

**Citidress II Corp. v Tokayer**

2010 NY Slip Op 30177(U)

January 14, 2010

Supreme Court, New York County

Docket Number: 112845/09

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK  
J.S.C. Justice

PART 2

Outdoors II Corp

INDEX NO. 112845/09

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

MOTION SEQ. NO. 0014002

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

- v -  
Tokayer

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 \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED

**FILED**

JAN 27 2010

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN APPEARANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 1/14/09

Ray  
J.S.C.

Check one:  FINAL DISPOSITION

Check if appropriate: DO NOT POST

**LOUIS B. YORK**  
J.S.C.

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 2

-----x  
CITIDRESS II CORP.,

Plaintiff,

Index No.: 112845/09

-against-

IRA TOKAYER,

Defendant.

-----x  
IRA DANIEL TOKAYER, ESQ.,

Plaintiff,

Index No.: 602611/09

-against-

OLEG KOBYLEVSKY a/k/a OLEG KOBYLEVSKI,  
CITIDRESS II CORP., and LAWRENCE F.  
MORRISION, ESQ.,

Defendants.

-----x  
LOUIS B. YORK, J.:

**BACKGROUND**

The two above-referenced actions, Index Nos.: 112845/09 and 602611/09, are consolidated for the purpose of disposition. Further, motion sequence numbers 001 and 002, Index No.: 112845/09, and motion sequence numbers 001, 002, and 003, Index No.: 602611/09, are also consolidated for disposition.

In motion sequence number 001, Index No.: 112845/09, Ira Tokayer (Tokayer), defendant in that action, moves to dismiss the action entitled *Citidress II Corp. v Ira Tokayer*, Index No.:

DECISION  
**FILED**  
JAN 27 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

19616/09 (Sup Ct, Queens County), pursuant to CPLR 3211 (a) (1) and (a) (7), and to change the place of trial to New York County, pursuant to CPLR 510 and 511. In motion sequence number 002, Index No.: 112845/09, plaintiff Citidress II Corp. (Citidress) moves, pursuant to CPLR 510 (3) and 511 (b), to deny Tokayer's motion, and to remand that motion back to Queens County, where the underlying action is filed.

In motion sequence number 001, Index No.: 602611/09, defendant in that action, Oleg Kobylevsky a/k/a Oleg Kobylevski (Kobylevsky), moves, pursuant to CPLR 3211 (a) (1), (a) (4), (a) (5), and (a) (7), to dismiss the action as against him. In motion sequence number 002, Index No.: 602611/09, Citidress, defendant in that action, moves, pursuant to CPLR 3211 (a) (1), (a) (4), (a) (5), and (a) (7), to dismiss the action as against it. In motion sequence number 003, Index No.: 602611/09, defendant in that action, Lawrence F. Morrison, Esq. (Morrison), moves, pursuant to CPLR 3211 (a) (1), (a) (4), (a) (5), and (a) (7), to dismiss the action as against him.

On or about December 17, 2007, Kobylevsky retained Tokayer to represent Citidress as appellate counsel in an action entitled *Citidress II Corp. v 207 Second Avenue Realty Corp.*, Index No.: 121848/99 (Sup Ct, New York County).

According to the retainer agreement (Motion Ex. B), the agreement was addressed to Kobylevsky at his home address, and stated that "you [Kobylevsky] have agreed to retain my services in connection with certain appeals in an action entitled

Citidress II Corp. v 207 Second Avenue Realty Corp., et al. ..."

The agreement goes on to state that, "You also agree to be personally subject to the jurisdiction of the courts of New York in connection with any such [fee] dispute." This retainer is signed "Oleg Kobylevsky," and no title or other designation appears with Kobylevsky's name. Kobylevsky is the owner and director of Citidress, and, in his affidavit in support of his motion, alleges that he signed this agreement in his representative capacity. The underlying action subject of this retainer agreement involved the foreclosure on a mortgage by Citidress.

