

<b>Ruskin Moscou Faltischek, P.C. v Alexander Ave. Kosher Rest.</b>
2008 NY Slip Op 31917(U)
June 26, 2008
Supreme Court, Nassau County
Docket Number: 5475-05/
Judge: Ute W. Lally
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SCAN

SHORT FORM ORDER

mod

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6  
NASSAU COUNTY

RUSKIN MOSCOU FALTISCHEK, P.C.

Plaintiff(s), MOTION DATE:5/5/08  
INDEX No.:5475/05  
MOTION SEQUENCE NO. 1  
CAL. NO.:2007N3515

-against-

ALEXANDER AVENUE KOSHER RESTAURANT,  
ANTHONY RUGGERIO and PASQUALE RUGGERIO,

Defendant (s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-3
Answering Affidavits.....	4-7
Replying Affidavits.....	8.9
Briefs: .....	

Upon the foregoing papers, it is ordered that this motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in favor of the plaintiff on their second cause of action, and dismissing defendant's counterclaim is determined as follows.

This is an action to recover payment for legal services. Defendant Alexander Avenue Kosher Restaurant Corp. (hereinafter "Alexander Avenue") retained plaintiff on or about June 23, 2003 to provide legal representation and services to Alexander Avenue with respect to an unfavorable decision by the Appellate Division, Second Department. Defendants operated a delicatessen. The appellate litigation involved a dispute with the owners of the "Ben's" trademarked name and Alexander Avenue's ability to continue to use the name "Ben's" for its restaurant. Pursuant to the representation, plaintiff moved to reargue in the Appellate Division, and when that was unsuccessful, sought leave to appeal to the Court of Appeals. The legal work was at defendants' specific request. For billing purposes the appellate work is shown on

plaintiff's invoices, and referred to hereinafter as "Matter No. 1." Plaintiff's work was pursuant to a written retainer for the period from June 2003, until on or about February 11, 2004. Plaintiff was to provide legal services to Alexander Avenue in return for an agreed hourly rates of compensation as well as payment of disbursements. Alexander Avenue agreed to pay on a current monthly basis pursuant to the written retainer.

Plaintiff also asserts that from on or about December 19, 2003 to on or about May 27, 2004, the Ruggieros requested that plaintiff provide related legal services for certain trademark issues in connection with the delicatessen for the personal benefit of Anthony Ruggiero and Pasquale Ruggiero (hereinafter referred to as "Matter No. 2" ). Plaintiff acknowledges there was no specific written retainer for Matter No. 2, but alleges it billed the Ruggieros "on the same terms as set forth in the parties' pre-existing retainer agreement" in connection with Matter No. 1. Plaintiff's causes of action in the sum of \$3,627.50 as set forth in the complaint sound in breach of contract; unjust enrichment and *quantum meruit*.

Plaintiff asserts that as to Matter No. 1 pursuant to the written retainer agreement and Matter No. 2 pursuant to the oral agreement copies of invoices were forwarded to the defendants.

	Invoice #	Date of Bill	Amount	Balance Due
Matter No. 1	36939062	October 23, 2003	\$ 51,573.10	\$42,382.72
	37786144	November 17, 2003	\$ 9,443.84	\$51,826.56
	38507768	December 17, 2003	\$ 6,118.55	\$47,945.11
	39355452	January 21, 2004	\$ 3,149.75	\$51,094.86
	40087930	February 10, 2004	\$ 816.96	\$51,910.82
	40828334	March 10, 2004	\$ 97.50	\$52,008.32
Matter No. 2	40087932	February 10, 2004	\$ 3,117.50	\$ 3,117.50
	42815480	June 10, 2004	\$ 510.00	\$ 3,627.50

Plaintiff states that not only did defendants receive the invoices without objection, they also made payments against the open balances. For example, as shown on the December 17, 2003 invoice, defendants made a payment on account of \$10,000 against the previously unpaid balance of \$51,826.56. The defendants did not object to any of the invoices. The defendant acknowledged and confirmed the account stated by making payments on the agreed balance without objection. Alexander Avenue failed to pay the accounts and, as a result, plaintiff commenced this action asserting claims of breach of contract, account stated, unjust enrichment and *quantum meruit* against all defendants.

The receipt and retention of accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness gives rise to an action based on an account stated, entitling plaintiff to summary judgment in its favor (*Shea & Gould v Burr*, 194 AD2d 369). In the counterclaim, defendants acknowledge they retained the services of plaintiff in connection with the Appellate Division litigation. Defendants have failed to submit any opposition to plaintiff's account stated claim for Matter No. 1. Therefore, plaintiff's motion for summary judgment on the second cause of action against Alexander Avenue in the sum of \$52,008.32 with interest as provided for in paragraph 6 of the Fee and Payment Policy Retainer Agreement is granted.

"The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in absence of any agreement (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561; see *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11; *State of New York v Barclays Bank of N.Y.*, 76 NY2d 533, 540). However, New York courts permit litigants to plead breaches of contract and unjust enrichment in the alternative (*Nakamura v Fujii*, 253 AD2d 387). The criteria for recovery under a theory of unjust enrichment are: "(1) the performance of the services in good faith; (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor and (4) the reasonable value of the services (*Joan Hansen & Co., Inc. v Everlast Word's Boxing Headquarters Corp.*, 296 AD2d 103; *Moors v Hall*, 143 AD2d 336, 337-338). To recover from a particular defendant, "a plaintiff must demonstrate that services were performed for the defendant resulting in its unjust enrichment (*Kagan v K-Tel Entertainment*, 172 AD2d 375, 376; *Kapral's Tire Serv. v Aztek Tread Corp.*, 124 AD2d 1011, 1013). Defendants deny plaintiff was ever engaged in regard to Matter No. 2 (the "trademark issues"). There is no written retainer agreement. Defendants never made a partial payment toward the account. Defendants claim they orally objected to the account stated, and if any services were performed they were in connection with and solely for the corporate defendant. The Ruggieros have raised questions of fact precluding the granting of summary judgment for the plaintiff's cause of action against the individual defendants Anthony Ruggiero and Pasquale Ruggiero in regard to Matter No. 2 and their claim for \$3,627.50 (see *Zuckerman v City of New York*, 49 NY2d 557).

Defendants allege that during the course of the appellate representation, plaintiff advised them to pay counsel to Alexander Avenue's adversary in the Ben's litigation \$25,000 to prepare a proposed settlement agreement resolving the litigation. Defendants further allege that, based on the advice of plaintiff, they paid \$25,000 to the adversary law firm that prepared an unsatisfactory draft settlement. Said law firm refused to return

any part of \$25,000 given to it for the preparation of the agreement. Defendant contends that the plaintiff failed to give proper advice concerning the payment of their adversary's legal fee, thereby exposing Alexander Avenue to the loss of its \$25,000. The senior partner of plaintiff asserts that he and another senior partner of the firm advised the defendant that the demand to pay \$25,000 to prepare a settlement agreement was "unprecedented" in their legal experience, recommended against Alexander Avenue acquiescing to the demand, and expressed concern about the arrangement since there was no assurance that paying the legal fee of the adversary counsel would yield a settlement. Plaintiff contends that Alexander Avenue voluntarily paid the \$25,000 retainer despite the full disclosure of the unusual nature of the fee arrangement and the risks associated with it. But this was the only way that Alexander Avenue would have any chance of staying in business and continuing to use the "Ben's Deli" name. The principals of Alexander Avenue deny having received any warning of possible consequences, in writing or orally, about paying the \$25,000 to the adversary's attorneys, but rather assert "they were led to believe that the matter was settled with payment. . . of the \$25,000."

Issue finding, rather than issue determination, is the key to summary judgment (*In re Cuttitto Family Trust*, 10 AD3d 656; *Greco v Posillico*, 290 AD2d 532; *Gniewek v Consolidated Edison Co.*, 271 AD2d 643; *Judice v DeAngelo*, 272 AD2d 583). The court should refrain from making credibility determinations (see *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341; *Surdo v Albany Collision Supply, Inc.*, 8 AD3d 655; *Greco v Posillico*, *supra*; *Petri v Half Off Cards, Inc.*, 284 AD2d 444, 445), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion (*Glover v City of New York*, 298 AD2d 428; *Perez v Exel Logistics*, 278 AD2d 213). Although plaintiff does not concede, as suggested by defendants that the \$25,000 was actually paid, neither party has established by probative evidence the date, time and manner of payment, and to whom payment was allegedly made, or the terms of the putative settlement agreement. However, as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof (see *Fromme v Lamour*, 292 AD2d 417; *George Larkin Truck Co. v Lisbon Tire Mart*, 185 AD2d 614).

Plaintiff's motion for summary judgment based on account stated for Matter No. 1 in the sum of \$52,008.32 plus interest (as per the retainer agreement) is granted. The balance of relief requested is denied.

Plaintiff's claim on the account stated for Matter No. 2 and the counterclaim are severed and the parties shall proceed to

trial on the outstanding issues.

Dated: JUN 26 2008

*Michael J*  
J.S.C.

**ENTERED**

JUL 01 2008

**NASSAU COUNTY**  
COUNTY CLERK'S OFFICE