

Nicoll & Davis LLP v Ainetchi

2007 NY Slip Op 30942(U)

April 20, 2007

Supreme Court, New York County

Docket Number: 0602324/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE PART 10
Justice

Nicoll + Davis LLP

INDEX NO. 602324/06

Isaac Aneteh
et al

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

FILED
APR 25 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: April 20, 2007

J. Gische
HON. JUDITH J. GISCHE 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 of New York: Part 10

-----X
Nicoll & Davis LLP,

Plaintiff,

Decision/Order

-against-

Index# 602324/2006
Mot. Seq. # 001, 003

Isaac Ainetchi, Harriet Krasnow, and
AMHI Corporation,

Defendants.

Present:
Hon. Judith J. Gische
J.S.C.

-----X
Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	NUMBERED
Notice of Motion(seq # 001), AJD affirm, exhibits.....	1
Notice of Cross-Motion, IA affd., HK affd., SBR affd., exhibits.....	2
Notice of Motion (seq # 003), BAS affirm, exhibits.....	3
IA affd. In Opp., exhibits.....	4
Reply affirm, exhibits.....	5

Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff is a law firm. It was retained by defendants to do legal work on several matters. It has filed an action seeking unpaid legal fees. The complaint alleges three causes of action respectively for breach of contract [1st cause of action]; *quantum meruit* [2nd cause of action] and account stated [3rd cause of action].

Defendants Ainetchi and Krasnow (collectively the "individual defendants") jointly filed an answer with two counterclaims for legal malpractice. The first counterclaim relates to an action in New Jersey Superior Court entitled Isaac Ainetchi and Harriet

Krasnow v. KBM Manufacturing and Boris Karpovsky ("KBM case"). The second counterclaim relates to an action in New York State Supreme Court entitled Isaac Ainetchi and Harriet Krasnow v. 500 West End LLC ("500 West End case"). Corporate defendant, AMHI corporation ("AMHI"), interposed a separate answer which also contain two counterclaims for legal malpractice. The first counterclaim concerns an action entitled AMHI Corpration v. Zeil and Helene Feldman ("Feldman case"). The second counterclaim relates to a matter identified as AMHI v. Ringo ("Ringo matter").

Plaintiff has moved for summary judgment on its third cause of action for account stated (motion seq # 001). Defendants have cross-moved for: [1] summary judgment dismissing the complaint, [2] attorneys fees and [3] sanctions. Issue has been joined, and the motion is timely. The court will, therefore, consider the request for summary adjudication on the merits. CPLR §3212; Brill v. City of New York, 2 NY3d 648 (2004).

Plaintiff has separately cross-moved to dismiss all four of the malpractice counterclaims based alternatively on documentary evidence and failure to state a cause of action (mot. Seq. # 003). Defendants oppose the motion. Since the motions and cross-motion all are interrelated, the court consolidates all of them for consideration and disposition in this single decision and order.

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where the proponent fails to make out its prima facie case for summary judgment, then the motion must be denied, regardless of

[* 4]

the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). If the burden is met then the party opposing the motion must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Once the court identifies a disputed issue of fact, the inquiry ends and the parties must wait to resolve their disputes at trial. Brunetti v. Musallam, 11 AD3d 280 (1st dept. 2004).

In this case each party seeks summary judgment in their favor. They each bear the initial burden of proving their entitlement to such relief and the secondary burden of opposing the other parties' right to same.

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. Shea & Gould v. Burr, 194 AD2d 369 (1st dept. 1993). A client's receipt of a law firm's invoices seeking payment for professional services rendered, which are retained without objection within a reasonable time, is the basis of a cause of action for an account stated. Ruskin, Moscou, Evans & Faltishek v. FGH Realty Credit Corp., 228 AD2d 294 (1st dept. 1996).

