[* 1]

Justice

PART

Index Number : 603631/2007
FRANKLIN, WEINRIB, RIDELL &
vs
SCHUMER, JENNIFER
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 12/19/07
MOTION SEQ. NO.
MOTION CAL. NO.

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiff Franklin, Weinrib, Rudell & Vassallo, P.C. for summary judgment in the amount of $84,806.80 on its second cause of action for account stated is granted with costs and disbursements to plaintiff as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the defendant's counterclaim for legal malpractice is severed; and it is further

ORDERED that upon presentation of a copy of this order, the County Clerk is directed to issue a no fee index number and the Trial Support Office shall issue a no fee RJI for the severed counterclaim, and a preliminary conference on the severed counterclaim shall be held on April 8, 2008, 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

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

Dated: March 5, 2008

HON. CAROL EDMEAD J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

FRANKLIN, WEINRIB, RUDELL
& VASSALLO, P.C.,

Index No. 603631/07

Plaintiff,

**DECISION/ORDER**

-against-

JENNIFER SCHUMER, also known as
JENNIFER SCHUMER FARBER,

Defendant.

----------X

**HON. CAROL EDMEAD, J.S.C.**

MEMORANDUM DECISION

In this action for legal fees plaintiff Franklin, Weinrib, Ruddell & Vassallo, P.C. ("plaintiff and/or "the firm") seeks an order granting summary judgment in the amount of $84,806.80 on the second cause of action for account stated, against defendant Jennifer Schumer, also known as Jennifer Schumer Farber ("defendant") pursuant to CPLR 3212. Plaintiff's motion is predicated upon the statement of an account between plaintiff and defendant and defendant's continued use of plaintiff's services after defendant received and accepted itemized invoices and promised, both in writing and orally to pay the charges out of the sale of the proceeds of her former marital residence.

Defendant opposes said motion and argues that she made a timely objection concerning the legal services provided by plaintiff. Defendant also points out that plaintiff's motion does not address her counterclaim for malpractice.

Background

According to the affirmation of John A. Vassallo ("Vassallo"), a member of the plaintiff law firm, on or about October 26, 2004 the parties entered into a written Retainer Agreement ("Retainer Agreement"), pursuant to which defendant retained plaintiff to represent defendant in connection with defendant's marital disputes and ancillary matters relating thereto ("underlying action"). The Retainer Agreement provided that defendant pay plaintiff an initial retainer of $15,000.00, which was to be credited against plaintiff's normal charges "as they may change from time to time." The Retainer Agreement then listed hourly rates for Vassallo, his partner Richard Abrams, Joseph Donahue who is Of Counsel to the firm, and Karen Platt who works as a paralegal for the firm. The hourly rates were listed as $550.00, $475.00, $400.00 and $150.00, respectively.

The Retainer Agreement further provided that plaintiff may seek a fee allowance against defendant's husband on behalf of the defendant in the underlying action, but that such an allowance may be denied and "in any event is not likely to cover our fee in full; therefore you will be responsible for the full payment of plaintiff's charges." The Retainer Agreement provided that the plaintiff would send defendant statements at least every 60 days in order that defendant would be kept informed concerning the status of defendant's account with the firm and that defendant would be billed monthly once the retainer was earned in full. The Retainer Agreement added that such bills were "payable upon receipt" unless defendant was advised to the contrary and that defendant had the right to be provided with copies of all correspondence and legal documents relating to defendant's case.

The Retainer Agreement was amended by letter on February 2, 2005 ("Amended Agreement"). The Amended Agreement stated in part that another attorney, not named in the Retainer Agreement, would also assist Vassallo, Richard Abrams, Joseph Donahue and Karen Platt in providing services on behalf of the defendant. An additional amendment was made to the Retainer Agreement in a letter also dated February 2, 2005 ("Second Amended Agreement"), giving notice that Karen Platt, the paralegal, was out on maternity leave and that Rai Schwartz would be working on defendant's case in her absence.

*Plaintiff's Contentions*

Plaintiff contends that the firm, pursuant to Retainer Agreement, furnished defendant with monthly invoices "detailing all of our services and disbursements on her behalf." Plaintiff claims to have performed extensive services for defendant. In support its motion for summary judgment, Vassallo affirms that:

> Our services were extensive for a number of reasons, among them: the unusual animosity between defendant and her now former husband; defendant's insistence that her husband had an ownership interest in the company by which he was employed, which he did not; the uncertainty concerning the income of defendant's former husband whom, she insisted, received cash kickbacks from the companies with which his employer did business and by reason of his use of his credit cards paid by employer; by reason of litigation between defendant's former husband and his employer, who claimed that he had set up a competing business after he was fired for abusing his credit card privileges, among other things; and by reason of his non-compliance with court orders concerning support and other issues.

Plaintiff contends that not only did defendant receive and accept without complaint the monthly invoices, "she made payments on [*sic*] account, called upon us to perform additional services and promised to pay the balance remaining out of the sale proceeds of her former marital residence, title to which was granted under the terms of her divorce settlement."

