

<b>Commerce Bank N.A. v Kamali</b>
2008 NY Slip Op 32442(U)
September 3, 2008
Supreme Court, New York County
Docket Number: 0105506/2006
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.  
*Justice*

PART \_\_\_\_\_

Index Number : 105506/2006  
COMMERCE BANK N.A.  
vs  
KAMALI, BAHRAM  
Sequence Number : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

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**

SEP 08 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/3/08

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check If appropriate:  DO NOT POST  REFERENCE

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

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

-----X  
COMMERCE BANK N.A. AS ASSIGNEE OF  
FISCHBEIN BADILLO WAGNER HARDING LLP,

Plaintiff,

-against-

BAHRAM KAMALI a/k/a BARRY KAMALI,

Defendant.  
-----X

**Decision/Order**

Index No.: 105506/06  
Seq. No.: 002

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>
Def n/m [sj] w/ SHR affirm, BK affid, exhs .....	1
Pltf n/x-mot [amend] w/ SLG affirm exhs .....	2
SHR affirm .....	3
SLG affirm .....	4

**FILED**  
SEP 08 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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

This is an action by plaintiff Commerce Bank, as assignee of the now defunct law firm Fischbein Badillo Wagner Harding, LLP ("FBWH"), to recover legal fees from the defendant. Defendant Bahram Kamali a/k/a Barry Kamali ("Kamali") moves for summary judgment dismissing the complaint. CPLR § 3212. Plaintiff cross-moves to serve an amended complaint and opposes the motion. CPLR § 3025 (b).

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 NY3d 648 (2004).

Many of the relevant facts are undisputed and/or are established by

[\* 3 ]  
documentary evidence. Plaintiff provided financing to FBWH pursuant to a Loan and Security Agreement dated November 1, 2001. On or about March 21, 2005, FBWH ceased the active practice of law and transferred to plaintiff the right, *inter alia*, to collect certain of the law firm's accounts receivables, pursuant to a document entitled "Agreement for Forbearance, Voluntary Surrender of Collateral and Twelfth Amendment to Loan and Security Agreement" and dated April 8, 2005.

Kamali executed a retainer agreement dated February 2, 2001 whereby he retained the services of FBWH in connection with the purchase of property located at Union Turnpike in Queens, New York. Defendant maintains that Rouben-Kamali Organization, LLC ("RKO"), rather than Kamali in his individual capacity, retained FBWH. The retainer agreement is addressed to:

Barry Kamali  
Roubeni - Kamali Organization LLC  
102 Madison Avenue, 2<sup>nd</sup> Floor  
New York, New York 10016

Kamali signed the retainer agreement on the bottom of the second page without any indication as to Kamali's capacity in signing the retainer agreement. The retainer agreement is also signed by Marvin Mitzner, Esq., on behalf of FBWH. Defendant has provided copies of invoices sent from FBWH which are addressed solely to RKO for services rendered during the period from April 2001 to May 31, 2002 pursuant to the retainer agreement.

Plaintiff has brought this action seeking to enforce a receivable in the amount of \$50,357.37 allegedly due from Kamali. Plaintiff asserted three causes of action against Kamali, to wit: [1] breach of the retainer agreement (first cause of action); [2] services

rendered (second cause of action); and [3] account stated. Kamali's answer contains general denials and the following affirmative defenses: [1] that there is no contract between plaintiff and defendant; [2] no privity between plaintiff and defendant; [3] that defendant has paid all fees due and owing; [4] that defendant did not sign the retainer agreement in his individual capacity; and [5] that plaintiff's claims are barred by unclean hands and breach of good faith and fair dealing.

Kamali has provided an affidavit on this motion wherein he claims the following. RKO retained FBWH to represent it in connection with the development of certain real property in Queens, New York. In October 2001, Golden Gate Residence LLC ("GGR") acquired title to property located on Union Turnpike in Queens (the "property"). The individual members of RKO and GGR are identical, and GGR was formed for the sole purpose of taking title to the property. Thereafter, FBWH continued to represent GGR, although a retainer agreement between these two entities was not executed until October 2004. Kamali signed that retainer agreement on behalf of GGR as well. Kamali has not provided a copy of the retainer agreement between GGR and FBWH to the court.<sup>1</sup>

Kamali maintains that Attorney Mitzner advised him in or around April 2005 that Cozen O'Connor had acquired FBWH, that Mitzner had become a partner of Cozen O'Connor and that all monies due for Attorney Mitzner's representation of GGR and RKO should be paid to Cozen O'Connor. On August 9, 2005, a real estate closing took

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<sup>1</sup> Kamali also states that FBWH represented Kamali Organization LLC, but this organization's relevance to the instant proceedings has not been identified nor has any other information about Kamali Organization been provided to the court.

place at which GGR completed the sale of the property to St. John's University. GGR was represented by Cozen O'Connor. At the closing, GGR paid a final legal bill in connection with Cozen O'Connor's representation in the sum of \$58,500. Kamali has provided a copy of the check evidencing this payment. Kamali maintains that this payment was for all work performed by both FBWH and Cozen O'Connor.

#### Arguments of the parties

Defendant argues that first cause of action is without merit and should be dismissed because there is no contract between him and plaintiff. He also contends that it is "illegal for a law firm to assign a retainer agreement with a client to [plaintiff]." Defendant argues the second cause of action is insufficient because plaintiff cannot sue for services rendered by a law firm and because the complaint does not allege what services were performed, who performed them, the costs of the services and the completion of the services as contemplated. Defendant argues that the third cause of action fails because Attorney Mitzner modified and/or cancelled FBWH's bill and directed that defendant pay any sums due thereunder to Cozen O'Connor.

Defendant's alternative argument is that he is not a proper party to this action, but rather, RKO was responsible for payments under the retainer agreement. Defendant further argues that the court should not pierce the corporate veil and hold Kamali liable for RKO's obligations under the retainer agreement.

Plaintiff opposes the motion for summary judgment and cross-moves to amend the complaint to add RKO, GGR, The Kamali Organization LLC ("TKO"), Cozen O'Connor and Attorney Mitzner as parties to this action. Plaintiff argues that "it is clear that [Kamali] executed the retainer agreement in his individual capacity; alternatively,

the capacity in which [Kamali] signed the retainer agreement is ambiguous and there are issues of fact with respect thereto." Plaintiff also argues that there are issues of fact and law as to: [1] whether Kamali, RKO, GGR and/or TKO were justified in ignoring their legal obligations for the outstanding receivables due to FBWH and instead paying such amounts to Cozen O'Connor at the purported direction of Mintzner; and [2] whether such improper payment to Cozen O'Connor relieved Kamali, RKO, GGR and/or TKO of their liability to plaintiffs as assignee of FBWH.

Plaintiff seeks to amend the complaint to assert the first, second and third causes of action against RKO, GGR and TKO, in addition to Kamali individually. Plaintiff also alleges a cause of action for conversion against Cozen O'Connor (the fourth cause of action) and tortious interference against Cozen O'Connor and Attorney Mintzner (the fifth cause of action).

### **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);

[\* 7 ]  
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 (2<sup>nd</sup> dept. 2003).

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 NY2d 97 (1959).

Defendant argues that he signed the retainer agreement in his representative capacity on behalf of RKO and cannot be held liable in this action. Presently, however, this is a triable issue of fact which precludes summary judgment. Kamali asserts in his affidavit that "[a]ll parties knew that the retainer agreement was being signed by [RKO]." However, the retainer agreement is addressed to both Kamali and RKO. The salutation of the retainer agreement is "Dear Mr. Kamali". The signature on the retainer agreement is by "Barry Kamali" and there is no indication whatsoever that Mr. Kamali signed as a "member" of RKO, or in any other capacity as a representative of RKO (cf. Diaz v. Siegel, 23 AD3d 251 [1st Dept 2005]; Metropolitan Switch Bd. Co., Inc. v. Amici Associates, Inc., 20 AD3d 455 [2d Dept 2005]). Nor does the retainer agreement clearly indicate that it is between FBWH and RKO.

Kamali's arguments with respect to piercing the corporate veil are unavailing. Plaintiff does not seek to pierce the corporate veil, but rather, seeks to hold plaintiff personally liable based on its contention that plaintiff signed the retainer agreement in his individual capacity.

Defendant also argues that a law firm cannot assign a retainer agreement. However, the assignment in this case is of receivables already earned under the retainer agreement. It is not an assignment of the right to do work for defendant. Therefore, the court rejects this argument (see i.e. IIG Capital LLC v. Archipelago, LLC, 36 AD3d 401 [1st Dept 2007]).

Defendant's additional claims that his alleged payment obligation under the retainer agreement was discharged and/or modified by Attorney Mitzner is unsupported by any evidence. Defendant's further claim that it has already paid the amount due to FBHW by making a payment to Cozen O'Connor at the time of closing is equally unsupported on this motion. Defendant has failed to sustain his summary judgment burden on these issues.

Plaintiff's second cause of action for services rendered is sufficient as a matter of law in that it incorporates the allegations of the complaint and the record before the court supports plaintiff's claim that FBWH rendered services to Kamali for which payment is currently due. Defendant has not demonstrated *prima facie* entitlement to summary judgment dismissing this cause of action.

However, summary judgment on the third cause of action against Kamali must be granted. Defendant denies personal receipt of any invoices addressed to him individually and has provided numerous copies of invoices, which were all addressed

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solely to RKO. 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 (1<sup>st</sup> 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 (3<sup>rd</sup> Dept. 2005).

Here, there is no dispute that neither plaintiff nor FBWH ever delivered to Kamali a statement of account evidencing Kamali's alleged indebtedness. Therefore, this cause of action fails. Accordingly, Kamali's motion for summary judgment is granted only to the extent that the third cause of action against him personally is hereby severed and dismissed.

Plaintiff cross-moves to amend the complaint. "Leave to amend a pleading is to be freely given where... there is no showing of prejudice or surprise to the nonmoving party, and the proposed amendment is not totally devoid of merit." Gjokaj v. Fox, 25 A.D.3d 759 (2d Dept. 2006).

Defendant does not argue that the proposed amendment will result in prejudice nor that the new claims are devoid of merit. The court rejects Kamali's sole argument in opposition to the cross-motion, that there is "no basis for an action as against defendant Kamali in his individual capacity."

Accordingly, plaintiff's cross-motion to amend the complaint is granted in its

entirety.

**Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that defendant's motion for summary judgment is granted only to the extent that the third cause of action against him is hereby severed and dismissed; and it is further

**ORDERED** that plaintiff's cross-motion to amend the complaint is granted; and it is further

**ORDERED** that plaintiff shall file and serve the proposed Supplemental Summons and Verified Amended Complaint (Exhibit "F" to its cross-motion papers) on Roubeni-Kamali Organization, LLC, Golden Gate Residence, LLC, The Kamali Organization, LLC, Cozen O'Connor and Marvin Mitzner within 30 days. Service on appearing counsel shall be completed within 20 days; and it is further

**ORDERED** that the status conference in this matter be scheduled for October 16, 2008 at 9:30 a.m. at 80 Centre, Room 122. The note of issue is hereby extended to January 25, 2009.

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  
September 3, 2008

So Ordered:

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

**FILED**  
SEP 18 2008  
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NEW YORK  
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