

Little Mendelson, P.C. v Tavern on the Green, LP

2009 NY Slip Op 31938(U)

August 26, 2009

Supreme Court, New York County

Docket Number: 601130/09

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____

PART _____

Index Number : 601130/2009
LITTLER MENDELSON, P.C.
 VS.
TAVERN ON THE GREEN. LP
 SEQUENCE NUMBER : 001
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this case to/for _____

FILED
 PAPERS NUMBERED _____
 AUG 27 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

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 the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of plaintiff Littler Mendelson, P.C. for an order, pursuant to CPLR §3212, granting it summary judgment against defendants The Tavern on the Green Limited Partnership, s/h/a Tavern on the Green, LP and Leroy Adventures Inc. on its account stated cause of action in the amount of \$180,545.92, plus interest is granted; and it is further

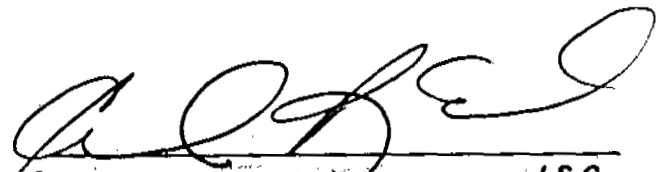
ORDERED that plaintiff's motion for an order dismissing defendants' affirmative defenses and counterclaim is granted, and defendants' affirmative defenses and counterclaim are hereby dismissed; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment in favor of plaintiff Littler Mendelson, P.C. and against defendants The Tavern on the Green Limited Partnership, s/h/a Tavern on the Green, LP and Leroy Adventures Inc. in the amount of \$180,545.92, plus statutory interest from the date of this Order, to be calculated by the Clerk.

This constitutes the decision and order of the Court.

Dated: 8/26/09



HON. CAROL EDMEAD *L.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 35

-----X
LITTLER MENDELSON, P.C.,

Plaintiff,

-against-

TAVERN ON THE GREEN, LP, and
LEROY ADVENTURES INC.,

Defendants.
-----X

HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 601130/09

DECISION ORDER

FILED
AUG 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this action, plaintiff Littler Mendelson, P.C. ("plaintiff") seeks to recover damages for breach of a retainer agreement and an account stated against defendants The Tavern on the Green Limited Partnership, s/h/a Tavern on the Green, LP ("Tavern"), and Leroy Adventures Inc. ("Leroy") (collectively "defendants").

Plaintiff now moves for an order, pursuant to CPLR §§3212 and 3016, granting it summary judgment on its second cause of action for account stated in the amount of \$180,545.42, plus interest, and dismissing defendants' affirmative defenses and counterclaim.

Factual Background¹

By a written retainer agreement executed on March 4, 2008 (the "Retainer"), Tavern retained plaintiff, an employment and labor law firm, to represent it with respect to various labor and employment matters. Michael Desiderio ("Mr. Desiderio"), Tavern's president and chief operating officer, signed the Retainer, and plaintiff sent a copy of the Retainer to Tavern's attorney, David C. Wrobel, Esq. ("Mr. Wrobel").

¹Information is taken from plaintiff's Complaint and motion, and defendants' Answer.

Plaintiff alleges that through February 2009 it performed legal services and incurred out-of-pocket expenses for which Tavern owes plaintiff. Plaintiff further alleges that it has submitted numerous bills of account to Tavern, and Tavern has not objected to any of them.

In response to plaintiff's Complaint, defendants filed an Answer wherein they allege as affirmative defenses that (1) plaintiff's Complaint fails to state a cause of action and (2) plaintiff fails to provide defendants with a retainer agreement in violation of 22 NYCRR §1215.

Defendants also allege in a counterclaim that plaintiff breached its fiduciary duties to Tavern.

