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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 : 112622/2005

MILLER, GRAUBARD

VS

GLOBAL JEWISH ASSISTANCE &

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

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
JAN 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
JAN 14 2008
MOTION SUPPORT OFFICE

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

Dated: 1/9/08

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MDAI

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

----------x

GRAUBARD MILLER,

Plaintiff,

-against-

GLOBAL JEWISH ASSISTANCE & RELIEF NETWORK, CHABAD LUBAVITCH MITZVAH TANK INC., TZIVOS HASHEM INC and FRONTLINE COMMUNICATIONS INTERNATIONAL, INC.,

Defendants.

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Decision/Order
Index No.: 112622/05
Seq. No. : 001

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 n/m [sj] w/ NRS affid, exhs	1
Defs opp and n/cm [dismiss] w/ SZE affid, JEG affirm, exhs	2
Pltf reply and opp w/NRS affid, exhs	3
Defs further supp w/ SZE affid, JEG affirm, exh	4

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

This is an action by plaintiff Graubard Miller ("Graubard") to recover legal fees from the defendants. Graubard, *pro se*, moves for summary judgment: [1] on its complaint against defendants Global Jewish Assistance & Relief Network ("Global"), Chabad Lubavitch Mitvah Tank, Inc. ("Chabad"), Beis Menachem Chabad Lubavitch, Inc. ("Beis"), Tzivos Hashem, Inc. ("Tzivos") and Frontline Communications International, Inc. ("Frontline"); and [2] dismissing defendants' affirmative defenses and counterclaims.

001

Global, Chabad, Beis and Tzivos (collectively herein referred to as the "cross-moving defendants") cross move to dismiss the complaint on the grounds that plaintiff has: [1] failed to comply with 22 NYCRR § 137 *et seq.*; and [2] failed to state a cause of action. Frontline has not opposed plaintiff's motion.[1]

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).

Relevant Undisputed Facts

Many of the relevant facts are undisputed. On March 13, 2003, Graubard and Frontline entered into a retainer agreement ("Frontline Retainer Agreement") whereby Frontline agreed to pay Graubard for the legal services rendered in connection with Frontline's "dealings with a variety of entities who have dealings with Con Edison Communications, Inc. ("CEC Inc.") and for disbursements incurred by Graubard on those parties' behalf. The Frontline Retainer Agreement required a $15,000 advance retainer fee from Frontline.

On March 25, 2003, Graubard and the cross-moving defendants each entered into four separate retainer agreements for Graubard to provide legal services to the same defendants in connection with a dispute with Con Edison Communications LLP

[1] Although Counsel for the cross-moving defendants, Jerome E. Goldman, Esq., states that he is attorney for all defendant except Frontline, he has previously appeared in this action on behalf of Frontline as well and has not been subsequently relieved as counsel for Frontline. Since no opposition to Graubard's summary judgment motion is interposed on behalf of Frontline, it is considered on default as to Frontline only.

("CEC LLP").[2] Pursuant thereto, the cross-moving defendants agreed to pay Graubard for legal services at the hourly rates in effect at the time the services were rendered and for disbursements that Graubard incurred on their behalf. None of the cross-moving defendants' resepctive retainer agreements required an advance retainer fee.

The cross-moving defendants admit that they were engaged in business dealings with Frontline with respect to agreements each had entered into with CEC. Frontline paid to Graubard the advance retainer fees required pursuant to the Frontline Retainer Agreements. Frontline also paid Graubard's initial April 9, 2003 invoice, in the total amount of $53,683.15, for work rendered from March 1, 2003 through March 31, 2003.

Pursuant to the retainer agreements, Graubard represented and commenced an action on behalf of the cross-moving defendants in the case entitled Global Jewish Assitance & Relief Network et al. v. Con Edison Communications, LLC, Index No. 600923/03 (the "prior action").

By Order to Show Cause dated May 2,2003, Graubard moved for leave to withdraw as counsel for the cross-moving defendants in the prior action based upon, among other reasons: [1] irreconcilable differences on strategic decisions; [2] lack of cooperation by the cross-moving defendants in the prosecution of the action; and [3] destruction of reciprocal confidence between said defendants and counsel.

