

Portnoy & Gallagher, P.C. v Prospect Owner's Corp.
2007 NY Slip Op 31974(U)
July 3, 2007
Supreme Court, New York County
Docket Number: 0119138/2006
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

CAROL EDMEAD
J.S.C.

PRESENT:

Index Number : 119138/2006

PART 35

PORTNOY & GALLAGHER, P.C.

vs

PROSPECT OWNER'S

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO.

119138/06

HEARING DATE

6/27/07

HEARING SEQ. NO.

002

HEARING CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No JUL 06 2007

Upon the foregoing papers, It is ordered that this motion NEW YORK
COUNTY CLERK'S OFFICE

The within motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of plaintiff Portnoy & Gallagher, P.C. for an order pursuant to CPLR 3212, granting summary judgment to plaintiff as against defendant Prospect Owner's Corp. ("defendant") on the causes of action for Account Stated and for Breach of Contract, in the amount of \$33,555.22 plus interest, costs and attorneys fees or alternatively awarding plaintiff a Judgment on the merits and setting this matter down for a hearing on fees, is granted to the extent that summary judgment on the merits on the issues of account stated and breach of contract is found. It is further

ORDERED that an assessment of damages against defendant s Prospect Owner's Corp shall be held on September 10, 2007 at 10:00 a.m., in Part 40, located at 60 Centre Street, New York, New York, Room 242, before Justice Ira Gammerman, and it is further

Dated: 7/3/07

CAROL EDMEAD 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):

ORDERED that plaintiff serve a copy of this order with notice of entry upon counsel for defendant within 20 days of entry, and do as further.

ORDERED that plaintiff serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), file of a notice of issue and a statement of readiness, and pay the proper fees, if any, for the assessment hereinafter directed.

DATED 11/11/79

ENTERED [Signature] J.S.C.

Check one: FINAL DISPOSITION NONFINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

PORTNOY & GALLAGHER, P.C.

x

Plaintiff,

Index No. 119138/06

-against-

DECISION/ORDER

PROSPECT OWNER'S CORP.

Defendant.

EDMEAD, J.S.C.

x

MEMORANDUM DECISION

Plaintiff Portnoy & Gallagher, P.C. ("plaintiff") moves for an order pursuant to CPLR 3212, granting summary judgment to plaintiff as against defendant Prospect Owner's Corp. ("defendant") on the causes of action for Account Stated and for Breach of Contract, in the amount of \$33,555.22 plus interest, costs and attorneys fees or alternatively awarding plaintiff a Judgment on the merits and setting this matter down for a hearing on fees.

Plaintiff's Contentions

Plaintiff rendered legal services to defendant in connection with an action entitled *Prospect Owners v Gloria Sandmeyer* commenced in the Supreme Court, New York County, Index No. 604112/02 (the "Prior Action").

Due to the failure of defendant to cooperate and its refusal to pay legal fees owed to plaintiff, the Court in the Prior Action relieved plaintiff as counsel to defendant. Plaintiff moved by Order to Show Cause to be relieved as defendant's counsel in the Prior Action. Unpaid legal fees were raised as a basis for plaintiff's application to be relieved and were stated in plaintiff's moving papers. Defendant did not oppose plaintiff's application or contest plaintiff's account

stated set forth therein. Defendant simply ignored the Order to Show Cause even though defendant was represented by counsel at that time. In fact, defendant was then represented by the same counsel representing defendant in the instant action, and, at the time the Order to Show Cause was signed in the Prior Action, Cory Weiss of defendant's then and current counsel's firm, was present.

The time for defendant to contest plaintiff's account stated has passed. And, the affirmation submitted with plaintiff's application to be relieved in the Prior Action confirmed that defendant admitted its receipt of plaintiff's invoices and did not dispute them.

Further, by letter dated February 12, 2003, plaintiff confirmed the financial arrangement agreed to between plaintiff and defendant for plaintiff's services in the Prior Action. The arrangement called for fees to be billed by plaintiff at the rate of \$200.00 per hour. This arrangement was never refuted or objected to by defendant, and, in fact, defendant paid some invoices sent in connection with the Prior Action and for other matters in accordance therewith.

After plaintiff was relieved as counsel to defendant, plaintiff sent a letter dated November 9, 2006 with a Notice of Client's Right to Arbitrate a dispute over attorney's fees, to both defendant and to defendant's managing agent, Robert Kaye ("Kaye"). No response, objection or any communication whatsoever was received by plaintiff thereafter. No response translates into a waiver of the Right to Arbitrate and no response translates into an admission of the legal fees and disbursements due plaintiff. An account stated was presented on numerous occasions and not objected to.

As to defendant's breach of contract, plaintiff fully performed pursuant to the agreement by rendering legal services for defendant in the Prior Action, and plaintiff's invoices detail the

services provided, the time spent thereon and the calculation of the amounts owed based on plaintiff's billing rate. Defendant breached the agreement by its refusal to pay the full amount owed to plaintiff pursuant to that agreement.

Defendant's Contentions

Defendant agreed to pay plaintiff for its services on an hourly basis, at a rate of \$200.00 per hour, and to reimburse plaintiff for disbursements plaintiff rendered on defendant's behalf in connection with the Prior Action. Beginning in 2003, plaintiff provided defendant with invoices for payment due and owing for its legal services in the Prior Action on an ongoing basis. Since 2003, defendant made payments to plaintiff totaling \$24,851.76.

