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3-16-10

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

PRESENT: Edmead PART 35

Justice

Index Number : 102759/2009
EATON & VAN WINKLE LLP.
VS.
MIDWAY OIL HOLDINGS LTD.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE 2/17/10

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

n this motion to/for ____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits ____

Replying Affidavits ____

FILED
MAR 16 2010
COUNTY CLERK'S OFFICE
NEW YORK

NYS SUPREME COURT
RECEIVED
MAR 16 2010
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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 branch of the motion of plaintiff Eaton & Van Winkle LLP for an order, pursuant to CPLR §3211(b), dismissing the jurisdictional defense of defendants is granted, and the jurisdictional defense alleged by said defendants is hereby severed and dismissed; and it is further

ORDERED that the branch of plaintiff's motion for an order, pursuant to CPLR §3211(b), dismissing defendants' defense of fraudulent inducement is denied; and it is further

ORDERED that the branch of plaintiff's motion for an order, pursuant to CPLR §3212, for summary judgment on all of its claims against defendants is denied; and it is further

ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, April 13, 2010 at 2:15 p.m.; 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.

This constitutes the decision and order of the Court.

Dated: 3/15/10

HON. CAROL EDMEAD 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: PART 35

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EATON & VAN WINKLE LLP,

Index No. 102759/09

Plaintiff,

-against-

DECISION/ORDER

MIDWAY OIL HOLDINGS LTD. a/k/a MIDWAY TRADING, INC., and STEPHEN BAUMGART,

Defendants.

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

MEMORANDUM DECISION

In this action to recover legal fees, plaintiff Eaton & Van Winkle LLP ("plaintiff") moves for an order, pursuant to CPLR §3211(b), dismissing the affirmative defenses of defendants Midway Oil Holdings Ltd. ("MOH") a/k/a Midway Trading, Inc. ("MTI") and Stephen Baumgart ("Mr. Baumgart") (collectively "defendants"), and, pursuant to CPLR §3212, granting plaintiff summary judgment on all of the claims in its Complaint, plus interests and costs.

Background

In its Complaint, plaintiff, a New York law firm, alleges that MOH, also known as MTI (which plaintiff refers to collectively as "Midway"),[1] is a Virginia limited liability company, and Mr. Baumgart is Midway's majority owner and president. Plaintiff further alleges that on June 5, 2007, Alan Van Praag ("Mr. Van Praag"), a partner in plaintiff, executed a retainer agreement with Midway, which was signed by Mr. Baumgart (*see* the "Retainer Agreement"). Pursuant to the Retainer Agreement, plaintiff agreed to advise and represent Midway in a legal matter in the

[1]The Court notes that defendants contend in their Answer and Counterclaim that MOH and MTI are separate corporate entities, and that only MOH was involved in any agreement with plaintiff.

U.S. District Court for the Southern District of New York, captioned "*Libra Shipping Services LLC v Midway Oil Holdings, Ltd.*, Civil Action No. 07-3396" (the "Libra Matter").

Plaintiff alleges that from June 2007 through July 2008, it duly performed all of the services to which the parties had agreed. Plaintiff further alleges that it billed Midway for its legal services, expenses, and disbursements, and has repeatedly demanded payment by letters, e-mails, and telephone conversations. On numerous occasions, Midway has admitted, through Mr. Baumgart, its obligations to plaintiff, and has promised to fully satisfy the outstanding balance of $16,114, plaintiff contends. Mr. Baumgart "has also personally guaranteed in writing to repay the Midway debt to [plaintiff]." To date, defendants have failed to pay the $16,114. Accordingly, plaintiff seeks the amount owed, together with interest, and attorneys fees, on the theories of (1) breach of contract, (2) *quantum meruit*, and (3) an account stated.

Defendants' Answer and Counterclaim ("Answer") contains two affirmative defenses: (1) plaintiff lacks personal jurisdiction over defendants, and (2) plaintiff induced Mr. Baumgart to enter into the Retainer Agreement based on plaintiff's misrepresentations that it would observe the elements of reasonable fees in the Code of Professional Responsibility DR 2-106.[2]

In its motion, plaintiff argues that defendants' jurisdictional defense lacks merit. Plaintiff contends that it represented "Midway"[3] in the Libra Matter, pursuant to the Retainer Agreement (see the affirmation of Mr. Van Praag [the "Van Praag Affm."], and plaintiff's memorandum of

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[2]In their counterclaim, which is not on motion before the Court, defendants seek to recover $35,000 in legal fees on the ground that plaintiff misrepresented its capacity to act as defendants' representative in the United Kingdom and on matters of English law.

[3]The Court notes that plaintiff uses the term "Midway" to refer to "Midway Oil Holdings Ltd. a/k/a Midway Trading Inc." (plaintiff's MOL, p. 1). However, in his affirmation, Mr. Van Praag states that plaintiff represented only MOH, pursuant to the Retainer Agreement (Van Praag Affm., ¶ 2).

law ["MOL"]). Plaintiff further contends that defendants "projected themselves into New York *via* telephone and e-mail" to solicit plaintiff's services, and continually contacted and corresponded with plaintiff in New York *via* telephone and e-mail through the successful resolution of the Libra Matter. As defendants established a continuing attorney-client relationship with plaintiff through meetings, telephone calls, and e-mails, they purposefully availed themselves of New York's laws. Thus, defendants are subject to the long-arm jurisdiction of this Court.

