

**Dwyer v Scarola**

2007 NY Slip Op 34542(U)

June 20, 2007

Supreme Court, New York County

Docket Number: 107109/05

Judge: Jane S. Solomon

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

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MARTHA M. DWYER,

INDEX NO. 107109/05

Plaintiff,

DECISION and ORDER

-against-

RICHARD J.J. SCAROLA AND HELEN D.  
REAVIS, individually and doing  
business as SCAROLA, REAVIS AND  
PARENT LLP, formerly known as  
SCAROLA & REAVIS,

Defendants.

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JANE S. SOLOMON, J.

**FILED**  
DEC 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendant Richard J.J. Scarola (Scarola) moves for partial summary judgment dismissing the complaint on the ground that it is barred under the statute of limitations. Plaintiff Martha M. Dwyer (Dwyer) cross-moves for partial summary judgment as to liability.

The individual parties are lawyers. Dwyer worked for the defendant law firm Scarola, Reavis and Parent LLP, formerly known as Scarola & Reavis (S&C) as an "of counsel" lawyer. She alleges that she was underpaid under the terms of their agreement, and sues to recover the shortfall. Scarola and defendant Helen D. Reavis (Reavis) were partners in the now defunct S&C firm, and are sued in their individual capacities for

the partnership debt. Defendants claim that Dwyer was paid all she is entitled to receive.

The complaint alleges that Dwyer was not paid for work she performed for two S&C clients, Financial Systems Architects, LLP (FSA) and Robert Sachs (Sachs). The ten causes of action separately allege breach of contract, account stated, quantum meruit, unjust enrichment and breach of fiduciary duty with respect to each the FSA and Sachs accounts. The complaint also alleges that under the terms of their agreement, she was "to be paid in full promptly prior to any payment" from the client (Complaint, paragraph 10). Scarola and Reavis denied this allegation in their answers.

The relevant facts are as follows: Dwyer worked for S&C on an "of counsel" basis pursuant to an oral contract (Transcript of Scarola deposition, annexed to cross-motion as Exhibit B, 25-26). She was compensated by S&C for work she performed on behalf of its clients, although she was free to work for her own clients as well. She informed S&C of the hours she worked on behalf of its clients, and S&C billed its clients for her work. Dwyer was paid seventy-five percent of the billed time, and payment was due when the client paid S&C. Dwyer was obligated to reimburse S&C for certain shared expenses, including her share of malpractice insurance and a listing in the Martindale-Hubbell directory.

Dwyer claims that she submitted bills for work on the FSA account in the amount of \$9,295 in legal fees plus \$166.75 for disbursements, for a total of \$9,461.75, of which S&C paid her \$243.75, leaving a balance of \$9,218. Dwyer claims that she submitted bills for work on the Sachs account in the amount of \$40,545 in legal fees plus \$673.13 for disbursements. She was paid \$9,984.94, leaving a balance of \$31,233.19. The total amount she seeks in the complaint is the sum of the FSA and Sachs balances, i.e., \$40,451.19 plus interest.

Dwyer sent S&C an invoice with the disputed charges on April 28, 1999. She then reminded S&C of the unpaid fees in a letter dated July 13, 1999 (Scarola Aff., Exhibit D). Scarola responded with a letter disputing Dwyer's claim on July 15, 1999 (Scarola Aff., Exhibit E). Dwyer sent another invoice regarding her work for FSA on July 19, 1999, which was met with a protest on July 21, 1999 (Scarola Aff., Exhibits E and F).

The Sachs matter, which involved litigation arising from his interest in publicly traded securities, concluded in March 1999. Dwyer assisted with preparing securities filings made in connection with the litigation, and nearly all of this work concluded by the end of April 1999. However, Sachs contested the S&C bill, which resulted in a lawsuit by S&C

against Sachs, which resulted in a settlement in September 2000 whereby Sachs paid a significant portion of the bill.

This action was commenced on May 20, 2005.

Accordingly, under the six year statute of limitations applicable to contract claims (CPLR 213), she is barred from recovering for a breach that occurred before May 20, 1999. Her claim for breach of fiduciary duty is a tort claim governed by a three year statute of limitations (CPLR 214). As such, it is dismissed; in any event, it is duplicative of the other claims.

Scarola's motion contends that Dwyer sent bills to S&C regarding these clients before May 20, 1999, and therefore the claim is barred under the six year statute of limitations. Scarola submits copies of bills sent to FSA and Sachs, which show the last entry for work by Dwyer on the FSA account as April 9, 1999, and the last entry for work by Dwyer on the Sachs account as May 20, 1999. Scarola also alleges that the claim for an account stated must be dismissed because S&C promptly protested when she sent bills in July 1999. On their face, these arguments are contradictory and undermine the request for summary judgment under the six year statute of limitations.

In opposition, Dwyer argues that the complaint inaccurately describes the agreement with respect to when S&C was obligated to pay her. Scarola testified that under the terms of

their agreement, Dwyer was not entitled to payment until after the client paid S&C. Dwyer adopts this contention, and states that she misstated the terms of the agreement in her complaint. Therefore, since it is not disputed that S&C was not paid for Dwyer's invoiced work until after May 20, 1999, and the agreement provided that Dwyer would not receive payment until after S&C was paid, that branch of the motion for summary judgment under the six year statute of limitations is denied.

There are questions of fact, however, regarding how and when Dwyer submitted her bills for payment, so summary judgment on the account stated claims also is denied. Scarola's motion includes invoices sent to FSA and Sachs in May, June and March 1999, that include demands for payment with respect to work performed by Dwyer. The earliest protest from S&C occurred in July 1999, after Dwyer had left the firm. Presumably, Dwyer submitted bills to S&C before invoices were sent to clients, and these bills predated S&C's first protest by several months, but the record here does not establish that definitively.

Dwyer's cross-motion for summary judgment on liability, however, must be granted on the breach of contract claims. There is no dispute that she performed legal work for S&C clients under the agreement, and that she was entitled to payment for that work. In fact, S&C made partial payments on both the FSA and Sachs accounts. Dwyer concedes that she is only entitled to

receive seventy-five percent of the amount billed, which reduces her claim from approximately \$40,000 to approximately \$30,000. At oral argument, Scarola and Reavis staunchly contended that Dwyer was paid in full once offsets for malpractice insurance, the Martindale-Hubbell directory listing and other expenses for which she is responsible are taken into account, in addition to other factors not at issue in this motion. Accordingly, a trial is necessary to resolve fact issues regarding what amount Dwyer is entitled to recover, if any. It hereby is

ORDERED that the motion by Scarola for partial summary judgment is granted to the extent that the ninth and tenth causes of action sounding in breach of fiduciary duty are dismissed; and it further is

ORDERED that the cross-motion by Dwyer for summary judgment as to liability on the breach of contract claims in the first and second causes of action is granted as to liability; and it further is

ORDERED that counsel shall appear in Part 55 for a pre-trial conference on January 28, 2008 at 2 PM.

Dated: December 20, 2007

ENTER:

**FILED**  
 DEC 26 2007  
 NEW YORK  
 COUNTY CLERK'S OFFICE 6

  
 J.S.C.  
**JANE S. SOLOMON**