

**Phillips Nizer LLP v Grethel**

2008 NY Slip Op 32792(U)

October 6, 2008

Supreme Court, New York County

Docket Number: 107332/2006

Judge: Michael D. Stallman

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: **HON. MICHAEL D. STALLMAN**

PART 7

Index Number : 107332/2006

PHILLIPS NIZER LLP

VS.

GRETHEL, HENRY

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO.

107332/06

MOTION DATE

7/24/08

MOTION SEQ. NO.

002

MOTION CAL. NO.

8

this motion to/for

ST

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-K

Answering Affidavits — Exhibits A

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

~~1-2~~ 1-2

3

4

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion **"is determined in accordance with the annexed memorandum decision and order."**

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

Dated: 10/6/08

**MICHAEL D. STALLMAN**  
J.S.C.



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: IAS PART 7**

-----X  
PHILIPS NIZER LLP,

Plaintiff,

Index No. 107332/2006

- against -

HENRY GRETHEL,

**Decision**

Defendant.

-----X

**HON. MICHAEL D. STALLMAN, J.:**

In this action, a law firm seeks to recover unpaid legal fees from its former client. Plaintiff Philips Nizer LLP now moves for summary judgment in its favor against defendant Henry Grethel on the theory of an account stated.

**BACKGROUND**

Defendant and former his business partner, Robert Bayer, were managing members of HG Design International, LLC a small business engaged in the design, manufacture, marketing, licensing and sale of apparel using the “Grethel” mark. It is undisputed that defendant retained plaintiff to represent defendant in a dispute with his former business partner, and later in connection with an involuntary bankruptcy petition in the Bankruptcy Court for the Southern District in New York, filed in April 2002 by three purported creditors of HG Design International, LLC.

It is undisputed that Bankruptcy Judge Prudence Carter Beatty dismissed the involuntary bankruptcy petition. Plaintiff claims that the parties in the bankruptcy proceeding settled their dispute, by which defendant obtained control of the company.

According to plaintiff, defendant initially paid plaintiff \$100,000 at the outset of the

\* 3 ]  
litigation, made partial payments toward his legal bills, and left arrears in the amount of \$572, 874. On May 25, 2006, plaintiff commenced this action against defendant to recover the unpaid attorneys' fees. The Court held settlement conferences, which were unsuccessful.

### DISCUSSION

An account stated arises when one party sends another party a bill for payment of a sum certain, and the recipient fails to object to the bill within a reasonable time. Shea & Gould v Burr, 194 AD2d 369, 370 (1<sup>st</sup> Dept 1993). By failing to object, the recipient of the bill signifies that it agrees with the sender regarding the amount owed. Id. What constitutes a reasonable time within which to object to the bill is generally a question of fact, except in cases where only one inference is reasonable, in which case a question of law is presented. Legum v Ruthen, 211 AD2d 701, 703 (2d Dept 1995); see also Darby & Darby, P.C. v VSI Intl., 95 NY2d 308, 315 (2000); Peterson v IBI Schroder Bank & Trust Co., 172 AD2d 165, 167 (1<sup>st</sup> Dept 1991). An allegation of a timely objection to the account, whether or not the objection is ultimately found meritorious, will generally defeat a summary judgment motion on an account stated. Shea & Gould 194 AD2d at 371; Diamond & Golomb v D'Arc, 140 AD2d 183, 183 (1<sup>st</sup> Dept 1988).

Plaintiff has established its prima facie entitlement to summary judgment. Plaintiff submitted a copy of its retainer agreement with defendant dated June 22, 1999. Galler Aff., D. Although the copy submitted is not signed by defendant, plaintiff alleged in its verified complaint that defendant's retention was memorialized in the June 22, 1999 retainer agreement (Galler Aff., Ex A [Verified Complaint] ¶ 4), and defendant admitted in his answer that he entered into an agreement to retain plaintiff's services. Id., Ex B [Verified Answer] ¶ 1. Plaintiff submits copies of 22 monthly invoices for professional services (Id., Ex H), which plaintiff mailed to defendant on or about the dates of the

invoices, from June 2000 through March 2002, at the direction of Perry S. Galler, a member of the law firm. Galler Aff. ¶ 36. Defendant admitted to receipt of the invoices allegedly sent, but denied that he owed plaintiff the amount sought. Verified Answer ¶ 3, 11. At his EBT, defendant stated that he knew that he received bills, perhaps on a monthly basis, but could not recall. Galler Aff., Ex C [Grethel EBT], at 81, 87. Defendant also testified that he did not object to specific items in the bills he received, never challenged any of the work, the nature of the services, type of work, or quality of the work. Grethel EBT, at 113. Therefore, defendant's retention of plaintiff's invoices and failure to object to the invoices within a reasonable time establishes an account stated. Morrison Cohen Singer and Weinstein, LLP v Waters, 13 AD3d 51, 52 (1<sup>st</sup> Dept 2004); Shea & Gould, 194 AD2d at 370.