Graubard's motion for leave to withdraw was granted by order dated May 8, 2003 (J. Gammerman). On or around May 13,2003, Graubard sent its final invoice,

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[2] From the record, it appears that CEC Inc. and CEC LLP refer to the same entities, and are collectively herein referred to as CEC.

addressed to: Rabbi Eliezer Avtzon/ President, Global Jewish Assistance & Relief Network/ Chabad Lubavitch Mitzvah Tank Inc./Tzivos Hashem Inc./ Beis Menachem Chabad Lubavitch Inc./ c/o Global Jewish Assistance & Relief Network/ 1485 Union Street/ Brooklyn, New York 11213.

The final invoice was for $89,911.84 for services rendered and disbursements incurred by Graubard in April 2003, less a retainer payment of $20,000, resulting in an claimed outstanding balance due of $69,911.84. Graubard also sent the cross-moving defendants statements reflecting the $69,911.84 balance due on July 15, 2003, August 13, 2003, September 11, 2003, and October 14, 2003. No part of the $69,9111.84 was paid.

In the complaint, Graubard has asserted five causes of action, to wit: [1] breach of contract against the cross-moving defendants; [2] breach of contract against Frontline; [3] *quantum meruit* against all defendants; [4] account stated against the cross-moving defendants; and [5] account stated against Frontline. Graubard now moves for summary judgment on all claims and for damages in the amount of $69,911.84.

An answer has been interposed on behalf of all defendants. Defendants have asserted twelve "affirmative defense[s] and... counterclaims," to wit: [1] failure to state a cause of action; [2] lack of subject matter and personal jurisdiction; [3] laches; [4] that Graubard breached each retainer agreement; [5] Graubard's legal fees "were excessive, duplicative and not commensurate with the services actually performed"; [6] unclean hands; [7] Graubard "acted in bad faith in withdrawing from the lawsuit"; [8] "[d]ue to acts of [Graubard], all agreements should be rescinded; [9] unjust enrichment;

[10] breach of fiduciary duty; [11] breach of covenant of good faith and fair dealings with all defendants except Frontline; and [12] legal malpractice for "abandon[ing] each of the defendant except Frontline by refusing to represent said defendants at a crucial stage of the pending litigation - namely at the time when depositions were about to commence."

Graubard claims that, as a matter of law, it has proven its cause of action for account stated against the defendants since it sent numerous statements to the cross-moving defendants reflecting the $69,911.84 balance due, and the cross-moving defendants never protested the amount of the invoice until November 30, 2005, when defendants interposed their answer with counterclaims in this action. Graubard also contends that it has established that the respective retainer agreements were breached by each of the defendnats.

Graubard further contends that defendants cannot prevail on their counterclaim for legal malpractice, because it is merely supported by conclusory allegations and fails to allege any negligent act on the part of Graubard.

The cross-moving defendants maintain that they were advised by Frontline to retain Graubard to commence the action against CEC for breach of contract. Rabbi S. Z. Elizer (Lazer) Avtzon ("Rabbi Avtzon"), who is the founder/director of Global, claims that Frontline asked each of the cross-moving defendants to "sign a retainer agreement with [Graubard] and [that Rabbi Avtzon] was told originally by [Frontline] and thereafter by Ed Pomeranz [("Pomeranz")], a senior partner of [Graubard], that it was merely a formality and required by law since the action was commenced in the name" of the cross-moving defendants and not Frontline. Rabbit Avtzon further states that:

> "at the time the request was made by [Frontline] for the defendants to execute the retainer agreement, neither I nor any of the other [cross-moving] defendants even met, let alone spoke to any of the attorneys of [Graubard], but nevertheless we all executed a separate retainer agreement."
>
> ...
>
> "That at the time the retainer agreements were signed and returned to [Frontline], each of the [cross-moving] defendants was assured that all monies due and owing [to Graubard] would be paid by [Frontline] and that [Graubard] was fully aware of and agreed to same."
>
> ...
>
> "There is no question in my mind or any of the other [cross-moving] defendants that had there been any indication whatsoever, or even an inkling, by either [Frontline] or [Graubard] that [the cross-moving] defendants would ever be held liable for any legal fees, not only would no retainer agreement be signed, but we would not even get involved with [Frontline] or CEC, as none of us ever received any monies from the CEC fiasco."

