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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Index Number : 100280/2008

KAYE SCHOLER LLP

VS.

FAILSAFE AIR SAFETY SYSTEMS

SEQUENCE NUMBER : # 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. 100280/08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

e 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 IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

SEP 26 2008

COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 9/23/08

LOUIS B. YORK 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: I.A.S. PART 2

----------X

KAYE SCHOLER LLP,

Plaintiff,

Index No.
100280/08

-against-

FAILSAFE AIR SAFETY SYSTEMS CORP.,

Defendant.

YORK, J.:

Plaintiff Kaye Scholer LLP (the Law Firm) moves, pursuant to CPLR 3212, for summary judgment on its account stated and breach of contract claims (Counts I, II and III) in the amount of $522,777.56, plus interest, and for dismissal of the counterclaims asserted by defendant Failsafe Air Safety Systems Corp. (Failsafe).

The Law Firm commenced the instant action to recover legal fees, disbursements and costs allegedly owed to it by Failsafe, for services performed on Failsafe's behalf between November 2002 and March 2006. In August 2006, the Law Firm previously instituted an action against Failsafe for the same relief sought herein, Kaye Scholer LLP v Failsafe Air Safety Systems, Supreme Court, New York County, index no. 110893/06 (the Previous Litigation). In the Previous Litigation, the Law Firm moved for partial summary judgment on its causes for breach of

contract and account stated, and Failsafe cross-moved for dismissal of the complaint based on the Law Firm's failure to comply with the fee dispute resolution program pursuant to Part 137 of the rules of the Court Administrator of the Courts, 22 NYCRR 137, et seq. In a Decision and Order entered January 2, 2008, the court granted Failsafe's cross-motion, and dismissed the Law Firm's complaint without prejudice on the ground that the Law Firm's complaint in that action did not recite in its allegations that "the dispute is not otherwise covered by" part 137 (the Law Firm's Exhibit D, the Prior Litigation, J. Shulman, 12/21/07).

The Law Firm then commenced the instant action, asserting the following six "counts" (causes of action): (1) breach of contract of an agreement dated November 21, 2003 (the November 2003 Agreement); (2) breach of contract of the retainer agreement dated February 10, 2003 (the Retainer Agreement); (3) account stated; (4) quantum meruit; (5) unjust enrichment; and (6) declaratory judgment. Failsafe interposed an answer, containing three affirmative defenses and three counterclaims.

The Law Firm now seeks partial summary judgment on its causes of action for breach of the contract and account stated. The proponent of a summary judgment motion must make a prima

facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists, warranting a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

In support of its application, Kenneth G. M. Mason (Mason), a partner at the Law Firm, claims that the Law Firm was retained by Failsafe in November 2002 to handle matters regarding intellectual property rights and general corporate matters; and that it performed legal services on Failsafe's behalf between November 2002 and October 31, 2003, which included, inter alia, preparing patent applications and related documents in the United States and other countries, and advising Failsafe regarding licensing matters. According to Mason, the parties executed the Retainer Agreement, which memorialized their prior oral agreement, and set forth, inter alia, the scope of work to be performed by the Law Firm. Subsequently, the parties entered into the November 2003 Agreement, which set forth a payment schedule for invoices dated October 31, 2003, which totaled

$364,217.10 in legal fees and $13,724.11 in costs and disbursements. Mason asserts that the Law Firm sent additional invoices thereafter dated November 30, 2004, August 24, 2005, September 23, 2005 and March 10, 2006 (the Additional Invoices), for a total of $389,324.25 in legal services and $5,112.10 in disbursements. He further contends that, as of the filing of the instant complaint, Failsafe only made 15 out of 33 monthly payments required under the November 2003 Agreement, and partial payments totaling $10,116.62 towards the Additional Invoices. The Law Firm thus argues that it establishes its claims for account stated and breach of contract regarding the invoices addressed in the 2003 Agreement and the Additional Invoices.

In opposition, Failsafe submits the affidavits of Paul Chirayath (Chirayath), its prior president and chief executive officer, Dr. Jerome Schentag (Schentag), its current chief executive officer, and various documents. Chirayath and Schentag acknowledge that Failsafe executed the aforementioned agreements, i.e., the Retainer Agreement and the November 2003 Agreement, and do not dispute receipt of the invoices. However, they oppose the Law Firm's application, relying on the affirmative defenses and counterclaim asserted in Failsafe's answer. They maintain that the Law Firm did not properly credit Failsafe with all of the

payments it made, that Failsafe objected to the invoices by written communication, and that the parties agreed that payments were contingent upon the Law Firm procuring equity financing on Failsafe's behalf upon which its payment would be derived, which the Law Firm failed to do. Additionally, they argue that the Law Firm breached its fiduciary duties to Failsafe by, inter alia, breaching its confidentiality obligations by performing work on behalf of Failsafe's licensee/competitor, Theodore Arts and his companies, and then billing Failsafe for these services.