Plaintiff further argues that defendants' defense of fraudulent inducement lacks merit, as defendants present no evidence from which it can be inferred that plaintiff had a present, undisclosed intention not to perform at the time it made any promises.

Turning to its Complaint, plaintiff argues that it is entitled to summary judgment on its first cause of action for breach of contract, because of the existence of "unambiguous agreements" and defendants' failure to establish the existence of facts essential to justify opposition to its motion. As set forth in the Complaint, Midway entered into an agreement with plaintiff, whereby plaintiff would advise and represent Midway in the Libra Matter. Citing defendants' Answer, plaintiff contends that Midway admitted that it entered into such an agreement,[4] and that such agreement is evidenced by the Retainer Agreement. Plaintiff rendered legal services to Midway in the Libra Matter from June 2007 through July 2008, as set forth in the invoices sent to Midway during this period (*see* the "Invoices"). Thus, Midway owes plaintiff $16,114, representing unpaid fees and disbursements in the Libra Matter, and Midway's

[4]The Court notes that in their Answer, defendants do not deny the allegation in ¶ 4 of plaintiff's Complaint that they entered into the Retainer Agreement. However, in response to plaintiff's first cause of action, defendants state that "'Midway' in the [Retainer] Agreement was not Midway Trading Inc. but rather Midway Oil Holdings, Ltd." (Answer, ¶ 7).

failure to pay plaintiff constitutes a breach of the Retainer Agreement.

Additionally, plaintiff contends that Mr. Baumgart personally guaranteed in writing to repay Midway's debt, and that defendants admit as much in their Answer.[5] Therefore, Mr. Baumgart also breached the Retainer Agreement.

Plaintiff argues that it is entitled to summary judgment on its second cause of action for *quantum meruit*, because it submitted the necessary proof in admissible form, and defendants have offered nothing to rebut plaintiff's substantiated allegations except "conclusory and unsubstantiated" denials. Plaintiff has properly alleged that it performed work and labor, and rendered services to defendants, and that such services were worth $16,114 in fees, of which $16,114 is currently due and owing by defendants. Further, the Invoices lay out with particularity the type and nature of the work completed by plaintiff for Midway. Plaintiff successfully concluded the Libra Matter for Midway, achieving the resolution of the case. Moreover, plaintiff had an expectation of payment for the services rendered.

Finally, plaintiff argues that it is entitled to summary judgment on its third cause of action for an account stated. Mr. Van Praag states in his sworn affirmation that he mailed the Invoices to defendants, creating a presumption of receipt by defendants. Moreover, defendants made partial payments of its obligations to plaintiff, and explicitly acknowledged that it owed an outstanding balance to plaintiff.[6]

In opposition, defendants contend that their jurisdictional defense is based on the place

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[5]The Court notes that defendants deny this allegation in their Answer: "[Mr. Baumgart] acted as officer of Defendant MOH and at no time did he give any personal guarantees" (Answer, ¶ 2).

[6]The Court notes that plaintiff bases the allegation that defendants acknowledged that it owed an outstanding balance on the fact that defendants did not deny such allegations (Complaint, ¶ 8) in their Answer.

of incorporation of the two corporate defendants. Relying on their Answer,[7] the affirmation of defendants' counsel (the "Friend Affm."), the affidavit by Mr. Baumgart (the "Baumgart Affd."), and the defendants' MOL, defendants argue that MOH is licensed and registered in the Turks and Caicos; MTI is a Virginia corporation with no property, affiliations, business, or other contacts in the State of New York; and Mr. Baumgart is a Virginia resident and officer of MOH and MTI. In distinguishing the caselaw on which plaintiff relies, defendants point out that MOH was necessarily drawn into New York to defend itself in the Libra Matter; defendants were not utilizing New York Courts as a plaintiff. As per the recitations in Mr. Baumgart's affidavit, none of the defendants is a New York resident; none of them does business in New York, and they do not have contacts in New York that would allow them to enjoy the commercial advantages of an in-state presence. The only contact MOH had with New York was retaining plaintiff's law firm there. Defendants also note that Mr. Van Praag conducted the majority of his communications with MOH from his residence in Florida.[8]

Defendants further contend that MOH, through Mr. Baumgart, retained plaintiff on June 1, 2007 "for the purpose of representation in U.S. District Court." Further, Mr. Baumgart attests that MTI was "at no time involved in the contractual arrangement with [plaintiff]." After the execution of the Retainer Agreement, a maritime arbitration pending in the United Kingdom prompted plaintiff to refer MOH to the London firm of Shaw & Croft (the "London firm"),

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[7]The Court notes that in an affidavit accompanying defendants' Answer, defendants' counsel Barbara Friend introduces the arguments defendants make in their opposition (*see* the "Friend Affd. to defendants' Answer").