Plaintiff contends that defendant promised to pay the invoices both orally and in writing. Plaintiff provided a copy of an email dated May 23, 2006 ("May 23, 2006 email") sent by defendant which states in part:

> I plan on paying your firm with the proceeds of the sale of my apartment. It was to my complete understanding many months ago at our last meeting that this would be the only way for me to pay your legal fees. My apartment will be sold after trial, or soon after we reach a settlement agreement. I will hand deliver a check to you of 10,000.00 tomorrow.

Plaintiff also provided emails sent to Vassallo during the period of July 23, 2007 through September 7, 2007 ("apartment sale emails"), in which defendant kept him posted on developments related to the sale of the apartment. Plaintiff contends that as late as October 13, 2007, defendant called on the firm to perform additional services primarily to handle her former husband's non-compliance with certain aspects of their settlement.

*Defendants Opposition*

Defendant argues that "some minimal level of detail is required in legal bills in order to justify the right to fees for services allegedly rendered." Upon examination of the bills at issue, it is clear that such bills "fall short of the detail required" to justify the attorney's fees and should therefore be denied.

With respect to "340 phone calls identified in the invoices" defendant argues that the phone calls are uniformly described in the invoices as "Telephone Client" with no indication as to what the phone call was about. Defendant adds that the phone calls to other parties also fail to provide any indication as to the subject matter of the calls.

Defendant also argues that the "213 invoice billing entries" for conferences between attorneys at plaintiff law firm simply state "Conference JAV" or "Conference RAA" and that these descriptions provide no indication as to what these conferences were about.

Defendant points out that the bills include some 48 entries which are described with notations like "Review File" and "Review Clients Documents." Defendant argues that plaintiff made no effort to describe why it was necessary for the file to be "reviewed" at that particular point.

Plaintiff's bills also include some "103 entries for letters to defendant or to a third party, and 52 emails to defendant." Defendant adds that the description said nothing more than "Letter Client" and shed no light on the reason of the letter.

Further the invoices reference some 14 entries described as "Miscellaneous" and another 14 entries described as "Prepare Memorandum." Defendant argues there is no basis for determining to what these tasks refer.

Defendant contends that a substantial portion of the entries in plaintiff's invoices describe vague services which courts have routinely found to be non-compensable. Given the degree to which plaintiff departed from normal billing practices and the fact that the overwhelming majority of entries fail to remotely present the information required, defendant respectfully submits that plaintiff's request for legal fees should be reduced across the board by 50% pursuant to case law.

According to defendant, she complained and raised questions about plaintiff's invoices both in oral conversations and in writing. Defendant contends that she questioned the nature of the services being performed, the numerous attorneys involved in her case (which she alleges led

to redundant work and charges), and the quality of the work provided. In support, defendant provides an email from Vassallo dated May 16, 2006 ("Vassallo's email"), in which he stated:

> It seems clear that your recent activities and emails are designed to make a case for nonpayment of our charges. If you are dissatisfied or plan to pursue such a strategy, I need to know that immediately in order that I can make a motion for leave to withdraw as your attorney and in order that you may retain someone in whom you will have confidence.

Defendant contends that she never waived her right to raise the questions and issues she raised about plaintiff's billing practices and conduct.

Defendant argues that the court must determine whether the turnover of attorneys representing the defendant led to duplication of efforts and gross inefficiencies in plaintiff's representation of defendant which would require a reduction of plaintiff's fees.

*Plaintiffs Reply*

According to plaintiff, it is undisputed that defendant received every monthly invoice and that those invoices described every service performed on her behalf. That defendant's Retainer Agreement required that she raise timely objections to the invoices and consistent with the agreement she received copies of every letter written or received on her behalf. Plaintiff points out that defendant does not claim that she raised any specific questions as to any specific charges described in the invoices and that she promised to pay the balance out of the sale proceeds of an apartment acquired in the settlement of her matrimonial dispute. Plaintiff argues that the cases relied upon by the defendant are irrelevant, as they have to do with the applications to courts under federal statutes.

Plaintiff contends that defendant offers no details concerning any conversation or written communication in which she raised questions or objections to any of the specific charges detailed

in the invoices. As to the "numerous attorneys" involved in her case, not only did defendant sign a Retainer Agreement acknowledging the attorneys who would assist in her case, she had frequent contact with each of them with respect to the matters on which they were working.

Defendant's assertion that she objected to the bills is contradicted by the May 23, 2006 email and $10,000.00 check sent the same day as well the apartment sale emails. Further, Vassallo claims that he spoke to defendant after the sale of the apartment, and she assured him that her check would be forthcoming and that it had simply "slipped her mind."

Plaintiff argues that Vassallo's email which purportedly addresses defendant's complaint had nothing to do with the content of plaintiff's invoices. Instead, Vassallo's email was written months before the financial issues in defendant's case were settled in July of 2006, and had to do with her lingering suspicions that her husband might have had an ownership interest in the companies that employed him. Plaintiff further argues that defendant's legal fees escalated due to the complexity of the underlying matrimonial action.

