SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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SCHLISSEL OSTROW KARABATOS, PLLC,

Plaintiff,

-against-

TAUNA K. VANDEWEGHE-MULLARKEY,

Defendants.

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SCAN

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.: 2201/08
Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

Papers Read on this Motion:

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In motion sequence number one, the Plaintiff moves for an order pursuant to CPLR §3212 for: (1) summary judgment; and (2) striking the Defendant's affirmative defenses.

The Defendant cross moves in motion sequence two (2) for an order pursuant to CPLR §§3212 and 3211 for an order dismissing the Plaintiff's Complaint.

By Summons and Complaint dated January 2008 the Plaintiff law firm Schlissel, Ostrow Karabatos, PLLC ["Schlissel Ostrow" or the "Plaintiff"], commenced the within, *pro se* action against its former client, the Defendant Tauna K. Vandeweghe-Mullarky, alleging that the Defendant failed to pay previously billed legal fees and disbursements in excess of $34,000.00 (Cmplt., [Pltff's Exh., "B"], ¶¶ 6, 13, 19).

The record indicates that the Defendant – who resides in California with her children – was awarded a judgment of divorce by this Court in 1999 (Rosenkrantz Aff. in Opp., Exh., "F"). Shortly thereafter, in September of 1999, the Defendant retained the law firm of Meltzer Lippe, Goldstein & Schlissel, P.C. ["Meltzer"] to represent her in connection with, *inter alia*, certain post-judgment matters, including a contempt application made by her former husband (Pltff's Exh., "A").

Attached to the Plaintiff's submissions, is a five-page written retainer agreement, dated September 17, 1999, by which the Defendant agreed that Meltzer was to represent her in the subject proceedings. Pursuant to that retainer – which was executed by Stephen W. Schlissel for Meltzer – the Defendant agreed, among other things, to pay Meltzer a retainer fee of $5,000.00, an amount which the Defendant concededly paid in full at the time (Rosenkrantz Aff., ¶¶ 1-2).

Thereafter, and as evidenced by various legal bills and statements annexed to the Plaintiff's papers, the Meltzer firm represented the Defendant from October of 1999 until June of 2000, at which point, the accumulated unpaid legal fees owed amounted to $15,545.95 (Pltff's Exh., "H" [*see*, Meltzer statement, June 6, 2000]).

Notably, while the record contains a series of Meltzer fee statements spanning the eight-month period between October of 1999 and June of 2000, the Defendant apparently never made any payments in connection with those statements – apart from the $5,000.00 she had originally paid upon executing the 1999 Meltzer retainer agreement.

Effective August 14, 2000, Meltzer's "matrimonial department," including Stephen Schlissel, left the Meltzer firm as a unit and merged with the firm of Ostrow & Taub, LLP, thereafter practicing under the new firm name of "Schlissel, Ostrow, Karabatos Poepplein & Taub, PLLC" ["Schlissel Ostrow"] (Rosenkrantz Aff. in further Opp., Exh., "A").

The new Schlissel Ostrow firm formally advised Meltzer's existing matrimonial clients of the change by letter dated August 7, 2000. Although the Plaintiff advises that it no longer possesses a copy of the original announcement letter it actually sent to the Defendant, it claims that the unexecuted, sample letter currently attached to its papers is an exact copy of the document it allegedly sent to her.

Significantly, the attached, August 2000 form letter advises clients, *inter alia,* that "when you first retained our [Meltzer's] services, you executed a written retainer. The terms of that retainer will continue without change." The letter further notes that, "[h]owever, it will be necessary for you to consent in writing to the new firm acting on your behalf pursuant to the initial retainer agreement. Thus we would ask that you countersign the enclosed copy of this letter permitting * * * [Schlissel Ostrow] to be deemed a signatory to that retainer agreement in place" of the Meltzer firm. Lastly, the letter included a "consent change of attorney form" – which the client was directed to execute and return with the letter.

Although the Plaintiff contends that the foregoing letter was sent to the Defendant (Rosenkrantz Aff. in Opp., at 3, fn 1), the Plaintiff has not produced any retainer agreement which has been executed by the Defendant. Nor, insofar as the record indicates, was a consent to change of attorney form ever executed by the Defendant or submitted to the Court.

According to the Plaintiff, after departing the Meltzer firm, its personnel continued to represent the Defendant, just as they had prior to the change.

