

**Trachtenberg Rodes & Friedberg, LLP v Premier  
Health Servs., Inc.**

2009 NY Slip Op 31010(U)

April 28, 2009

Supreme Court, New York County

Docket Number: 104639/08

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB

PART \_\_\_\_\_

Index Number : 104639/2008  
**TRACHTENBERG RODES**  
vs.  
**PREMIER HEALTH SERVICES**  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

**IS DECIDED**

**FILED**

MAY 03 2009

CLERK OF COURT  
NEW YORK

Dated: 4/20/09

WALTER B. TOLUB J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 15

-----X  
TRACHTENBERG RODES & FRIEDBERG, LLP,

Plaintiff,

Index No.  
104639/08

-against-

PREMIER HEALTH SERVICES, INC.,

Defendant.

-----X

WALTER TOLUB, J.:

Plaintiff Trachtenberg Rodes & Friedberg LLP (the Firm) moves, pursuant to CPLR 3212, for summary judgment on its third cause of action for an account stated in the amount of \$75,379.49.

Facts

The Law Firm commenced the instant action to recover legal fees, disbursements and costs it claims are owed by defendant Premier Health Services, Inc. (Premier) for services performed on Premier's behalf between July 2007 and November 2007, in connection with an action entitled *Premier Health Services, Inc. v Resort Nursing Home, Bella Davis, Rachel Bergman, Barry Geier and Jonathan Rose* (Sup Ct, Queens County, Index No. 17132/07). The complaint asserts three causes of action: breach of contract (first); quantum meruit (second); and account stated (third).

The Law Firm now moves for summary judgment on its third cause of action.

Discussion

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, David G. Trachtenberg, a member of the Firm, claims that, on or about July 5, 2007, the Law Firm was retained by Premier to represent it in the underlying action; that the Law Firm sent a retainer letter dated 7/5/07 to Premier together with an invoice for the agreed upon retainer of \$7,500.00; and that, while Premier did not return a countersigned copy of the retainer letter, it remitted the sum of \$7,500 on July 17, 2007, in satisfaction of the invoice. Trachtenberg further maintains that it sent four invoices, dated August 2007 through December 2007, for outstanding legal fees in the amount of \$75,379.49. While Mr. Trachtenberg claims that Premier did not timely object to any of the bills, he acknowledges that, on January 14, 2008, Premier, by its principal, Chayie Sieger, informed him by phone that Premier

would not pay the bills "for the sole stated reason that they were too high" (Trachtenberg's affidavit dated 1/21/09, at 4). Mr. Trachtenberg argues that the Law Firm establishes its claim for an account stated.

Premier's counsel does not dispute Premier's receipt of the retainer agreement and further, acknowledges that the retainer agreement, which was not signed by Premier, provided that the Law Firm was entitled to bill for "charges for related expenses and services, such as photocopying, computerized research, travel, long distance telephone calls, telecopy and delivery services ..." (Premier's counsel's affirmation dated 2/9/09 at 1). Rather, Premier argues that there are numerous disbursements submitted by plaintiff, which do not fit within any of the permissible disbursement categories, including those for paralegal overtime, meals and Westlaw charges. Additionally, Premier claims that while production of documentation justifying these disbursements were requested from the Law Firm, they have not been produced. Premier's counsel also maintains that the Law Firm's billing records are insufficiently detailed to allow summary judgment to be granted on the Law Firm's account stated claim. Additionally, Premier notes Mr. Trachtenberg's acknowledgment that Premier objected to the Law Firm's invoices, and claims that this objection is sufficient to warrant denial of the Law Firm's application.

Generally, the receipt and retention of bills without any objection for a sufficient length of time gives rise to an actionable account stated entitling a moving party to summary judgment in its favor (*Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51 [1st Dept 2004]). Recovery on an account stated claim, however, will fail "where a dispute about the account can be shown to have existed" (*Farley v Promovision Video Displays Corp.*, 198 AD2d 122, 123 [1st Dept 1993]). While a lapse of two or three months between the receipt and the objection is not so long as to constitute "an unequivocal assent to the balance(s) stated" (*Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478, 478 [1st Dept 2002], quoting *Epstein Reiss & Goodman v Greenfield*, 102 AD2d 749, 750 [1st Dept 1984]), a lapse of more than four and a half months has been deemed sufficient to give rise an account stated as a matter of law (*Ellenbogen & Goldstein, P.C. v Brandes*, 226 AD2d 237 [1st Dept 1996], *lv denied* 89 NY2d 806 [1997]). Thus, Premier's oral objections to the bills in January 14, 2008, as acknowledged by the Law Firm, were not timely as a matter of law with respect to the invoice dated August 3, 2007 (*id.*). Therefore, the Law Firm's motion for partial summary judgment on its claim for an account stated is granted with respect to the first invoice dated August 3, 2007. The unpaid balance reflected in this invoice is 38,679.01, of which Premier paid a retainer of \$7,500.00, leaving an unpaid

balance of \$31,179.10.

With respect to the remaining invoices, "evidence of an oral objection to an account rendered is sufficient on a motion for summary judgment to rebut any inference of an implied agreement to pay the stated amount" (*Shea & Gould v Burr*, 194 AD2d 369, 371 [1st Dept 1993], quoting *Diamond & Golomb v D'Arc*, 140 AD2d 183, 183 [1st Dept 1988]). Mr. Trachtenberg's admission that in January 2008 Premier advised him that it was not paying the bills since they were too high, discloses to whom, and when the objections were made by Premier with respect to the bills, as well as the substance of Premier's conversation with the Law Firm. While this admission provides sufficient information generally required to sustain evidence of an oral objection to an account rendered (see *Levisohn, Lerner, Berger & Langsam v Gottlieb*, 309 AD2d 668 [1st Dept 2003], *lv denied* 1 NY3d 509 [2004]), it also raises a triable issue as to whether Premier's statements to Mr. Trachtenberg constitute sufficient objections to the reasonableness of the amounts billed in the invoices dated September 7, 2007 through December 4, 2007, and whether they are sufficient to defeat the Law Firm's claim for an account stated (see *Ween v Dow*, 35 AD3d 58 [1st Dept 2006]; see also *Herbert Paul, P.C. v Coleman*, 236 AD2d 268 [1st Dept 1997]). Additionally, there exists a triable issue of fact as to whether certain disbursements reflected on these bills were authorized

under the retainer agreement (*Cadwalader, Wickersham & Taft v Klear*, 303 AD2d 204 [1st Dept 2003]).

While Premier's counsel claims that the invoices were insufficiently itemized, that fact, in of itself, does not prevent an account stated from being created (see *Zanani v Schvimmer*, 50 AD3d 445 [1st Dept 2008]). In light of the above noted issues of fact, the Law Firm's motion for summary judgment on its claim for an account stated is denied with respect to the invoices dated September 7, 2007, October 3, 2007 and December 4, 2007.

Accordingly it is

ORDERED that the motion by Trachtenberg Rodes & Friedberg LLP for summary judgment on its third cause of action for an account stated is granted only with respect to the invoice dated August 3, 2007 in the amount of \$31,179.10, and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of Trachtenberg Rodes & Friedberg LLP and against defendant Premier Health Services, Inc. in the amount of \$31,179.10, together with interest as prayed for allowable by law until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and it is further

ORDERED that the balance of the motion by Trachtenberg,

Rodes & Freidberg LLP for summary judgment on the third cause of action for an account stated is denied with respect to the three remaining unpaid invoices dated from September 7, 2007 through December 4, 2007.

Counsel for the parties are directed to appear for a pre-trial conference on June 5, 2009 at 11:00AM in room 335 at 60 Centre Street.

Dated: *vj/20/09*

ENTER:

*W*  
\_\_\_\_\_  
WALTER E. TOLUB J. S. C.

**FILED**  
MAY 01 2009  
COUNTY CLERK'S OFFICE  
NEW YORK