Generally, the receipt and retention of an account, without objection, within a reasonable period of time, coupled with an agreement to make partial payment, gives rise to an actionable account stated entitling the moving party to summary judgment in its favor (Shea & Gould v Burr, 194 AD2d 369 [1st Dept 1993]). However, where, as here, Failsafe's affirmative defenses and counterclaims raise issues of fact and credibility, summary judgment is not warranted on the Law Firm's account stated claims (see Glazer & Gottlieb v Nachman, 233 AD2d 275 [1st Dept 1996]).

Failsafe's affirmative defenses and counterclaims assert, inter alia, that the Law Firm's fee was contingent upon it obtaining equity financing on Failsafe's behalf from which its

fees would be derived. Here, the Law Firm, in their supporting papers, vaguely dispute this assertion. However, the evidence submitted by Failsafe, consisting of affidavits by its current and past officers, Chirayath and Schentag, and written communications to the Law Firm by Failsafe, alleging that there was a contingency, and complaining of the Law Firm's failure to fulfill its agreement to obtain financing, sufficiently raise questions of fact and credibility regarding the existence of a contingency (see Glazer & Gottlieb v Nachman, 233 AD2d 275, supra).

Further, in support of its breach of duty of confidentiality counterclaim against the Law Firm, Failsafe submits documents which demonstrate that the Law Firm may have performed work for Failsafe's alleged competitor, Theodore Arts and his companies during the period for which it was billed. In its memorandum of law, the Law Firm addresses this contention, relying on documentary evidence consisting of, inter alia, the summons and third-party summons in another action, Theordore Arts, et al. v Failsafe Air Safety Systems Corp., et al., Supreme Court, Erie County, Index No. I2006-2161, and the deposition testimony taken in that action of Vincent Tracy, Jr., an alleged former Failsafe employee. Contrary to the Law Firm's argument,

however, these documents do not indisputably establish that the work, complained of by Failsafe, was done in accordance with the Law Firm's obligations to Failsafe. Thus, the record raises a question of fact as to Failsafe's counterclaim (Glazer & Gottlieb v Nachman, 233 AD2d 275, supra).

Additionally, the Law Firm submits a cash receipt list, reflecting all alleged payments received by Failsafe in the total amount of $320,235. Failsafe disputes the accuracy of the credits given to it by the Law Firm, submitting a breakdown of the payments it allegedly made, including the date and amount of each payment made, and copies of checks in its possession, which demonstrate payments totaling $333,487.00. Thus, there is also question of fact as to the balance allegedly owed by Failsafe.

As noted by Failsafe, "oral objections to an account stated are sufficient on a motion for summary judgment to rebut any inference of an implied agreement to pay the stated amount (see Diamond & Golomb, P.C. v D'Arc, 140 AD2d 183 [1st Dept 1988], quoting Sandvoss v Dunkelberger, 112 AD2d 278 [2d Dept 1985]). Here, Failsafe relies on its aforementioned written correspondence, which object to the Law Firm's billing based on the alleged contingency of its fee, but do not object to the billings's alleged double, tripling and inappropriate billings,

as contended by Failsafe (see Marcus Borg Rosenberg & Diamond v Gilbert, Segall and Young, 248 AD2d 279 [1st Dept 1998]). Failsafe also does not set forth to whom, or when such objections were verbally conveyed to the Law Firm (see Shea & Gould v Burr, 194 AD2d 369, supra). In any event, in view of the various issues of fact and credibility raised in the record regarding Failsafe's other affirmative defenses and counterclaims, the Law Firm's reliance on the insufficiency of certain objections by Failsafe to its billings does not alter this court's determination denying partial summary judgment on the Law Firm's account stated claim.

Thus, that branch of the Law Firm's motion for partial summary judgment on its account stated claim is denied.

The Law Firm also moves for partial summary judgment on its breach of contract claim regarding the Retainer and Engagement Agreements. A breach of contract action requires proof of the existence of a valid agreement, performance by plaintiff of its obligations thereunder, defendant's breach of its contractual obligations, and resulting damages to the plaintiff (see Morris v 702 East Fifth Street HDFC, 46 AD3d 478 [1st Dept 2007]). In view of the aforementioned issues of fact and credibility regarding the Law Firm's alleged performance of

its professional obligations, this branch of the Law Firm's motion is also denied, as well as its application for dismissal of Failsafe's counterclaims.

Accordingly, it is

ORDERED that the motion by Kaye Scholer LLP for partial summary judgment on its account stated and breach of contract claims, and for dismissal of the counterclaims asserted by Failsafe Air Safety Systems Corp. is denied in its entirety.

Dated: 9/23/08

ENTER:

J. S. C.

LOUIS B. YORK
J.S.C.

FILED
SEP 26 2008
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