Defendant alleges that there are numerous issues of fact concerning : (1) plaintiff's failure to provide a proper and sufficient affidavit of services allegedly rendered; (2) the reasonableness of plaintiff's legal fees, and (3) plaintiff's application of payments made by defendant.

Plaintiff's invoices combine numerous tasks as well as the hours spent on such tasks into single entries on invoices, without indicating how much time plaintiff devoted to each individual task. Further an exorbitant amount of time is allocated to menial matters such as "revision of affirmation..."

Plaintiff's Reply

Defendant does not dispute that bills were sent and received; nor does defendant dispute that the bills were not disputed. Kaye does not deny receipt of the invoices sent or his meeting with plaintiff on October 10, 2006, at which time all invoices sent by plaintiff were reconciled to Kaye's records. Nor does Kaye deny that defendant intended to pay said invoices at that time.

Analysis

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the “cause of action . . . has no merit” (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, *supra* at 562). Opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Account Stated

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, if any, in favor of one party or the other (*see* 1 NY Jur, Accounts and Accounting, §§ 5-7). In the case of an existing indebtedness, the agreement may be implied as well as express (*cf. Gurney, Becker & Bourne v Benderson Dev. Co.*, 47 NY2d 995, *revg* 62 AD2d 1165). An agreement may be implied if a party receiving a statement of account keeps it without objecting to it within a reasonable time, because the party receiving the account is bound

to examine the statement or to procure someone to examine it for him, and object if he disputes its correctness (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165, 167, 567 NYS2d 704, 705 [1st Dept 1991]). If he admits it to be correct it becomes a stated account and is binding on both parties (*Rodkinson v Haecker*, 248 NY 480 [1928]). If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165, 167; *see Rodkinson v Haecker*, 248 NY 480 [1928]). An agreement may also be implied if the debtor makes partial payment. The partial payment is considered acknowledgment of the correctness of the account (*Parker Chapin Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 399 NYS2d 222 [1st Dept 1997] [where defendant made partial payment of this account, such payment constituted an acknowledgment of the validity of the bill, thereby establishing it as an account stated]; *Rik Shaw Assoc. v Bronzini Shops*, 22 AD2d 769, 253 NYS2d 596 [1st Dept 1964]). An attorney may contract with his client on the cost of his past or future services, of course, and an account stated may exist between them (*Rodkinson v Haecker*, *supra* at 485, 489; *Parker Chapin Flattau & Klimpl v Daelen Corp.*, *supra*).

It is well settled that where an account is made up and rendered, the one who receives it is bound to examine it, and, if the accounting is admitted as correct, it becomes a stated account and is binding on both parties, the balance being the debt which may be sued for and recovered by law (*Rosenman Colin Freund Lewis & Cohen v Neuma*, 93 AD2d 745 [1st Dept 1983]). Moreover, where an account is rendered showing a balance, if the party receiving the account fails to dispute its correctness or completeness, that party will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown (*Peterson v IBJ*

Schroder Bank & Trust Co, 172 A.D.2d 165 [1st Dept 1991]).

Breach of Contract

To state a cause of action for breach of contract, the proponent of the pleading must specify the making of an agreement, the performance by that party, breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court New York County 2006], citing *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071 citing *Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; and *Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]).

A complaint alleging breach of contract must set forth the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract or by attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v Silliker, Inc.*, 11 Misc 3d 1072, 816 NYS2d 693 (Supreme Court New York County 2006) citing *Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [1987] and *accord Valley Cadillac Corp. v Dick*, 238 AD2d 894, 894 [1987]).

Plaintiff has established its entitlement to summary judgment on both account stated and breach of contract theories discussed above. The terms of defendant's agreement with plaintiff have not been disputed. Defendant does not dispute that it received bills from plaintiff and did not dispute said invoices. Defendant offers no plausible reason for failing to pay said invoices when rendered. There are no written objections to the bills and indication of "protest."

Further, discovery is unwarranted on the issue of liability. However, the court shall put this matter down for a hearing on damages.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of plaintiff Portnoy & Gallagher, P.C. for an order pursuant to CPLR 3212, granting summary judgment to plaintiff as against defendant Prospect Owner's Corp. ("defendant") on the causes of action for Account Stated and for Breach of Contract, in the amount of \$33,555.22 plus interest, costs and attorneys fees or alternatively awarding plaintiff a Judgment on the merits and setting this matter down for a hearing on fees, is granted to the extent that summary judgment on the merits on the issues of account stated and breach of contract is found. It is further

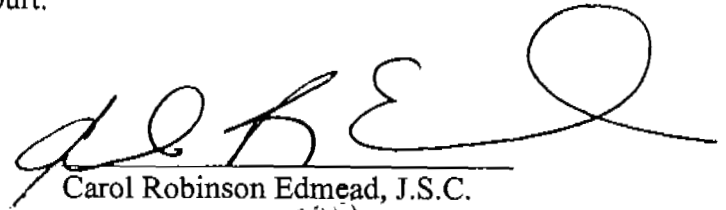
ORDERED that an assessment of damages against defendant s Prospect Owner's Corp. shall be held on September 10, 2007 at 10:00 a.m., in Part 40, located at 60 Centre Street, New York, New York, Room 242, before Justice Ira Gammerman, and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon counsel for defendants within 20 days of entry; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), file of a note of issue and a statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed.

This constitutes the decision and order of the court.

Dated: July 3, 2007



Carol Robinson Edmead, J.S.C.

CAROL EDMED
J.S.C.

FILED

JUL 06 2007,

NEW YORK
COUNTY CLERK'S OFFICE