[8]Defendants further contend that as their affirmative defense could have been the subject of a CPLR §3211(a) motion to dismiss, the Court can treat it as such and dismiss the Complaint. By the inclusion of the jurisdictional defense in the Answer, plaintiff is neither surprised nor prejudiced by the Court's consideration of the defense, they argue.

because plaintiff could not handle matters of English law. Subsequently, MOH retained the London firm for the arbitration, and MOH was "fully represented by that firm in London."

Second, defendants argue that plaintiff is not entitled to summary judgment on its breach of contract claim. Defendants contend that contrary to plaintiff's argument, plaintiff has not shown the existence of an "unambiguous" agreement, *i.e.* the Retainer Agreement. Defendants further argue that this "purported agreement" does not constitute a personal guaranty on the part of Mr. Baumgart. On the face of the Retainer Agreement's signature page is the name of MOH. Further, the body of the Retainer Agreement speaks to MOH, not to one of its officers. Mr. Baumgart signed the Retainer Agreement in his corporate capacity only. Defendants argue that whether Mr. Baumgart signed in an individual or corporate capacity presents a material issue of fact, requiring the denial of summary judgment. Defendants further contend that their payment of $25,000 to plaintiff and the conflicting affidavits of Mr. Baumgart and Mr. Van Praag also raise evidence triable issues of fact.[9]

Third, defendants argue that plaintiff is not entitled to summary judgment on either its *quantum meruit* or account stated claims. As discussed above, the Baumgart Affd. controverts plaintiff's assertions of its entitlement to fees. As an MOH officer, Mr. Baumgart understood that a London firm would be necessary for appropriate representation in the United Kingdom. He did not anticipate the ongoing billing that continued once the London firm was retained, *i.e.* that plaintiff would generate fees for "reading and reviewing" the London firm's work product.

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[9]The Court notes that defendants mistakenly cite to an "Exh. 4 to the Baumgart Affd.," which the parties confirmed in a conference call on February 24, 2010 does not exist. Further, even though defendants' counsel clarified that defendants were referring to the Invoices attached to the Baumgart Affd., the Court cannot find the specific payment of $25,000 to which defendants refer. However, Exh. D to the Baumgart Affd." demonstrates that defendants made such a payment.

There was no express agreement that MOH would continue to be represented by plaintiff once plaintiff referred the matter to an outside, foreign firm, defendants argue.[10]

However, the London firm also was forwarding courtesy copies of its electronic mail in the Libra Matter to plaintiff. When it came to Mr. Baumgart's attention that plaintiff was billing MOH for reading and reviewing said e-mail, "as an officer on behalf of MOH I asked that they stop immediately. I had reasonably assumed that the matter was fully transferred to the London firm by [plaintiff] based on oral and written understandings to that effect," Mr. Baumgart attests, citing an e-mail he sent to Mr. Van Praag on July 17, 2007 (*see* Exh. C, containing the "July 17, 2007 e-mail"). Mr. Baumgart further attests that at no time did MOH authorize plaintiff to charge fees for the oversight of the work done by the London firm, nor did he personally guarantee such fees to plaintiff. "An escrow agreement and work on the matter were done in London," he states. Therefore, Mr. Baumgart's statements raise material issues of fact sufficient to defeat summary judgment, defendants argue.

Defendants concede that Mr. Baumgart made a payment to plaintiff; however, they argue that such payment does not constitute a partial payment on the Invoices. Instead, said payment was payment in full for plaintiff's representation up to the point of its referral of MOH to the London firm. "To have presumed to unilaterally carry on a representation in contract, when as a reasonable person [Mr. Baumgart] thought the retainer of [the London firm] brought MOH's fiscal obligation to an end, would appear to constitute fraudulent inducement," defendants contend.

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[10]The Court notes while defendants cite to an "Exh. 5 to the Baumgart Affd.," such an "Exh. 5" is not included among defendants' submissions. Pursuant to the conference call with the parties on February 24, 2010, Ms. Friend informed the Court that the reference was to defendants' Exh. C, which was faxed to the Court and plaintiff on March 2, 2010.

In reply, plaintiff first argues that defendants have not proved that this Court lacks personal jurisdiction over them (*see* the reply affirmation of Mr. Van Praag [the "Van Praag Reply Affm."], and plaintiff's reply MOL). Plaintiff contends that while the London firm represented Midway in the London arbitration proceeding (the "London Arbitration"), plaintiff defended Midway in the "New York Action," and successfully reached a settlement on Midway's behalf (*see* the "Libra Docket"). Plaintiff further contends that while it does not dispute that the London firm represented Midway in the London Arbitration, pursuant to the terms of the Retainer Agreement, plaintiff advised and consulted with the London firm on the procedural establishment and closing of an escrow account, as well as issues that arose out of such transactions. Additionally, pursuant to the Court's Order of Maritime Attachment in the New York Action, plaintiff was required to report to the Court with details on the progress of the London Arbitration and, accordingly, consulted with the London firm.[11] Contrary to defendants' argument that plaintiff simply read and reviewed courtesy e-mails sent to plaintiff by the London firm, plaintiff's "review of correspondence from London Counsel was part of its global representation of Midway in not only the New York Action but [also] in the full representation of Midway in related matters that required [plaintiff's] legal expertise."