More specifically, the Plaintiff contends that: (1) until January 2004, it provided legal services to the Defendant with her express knowledge and consent; (2) that it regularly billed her at the same billing address previously utilized by Meltzer; (3) that none of the bills so addressed and mailed was ever returned (4); that the Defendant never interposed any objections – written or otherwise – to the legal bills which were sent to her; and (5) that in 2001, she personally assisted in the preparation of certain court documents required for a hearing; corresponded with the Plaintiff with respect to that proceeding; and then later appeared in court several times with the Plaintiff, who acted as her litigation counsel at the hearing (Rosenkrantz Aff. in Opp., at 3-5 Exh., "D"; Rosenkrantz, [Main] Aff., ¶¶ 2-5; Cmplt., ¶¶ 2-9).

Thereafter, the litigation continued, albeit with complications apparently arising from the simultaneous pendency of related custody and visitation proceedings then on-going in California, where the Defendant and her children were residing (*see*, Order of Parga J., dated January 7, 2003 [Rosenkrantz Aff., in Opp., Exh., "M"]).

According to the Plaintiff, in October of 2002, a Court conference was held at which time the Defendant and her husband allegedly agreed to suspend further litigation and instead, refer their dispute to private, binding arbitration (Rosenkrantz Aff. in Opp., at 5-6).

A handwritten, "so-ordered" stipulation, dated October 10, 2002 (Ross, J.), has been produced by the Plaintiff, which provides that "the parties agree to private binding arbitration to address and resolve the pending motions/hearings," which arbitration was to take place "on or before December 31, 2002" (Rosenkrantz Aff., in Opp., Exh., "J").

Although the Defendant did not attend the October 2002 Court conference – since her presence would have required travel from California – the Plaintiff contends that the Defendant was aware of what had transpired, since its personnel verbally discussed the matter with her and mailed a copy of the

stipulation, which at that point, had been executed by the parties' counsel only (Rosenkrantz Aff., in Opp., Exh., "J").

As to the outcome of the proposed arbitration, the Plaintiff contends that although the Defendant and her former husband were initially amenable to resolution by arbitration, they ultimately "choose not to follow through with the [arbitration] process" and to "waive their respective claims against each other" (Rosenkrantz Aff., in Opp., at 6). In fact, the contemporaneously generated docket notes/minutes made by the Nassau County Clerk provided that "parties agree to arbitration" (December 2002 notation); however, there is nothing in the record which formally memorializes a waiver of rights by the matrimonial parties or any alleged agreement to forego arbitration.

Notably, the record contains yet another order, dated January 3, 2003 (Parga, J.), which addresses a prior application made by the Plaintiff on the Defendant's behalf in late 2002. The motion apparently sought a declaration to the effect that the New York Courts should decline jurisdiction over certain custody and visitation issues, which were pending at the same time in California because the California Courts would not exercise jurisdiction until New York had affirmatively declined to do so (Order of Parga J., dated January 7, 2003 [Rosenkrantz Aff., in Opp., Exh., "M"]).

The Court's January 2003 order directs a conference with respect to the issue, but the record does not indicate what, if anything, thereafter transpired with respect to the issue. Nor does the contemporaneous record indicate the precise manner in which the litigation itself actually terminated – apart from the Plaintiff's claim that, in effect, the parties agreed to effectively abandon and/or discontinue Court proceedings in favor of arbitration, and then never pursed that remedy – or, it seems, any remedy for that matter.

According to the Defendant, however, at some point in 2002 – she could not recall exactly – she was in Court with Mr. Schlissel and supposedly directed him to "stop and settle for whatever they [her former husband] agreed upon," although she claims he disregarded her instructions and pursued the arbitration settlement discussed above, which she allegedly never heard of or approved (Def's Aff.,¶ 14).

Thereafter, at some point in 2007, the Plaintiff and Defendant herein apparently corresponded with respect to the unpaid counsel fees the Defendant allegedly owed to the Plaintiff – although there is nothing in the record prior to this point establishing that the Plaintiff affirmatively demanded the

overdue fees in writing – apart from the bills sent (Rosenkrantz Aff., in Opp., Exh., "H").

Specifically, by letter dated April 23, 2007, Schlissel Ostrow partner Jennifer Rosenkrantz, who had handled the Defendant's case with Mr. Schlissel, wrote to the Defendant, summarizing that in 2002–2003, the Defendant and her former husband agreed to arbitrate their dispute but never pursued that remedy.