As to the "approximately 192 phone calls to defendant" plaintiff claims that since those phone calls were with the defendant she knew what they were about and if she had questions concerning them she should have raised them at the time. As to calls with other parties, plaintiff claims that these calls were promptly reported defendant who was in daily contact with plaintiff.

Additionally, the conferences among attorneys in plaintiff law firm were essential so that lesser work could be delegated to more junior attorneys. Plaintiff contends that review of the documents was needed to respond to the court concerning a moving affidavit and that since defendant received a copy of all documents she knew which documents plaintiff was reviewing.

Finally, invoices need not describe the content of "letters to defendant or to a third party and 52 emails to defendant" because it was defendant who received plaintiffs letters and emails pursuant to the Retainer Agreement and she received copies of all letters written on her behalf.

**Analysis**

To obtain 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 (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his

or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York,*, 49 NY2d [1999], *supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other (*see* 1 NY Jur, Accounts and Accounting, §§ 5-7). In the case of an existing indebtedness, the agreement may be implied as well as express (*cf. Gurney, Becker & Bourne v Benderson Dev. Co.*, 47 NY2d 995, *revg* 62 AD2d 1165 [1979]). An agreement may be implied if a party receiving a statement of account keeps it without objecting to it within a reasonable time, because the party receiving the account is bound to examine the statement or to procure someone to examine it for him, and object if he disputes its correctness (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165, 167, 567 NYS2d 704, 705 [1st Dept 1991]). If one admits it to be correct it becomes a stated account and is binding on both parties (*Rodkinson v Haecker*, 248 NY 480 [1928]). If the party receiving the

account fails to dispute its correctness or completeness, that party will by it silence is deemed to have acquiesced and be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown (*Peterson v IBJ Schroder Bank & Trust Co*, 172 AD2d 165, 167 [1st Dept 1991]). An agreement may also be implied if the debtor makes partial payment. The partial payment is considered acknowledgment of the correctness of the account (*Parker Chapin Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 399 NYS2d 222 [1st Dept 1997] [where defendant made partial payment of an account, such payment constituted an acknowledgment of the validity of the bill, thereby establishing it as an account stated]; *Rik Shaw Assoc. v Bronzini Shops*, 22 AD2d 769, 253 NYS2d 596 [1st Dept 1964]). An attorney may contract with his client on the cost of his past or future services, of course, and an account stated may exist between them (*Rodkinson v Haecker*, 248 NY 480 [1928], *supra* at 485, 489; *Parker Chapin Flattau & Klimpl v Daelen Corp,*. 59 AD2d 375 [1997], *supra*]).

It is well settled that where an account is made up and rendered, the one who receives it is bound to examine it, and, if the accounting is admitted as correct, it becomes a stated account and is binding on both parties, the balance being the debt which may be sued for and recovered by law (*Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745 [1st Dept 1983]).

In the instant action, plaintiff has set forth sufficient evidence establishing account stated. It undisputed that defendant received and retained plaintiff's invoices from October 31, 2004 through September 30, 2007. Defendant has not provided sufficient evidence that she disputed plaintiff's invoices in a material way. Vassallo's email on May 16, 2006, to which defendant cites as evidence of her objection, was sent one and a half years after she received plaintiff's invoices. Further, such email does not discuss any objection by defendant as to the content of the

invoices. The court notes, that although Vassallo's May 16th email invites defendant to express any dissatisfaction with the firm's services, the next dated response from the plaintiff indicates her understanding that she would pay plaintiff's legal fees out of the sale of her apartment. In such email, defendant agrees to hand deliver a check to plaintiff for $10,000.00. According to plaintiff, that same day, defendant sent the check as partial payment on her account. Moreover, challenging the invoices at this late juncture is not sufficient to warrant a timely objection to an account stated (*see e.g. Shea & Gould v Burr*, 194 AD2d 369[1st Dept1993] [the failure to object to a bill for a period of five months suffices to give rise to an account stated, especially in view of the partial payment made]). Thus, defendant is "bound by an account stated" (*see Rosenman Colin Freund Lewis & Cohen v Neuman,* 93 AD2d 745 [1983], *supra*). Additionally, there is no evidence of any fraud, mistake or other equitable considerations. Based on the above, plaintiff is entitled to summary judgment on the theory of account stated.

Accordingly, it is hereby

ORDERED that the motion by plaintiff Franklin,Weinrib, Rudell & Vassallo, P.C. for summary judgment in the amount of $84,806.80 on its second cause of action for account stated is granted with costs and disbursements to plaintiff as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the defendant's counterclaim for legal malpractice is severed; and it is further

ORDERED that upon presentation of a copy of this order, the County Clerk is directed to issue a no fee index number and the Trial Support Office shall issue a no fee RJI for the severed counterclaim, and a preliminary conference on the severed counterclaim shall be held on April 8, 2008, 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 5, 2008

Hon. Carol Robinson Edmead, J.S.C.