SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 50**

KENNETH S. GUTTENPLAN,

INDEX NO.: 020132/06

Plaintiff,

MOTION DATE:8-23-07
SUBMIT DATE: 10-5-07
SEQ. NUMBER - 001 & 002

-against-

MICHAEL STEIN,

Defendants

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The following papers have been read on this motion:

Notice of Motion, dated 7-24-07.....1
Notice of Cross Motion, dated 8-14-07.....2
Affirmation in Opposition to Cross Motion, dated 8-22-07.....3
Affidavit in Opposition and Reply, dated 9-26-07.....4
Reply Affidavit, dated 10-4-2007.....5

The motion by the plaintiff for a default judgment is granted as indicated in this order. The cross motion by the defendant pursuant to CPLR 5240 for a protective order against the use of a restraining notice directed to disability payments is denied as premature.

This is an action for attorney's fees stemming from the plaintiff's representation of the defendant during the latter's divorce proceedings. The plaintiff *pro se* has submitted the necessary papers required by CPLR 3215 demonstrating the existence of a valid claim, service of a complaint and defendant's default. He has also shown compliance with Part 136

of the Rules of the Chief Administrator regarding an offer of arbitration of the fee dispute.

The defendant does not dispute service of the complaint nor his default. Further, although he claims that he paid the plaintiff "between $75,000- $$85,000.00 [sic]" during the course of the representation, he presents no proof of any kind to the effect that any part of these payments should be applied to the sums stated to be owed. Moreover, the complaint alleges that the plaintiff billed the defendant a total of $164,106.80, and has sued for $67,771.12. Thus, even assuming that $85,000 was paid, the amount remaining would still exceed what is claimed by the plaintiff to be the remaining balance.

Perhaps more importantly, the first cause of action pled in the complaint was that the debt owed was established as an account stated, and there is no claim made here that the defendant timely objected to any of the bills that comprise the sum for which he was sued. The defendant states that he was "not equipped to focus on Plaintiff's bills" and thus did not timely object to any of them because he suffered from and still has a depression condition. However, this can no longer serve as a defense to this claim, as the defendant defaulted in pleading, and the existence of a valid account stated thus has been admitted. *See generally, Rokina Optical Co., Inc. v Camera King, Inc.,* 63 NY2d 729 (1984).

Given the foregoing, there is no reason to direct an inquest, because "it is not necessary to establish the reasonableness of the fee since the client's act of holding the statement without objection will be construed as acquiescence as to its correctness." *Cohen Tauber Spievak & Wagner, LLP v Alnwick,* 33 AD3d 562, 563 (1st Dept. 2006) quoting *O'Connell & Aronowitz v Gullo,* 229 AD2d 637, 638 (3d Dept 1996), *lv denied* 89 NY2d 803 (1996).

The plaintiff has offered to reduce the amount sought by $891 to conform the bills rendered to what was sought in the complaint, and the Court will adjust the amount accordingly. The motion is thus granted and the plaintiff may enter judgment for $66,880.13 on his first cause of action.

The plaintiff also is entitled to interest from November 1, 2003. This is the earliest ascertainable date from which the cause of action existed, as the plaintiff states in his affidavit for legal fees that the defendant ceased paying his bills as of that month. CPLR 5001(b); *see, Malsin v Stockman,* 265 AD2d 533 (2d Dept. 1999). However, the Court finds that the rate sought, 12%, is excessive. While such a rate was fixed in the retainer agreement, and in other contexts involving unfulfilled promises to pay the rate established in a contract should be enforced (provided, of course, that it is not illegal), courts must always be mindful that where legal fees are concerned interest is subject to the same reasonableness requirement that applies to the fees themselves. *Ween v Dow,* 35 AD3d 58, 64 (1st Dept. 2006). Further, there is no indication or claim that each of the bills rendered and unpaid contained any statement that interest at 12% was running on such amount. Therefore, the account stated analysis noted above – *i.e.,* that the reasonableness of the fee is established by the retention of the bills without objection – does not include the rate of interest. Here, the Court finds that applying the legal rate of interest, nine per cent, is reasonable and fulfills the goal of making the plaintiff whole. *155 Henry Owners corp. v Lovlyn Realty Co.,* 231 AD2d 559, 560 (2d Dept. 1996). It thus awards interest on the unpaid principal at that rate until the date of this decision. CPLR 5001.

The cross motion for a protective order pursuant to CPLR 5240 for relief against

judgment enforcement is denied as premature. Although the defendant is correct when he contends that such a motion may be made in the context of the underlying action, this does not mean that the debtor may do so before a judgment has even been entered. Rather, it permits a judgment debtor to bring such an application under the existing case caption and index number, rather than forcing him to start a new plenary action or proceeding, but this does not alter the character of the motion as one for *post*-judgment relief. *See, Paz v Long Is. R. R.*, 241 AD2d 486 (2d Dept. 1997) [judgment enforcement after jury verdict].

As currently framed the cross motion would have been denied in any event. It is premised on the assertion that the only sources of income for the defendant are Social Security disability benefits and disability benefits being paid by a private insurer, and that both are wholly exempt. The defendant is correct as to the former, as under federal law Social Security payments are exempt from any attachment or any other type of judgment enforcement that might be used by the plaintiff here. 42 USC § 407(a); *State v Jacobs,* 167 AD2d 876 (4th Dept. 1990).

However, the plaintiff does not dispute this, and focuses instead on the private disability payments. In that case, New York's Insurance Law provides that where the debt sought to be enforced was not incurred for necessaries (where there is no exemption at all), only the first four hundred dollars paid monthly to an insured is exempt. Insurance Law § 3212(c)(2) ["...with respect to all other debts or liabilities incurred after the commencement of disability of the insured, the exemption... shall not at any time exceed payment at a rate of four hundred dollars per month..."]. Accordingly, the plaintiff may seek enforcement of the judgment to be entered against any payments made from a private

disability insurer above $400 per month, subject to any and all additional limits imposed by CPLR Article 52, or other applicable law.

Further, if funds restrained are not clearly identifiable to the creditor as exempt, the burden is on the debtor to claim and prove the exemption. *Balanoff v Niosi,* 16 AD3d 53 (2d Dept. 2005). Thus, if an account is claimed to be exempt, the defendant debtor would have to demonstrate that he deposited only the Social Security disability payments and the private disability income into such account, *and* that there is nothing available to the creditor after the Social Security disability income and the $400 private insurance income exemption are added together. Otherwise, he is entitled to an exemption only up to that figure, and anything above it be subject to enforcement, subject, as noted above, to any other limitations imposed by Article 52 or other law.

Accordingly, the plaintiff may enter judgment for $66,880.13 on his first cause of action, with interest at 9% from November 1, 2003 to the date of this order, with the costs and disbursements of the action, as taxed by the Clerk.

This shall constitute the Decision and Order of this Court.

Submit judgment to Clerk.

ENTER

DATED: October 22, 2007

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: **Kenneth S. Guttenplan**
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