

Miller v Nadler

2007 NY Slip Op 32476(U)

August 6, 2007

Supreme Court, New York County

Docket Number: 0603932/2004

Judge: Carol R. Edmead

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

CAROL EDMEAD

J.S.C.

PART 35

PRESENT:

Index Number: 03932/2004

GRAUBARD MILLER

vs

NADLER, RONALD I.

Sequence Number: 002

SUMMARY JUDGMENT

INDEX NO. 603932/04

MOTION DATE 7/18/07

MOTION SEQ. NO. 002

MOTION 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 _____

Cross-Motion: Yes No

FILED AUG 10 2007 NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

The motion and cross motion are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of plaintiff Graubard Miller, for an order pursuant to CPLR 3212 granting summary judgment on its complaint against defendant Ronald J. Nadler on the theory of account stated, is granted. It is further

ORDERED that the motion of plaintiff Graubard Miller, for an order pursuant to CPLR 3212 granting summary judgment on its complaint against defendant Ronald J. Nadler on the theory of quantum meruit, is granted. It is further

ORDERED that the cross motion of defendant Ronald J. Nadler for summary judgment dismissing the complaint of plaintiff Graubard Miller, is denied. It is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Graubard Miller as against defendant Ronald J. Nadler in the amount of \$103,492.44, plus interest from April 7, 2004 in the sum of _____ to be calculated by the Clerk. It is further

ORDERED that Graubard Miller, pro se shall serve a copy of this order with notice of entry within twenty days of entry, on counsel for defendant Ronald J. Nadler.

Dated: 8/6/07

CAROL EDMEAD 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):

GRAUBARD MILLER,

Plaintiff,

-against-

RONALD J. NADLER,

Defendant.

EDMEAD, J.S.C.

Index No. 603932/04

DECISION/ORDER

FILED
AUG 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Plaintiff Graubard Miller ("GM") moves for an order pursuant to CPLR 3212 for an order granting summary judgment on its complaint against defendant Ronald J. Nadler ("Nadler") on two grounds: first, account stated and second, *quantum meruit*. Nadler opposes the within motion and cross moves for an order granting summary judgment dismissing GM's complaint on the grounds that: (1) the court lacks personal jurisdiction over Nadler; (2) dismissing the first cause of action as to breach of contract;¹ (3) and dismissing the second cause of action as to *quantum meruit*.

The Parties

GM is a law partnership organized and existing under the laws of the State of New York. Nadler is a Florida resident.

GM's Contentions

Beginning in or about October 2003 through February 5, 2004, GM represented Nadler

¹ GM does not oppose or address Nadler's cross motion to dismiss the first cause of action to the degree it asserts a claim for "breach of contract." GM argues that its motion seeks summary judgment on the first cause of action on the ground of "account stated."

and his partner William Rouhana ("Rouhana") in connection with the formation of an entity called 2Stars, Inc. (which was going to be used by Rouhana and Nadler) to purchase a majority interest in Equity Broadcasting Company (the "Subject Transaction"). Rouhana was a long-standing client of GM who introduced Nadler to GM as his partner in the Subject Transaction. From GM's perspective, GM was performing work for its longstanding client Rouhana and his partner, and GM was performing the type of work it had provided to Rouhana on several occasions.

As set forth in detailed time records, from in or about October 2003 through February 5, 2004, GM performed extensive due diligence on the Subject Transaction, advised Nadler and Rouhana regarding the structure of the transaction and the formation of 2Stars, drafted and revised numerous contract documents, including, but not limited to: consulting agreements for Nadler and Rouhana; restricted stock grants for Nadler and Rouhana; option agreements for Nadler and Rouhana; numerous employment agreements; stock purchase agreements; shareholders' agreements; articles of incorporation; and escrow agreements.

Since the shares of Equity Broadcasting Company that were going to be purchased by Rouhana and Nadler through 2Stars, Inc. were owned by several different parties, multiple agreements and negotiations were required in an effort to try to consummate the transaction. GM counseled Nadler on proposed changes to transaction documents sent by attorneys for other parties to the transaction and engaged in extensive negotiations with those attorneys. GM also participated in numerous conference calls and meetings regarding the Subject Transaction.