Discussion

Plaintiff claims that it entered into two written retainer agreements with defendants to perform legal services for them. It claims that it rendered invoices for its

work on various matters, beginning in August 2005 and regularly thereafter. It also states that no objection to the billing was ever made until an answer was interposed in this matter. Although the answer is undated, this action was not commenced until June 9, 2006.¹

A review of the documents submitted by plaintiff as exhibits to its motion is not necessarily consistent with their contentions in support of their claim. The retainer agreements submitted apply only to two litigations that were brought in the State of New Jersey. Much of the work, for which fees are sought, was performed in the action brought in the New York State Supreme Court of New York County. No distinction is made by plaintiffs regarding the work performed on matters for AMHI, the corporate defendant and other matters that appear to involve only the individual defendants. No explanation or legal argument is advanced regarding why AMHI is responsible for the legal debts of the individual defendants and *vice versa*. The invoices were all rendered at one time, on or about August 12, 2005. The legal work had been ongoing for over two years prior to that date. Regular bills were not sent when the vast majority of the work was performed, nor were bills sent in accordance with the billing procedures outlined in the retainer agreements that plaintiff relies upon. Morrison, Cohen, Singer & Weinstein v. Brophy, 19 AD3d 161 (1st dept. 2005). The court finds that plaintiff has failed to make out a *prima facie* case entitling it to summary judgment at this time on

¹The pleadings were not provided as part of the motion or cross-motion for summary judgment. They were, however, provided as part of the motion to dismiss the counterclaims. Since the two motion have been consolidated, the court overlooks this technical defect in the summary judgment motion.

the cause of action for an account stated.

Even were the court to find that plaintiff had established a *prima facie* cause of action for account stated, summary judgment would be denied because there is an issue of fact concerning whether timely objections were interposed to the bills that the firm sent. Although plaintiff claims that defendants made no objections to the bills until they filed their answer in this case, defendants have produced a letter dated December 20, 2005 (written before this action was even commenced) which would contradict that. In this letter, the defendants object to the bills and any claim by plaintiff that legal fees were outstanding at the time. The letter also refers to conversations about defendants' objections to the bills.

Defendants have cross-moved for summary judgment. They claim that because there was never a separate retainer agreement signed for the New York State Supreme Court matter, plaintiff is barred from collecting fees, as a matter of law, regardless of whether it provided services or not. They argue this failure would preclude any theory of recovery, even *quantum meruit*.

22 NYCRR 1215.1 requires that attorneys enter into either a letter of engagement or a formal retainer agreement with clients that they are representing on non-matrimonial civil matters.² As was made clear in the recent appellate division case of Seth Rubenstein, P.C. v. Cynthia Ganea (AD3d, 2007 Slip Op 02923 [2nd Dept 2007]) failure to strictly comply with the new retainer agreement rules does not

²Retainer agreements for matrimonial matters are covered under a separate set of rules.

automatically preclude recovery of fees for services provided. See also: Grossman v. West 26th Corp., 9 Misc.3d 414 (N.Y. City Civ. Ct.,2005); In re Estate of Feroleto, 6 Misc.3d 680 (N.Y.Sur. 2004). Nor does it preclude recovery by a law firm in *quantum meruit* for the fair value of its services. Seth Rubenstein, P.C. v. Cynthia Ganea, *supra*. The cross-motion for summary judgment must, therefore, be denied.

Defendants' additional claims for relief are unsupported and unsupportable.

Although defendants have cross-moved for attorneys fees, they make no factual or legal showing of entitlement to such relief. It is well settled that in the absence of a statutory authority, or unless the parties have otherwise agreed or stipulated, "a civil litigant may [not] sue his adversary to recover fees paid to his attorney for legal services." Rahabi v. Morrison, 81 A.D.2d 434 (2nd Dept. 1981); City of Buffalo v. J. W. Clement Co., 28 N.Y.2d 241(1971).

Although defendants have also cross-moved for sanctions, they have not shown that plaintiff's efforts to recover fees for legal work rendered is frivolous within the meaning of 22 NYCRR 130-1.1.

Accordingly, defendants' cross-motion for summary judgment is denied.

