

**Rose v Guzov Ofsink, LLC**

2007 NY Slip Op 31240(U)

May 11, 2007

Supreme Court, Suffolk County

Docket Number: 0030012/2006

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
**DCM-J - SUFFOLK COUNTY**

**PRESENT:**

**Hon. Paul J. Baisley, Jr.**

\_\_\_\_\_  
JAMES ROSE

Plaintiff(s),

-against-

GUZOV OFSINK, LLC.

\_\_\_\_\_  
Defendant(s).

**ORIG. RETURN DATE:** February 5, 2007  
**FINAL RETURN DATE:** February 27, 2007  
**MTN. SEQ. #:** 001-MG

**PLTF'S ATTORNEY:**  
ROSENBERG & GLUCK, LLP  
1176 PORTION ROAD  
HOLTSVILLE, NY 11742

**DEFT'S ATTORNEY:**  
GUZOV OFSINK, LLC.  
DAMIEN MATTHEW BOSCO, ESQ.  
600 MADISON AVE, 14TH FLOOR  
NEW YORK, NY 10022

Upon the following papers numbered 1 to 32 read on this motion for partial summary judgment: Notice of Motion and supporting papers 1 - 9; Affirmation in opposition and supporting papers 10 - 25; Reply affidavit 26 - 30; Sur-Reply Affirmation and supporting papers 31 - 32; it is,

**ORDERED** that the motion (001) by the defendant for partial summary judgment on its counterclaims is granted as to the issue of liability on the part of the plaintiff to pay legal fees to the defendant law firm; and it is further

**ORDERED** that the complaint seeking a declaratory judgment that the plaintiff is not indebted to the defendant for legal services is dismissed and the action is to be continued as to the counterclaims as provided herein; and it is further

**ORDERED, ADJUDGED and DECLARED** that the plaintiff is indebted to the defendant for legal services; and it is further

**ORDERED** that with regard to the remaining issue as to the amount or extent of damages owed to the defendant, the parties are directed to appear, pursuant to 22 NYCRR 202.8(f), for a preliminary conference on May 24, 2007 at the Supreme Court Annex, DCM Part, Room 203A, One Court Street, Riverhead, New York at 10:00 a.m.

This action arises out of a fee dispute between the plaintiff and his former attorneys. On January 31, 2003, the plaintiff and the defendant entered into a written retainer agreement with regard to the providing of legal services required to preserve the assets of the plaintiff's mother's estate and to insure that no assets of said estate inured to the plaintiff's stepfather who was subsequently found guilty and sentenced for second degree murder of the plaintiff's mother.

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From January 31, 2004 until May 31, 2006, legal services were rendered in accordance with the retainer agreement, regular statements of monies paid and owed were provided to the plaintiff, no objections were allegedly made with regard to the items contained in those statements (until after the defendant informed the plaintiff that it would no longer represent him unless he made payments on his bill), arrangements for partial payments were made as well as acknowledgment of the balances owed.

When the plaintiff expressed concerns about the amounts charged - not the work done - the defendant informed the plaintiff he could go to arbitration or the firm would sue for the monies owed. The plaintiff went to arbitration and, after the arbitration, was given 30 days to bring this action to seek a de novo determination or accept the arbitration decision. The plaintiff chose to bring this action.

The defendant now seeks partial summary judgment on its counterclaims to the extent that the plaintiff is liable for payment as to the legal services rendered.

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In support of this motion, the defendant offers proof of the work performed, billed and the payments and credits accounted for. The defendant also argues on the basis of an account stated as well as in the alternatives of quantum meruit and unjust enrichment.

In a situation such as this where the defendant law firm shows that the client retained bills without making timely objections<sup>1</sup> and made partial payments as well as allegedly acknowledging the debt, a prima facie showing of an account stated is made (*see Morrison Cohen Singer and Weinstein v Waters*, 13 AD3d 51, 786 NYS2d 155 [1<sup>st</sup> Dept 2004]).

The burden now shifts to the plaintiff client to show there are triable issues of fact. In opposition to this motion, the plaintiff concedes the validity of the retainer agreement but argues that the defendant was in breach of the agreement because it mishandled certain matters and improperly billed. In support of these contentions, the plaintiff urges that it should be afforded the opportunity to have discovery to identify the alleged instances of mishandlings and improper billings.

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<sup>1</sup>The retainer agreement provides that the client has 30 days to apprise the law firm of any objections to any bill and failure to do results in the law firm concluding that there are no objections to that particular bill (Exhibit D to motion, page 5, Section 11).

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While the plaintiff client states that he did have discussions with regard to the amounts and rates of the charges, he does not indicate any substantial dispute as to legal services having been performed except with regard to one former partner whose services the firm agreed not to charge for as well as agreeing not to charge for any remedial work necessitated by that former partner. But with regard to issues regarding rates and amounts charged, the plaintiff client has sufficiently raised issues of fact.

Accordingly, the defendant law firm is entitled to partial summary judgment as to it having performed legal services and being entitled to payment for those services but the plaintiff client has raised questions of fact as to the amounts charged for those services. Since this decision only decides the plaintiff's liability to pay for the services and not the amounts due for the services, the plaintiff will be able to have discovery and his day in court with regard to amounts charged.<sup>2</sup>

This decision constitutes the order of the court.

Dated: *May 11 2007*

HON. PAUL J. BAISLEY, JR.  

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HON. PAUL J. BAISLEY, JR., J.S.C.

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In the defendant's reply affidavit, the law firm noted that the plaintiff's affidavit in opposition was not notarized but the court is satisfied with this oversight being corrected in the plaintiff's sur-reply.