

Edelman v Sernick

2006 NY Slip Op 30244(U)

February 16, 2006

Supreme Court, New York County

Docket Number:

Judge: Marilyn Shafer

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

PRESENT: _____
Justice

PART _____

Index Number : 601988/2005

EDELMAN, PETER F.

vs

SERNICK, KEITH

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is 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

granted
present to attached Return

FILED

FEB 28 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/16/06

HON. MARILYN STAHER, JSC

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 NEW YORK: IAS PART 62

-----X
Peter F. Edelman,

Plaintiff,

Index No. 601988/05

-against-

Keith Sernick,

Defendant.

-----X
Marilyn Shafer, J.:

In this action for a breach of contract, account stated, and attorney fees, plaintiff, a pro se attorney, moves for an order, pursuant to CPLR 3212, granting him summary judgment against the defendant, also a pro se attorney.

Plaintiff represented defendant in certain Nassau County Family Court proceedings commenced by defendant's ex-wife for child support, child care and related support arrears.¹ A retainer agreement was executed by defendant on January 30, 2002 (see Notice of Motion, Exhibit D). Pursuant to the terms of the retainer agreement, questions or complaints concerning the invoices were to be sent, in writing, within 20 days of being rendered (id., at 2). Defendant submitted no copies of written complaints about the invoices though he contends that there were oral disputes regarding the invoices. The retainer agreement also allowed for plaintiff to withdraw as counsel for defendant should the invoice balance remain unpaid over a certain time period (id., at 4). Throughout the period when plaintiff was representing the defendant,

¹Plaintiff represented defendant in the action entitled *Moadel-Sernick v Sernick* under docket numbers F-08266-02/A, 02/02/B, 02/02C, 02/02D, 02/03E, 02/03F, and 02/04G. Court records reflect that an uncontested divorce was granted to the parties in the Family Court action by the Nassau County Supreme Court on September 19, 2001 in the action entitled *Renee Moadel-Sernick v Keith Sernick*.

defendant made partial payments on the invoices. Plaintiff never sought to withdraw as counsel despite this ongoing per se violation of the retainer agreement, even after defendant failed to follow through on a house refinancing to pay his outstanding legal fees, failed to follow through on scheduled fee payments, and bounced a \$5,000.00 check dated October 31, 2003 (see Motion, Exhibits F, G and H).

Eighteen invoices cover the period of January 16, 2002 through October 6, 2004 (see Notice of Motion, Exhibit E). The invoices reflect defendant's payment history and an explanation for the charges, such as the time involved and type of activity. The retainer agreement and invoices reflect that plaintiff's hourly fee was \$375.00 per hour. Both defendant and defendant's wife requested plaintiff's continued services through December 2004 (see Notice of Motion, ¶ 4i). Those services on behalf of the wife were not reflected on the invoices (id.).

In a January 13, 2005 letter, from plaintiff to defendant it was stated that there were outstanding fees in the amount of \$37,110.91. In that same letter plaintiff informed defendant that, if he disputed the outstanding balance, he had the right to submit the fee dispute to arbitration, and also provided pertinent forms, including a Notice of Right to Arbitrate, a Request for Fee Arbitration, and standard instructions for commencing such a proceeding. Plaintiff notified defendant that he would commence an enforcement proceeding only if necessary (see Notice of Motion, Exhibit I).

In response to plaintiff's January 13, 2005 letter, defendant sent a letter on February 9, 2005, which stated, *inter alia*, that plaintiff's \$37,110.91 calculation of outstanding legal fees failed to take into account defendant's "initial retainer" payment of "\$5,000.00" (see Notice of Motion, Exhibit J), which defendant alleges would decrease the unpaid fees to \$32,110.91. The

court notes that the January 31, 2002 invoice does not reflect a \$5,000.00 initial retainer payment. Defendant also indicated in his response that, based on his income and expenses, he was currently prepared to pay only \$500.00 per month until the amount due was paid in full.

Plaintiff responded to defendant with a letter, also dated February 9, 2005, wherein plaintiff stated, *inter alia*, that the initial retainer fee check was for \$3,750.00, a reduction from the \$5,000 amount as a courtesy, and that, in any event, the initial retainer fee check bounced. This version, of what the initial retainer fee amount was, is, also, contrary to the retainer fee indicated on plaintiff's January 31, 2002 invoice. Plaintiff further stated that the first payment he received was in the amount of \$3,032.50 plus bank fees and costs for time expended resolving the bounced retainer fee check. The court notes that the "\$3,032.50" quote is again contrary to the accounting presented in any of the plaintiff's 2002 invoices. Plaintiff also informed defendant that the proposed payment schedule of \$500.00 for 75 months over a six year plus time period was unacceptable, but, that, as an alternative to commencement of an enforcement proceeding (now before this court), plaintiff would accept a lump sum payment of \$25,000.00 (a 33 1/3% discount), or, payment of the full balance at the rate of \$1,000.00 per month for 37 months plus interest at the rate of 5% per annum on the outstanding balance. Defendant did not respond to plaintiff's letter, hence, plaintiff commenced this enforcement proceeding based upon defendant's breach of their retainer agreement.