The cross-moving defendants also claim that Frontline is no longer in business. Rabbi Avtzon further states that Graubard withdrew from its representation of the cross-moving defendants in the prior action because of a conflict of interest arising from its dual representation of the cross-moving defendants and Frontline, and that Graubard's first obligation was to Frontline. Rabbi Avtzon claims that he never saw the motion papers wherein Graubard sought to withdraw as counsel for the cross-moving defendants in the prior action.

Rabbi Avtzon denies that any of the cross-moving defendants received the monthly invoices allegedly sent by Graubard in 2003. Rabbi Avtzon merely recalls

having received "either a letter or a statement from [Graubard] many years ago concerning this matter." Rabbi Avtzon states he called Pomeranz at Graubard and inquired as to this letter/statement, and was told that the letter/statement was a "courtesy copy" and that Graubard was going to sue Frontline for the balance of the bill.

Rabbi Avtzon states that the bills submitted by Graubard are "not only excessive, but totally outrageous." However, Rabbit Avtzon admits that he met with Pomeranz for the preparation of an affidavit or deposition and that he spoke with Pomeranz many times by phone and met in his office with Pomeranz and other members of Graubard "three or four times."

Discussion

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).

At the outset, the court notes that the cross-moving defendants generally seek dismissal of the complaint on the grounds that Graubard has failed to comply with 22 NYCRR § 137 *et seq.*

22 NYCRR § 137 provides for "the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation." However, this Part does not apply where:

> "(2) amounts in dispute involving a sum of less than $1,000 or more than $50,000, except that an arbitral body may hear disputes involving other amounts if the parties have consented" 22 NYCRR § 137(b).

The court rejects the cross-moving defendants claim that "[t]he fact that plaintiff's claim exceeds $50,000.00... is irrelevant in the instant action [because they claim] that no fee whatsoever was ever due plaintiffs from said defendants." It is undisputed that the amount in dispute is greater than $50,000.00, regardless of who ultimately prevails. Therefore, this case is properly before the court.

Breach of contract

Subject to certain ethical requirements, contracts between attorneys and clients

relative to professional services rendered are interpreted and enforced in the same manner as all other contracts. Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43 (1959). At issue is whether the defendants breached their respective retainer agreements.

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) defendants' 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 Terminal Corp. V. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999).

The cross-moving defendants essentially argue that they are not liable for Graubard's legal fees despite having executed retainer agreements on the basis of contemporaneous and prior oral agreements.

"Extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." Intercontinental Planning v. Daystrom, Inc., 24 N.Y.2d 372, 379 (1969); see also, Chimart Assocs. v. Paul, 66 N.Y.2d 570, 573 (1986). Unless the court finds ambiguity, rules governing interpretation of ambiguous contracts do not come into play. R/S Associates v. New York Job Development Authority, 98 N.Y.2d 29 (2002). Thus, when interpreting an unambiguous contract term, evidence outside the four corners of the document is generally inadmissible to add or otherwise modify the writing. R/S Associates v. New York Job Development Authority, *supra*.

The respective retainer agreements signed by each of the cross-moving

defendants are identical and set forth the following:

> "[Each cross-moving defendant] requested and authorized [Graubard] to represent [it] in connection with its dispute with [CEC]. [Grabuard's] fees [would be] charged on an hourly basis at standard rates as in effect at the time services are rendered."
>
> ...
>
> "Bills for [Graubard's] fees and disbursements will be rendered monthly and are payable within ten days of receipt by [each cross-moving defendant] of [Graubard's] invoice."
>
> ...
>
> "If the foregoing accurately reflects out understanding and you agree to pay our fees and disbursements as set forth above, please countersign this letter and return it to us."