Plaintiff further contends that defendants falsely allege that since Mr. Van Praag's "primary residence is in Florida . . . [plaintiff] cannot be found to have purposefully availed itself in New York. Plaintiff argues that defendants retained plaintiff, a New York law firm, to represent them. The work plaintiff performed for defendants was conducted at its offices in New

[11]The Court notes that the Order of Maritime Attachment is not included with plaintiff's submissions; however, the Libra Docket makes reference to such an order (Libra Docket, item No. 12).

York by Mr. Van Praag and Michael Hardison ("Mr. Hardison"). Mr. Van Praag and Mr. Hardison conferred with the client and related parties on defendants' matters *via* telephone, e-mail, and fax from New York. Moreover, while Mr. Van Praag maintains a residence in Florida, plaintiff is located at 3 Park Avenue, New York, New York, and Mr. Van Praag goes back and forth between Florida and New York on a regular basis.

Second, plaintiff argues that Mr. Baumgart's argument that plaintiff fraudulently induced Midway into executing the Retainer Agreement is contradicted by the express terms of the Retainer Agreement, wherein plaintiff states that it would "provide [Midway] with legal services relating to the attachment of funds belonging to Midway Oil Holdings Ltd. in connection with [the Libra Matter]" (Retainer Agreement, p. 1). Those services necessarily included consulting with the London firm regarding the escrow account and the status of the arbitration proceedings.

Plaintiff further contends that defendants' argument that Mr. Baumgart, "as a reasonable person . . . thought the retainer of [the London firm] brought MOH's fiscal obligation to an end" flatly contradicts the terms of the Retainer Agreement, and does not meet the requirements established under New York law. The express terms of the Retainer Agreement, read and reviewed by defendants, clearly do not demonstrate an undisclosed intention not to perform at the time plaintiff made any promises.

Finally, plaintiff contends that defendants have not opposed the branch of plaintiff's motion seeking summary judgment. Instead, defendants confirm that plaintiff and Midway entered the Retainer Agreement for legal services with respect to the Libra Matter. The terms of the Retainer Agreement expressly provided that plaintiff would represent Midway on all matters relating to the attachment of funds belonging to MOH. Plaintiff provided such legal services,

including, but not limited to, advisory work for defendants and the London firm. Plaintiff's failure to provide its expertise in an area of law unfamiliar to the London firm would have amounted to malpractice on plaintiff's part. Plaintiff further argues that plaintiff's services resulted in a successful outcome for defendants, to which defendants did not object. Defendants' claim that they only owed payments "up to the point of its referral of [MOH]" to the London firm is a wrongful attempt to avoid paying fees for the work successfully performed on defendants' behalf and pursuant to the express terms of the Retainer Agreement, plaintiff argues.

Discussion

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. The truth of the allegations must be assumed, and if under any view of the facts a defense is stated, the motion must be denied" (*Matter of Ideal Mutual Ins. Co. v Becker*, 140 AD2d 62, 67 [1st Dept 1988] [internal citation omitted]; *Intertex USA v Abaete By Laura Poretzky, Ltd.*, 2008 WL 3895198 [Trial Order] [Sup Ct, New York County 2008] ["In considering a motion to dismiss [the defendant's affirmative defenses], the court must accept the allegations as true and give the Defendant the benefit of all inferences"]).

Lack of Personal Jurisdiction

As to the affirmative defense that the Court lacks personal jurisdiction over defendants, the burden of proving jurisdiction is upon the party asserting it (*Jacobs v Zurich Ins. Co.*, 53

AD2d 524 [1st Dept 1976], *citing Saratoga Harness Racing Assn. v Moss*, 26 AD2d 486, 490 [1966], *affd* 20 NY2d 733 [1967]). With respect to long-arm jurisdiction, CPLR §302(a)(1) provides in relevant part:

> As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . transacts any business within the state or contracts anywhere to supply goods or services in the state.

Thus, under CPLR §302(a)(1) a court may exercise personal jurisdiction over a non-domiciliary who "transacts any business" within the State, provided that the cause of action arises out of the transaction of business (*Lebel v Tello*, 272 AD2d 103 [1st Dept 2000]).

As to the first requirement of a transaction of business *within* New York, "a single act" will suffice, as long as there is a substantial relationship between that transaction and the alleged injury (*George Reiner & Co., Inc. v Schwartz*, 41 NY2d 648, 651[1977]; *Bunkoff General Contractors Inc. v State Auto. Mut. Ins. Co.*, 296 AD2d 699, 700 [2002]; *see also Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988] [holding that one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, provided the defendant's activities here were purposeful, and there is a substantial relationship between the transaction and the claim asserted]). To determine whether a party has "transacted business" in New York a court must consider "the totality of circumstances when determining the existence of purposeful activity" (*SAS Group, Inc. v Worldwide Inventions, Inc.*, 245 F Supp 2d 543, 548 [SDNY 2003]). Thus, it has been held that the statutory test may be satisfied by a showing of other purposeful acts performed by the defendant in New York in relation to the contract, albeit preliminary or subsequent to its execution, even when the last act marking the formal execution of a contract may not have occurred within New York (*Longines-Wittnauer Watch Co. v Barnes*