On May 9, 2008, Kobylevsky counter-signed an amendment to the retainer letter, in which he allegedly confirmed his instruction that Tokayer not pursue an appeal of the decision of a Special Referee that determined the amount of fees and disbursements for which Citidress was entitled to be reimbursed by the defendant in the underlying foreclosure action. Opp. Ex. A. Morrison is the escrow agent and stakeholder of funds awarded to Citidress in the underlying foreclosure action, being held in escrow for the benefit of law firms, not parties to the present action, who represented Citidress prior to Tokayer's retention.

Tokayer submitted bills for services rendered to Kobylevsky, pursuant to the retainer agreement, totaling \$61,468.43, of which approximately \$27,156.14 has been paid, leaving a balance of \$34,312.29. These invoices were sent between July and November, 2008. Allegedly, Kobylevsky did not object to these invoices,

until he filed a demand for arbitration on June 23, 2009, having made payments through November 17, 2008. According to Kobylevsky's affidavit, he orally objected to these bills. However, according to Tokayer, Kobylevsky orally agreed that the monies due and owing would be paid out of the escrow funds being held by Morrison.

On or about June 8, 2009, one of Citidress' former law firms moved for the release of funds held by Morrison, and on or about June 19, 2009, Tokayer cross-moved for an order authorizing and directing Morrison to pay Tokayer's outstanding bills, plus interest, from the same escrow account.

In determining Tokayer's cross motion, the court stated that "I take no position whatsoever on whether Mr. Tokayer is entitled to \$34,000.00, or entitled to less than that or entitled to anything about it at all. I take zero position." The court went on to say that Tokayer's cross motion was inappropriate, and that he should "proceed in the normal way and take out a normal summons and complaint." Motion Ex. C.

On July 29, 2009, in a special proceeding filed by Tokayer, the court denied Tokayer's application for injunctive relief to restrain the release of the escrow funds held by Morrison pending the fee dispute arbitration, stating that Tokayer had not presented any evidence that a presumptive arbitration award would be ineffectual. The court also refused to stay the release of funds ordered by the court to satisfy Citidress' former counsel.

On July 22, 2009, Citidress commenced an action in Supreme

Court, Queens County, Index No.: 19616/09, alleging four causes of action against Tokayer: (1) malpractice; (2) breach of contract; (3) false representation; and (4) gross negligence and lapse of ethical duty as an attorney.

On August 20, 2009, Tokayer instituted the action bearing New York County Index No.: 602611/09, alleging four causes of action against Kobylevsky, Citidress and Morrison: (1) breach of contract as against Kobylevsky and Citidress; (2) account stated as against Kobylevsky and Citidress; (3) quantum meruit as against Kobylevsky and Citidress; and (4) declaratory judgment as against all defendants that Tokayer be paid from the escrowed funds held by Morrison.

On September 8, 2009, Tokayer, having purchased a New York County index number, moved to dismiss the Queens County action asserted against him, or alternatively, to join the two actions for trial in New York County.

#### **DISCUSSION**

Tokayer's motion with respect to the case bearing Index No.: 112845/09 is denied.

Citidress initially argues that Tokayer's motion to change the place of trial, pursuant to CPLR 510 and 511, was untimely, but the court disagrees. The demand for a change of venue was filed on August 26, 2009, and the instant motion was served on September 11, 2009, 16 days later. Tokayer states that he initially attempted to serve the motion with the Queens County index number, but was informed that a New York County index

number was required, which caused the delay. CPLR 511 (b) requires that such motion be served within 15 days after service of the demand, but there is no indication of any prejudice to Citidress, and no discovery has yet taken place. Consequently, the court concludes that the motion was brought in a reasonably timely manner. *L.M.V. v Cazenovia College*, 58 AD3d 451 (1<sup>st</sup> Dept 2009).

"CPLR 510 (3) states that '[t]he court, upon motion, may change the place of trial of an action where ... the convenience of material witnesses and the ends of justice will be promoted by the change.' As suggested by the language of this statute, the decision of whether to grant a change of venue based on the convenience of material witnesses is discretionary."

*O'Brien v Vassar Brothers Hospital*, 207 AD2d 169, 171 (2d Dept 1995).

