

**Kramer Levin Naftalis & Frankel v Canal Jean Co.,
Inc.**

2009 NY Slip Op 32793(U)

November 25, 2009

Supreme Court, New York County

Docket Number: 116300/08

Judge: Edward H. Lehner

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

EDWARD H. LEHNER

Index Number : 116300/2008

PART 19

KRAMER LEVIN NAFTALIS &

vs

CANAL JEAN CO INC

Sequence Number : 001

SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance


with accompanying memorandum decision

FILED

DEC 01 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: NOV 25 2009


J.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 : IAS PART 19

-----X
KRAMER LEVIN NAFTALIS & FRANKEL,

Plaintiff,

Index No.
116300/08

- against -

CANAL JEAN CO., INC., 44 CROSBY STREET REALTY
LLC, R & R CAPITAL LLC and HARVEY RUSSACK,

Defendants.

FILED
DEC 01 2009
NEW YORK
COUNTY CLERK'S OFFICE

EDWARD H. LEHNER, J.;

Before the court is a motion by plaintiff for summary judgment and a cross-motion by defendants for leave to amend their answer.

Plaintiff's complaint has five causes of action: i) reasonable value of legal services against Canal Jean Co., Inc. ("Canal Jean") and 44 Crosby Realty, LLC ("44 Crosby") in the amount of \$569,529.29; ii) account stated against Canal Jean and 44 Crosby in the same amount; iii) reasonable value of legal services against Harvey Russack ("Harvey") in the amount of \$59,331.71; iv) account stated against Harvey in the same amount; and v) reasonable value of legal services against R& R Capital, LLC ("R&R") in the amount of \$456,056.03.

Plaintiff is seeking summary judgment solely on its causes of action for account stated (tr. p. 2, Scott Rosenblum affidavit ¶ 1). Defendants are seeking leave to

amend their answer to add counterclaims for breach of duty, and for the expense incurred in obtaining new counsel.

Plaintiff alleges: it is a law firm that began representing Canal Jeans pursuant to a letter dated December 22, 2000 sent to Ira Russack (“Ira”), Canal Jeans’ sole owner and his brother Harvey (Rosenblum affidavit ¶ 3); that it began representing R&R, also wholly owned by Ira, pursuant to an engagement letter dated March 22, 2006 (Id. ¶ 4); that plaintiff performed legal services related to a trademark owned by Harvey (Id. ¶ 8); that plaintiff regularly sent bills to defendants and that Ira or entities he controlled paid these bills through January 2008 (Id. ¶¶ 9, 10); that at a meeting in connection with a pending action with a potential mediator, Harvey and Ira claimed that the potential mediator indicated conduct that led them to seek recusal of the justice before whom a matter was pending, and that when plaintiff did not seek recusal of the judge, defendants ceased paying plaintiff’s bills in full [tr. p. 17, Rosenblum affidavit (¶¶ 11, 13)]; that defendants made partial payments in April and June 2008 and that plaintiff discussed with Harvey and Ira that they owed plaintiff \$1 million and they agreed to make payments to plaintiff (Rosenblum affidavit ¶¶ 16, 17); that at a meeting on July 25, 2008 Harvey and Ira “did not object to (plaintiff’s) fees” (id. ¶ 17); that since the outstanding bills were ultimately not paid, plaintiff terminated its representation of defendants in November 2008 and commenced this action seeking payment of its legal fees (Id. ¶¶ 20, 21).

Defendants contend: that Harvey is neither an owner nor an officer of Canal Jeans, 44 Crosby or R&R (tr. p. 38); that Ira and Harvey had meetings with Rosenblum at which they objected to the bills (Harvey affidavit ¶ 25, Ira affidavit ¶ 29); that at these meetings the Russacks objected to the amount of the bills, alleged overstaffing and that Rosenblum stated that at the time of the ultimate resolution of the pending matters the bills would be settled (Ira affidavit ¶ 30; Harvey affidavit ¶ 25); that a meeting was scheduled on July 25, 2008 with plaintiff's managing partner to discuss the "outstanding statements" (Ira affidavit ¶ 33, Exhibit L); that at the meeting Harvey and Ira objected to the staffing, amount of the invoices and claimed unnecessary duplication of work (Ira affidavit ¶ 37, Harvey affidavit ¶ 33); that therefore plaintiff has not demonstrated an account stated claim, there is no cause of action against R&R for account stated (tr. pp. 32-33), and plaintiff's motion for summary judgment should be denied.

"An account stated has long been defined as an 'account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance' The receipt and retention of an account, without objection, within a reasonable amount of time, coupled with an agreement to make partial payment, gives rise to an account stated entitling the moving party to summary judgment in its favor" [Morrison Cohen Singer & Weinstein, LLP v. Ackerman, 280 AD2d 355, 355-356 (1st Dept. 2001)]. Issues

of fact may exist when a defendant presents "evidence of defendant's oral communications of dissatisfaction (with the invoices) and plaintiff's failure to specify on the invoices the billable hours it devoted to the services rendered" [Kaye Scholer, Fierman, Hays & Handler, LLP v. L.B. Russell Chemicals, Inc., 246 AD2d 479, 480 (1st Dept. 1998)]. "Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible" [Yannelli, Zevin & Civardi v. Sakol, 298 AD2d 579, 580 (2nd Dept. 2002)].

While "conclusory and unsubstantiated allegations (of oral objections) ... are insufficient to defeat plaintiff's motion" [Morrison, Cohen, Singer and Weinstein, supra at p. 356], Harvey and Ira have stated that they spoke with Rosenblum at many meetings, including nine dates in March 2008 (Ira affidavit ¶ 29); that at these meetings they objected both to the amount of the bills, alleged duplication and overstaffing; and that they met on July 25, 2008 with plaintiff's then managing partner and that the subject of the meeting was the conflict over the bills. Therefore, as in Yanelli, Zevin & Civardi v. Sokol, supra at p. 580, "the factual situation attending the particular transactions' does not unequivocally support an inference of the defendant's assent to the correctness of the bill. (Rather a)t the very least, more than one inference is 'rationally possible.'" See also, Ween v. Dow, 35 AD3d 58 (1st


Dept. 2006).

In light of the foregoing, plaintiff's motion for summary judgment on its causes of action for account stated is denied. Additionally, the motion against R&R is denied since generally "a party may not obtain summary judgment on an unpleaded cause of action" [Weinstock v. Handler, 254 AD2d 165, 166 (1st Dept. 1998)].

Defendants' cross-motion for leave to amend is denied as neither proposed counterclaim sets forth a viable cause of action, the second merely setting an alleged defense to plaintiff's claims.

This decision constitutes the order of the court.

Dated: November 25, 2009



J.S.C.

FILED
DEC 01 2009
NEW YORK
COUNTY CLERK'S OFFICE