On or about February 5, 2004, Nadler and Rouhana advised GM that they were abandoning the Subject Transaction. GM confirmed this advice in a letter to Nadler and

Rouhana dated April 7, 2004, and said letter, sent certified mail, return receipt requested, also forwarded to Nadler and Rouhana GM's final invoice for work performed from November 1, 2003 through January 31, 2004.

GM's final invoice to Nadler and Rouhana reflects an amount due of \$155,992.44. At Nadler and Rouhana's request, on April 16, 2004, GM sent to each its time records setting forth in detail the services provided, the time spent by each attorney, each attorney's hourly rate and disbursements incurred. Nadler retained GM's final invoice and underlying time records, and until serving his answer to the complaint, on or about January 21, 2005, never objected to either, but instead made continuous promises of payment.

Thus, in three email communications on May 27, 2004, June 2, 2004 and September 3, 2004, which accompany this motion, Nadler admitted his debt to GM and repeatedly promised to pay GM as soon as he was able to obtain certain financing, which he represented was imminent. Nadler also acknowledged his liability in messages left with Kaaryn Broemmer, the secretary to David Alan Miller, a member of the firm GM ("Miller"), on July 9, 2004, by representing that he would pay GM as soon as his bank received a contract he had already sent to it, and on August 20, 2004, by representing that he would pay GM as soon as he finished negotiating a certain lease, which he stated would take no more than 48 hours.

Transcripts accompany this motion which establish that Nadler also confirmed his debt to GM and his promise to pay GM's invoice in voice mail messages he left for Miller. In the first, Nadler states "I am just waiting for one document and then everything will be taken care of," and that he was "sorry for the delays." In a second, left on May 14, 2004, Nadler again represented to Miller that payment was forthcoming.

When the Subject Transaction was abandoned, GM offered both Nadler and Rouhana a discount, on its fees, contingent upon payment, as a courtesy to Rouhana, its long-standing client, wherein GM would accept a total of \$100,000 for fees incurred, and payment for disbursements incurred in the amount of \$5,000. Nadler and Rouhana agreed between themselves to each pay one half of that amount. Rouhana paid GM \$52,500, which GM accepted in full satisfaction of Rouhana's obligation to GM in connection with the Subject Transaction. Nadler never paid GM and thereby rejected its discount offer. GM commenced this action on November 19, 2004 and now seeks \$103,492.44, representing GM's total fee for the Subject Transaction minus the amount Rouhana paid to GM upon accepting its discounted offer.

As to Nadler's affirmative defense of lack of personal jurisdiction, Miller states in his affidavit that in connection with the Subject Transaction, Nadler retained New York counsel, traveled to New York City and met with him and other attorneys at GM on at least two occasions, frequently exchanged emails with him and other GM attorneys, and participated in numerous telephone conference calls with him and his colleagues.

As to Nadler's affirmative defense that there was no retainer agreement between him and GM; therefore, GM should not be entitled to any fee, that defense too fails because: (1) Rouhana was a long-standing client of GM; (2) Rouhana introduced Nadler to GM as his partner in the Subject Transaction; and (3) GM had previously provided Rouhana with the same type of services as those performed for the same fee arrangement as was billed in connection with the Subject Transaction, namely services rendered at GM's regular hourly rates. Thus, under 22 NYCRR§1215.2(b), which provides that 22 NYCRR 1215.1 "shall not apply to ... representations where the attorney's services are of the same general kind as previously rendered

to and paid for by the client," a retainer agreement was not required.

In addition, even in the absence of a retainer agreement, GM is entitled to be paid for its services on a *quantum merit* basis. Since Nadler has already admitted in communications with Miller his liability for GM's invoice and promised to pay such invoice, that invoice constitutes the *quantum merit* amount that GM is entitled to receive.

Nadler also asserts GM violated disciplinary rules because Rouhana's interest in the Subject Transaction created a conflict of interest. This defense is without merit. As shown in the Shareholder's Agreement, 2Stars, Inc. was to acquire shares of Equity Broadcasting Company from individuals and entities unrelated to Rouhana and his family. Nadler's assertions to the contrary are without any evidentiary support and are directly contradicted by the Signature Page of the Shareholder's Agreement.