& Reinecke, Inc., 15 NY2d 443, 457 [1965], *cert denied* 382 US 905). Such purposeful acts may include contract negotiations between the parties, meetings at which the defendant was present, or letters sent and phone calls made by the defendant to the plaintiff (*Scholastic, Inc. v Stouffer*, 2000 US Dist LEXIS 11516 [SDNY 2000]). Although limited contacts through telephone calls, mailings, and by facsimile, on their own are usually insufficient to confer personal jurisdiction under CPLR §302(a)(1) (*see International Customs Assoc., Inc. v Ford Motor Co.*, 893 FSupp 1251, 1261 [SDNY 1995]; *Granat v Bochner*, 268 AD2d 365 [1st Dept 2000]), such contacts may provide a basis for jurisdiction where the defendant projects himself by those means into New York in such a manner that he purposefully avails himself of the benefits and protections of its laws (*Fischbarg v Doucet*, 9 NY3d 375, 379, 382-383 [2007], *citing Parke-Bernet Galleries, Inc. v Franklyn*, 26 NY2d 13, 18 [1970]; *Hanson v Denckla*, 357 US 235, 253 [1958]).

The Court must consider various factors in determining whether a non-domiciliary has transacted business, including: (1) whether the defendant has an ongoing contractual relationship with a New York corporation; (2) whether the defendant negotiated or executed a contract in New York, and whether the defendant visited New York after executing the contract for the purpose of meeting with the parties to the contract regarding the relationship; and (3) what the choice of law is in any such contract (*Agency Rent a Car SYS., Inc. v Grand Rent a Car Corp.*, 98 F3d 25, 29 [2d Cir 1996] [court also considering whether the contract requires franchisees to send notices and payments into the forum state or subjects them to supervision by the corporation in the forum state]). A defendant may not be subject to jurisdiction based on "random," "fortuitous," or "attenuated contacts" (*Burger King v Rudzewicz*, 471 US 462, 475 [1985]). The contacts must provide a fair warning to defendant of the possibility of being haled into court in

the forum state (*Spencer Trask Ventures, Inc. v Archos S.A.*, 2002 WL 417192, at *3 [SDNY Mar. 18, 2003]; *Kreutter*, 71 NY2d at 466-467).

Once a court determines that a defendant has transacted business, pursuant to CPLR §302(a)(1), then it must determine whether the exercise of jurisdiction comports with due process (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]). "Due process is not offended '[s]o long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there ... even if not present' in that State" *(Northern Valley Partners, LLC v Jenkins*, 2009 WL 1058162, 4 [Sup Ct, New York County 2009], quoting *Kreutter,* 71 NY2d at 466, citing *McGee v International Life Ins. Co.*, 355 US 220, 222-223 [1957]). To satisfy the minimum contacts requirement, it is essential that there be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*Hanson*, 357 US at 253).

Here, the factual allegations in the record are sufficient to establish personal jurisdiction over defendants. As a threshold matter, the evidence in the record makes clear that *only two defendants* are implicated in this case: MOH and Mr. Baumgart. Plaintiff provides no evidence that MOH is "also known as" MIT, as alleged in its Complaint, or that MOH transacts business as MTI. Further, plaintiff does not dispute defendants' arguments that MOH and MTI are separate entities, and that only MOH, *via* Mr. Baumgart, executed the Retainer Agreement with plaintiff (*see* Baumgart Affd., ¶ 4).

Further, it is clear from the Retainer Agreement that the entity plaintiff refers to as "Midway" is MOH. The Retainer Agreement is addressed to "Midway Oil Holdings Ltd. c/o

S.W. Baumgart," attention "S.W. Baumgart," and opens as follows: "Thank you for requesting that we provide you with legal services relating to the attachment of funds belonging to *Midway Oil Holdings Ltd.* in connection with [the Libra Matter]" (Retainer Agreement, p. 1) (emphasis added). Finally, only MOH is named as the defendant in the Libra Matter. Therefore, as MTI is not a defendant herein, the threshold issue is whether the Court has personal jurisdiction over MOH and Mr. Baumgart.

Although defendants maintain that the *only* contact MOH had with New York was retaining plaintiff to represent MOH in the Libra Matter (*see* the Friend Affm., ¶ 7), according to the factual allegations and caselaw, such contact is sufficient to establish personal jurisdiction over MOH. For example, in *Fischbarg*, the defendants, residents of California, retained a New York attorney to represent the corporation in an action brought in an Oregon federal court (*Fischbarg*, 9 NY3d at 377). The defendants argued that they never physically came to New York;[12] "they have transacted no business in New York because they have not purposefully availed themselves of the privileges and protections of our state's laws" and "their retention of plaintiff and their communications – by telephone, facsimile and e-mail – with him are, as a matter of law, insufficient predicates for long-arm jurisdiction" (*id.* at 379). In rejecting the defendants' arguments, the Court of Appeals concluded that the defendants' "retention and subsequent communications with plaintiff in New York established a continuing attorney-client relationship in this state and thereby constitute the transaction of business under CPLR 302(a)(1)" (*id.* at 377). In particular, the Court of Appeals noted that the defendants sought out

[12] *See Fischbarg v Doucet*, 38 AD3d 270, 272 [1st Dept 2007]). The Court of Appeals noted that a continuing relationship with the New York attorney was contemplated and created by the defendants "even though defendants never entered New York" (*Fischbarg*, 9 NY3d at 381).

the plaintiff in New York to perform legal services, frequently communicated with plaintiff in New York, and made their payments to plaintiff's office in New York, where they consulted plaintiff about their lawsuit and formulated and executed their litigation strategy.

