

**Ruffer v 210 E. Seventeenth St. Hous.
Dev. Corp.**

2007 NY Slip Op 33435(U)

October 12, 2007

Supreme Court, New York County

Docket Number: 0116056/2004

Judge: Judith J. Gische

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

PRESENT: **JUDITH J. GISCHE, J.S.C.**

PART 10

Index Number : 116056/2004
RUFFER, WILLIAM C.

vs
210 EAST SEVENTEENTH STREET
Sequence Number : 004

PSJ

X NO. _____
ON DATE _____
DN SEQ. NO. _____
IN 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
OCT 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/12/07

JUDITH J. GISCHE, J.S.C. *J.S.C.*

Check one: ~~FINAL DISPOSITION~~
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----x
WILLIAM C. RUFFER,

Plaintiff,

-against-

210 EAST SEVENTEENTH STREET
HOUSING DEVELOPMENT FUND
CORPORATION,

Defendant.
-----x

Index No.: 116056/04
Seq. No. : 004

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

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

Papers	Numbered
Pltf's motion [psj] w/ WCR affirm in support, exhs, memo	1
Def's crss mot w/ JCP affirm, exhs	2
Pltf's WCR reply affirm in further support and opp, exhs	3
Def's JCP reply affirm in further support	4

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

This is an action by plaintiff to recover legal fees from the defendant. Plaintiff moves for partial summary judgment on his first and second causes of action [CPLR § 3212], to dismiss defendant's first through fourth affirmative defenses [CPLR § 3211(b)] and to dismiss defendant's first and second counterclaims [CPLR §§ 3211(a)(1); 3211(7)]. In the alternative, plaintiff seeks an order compelling defendant's compliance with certain discovery requests [CPLR § 3124], preclusion or striking of defendant's answer [CPLR §§ 3216(2), 3126(c)], extending plaintiff's time to file the note of issue and directing defendant to produce its president, Gillian Wells. Defendant cross moves 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).

This case arises from plaintiff's representation of defendant pursuant to a retainer agreement from June 1997 through July 2002. In a series of emails during July 2002, the parties agreed that defendant owed plaintiff \$26,454.18 under the retainer agreement. The parties agreed that defendant would pay plaintiff \$21,454.18, with 9% interest, to be paid in 24 monthly installments, through a series of emails exchanged between July 9, 2002 through July 12, 2002. These emails have been provided to the court.

Starting in July 2002, defendant made eleven payments, one of which was dishonored by the drawee bank. It is undisputed that defendant now owes the principal sum of \$16,672.75 for legal services plaintiff provided. The only dispute arises from the calculation of interest on that sum. Plaintiff contends he is entitled to interest, pursuant to CPLR §§ 5001(2), 5002, from the date plaintiff's bills became due.

Defendant claims that it tried to settle this claim and that plaintiff has "intentionally and reprehensibly delayed the resolution of this lawsuit [so] that he could increase the amount of interest due and owing on a debt that the defendant has acknowledged and has volunteered to pay."

By letter dated January 12, 2005, plaintiff acknowledged a settlement offer made by defendant. However, plaintiff rejected this offer because it did not "include statutory interest or legal fees." Plaintiff's counter-offer was for the principal payment of \$16,672.75, plus statutory interest; plaintiff offered to forgo his legal fees.

Defendant states that because plaintiff has repeatedly refused to accept \$16,672.75

in satisfaction of all its claim, it has kept that amount in its counsel's escrow account since before May 2006. On June 2, 2006, defendant offered to pay plaintiff \$20,000, which constituted the principal which plaintiff seeks plus \$3,327.25 "towards interest and legal fees." In that same letter, defendant also stated that it was withdrawing its counterclaims in this action.

Plaintiff responded by letter dated June 6, 2006, stating that "the counterclaims should be withdrawn by a stipulation" and "[m]eanwhile, [he] will consider [defendant's] settlement offer."

Plaintiff seeks summary judgment on the first cause of action for account stated and the second cause of action for breach of contract.¹ Plaintiff also claims that defendant has refused to respond to its first set of interrogatories and discovery demands, both dated February 22, 2006. Plaintiff further states that defendant refuses to produce for deposition its president, Gillian Wells ("Wells"), who verified defendant's Verified Answer. Plaintiff claims that Wells has no personal knowledge of any fact contained in the Verified Answer.

Defendant has pled four affirmative defenses in its answer, to wit: [1] that this court lacks personal jurisdiction; [2] that the complaint fails to state a cause of action; [3] that "[d]efendant is not liable for the charges set for in the Retainer Agreement due to [p]laintiff's complete inability to perform its obligations pursuant to said agreement;" and [4] defendant disputes the amount claimed due by plaintiff "by virtue of [p]laintiff's lack of knowledge or ability to perform the services for which [p]laintiff was hired." Defendant also

¹ Plaintiff has also pled a third cause of action for *quantum meruit* and a fourth cause of action seeking his legal fees incurred in prosecuting this action.

asserted two counterclaims alleging legal malpractice.