As to the fee issue, Rosenkrantz referred to the original Meltzer retainer as determinative and further advised the Defendant that she could challenge the billing amounts by way of arbitration, if she so elected. The letter also contains an offer in settlement, pursuant to which the Plaintiff agreed to accept $20,000.00 in full settlement of the claim.

In subsequent, related correspondence dated July 2007 – which replied to a responsive letter by the Defendant dated May 9, 2007 letter (not annexed) – Rosenkrantz (1) rejected, *inter alia,* an apparent claim that the Plaintiff had waived its fee by failing to request it; (2) again offered to accept $20,000.00 in full settlement of the claim; and (3) threatened litigation in the event the fee was not otherwise paid in full (Rosenkrantz Aff., in Opp., Exh., "H"]).

In February 2009, the Defendant e-mailed Ms. Rosenkrantz and inquired about how the case ended, stating, *inter alia*, that it was her impression that the case was not over since from what she had seen and what Rosenkrantz had allegedly told her, she did not get the impression that it had terminated – this because there was nothing signed by the parties to this effect (Rosenkrantz Aff., in Opp., Exh., "I"]).

Rosenkrantz responded by e-mail that it was her recollection that the last significant occurrence in the matter was the agreement to arbitrate, which she believed, was never pursued by the Defendant and her former husband (Rosenkrantz Aff., in Opp., Exh., "I"]).

Significantly, the last legal bill submitted by the Plaintiff is dated February 4, 2004, for services rendered through January 31, 2004, and includes a written attachment listing all amounts then due and owing, apparently from the inception of the Meltzer representation in 1999, *i.e.*, the sum of $34,515.44 (Pltff's Exh., "H").

The Plaintiff thereafter commenced the within action in early, 2008, advancing claims sounding in breach of contract and/or failure to pay for services rendered and account stated. The Defendant has answered, denied the material allegations of the complaint and interposed three affirmative defenses,

alleging lack of/improper personal service; failure to state a cause of action; and the statute of limitations.

The Plaintiff now moves for summary judgment on its claims, while the Defendant has cross moved to dismiss the complaint pursuant to CPLR §§3211 and 3212.

Significantly, in opposition to the motion and in support of her cross motion, the Defendant asserts that recovery is precluded as a matter of law, since the Plaintiff failed to comply with Court rules governing retainer agreements and legal billing procedures applicable to attorneys in domestic relations/matrimonial matters, *i.e.*, the Defendant claims that she never executed a new retainer with the Plaintiff and that the Plaintiff failed to provide billing statements "at least every 60 days" as mandated by stated Court rules (*e.g.*, 22 NYCRR §§ 1400.2, 1400.3[9] *see*, DR§ 2-106[c][2][b]).

The Defendant further contends, *inter alia*, that portions of the Plaintiff's claims are time-barred, and alternatively, that the Plaintiff's motion is otherwise premature inasmuch she has not yet had the opportunity to engage in any significant and meaningful discovery.

The parties' respective motions are granted in part to the limited extent indicted below.

With respect to the Plaintiff's alleged non-compliance with stated Court rules, it is settled that an attorney will be "precluded from seeking fees from his or her client where the attorney has failed to comply with 22 NYCRR §1400.3, which requires the execution and filing of a retainer agreement that sets forth, *inter alia*, the terms of compensation and the nature of services to be rendered" (*Bishop v Bishop*, 295 AD2d 382, 383 [2d Dept 2992], *quoting from*, *Mulcahy v Mulcahy,* 285 AD2d 587 [2d Dept 2001] *see, Gahagan v Gahagan*, 51 AD3d 863, 864 [2d Dept 2008]; *Wagman v Wagman*, 8 AD3d 263 [2d Dept 2004]; *Kayden v Kayden*, 278 AD2d 202 *see also*, *Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 62 [2d Dept 2007] *see also, Sheresky Aronson & Mayefsky, LLP v Whitmore*, 53 AD3d 414 [1st Dept 2008]).

"Likewise, an attorney's failure to provide written, itemized bills at least every 60 days pursuant to 22 NYCRR § 1400.2 will also preclude collection of a fee" (*Gahagan v Gahagan*, *supra*; *Wagman v Wagman*, 8 AD3d 263 [2d Dept 2004]; *Julien v Machson*, 245 AD2d 122 [1st Dept 1990] *see also*, *Grald v Grald*, 33 AD3d 922 [2d Dept 2006]; *Ackerman v Gebbia-Ackerman,* 19 AD3d 519 [2d Dept 2008]; *Pillai v Pillai*, 15 AD3d 466 [2d Dept 2005]; *Alexander Potruch, P.C. v Berson*, 261 AD2d 494 [2d Dept 1999]; *Verkowitz v Torres*, ___Misc3d___, 2009 WL 1455303 [Supreme Court, Nassau

County 2009] *see also,1 Gross v Gross*, 36 AD3d 318, [2d Dept 2006] 323-324 *cf., Seth Rubenstein, P.C. v Ganea, supra,* at 62).