Nadler's Contentions

Nadler recalls that he had only one personal contact with GM in New York, and that was an unplanned, short encounter that Rouhana arranged with Miller prior to any retention of GM to work on the Subject Transaction and involving little or no discussion of the Subject Transaction.

Further, GM cannot prevail on its first cause of action for breach of contract because GM failed to comply with 22 NYCRR §1215.1; GM never provided a letter of retention or retainer agreement to Nadler explaining the terms and conditions of any retention by Nadler of GM.

GM attempts to take advantage of the exception to the rule by arguing that its services are the same general kind as previously rendered and paid for by the client. However, before the Subject Transaction, Nadler had not met and had never heard of GM. So, GM indisputably never "previously rendered" any legal services to Nadler, and Nadler never previously "paid for" any

legal services from GM. Further, Nadler argues that he was never Rouhana's partner. He and Rouhana were simply two individuals contemplating an investment.

Nadler argues that he is entitled to summary judgment dismissing GM's second cause of action for *quantum merit* based on Nadler's reliance on Rouhana's repeated assurances to him that he would pay little or nothing for a failed transaction, as occurred.

Nadler states that his understanding was that for a successful transaction, GM would charge him a maximum of one half of the \$100,000 cap, and for a failed transaction, as occurred here, GM would charge Nadler little or nothing.

And, GM should not benefit from *quantum meruit* based on GM's unclean hands. GM first combined with Rouhana to manipulate Nadler into acquiescing to GM's retention with regard to the Subject Transaction. Then, GM utterly failed to apprise Nadler in writing of the conflicts of interest inherent in its dual representation of Rouhana and Nadler, and also arising from Rouhana's undisclosed personal stake in the target of the Subject Transaction.

In or about mid-December, 2003, Rouhana first informed Nadler that Rouhana's family trust owned an interest in Equity Broadcasting Company . So the Subject Transaction, which Rouhana had proposed to Nadler, and which he and Rouhana were pursuing, had the potential to benefit Rouhana personally in ways that he did not previously disclose to Nadler. Nadler believes that GM "almost surely knew of Mr. Rouhana's personal interest in Equity Broadcasting Company . However, GM never disclosed that to [Nadler] or attempted to confirm with [Nadler] that Mr. Rouhana so advised [Nadler]."

At not time did Miller or any other GM attorney ever explain to Nadler the existence or consequences of any potential conflicts of interest between Rouhana and Nadler with regard to

the Subject Transaction. GM never advised Nadler to consult with independent counsel with regard to the Subject Transaction or GM's representation of both Rouhana and Nadler with regard to the Subject Transaction.

Finally Nadler argues that he objected to GM's demands for payment "early and often."

Nadler asserts that GM and Rouhana "plotted" (Nadler Affidavit ¶ 30) to extract exorbitant fees from Nadler.

Nadler admits that he participated in "several conference calls.... from Florida." (Nadler Affidavit ¶22). He further admits "My participation was limited to conference calls with them from Florida from time to time, and receipt of, and making limited comments upon, drafts of various documents." (Nadler Affidavit ¶ 23).

GM's Reply

Nadler conducted business in this State within the meaning of CPLR 302(a)(1) by using GM's services, and in particular by soliciting GM's advice in numerous one-on-one telephone calls, participating in numerous conference calls with GM attorneys, sending email communications to GM attorneys and in a lengthy meeting in GM's offices. As reflected in GM's time records, during a meeting on December 9, 2003, at GM's offices, Nadler discussed with Miller and other GM attorneys the underlying transaction he and Rouhana planned to enter into as well as the terms of the draft deal documents that had been prepared.

The complaint's first cause of action states a claim for account stated. And, even if the allegations in the complaint were somehow insufficient to state a cause of action for an account stated, in light of the evidence proffered on this motion, this court may conform the pleading to the proof and grant summary judgment on an account stated.