Here, as in *Fischbarg*, the evidence in the record first establishes that defendants have "an ongoing contractual relationship" with plaintiff, a New York legal firm (*Agency Rent a Car* at 29). Although Mr. Baumgart contends that MOH "has never done business in the State of New York" (Baumgart Affd., ¶ 3), his own testimony demonstrates otherwise. Mr. Baumgart states that plaintiff and MOH executed the Retainer Agreement (*id.*) and that he had "contracted" with plaintiff to represent MOH in the Libra Matter (*id.* at ¶ 5). Mr. Baumgart further attests: "All contracts with the State of New York were with the offices of [plaintiff] in connection with its representation of MOH in Federal Court" (*id.* at ¶ 13). Therefore, as defendants contacted plaintiff in New York to retain plaintiff, defendants "projected themselves into our state's legal services market" (*see Fischbarg* at 382, *citing Parke-Bernet*, 26 NY2d 13, 18 [1970]).

Second, while it is not clear from the record whether defendants negotiated or executed the Retainer Agreement in New York, or whether defendants visited New York after executing the contract for the purpose of meeting with plaintiff regarding the attorney-client relationship *(Agency Rent a Car* at 29), "one need not be physically present [here] . . . to be subject to the jurisdiction of our courts under CPLR 302 for, particularly in this day of instant long-range communications, one can engage in extensive purposeful activity here without ever actually setting foot in the State" (*Fischbarg* at 382). The Court of Appeals in *Fischbarg* goes on to explain that a defendant can engage in a "sustained and substantial transaction of business" *via* instant messaging, e-mail, and telephone (*id.*).

Here, as in *Fischbarg*, "defendants' solicitation of plaintiff in New York and *their frequent communications* with [plaintiff] in this state . . . form the basis of jurisdiction" (*id.* at 383) (emphasis added). Mr. Baumgart attests that he made "telephone calls" to plaintiff "to engage legal counsel for MOH" (Baumgart Affd. at ¶ 17). Further, the Invoices, which detail the work plaintiff allegedly performed for defendants from June 1, 2007 through July 23, 2008, indicate numerous e-mails and phone calls between plaintiff and Mr. Baumgart regarding the Libra Matter (*see* the Invoices). Further, Mr. Baumgart does not dispute that plaintiff represented MOH in the Libra Matter *in New York* from June 2007 up until the case was closed on February 5, 2008 (*see* the Libra Docket, Item 13). Finally, Mr. Baumgart attests that MOH paid plaintiff a $5,000 retainer and approximately $25,000 in fees for plaintiff's work in the Libra Matter (Baumgart Affd., ¶¶ 14-15). The Retainer Agreement makes clear that the retainer was to be wired to a Citibank branch *in New York* (Retainer Agreement, p. 2).

Third, the Retainer Agreement contains a choice of law clause, designating New York as the chosen forum for any disputes arising from the contract (*Agency Rent a Car* at 29). The clause states:

> This engagement and retainer agreement is governed by the laws of the State of New York without reference to its rules regarding conflicts of laws. *The jurisdiction and forum for any claim arising under this agreement that is not subject to arbitration under the rules set forth above shall be exclusively the Federal or State courts located in the County and State of New York in the United States of America.*
> (Retainer Agreement, p. 3) (emphasis added)

Thus, the record establishes that MOH transacted business in New York, pursuant to CPLR §302(a)(1).

The record also makes clear that the Court's exercise of jurisdiction comports with due process (*International Finance B.V., supra*; *LaMarca, supra*]). As discussed above, "defendants

purposefully availed themselves of New York's legal services market by establishing a continuing attorney-client relationship with plaintiff" (*Fischbarg* at 384). Their contacts were sufficient predicates for long-arm jurisdiction, consisting of solicitation of plaintiff's services here and frequent communications with plaintiff law firm. Given these facts, and the choice of law clause in the Retainer Agreement, defendants should have reasonably expected to defend against a suit based on their relationship with plaintiff in New York.

Finally, it is clear that there is a "substantial relationship between the transaction and the claim asserted", as plaintiff's claim for legal fees arises from the Retainer Agreement (*Kreutter* at 467). Therefore, defendants' first affirmative defense as to MOH lacks merit. Accordingly, defendants' first affirmative defense is dismissed as to MOH.

