

Cohen, Tauber, Spievack & Wagner v Alwick

2005 NY Slip Op 30219(U)

August 25, 2005

Supreme Court, New York County

Docket Number: 0603976/2003

Judge: Harold B. Beeler

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: HAROLD BEELER
J.S.C. Justice

PART 9

COHENTAU BER SPIEVACK

INDEX NO. 603976/2003

ALNWICK, JEFFREY

MOTION DATE _____

MOTION SEQ. NO. 001

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 ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by plaintiff for partial summary judgment is granted in accordance with the annexed memorandum decision of today's date.

FILED
SEP 06 2005
NEW YORK
COUNTY CLERK'S OFFICE

A preliminary conference is scheduled for Tuesday, October 11, 2005 at 3³⁰ pm at 1AS Port 9, 71 Thomas St Rm 304.

Dated: 8/25/05

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

At IAS Part 9 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 71 Thomas Street, New York, New York on the 25th of August, 2005.

PRESENT: HON. HAROLD B. BEELER

-----X
COHEN TAUBER, SPIEVACK & WAGNER, LLP,

Plaintiff,

-against-

JEFFREY ALNWICK, MARIE ALNWICK,
and BIG BLUE PRODUCTS,

Defendants.
-----X

DECISION/ORDER

Index No. 603976/03
Motion Seq. 001

Plaintiff law firm, Cohen, Tauber, Spievack & Wagner, LLP (“CTSW”), moves for partial summary judgment for \$210,036.28, the amount the law firm billed to its defendant clients up to September 15, 2003, and for dismissal of all counterclaims asserted by defendants for the same period. Defendants oppose.

This action involves defendants’ alleged failure to pay for plaintiff’s legal services rendered. Defendant Big Blue Products (“BBP”) is a buyer/seller of computer equipment and the Alnwick defendants are principals of BBP. BBP was founded by the Alnwicks in 1984. In 1996, Harry Shields and John Gallagher suggested a European joint venture named “Big Blue Europe” (“BBE”) with companies controlled by Shields and Gallagher to expand BBP into the European market. Subsequently, the relationship between Shields and Gallagher and the Alnwicks deteriorated, and in 1999 the Alnwicks retained the law firm of “Kronish, Lieb, Wiener and Hellman” (“Kronish”) to represent their interests against Shields and Gallagher. Jay Spievack

("Spievack"), a Kronish partner at the time, was the attorney assigned to represent the Alnwicks in that matter and on or about November 12, 1999, Spievack, on behalf of the Alnwicks, commenced a federal court action in the Eastern District of New York entitled "Alnwick v European Micro Holdings", Index No. CV99 7380 ("the underlying action").

On or about January 2, 2000, Spievack resigned his partnership with Kronish and joined plaintiff law firm CTSW. On January 12, 2000, the Alnwicks and BBP executed authorizations to transfer their files from Kronish to CTSW and retained CTSW to represent their interests in the underlying action. By order dated January 18, 2000, the District Court permitted CTSW to be substituted as counsel.

While representing defendants in the underlying action, CTSW simultaneously provided legal services to the Alnwicks in three other related litigations in the Netherlands and one in the United Kingdom ["the foreign litigations"]. The underlying defendants moved to dismiss the underlying action based on inconvenient forum, arguing that the entire action should be tried in the Netherlands. CTSW opposed the motion to dismiss on behalf of the Alnwicks. According to plaintiff, only limited discovery was permitted in the underlying action.

By order dated March 22, 2001, the District Court dismissed the underlying action and the Alnwicks instructed CTSW to appeal. By order dated March 15, 2002, the Second Circuit vacated the March 22, 2001 decision and remanded the case back to the District Court. On July 17, 2002, CTSW, on behalf of the Alnwicks, served an amended complaint. The underlying defendants then filed another motion to dismiss based on inconvenient forum and that certain of the counts in the amended complaint failed to state a claim upon which relief could be granted.

By order dated September 15, 2003 [the cutoff date by which plaintiff seeks legal fees in this motion], the federal court denied the underlying defendant's motion to dismiss and ordered

“that the parties are directed to select a jury in this 1999 lawsuit on 11/12/03 at 9 am.” CTSW advised the Alnwicks that discovery must be completed immediately to enable the parties to prepare for trial within the time frame ordered by the court and also moved the federal court to reschedule the trial date, alleging a lack of opportunity to conduct any meaningful discovery.

In response to the District Court’s denial of its motion to reschedule the trial date, CTSW scheduled 12 depositions in Europe and Florida, coordinated depositions and other discovery with their European local counsel, retained experts to address liability and damages issues and hired temporary staff to assist with the documentary discovery. By email to Spievack dated September 29, 2003, J. Alnwick instructed CTSW to discontinue all work until he spoke with him the following morning. According to plaintiff, on September 30, 2003, the Alnwicks decided to continue preparing for trial and thus the depositions scheduled to begin the following week were kept in place.

According to plaintiff, on October 3, 2003, Spievack advised the Alnwicks of various options including both sides giving up their respective claims and just “walking away” from the litigation; discontinuing the US action and pursuing the European actions; or continuing with the expensive trial preparation. According to plaintiff, the same day the Alnwicks opted to resolve the matter and instructed Spievack to cease all work on the case, except for the work necessary to arrive at the settlement, including drafting the settlement agreement. By this time, the Alnwick debt to CTSW had risen to \$207,536.28 in accounts receivable and \$180,073.14 in work in process and disbursements. By email to Spievack dated November 11, 2003, J. Alnwick complained about the recent billing and on December 2, 2003 instructed CTSW to direct all future inquiries regarding any unpaid invoices to the attorney who is now defending them in this action.

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 (1st Dep't 1993). According to the account stated principle, the receipt and retention of accounts without objection within a reasonable time, and agreement to pay a portion of the indebtedness gives rise to an account stated thereby entitling one to summary judgment. *Id.*

An account stated has long been defined as an account balanced and rendered with an assent to the balance express or implied so that the demand is essentially the same as if a promissory note had been given for the balance. *Morrisson Cohen Singer & Weinstein LLP v Ackerman*, 280AD2d 355 (1st Dep't 2001).

An agreement may be implied if the party receiving the statement of account keeps it without objecting to it within a reasonable time, because the party receiving the account is bound to examine the statement and, upon such examination, convey any of his objections with regard thereto. *Chisholm-Ryder Company Inc. v Sommer & Sommer*, 70 AD2d 429 (4th Dep't 1999). Silence is deemed acquiescence and warrants enforcement of the implied agreement to pay. *Id.* An agreement may also be implied if the debtor makes partial payment. *Id.* The partial pymt is considered acknowledgment of the correctness of the account. *Id.*

While evidence of an oral objection to an account rendered is sufficient on a motion for summary judgment to rebut any inference of an implied agreement to pay the stated amount, conclusory allegations that oral protests were made but without any specifics as to when and to whom made are insufficient. *Shea & Gould, supra*. Self serving, bald allegations of oral protests are insufficient to raise a triable issue of fact as to the existence of an account stated. *Darby & Darby PC v VSI International Inc.*, 95 NY2d 308 (2000). It is not necessary to establish the

reasonableness of the fee since the client's act of holding the statement without objection is construed as acquiescence as to its correctness. *O'Connell and Aronowitz v Gullo*, 229 AD2d 637 (3d Dep't 1996).

It is undisputed that, during the course of its representation, CTSW provided the Alnwicks with monthly statements for legal fees and disbursements and that the Alnwicks made regular payments to plaintiff. Although there was no written retainer agreement, one was not required by law at the time the parties' professional relationship began, and it is clear from the record that such a professional relationship was established. It is undisputed that there are no pre September 15, 2003 written objections to the invoices, with the exception of a May 11, 2001 objection to a "Field Fisher Waterhouse" bill which is of no moment since apparently defendants were never forced to render payment on that bill.

Defendants' opposition papers contain allegations of general oral protests conveyed to plaintiff – to wit: defendants' lack of confidence in a younger associate, Leo Esses, whom defendants did not want working on their case; and complaints that Spievack would not be the attorney trying the case but rather Sari Kolatch, Esq. who would have to become acquainted with their file. However, there are no specifics as to whom and when such complaints were made, and thus, they are insufficient to create a triable issue of fact. Additionally, although the opposition papers are replete with first time complaints concerning alleged "billing irregularities", such complaints being made now, for the first time, years after defendants' receipt of such invoices, are necessarily untimely as a matter of law. Thus, CTSW is entitled to summary judgment on its account stated claim as to work performed from January 1, 2000 through September 15, 2003 as well as dismissal of defendants' conclusory counterclaims for the same period.

WHEREFORE, it is

ORDERED that plaintiff's motion for partial summary judgment is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants JEFFREY ALNWICK, MARIE ALNWICK, and BIG BLUE PRODUCTS in the sum of \$210,036.28 with interest as prayed for allowable by law until the date of entry of judgment as calculated by the Clerk and thereafter at the statutory rate together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the defendants' counterclaims for the period up to September 15, 2003 are severed and dismissed; and it is further


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

ORDERED that a **preliminary conference** is scheduled for **Tuesday, October 11, 2005** at **3:30 pm** at IAS Part 9, 71 Thomas Street, Room 304.

This constitutes the decision and order of the court.

Dated: August 25, 2005

ENTER:



HAROLD B. BEELER, JSC

FILED
SEP 06 2005
NEW YORK
COUNTY CLERK'S OFFICE