

**Omansky v Gest**

2007 NY Slip Op 32168(U)

July 12, 2007

Supreme Court, New York County

Docket Number: 0604235/2006

Judge: Judith J. Gische

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

JUDITH J. GISCHE, J.S.C.

DECEMBER

PART 10

Index Number : 604235/2006

OMANSKY, LAWRENCE A.

vs

GEST, DAVID

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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~~

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

JUL 19 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/13/07

JUDITH J. GISCHE, J.S.C. 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  
LAWRENCE A. OMANSKY, ESQ.,

Index No.: 604235/06  
Seq. No. : 001

Plaintiff,

-against-

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

DAVID GEST, DAVID GEST PRODUCTIONS,  
INC. and DAVID GEST & ASSOCIATES, INC.,

Defendants.  
-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**FILED**  
JUL 19 2007

<b>Papers</b>	<b>Numbered</b>
Plt's motion [sj] w/LO affid in support, exhs	1
Def's crss mot w/LN affirm, exhs	2
Plt's LO reply affirm in further support and opp, exhs	3
Def's LN reply affirm in further support	4

-----X

NEW YORK  
COUNTY CLERK'S OFFICE

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

This is an action by plaintiff Lawrence A. Omansky, Esq. to recover legal fees from the defendants David Gest ("Gest"), David Gest Productions, Inc. and David Gest & Associates, Inc. Plaintiff now moves for summary judgment. CPLR § 3212. Defendants cross move to compel arbitration, pursuant to CPLR § 7503, and also for summary judgment.

Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. CPLR 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004). The court's decision follows.

## Background

Many of the facts are undisputed. Gest executed a retainer agreement, dated February 10, 2005, for plaintiff's representation of defendants in "matters pertaining to the prosecution or adjustment of claims for damages arising from lawsuits against Liza Minnelli for assault and battery, breach of contract and all lawsuits which may arise from this matter." On that same day, Gest also delivered to plaintiff an initial retainer deposit of \$12,000.

Plaintiff thereafter represented Gest in a divorce action, Gest v. Minnelli, Index Number 350637/03, and in a separate action, Gest v. Minnelli, index number 118332/03. During the course of plaintiff's representation, he sent Gest five itemized bills for legal fees incurred during his representation of defendants. Each bill was sent via facsimile. It is undisputed that Gest paid the first four bills, leaving the fifth and last bill, for the period April 14, 2006 through August 10, 2006, unpaid (the "unpaid bill"). The unpaid bill is in the amount of \$31,619.

On August 30, 2006, plaintiff signed a Consent to Change Attorney in the action bearing index number 118332/03. It is undisputed that plaintiff discontinued his representation of defendants in both actions. Before and after that date, plaintiff made several unsuccessful attempts to collect on the unpaid bill. However, as required by 22 NYCRR § 137, plaintiff did not give defendants notice of their right to arbitrate the fee dispute; he did state in several letters "if there are any problems or questions please don't hesitate in calling or writing." Plaintiff thereafter commenced this action with the filing of the summons and complaint on December 11, 2006.

In the complaint, plaintiff asserts two causes of action seeking \$31,619, under

[\* 4 ]

theories of payment for services performed (first cause of action) and account stated (second cause of action). The third cause of action seeks reasonable attorneys fees incurred in prosecuting this action and other collection costs.

Defendants answered the complaint with general denials and affirmative defenses and have asserted several counterclaims sounding in tort and breach of contract. Defendants also seek their reasonable attorneys fees. As both a separate affirmative defense and counterclaim, defendants preserved their right to arbitration and demanded an arbitration of this fee dispute, respectively.

#### Arguments of the Parties

Plaintiff now argues that he is entitled to summary judgment on the second cause of action for account stated against defendants. Specifically, he contends that because defendants received and paid the prior bills, and thereafter received and failed to timely object to the unpaid bill prior to the commencement of this action, he is entitled to summary judgment.

Defendants cross move to compel arbitration for plaintiff's failure to comply with the requirements of 22 NYCRR § 136.5. Defendants highlight plaintiff's failure to provide them with notice of their right to elect to submit to arbitration, and defendant's failure to allege in his complaint that the defendants received such notice and did not timely file a request for arbitration. Based on the affidavit of Edward M. Bearman ("Bearman"), an attorney admitted to practice in the State of Tennessee and Gest's general counsel, defendants further claim that Gest timely disputed the unpaid bill.