However, "substantial, not strict, compliance with 22 NYCRR § 1400, *et., seq.*, is required" (*Behrins & Behrins, P.C. v Chan*, 305 AD2d 348 [2d Dept 2005]; *Ackerman v Gebbia-Ackerman, supra; Flanagan v Flanagan,* 267 AD2d 80 [1st Dept 1999]). Accordingly, in cases where an attorney can establish, *inter alia*, substantial compliance and/or that the alleged omission does not implicate an abuse "for which those rules were promulgated," he or she may recover a fee from his or her own client (*Gross v Gross, supra*; *Ackerman v Gebbia-Ackerman, supra; see also, Behrins & Behrins, P.C. v Chan, supra*; *Koeth v Koeth*, ___Misc3d___, 2002 WL 523109 [Supreme Court, Nassau County 2002]; *Reisman, Peirez & Reisman, L.L.P. v Gazzara*, 15 Misc.3d 1113(A), 2007 WL 949436 [Supreme Court, Nassau County 2007]).

Significantly, the Appellate Division, Second Department has held that where a client affirmatively and plainly ratifies a previously executed retainer agreement, the failure to execute a new retainer will not necessarily preclude the recovery of a fee – particularly where the attorney who later represented the Defendant client, and who is seeking the fee, was also affiliated with the law firm which executed the original retainer (*see*, *Gross v Gross, supra; Koeth v Koeth, supra*).

Applying these principles to the facts presented, the Court discerns the existence of unresolved factual questions with respect to, *inter alia*, whether and to what extent the Defendant's conduct can be viewed as a ratification of the underlying Meltzer retainer – and/or whether the Plaintiff's conduct substantially complied with the foregoing matrimonial rules (*see, Behrins & Behrins, P.C. v Chan, supra*).

At bar, there is no dispute that after the Meltzer matrimonial group left the Meltzer firm and formed a distinct and new entity – the Schlissel Ostrow firm – it never secured a newly executed retainer with respect to its representation of the Defendant.

Indeed, and as evidenced by its own August 2000 letter, the Plaintiff itself recognized that as a newly constituted firm, there was a need to obtain both a consent to change of counsel and a newly executed retainer – or at least, a signed acknowledgment that the original Meltzer retainer still governed (*cf.*, *Gross v Gross, supra*). Here, however, there is no evidence in the record – and no claim made by the Plaintiff – that either document was ever obtained, executed or filed with the Court – and thus that

the Plaintiff law firm complied with the technical requisites of the Court rule. Nor is there any contemporaneous, written evidence in the record establishing that the Defendant was apprised of her rights, duties and obligations in connection with the Plaintiff's representation.

It bears noting as well, that the billings submitted were concededly not always delivered or transmitted in strict conformity with the 60-day mandate prescribed by 22 NYCRR §1400.3 – or the thirty-day period referenced in the Meltzer retainer agreement (*Ackerman v Gebbia-Ackerman, supra*; *Behrins & Behrins, P.C. v Chan*, *supra see also*, Retainer at 1; Rosenkrantz Aff. in Opp., at 4; Koenig Aff., ¶¶ 5-7).

The facts at bar also fall short of establishing, as a matter of law, a viable ratification within the meaning of *Gross v Gross, supra.* In *Gross*, where a client ratification was discerned by the Court, the Plaintiff-attorney was, in fact, formally substituted as counsel. Moreover, the matrimonial parties in *Gross* ultimately entered into a stipulation of settlement pursuant to which the Defendant-client expressly agreed that the Plaintiff's fees were to be deducted from the sale of her one-half equity interest in the marital residence. The Court in *Gross* also emphasized that the former client, in sworn court submissions, expressly referenced the original partnership retainer agreement as determinative of her current fee arrangement with the successor Plaintiff-attorney.

Here, however, the record as presently constituted is inconclusive and ambiguous – as evidenced in particular, by the opposing parties' murky and largely undocumented factual accounts of how the representation – and underlying Court proceedings – were actually concluded. There is also a dearth of contemporaneously generated materials documenting the key events which transpired at the time the representation and the Court proceedings became largely quiescent in late 2002.

