

**Phillips Nizer LLP v Yien Koo Wang King**

2007 NY Slip Op 34496(U)

February 20, 2007

Supreme Court, New York County

Docket Number: 104389/06

Judge: Shirley Werner Kornreich

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6

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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PHILLIPS NIZER LLP,

Plaintiff,

Index No.: 104389/06

-against-

YIEN KOO WANG KING, KENNETH KING  
and CY ART LTD.,

Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

DECISION  
and  
**FILED**  
MAR 07 2007  
COUNTY CLERKS OFFICE  
NEW YORK

This is an action to recover unpaid legal fees. Plaintiff-law firm now seeks partial summary judgment on its claim for an account stated, only as to the following invoices: No. 58695 (1/7/04), No. 59443 (2/4/04), No. 60179 (3/3/04), No. 61203 (4/7/04), and No. 61879 (5/6/04) (collectively, the "Subject Invoices"). Plaintiff also seeks dismissal of defendants' ninth and eleventh affirmative defenses, as well as their first and fourth counterclaims.

I. **Background**

On July 14, 2003, defendants Yien Koo Wang King ("Yien Koo"), Kenneth King ("Mr. King") and corporate defendant Cy Art Ltd. (collectively, the "Kings") executed a written agreement, by which they retained plaintiff Phillips Nizer LLP ("PN") to represent them in a New York Surrogate's Court proceeding and a related action in New York State Supreme Court. Those actions arose from disputes over the will of Chi Chuan Wang, Yien Koo's father, which "essentially disinherited Yien Koo."

Helen Davis Chaitman, a member of PN, avers that during PN's representation of the

Kings—from August 6, 2003 through September 14, 2004—she “was in contact with the Kings and their 38-year old son, Raymond King, virtually every day, usually several times per day, primarily by email and to a lesser extent by telephone and fax.”

The Kings made their first payment to PN, pursuant to the retainer agreement, on July 17, 2003, in the amount of \$50,000. Thereafter, in November 2003, the Kings owed PN \$143,274.89 and, on or about November 18, 2003, the Kings made a second payment to PN in the amount of \$150,000, leaving them with a credit of \$6,725.11. By January 7, 2004, the Kings again owed PN a substantial amount, viz., \$119,476.93, which they paid in part on January 10, 2004. The remaining balance, after that payment, was \$79,476.93.

PN continued to represent the Kings and their legal fees continued to accrue. However, the January 10, 2004 payment was the last the Kings made. On February 4, March 3, April 7 and May 6, 2004, PN sent invoices to the Kings. According to Ms. Chaitman, the Kings never objected to these invoices, which by May 2004 reflected an unpaid balance of \$395,197.10. On the other hand, Ms. Chaitman avers that, on April 7, 2004, when she emailed the Kings informing them “that a decision needed to be made whether to settle their lawsuits or figure out a way to fund the litigation going forward,” Mr. King assured her that he had \$500,000 in China that he could use to pay PN bills, but that he did not know how to transfer that money out of China. The Kings and Ms. Chaitman continued to discuss the means by which the Chinese funds could be moved through May 2004 and “[a]t no point during these communications . . . did the Kings raise any objections concerning the amount or accuracy of the Invoices.”

Upon not being paid, PN submitted an agreement to Yien Koo, which provided that Yien Koo would deliver certain paintings to PN—valued at approximately \$1.25 million—to “serve as

collateral for [the Kings'] obligations to [PN] for payment of legal fees, presently owing and hereafter incurred." Yien Koo executed the June 3, 2004 letter, thereby providing PN a security interest in the paintings. Mr. King then wrote to PN on June 7, 2004, expressing his dismay regarding the June 3 collateral agreement and generally expressing frustration with the litigation process without expressing any specific dissatisfaction with PN or objecting to PN's bills. On July 15, 2004, Mr. King sent PN an email in which he acknowledged partial responsibility for a July 8, 2004 invoice in the amount of \$487,493.29 but wrote that he "[did] not agree to it in its entirety, [his] reasons which [he has] already expressed in [his] numerous emails to [PN] in late May and early June 2004." There is no further specification as to the "numerous" prior emails, and the parties' submissions do not include such emails. In that same email, Mr. King assured PN that although defendants did not "have the ability to settle [PN's] invoices" at that time, "after winning this lawsuit, [they] will have plenty of funds to pay for all [their] legal expenses[.]" Mr. King further assured PN that defendant would "settle [PN's] fees in a fair and professional manner once [defendants] win this lawsuit."