As set forth in GM's February 13, 2004 invoice, the amount billed by GM at its normal hourly rates for the work performed and disbursements incurred was \$155,992.44. Although Nadler purports not to remember receiving GM's invoice, documentary evidence shows that in fact he received GM's invoice on two separate occasions. GM first sent its invoice to Nadler by facsimile on February 13, 2004, and sent it again on or about April 7, 2004. GM also sent Nadler the detailed time records underlying its invoice by email on April 16, 2004.

Further, documentary evidence, including Nadler's own email of April 15, 2004, directly refutes Nadler's contention that GM agreed "to charge little or nothing" if the deal was unsuccessful.

And, as to Nadler's argument that GM may not rely on the exception to 22 NYCRR §1215.1 based on the perceived partnership of Nadler and Rouhana, in Nadler's own email exchange with Rouhana (forwarded to Miller on October 23, 2003, and attached to the Miller Reply Affidavit), Nadler wrote to Rouhana as follows:

Bill: Thanks for your constructive suggestions and ideas. I will "noodle" on them. I agree with you that, at this time, a loan to *our partnership* would make most sense to avoid triggering any tax events, and an orderly pay back program would appear to be feasible.... (emphasis added per Miller Affidavit)

Nadler's argument that GM's right to recover on its *quantum meruit* cause of action is barred by the unclean hands doctrine is frivolous. Nadler's unfounded, wild speculation that GM "schem[ed] with Rouhana to squeeze out of Mr. Nadler the maximum amount of legal fees possible," is defeated by documentary evidence showing, among other things, that GM offered Nadler a courtesy discount, that Nadler and Rouhana agreed to pay \$100,000 plus disbursements and that Rouhana paid his share. In fact, the only "unclean hands" at issue in this action is Nadler reneging on his repeated promises to pay the \$52,500 he agreed to pay and then falsely

swearing that he did not make those promises.

Similarly, Nadler's contention that GM has unclean hands because of a purported failure to alert him to a conflict of interest between him and Rouhana, should be given short shrift. The Subject Transaction involved the purchase of shares of Equity Broadcasting Company from individuals and entities unrelated to Rouhana and his family. That the purported conflict is pretextual is confirmed by the fact that Nadler now admits that as of December 2003 he had full knowledge that a Rouhana family trust owned an interest in Equity Broadcasting Company and nevertheless went forward with the transaction.

By refusing to pay the amount Nadler agreed to pay, Nadler effectively rejected GM's offer to accept a courtesy discount in exchange for prompt payment. Accordingly, by this action, GM is entitled to recover \$103,492.44, plus interest, representing the full amount of its fees less the \$52,500 paid by Rouhana.

Nadler's Reply

Nadler first argues that the court lacks personal jurisdiction over him. He asserts that he had no intention or desire to retain New York counsel to handle the Subject Transaction, which involved a Connecticut resident Rouhana, and a Florida resident - himself - attempting to purchase interests in an Arkansas company, Equity Broadcasting Company. Nadler argues that he never appeared in New York to meet with GM regarding the Subject Transaction. And, that communications regarding the Subject Transaction between GM in New York and Nadler in Florida were sporadic at most, almost always at GM's initiative, and largely reflected that Rouhana almost exclusively handled GM's rendering of legal services for the Subject Transaction.

Nadler next argues that GM cannot sustain its breach of contract first cause of action against him because of its failure, in violation of 22 NYCRR§1215.1(b), to present Nadler with a retainer agreement or letter describing the charges and other terms of its representation. Nadler argues that GM's explanation that it did not comply with this requirement in light of its long history representing Rouhana in similar transactions, and the fact that Nadler was presented to GM as Rouhana's partner in connection with the Subject Transaction, is unavailing.

GM's *quantum merit* claim should likewise fail because GM's unethical conduct bars GM entitlement to such relief.

Analysis

Personal Jurisdiction

The burden of proving jurisdiction is upon the party asserting it, and when challenged on jurisdiction, such party must sustain that burden by preponderating proof (*Saratoga Harness Racing Assn. v Moss*, 20 NY2d 733, 283 NYS2d 55 [1967]; *Jacobs v Zurich Ins. Co.*, 53 AD2d 524, 384 NYS2d 452 [1st Dept 1976]).