"To show the convenience of witnesses, a movant is required to set forth the names and addresses of the potential witnesses, a summary of their proposed testimony and the materiality of that testimony." *Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211, 214 (1<sup>st</sup> Dept 1990). In his memorandum in support of his motion, Tokayer identifies his necessary witnesses as two lawyers whose offices are located in Manhattan, and states that these witnesses "would be inconvenienced" by having the trial in Queens, but provides no basis for such a conclusion of inconvenience. Based on these scant assertions, "[Tokayer] failed to sufficiently establish that the nonparty witnesses for whose convenience the change of venue was sought were willing to testify on his behalf

and would be inconvenienced if venue were not changed." *Goldberg v Goldberg*, 65 AD3d 1282, 1283 (2d Dept 2009).

Therefore, Tokayer's motion to change venue is denied, and, as a consequence, the court lacks the authority to decide that portion of Tokayer's motion seeking dismissal of the complaint, since the action is still within the jurisdiction of the Queens County Supreme Court. Citidress' motion is granted only to the extent of denying Tokayer's motion; this court lacks the jurisdictional ability to remand the motion to a court of equal jurisdiction.

The court now directs its attention to the three motions made, respectively, by Kobylevsky, Citidress and Morrison to dismiss the action for nonpayment of legal fees brought in this county by Tokayer.

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or

\* \* \*

(4) there another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or

\* \* \*

(5) the cause of action may not be maintained because of ... collateral estoppel, ... res judicata, statute of limitations, or statute of frauds; or

\* \* \*

(7) the pleading fails to state a cause of action ... ."

As stated in *Ladenburg Thalmann & Co., Inc. v Tim's*

*Amusements, Inc.* (275 AD2d 243, 246 [1<sup>st</sup> Dept 2000]),

"the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to

the asserted claims as a matter of law (*id.*, at 88)."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 (1<sup>st</sup> Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1<sup>st</sup> Dept 1996).

With respect to the first cause of action, against Kobylevsky and Citidress for breach of contract, the only documentary evidence supplied by both parties are the retainer agreement and an amendment to the retainer agreement, which is signed by Kobylevsky. In opposition, Kobylevsky has provided, as his alleged documentary evidence, his own affidavit. Although affidavits may be used on a CPLR 3211 (a) (1) motion as a connecting link, the affidavit may not be used as proof in itself of a fact in issue. See *Realty Investors of USA Inc. v Bhaidaswala*, 254 AD2d 603 (3d Dept 1998); *Standard Chartered Bank*

*v D. Chabbott, Inc.*, 178 AD2d 112 (1<sup>st</sup> Dept 1991). Therefore, Kobylevsky and Citidress have failed to come forward with documentary evidence that conclusively establishes their right to have Tokayer's first cause of action dismissed. *Goshen v Mutual Life Insurance Company of N.Y.*, 98 NY2d 314 (2002).

To enunciate a cause of action for account stated or quantum meruit, Tokayer's second and third causes of action as against Kobylevsky and Citidress, a plaintiff need produce "documentary evidence showing that [the defendants] received and retained the invoice without objection" (*Miller v Nadler*, 60 AD3d 499, 499 [1<sup>st</sup> Dept 2009]), as well partial payment on those invoices by the defendants. *Gamiel v Curtis & Reiss-Curtis, P.C.*, 60 AD3d 473 (1<sup>st</sup> Dept 2009).

"In the instant case, plaintiff's invoices were retained without any objection for a sufficient length of time as a matter of law to establish defendant[s]'liability on the account stated cause of action." *Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51, 52 (1<sup>st</sup> Dept 2004). "The self-serving claim of Citidress's principal, Oleg Kobylevsky, that he had asserted regular objections to the bills was unsupported." *Citidress II v 207 Second Avenue Realty Corp.*, 59 AD3d 209, 210 (1<sup>st</sup> Dept 2009); *Darby & Darby, P.C. v VSI International, Inc.*, 95 NY2d 308 (2000); *Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418 (1<sup>st</sup> Dept 2009).