Defendant cross-moves for summary judgment, claiming that because plaintiff has prolonged the litigation, defaulted in appearing at a compliance conference on September 7, 2006, this case should be dismissed. Defendant opposes plaintiff's motion, claiming that because it "tried so mightily to settle the case by simply paying what was owed (and then some)," plaintiff is only entitled to the principal and has forfeited his rights to collection of statutory interest. Defendant also claims that plaintiff failed to file the note of issue on or before September 8, 2006.

Discussion

Before turning to the merits, at the outset, the court rejects defendant's argument that this motion is untimely. Although the note of issue was not filed as originally directed, the court extended the time. On April 26, 2007, the court issued an order extending plaintiff's time to file the note of issue by ninety days. The motion for summary judgment was filed within the ninety day extension period.

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. Weisz, 303 A.D.2d 459 (2nd dept. 2003).

When 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. Weisz, 303 A.D.2d 459 (2nd 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.

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2nd Dept. 1990). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Industries and Termianl Corp. V. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999).

An account stated represents an agreement between the parties reflecting amounts

due on prior transactions. Jim-Mar Corp. v. Aquatic Constr., 195 A.D.2d 868 (3d Dept. 1993), *lv. denied* 82 N.Y.2d 660 (1993). Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails. M & A Const. Corp. v. McTague, 21 A.D.3d 610 (3rd Dept. 2005). A client's receipt and retention of a lawyer's invoices for legal fees, without objection within a reasonable time, or after partial payment, gives rise to a cause of action for an account stated to recover said legal fees. Morrison Cohen Singer and Weinstein, LLP v. Waters, 13 A.D.3d 51 (1st Dept. 2004).

Plaintiff has satisfied all the elements of a breach of contract and an account stated, and defendant's claims in opposition failed to raise a material issue of fact as to any of those elements. Fred Ehrlich, P.C. v. Tullio, 274 A.D.2d 303 (1st Dept. 2000). In the instant case, defendant has conceded that it agreed to pay and subsequently failed to pay the principal sum of \$16,672.75 to plaintiff for legal services rendered. Moreover, plaintiff is entitled to collect a statutory award of prejudgment interest even assuming plaintiff has unreasonably delayed the prosecution of this case. The purpose of prejudgment interest is to indemnify successful plaintiffs for nonpayment of what is due to them and not to punish defendants for delaying a final resolution of litigation. Love v. State, 78 N.Y.2d 540 (1991); Selinger v. Selinger, 232 A.D.2d 471 (2d Dept. 1996); Walters Motorcars, Ltd. v. Mazda Motor of America, Inc., 169 Misc. 2d 737 (N.Y. Sup. Nassau Co. 1996).

Moreover, plaintiff is entitled to pre-judgment interest at the rate of 9% because, on July 10, 2002, defendant agreed to pay plaintiff the principal due with interest at a rate of 9% thereon. Accordingly, plaintiff's motion for partial summary judgment on the first and second causes of action is hereby granted and defendant's cross motion is denied.

Plaintiff is, therefore, entitled to recover the principal sum of \$16,672.75, plus pre-judgment interest thereon from July 10, 2002.

Plaintiff is also entitled to an order dismissing defendant's affirmative defenses and counterclaims. Defendant has not asserted any facts in support of either its affirmative defenses or counterclaims. Indeed, there is no client affidavit or sworn statement on its cross-motion for summary judgment. It is supported only by an attorney affirmation. Attorney Price does not even state any facts regarding the quality of plaintiff's pre-action representation of defendant. Zuckerman v. City of New York, *supra*. It appears from the record before the court that defendant has abandoned its counterclaims. Accordingly, plaintiff's motion to dismiss defendant's affirmative defenses and counterclaims is hereby granted.

Since plaintiff has moved for partial summary judgment, the status of plaintiff's remaining claims is unclear. The court hereby schedules a status conference to be held on November 1, 2007 at 9:30 a.m at 80 Centre, Room 122.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for partial summary judgment on the first and second causes of action is hereby granted; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of plaintiff William C. Ruffer and against defendant 210 East Seventeenth Street Housing Development Fund Corporation, in the amount demanded in the complaint, totaling Sixteen Thousand Six Hundred Seventy Two 75/100 Dollars (\$16,672.75), plus pre-judgment interest thereon

from July 10, 2002; and it is further

ORDERED that plaintiff's motion to dismiss defendant's affirmative defenses and counterclaims is hereby granted; and it is further

ORDERED that plaintiff's motion is otherwise denied; and it is further

ORDERED that defendant's cross-motion for summary judgment is hereby denied; and it is further

ORDERED that this matter is hereby scheduled for a status conference on November 1, 2007 at 9:30 a.m. at 80 Centre, Room 122.

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
October 12, 2007

So Ordered:



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

FILED
OCT 23 2007
NEW YORK
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