Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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GOLDBERG & CONNOLLY,

Plaintiff(s),

-against-

B & B DEVICES, INC.,

Defendant(s).

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Index No. 4478/08

Motion Submitted: 7/15/08
Motion Sequence: 001, 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....
Briefs: Plaintiff's/Petitioner's.....X
Defendant's/Respondent's.....

Plaintiff moves this Court for an order granting partial summary judgment in its favor as to the second cause of action. Defendant cross moves for summary judgment dismissing the complaint.

This is an action to recover legal fees for representing defendant.

Defendant B & B Devices, Inc. (hereinafter "B & B") is a defense contractor. Norman A. Steiger is an attorney who represented B & B in connection with its government procurement. B & B was originally Sieger's "own client," and he continued to represent the company after becoming associated with the plaintiff law firm in 1998. Neither Steiger nor plaintiff ever provided B & B with a written retainer agreement. However, B & B received monthly invoices and was billed at the firm's "usual and customary hourly rates."

In March 2003, plaintiff was retained to represent B & B in connection with a dispute with Sterling Engineering, the company that performed the fabrication and testing of materials for one of B & B's contracts. Although the contract called for goods to be supplied to the Navy, the parties do not describe the nature of the goods or explain whether they were a finished product or some type of component. Plaintiff's invoices indicate that Sterling initially refused to ship the product, and the Navy subsequently objected to the manner of welding. However, the parties' do not discuss the manner in which Sterling breached its contract or the amount of damages B & B sustained. Nevertheless, plaintiff did commence an action on B & B's behalf against Sterling, which was submitted to court-ordered mediation. Although defendant asserts that the Sterling dispute "concluded" on July 26, 2005, plaintiff continued to perform legal services concerning the matter through November 30, 2005. It is unclear what was the result of the litigation.

In December 2004, plaintiff was retained to represent B & B in connection with an investigation being conducted by the Defense Criminal Investigative Service ("DCIS") concerning the contract for which Sterling Engineering was the subcontractor. The parties' submissions suggest that the investigation focused on whether testing reports submitted to the Navy violated the False Statements Act, 18 U.S.C. § 1001. Although plaintiff's representation continued through July 20, 2005, the parties do not disclose the result of the criminal investigation.

As noted, plaintiff submitted monthly invoices to defendant during the course of the representation. Separate invoices were submitted for the suit against Sterling Engineering and the DCIS investigation. The invoices show the attorney who performed the legal work, the hourly rate charged, the dates the legal services were performed, the number of hours, and a brief description of the services. It appears that at some point a dispute arose as to plaintiff's fees. On July 5, 2005, Barry Hardy, the Vice President of B & B, wrote to plaintiff "proposing a payment of $5,000 a month . . . until all invoices are resolved." This Court notes that plaintiff's representation was ongoing at the time of Hardy's proposal. The invoices pertaining to the suit against Sterling show a balance outstanding of $11,494.75 as of December 1, 2005. The invoices pertaining to the criminal investigation show a balance outstanding of $10,501.66 as of November 8, 2005. Plaintiff also submits invoices pertaining to "general representation" showing a balance outstanding of $348.50 as of August 31, 2005, for a total balance of $22,344.91. On February 23, 2006, B & B wrote to plaintiff, stating that it was disputing plaintiff's invoices.

This action, seeking to recover $22,344.91 in legal fees and disbursements, was commenced on March 10, 2008. Plaintiff asserts theories of breach of contract, an account stated, and quantum meruit.

Plaintiff is moving for partial summary judgment on its claim for an account stated claiming that defendant did not "contemporaneously" object to its invoices. Defendant is cross-moving for summary judgment dismissing the complaint based on plaintiff's noncompliance with Part 1215, the rule requiring a written letter of engagement. Plaintiff argues that a letter of engagement or retainer agreement was not required because the legal services were of a similar kind to services previously provided and representation commenced before Part 1215's effective date.

As a matter of public policy, courts pay particular attention to fee arrangements between attorneys and their clients (***Jacobson v. Sassower***, 66 N.Y.2d 991, 489 N.E.2d 1283, 499 N.Y.S.2d 381 [1985]). Even absent fraud or undue influence, an agreement to pay a legal fee may be invalid if it appears that the attorney "got the better of the bargain," unless the attorney can show that the client was fully aware of the consequences and there was no exploitation of the client's confidence in the attorney. (***Id***. at 993) Consistent with this public policy, an attorney has the burden of showing that a fee contract is fair, reasonable, and fully known and understood by the client. (***Id***.)

The reasonableness of a legal fee is determined by a number of factors including the time and labor required; the novelty and difficulty of the questions involved; the skill required to perform the legal service properly; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the lawyer; and the amount involved and the results obtained (***Code of Prof. Resp. DR 2-106***).

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due." (***Ryan Graphics, Inc v. Bailin***, 39 A.D.3d 249, 833 N.Y.S.2d 448 [1st Dept., 2007]). "An account stated assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists." (***Gurney, Becker & Bourne v. Benderson Dev. Co.***, 47 N.Y.2d 995, 996, 394 N.E.2d 282, 420 N.Y.S.2d 212 [1979]). An account stated may arise based upon legal services performed by an attorney (***Zanani v. Schvimmer***, 50 A.D.3d 445, 856 N.Y.S.2d 65 [1st Dept., 2008]). However, the underlying fee agreement must still be fair, reasonable, and fully known and understood by the client.

