

Finkelstein Newman Ferrara LLP v Mitani

2007 NY Slip Op 33231(U)

September 28, 2007

Supreme Court, New York County

Docket Number: 0101557/2007

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

FINKELSTEIN NEWMAN FERRARA LLP f/k/a
FINKELSTEIN NEWMAN LLP,
Plaintiff,

Index No.: 101557/07

Motion Date: 05/22/07

Motion Seq. No.: 01

Motion Cal. No.: 92

- v -

KUKIKO MITANI, as Trustee Under
(a) Indenture of Trust Dated August 1, 1990
from MELVIN POMERANTZ f/b/o EVE POMERANTZ
and
(b) Indenture of Trust Dated August 1, 1990
from MELVIN POMERANTZ f/b/o SETHIAN KEN
POMERANTZ,
Defendant.

The following papers, numbered 1 to 4 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

| PAPERS NUMBERED | |
|-----------------|-------|
| 1 | _____ |
| 2 | _____ |
| 3, 4 | _____ |

Cross-Motion: Yes No

Upon the foregoing papers,

In this action for unpaid attorney's fees, the court shall grant defendant's motion to dismiss plaintiff's second cause of action for account stated and otherwise deny the motion. The court shall deny plaintiff's motion for summary judgment as procedurally improper.

There is no dispute that plaintiff's first cause of action

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):

FILED
OCT 10 2007
NEW YORK COUNTY CLERK'S OFFICE

alleges a breach of contract insofar as plaintiff states that defendant owes it legal fees under a July 31, 2006 Retainer Agreement (that was subsequently amended according to the plaintiff at oral argument) and that the defendant failed to pay the fees when due. Defendant seeks dismissal alleging that pursuant to the terms of the Retainer no fees are due.

As stated by the Court of Appeals, "[o]n a motion to dismiss a complaint we accept the facts alleged as true and determine simply whether the facts alleged fit within any cognizable legal theory." Morone v Morone, 50 NY2d 481, 484 (1980) (citations omitted). Viewing plaintiff's allegations in this manner, the cause of action for breach of contract survives dismissal. Plaintiff's allegations that the Retainer can be interpreted to require immediate payment of legal fees because the contemplated transaction did not go forward may on the facts be a supportable interpretation of the terms of the representation. Accordingly, summary dismissal shall be denied with respect to the first cause of action.

However, with respect to the cause of action for account stated, plaintiff's allegations fail to set forth a cognizable cause. It has been held that "[w]hether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a

question of law only in those cases where only one inference is rationally possible." Yannelli, Zevin & Civardi v Sakol, 298 AD2d 579, 580 (2d Dept 2002) (citation and quotation omitted). In this case however, the complaint alleges that the account was rendered sometime in January 2007. The complaint is dated January 29, 2007 and was filed on February 1, 2007. Therefore, even viewing the facts alleged in the complaint in the light most favorable to the plaintiff, an insufficient amount of time elapsed, as a matter of law, for defendant's alleged lack of protest to be considered assent to the account. There is no allegation in the complaint that any demand for the payment of any legal fees was made from July 2006 through January 2007. Nor is there any allegation that the defendant otherwise agreed to the statement of account. In the absence of sufficient facts to imply defendant's assent to the account, the cause of action must fail as pled. See Herrick, Feinstein LLP v Stamm, 297 AD2d 477, 478 (1st Dept 2002) (retention of legal invoices for two months did not as a matter of law constitute "an unequivocal assent to the balances stated").

Finally, only the court has the authority under CPLR 3211 (c) to convert a motion brought under CPLR 3211 to one under CPLR 3212 and therefore plaintiff's application is improper.

Accordingly, it is

ORDERED that defendant's motion to dismiss plaintiff's second cause of action for account stated is GRANTED and the second cause of action in the complaint is hereby DISMISSED and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant's motion to dismiss is otherwise DENIED and defendant is directed answer pursuant to CPLR 3211 (f); and it is further

ORDERED that plaintiff's cross-motion is DENIED; and it is further

ORDERED that the remaining parties are directed to attend a preliminary conference on October 30, 2007, at 9:30 A.M. in Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: September 28, 2007

ENTER:

~~Debra A. James~~
DEBRA A. JAMES S.C.
J.S.C.

FILED
OCT 10 2007
NEW YORK
COUNTY CLERK'S OFFICE