As a consequence of the foregoing, the court concludes that the complaint does sufficiently state causes of action for both

account stated and quantum meruit to withstand defendants' motion to dismiss.

Defendants' assertions that the instant action, specifically the fourth cause of action seeking a declaratory judgment with respect to the funds held by stakeholder Morrison, is barred by collateral estoppel and is similarly found to be without merit.

Collateral estoppel only applies

"If the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action' [internal citation omitted]."

*City of New York v Welsbach Electric Corp.*, 9 NY3d 124, 128 (2007).

"The party seeking the benefit of collateral estoppel bears the burden of proving that the identical issue was necessarily decided in the prior proceeding, and is decisive of the present action. The party against whom preclusion is sought bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination."

*City of New York v College Point Sports Association, Inc.*, 61 AD3d 33, 42 (2d Dept 2009).

In the instant matter, as evidenced by the earlier decisions quoted above, upon which defendants base their arguments, the prior courts specifically declined to address Tokayer's claim for unpaid invoices. As a consequence, collateral estoppel does not bar the present action.

Lastly, defendants maintain that the instant action should be dismissed because a similar, previously filed action involving

the same parties is currently pending in the Queens court.

The cause of action in Queens is based on a claim of malpractice, whereas the cause of action in New York is for nonpayment for professional services. Tokayer argues that the two actions are not similar, both because of the different relief sought (*Zirmack Investments, L.P. v Miller*, 290 AD2d 552 [2d Dept 2002]; *Morrison Cohen Singer & Weinstein v Ackerman*, 280 AD2d 355 [1<sup>st</sup> Dept 2001]), and the lack of complete identity of the parties. It is noted that the Queens lawsuit only involves Tokayer and Citidress. However, only substantial, not complete, identity of the parties is all that is required for dismissal pursuant to CPLR 3211 (a) (4). *Proietto v Donohue*, 189 AD2d 807 (2d Dept 1993).

Although both lawsuits involve substantially the same litigants, and involve essentially the same factual basis for the claims asserted, CPLR 3211 (a) (4) does not require a court to dismiss an action on these grounds, but affords the court the discretion to formulate a solution that best serves the interests of the parties and the interests of justice. In order to "avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts" (*Gutman v Klein*, 26 AD3d 464, 465 [2d Dept 2006]), the court is consolidating this action with the action now pending in Queens County, bearing Index No.: 19616/09.

Finally, both Kobylevsky and Morrison must remain in the

actions as necessary parties who may be adversely affected by any eventual judgment. Kobylevsky is the principal for Citidress, and the signatory on the retainer agreement in question, and Morrison is the escrow agent and stakeholder for funds that may be the source for the satisfaction of any potential judgment in Tokayer's favor. CPLR 1001.

#### **CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that, in the action bearing the Index No.: 112845/09, defendant Ira Tokayer's motion to dismiss the action entitled *Citidress II Corp. v Ira Tokayer*, Index No.: 19616/09, Supreme Court, Queens County, or, alternatively, to have that action moved to New York County, is denied; and it is further

ORDERED that, in the action bearing Index No.: 112845/09, that portion of plaintiff Citidress II Corp.'s motion seeking to deny plaintiff's motion is granted; and it is further

ORDERED that, in the action bearing Index No.: 112845/09, that portion of plaintiff Citidress II Corp.'s motion seeking to remand plaintiff's motion back to Queens County is denied; and it is further

ORDERED that defendants Igor Kobylevsky, Citidress II Corp. and Lawrence F. Morrison's motions to dismiss the complaint in the action bearing Index No.: 602611/09 are denied; and it is further

ORDERED that the above-captioned actions are consolidated with *Citidress II Corp. v Ira Tokayer*, Index No.: 19616/09



County, who is hereby directed to mark the court's records to reflect the consolidation.

Dated: 1/14/10

ENTER:

*fly*

Louis B. York, J.S.C.

**FILED**  
JAN 27 2010  
NEW YORK  
COUNTY CLERK'S OFFICE