Defendant served an answer with three affirmative defenses and five counterclaims. The affirmative defenses are lack of jurisdiction (does not specify personal or subject matter jurisdiction), unclean hands, and reliance. The five counterclaims allege malpractice by the plaintiff (1) for failing to vigorously represent defendant; (2) for failing to submit the proper

documents to the court on several occasions; (3) for “failing to submit all necessary and required documentation in his motion for Counsel fees;” (4) for failing to appear in court on a scheduled date; and (5) for “failing to appear in court with the necessary documents and or paper work to continue a hearing on at least two occasions.”

Plaintiff’s verified reply to the counterclaims in defendant’s answer alleged the same two affirmative defenses to each counterclaim, those affirmative defenses being (1) the counterclaims fail to plead, with the required particularity, a cause of action for malpractice, and (2) the counterclaim fails to state, as a matter of law, a cause of action for malpractice.²

The defendant’s opposition papers consist of a mere three page Affidavit in Opposition and a four page Memorandum of Law. Other than stating allegations of overcharging, defendant fails to provide any documentation to substantiate his allegations of legal malpractice. There are no exhibits attached to these submissions. The defendant does not rebut plaintiff’s affirmative defense of “failure to plead with particularity” in his affidavit, but instead uses broad non-specific terms. For example, in ¶ 5 of his Affidavit in Opposition, he states that he and his wife, Marla, had numerous conversations with plaintiff regarding the outstanding invoices and what appeared to be overcharges or charges not incurred on their behalf. In ¶ 6 he states that there was a need to submit necessary paperwork for his Family Court motion seeking attorney’s fees which was being opposed in opposition papers prepared by a Mr. Jeffrey Schecter (the Schecter papers), his ex-wife’s counsel. Defendant states that Mr. Schecter opposed defendant’s motion for attorney fees because Mr. Schecter relied on and referred to the same alleged invoice

²An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff’s losses; and (3) proof of actual damages (see *Brooks v Lewin*, 21 AD3d 731 [1st Dept 2005]).

discrepancies already referred to in ¶ 5, *supra*. In ¶ 7 he states that the December 16, 2002 Settlement Agreement issued by the Family court denied counsel fees because plaintiff failed to submit all the necessary paperwork, more specifically, the Financial Disclosure Form. In ¶ 10 he argues that summary judgment must be denied because there are questions of fact, but he does not specify what the questions of fact are.

In the "Statement of Facts" portion of his memorandum of Law, defendant reiterates the same broad unsubstantiated allegations found in his affidavit. For whatever reasons, the defendant fails to include any pertinent documentation which would support his counterclaims, i.e., an affidavit from his wife, or, even the Nassau County Family Court papers prepared by his ex-wife's attorney which allegedly cite to the alleged overcharges in the invoices. In order to defeat a motion for summary judgment, the party opposing the motion must disclose in evidentiary form the parol evidence on which it relies. Bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment (*see Fink, Weinberger, Friedman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, 781-782 [1st Dept 1981], appeal dismissed 53 NY2d 1028 [1981]).

Plaintiff includes two affidavits in his motion papers. Regarding the allegations of malpractice, plaintiff points out, in ¶ 7[i] of his Affidavit in Support attached to his Notice of Motion, that the results of plaintiff's representation of defendant belie the claims of alleged malpractice. He makes reference to the Nassau County Family court decision, dated December 16, 2002 in support of this position (*see* Notice of Motion, Exhibit K). He lists the following

results found in that decision as being indicative of his vigorous³ and adequate representation of defendant in the Family Court matters: *i.e.*, (1) the support arrears petitions against defendant therein were either withdrawn by the petitioner or the claims asserted against him were rejected by the Court after trial; (2) the ultimate Settlement spread on the Record in open court on February 25, 2004, not only dismissed the alleged arrears, but also prospectively reduced defendant's child care liability by 70%, and, reduced liability for a certain college fund, for all extracurricular activities, and for certain increased camp tuition by 100%; and (3) plaintiff obtained the withdrawal of the request by defendant's wife for a willful finding against defendant. Plaintiff further argues that the remainder of plaintiff's allegations are self-serving in an attempt to avoid payment for services rendered.