It is also undisputed that the Defendant never made partial payments (*cf., Mintz & Gold, LLP v Hart*, 48 AD3d 526, 528 [2d Dept 2008]) – or any payments at all to the Plaintiff law firm – the evidence being that the only payment she ever made was the original retainer advance made to the Meltzer firm, which predated the Plaintiff's existence. Despite the foregoing, there are no written documents suggesting that the Plaintiff corresponded with the Defendant in 2004 – immediately after the last billing was provided and when the representation was presumably terminated – and referenced the then long-outstanding debt.

Lastly, the Defendant has similarly failed to demonstrate as a matter of law that the Plaintiff's

conduct did not represent substantial compliance (*Behrins & Behrins, P.C. v Chan, supra*). The record is inconsistent with the Defendant's assertion that she "never retained" the Plaintiff law firm, since even the limited documentation before the Court at this juncture suggests that a relationship plainly existed and that legal services were rendered with the Defendant's knowledge and consent.

Under these circumstances, factual questions exist with respect to the nature and scope of the Plaintiff's noncompliance with the subject rules, which cannot be summarily resolved upon the record presented (*Behrins & Behrins, P.C. v Chan, supra*). Moreover, upon the incomplete record presented here, the Court cannot determinatively conclude that the conduct at issue here "did not evince any of the hallmarks of abuse for which those rules were promulgated" (*Gross v Gross, supra*).

Turning to the Defendant's limitations defense, the Defendant has carried her "initial burden of establishing *prima facie* that the time in which to sue has expired" with respect to those breach of contract claims based on legal services rendered in excess of six years prior to the commencement of the subject action (CPLR §213[2] *see generally*, *In re Schwartz*, 44 AD3d 779 [2d Dept 2007]; *Swift v New York Med. Coll.*, 25 AD3d 686, 687 [2d Dept 2006]; *Rosenfeld v Schnecken*, 5 AD3d 461 [2d Dept 2004]; *Savages v Shatz*, 273 AD2d 219, 220 [2d Dept 2000] *see also*, *Gravel v Cicola*, 297 AD2d 620 [2d Dept 2002]).

The Court notes that the foregoing bills themselves provide that they are payable "upon receipt of this notice" – from which point well over six years have elapsed prior to commencement of the action (Pltff's Exh., "H"). The cases relied upon by the Plaintiff are inapt since they are based upon claims sounding in legal malpractice (Rosenkrantz Aff., ¶ 8)(*e.g., Garden City Imaging Center v Lawrence and Walsh, P.C.*, 234 AD2d 414 [2d Dept 1996]). Nor has the Plaintiff established its entitlement to recover upon bills generated by the Meltzer firm – a separate legal entity distinct, in its existence from the Plaintiff-law firm.

However, and apart from the above, the Plaintiff has demonstrated that issues of fact exist with respect to the timeliness of its claims insofar as predicated upon its account stated theory.

Notably, an "account stated" claim – which is independent of the underlying contract (*Duane Reade v Cardinal Health, Inc.*, 21 AD3d 269, 270 [1st Dept 2005]) – is based on "a contract implied in law" to which a six-year limitations period applies pursuant to CPLR §213[2] – measured from the date of the last transaction in the account (*Hertzberg & Sanchez P.C. v Friendship Dairies Inc.*, 14 Misc.3d

136(A), [App.Term, 2d Dept 2007]; *Stewart R. Fink, PC v Weiss*, 7 Misc.3d 138(A), 2005 [App. Term 2d Dept 2005] *see also*, *Erdheim v Gelfman*, 303 AD2d 714 [2d Dept 2003]; *Joseph Gaier, P.C. v Iveli*, 287 AD2d 375 [1st Dept 2001]; *Stewart v Stuart,* 262 AD2d 396, 367 [2d Dept 1999] *cf., Chase v Houghton*, 41 AD3d 1062, 1063 [2d Dept 2007]).

Here, the record indicates that the statements of account were allegedly mailed and thus completed at some point in early 2004, and that therefore, insofar as the record currently indicates, the Plaintiff's account stated cause of action is ostensibly timely.