The extent to which a court may exercise personal jurisdiction over a nondomicilliary without violating the Due Process Clause of the Constitution was defined in the Supreme Court's opinion in *International Shoe Co. v Washington* (326 US 310 [1945]). In order to subject a defendant to a judgment *in personam*, "if he be not present within the territory of the forum, he [must] have certain minimum contacts" with the forum state such that the "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (*International Shoe Co. v State of Wash.*, *supra* at 615; *World-Wide Volkswagen Corp. v Woodson*, 444 US 286 [1980]; *see also Indosuez International Finance B.V. v National Resrve Bank*, 98 NY2d 238, 746

personal jurisdiction pursuant to CPLR 302(a)(1) (*see Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71, 818 N.Y.S.2d 164 [2006]; *Parke-Bernet Galleries, Inc v Franklyn*, 26 N.Y.2d 13, 17, 308 N.Y.S.2d 337 [1970]). Indeed, courts have recognized that the evolution of modern technology has enabled business persons and professionals to transact business by electronic means, using telephones, fax machines and e-mail, as occurred in the instant matter (*see Fischbarg v Doucet*, 38 AD3d 270, 274 [1st Dept 2007]). As the Court of Appeals observed in *Kreutter v McFadden Oil Corp.* (71 N.Y.2d 460, 466, 527 N.Y.S.2d 195 [1988]):

“With the growth of national markets for commercial trade and technological advances in communication and travel systems, however, an enormous volume of business may be transacted within a state without a party ever entering it.”

(*see also Duetsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d at 71; *Parke-Bernet Galleries, Inc. v Franklyn*, 26 N.Y.2d at 17).

The allegations in the complaint, as supplemented by the details set forth in the affidavit submitted by Miller and documentary evidence, establish that Nadler purposefully availed himself of New York to engage in a significant business transaction with GM, specifically the Subject Transaction. The facts alleged in the complaint and in the affidavit submitted by Miller and documentary evidence, viewed collectively, establish that Nadler purposefully transacted business in New York, within the meaning of CPLR 302(a)(1), notwithstanding the conflicting statements concerning whether Nadler traveled to New York to meet with GM attorneys in connection with the Subject Transaction; including, engaging in numerous telephone and email communications with GM in connection with the Subject Transaction; and this suit arises from Nadler’s failure to pay fees to GM, a New York law firm, in connection with the Subject Transaction.

Further, Nadler admits that he participated in “several conference calls.... from Florida.” (Nadler Affidavit ¶22). He further admits “My participation was limited to conference calls with them from Florida from time to time, and receipt of, and making limited comments upon, drafts of various documents.” (Nadler Affidavit ¶ 23).

Thus, this court finds that it has personal jurisdiction over Nadler.

Summary Judgment

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). 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 Perlbinde*r, 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]).

Plaintiff has met its burden and established its cause of action for account stated.

Although labeled as a breach of contract cause of action, the first cause of action sufficiently asserts a claim for account stated: "Graubard undertook to perform, and did perform legal services for defendant....Graubard has demanded payment from defendant of the balance due Graubard. Despite repeated assurances that payment would be forthcoming, defendant has failed to make any payment to date."

Nadler argues that GM's first cause of action is for breach of contract only. Further, GM has made no motion to amend its complaint to assert a cause of action for account stated. And, therefore, the court should not consider GM's demand for summary judgment on an account stated theory.

This court finds that when the court considers the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings. Where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint. And, the court may consider the request of GM to conform the pleadings to the proof, which the court does herein.

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]).

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]).

Finally, where an attorney demonstrates that a bill was issued to a client and held by him or her without objection for a reasonable period of time, an account stated is established (*see O'Connell & Aronowitz v Gullo*, 229 A.D.2d 637, 638 [1996]; *Shea & Gould v Burr*, 194 A.D.2d 369, 371 [1993]).

Based on the Miller affidavit and the plethora of documentary evidence, GM has established services rendered, demand for payment, failure to reject demand by Nadler and essentially an acknowledgment of the debt due and willingness to pay.