There is no dispute that the cross-moving defendants retained Graubard to represent them in connection with the prior action. The plain language of the retainer agreements clearly states that defendants are responsible to pay legal fees and disbursements. The arguments made by the cross-moving defendants, that Frontline is responsible to pay the fees, constitute an attempt to interpret the respective retainer agreements in a way that is contrary to their plain meaning.

While the parol evidence rule does not apply to an oral contract independent of the written contract, or a subsequent oral modification with new consideration, or where fraud, duress or coercion are claimed, the cross-moving defendants have not set forth any facts which would support a claim that any of these circumstances existed here. See, e.g. Backer v. Lewit, 180 A.D.2d 134 (1st Dept. 1992); Otis Elevator Co. v. Heggie Realty Co., Inc., 107 Misc.2d 67 (App Term. 1st Dept. 1980). Rabbi Avzton merely

contends that it was understood and agreed that Frontline was responsible for Graubard's legal fees and disbursements incurred in connection with the prior action. This argument is clearly contradicted by the express language of the retainer agreement. "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990).

The court finds that, as a matter of law, the defendants breached their respective retainer agreements by failing to pay for legal fees incurred in connection with the prosecution of the prior action. Therefore, on the issue of liability, the cross-moving defendants are obligated, joint and severally, along with Frontline, for the reasonable legal fees and disbursements incurred in prosecuting the prior action under the respective retainer agreements.

While Graubard has provided copies of the invoices detailing the outstanding amount due from the defendants, Graubard has not set forth an adequate basis for the court to determine the reasonableness of the fees. Gair v. Peck, *supra*. There is no affidavit of services and the invoices alone do not establish the reasonableness of the fees sought. The issue of damages must, therefore, be tried before the court.

Accordingly, Graubard's motion for summary judgment on the first and second cause of action is hereby granted on the issue of liability only.

Account stated

Graubard argues that it has validly stated a claim for account stated and that the cross-moving defendants never protested Graubard's billing invoices.

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). The receipt and retention of an account, without objection, within a reasonable period of time, gives rise to an account stated entitling the moving party to summary judgment in its favor. Morrison Cohen Singer & Weinstein, LLP v. Ackerman, 280 A.D.2d 355 (1st Dept. 2001). 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).

There is a material issue of fact as to whether the cross-moving defendants ever received an account stated in which it was clear that Graubard was looking to them, and not Frontline only, for payment thereon. Rabbi Avtzon states that he was told, by Pomeranz, that the statement was merely a courtesy copy and that Graubard was seeking payment from Frontline. In one of a series of emails between Pomeranz and Rabbi Avtzon, dated July 16, 2003, Rabbi Avtzon wrote "Ed/ What's the story with the bill/ I know we signed a retainer and you had a separate agreement with Frontline, so please advise what our position is at this time?/ Thanks/ Lazer." On that same day, Pomeranz responded:

> "[w]hile I have looked to Frontline in the first instance to pay the bill it is the obligation of the organizations as well as Frontline. That is why you each signed retainer letters.
>
> ...
>
> [B]y not agreeing to work out some reasonable settlement of our invoice it seems Frontline would rather turn us into adversaries. This is not what we wanted but absent some settlement of our invoice we have no

> choice. Your efforts to try and resolve this situation might be helpful and avoid unnecessary conflict."

There is also an issue of fact as to whether it was reasonable for the cross-moving defendants to believe that Frontline would satisfy the May 13, 2003 statement where Frontline paid the advance retainer fees as well as the April 13, 2003 statement for $33,683.15. Such facts are established, then the failure to object to the bills may not constitute any acknowledgment that the amounts billed were correct.

In the fifth cause of action, Graubard has asserted a claim for account stated against Frontline. However, none of the invoices that have been provided to the court were addressed to Frontline and Graubard has otherwise failed to establish a claim for account stated against Frontline.

Accordingly, plaintiff's motion for summary judgment on the fourth and fifth causes of action is denied.

Quantum Meruit

A claim under the theory of *quantum meruit* must fail in the face of a valid contract. Clark-Fitzpatrick v. L.I.R.R., 70 N.Y.2d 382 (1987). The court has held that the retainer agreements are valid contracts. Accordingly, plaintiff's motion for summary judgment on the third cause of action is denied and the third cause of action is hereby severed and dismissed.

The affirmative defenses and counterclaims

Having prevailed, in part, on its motion for summary judgment, the only issues left for the court to adjudicate is whether Graubard is entitled to summary judgment dismissing the affirmative defenses and counterclaims.

Defendants' affirmative defense that plaintiff has failed to state a cause of action is moot in light of the court's disposition of that branch of plaintiff's motion seeking summary judgment on the complaint.

Graubard argues that the counterclaim for legal malpractice must fail because defendants have failed to state a cause of action. Graubard specifically claims that this counterclaim is supported by mere conclusory allegations; defendants have failed to assert that they would have prevailed in the prior action but for Graubard's negligence; and defendants have failed to allege a negligent act on the part of Graubard in support of their claim.

In their claim for legal malpractice, defendants "must demonstrate that [Graubard] failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that [Graubard's] breach of this duty proximately caused [defendants] to sustain actual and ascertainable damages." Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438 (2007) [internal citations and quotations omitted]. To establish causation, the client must show that s/he would have prevailed in the underlying action or would not have incurred any damages, "but for" the lawyer's negligence. Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, *supra*.

Although defendants claim that they paid too much for the result Graubard achieved, defendants have not stated any facts about what they believe the law firm did wrong, or what kind of a better result they expected, than ultimately was achieved. Defendants fail to address even how the results achieved by the law firm are unfavorable or unsatisfactory. Defendants' sole argument in support of this claim is

based upon Graubard's withdrawal as counsel in the prior action.

However, the cross-moving defendants did not object to Graubard's motion to withdraw as counsel in the prior action. The cross-moving defendants assert that their failure to oppose Graubard's motion to withdraw was as a result of "[n]ot being sophisticated in the intricacies of the practice of law." The court rejects this argument. While Rabbi Avtzon states that he never saw the motion papers wherein Graubard sought to withdraw as counsel for the cross-moving defendants in the prior action, he admits that "all the defendants agreed not to oppose [Graubard's] motion to withdraw as counsel" in the prior action.

In any event, the cross-moving defendants have not even alleged prejudice as a result of Graubard's withdrawal as counsel in the prior action. The order granting Graubard's motion to withdrawn (5/2/03, J. Gammerman) contained procedural protections for the cross-moving defendants, such as adequate time to secure new representation.

Accordingly, Graubard's motion to dismiss defendants' twelfth "affirmative defense and by way of counterclaim" sounding in legal malpractice is granted and that counterclaim is hereby dismissed.

Defendants' remaining affirmative defenses and counterclaims have not been addressed by Graubard, and to the extent that they are relevant as to the issue of Graubard's damages, these affirmative defenses and counterclaims survive summary judgment.

Conclusion

In accordance herewith, it is hereby

ORDERED that the motion by plaintiff Graubard Miller is granted to the following extent: [1] that Graubard Miller is entitled to summary judgment on the issue of liability on the first and second causes of action against defendants Global Jewish Assistance & Relief Network, Chabad Lubavitch Mitzvah Tank Inc., Beis Menachem Chabad Lubavitch Inc., Tzivos Hashem Inc. and Frontline Communications International, Inc., joint and severally; and [2] Graubard Miller is entitled to summary judgment dismissing defendants' affirmative defenses and counterclaims for failure to state a cause of action and legal malpractice, asserted in defendants' answer as the first and twelfth "affirmative defense[s] and by way of counterclaim[s]"; and it is further

ORDERED that plaintiff Graubard Miller's motion for summary judgment is otherwise denied; and it is further

ORDERED that the cross motion by defendants Global Jewish Assistance & Relief Network, Chabad Lubavitch Mitzvah Tank Inc., Beis Menachem Chabad Lubavitch Inc., and Tzivos Hashem Inc. is denied in its entirety.

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
January 9, 2008

So Ordered:

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