Effective March 4, 2002, Part 1215 of the joint Appellate Division rules requires an attorney, who undertakes to represent a client and enters into an arrangement for, or charges or collects, a fee, to provide the client a written letter of engagement before commencing the representation. (***22 NYCRR § 1215.1***). The letter of engagement must explain the scope of the legal services to be provided and an explanation of the fees and expenses to be charged. (***Id***.) The letter of engagement shall also inform the client of the right to demand arbitration of fee disputes pursuant to Part 137, if the legal services are of a kind covered

by that dispute resolution program. The letter of engagement may be provided within a reasonable time after commencing representation, if providing it beforehand is impracticable or the scope of services cannot be determined at the time of commencement (***Id.***) Instead of providing a letter of engagement, the attorney may provide the client with a written retainer agreement, if the agreement addresses the matters required to be in the letter. (***22 NYCRR § 1215.1[c]***). The rule has several exceptions, including representation where the attorney's services are of the "same general kind" as services previously rendered to and paid for by the client. (***22 NYCRR § 1215.2***) An attorney who fails to comply with Part 1215, by providing a letter of engagement or retainer agreement, is still permitted to recover the reasonable value of legal services in quantum meruit (***Seth Rubenstein, P.C. v. Ganea***, 41 A.D.3d 54, 833 N.Y.S.2d 566 [2d Dept., 2007]). In ***Rubenstein***, the court noted that, unlike its domestic relations counterpart, Part 1400, § 1215.1 was not intended to address abuses in a particular area of law. (***Id.*** at 61). The court also noted that § 1215.1 does not contain an express penalty for noncompliance. (***Id.*** at 60) Because the attorney failed to comply with Part 1215, the court precluded the attorney from suing for breach of contract (***Id.*** at 59). However, the court held that if the failure to comply with the rule is not wilful, the attorney may recover in quantum meruit to avoid an "unfair windfall" for the client. (***Id.*** at 63).

In ***Rubenstein***, the court noted that attorneys have "every incentive" to comply with Part 1215 and are at a "marked disadvantage" if they fail to do so. (***Id.*** at 64). Absent a letter of engagement or written retainer agreement, attorneys will have greater difficulty "meeting the burden of proving the terms of the retainer and establishing that the terms were fair, understood, and agreed upon." (***Id.***) The court observed that there was no "guarantee . . . that the fact finder will determine the reasonable value of services under quantum meruit to be equal to the compensation that would have been earned under a clearly written retainer agreement or letter of engagement." (***Id.***)

As noted, Part 1215 by its terms does not apply where the attorney's services are of the "same general kind" as previously rendered to and paid for by the client. Additionally, even if no prior services were provided, Part 1215 does not apply where an attorney was "retained" before Part 1215's effective date. (***Ziskin Law Firm LLP v. Bi-County Elec. Corp.***, 43 A.D.3d 1158, 843 N.Y.S.2d 129 [2d Dept., 2007]). To be excused from Part 1215's letter of engagement requirement, the attorney must have been retained on the specific matter for which fees are sought.

On a motion for summary judgment, it is the proponent's burden to 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. (***JMD Holding Corp. v. Congress Financial Corp.***, 4 N.Y.3d 373, 384, 828 N.E.2d 604, 795 N.Y.S.2d 502 [2005]). Failure

to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Id***). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact, which require a trial. (***Alvarez v. Prospect Hospital***, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]).

Plaintiff argues that the July 5 letter from Barry Hardy was an express agreement on defendant's part to pay the outstanding balance shown on the invoices. However, since plaintiff's representation was ongoing, defendant's purpose in sending the letter could also be considered as a promise in good faith to make payments on account until the fee dispute was "resolved," in order to preserve the attorney-client relationship.

Whether a bill has been held for a sufficient time without objection sufficient to give rise to an inference of assent is ordinarily a question of fact unless only one inference is possible. (***Yanelli, Zevin & Civardi v. Sakol***, 298 A.D.2d 579, 749 N.Y.S.2d 270 [2d Dept., 2002]). This Court does not find plaintiffs have satisfied this burden.

Since the plaintiff failed to meet his burden of proof, the burden does not shift to the defendant and it is not necessary to consider whether the defendant's papers in opposition to the instant motion were sufficient to raise a triable issue of fact. (***Tavarez v. Jackson***, 41 A.D.3d 833, 837 N.Y.S.2d 581 [2d Dept., 2007]).

The Court now turns to defendant's summary judgment motion. Since B & B was originally Seiger's client, plaintiff's failure to comply with Part 1215 was clearly not wilful. According to defendant, it retained plaintiff in June 1998 to draft two letters to the government in response to a product quality deficiency report. Defendant asserts that in September and October 2002, it again retained plaintiff for advice concerning a charge of overpricing on a government contract and drafting a letter in reply. Defendant argues that the legal services rendered in connection with the Sterling Engineering suit and DCIS investigation were not of the same general kind as the routine legal services plaintiff provided in 1998 in that the Sterling matter was far more complex and the DCIS investigation was criminal in nature.

In response, Steiger alleges that B & B was a "longstanding client" before he became associated with plaintiff, and he was B & B's "federal contracts attorney." Stieger does not claim to have brought an action on behalf of B & B prior to the suit against Sterling Engineering. Nor does Steiger claim to have represented B & B in connection with a prior DCIS investigation. The court concludes that the legal services on which plaintiff sues are not of the same general kind as services previously rendered to defendant. Since plaintiff

violated Part 1215 by not providing defendant with a letter of engagement in connection with the Sterling Engineering suit and the DCIS investigation, plaintiff is precluded from recovering a fee for those matters on a breach of contract theory.

In order to establish prima facie entitlement to judgment on the quantum meruit and account stated theories, defendant must make a showing that the fees charged were not reasonable. Defendant has offered no such evidence. Their cross motion for summary judgment or the quantum meruit and account stated theories are therefore denied.

The foregoing constitutes the Order of this Court.

Dated: September 29, 2008
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
OCT 06 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE