

**Plitman v Jewell**

2007 NY Slip Op 30065(U)

March 8, 2007

Supreme Court, New York County

Docket Number: 0104878

Judge: Leland G. DeGrasse

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

PRESENT: **HON. LELAND DEGRASSE**  
*Justice*

PART 25

Index Number : 104878/2006

INDEX NO. 104878/06

PLITMAN, DAN

MOTION DATE 12/4/06

vs

JEWELL, R. KENNETH

MOTION SEQ. NO. 002

Sequence Number : 002

MOTION CAL. NO. 96

SUMMARY JUDGMENT

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

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION.**

MAR 08 2007

Dated: \_\_\_\_\_ MS \_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION [\* 1]

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK : I.A.S. PART 25

----- X  
DAN PLITMAN, :  
 : Index No.: 104878/2006  
 :  
 Plaintiff, :  
 : Cal. No. 96 of 12/4/06  
 :  
 -against- :  
 :  
 :  
 R. KENNETH JEWELL, ESQ. :  
 :  
 :  
 Defendant. :  
----- X

DeGRASSE, J.:

Defendant, R. Kenneth Jewell, Esq., acting *pro se*, moves pursuant to CPLR 3212 for summary judgment. Plaintiff, Dan Plitman, cross-moves for the same relief.

This action was commenced by plaintiff for *de novo* review following an attorney fee dispute arbitration award rendered under the New York State Fee Dispute Resolution Program (Rules of the Chief Administrator [22 NYCRR] § 137.0 *et seq.*) on March 13, 2006. Plaintiff seeks a declaration that he is not personally liable to defendant for legal services rendered to Bici Imports LLC [the "LLC"]. The complaint alleges that plaintiff entered into a retainer agreement with defendant for the performance of legal services "in connection with the formation of Bici Imports LLC as a limited liability corporation." It is also alleged that although "[d]efendant was only partially paid" for the legal services he rendered to the LLC, "[p]laintiff does not have any personal liability for the fees charged by defendant."

Defendant contends that he is entitled to summary judgment on his claims for an account stated against plaintiff in the amount of \$20,701.08 for legal services rendered to the LLC because plaintiff is personally responsible for the LLC's outstanding fees. Defendant bases his claim upon the Letter of Engagement which was signed by the parties on September 3, 2003. Defendant maintains that the Letter of Engagement obligates plaintiff to pay him for the legal services he rendered to the LLC. Defendant also bases his claim upon an e-mail that he received from plaintiff on May 24, 2005, which defendant maintains is a written admission of plaintiff's promise to pay the LLC's legal fees.

In his affidavit in opposition to the motion and in support of his cross motion, plaintiff asserts that he did not sign the Letter of Engagement in an individual capacity nor did he sign any instrument personally guaranteeing any debts of the LLC. In support of his contention, plaintiff submits a computer printout from the New York Department of State showing that the LLC was formed on September 9, 2003, and that plaintiff has agency authority to act for the LLC. As such, plaintiff maintains that since all of his dealings with defendant were on behalf of the LLC, he cannot be held personally liable for any fees arising out of the LLC's agreement with defendant.

"When reviewing a motion for summary judgment, the focus of the court's concern is issue finding, not issue determination" (*Renda v Frazer*, 75 AD2d 490, 495 [1980]). Thus, summary judgment is to be granted only when there are no genuine issues of material fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). In opposing a motion for summary judgment, the adverse party must produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

As its name suggests, a limited liability company is validly and legally formed to protect against personal liability. Limited Liability Company Law (“LLCL”) § 609 (a) provides in pertinent part:

“Neither a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited liability company ... is liable for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities or participating ... in the conduct of the business of the limited liability company.

Thus, as a member of the LLC, plaintiff cannot be held personally responsible for the obligations of the LLC, unless he agreed to such liability pursuant to LLC Law § 609 (b) which provides in pertinent part:

“Notwithstanding the provisions of subdivision (a) of this section, all or specified members of a limited liability company may be liable in their capacity as members for all or specified debts, obligations or liabilities of a limited liability company if (1) a statement to such effect is specifically contained in the articles of organization of the limited liability company and (2) any such member so liable shall have (i) specifically consented in writing (A) to the adoption of such provisions or (B) to be bound by such provision or (ii) specifically voted for the adoption of such provision. ...”