Regarding defendant's allegation of failing to provide a Financial Disclosure Form, in ¶ 6 of plaintiff's Reply Affidavit, plaintiff explains that he had initially filed a Financial Disclosure Form for defendant with the Nassau County Family Court and had subsequently discussed the Financial Disclosure Form with defendant (see Notice of Motion, Exhibit E, August 2004 and October 2004 invoice daily time records; see also Notice of Motion, Exhibit K, February 25, 2004 hearing, at 19, lines 10-12). The motion papers indicate that a Dr. Moadal had provided plaintiff, as defendant's counsel in the Family Court matter, with an updated Financial Disclosure Form, but defendant, himself, refused to complete an updated form and directed plaintiff not to submit such "to avoid disclosing his increased income, and, in turn, to avoid the increased financial liability for child support and an increased allocable percentage of related

³In rebuttal of defendant's first legal malpractice counterclaim of non-vigorous representation of defendant, plaintiff submits an October 8, 2003 letter, wherein defendant specifically thanks plaintiff for his "vigorous" representation of defendant (see Notice of Motion, Exhibit G).

support items in accordance with the provision of his Post Nuptial Agreement” (see Reply Affidavit, ¶ 6). In short, plaintiff states that “there was no failure to file the Form...but a refusal by Mr. Sernick to file the Form” (*id.*). Thus, he concludes, due to the failure to provide such, the Family Court did not issue an order granting defendant attorney fees.

Ordinarily, where there are conflicting affidavits, such as here, summary judgment will be denied (see *Loyal Supply Corporation v Gregg*, 202AD2d 836, 838 [3rd Dept 1993]). Here, however, plaintiff has substantially rebutted the defendant’s affirmative defenses and five counterclaims of malpractice.

To date, defendant has paid plaintiff a total of \$30,000.00 in attorney fees with an additional \$37,110.91 allegedly still being owed. Ironically, despite defendant’s failure to provide any documentation in support of his allegations of overcharging and invoice inaccuracies related to the retainer, a basis for defendant’s claim of the existence of triable questions of fact arises from the inconsistencies found in plaintiff’s own letter documentation and invoice exhibits. For example, the court notes that, contrary to some of the assertions in the January 13, 2005 and February 9, 2005 letters between plaintiff and defendant, the invoices reflect a retainer fee of neither \$5,000.00 nor \$3,750.00, but of only \$1,500 in the January 31, 2002 invoice. Another example is that of when the first payment was made. The invoices reflect that the first payment from defendant for services rendered by plaintiff was not \$3,032.50 but that of \$900.00 dollars in the December 12, 2002 invoice. The conflicting statements in plaintiff’s affidavits and letter exhibits, when compared with the ledger accounts in plaintiff’s invoice exhibits suggests a scintilla of credibility to the overcharge claims based on the alleged “oral” [emphasis added], not written, discussions between plaintiff and defendant.

Despite these inconsistencies, there is, nonetheless, a basis for granting partial summary judgment to plaintiff. An "account stated" is 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 (see *Parker, Chapin, Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 377 [1st Dept 1977]). A party who receives accounts for services rendered and does not expressly assent, but fails to object to them within a reasonable time, will be bound by them as accounts stated (see *Fink, Weinberger, Fredman, Berman & Lowell v Petrides*, supra, at 781). The making of partial payments of an account constitutes an acknowledgment of the validity of the bill, thereby establishing it as an account stated (see *Parker, Chapin, Flattau & Klimpl v Daelen Corp.*, supra, at 378). It is evident to this court that, when defendant first raised a dispute over the initial amount of the retainer fee by suggesting that the amount owed should be reduced from \$37,110.91 to \$32,110.91 and then made an offer to send payments of \$500.00 per week until the amount due was paid in full, defendant admitted that he owes plaintiff at least \$32,110.91.

Accordingly, based on the unresolved allegations of overcharges and disputes over the exact amounts of the retainer fee and the defendant's first payment, and the existence of certain inconsistencies as reflected on some of the invoices, it is

ORDERED that the motion is granted to the extent of granting partial summary judgment in favor of the plaintiff and against defendant as follows:

1. Plaintiff is granted judgment on the first cause of action to the extent of finding that the defendant has breached the retainer agreement, but is denied as to the amount of damages resulting from that breach;

2. Plaintiff is granted judgment on the second cause of action for account stated to the extent of finding that plaintiff is entitled to attorneys fees arising from the Nassau County Family Court proceedings, at a minimum, in the amount of \$25,000.00 (the lump sum payment previously offered by plaintiff to defendant in his February 9, 2005 response letter), but is denied as to the \$12,110.91 remainder from the \$37,110.91 being sought, together with interest at the rate of 9% per annum from the date of February 9, 2004 until entry of judgment, as calculated by the Clerk of the Court, 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;

3. The first cause of action and that portion of the second cause of action for an account stated in the amount of \$25,000, and interest accruing therefrom, is severed, and the Clerk is directed to enter judgment accordingly;

4. The action shall continue as to that remaining portion of the second cause of action addressing the \$12,110.91 remainder, and as to the third cause of action for attorney fees arising from commencement of this enforcement action, pursuant to the retainer agreement; and it is further

ORDERED that, pursuant to CPLR 4317(b), the issues of overcharges and the exact amount of the retainer fee is referred to a Special Referee to hear and report, with recommendations, as to (1) what was the actual retainer fee agreed to by the parties; (2) what invoice, if any, actually reflects that retainer fee; (3) which of the 18 invoices attached as Exhibit E are being disputed (*i.e.*, as reflected in ¶6 of defendant's affidavit referencing the Schecter papers); (4) what charges, using the Schecter papers, if any, were either excessive or for services not rendered; and (5) what portion of the \$12,110.91 remainder should be paid to plaintiff, if any,

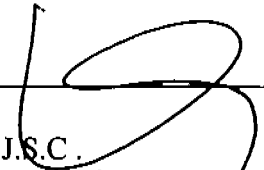
except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee shall determine the aforesaid issues; and it is further

ORDERED that the remainder of this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Motion Support Office (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the matter of the propriety of awarding attorney fees for this action will be resolved upon receipt and confirmation of the referee's report by this court.

Dated: 2/16/06

ENTER: _____

 J.S.C.

HON. MARILYN SHAFER, JSC

FILED
 FEB 28 2006

COUNTY CLERK'S OFFICE
 NEW YORK

45

⁴The following is an encapsulation of the invoice data, absent an explanation of the charges:

<u>Invoice date</u>	<u>Costs/disbursements</u>	<u># of hours</u>	<u>New charges</u>	<u>Payment</u>	<u>Balance Due</u>
January 31, 2002	None	6.90	\$2,587.00 \$1,500.00 retainer	None	\$4,087.50
April 15, 2002	\$70.00 bank fees plus costs for bounced check	1.00	\$375.00	None	\$3,032.50
July 10, 2002	None	8.20	\$3,075.00	None	\$3,075.00
August 30, 2002	\$80.00	14.80	\$5,500.00	None	\$5,630.00
November 1, 2002	\$216.40	51.00	\$19,125.00	None	\$20,221.40

December 18, 2002	\$118.10	14.70	\$5,512.00	\$900.00	\$24,952.00
February 11, 2003	None	2.10	\$787.50	\$5,630.00	\$17,787.50
				\$2,322.00	
March 31, 2003	None	—	None	None	\$17,787.50
May 8, 2003	\$94.00	2.60	\$975.00	\$4,500.00	\$14,356.50
August 8, 2003	\$50.00	5.40	\$2,025.00	\$1,000.00	\$13,181.50
				\$2,250.00	
September 19, 2003	\$92.01	13.60	\$5,025.00	\$500.00	\$17,798.51
November 25, 2003	\$204.40	27.00	\$10,125.00	\$500.00	\$21,627.91
				\$6,000.00	
January 20, 2004	\$79.20	42.50	\$15,937.50	\$1,000.00	\$35,144.61
				\$1,000.00	
				\$500.00	
March 8, 2004	\$102.40	22.10	\$8,287.50	\$4,000.00	\$39,534.51
May 21, 2004	\$191.10	15.20	\$5,700.00	\$2,000.00	\$35,925.61
				\$7,500.00	
June 30, 2004	\$205.90	11.5	\$4,312.50	\$3,000.00	\$35,925.61
August 6, 2004	\$41.90	6.2	\$2,325.00	\$4,500.00	\$35,310.91
October 6, 2004	None	4.8	\$1,800.00	None	\$37,110.91
				\$30,500.00	

⁵A review of the Exhibit E invoices reflect that the January 31, 2002 invoice indicates \$1,500.00 as the "requested retainer" with a total due of \$4,087.50. In contrast to plaintiff's January 31, 2002 invoice reflecting a total due of \$4,087.50, the April 15, 2002 invoice no longer distinguishes the \$1,500.00 retainer fee, and does not reflect any payments being made, yet lists the total due as \$3,032.50. The July 10, 2002 invoice does not reflect any payments made or any outstanding balance due from the April 15, 2002 bill. The August 30, 2002 invoice does not reflect any payments made or any outstanding balance being due from the July 10, 2002 bill. The November 1, 2002 invoice does not reflect any payments made or fees incurred in the bouncing of the October 31, 2003 check, but, instead of listing an outstanding August 30, 2002 balance of \$5,630.00, the invoice lists an outstanding balance due of only \$800.00. The June 30, 2004 invoice contains an addition error on the balance due which is corrected on the August 6, 2004 invoice. The October 6, 2004 invoice reflects a final balance due of \$37,110.91.