

**Tannanbaum Helpern Syracuse & Hirschtritt LLP v
Gocard, LLC**

2007 NY Slip Op 32164(U)

July 9, 2007

Supreme Court, New York County

Docket Number: 0601583/2006

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT
LLP,

Plaintiff,

- v -

GOCARD, LLC,

Defendant.

Index No.: 601583/06

Motion Date: 03/22/07

Motion Seq. No.: 01

Motion Cal. No.: 16

The following papers, numbered 1 to 8 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits

Answering Affidavits - Exhibits

Replying Affidavits - Exhibits

PAPERS NUMBERED

1 - 3

4, 5

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 412)

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff law firm moves for summary judgment on its account stated and breach of contract causes of action in this case seeking attorney fees from the defendant who is a former client of the firm. The plaintiff's complaint sets forth causes of action for breach of contract, account stated and quantum meruit. Defendant cross-moves for summary judgment on its counterclaim for excessive legal fees and opposes plaintiff's motion.

Plaintiff seeks judgment on its complaint for legal fees billed to the defendant pursuant to an engagement letter dated

NYS SUPREME COURT
RECEIVED
JUL 17 2007
SUPPORT OFFICE

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):

100-10000000000

July 22, 2003. Plaintiff submits with the moving papers copies of bills it claims were unpaid after being sent to the defendant dated February 9, 2005, April 11, 2005, May 9, 2005, June 9, 2005, and September 26, 2005. Defendant does not deny the receipt thereof.

Plaintiff argues that it has established all the elements of account stated and breach of contract. Defendant counters that plaintiff cannot recover on a summary basis because defendant had objected to these bills. Defendant states in its affidavit that it had paid \$123,580.00 in legal fees during the course of the engagement and plaintiff submits no evidence to rebut this assertion.

The First Department has held that

"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." In this regard, "receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor." Further, an attorney may contract with his client on the cost of his past or future services, and an account stated may exist between them.

The failure to object to the unitemized bill for a period of five months suffices to give rise to an account stated, especially in view of the partial payment made. While "[e]vidence of an oral objection to an account rendered is sufficient on a motion for summary judgment to rebut any inference of an implied agreement to pay the stated amount," defendants' allegations of protest are merely conclusory, as Supreme Court determined, and "failed to relate when and to whom the alleged telephone

calls were made or to specify the substance of the alleged conversations."

Shea & Gould v Burr, 194 AD2d 369, 370 -371 (1st Dept 1993)

(citations omitted).

Defendant in its affidavit in opposition only specifically sets forth an objection to the September 26, 2005, bill based upon a phone call to plaintiff's managing partner immediately upon receipt thereof. Defendant has not asserted that any particularized objection was ever made to plaintiff's other bills at issue here. On these facts, the court agrees that defendant has failed to rebut the presumption that the defendant agreed to pay the amount billed by plaintiff in the absence of any allegation of an objection by defendant except as to the September 26, 2005 invoice for \$570.00.

The Court of Appeals has held that "self-serving, bald allegations of oral protests [are] insufficient to raise a triable issue of fact as to the existence of an account stated" in a suit for attorney's fees. Darby & Darby, P.C. v VSI Intern., Inc., 95 NY2d 308, 315 (2000). In this case, defendant's affidavit in opposition to the motion raises no specific basis for objection to plaintiff's invoices (other than the September 26, 2005 invoice) such as lack of performance, improper price, or non-compliance with the terms of the retainer. Defendant's objections are not of the type which would preclude

entry of summary judgment in favor of the plaintiff. ¹ See Ruskin, Moscou, Evans, & Faltischek, P.C. v FGH Realty Credit Corp., 228 AD2d 294, 295-296 (1st Dept 1996) ("[D]efendant argued that it had objected to the plaintiff's bills. However, it failed to submit any writing, letter, note, documentation or evidentiary proof to support such a claim."); Fred Ehrlich, P.C. v Tullo, 274 AD2d 303, 304 (1st Dept 2000).

The court finds that defendant has failed to raise any triable issue of fact with respect to plaintiff's claim for account stated and breach of contract in this action except as to the September 26, 2005 invoice. The engagement letter set forth the terms of the representation and no objection was made to the bills issued by plaintiff pursuant to that retainer. The court shall therefore grant summary judgment to the plaintiff except as to the \$507.00 balance of the September 26, 2005, invoice as defendant has raised an issue of fact as to that bill balance.

Defendant's counterclaim of overcharge shall be dismissed as defendant's objections lack particularity as to the nature of the overcharges in light of the parties' agreement as to the terms of the representation. Importantly, defendant itself points out that until 2005 it had paid plaintiff's invoices without

¹ Defendant's supplemental affidavit in opposition to plaintiff's motion adds no new facts warranting a different conclusion as it too merely contains generalized statements about alleged objections to plaintiff's bills that defendant failed to raise in its initial opposition/cross-motion papers.

objection evincing an understanding of the parties' agreement. Defendant fails to set forth that it at any time complained about plaintiff's conduct of the litigation. See Paul, Weiss, Rifkind, Wharton & Garrison v Koong, 4 Misc3d 447, 452 (Sup Ct, NY County 2004) (defendants belated oral complaints to attorneys that the bills were "too much" insufficient to raise an issue of fact on summary judgment).

Based upon the foregoing, the court shall grant plaintiff's motion for summary judgment.

Accordingly, it is

ORDERED that defendant's cross-motion for summary judgment on defendant's counterclaim is DENIED; and it is further

ORDERED and ADJUDGED that plaintiff's cross-motion for summary judgment dismissing defendant's counterclaim is GRANTED and the Clerk is directed to enter judgment DISMISSING defendant's counterclaim; and it is further

ORDERED and ADJUDGED that the plaintiff's motion for summary judgment is GRANTED on plaintiff's first cause of action for account stated as to defendant's liability thereupon and second cause of action for breach of contract as to defendant's liability thereupon; and it is further

ORDERED and ADJUDGED that the Clerk shall enter judgment in favor of plaintiff TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT LLP, and against defendant GOCARD, LLC, in the amount of \$41,789.30,

plus interest at the statutory rate from May 5, 2006 through the date of entry of judgment to be calculated by the Clerk in the amount of _____, plus costs and disbursements associated with this application of \$_____, as taxed by the Clerk, for the total amount of \$ _____, and that Plaintiff shall have execution therefor.

This is the decision and order of the court.

Dated: July 9, 2007

ENTER:

J.S.C.
DEBRA A. JAMES
J.S.C.

UNFILED JUDGMENT
his judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B)