

<b>Stack v DeFrancesco</b>
2008 NY Slip Op 30497(U)
February 14, 2008
Supreme Court, New York County
Docket Number: 0600522/2007
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHÉ

PRESENT:

PART 10

Justice

Index Number : 600522/2007

**STACK, TAMARA**

VS.

**DEFRANCESCO, GARY**

SEQUENCE NUMBER : # 001

COMPEL

INDEX NO. 600522-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

re read on this motion to/for \$3126 and \$3212 (x/mse)

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

FILED FEB 26 2008 NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

and A/c scheduled for 3/13/08 @ 9:30 am

Dated: 2/14/08

HON. JUDITH J. GISCHÉ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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

-----X

Tamara Stack,  
Plaintiff

-against-

Gary DeFrancesco and  
Funding Connection, Inc.,

Defendants.  
-----X

**Decision/Order**

Index No.: 600522/07

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):

<b>Papers</b>	<b>Numbered</b>
Defs' n/m compel-preclude w/JB affirm, exhs . . . . .	1
Pltf's x/m (§3212) w/TS and MDD affirms, exhs . . . . .	2
Def's opp w/JB affirm, exhs . . . . .	3
Pltf reply w/MDD affirm and TS affid (sep backs) . . . . .	4,5
Defs' further opp to x/m w/JB affirm . . . . .	6

*Upon the foregoing papers the court's decision is as follows:*

*GISCHE, J.;*

This is an action for the recovery of legal fees by the former attorneys of the defendants. The court has before it defendants' motion to compel responses to its combined discovery demands dated March 9, 2007, served with its answer. Plaintiff has cross moved for summary judgment. Issue has been joined, but the note of issue has not yet been filed. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

The defendants oppose the motion as being premature [CPLR § 3212 (f)] and also on the merits. Therefore, in evaluating plaintiff's motion for summary judgment, not only must it decide whether plaintiff has tendered sufficient evidence to eliminate

any material issues of fact from the case [Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985)], it must further consider whether the information necessary for defendants to fully oppose the motion remains under plaintiff's control. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 A.D.3d 324 (1<sup>st</sup> dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 A.D.3d 93 (1<sup>st</sup> dept 2006) (*internal citations omitted*).

The court's decision and order is as follows:

### **Arguments**

The individually named defendant ("DeFrancesco") is the principal of the corporate defendant ("Funding"). Plaintiff contends that beginning in 2001 through January 2006, she rendered legal services to both defendants. She alleges that although she did not have a written retainer agreement with either of them, DeFrancesco retained her on behalf of the corporate defendant and individually. Plaintiff alleges further that DeFrancesco orally agreed to be responsible for all the fees, regardless of whether the services were rendered to him in his personal capacity, or to the corporate defendant.

Plaintiff contends that she sent the defendants bills which they initially paid. Then, in January 2006, the defendants stopped making payments, retained the bills, but did not object them. According to plaintiff, the defendants owe her more than \$40,000 in unpaid legal fees. She has asserted a breach of contract claim against them (1<sup>st</sup> cause of action), as well as a claim for an account stated (2<sup>nd</sup> cause of action). Her third cause of action is for fraudulent inducement, based upon claims that she

provided services based upon defendants' misrepresentation that they would pay them.

In support of plaintiff's motion for summary judgment, she provides her affirmation as an attorney of what her hourly rate is, the services she provided, and the number of hours she billed the defendants for. She also provides an invoice dated April 30, 2007 showing entries for the years 2006 and 2007. Plaintiff also relies upon some electronic correspondence she had with DeFrancesco in which different projects are referenced, and payments are discussed. In one message from DeFrancesco dated October 11, 2006, he states that he has sent plaintiff "a personal check for 5000." In the same message, however, DeFrancesco states that the check is being sent in case another check that was expected from a client is late in arriving.

Plaintiff contends that the foregoing proves she is entitled to legal fees from both defendants and that none of the defenses asserted are effective against her claims.

Defendants assert a number of affirmative defenses, including that the absence of any retainer agreement bars this action for legal fees from them, that the dispute should have been arbitrated because it involves legal fees of less than \$50,000 [22 NYCRR § 1215.1], and that plaintiff has not proved as to defendant DeFrancesco that he has personal liability for any of these legal fees. The defendants contend, in any event, that until plaintiff has provided them with discovery, they cannot fully develop their defenses, or themselves move for summary judgment, dismissing the complaint.

**Discussion**

The court finds that defendants' motion for discovery must be granted and plaintiff's cross motion for summary judgment must be denied as premature.

The documents that plaintiff relies upon highlights the many ambiguities in this case, including whether her services were rendered to both defendants. Although plaintiff and DeFrancesco often corresponded, there is no proof on these motions that any of these services were provided to him personally, or that he agreed to be personally responsible for the debts of the corporate defendant. Defendants contend that plaintiff has not complied with any of the court rules applicable to retainer agreements and that this fees dispute should have been arbitrated. See: 22 NYCRR §§ 137.1 and 1215.1. Although plaintiff contends these rules are inapplicable because the parties initiated their attorney/client relationship in 2001, well before the rules became effective in March 2002 [22 NYCRR § 1215 et seq], and because she rendered services in 2006/2007 that were of the same general kind as she had previously rendered to and were paid for by the defendants, this case is still in the preliminary stages and those claims have not been proved.

The court directs that there be a preliminary conference on **March 13, 2008 at 9:30 a.m. in Part 10, 80 Centre Street, Room 122** so that a discovery schedule can be set by the court.

### **Conclusion**

For the foregoing reasons, plaintiff's cross motion for summary judgment is denied as premature. Defendant's motion to compel discovery is granted to the extent that a preliminary conference is scheduled for **March 13, 2008 at 9:30 a.m. In Part 10, 80 Centre Street, Room 122.**

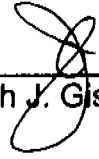
Any relief requested that has not been addressed has nonetheless been

considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

Dated: New York, New York  
February 14, 2008

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
FEB 26 2008  
NEW YORK  
COUNTY CLERK'S OFFICE