In opposition to plaintiff's motion, defendants point to the existence of triable issues of fact in opposition to plaintiff's motion, and further contend they are entitled to summary

[\* 5 ]

judgment. Defendants dispute the unpaid bill, claiming that plaintiff "billed for matters outside the agreement, did not have permission to use another lawyer and did not give Mr. Gest what was promised under the agreement. Defendants argue that they are entitled to summary judgment because plaintiff has not complied with 22 NYCRR §§ 136.5, 1400.2 or 1400.3 prior to commencing this action.

In response, plaintiff argues that he is entitled to summary judgment in the interest of judicial economy, "notwithstanding the fact that this might have to be referred to arbitration. Plaintiff further contends that defendants waived their right to arbitration because they had numerous notices of the unpaid bill, had five months to contest the unpaid bill and failed to otherwise respond to plaintiff. Plaintiff additionally argues he did not violate 22 NYCRR § 1400.2 and that his noncompliance with 22 NYCRR § 1400.3 does not bar the relief he seeks. Finally, plaintiff argues there is no merit to defendants' factual contentions; he did not bill for matters outside the agreement and did not hire outside counsel in violation of the retainer agreement.

### **Discussion**

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the

proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Wejsz, 303 A.D.2d 459 (2<sup>nd</sup> dept. 2003).

Since each party has moved for summary judgment, each bears the initial burden of establishing that they are entitled to what they seek. While both parties have cited 22 NYCRR § 136.5, this provision has been repealed and replaced with 22 NYCRR § 137, which provides for "the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation." 22 NYCRR § 137.0.

Where an attorney and his/her client has a fee dispute, 22 NYCRR § 137.6(a)(1) states in pertinent part that:

"the attorney shall forward a written notice to the client, entitled *Notice of Client's Right to Arbitrate*, by certified mail or by personal service. The notice:

- (i) shall be in a form approved by the board of governors;
- (ii) shall contain a statement of the client's right to arbitrate;
- (iii) shall advise that the client has 30 days from receipt of the notice in which to elect to resolve the dispute under this Part;

(iv) shall be accompanied by the written instructions and procedures for the arbitral body having jurisdiction over the fee dispute, which explain how to commence a fee arbitration proceeding; and  
(v) shall be accompanied by a copy of the request for arbitration form necessary to commence the arbitration proceeding.”

Further, if “the client does not file a request for arbitration within 30 days after the notice was received or served, the attorney may commence an action in a court of competent jurisdiction to recover the fee and the client no longer shall have the right to request arbitration...”

22 NYCRR § 137.6 applies to this fee dispute. It is undisputed that plaintiff failed to comply with these statutory requirements. Moreover, the retainer agreement provides that:

“[i]n the event that there is a fee dispute between us, you have the right to arbitrate the dispute if the fee is between one thousand (\$1,000) and fifty thousand (\$50,000) dollars. 22 NYCRR Part 137 requires fee-dispute arbitration initiated by you and permits arbitration at our request if you agree. The results of an arbitration will be final and binding.”

On this basis alone, defendants’ motion to compel arbitration must be granted. Plaintiff argues that the court should overlook his noncompliance with 22 NYCRR § 137.6 in the interest of judicial economy. He further claims he is entitled to summary judgment and submitting this matter to arbitration would compel the same result. The court rejects plaintiff’s arguments. Plaintiff’s compliance with the statutory requirements of 22 NYCRR § 137.6 was a condition precedent to the successful commencement of this action. Paikin v. Tsirelman, 266 A.D.2d 136 (1<sup>st</sup> Dept. 1999); Hobson-Williams v. Jackson, 10 Misc.3d 58 (Sup. App. Term. 2005). As a consequence of his failure to

comply therewith, the complaint must be dismissed and the requests for summary judgment by both parties has been rendered moot.

**Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that defendants' motion to compel arbitration is hereby granted and the complaint is dismissed with without prejudice; and it is further

**ORDERED** that plaintiff's and defendants' respective motions for summary judgment are hereby denied as moot.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York  
July 12, 2007

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
JUL 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE