agreement which set forth the terms for payment, that Plaintiff provided legal services from August 2006 to March 2007, with final charges for services rendered reflected in an invoice dated April 5, 2007. Abramowitz further avers that Defendant made the following payments to Plaintiff: \$24,817 on December 6, 2006, \$75,000 on January 27, 2007, and \$40,000 on April 23, 2007.

Abramowitz further avers that on April 18, 2007, Defendant stated by e-mail that she intended to pay the remaining \$20,000 that Plaintiff agreed to accept in satisfaction of the final balance. Abramowitz avers that other than a complaint regarding a process server over four months after the representation ceased, Defendant did not object to the invoices or statements sent to her.

Abramowitz avers that to date, Defendant has failed to pay \$61,285.68 of the legal fees incurred, which reflects the actual amount due and owing as reflected on the invoices, with interest, rather than the reduced amount that Plaintiff states it would have been willing to accept in full satisfaction had payment been made years ago.

In opposition, Defendant submits the affidavit of Carolyn Donovan and the affidavit of Daniel J. Tyczinski. Defendant contends that discovery remains outstanding, including the Defendant's Notice to Take the Deposition of Abramowitz concerning his alleged high legal fees and inadequate representation of Defendant.

"The elements of a breach of contract claim are formation of a contract

between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage.” (*Flomenbaum v New York Univ.*, 71 A.D.3d 80, 91 [1st Dept. 2009]).

“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 . . . In this regard, receipt and retention of plaintiff’s accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor.” (*Shea & Gould v. Burr*, 194 AD2d 369, 370[1st Dept. 1993]). “The existence of a counterclaim of uncertain amount does not preclude the grant of summary judgment in favor of plaintiff on its account-stated cause of action; however, execution and costs should abide the resolution of the remaining claims.” *RPI Professional Alternatives, Inc. v. Citigroup Global Markets, Inc.*, 61 A.D. 3d 618, 619 [1<sup>st</sup> Dept 2009](citations omitted).

Here, Plaintiff has made a prima facie showing of entitlement to judgment as a matter of law on its account stated claim by submitting evidence of Defendant’s receipt and retention of Plaintiff’s invoices without objection within a reasonable time, and partial payments made thereon. Defendant, in opposition, has failed to raise a triable issue of fact by failing to submit evidence in admissible form that Defendant made any objection upon receipt of the Plaintiff’s invoices or within a reasonable time thereafter. The discovery defendant claims is outstanding, specifically, the deposition of Abramowitz, would not be the source of such evidence.

Furthermore, as for Defendant Rosenbaum’s Counterclaims, Defendant Rosenbaum previously commenced an action on March 10, 2010 entitled “*Carolyn Donovan Rosenbaum v. Sheresky Aronson Mayefsky & Sloan, LLP, Heidi E. Harris, Esq., Allan Mayesky, Esq., Mayerson Stutman Abramowitz, LLP, and Alton L. Abramowitz, Esq.*,” Index No. 7341-2010, which asserted claims for legal malpractice arising from the Mayerson law firm’s negotiation of her Separation Agreement, breach of contract based on allegations of overcharging of Plaintiff by the Mayerson law firm, and unjust enrichment. On August 17, 2010, Justice Mary H. Smith dismissed the legal malpractice claim on the basis that the Mayerson law firm demonstrated that the parties’ legal relationship had ceased nineteen months

before the purported Settlement Agreement had been reached. The Court further dismissed Rosenbaum's breach of contract claim as duplicative of her legal malpractice and excessive fee claims and Rosenbaum's unjust enrichment claim in light of the existence of a written retainer agreement. The Court permitted Rosenbaum to re-file her fee dispute claim with the Joint Committee on Fee Dispute and Conciliation. On March 3, 2011, Defendant filed an appeal with the Appellate Division, Second Department, asserting that the lower court erred in dismissing the action against the Mayerson law firm. On November 14, 2012, the Second Department affirmed the decision of the trial court. On November 28, 2012, the Mayerson law firm attempted to restore the Fee Arbitration but was unable to do so and commenced the instant action.

Rosenbaum argues that CPLR §205(a) permits her to assert the same claims that were previously dismissed. However, the claims were indeed decided on the merits.

Wherefore it is hereby

ORDERED that plaintiff's motion is granted and plaintiff is entitled to summary judgment on its account stated claim; and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff Mayerson Stutman Abramowitz, LLP, and against defendant Carolyn Donovan Rosenbaum in the amount of \$61,285.68, together with interest as prayed for allowable by law (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that Defendant's counterclaims are hereby dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JANUARY 6, 2014

  
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EILEEN A. RAKOWER, J.S.C.