

Skolnick & Hochberg, P.C. v Infra-Structures, Inc.

2006 NY Slip Op 30761(U)

February 27, 2006

Supreme Court, New York County

Docket Number: 104945/2005

Judge: Karen S. Smith

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

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SKOLNICK & HOCHBERG, P.C.,

Plaintiff,
-against-

Index no.: 104945/2005
Motion seq.: 001
Motion date: 01/06/06

INFRA-STRUCTURES, INC.,

DECISION AND ORDER

Defendant.

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PRESENT: KAREN S. SMITH, J.S.C.:

Plaintiff's motion for summary judgment is denied.

FILED
MAR 08 2006
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Plaintiff, Skolnick & Hochberg, P.C. (hereafter referred to as "S&H") brought this action to collect legal fees in the amount of \$259,020.30 allegedly due and owing from the defendant, Infra-Structures, Inc. (hereafter referred to as "ISI"). The substance of S&H's complaint is that it represented ISI as general counsel for many years. S & H further alleges that, while ISI paid S&H substantial sums of money during those years, ISI was always behind in paying for all of the services S&H was providing, as a result of which, the outstanding balance now alleged to be due accrued over the course of the parties relationship. S&H's complaint alleges causes of action for breach of contract, quantum meruit and account stated.

S&H now moves for summary judgment on its complaint contending that no triable issues of fact exist. S&H argues that it has rendered regular invoices which justify amounts it now claims are due and that those invoices have been retained by ISI without objection.

Therefore, S&H seeks a summary judgment for the full amount set forth in its complaint on the account stated cause of action. S&H also argues that ISI has not challenged the fact that it is liable to S&H for outstanding fees but is, instead, attempting to challenge the amount due. Therefore, as alternative relief, S&H seeks summary judgment on the issue of liability and a hearing to assess damages.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In support of its motion, S&H has submitted pleadings consisting of the summons and complaint and ISI's answer. Additionally, S&H has submitted numerous invoices and other communications between S&H and ISI in connection with the outstanding legal fees at any given time.

Assuming *arguendo*, that all of the documents S&H has submitted are admissible evidence¹, they do not constitute evidence demonstrating the absence of any material issues of

¹It is not necessary at this stage in the proceedings for the court to parse through each of the submitted exhibits to determine if all the information they contain qualifies as evidence admissible at trial. For example, the document offered as Exhibit E contains some information which appears to be hearsay. The court's consideration of the documents, for purposes of the instant motion, shall not be construed as a ruling of admissibility that is binding upon the court or the parties for any other purposes.

fact sufficient to establish a *prima facie* showing of S&H's entitlement to judgment as a matter of law. None of the documents, either individually or collectively, establishes any calculation setting forth the amount S&H alleges to be the current outstanding balance due for legal fees. In fact, other than one document which is titled "Skolnick & Hochberg Payments" and totals \$258,203.19 (last page of Exhibit D to moving papers) none of the documents attached to S&H's motion papers contains any sum even close to the amount alleged to be due in the complaint. Further, assuming *arguendo* that ISI received and retained these documents without comment, ISI could not have determined how much, if anything, was properly due and owing to S&H based upon them. The affidavit submitted by S&H in support of the motion does not cure the problem. Aside from its self-serving content and the fact that it is testimonial in nature (thus requiring an assessment of credibility, which is not an appropriate consideration in a summary judgment motion), it too fails to provide any indication of how the amount alleged to be due accrued or was calculated. If, in fact, S&H has provided ISI with regular invoices detailing the balance due at any given time based upon legal services actually provided less payments actually received, S&H has not attached them to its motion papers.

Since S&H's motion papers do not establish the absence of any material issues of fact with respect to the allegations contained in its complaint, the burden of producing evidence never shifted to ISI, the court need not consider the adequacy of ISI's opposition papers and S&H's motion must be denied. Accordingly, it is;

ORDERED: that S&H's motion for summary judgment is denied and it is;

FURTHER ORDERED: that counsel for all parties in this action and the related cases pending under Index Number 601309/2005 and 105049/2005 shall appear before Part 44 of this

court in Room 581 at 111 Centre Street, New York, New York on March 24, 2006 at 9:30 AM
for a status conference.

The foregoing constitutes the decision and order of this court.

Dated: February 27, 2006

ENTER:



Hon. Karen S. Smith, J.S.C.

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