GM sent a final invoice to Nadler and Nadler kept the invoice and did not object to it. Indeed, in repeated emails, messages, and voice mail messages left on GM's telephone, Nadler explicitly acknowledged his liability to GM for legal fees and disbursements referenced in GM's invoice and promised to pay such invoice.

GM has established its *prima facie* right to a judgment in its favor, as a matter of law, upon its claim of an account stated, based upon the foregoing proof that Nadler received and retained, without prompt objection, the invoices that GM sent seeking payment for services rendered. *Bracken & Margolin, LLP v Schambra*, 270 A.D.2d 221, 703 N.Y.S.2d 520 (2nd Dept. 2000); *Thaler & Gertler, LLP v Weitzman*, 282 A.D.2d 522, 722 N.Y.S.2d 891 (2nd Dept. 2001). Having done so, it is incumbent upon the Nadler to show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where as here 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). Mere conclusions, expressions of hope or unsubstantiated

allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Defendant Nadler has failed to raise an issue of fact as to his liability. In his answer, Nadler sets forth fifteen affirmative defenses. In support of his cross motion, Nadler discusses four of those defenses: failure to state a cause of action; lack of personal jurisdiction; failure to obtain a written retainer agreement; and unclean hands. In opposition to a motion for summary judgment, Nadler “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]).

This court finds that GM prevails on its “account stated” cause of action. Nadler’s claim that he complained “early and often” about the account sent by GM, is unsupported by documentary evidence.

No Retainer Agreement

GM argues that GM should be entitled to its fee because: (1) Rouhana was a long-standing client of GM; (2) Rouhana introduced Nadler to GM as his partner in the Subject Transaction; and (3) GM had previously provided Rouhana with the same type of services as

those performed for the same fee arrangement as was billed in connection with the Subject Transaction, namely services rendered at GM's regular hourly rates. Thus, under 22 NYCRR § 1215.2(b), a retainer agreement was not required.

In addition, even in the absence of a retainer agreement, GM is entitled to be paid for its services on a *quantum meruit* basis. Since Nadler has already admitted in communications with Miller his liability for GM's invoice and promised to pay such invoice, that invoice constitutes the *quantum meruit* amount that GM is entitled to receive.

Nadler argues that GM cannot prevail on its first cause of action for breach of contract because GM failed to comply with 22 NYCRR §1215.1; GM never provided a letter of retention or retainer agreement to Nadler explaining the terms and conditions of any retention by Nadler of GM.

Nadler argues that there was never any partnership or other arrangement established between he and Rouhana, and he never authorized Rouhana to act on his behalf with regard to any contractual, financial or other relations with GM or others. Nadler argues that GM was, or should have been, fully aware of this, especially since, as Rouhana's longstanding attorneys, GM undoubtedly would have been involved in establishing any partnership or similar relationship between Nadler and Rouhana.

However, Nadler concedes that at some point during its legal work, GM "may have arranged for the formation of a Delaware limited liability company known as '2 Stars' to govern any legal relationship that might be established between Mr. Rouhana and [Nadler]." (Nadler Affidavit at footnote 4)

Further, Nadler denies that he owes anything to GM based on repeated commitments to Nadler by GM that he and Rouhana would pay little or nothing for a failed transaction, as occurred. GM's failure to comply with 22 NYCRR §1215.1 was not inadvertent. And, GM's unclean hands should preclude its reliance on a *quantum meruit* theory.

Although not controlling, this court finds the discussion in *Seth Rubenstein, P.C. v Ganea* 41 A.D.3d 54, 833 N.Y.S.2d 566 N.Y.A.D. 2 Dept. 2007 persuasive. As explained by the Second Department in *Seth Rubenstein, P.C.*, public policy dictates that courts pay particular attention to fee arrangements between attorneys and their clients, as it is important that a fee contract be fair, reasonable, and fully known and understood by the client (*see Jacobson v Sassower*, 66 N.Y.2d 991, 993, 499 N.Y.S.2d 381, 489 N.E.2d 1283; *Shaw v Manufacturers Hanover Trust Co.*, 68 N.Y.2d 172, 176, 507 N.Y.S.2d 610, 499 N.E.2d 864; *Matter of Bizar & Martin v U.S. Ice Cream Corp.*, 228 A.D.2d 588, 644 N.Y.S.2d 753). If the terms of a retainer agreement are not established, or if a client discharges an attorney without cause, the attorney may recover only in *quantum meruit* to the extent that the fair and reasonable value of legal services can be established (*see Matter of Cohen v Grainger, Tesoriero & Bell*, 81 N.Y.2d 655, 658, 602 N.Y.S.2d 788, 622 N.E.2d 288; *Campagnola v Mulholland, Minion & Roe*, 76 N.Y.2d 38, 43, 556 N.Y.S.2d 239, 555 N.E.2d 611; *Matter of Schanzer*, 7 A.D.2d 275, 182 N.Y.S.2d 475, *affd.* 8 N.Y.2d 972, 204 N.Y.S.2d 349, 169 N.E.2d 11).