That branch of the Plaintiff's motion which is to strike the Defendant's second affirmative defense – which alleges that the complaint fails to state a cause of action – is **denied**, since the Second Department has recently overruled its prior holdings (*e.g., Propoco, Inc. v Birnbaum*, 157 AD2d 774 [2d Dept 1990]), and concluded that the foregoing defense may, in fact, be pleaded as an affirmative defense (*see, Butler v Catinella*, 58 AD3d 145, 148-149 [2d Dept 2008]).

However, the Defendant has not addressed or opposed that branch of the Plaintiff's motion which is to strike her first affirmative defense alleging improper personal service. Nor has the Defendant moved for judgment on that ground within sixty days after serving her pleading (CPLR §3211[e] *see, Reyes v Albertson,* 62 AD3d 855 [2d Dept 2009]; *Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 742 [2d Dept 2008]). Accordingly, the first affirmative defense shall be stricken.

Although the existence of factual issues regarding the Plaintiff's compliance with the Court matrimonial rules otherwise precludes any award of judgment, the Court notes that issues of fact have similarly been presented with respect to the bills on which with the alleged account stated is based.

While attorney fees may be recovered upon an account stated theory (*e.g.*, *Gassman & Keidel, P.C. v Adlerstein*, 63 AD3d 784 [2d Dept 2009]; *Miller v Nadler*, 60 AD3d 499 [1st Dept 2009]; *Mintz & Gold, LLP v Hart*, 48 AD3d 526, 528 [2d Dept 2008]), the Court notes that the Defendant has denied that she received many of the bills attached to the Plaintiff's motion papers (Def's Aff., ¶¶ 3, 4, 6, 15).

In any event, and irrespective of the Defendant's claims, it is the Plaintiff, as the proponent of the motion, who must carry the initial burden of showing its *prima facie* entitlement to judgment by submitting, *inter alia*, evidentiary proof that the attached legal billings were duly and properly mailed in the first instance (*New York and Presbyterian Hosp. v Allstate Ins. Co.*, 29 AD3d 547, 548 [2d Dept 2006]).

Significantly, a mailing "presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (*Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679, 680 [2d Dept 2001] *see generally, LMK Psychological Services, P.C. v Liberty Mut. Ins. Co.*, 30 AD3d 727 {3d Dept 2006]; *New York and Presbyterian Hosp. v Allstate Ins. Co.*, *supra*).

Here, while the bills themselves have been submitted by the Plaintiff, the record does not contain a probative submission adequately establishing that: (1) disputed bills were either personally mailed by a stated firm employee; or (2) otherwise mailed in accord with specifically described office practices and procedures utilized by the Plaintiff in the ordinary course of its business and calculated to "ensure that [the] items are properly addressed and mailed" (*New York and Presbyterian Hosp. v Allstate Ins. Co.*, *supra*).

Rather, the Plaintiff's papers rely upon a unelaborated and conclusory assertions made by an attorney to the effect that the submitted bills were properly addressed and mailed on a regular basis pursuant to certain, undescribed office practices (Rosenkrantz Aff., ¶ 5; Rosenkrantz Aff. in Opp., at 4).

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact (*Andre v Pomeroy*, 35 NY2d 361 [1974]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2d Dept 2001]). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*In re Cuttitto Family Trust*, 10 AD3d 656 [2d Dept 2004]; *Rudnitsky v Robbins*, 191 AD2d 488, 489 [2d Dept 1993]).

The Court has considered the parties' remaining contentions and concludes that none warrants an award of relief in excess of that granted above.

Accordingly, it is,

ORDERED that the motion pursuant to CPLR §3212 by the Plaintiff Schlissel, Ostrow Karabatos, PLLC, for: (1) summary judgment; and (2) for an order striking the Defendant's affirmative defenses, is **granted** to the extent that the Defendant's first affirmative defense is stricken, and the motion is otherwise **denied**, and it is further,

ORDERED that the cross motion pursuant to CPLR §§3212 and 3211 by the Defendant Tauna K. Vandeweghe-Mullarky, for an order dismissing the Plaintiff's complaint, is **granted** to the limited extent that the Plaintiff's breach of contract claims, insofar as based on: (I) legal services rendered in excess of six years prior to the commencement of the subject action; and (ii) bills issued by the Meltzer

firm, are hereby dismissed, and the cross motion is otherwise **denied**. It is further

ORDERED, that the parties are directed to appear before the undersigned on September 10, 2009 at 9:30 a.m. for a Certification Conference.

This constitutes the Decision and Order of the Court.

DATED: August 31, 2009
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD

H:\DECISION - SUMMARY JUDGMENT\Schlissel v Vandeweghe.wpd