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

PRESENT: WALTER B. TOLUB Justice

PART 15

Index Number : 100585/2009

DAVIDOFF MALITO & HUTCHER LLP

VS.

MALEKAN, ROBIN

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 100585-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on 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 is decided in accordance with the accompanying memorandum opinion

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

FILED
NOV 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/10/09

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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DAVIDOFF MALITO & HUTCHER, LLP

Plaintiff,

-against-

ROBIN MALEKAN,

Defendant.

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Index No. 100585/09
Mtn Seq. 001

WALTER B. TOLUB, J.:

This is an action commenced by a law firm to recover fees for legal services claimed rendered to defendant. By this motion, defendant moves for dismissal of this action pursuant to CPLR 3211. Alternatively, defendant moves pursuant to CPLR 604 to have this action transferred to Nassau County Supreme Court to be joined with the action captioned, Malekan v. Tehrani (Nassau County Index No. 4821/2008)(the "Nassau County action").

Background

In March of 2008, defendant retained the services of the law firm of Davidoff Malito & Hutcher ("plaintiff") to commence litigation on his behalf against Ariel Tehrani in connection with the collection of an unpaid $200,000 loan ("the loan") made to Falcon Motors, Inc. ("Falcon"), Executive Funding Corp., ("Executive Funding") and/or Executive Motors, LTD ("Executive Motors") in September 2007. The loan, personally guaranteed by Mr. Tehrani, was due to be repaid with interest on September 25,

2007[1] (Complaint ¶ 2; Affidavit in Opposition, Exhibit B). Despite demands, with the exception of approximately $4,000, the balance of loan and related principal remained unpaid.

In connection with plaintiff's retention, the parties executed a standard engagement letter detailing the terms of plaintiff's representation of defendant (Affirmation in Opposition, Exhibit A). Defendant paid plaintiff a retainer fee of $3,500 at the time that the letter was executed. In May of 2008, plaintiff then commenced the Nassau County action on defendant's behalf seeking to recover monies on the aforementioned unpaid loan.

Shortly after the Nassau County was commenced, Falcon filed for bankruptcy in the Southern District of New York ("the bankruptcy action". Plaintiff claims that defendant, who was listed in Falcon's bankruptcy petition as a owner, rather than a creditor (see, Hutcher Affidavit ¶10), asked plaintiff to represent defendant's interest in the bankruptcy action.

In all, plaintiff claims that it provided a significant amount of representation to defendant for both legal matters, sending monthly bills to defendant detailing the nature of the work, and the fees associated with the representation provided (Affidavit in Opposition, Exhibit B). Plaintiff claims that defendant neither objected to any of the bills, nor were any of

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[1] Mr. Tehrani is a former friend of the defendant.

them ever paid, ultimately resulting in plaintiff's successful applications to be relieved as counsel for defendant in both the Nassau County action and the United States Bankruptcy Proceeding. This action, comprised of five causes of action claiming breach of contract, account stated, quantum meruit, unjust enrichment, and entitlement to attorneys' fees, followed.

Discussion

Irrespective of defendant's arguments concerning questions of billing practices, the only inquiry to be made by the court on a motion to dismiss is whether plaintiffs' facts, as alleged, "fit within any cognizable legal theory" upon which plaintiff may succeed (Leon v. Martinez, 84 NY2d 83, 87-88 [1994]; Campaign For Fiscal Equity, Inc. v. State of New York, 86 NY2d 307, 318 [1995]. See generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial [James Publishing 2008] §36.01 *et seq.*).

A review of plaintiff's first cause of action alleging breach of contract reveals that while the retainer agreement between the parties is referenced, the terms of that agreement are not explicitly stated, and the agreement itself is not annexed to the complaint. The complaint paints a general overview, stating that in addition to the payment of a $3500 retainer, the parties executed a standard engagement letter which explained the scope of the legal services to be provided, the

fees and expenses associated with representation, and the billing practices of the firm (Complaint ¶¶ 2,4,15). There is an overview of the legal representation undertaken by plaintiff on defendant's behalf (Complaint ¶¶ 23-33), a claim that defendant failed to pay, and a statement concerning damages - the unpaid amount claimed due and owing to plaintiff for rendering legal services. Contrary to defendant's arguments, even without having annexed a copy of the retainer agreement to the complaint, plaintiff has pleaded the necessary claims for a cause of action claiming breach of contract, (see, Furia v. Furia, 116 AD2d 694 [2nd Dept 1986]), and has made sufficient statements so as to give all parties adequate notice of the transactions, occurrences, or series of transactions upon which the first cause of action is based (see, CPLR 3013).

That the retainer agreement is referenced, but not annexed to plaintiff's complaint, is not however, fatal to the cause of action. An affidavit, such as the one presented by plaintiff which contains the executed retainer agreement (Affirmation in Opposition, Exhibit A), "may be used freely to preserve inartfully pleaded by potentially meritorious, claims" (Rovello v. Orofino Realty Co., 40 NY2d 633, 635 [1976]). Having reviewed the papers and submissions of the parties, it is this court's opinion that plaintiff has stated a cause of action for breach of contract which may proceed.

Defendant's claim that plaintiff cannot bring claims of unjust enrichment (fourth cause of action) and quantum meruit (third cause of action) are also rejected. Claims of unjust enrichment may stand alongside claims of breach of contract in the pleading stage until the validity of the contract is established (Shilkoff, Inc. v. 885 Third Ave. Corp., 299 AD3d 253, 254 [1st Dept 2002]). The inclusion of an alternative claim of recovery predicated upon a theory of quantum meruit is therefore also permissible at this stage of pleadings, as it is presented as an alternative or hypothetical theory of recovery, which is permissible under CPLR 3014. Both causes of action may therefore proceed.

Defendant's claim that there is no cause of action for "account stated" is simply incorrect (Ryan Graphics, Inc. v. Bailin, 39 AD3d 249 [1st Dept 2001]; Federal Express Corp. v. Federal Jeans, Inc., 14 AD3d 424 [1st Dept 2005]; Fleming v. Vassallo, 43 AD3d 278 [1st Dept 2007]; Risk Management Planning Group, Inc. v. Cabrini, 63 AD3d 421 [1st Dept 2009]). The claim requires the allegation that regular billing statements to the defendant, which the defendant failed to contest within a reasonable time (id.). Inasmuch as the complaint and supporting papers meet the aforementioned requirements, plaintiff's second cause of action may also proceed.

Despite defendant's claims to the contrary, plaintiff's

fifth cause of action for legal fees may also proceed. Pursuant to the retainer agreement, the parties agreed that plaintiff would be entitled to recover its unpaid legal fees in the event it became necessary to file and action to recover the fees and costs set forth in the retainer agreement (Affirmation in Opposition, Exhibit A). The fact that plaintiff is appearing *pro se* in this action does not mandate forfeiture of fees it may be entitled to in connection with this action if it prevails (see, Corazza v. Jacobs, 277, AD2d 52 [1st Dept 2000]; Gray v. Richardson, 251 AD2d 268 [1st Dept 1998]; Parker 72nd Associates v. Isaacs, 109 Misc.2d 57 [Civ Ct. NY Co. 1980]).

Lastly, this court has reviewed the parties' arguments raised in connection with the portion of defendant's motion seeking a transfer of venue pursuant to CPLR 603, and declines to transfer this matter to Nassau County.

Accordingly, it

ORDERED that defendant's motion to dismiss is denied in its entirety.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/12/07

HON. WALTER B. TOLUB, J.S.C.