Plaintiff's Motion

Plaintiff contends that it has demonstrated that Tavern executed the Retainer on March 4, 2008. Defendants' Answer is signed by Mr. Wrobel, and verified by Mr. Desiderio under penalty of perjury. Plaintiff argues that this same Mr. Desiderio executed the Retainer on Tavern's behalf, and this same Mr. Wrobel was copied on the letter from Michael Weber ("Mr. Weber"), the senior shareholder of plaintiff, to Mr. Desiderio along with the Retainer (see the "March 3, 2008 Letter"). Plaintiff argues that, as the copy of the Retainer attached to the Weber affidavit (the "Weber Aff.") demonstrates, both Tavern and its attorney were well aware of the Retainer "when they interposed Tavern's frivolous defense."

Plaintiff argues that it should be awarded summary judgment on its claim for an account stated because Tavern acknowledged the validity of plaintiff's Invoices by: (1) failing to make any objection thereto; and (2) making five separate partial payments to plaintiff, plaintiff argues. Mr. Weber attests that the Retainer is clear and unambiguous and was fully understood by Tavern at the time it was executed. The Retainer sets forth plaintiff's hourly rates for representing Tavern, as well as billing for out-of-pocket and in-house expenses. The Retainer also states that

“should you have any questions or comments about hourly rates, hours charged, billing practices, or expenses, we strongly encourage you to contact us promptly,” Mr. Weber contends. The Retainer further provides Tavern with 60 days to object to any of plaintiff’s Invoices, and that if Tavern fails to object to the Invoices within 60 days, the Invoices will be deemed “accepted.”

Plaintiff contends that it rendered legal services for Tavern, pursuant to the Retainer, from March 2008, through April 2009. Throughout its representation, plaintiff provided Tavern with detailed monthly invoices outlining every charge and the amount thereof (see the “Invoices”). The Invoices identified the attorney who performed each service, the service performed by the attorney, the amount of time spent by the attorney, and the attorney’s hourly rate. Plaintiff further alleges that the Invoices, which were submitted to and retained by Tavern, total \$235,545.92.

Mr. Weber attests that Tavern never once objected to any Invoice. He further attests that Tavern paid plaintiff a \$5,000 retainer upon its execution of the Retainer, and thereafter, Tavern made five partial payments against the Invoices totaling \$50,000 (see the “Checks”). Therefore, an account has been stated against Tavern in the amount of \$180,545.92 (\$235,545.92 minus \$55,000).

Plaintiff contends that New York Courts have routinely awarded summary judgment to plaintiffs on an account stated claim where, as here, the defendant both accepted the bills without objection and made partial payments against the bills. Having failed to object to any bill and after making five partial payments, Tavern should not be allowed to defeat summary judgment “by concocting in their opposition papers a self-serving and previously undocumented allegation of an oral objection,” plaintiff argues. Instead, plaintiff should be awarded summary judgment on its account stated cause of action in the amount of \$180,545.92.

Plaintiff also alleges that Leroy, Tavern's managing general partner, is legally responsible for Tavern's debt.

In addition, plaintiff contests defendants' allegation in its Answer that plaintiff was retained for "the specific task of representing [Tavern] in connection with the defense of a pending case," but "undertook the representation of [Tavern] in connection with a number of other matters." Plaintiff argues that the plain language of the Retainer states that plaintiff was retained "with regards to labor and employment *matters*" (*emphasis added*).

Plaintiff also disputes defendants' counterclaim that plaintiff "acted in a manner inconsistent with its duties and/or breached its duties to [Tavern]." Plaintiff argues that defendants did not particularize any alleged act of a breach of fiduciary duty; nor did they allege that any damages were sustained as a result of plaintiff's alleged breach of fiduciary duty.

Defendants' Opposition

In an affidavit by Mr. Desiderio (the "Desiderio Aff."), defendants contend that plaintiff's lawsuit never had to be filed, and that "its very existence" supports their counterclaim. They argue that an attorney stands in the position of a fiduciary with respect to a client, and, thus, when an attorney is owed money, he should not behave in the manner of an ordinary creditor. "Moreover, it stands to reason that an attorney should not unduly embarrass his client or former client in the course of collecting fees," defendants argue.

Defendants argue that "[i]n the interest of not embarrassing plaintiff, they have alleged a counterclaim of breach of fiduciary duty, but spared the details from the public pleadings. Defendants contend that they are ready, willing and able to discuss the details with the Court or a Court-appointed mediator at any time. In the event that this Court requires defendants to

explicitly state in writing their issues with plaintiff's services, defendants will do so, "although we hope this will be unnecessary," defendants argue. Defendants state that they "firmly believe that this matter can be resolved in the context of a confidential meeting with the Court or a Court-appointed mediator. Defendants further contend that they do not intend to prolong this dispute, but that they do not want their "rights" to "be trampled upon."

In response to plaintiff's arguments regarding an account stated, defendants maintain that they raised questions in connection with the Invoices. "The extent of the fees was a matter of frequent discussion and, in any event, [defendants] should have the right to determine whether the hours reflect services actually worked and properly recorded," defendants argue.

Defendants note that plaintiff has alleged that defendants "failed to serve any discovery demand with their answer." Defendants contend that there is no requirement that such demands be served "with" an answer, and it is quite typical for demands to not be served until a Preliminary Conference is held. In the instant case, there has been no Preliminary Conference, and no opportunity for Judicial Intervention until this motion was made. Defendants reiterate that they "welcome judicial intervention, in private, to discuss a practical resolution to this case."

Finally, defendants contend that it is "entirely inappropriate" for plaintiff to ask for summary judgment dismissing defendants' counterclaim at this time.

Plaintiff's Reply

First, plaintiff argues that the Desiderio Aff. falls far short of creating a triable issue of fact on plaintiff's account-stated cause of action. Defendants fail to explain the \$50,000 in partial payments they made against plaintiff's outstanding Invoices, and they fail to provide the Court with any proof of any written objection to plaintiff's Invoices, plaintiff argues. Further,

defendants fail to provide any specifics pertaining to any alleged oral objection. In fact, defendants fail to allege that they made any oral objection at any time. Defendants merely allege that “questions” had “been raised,” and that plaintiff’s fees were “a matter of frequent discussion.” Further, defendants fail to support such vague allegations with any specifics, plaintiff argues. .

Second, plaintiff argues that defendants are barred from disputing the reasonableness of plaintiff’s fees where defendants acquiesced to the correctness of plaintiff’s Invoices. Plaintiff maintains that there is no merit to defendants’ argument that they have the “right to determine whether the hours reflect services actually worked and properly recorded,” because defendants waived the right to contest the validity of plaintiff’s fees by failing to object plaintiff’s Invoices.

Third, plaintiff argues that summary judgment should not be delayed by defendants’ request for a preliminary conference. Defendants do not requested a continuance, pursuant to CPLR §3212(f), to conduct discovery, plaintiff contends. Further, defendants do not allege that discovery is needed, nor do they identify any of the discovery they allegedly need. Plaintiff argues that discovery is not needed where the issue is the defendants’ own inaction in failing to object to plaintiff’s Invoices. Instead, defendants request that plaintiff’s motion be denied simply because a preliminary conference has yet to be held, as though a preliminary conference is a condition precedent to the granting of summary judgment. Plaintiff contends that defendants “know full well” that they never objected to plaintiff’s Invoices, and they are now attempting to delay the inevitable with an unfounded request for a conference. Defendants’ request for a preliminary conference to discuss a practical resolution to this case is no basis for the denial of plaintiff’s motion for summary judgment, plaintiff argues.

Fourth, plaintiff argues that defendants' affirmative defenses and counterclaim should be dismissed. Plaintiff contends that defendants concede by their silence the falsity of their affirmative defense alleging that plaintiff failed to provide defendants with a written retainer, as required by law. Such a concession mandates the dismissal of defendants' second affirmative defense.

As for defendants' breach of fiduciary duty counterclaim, plaintiff argues that defendants only allege that they failed to provide the required particulars to avoid "embarrassing" plaintiff. However, CPLR §3016(b) requires defendants to provide all of the particulars in their counterclaim. Plaintiff argues that defendants cannot circumvent the CPLR by alleging that their pleading deficiencies were engendered by their desire to avoid "embarrassing" plaintiff.

Analysis

Summary Judgment

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A

party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra; Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The defendant “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*; 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]).

Account Stated

An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other (*see* 1 NY Jur, Accounts and Accounting, §§5-7). It is well settled that where an account is made up and rendered, the one who receives it is bound to examine it, and, if the accounting is admitted as correct, it becomes a stated account and is binding on both parties, the balance being the debt which may be sued for and recovered by law (*Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745 [1st Dept 1983]; *see also Ruskin, Moscou, Evans, & Faltischek, P.C. v FGH Realty Credit Corporation.*, 228 AD2d 294, 295 [1st Dept 1996] ["Defendant's receipt and retention of the plaintiff law firm's invoices seeking payment for professional services rendered, without objection within a reasonable time, gave rise to an actionable account stated, thereby entitling the plaintiff to summary judgment in its favor"]).

An agreement may be implied if a party receiving a statement of account keeps it without objecting to it within a reasonable time, because the party receiving the account is bound to examine the statement or to procure someone to examine it for him, and object if he disputes its correctness (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165, 167 [1st Dept 1991]). If the party receiving the account fails to dispute its correctness or completeness, that party, by its silence, is deemed to have acquiesced and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165, 167 [1st Dept 1991]).

Here, plaintiff has demonstrated a *prima facie* case that it is entitled to summary

judgment on an account stated. Plaintiff provides a copy of the Retainer executed by Tavern and plaintiff on March 4, 2008, which states in relevant part:

If you request or require any changes to the format of our billings, *including the amount of detail or itemization of our work, or if you have concerns with the accuracy or amount of any billing to you, you agree to notify us in writing within 60 days of receipt of the billing of any such concern, request, requirement or objection.* Upon the expiration of the 60-day period, all billings not previously objected to in writing shall be deemed accepted and a part of this written agreement. (Retainer, p. 2) (*Emphasis added*)

It is undisputed that from April 28, 2008 to April 25, 2009, plaintiff submitted to defendants, and defendants received, monthly Invoices for the legal services it performed for defendants (see the Invoices).

Further, the record fails to establish that defendants objected to the Invoices at any time. It is well established that an undocumented allegation of an oral objection is insufficient to defeat an account stated. In a similar case in which the First Department upheld a plaintiff's summary judgment motion to recover legal fees on an account stated, the Court held:

[Defendant's] assertion that she orally objected to the bills is insufficient because she fails to state when she objected or the specific substance of the conversations in which the objections were made (see *Levisohn, Lerner, Berger & Langsam v Gottlieb*, 309 AD2d 668 [2003], lv denied 1 NY3d 509 [2004]; *Fink, Weinberger, Fredman, Berman & Lowell v Petrides*, 80 AD2d 781 [1981], lv dismissed 53 NY2d 1028 [1981]). Indeed, with respect to bills received by defendants after plaintiff was terminated, [defendant] does not even assert that she objected to the bills, only that she "discussed" plaintiff's outstanding fees with him and told him that when the matter was concluded she would "address the issue with him."
(*Zanani v Schwimmer*, 50 AD3d 445, 446, 2008 NY Slip Op 03317 [1st Dept 2008])

The First Department also upheld summary judgment in the case of *Darby & Darby, P.C. v VSI Intern., Inc.*, (268 AD2d 270, 273 [1st Dept 2000]), wherein the Court noted that "[t]here is no indication that any protest was made to the regularly issued invoices, aside from the bare assertion of oral protest contained in the unsupported affidavit of [defendant], and the excuse

offered for the absence of any written objection to the bills is similarly vague and conclusory (*citation omitted*).”

Here, Mr. Desiderio attests that “questions have certainly been raised in connection with the Invoices” and that “the extent of the fees was a matter of frequent discussion” (opp., ¶ 9). However, defendants submit no documentation in support of this allegation, and do not disclose the nature or content of those questions and discussions, *i.e.* whether they objected to the Invoices; nor do defendants specify which Invoices they questioned or discussed.

Additionally, it is well established that where, as here, a defendant makes a partial payment against a bill, it acknowledges the validity of the bill, “thereby establishing it as an account stated” (*Parker, Chapin, Flattau and Klimpl v Daelen Corp.*, 59 AD2d 375, 378 [1st Dept 1977]; *Coudert Bros. v Finalco Group, Inc.*, 176 AD2d 622, 623 [1st Dept 1991] [“By their silence and partial payments, defendants expressed their agreement that the bills were correct and would be paid. Upon such proof, summary judgment on an account stated was properly granted”]; *Beieen v Paul K. Roonev. P.C.*, 269 AD2d 264 [1st Dept 2000] [“Summary judgment was properly granted on defendants’ claim for legal fees based on account stated, in view of plaintiff’s failure to object to defendants’ invoices and the partial payments that plaintiff made”]). It is undisputed that Tavern submitted six checks to plaintiff for its legal services: a check for \$5,000 dated March 4, 2008, for the retainer fee, and five separate checks on the Invoices, each for \$10,000 and dated, respectively: June 12, 2008; July 17, 2008; October 17, 2008; December 19, 2008; and December 31, 2008 (see the Checks). Therefore, plaintiff is entitled to summary judgment on its claim for an account stated, in light of defendants’ failure to object to plaintiff’s Invoices and the partial payments that defendants made.

Defendants' argument that they "should have the right to determine whether the hours reflect services actually worked and properly recorded [*sic*]" also lacks merit. Once an account has been stated by a law firm, the firm is not required to establish the reasonableness of its fees because "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, 563, 2006 NY Slip Op 07812 [1st Dept 2006], *lv to appeal dismissed* 8 NY3d 840 [2007]).

As plaintiff has established a *prima facie* case of an account stated, and defendants have failed to raise the existence of a factual issue requiring a trial, plaintiff's motion for summary judgment on an account stated is granted. The Court notes that defendants do not challenge plaintiff's contention that Leroy is responsible for Tavern's debt. Therefore, summary judgment is warranted against both defendants.

Insufficient Discovery

Defendants fail to support its contention that plaintiff's request for summary judgment is "entirely inappropriate" at this juncture (opp., ¶ 13). Defendants provide no caselaw stating that summary judgment is premature where a preliminary conference has not been held (opp., ¶ 10). Further, while defendants acknowledge that there has been no discovery (*id.*), they make no demand for such discovery; nor do they provide any evidence that discovery is warranted. It is well settled that an argument opposing summary judgment on the grounds of insufficient discovery "is unavailing where the nonmoving party has failed to 'produce some evidence indicating that further discovery will yield material and relevant evidence'" (*Heritage Hills Soc., Ltd. v Heritage Development Group, Inc.*, 56 AD3d 426, 427 [2d Dept 2008], quoting *Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203, 1205 [3d Dept 2008]); *Hayden v City of*

New York, 809 NYS2d 75, 76 [1st Dept 2006] [“In addition, plaintiff failed to show that the representatives already deposed had insufficient knowledge or were otherwise inadequate, or that further discovery was warranted by reason of a substantial likelihood that additional persons sought for deposition possessed information material and necessary to oppose the motion”]; *Steinberg v Abdul*, 230 AD2d 633, 633 [1st Dept 1996] [“We add that the mere hope, expressed by plaintiffs, that evidence sufficient to establish defendants’ assumption of a duty to plaintiffs’ decedent may be obtained during discovery does not fulfill their obligation to demonstrate the likelihood of such disclosure (CPLR 3212[f]) and, thus, is insufficient to defeat defendants’ motions for summary judgment”]; *Frierson v Concourse Plaza Associates*, 189 AD2d 609, 610 [1st Dept 1993] [“Neither can [defendants] avoid summary judgment by claiming a need for discovery. The ‘mere hope’ of defendants that evidence sufficient to defeat such a motion may be uncovered during the discovery process is not enough . . . Defendants were bound to show there was a likelihood of discovery leading to such evidence, *i.e.*, that facts “may” exist but cannot be stated at that time (CPLR 3212[f]). This they failed to do”].

Accordingly, the Court finds that defendants’ arguments in opposition to plaintiff’s motion lack merit and fail to raise an issue of triable fact.

Dismissal of Affirmative Defenses

According to CPLR §3211(b), a “party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.” The “standard of review on a motion to dismiss an affirmative defense pursuant to CPLR 3211(b) is akin to that used under CPLR 3211(a)(7), *i.e.*, whether there is any legal or factual basis for the assertion of the defense. (See, *Winter v Leigh-Mannell*, 51 AD2d 1012 [1976]).

Further, statements that will not defeat, mitigate or reduce the plaintiff's remedy are insufficient as a defense (*see* NY Jur, Pleading §138; *Walsh v Judge*, 223 AD 423, 425 [1st Dept 1928]). Thus, allegations of a plaintiff's wrongdoing are insufficient as defenses if the alleged wrongdoing is unrelated to the claim made against the defendants; instead the plaintiff's actions must in some way justify the defendant's actions to be properly pleaded as defenses (*TNT Communications Inc. v Management Television Systems, Inc.*, 32 AD2d 55 [1st Dept 1969], *order affd*, 26 NY2d 639 [1970] [plaintiff's alleged violation of antitrust laws did not justify defendant's appropriation of trade secrets and hence was not a proper defense]). Finally, if a defendant asserts an affirmative defense, he also must be able to prove it. "General denials in an answer are insufficient to raise triable issues" (*Iandoli v Lange*, 35 AD2d 793, 793, [1st Dept 1970]).

Failure to State a Cause of Action

The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). On a motion to dismiss made pursuant to CPLR §3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, [1994]). However, where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are

not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *aff'd* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept], *lv denied* 89 NY2d 802 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

Breach of the Retainer

To state a cause of action for breach of an agreement, the proponent of the pleading must specify the making of an agreement, the performance by that party, breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071[A], 2006 NY Slip Op 50497 [U] [NY Sup 2006], *citing Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). Further, a complaint alleging breach of contract must set forth the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract or by attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v Silliker, Inc.*, 11 Misc 3d 1072, 816 NYS2d 693 [NY Sup 2006]), *citing Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [3d Dept 1987], *accord Valley Cadillac Corp. v Dick*, 238 AD2d 894, 894 [4d Dept 1987]).

Here, plaintiff alleges as the first cause of action of its Complaint that plaintiff and Tavern entered into an written agreement for legal services on March 4, 2008 (Complaint, ¶ 6; the Retainer). Plaintiff further alleges that Tavern agreed to pay for such legal services at plaintiff's customary hourly rates, and to reimburse plaintiff for all expenses relating thereto

(Complaint, ¶ 6). Through February 2009, plaintiff performed legal services and incurred out-of-pocket expenses for Tavern (Complaint, ¶ 7). However, Tavern breached the Retainer by failing to pay plaintiff for its services and expenses amount to \$200,000, despite plaintiff's demands (Complaint, ¶¶ 8-9). Finally, plaintiff alleges that by reason of Tavern's breach, plaintiff is entitled to damages (Complaint, ¶ 9). Therefore, plaintiff has sufficiently pleaded its first cause of action for breach of the Retainer.

Account Stated

As discussed above, to plead a cause of action for an account stated, a party must allege that it made up and rendered an account and that the party that received the account retained it without objecting to it within a reasonable time (*Rosenman Colin Freund Lewis & Cohen v Neuman; Ruskin, Moscou, Evans, & Faltischek; P.C. v FGH Realty Credit Corporation*).

Here, plaintiff alleges in its Complaint that it submitted numerous bills of account to Tavern pursuant to the parties' Retainer Agreement, and Tavern failed to object to any of them (Complaint, ¶ 11). And, as indicated above, plaintiff has a cause of action for an account stated.

As plaintiff has sufficiently pleaded both breach of contract and an account stated, defendants' first affirmative defense that plaintiff's Complaint fails to state a cause of action lacks merit, and, accordingly, is dismissed.

Failure to Provide a Retainer Agreement

Defendants' second affirmative defense that plaintiff failed to provide a retainer agreement in violation of 22 NYCRR §1215 also lacks merit. The rule states in relevant part:

Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter.

(22 NYCRR §1215.1[a])

However, an attorney's failure to comply with 22 NYCRR 1215.1 does not preclude it from suing to recover legal fees for the services it provided (*Miller v Nadler*, 60 AD3d 499, 500 [1st Dept 2009]; *Egnotovitch v Katten Muchin Zavis & Roseman LLP*, 55 AD3d 462, 464 [1st Dept 2008]). Further, here, the documentary evidence in the record flatly contradicts defendants' allegations. Attached to its motion, plaintiff provides a copy of the Retainer, which is signed by Mr. Desiderio on behalf of Tavern and dated March 4, 2008. Plaintiff also provides a copy of the March 3, 2008 Letter from Mr. Weber to Mr. Desiderio stating:

Enclosed is a copy of our firm's standard engagement agreement *that we are required to obtain*. I would appreciate your signing the enclosed copy of the engagement agreement and returning it to me, along with a retainer check in the amount of \$5,000, at your earliest convenience.
(*Emphasis added*)

Finally, plaintiff provides a copy of a check for \$5,000 from Tavern to plaintiff, dated March 4, 2008, the same date the Retainer was signed.

As the record fails to support defendants' allegation that plaintiff failed to provide the Retainer, defendants' second affirmative defense is dismissed.

Breach of Fiduciary Duty

Finally, defendants' counterclaim that plaintiff breached its fiduciary duties to Tavern lacks merit. To assert a cause of action for breach of fiduciary duty, a movant must allege (1) the existence of a fiduciary duty between the parties, (2) the breach of that duty and (3) damages suffered by the movant as a result of the breach (*see* 4A NY Prac, Com Litig in New York State Courts §70:17 [2d ed]; *Blue Chip Emerald LLC v Allied Partners Inc.*, 299 AD2d 278 [1st Dept 2002]; *Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 184-185 [1st Dept 2000]).

The First Department also makes clear that a pleading of breach of fiduciary duty must comply with the heightened pleading requirements of CPLR §3016(b), which states: “Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, *breach of trust* or undue influence, the circumstances constituting the wrong shall be stated in detail” (*emphasis added*) (see *Shearson Lehman Bros. Inc. v Bagley*, 205 AD2D 467, 467 [1st Dept 1994] [holding that plaintiff’s cause of action for breach of fiduciary duty satisfied CPLR §3016(b) because plaintiff provided sufficient detail about a complex scheme against plaintiff’s interests]; cf. *Perl v Smith Barney Inc.*, 230 AD2d 664 [1st Dept 1996], *lv to appeal denied* 89 NY2d 803 [1996]; *Gall v Summit. Rovins And Feldesman*, 222 AD2d 225 [1st Dept 1995]).

Here, defendants not only fail to allege that plaintiff breached its fiduciary duty to them, they also fail to allege that they suffered any damages as a result of a breach. Further, defendants provide no details to support their counterclaim in either their Answer or their opposition. Accordingly, defendants’ counterclaim is dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of plaintiff Littler Mendelson, P.C. for an order, pursuant to CPLR §3212, granting it summary judgment against defendants The Tavern on the Green Limited Partnership, s/h/a Tavern on the Green, LP and Leroy Adventures Inc. on its account stated cause of action in the amount of \$180,545.92, plus interest is granted; and it is further

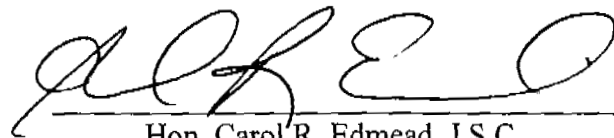
ORDERED that plaintiff’s motion for an order dismissing defendants’ affirmative defenses and counterclaim is granted, and defendants’ affirmative defenses and counterclaim are hereby dismissed; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment in favor of plaintiff Littler Mendelson, P.C. and against defendants The Tavern on the Green Limited Partnership, s/h/a Tavern on the Green, LP and Leroy Adventures Inc. in the amount of \$180,545.92, plus statutory interest from the date of this Order, to be calculated by the Clerk.

This constitutes the decision and order of the Court.

Dated: August 26, 2009



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
AUG 27 2009
COUNTY CLERKS OFFICE
NEW YORK