Under the section entitled “Our Agreement” the Letter of Engagement sets forth the terms of the parties’ relationship and states in pertinent part:

“The law firm of Ebert & Jewell, LLC (hereinafter referred to as ‘we’, ‘us’ and ‘attorneys’) agrees to represent Dan Plitman, as an individual acting on behalf of Bici Imports, in the incorporation of their entity known as ‘Bici Imports’ under the New York Limited Liability Company Law. At such time when Bici Imports is recognized by the New York State Department of State as a limited liability company organized under the laws of the State of New York, the attorneys will then represent Bici Imports in all its legal affairs, and cease

representing Dan Plitman as an individual acting on behalf of Bici Imports. The representation is ongoing for an indefinite period of time, and can be terminated only upon fifteen (15) days written notice from an officer of Bici Imports, LLC once it is recognized by the NYS Secretary of State.”

It is well settled that the interpretation of an unambiguous written contract is a matter for the court which must ascertain the intention of the parties from the language which they have employed" (*Carvel Corp. v Rait*, 117 AD2d 485, 487 [1986]; *see also Sutton v East River Sav. Bank*, 55 NY2d 550, 554 [1982]; *Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 171-172 [1973]). Here, the plain and literal reading of the Letter of Engagement establishes that defendant agreed “to represent [plaintiff], as an individual acting on behalf of [the LLC].” Furthermore, upon the LLC’s formation, the parties agreed that defendant “[would] then represent [the LLC] in all its legal affairs, and cease representing [plaintiff] as an individual acting on behalf of [the LLC].” Thus, it is clear that plaintiff entered into the agreement with defendant solely in a representative capacity, and did not assume personal responsibility for the LLC’s contractual obligations.

Defendant’s contention that the e-mail he received from plaintiff on May 24, 2005 is sufficient proof of plaintiff’s intention to be personally responsible for the LLC’s indebtedness to defendant is without merit. The May 24<sup>th</sup> e-mail states, in pertinent part:

“Since you have forgotten all that there is no point in arguing about it, but like I said yesterday I could not make any promises on something I do not know about. I owe over \$100K personally that is personally guaranteed. My original intentions were to get back on my feet and start paying that off first. Then after that was paid off I would look to pay off certain friends etc. You were on that list, but you have decided to throw our friendship out of the door and threaten me with a lawsuit. Because of you actions in the past day I am not personally obligated to pay you and I also choose not to pay you back from any future personal earnings.”

The language in the e-mail does not obligate plaintiff to be personally liable for the claimed outstanding legal fees. Rather, the e-mail establishes that after plaintiff finished paying off the "\$100K ... that [he] personally guaranteed," plaintiff had hoped to "pay off certain friends," one of which included defendant. This, without more, is insufficient to demonstrate that plaintiff intended to perform the obligations contractually imposed upon the LLC.

Here, there are no questions of fact to be determined at trial under which plaintiff could be found personally liable to defendant for legal services rendered to the LLC. Since plaintiff has made a prima facie showing of entitlement to judgment as a matter of law, and defendant has failed to raise a triable issue of fact, summary judgment is granted in favor of plaintiff. Defendant's account stated counterclaim is fatally unsupported by any allegation of when his billing statements were mailed or whether he had a regular office mailing procedure (*see e. g. Morrison, Cohen, Singer & Weinstein, LLP v Brophy*, 19 AD3d 161, 162 [2005]). Defendant's counterclaim for breach of an alleged agreement to furnish him with more business is facially deficient.

Accordingly, defendant's motion for summary judgment is denied. The cross motion by plaintiff for summary judgment against defendant on his cause of action for a declaratory judgment is granted. It is adjudged and declared that plaintiff has no obligation to pay defendant for the legal services he rendered to Bici Imports LLC. Settle judgment.

DATED:

MAR 9 2007

MAR 08 2007



J.S.C.

HON. LELAND DeGRASSE