By letter dated August 24, 2004, defendants discharged PN. In that letter, defendants cited various reasons for their dissatisfaction with PN's representation. Ms. Chaitman avers that "[a]lmost all of their complaints date back to the first few months of the representation," not the invoices in question here; and the complained-of work was billed in invoices from "2003 and early 2004." Ms. Chaitman also claims that the other complaints in the August 24 letter refer to events, which "are not contained in any Invoice that is the subject of this motion."

In his affidavit, Mr. King avers that "[PN] admits that [he] sent e-mails complaining of their representation, and which are reproduced in [PN's] motion papers, require a significant

factual analysis and require factual findings.” He claims that he “objected to bills in [his] emails of 7/15/04 and 8/24/04,” but does not point to any specific objections to the subject PN invoices, claiming only that PN “was terminated *for cause*” (emphasis as in original). Mr. King states that Ms. Chaitman and PN “made legal and technical mistakes in [their] handling of this case . . . [and] these mistakes cost defendants money and time in the handling of the estate matter, and prejudiced the estate matter against the defendants.” Due to such mistakes, the Kings terminated PN. Although Mr. King has attached a second “affidavit in opposition to plaintiff’s motions,” the document has not been signed, nor does it even contain a signature block.

Defendants’ ninth affirmative defense states that the retainer agreement “is unenforceable because any agreements were entered into based on intentional or negligent misrepresentations made to defendants by plaintiff’ and the eleventh affirmative defense states that “[t]he alleged agreement or agreements are void in whole or part due to fraud in the inducement and/or fraud in the procurement.” Defendants’ first counterclaim, recited entirely upon information and belief, alleges that PN induced defendants into the retainer agreement by misrepresenting their “special expertise” in estate law and acted “below the standard of professionalism,” to defendants’ pecuniary detriment. The fourth counterclaim, also made “upon information and belief,” includes elements of various causes of action, though the court is unable to determine upon what grounds this counterclaim seeks relief. To date, the parties have not exchanged any discovery and no preliminary conference has been held.

## II. *Conclusions of Law*

### A. *Partial Summary Judgment*

A defendant’s receipt of invoices, which seek payment for professional services rendered,

without objection within a reasonable time, will give rise to an account stated, and will entitle plaintiff to summary judgment in its favor. *Ruskin, Moscou, Evans, & Faltischek, P.C. v. FGH Realty Credit Corp.*, 228 A.D.2d 294, 295 (1st Dept. 1996). See also *Morrison, Cohen, Singer & Weinstein, LLP v. Waters*, 13 A.D.3d 51, 52 (1st Dept. 2004) (“either retention of bills without objection or partial payment may give rise to an account stated”). “[W]here an account is made up and rendered, he who receives it is bound to examine the same, or to procure some one to examine it for him; if he admits it to be correct, it becomes a stated account and is binding on both parties – the balance being the debt which may be sued for and recovered at law.” *Lockwood v. Thorne*, 11 N.Y. 170, 174 (1854); *Rosenman Colin Freund Lewis & Cohen v. Neuman*, 93 A.D.2d 745, 746 (1st Dept. 1983).

Here, defendants have failed to submit evidence that they objected to the subject invoices (No. 58695 [1/7/04], No. 59443 [2/4/04], No. 60179 [3/3/04], No. 61203 [4/7/04], and No. 61879 [(5/6/04)] within a reasonable amount of time, while it is undisputed that they made partial payment of their debt. Indeed, evidence demonstrates that—through July 2004—defendants assured plaintiff they would pay their outstanding balance, once they had access to certain funds. While PN has demonstrated that defendants never timely objected to the Subject Invoices, defendants have not disputed these contentions.<sup>1</sup> Although defendants did challenge PN’s bills in their August 24, 2004 letter, discharging PN as counsel, PN contends that those objections did not refer to the subject invoices—a claim that defendant has failed to

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<sup>1</sup> The court will not consider defendants’ unsigned and unsworn “affidavit.” See *Rue v. Stokes*, 191 A.D.2d 245 (1st Dept. 1993) (“[u]nsworn reports, letters, transcripts and other documents do not constitute evidentiary proof in admissible form and may not be considered in opposition to a motion for summary judgment”) (emphasis supplied).

dispute.

In order to prevail on a motion for 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, and do so by tender of evidentiary proof in admissible form. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557 (1980). If the movant makes out a prima facie case, the opponent must come forward and “lay bare his proofs” of any alleged triable issues of fact. *See In re Dissolution of Rencor Controls, Inc.*, 263 A.D.2d 845 (3d Dept. 1999) citing *Hanson v. Ontario Milk Producers Coop., Inc.*, 58 Misc.2d 138 (Sup.Ct. Oswego County 1968)(Aronson, J.); *Bank of New York v. Spitzer*, 43 A.D.2d 105 (1st Dept. 1973).