22 NYCRR 1215.1, otherwise known as the "letter of engagement rule," was promulgated by joint order of the Appellate Divisions, and applies to all civil actions where the amount in controversy is \$3,000 or more. The rule requires attorneys to provide all clients with a written letter of engagement explaining the scope of legal services, the fees to be charged, billing

practices to be followed, and the right to arbitrate a dispute under Part 137 of the Rules of the Chief Administrator (*see* 22 NYCRR 1215.1[b]; *see generally* *Grossman v West 26th Corp.*, 9 Misc.3d 414, 801 N.Y.S.2d 727). The rule is also satisfied if the attorney and client execute a formal written retainer agreement reflecting the same information as required for a letter of engagement (*see* *Beech v Gerald B. Lefcourt, P.C.*, 12 Misc.3d 1167(A), 2006 WL 1562085).

The language of 22 NYCRR 1215.1 contains no express penalty for noncompliance (*see* 22 NYCRR 1215.1; *Beech v Gerald B. Lefcourt, P.C.*, *supra*; *Matter of Feroletto*, 6 Misc.3d 680, 682, 791 N.Y.S.2d 809). Indeed, the intent of Rule 1215.1 was not to address abuses in the practice of law, but rather, to prevent misunderstandings about fees that were a frequent source of contention between attorneys and clients. This intent was described by Chief Administrative Judge Jonathan Lippman upon the rule's adoption, that "this [rule] is not about attorney discipline in any way, shape or form, and we certainly do not expect in any significant degree there to be a large number of disciplinary matters coming out of this rule" (*Caher*, "Rule Requires Clients Receive Written Letters of Engagement," N.Y.L.J., Jan. 22, 2002, at 1, col. 1, and quoted in *Matter of Feroletto*, *supra* at 683, 791 N.Y.S.2d 809). The purpose of the rule therefore is to aid the administration of justice by prodding attorneys to memorialize the terms of their retainer agreements containing basic information regarding fees, billing, and dispute resolution which, in turn, minimizes potential conflicts and misunderstandings between the bar and clientele.

It is undisputed that no written retainer agreement or letter of engagement was prepared or executed, by GM relating to the Subject Transaction, notwithstanding the requirements of 22 NYCRR 1215.1. That rule requires the execution of engagement letters explaining the scope of services, fees, and billing practices, and the right to arbitration. However, an attorney's failure to

comply with the mandates of 22 NYCRR 1215.1 does not necessarily preclude GM from collecting fees. Blind adherence to the rule would result in unfair windfall to Nadler, and GM's noncompliance with the rule should be reviewed upon the circumstances of this specific case.

The court reasoned in *Seth Rubenstein, P.C.* that a strict rule prohibiting the recovery of counsel fees for an attorney's noncompliance with 22 NYCRR 1215.1 is not appropriate and could create unfair windfalls for clients, particularly where clients know that the legal services they receive are not *pro bono* and where the failure to comply with the rule is not willful (*see Matter of Feroletto, supra* at 684, 791 N.Y.S.2d 809). Nadler argues that there is no evidence that GM's non compliance was not willful. On the contrary, there is no evidence that it was willful.

The penalty of precluding an award of fees to GM would be unduly harsh and unwarranted.

This court finds that GM prevails in *quantum meruit*.