Plaintiffs have separately moved to dismiss all four counterclaims for professional malpractice. To the extent that the motion is based upon traditional notions of failure to state a cause of action, the complaint is construed in favor of the plaintiff and it is entitled to the benefit of every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). Affidavits may be relied upon only to the extent they amplify the claim in the challenged pleading.

Rovello v. Orofina Realty Co., Inc., 40 NY2d 633 (1976); Gem Services of New York Inc. v. United General Title Ins. Co., 28 AD3d 516 (2nd dept. 2006). To the extent the motion to dismiss is based upon documentary evidence, the documents proffered must indisputably refute the allegations. Levenherz v. Povinalli, 14 AD3d 658 (2nd dept. 2005); Standard Chartered Bank v. D. Cahbot, Inc., 178 AD2d 112 (1st dept. 1991).

Plaintiff claims that the allegations of malpractice are vague and conclusory; that they do not set out facts that would support a claim for malpractice and that, in any event, the allegations do not establish the "but for" causation necessary to advance a claim for legal malpractice. These arguments are examined in the context of the specific legal matters that underlie defendants claims of malpractice.

An 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. In order to establish proximate cause, a plaintiff must demonstrate that but for the attorney's negligence, s/he would have prevailed in the underlying matter or would not have sustained any ascertainable damages. Brooks v. Lewin, 21 AD3d 731 (1st dept. 2005). The failure to establish proximate cause mandates the dismissal of a legal malpractice action, regardless of the attorney's negligence. Reibman v. Senie, 302 AD2d 290 (1st dept. 2003).

KBM Litigation

The KBM litigation concerned claims by the individual defendants that KBM had failed to deliver cabinetry they ordered. The counterclaim alleges that plaintiff "completely failed to seek, document or enter into the record the settlement agreement

between the parties." The complaint further alleges that as a result, the individual defendants had to commence a new action for enforcement. Plaintiffs produced a court transcript irrefutably demonstrating that the matter had been settled in open court before the Judge in New Jersey. A follow up letter memorializing the terms was sent to KBM's counsel. The individual defendants now contend (In affidavits) that the malpractice occurred after the in court settlement and consisted of not finalizing the settlement with appropriately executed documents.

In New Jersey (like New York) settlements that are made in open court and on the record are enforceable by the court, without the need for the execution of further documents by the parties. Jennings v. Reed, 381 NJ Super 217 (AD 2005); Newell v. Hudson, 376 NJ Super 29 (AD 2005). At bar, the agreement, which contained all of the material terms of the settlement, was made in open court by the attorneys with all the clients present. It did not require other agreements to be enforceable. While defendants claim they had to go to court again on the matter, they do not dispute that it was due to the failure of their adversary to live up to the terms of the in court settlement. Defendants have not alleged any facts from which to conclude that the in court agreement was incomplete or that the actions of plaintiff were responsible for KBM's failure to live up to the terms of the settlement reached. They have not otherwise put forth facts in support of their contention that plaintiff failed to finalize the settlement.

This counterclaim for malpractice must, therefore, be dismissed.

500 West End case

The individual defendants sued 500 West End for specific performance and

damages in connection with the purchase and construction of a residential condominium unit. Plaintiffs were co-counsel to the law firm of Connors & Sullivan, PC. The matter was tried and defendants were successful to the extent that they were granted specific performance and \$30,000 in damages for construction defects. Defendants claim that they were entitled to, but did not get, an award of greater construction damages in the amount of \$700,000. In the original counterclaim defendants generally alleged that the unfavorable result was due to plaintiff's failure to properly advise, supervise, maintain and submit evidence and testimony at trial. In affidavits they claim that it was the failure of plaintiff to call an expert witness with knowledge about the conditions in the condominium that resulted in their being unable to collect the full amount of damages.

Although plaintiff claims that as the second seat attorney in the action, it was not responsible for calling witnesses, defendants allege that they had such a responsibility. This is a factual, not legal, dispute and does not defeat a pleading.

A failure to call a witness may in certain circumstances constitute malpractice. Weil, Gotshal & Manges, LLP v. Fashion Boutique, 10 AD3d 267 (1st dept. 2004); Berkeley v. Liddle, 247 AD2d 231 (1st dept. 1998). The issue of whether the failure in this case is malpractice or a second guessing of legal strategy cannot be ascertained at the pleading stage. The issues raised by plaintiff are more properly addressed at trial or in a summary judgment motion. See: LIC Commercial Corp. v. Rosenthal, 202 AD2d 644 (2nd dept. 1994).

The motion to dismiss this counterclaim is, therefore, denied.

Feldman case

AMHI manufactures and installs luxury wall and ceiling finishes. It hired plaintiff to commence an action against the Feldmans for non-payment for services, materials and supplies furnished and installed in the Feldmans' home. AMHI and the Feldmans had a written agreement that specified work would cost \$150,000 and that "add ons" would be billed separately. AMHI had a dispute about whether certain work was included in the contract or was add on work that entitled AMHI to additional compensation. AMHI (as amplified in affidavits) alleges that as a result of plaintiff's failure to conduct timely discovery, they were prevented from getting any discovery in the Feldman case. They have presented two court orders which deny them the right to any discovery including the right to inspect the Feldman home. AMHI claims that the absence of discovery prevented them from proving the nature of the actual work done and they only recovered the \$150,000 contract price as a result. Plaintiff claims that AMHI, who did the work, had knowledge of what was actually done and, therefore could have proven its claim without discovery.

Under certain circumstances a lawyer's failure to obtain discovery in a pending action can constitute malpractice. Bernstein v. Oppenheim & Co., 160 AD2d 428 (1st dept 1990). The issue of whether the failure to obtain discovery in this case constitutes malpractice cannot be resolved at the pleading stage. The issues raised by plaintiff are more properly raised at trial or in a summary judgment motion.

Ringo matter

AMHI alleges in its second counterclaim that plaintiff "failed to properly submit/

file and/or renew a mechanic lien for monies owed to AMHI" by Ringo. Plaintiff has, however, produced documentary evidence of the filed mechanic lien. AMHI does not raise any opposition to the motion.

This counterclaim is, therefore, dismissed.

Fraudulent Billing

Throughout the counterclaims are generalized allegations of fraudulent billing. Plaintiff moves to dismiss these "counterclaims." Fraud requires specificity not otherwise apparent in the allegations made. CPLR § 3016. The court, therefore, grants the motion to the extent that none of the remaining counterclaims supports a separate cause of action against plaintiff for fraudulent billing.

Conclusion

In accordance herewith it is hereby:

ORDERED that plaintiff's motion for summary judgment on its third cause of action is denied, and it is further

ORDERED that defendants cross-motion for summary judgment dismissing the complaint is denied, and it is further

ORDERED that defendants cross-motion for legal fees is denied , and it is further

ORDERED that defendants cross-motion for sanctions is denied, and it is further

ORDERED that plaintiff's motion to dismiss the counterclaims is granted to the extent that the First counterclaim contained in defendant Ainetchi and Krasnow's answer and the Second counterclaim contained in defendant AMHI's answer are

hereby dismissed, and it is further

ORDERED that plaintiff's motion to dismiss the counterclaims is denied with respect to the Second Counterclaim contained in defendant Ainetchi and Krasnow's answer and the First Counterclaim contained in defendant AMHI's answer and plaintiff is directed to interpose its reply to such counterclaims within 30 days of the date of this decision, and it is further


ORDERED that parties are required to appear before this court for a preliminary conference on **June 14, 2007 at 9:30 am** , and it is further

ORDERED that any requested relief not expressly granted herein is denied, and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
April 20, 2007

SO ORDERED:



J.G. J.S.C.

FILED
APR 26 2007
NEW YORK
COUNTY CLERK'S OFFICE