Here, PN has established an account stated as to the subject invoices, and defendants have failed to raise any triable issues in response. Although defendants point to various emails to raise such an issue, the documents do not support defendants’ claims. Thus, PN is entitled to summary judgment as to the subject invoices.

**B. *Dismissal of Defendants’ Affirmative Defenses and Counterclaims***

CPLR 3016(b) provides that “[w]here a . . . defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.” A pleading that “fails to set forth the substance of, the dates upon which or the persons to whom the alleged misrepresentations purportedly were made, falls far short of satisfying the pleading requirement imposed by CPLR 3016(b).” *Mountain Lion Baseball, Inc. v. Gaiman*, 263 A.D.2d 636, 638 (3d Dept. 1999).

Here, defendants ninth and eleventh affirmative defenses are devoid of even a single factual allegation. These defenses fail to satisfy the pleading requirement of CPLR 3016(b) and

must be dismissed. Similarly, defendants' first counterclaim fails to allege facts sufficient to withstand the requirement of CPLR 3016(b). See also *Sandra Greer Real Estate, Inc. v. Johansen Organization*, 182 A.D.2d 468, 469 (1st Dept. 1992) (statement of "belief" as to party's intention at time agreement is executed "does not . . . make out a cause of action for fraud").

Defendants' fourth counterclaim must also be dismissed. In order to withstand a motion for dismissal, a pleading must be particular enough that it provides the court and parties "with notice of the transaction or occurrences to be proved." *Travelers Ins. Co. v. Ferco, Inc.*, 122 A.D.2d 718, 719 (1st Dept. 1986) (pleadings consisting of bare allegations "are so devoid of factual substance [as to] require dismissal pursuant to CPLR 3211 (a) (7).") The court can discern no cause of action which would arise from the text of defendants' fourth counterclaim. Defendants seem to be alleging that, *inter alia*, PN misrepresented the source from which it would be paid; PN took unnecessary and wasteful actions; and PN produced an "unnecessary windfall" for itself. Plaintiff then claims damages of \$800,000 and punitive damages in the amount of \$5 million. Defendants have not specifically opposed this portion of plaintiff's motion, but have only requested that the court "permit re-pleading of the counterclaim." However, defendants have not cross-moved to amend their answer, therefore, this portion of plaintiff's motion will be granted.<sup>2</sup> Accordingly, it is

ORDERED that plaintiff's motion is granted to the extent of granting partial summary

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<sup>2</sup> Finally, the court, once again, reminds the parties that Rule 14 of the Rules of the Justices of the Supreme Court, Civil Branch, New York County, governing motion papers, requires: "[u]nless advance permission otherwise is granted by the court for good cause, memoranda of law shall not exceed 30 pages each . . . and affidavits/affirmations shall not exceed 25 pages each."

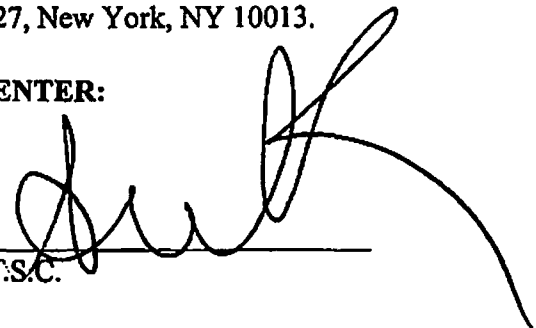
judgment in favor of plaintiff and against defendants as follows:

1. Plaintiff is granted judgment on its second cause of action (account stated) as to the following invoices only: No. 58695 (1/7/04), No. 59443 (2/4/04), No. 60179 (3/3/04), No. 61203 (4/7/04), and No. 61879 (5/6/04) in the sum of \$395,197.10, with interest as prayed for allowable by law at the rate of 1% per month from the date of August 24, 2004 (date of termination), until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, the first cause of action is severed, and the Clerk is directed to enter judgment accordingly;
2. Plaintiff is granted judgment on that portion of its motion seeking dismissal of defendants' ninth and eleventh affirmative defenses and first and fourth counterclaims and those affirmative defenses and counterclaims are dismissed, and the Clerk is directed to enter judgment accordingly; and it is further
3. The remainder of the action is severed and shall continue.

And it is further

ORDERED that all parties are to appear for a preliminary conference before the Court at 11:00 a.m. on March 8, 2007 at 111 Centre Street, Room 1227, New York, NY 10013.

ENTER:



A handwritten signature in black ink, appearing to be 'J.S.C.', written over a horizontal line.

J.S.C.

Date: February 20, 2007  
New York, New York

**FILED**

MAR 07 2007

**COUNTY CLERK'S OFFICE  
NEW YORK**