Quantum Meruit

"*Quantum meruit*" is simply defined in *Reubenbaum v B. & H. Exp. Inc.*, 6 A.D.2d 47, 48 (1st Dept 1958) as "the value of the services" performed by an attorney for a client. Unlike an "account stated" which is contractual, "*quantum meruit*" is quasi-contractual in nature. In *Moors v Hall*, 143 A.D.2d 336 (2d Dept 1988), the Court stated at 337-338, that "to make out a claim in quantum meruit, a claimant must establish (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." *See Gerald v Melamid*, 212 A.D.2d 575 (2d Dept 1995).

As noted above, since Nadler has already admitted in communications with Miller his liability for GM's invoice and promised to pay such invoice, that invoice constitutes the *quantum meruit* amount that GM is entitled to receive.

In conclusion, this court concludes that GM prevails and may recover legal fees from Nadler under an "account stated." *Parker, Chapin, Flattau & Klimpl v Daelen Corp.*, 59 A.D.2d 375 (1st Dept 1977). Also, this court concludes that GM prevails and may recover legal fees from Nadler under *quantum meruit*. *In re Montgomery's Estate*, 272 N.Y. 323 (1936); *Lai Ling Cheng v Modansky Leasing Co., Inc.*, 73 N.Y.2d 454 (1989); *Cohen v Grainger, Tesoriero & Bell*, 81 N.Y.2d 655 (1993).

Other than dismissal of GM's breach of contract cause of action, Nadler's remaining defenses and asserted bases for summary judgment lack merit.

Nadler states that his understanding was that for a successful transaction, GM would charge him a maximum of one half of the \$100,000 cap, and for a failed transaction, as occurred here, GM would charge Nadler little or nothing. Nadler, however, fails to substantiate this claim in any way, shape or form.

Likewise, Nadler's arguments that GM should not benefit from *quantum meruit* based on GM's unclean hands, in that GM first combined with Rouhana to manipulate Nadler into acquiescing to GM's retention with regard to the Subject Transaction; then, GM utterly failed to apprise Nadler in writing of the conflicts of interest inherent in its dual representation of Rouhana and Nadler, and also arising from Rouhana's undisclosed personal stake in the target of the Subject Transaction, again, are wholly unsubstantiated and baseless.

Further, Nadler's "theory" that GM "almost surely knew" of Mr. Rouhana's personal

interest in Equity Broadcasting Company; however, GM never disclosed that to Nadler or attempted to confirm with Nadler that Mr. Rouhana so advised Nadler, as to GM, this theory is pure conjecture and insufficient to grant summary judgment in Nadler's favor, or to overcome GM's entitlement to summary judgment.

Finally, Nadler's assertion that he objected to GM's demands for payment "early and often," is unsupported.

Nadler's claim that GM and Rouhana "plotted" (Nadler Affidavit ¶ 30) to extract exorbitant fees from Nadler rests on nothing.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of plaintiff Graubard Miller, for an order pursuant to CPLR 3212 granting summary judgment on its complaint against defendant Ronald J. Nadler on the theory of account stated, is granted. It is further

ORDERED that the motion of plaintiff Graubard Miller, for an order pursuant to CPLR 3212 granting summary judgment on its complaint against defendant Ronald J. Nadler on the theory of *quantum meruit*, is granted. It is further

ORDERED that the cross motion of defendant Ronald J. Nadler for summary judgment dismissing the complaint of plaintiff Graubard Miller, is granted to the extent that the first cause of action is dismissed to the degree that it asserts a cause of action for breach of contract. It is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Graubard Miller as against defendant Ronald J. Nadler in the amount of \$103,492.44, plus

interest from April 7, 2004, plus costs and disbursements, in the sum of _____

to be calculated by the Clerk. It is further

ORDERED that Graubard Miller, *pro se* shall serve a copy of this order with notice of entry within twenty days of entry, on counsel for defendant Ronald J. Nadler.

This constitutes the decision and order of this court.

Dated: August 6, 2007

A handwritten signature in cursive script, appearing to read 'C. R. Edmead', written over a horizontal line.

Carol Robinson Edmead, J.S.C.

FILED
AUG 10 2007
NEW YORK
COUNTY CLERK'S OFFICE