In opposition, defendant essentially argues that, had he known he would be responsible for the legal fees, which he could not pay, and that the legal fees could have escalated to the amount sought, he would never have engaged plaintiff's services. Grethel Aff. ¶ 18. Defendant assumed that the bankruptcy petitioners would be held responsible for the legal fees, based on what he asserts that he heard from members of the firm.<sup>1</sup> Grethel Aff. ¶ 17; Grethel EBT, at 115. Defendant claims that plaintiff refused to file a fee petition in the bankruptcy court. Grethel Aff. ¶ 25.

In reply, plaintiff claims that a significant reason why it continued to represent defendant after he had accumulated substantial fees was defendant's alleged "confident assurance that he would soon have his company back, that it would be highly successful, and that the Firm [plaintiff] would

---

<sup>1</sup>Specifically, defendant claims that Galler made it clear to defendant's adversaries in the bankruptcy proceeding that defendant "was a personal friend of his family and that under no circumstances should they presume my inability to pay his firm's huge legal fees would cause Philips Nizer to end its relationship with me, that he had no intention of letting me lose and he fully expected to hold them responsible for these fees." Gerthel Aff. ¶ 17.

5 ] .

even be asked to represent it.” Galler Reply Aff. ¶ 27. Plaintiff maintains that defendant had engaged his corporate lawyers to negotiate a settlement of the bankruptcy proceedings, which included defendant’s decision to drop his claims for attorneys’ fees. Galler Reply Aff. ¶ 7.

By the unambiguous terms of the retainer agreement, plaintiff agreed “to make prompt payment of [plaintiff’s] bills and expenses.” Galler Aff., Ex D. At his EBT, defendant claimed that it was intimated that the bankruptcy petitioners would be responsible for legal fees, but defendant could not recall any specific representation:

- “Q. Can you recall any words that any attorney at this firm used that intimated that you would certainly win your legal fees from Bayer or Bayer’s company?  
A. I think I have to again answer, Dan, that it was — it was intimated to me that’s what would happen, because I knew that — how else could I pay for this?”

Grethel EBT, at 96. Defendant’s assumption was incorrect, given the express terms of the retainer agreement. Although defendant claims that plaintiff knew of his limited financial means, and that his ability to pay legal fees was very limited (Grethel Aff. ¶ 9), defendant admits that he did not believe that he was ever entitled to free representation. Id. ¶ 29. Defendant’s EBT testimony is telling:

- “Q. Did you ever tell the firm Philips Nizer [‘S]top working on my behalf because I will never be able to pay your bills?[']  
A. No, I really would – I would have left that up to Philips Nizer, not me.”

Grethel EBT, at 106.

Defendant does not go so far as to claim that the parties agreed to accept whatever defendant could afford as satisfaction in full of the legal fees owed. As plaintiff indicates, defendant stated in an affidavit in support of dismissal of the involuntary bankruptcy petition that “had incurred significant professional fees as a result of Bayer’s action.” Galler Aff., Ex E [Grethel Dec.] ¶ 84.

[\* 6 ]  
This statement would not be accurate if the parties had previously agreed that defendant would only pay the legal fees that he could afford.

Defendant's assertions that plaintiff orally advised him to ignore its monthly bills are conclusory. Ellenbogen & Goldstein, P.C. v Brandes, 226 AD2d 237, 238 (1<sup>st</sup> Dept 1996). A general complaint that the bills were mounting and that defendant could not afford to pay them is not sufficient to defeat summary judgment. Morrison Cohen Singer & Weinstein, LLP v Ackerman, 280 AD2d 355, 356 (1<sup>st</sup> Dept 2001).

Contrary to defendant's argument, a hearing "is 'not necessary to establish the reasonableness of the fee since the client's act of holding the statement without objection will be construed as acquiescence as to its correctness.'" Cohen Tauber Spievak & Wagner, LLP v Alnwick, 33 AD3d 562, 562-563 (1st Dept 2006) (citations omitted). Defendant does not raise any triable issue of fact as to whether plaintiff charged excessive fees in violation of DR 2-106. Defendant claims that the 78.5 hours billed in the first three days of May 2000 are "unconscionable," but a team of three lawyers worked primarily on defendant's matters, whose work defendant admittedly praised and complimented. Grethel EBT, at 77, 90-91, 108. As plaintiff indicates, hearings in the bankruptcy court were held on May 8, May 24, June 16, July 10 and July 24, 2000. Galler Aff. ¶ 28. Given the circumstances, the number of hours that three lawyers billed prior to the hearings does not itself raise an issue as to the excessiveness of the fees.

Defendant's remaining arguments are without merit. The rules governing retainer agreements became effective March 4, 2002, which predates plaintiff's engagement. 22 NYCRR 1215.1.

Therefore, defendant fails to raise a triable issue of fact warranting denial of the motion, and plaintiff's motion is granted. Plaintiff is entitled to recover prejudgment interest upon the account

[\* 7 ]  
stated, which runs at the statutory rate from the date of each invoice. Music Sales Corp. v Mark Music Service, Ltd., 194 AD2d 470, 471 (1st Dept 1993).


**CONCLUSION**

Plaintiff's motion for summary judgment is granted. Plaintiff is directed to settle an order on notice to defendant, setting forth seriatim the amount of each invoice.

Settle order.

Dated: *October 6, 2008*  
New York, New York

ENTER:

  
\_\_\_\_\_  
J.S.C.

MICHAEL D. STALLONE  
10/6/08