Regarding Mr. Baumgart, defendants' argument that Mr. Baumgart signed the Retainer Agreement only in his capacity as an officer of MOH speaks to only liability, not to personal jurisdiction, the threshold issue herein (*see Kreutter* at 470). It appears from defendants' argument that they are trying to invoke the "fiduciary shield doctrine" as a bar to this Court's long-arm jurisdiction over Mr. Baumgart. The fiduciary shield doctrine provides that an individual "should not be subject to jurisdiction if his dealings in the forum State were solely in a corporate capacity," on the ground that it is "unfair to subject a corporate employee personally to suit in a foreign jurisdiction when his only contacts with that jurisdiction have been undertaken on behalf of his corporate employer" (*id.* at 467-468). However, such a doctrine is "not available to defeat jurisdiction under the New York long-arm statute" (*id.* at 472; *see also Humitech Development Corp. v Comu*, 16 Misc 3d 1109, 847 NYS2d 896 [Sup Ct, New York County 2007] ["New York has declined to invoke the fiduciary shield doctrine to insulate a corporate

officer or director from personal jurisdiction in New York, if he engages in purposeful business transactions in this State"]). The Court of Appeals in *Kreutter* explained that "[n]othing in [CPLR §302's] language or the legislative history relating to it suggests that the Legislature intended to accord any special treatment to fiduciaries acting on behalf of a corporation or to insulate them from long-arm jurisdiction for acts performed in a corporate capacity" (*Kreutter* at 470).

Here, it is clear from the evidence in the record that Mr. Baumgart, as an officer of MOH, engaged in purposeful business transactions in New York when he executed the Retainer Agreement and retained plaintiff's legal services, on behalf of MOH, in the Libra Matter. The record also indicates that throughout plaintiff's representation of MOH in the Libra Matter, Mr. Baumgart regularly communicated with plaintiff and paid plaintiff a retainer and fees, pursuant to the Retainer Agreement. Therefore, defendants' first affirmative defense as to Mr. Baumgart lacks merit. Accordingly, defendants' first affirmative defense is dismissed as to Mr. Baumgart.

Fraudulent Inducement

It is well settled that a claim of fraudulent inducement "based upon a statement of future intention must allege facts to show that the defendant, *at the time the promissory representation was made, never intended to honor or act on his statement*" (*Laura Corio, M.D., PLLC v R. Lewin Interior Design, Inc.*, 49 AD3d 411, 412 [1st Dept 2008] (emphasis added); *see also Non-Linear Trading Co., Inc. v Braddis Associates, Inc.*, 243 AD2d 107, 118 [1st Dept 1998] ["Absent *a present intention to deceive*, a statement of future intentions, promises or expectations is not actionable on the grounds of fraud" (emphasis added)]).

Here, defendants offer three bases for their fraudulent inducement defense. First, in their

Answer, defendants allege:

> Defendant MOH entered into the contract . . . *in reliance upon the truth of the representations made by Plaintiff* to Defendants to observe the elements of reasonable fees as set forth in [DR 2-106] of the Code of Professional Responsibility.
>
> Plaintiff *made those statements in order to induce* Defendant Baumgart on behalf MOH to enter into the contract and with the intention that Defendants rely upon Plaintiffs statements.
> (Answer, ¶¶ 22-23) (emphasis added)

However, defendants fail to allege any facts that demonstrate that at the time the plaintiff represented to defendants that it would charge defendants reasonable fees, pursuant to DR 2-106, plaintiff had no intention of charging same.

As to their second basis, defendants argue in their MOL that: "To have presumed to unilaterally carry on a representation in contract, when as a reasonable person MOH officer Baumgart thought the retainer of [the London Firm] brought MOH's fiscal obligation to an end, would appear to constitute fraudulent inducement" (Defendants' MOL, p. 8). However, defendants fail to allege that at the time the parties executed the Retainer Agreement, plaintiff had the requisite intent to deceive defendants about exactly when defendants' fiscal obligation would end. The Retainer Agreement makes only a vague reference to the termination of the attorney-client relationship between plaintiff and defendants: "If, *when your matter is concluded or our relationship is terminated*, you have a positive account balance after applying your retainer to all unpaid time expended and unpaid expenses incurred, then we will refund the unused balance to you" (Retainer Agreement, p. 2) (emphasis added). Further, defendants do not allege that the fact that the Retainer Agreement does not specifically define the method for terminating the attorney-client relationship constitutes plaintiff's intent to deceive.

As a third basis, defendants allege that a "maritime arbitration in the United Kingdom . .

. *was also contemplated* in said required services" to be performed by plaintiff (defendants' MOL, p.2) (emphasis added). Here, an intent to deceive regarding plaintiff's duties under the Retainer Agreement can be inferred from the alleged facts. Mr. Baumgart attests that as plaintiff "did not clearly state [it] could not represent MOH in the United Kingdom on the arbitration matter prior to executing the agreement and being paid a $5,000 retainer, [plaintiff] fraudulently induced MOH into the agreement" (Baumgart Affd., ¶ 15). Mr. Baumgart further attests:

> *Early in the case* I requested that [plaintiff] file a counter suit in Federal Court regarding certain claims against MOH and for which I had contracted [plaintiff]. That request was refused. [Plaintiff] inferred to me that such a request was not in [plaintiff's] interest. *At a point* in dealing with [plaintiff] on behalf of MOH, [plaintiff] indicated that it could not handle the arbitration case in the United Kingdom against MOH *which was the reason for requiring* [plaintiff's] *representation*. Prior to executing the agreement with [plaintiff] on behalf of MOH there was no indication that they could not represent MOH in the United Kingdom on an arbitration matter.
> (Baumgart Affd., ¶¶ 5-7) (emphasis added)

It is undisputed that the parties executed the Retainer Agreement on June 5, 2007. It is further undisputed that soon afterward, on June 13, 2007, Mr. Hardison and Mr. Van Praag e-mailed Mr. Baumgart stating that plaintiff cannot respond to a communication sent by the arbitrator appointed "in connection with the London arbitration proceedings commenced by Libra Shipping" because the "communication raises issues governed by English law and practice. We recommend that Midway retain an English solicitor to represent its interests in connection with the London arbitration proceedings. We can recommend an English solicitor if Midway needs such a recommendation" (*see* the "June 13, 2007 e-mails"). Defendants' counsel attests that in that same month, June 2007, MOH retained the London firm for the express purpose of settling "the maritime arbitration proceeding in the United Kingdom." However, it is not clear from the record whether plaintiff was aware of defendants' need for representation in London at the time

the parties executed the Retainer Agreement.

In reply, plaintiff does not dispute that maritime arbitration in the United Kingdom *was contemplated* at the time plaintiff promised to represent defendants, or that the arbitration case in the United Kingdom was the reason defendants sought out plaintiff's representation. Further, contrary to plaintiff's arguments in reply, the express terms of the Retainer Agreement do not contradict defendants' fraudulent inducement allegations. It is not clear from the terms of the Retainer Agreement that the kind of representation defendants contemplated at the time the parties executed the Retainer Agreement was the kind of representation plaintiff provided. The Retainer Agreement states only that plaintiff would provide defendants "with legal services *relating to* the attachment of funds belonging to Midway Oil Holdings Ltd. in connection with a legal matter now pending in the U.S. District Court for the Southern District of New York" (Retainer Agreement, p. 1). The rest of the Retainer Agreement does not elaborate.

Thus, the Court is left with two disparate views of the type of services plaintiff was to perform, pursuant to the Retainer Agreement: Defendants argue that such services included actually representing MOH in the London Arbitration. Meanwhile, plaintiff argues that those legal services included "consulting with London Counsel regarding the escrow account and the status of the arbitration proceedings" (Van Praag Reply Affm., ¶ 6). Mr. Van Praag elaborates:

> *Pursuant to the terms of the retainer agreement*, along with its representation of Midway in the New York Action, [plaintiff] advised and consulted with the client and counsel in London as necessary. *[Plaintiff] does not dispute that London counsel represented Midway in the London arbitration.* However, [plaintiff] advised and consulted London Counsel on the procedural establishment and closing of an escrow account as well as issues that arose out of such transactions. . . . Additionally, pursuant to the court's order of attachment in the New York Action, [plaintiff] was required to report to the court with details on the progress of the London arbitration and, accordingly, consulted with London Counsel.
> (Van Praag Reply Affm., ¶ 4) (emphasis added)

Finally, plaintiff contends: "[A]s part of its global advisory work and representation of Midway, [plaintiff] advised its client and the [London firm], which was retained by Midway to work on the arbitration proceedings in London, *on matters relating to the attachment of Midway's funds*, including, but not limited to, *the set up and closing of escrow accounts* following arbitration. Moreover, [plaintiff] advised Defendants and London Counsel on areas of law admittedly unfamiliar to London Counsel, but which [plaintiff] has expert knowledge" (Reply MOL, p. 2) (citations omitted) (emphasis added). Unfortunately, the Retainer Agreement fails to specify such duties, or any specific duties or services.

As it is not clear, based on the evidence in the record, *exactly what type of services* were contemplated by the parties at the time the parties executed the Retainer Agreement, and as nothing in the record contradicts defendants' allegations that at the time the parties executed the Retainer Agreement, plaintiff misled defendants *with the intent to deceive defendants* about plaintiff's representation of MOH in the United Kingdom, the Second Affirmative Defense survives plaintiff's motion to dismiss.

Summary Judgment

As the proponent of the motion for summary judgment, plaintiff 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 Perlbinder*, 307 AD2d

230, 762 NYS2d 386 [1st Dept 2003]). Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material 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]).

Breach of Contract

Plaintiff's first cause of action alleges breach of contract. It is well settled that where a party employs an attorney under an express valid contract stipulating the compensation the attorney is to receive for his services, the stipulated method of compensation must generally control both the attorney and the client (7 NY Jur 2d Attorneys at Law §194; *Ransom v Ransom*, 147 AD 835, 848-849 [1st Dept 1911] [stating that absent any proof of fraud, misrepresentation, undue influence or other contractual infirmities, a written employment contract between a plaintiff attorney and his client would govern the attorney's compensation for his services]). "To state a cause of action for breach of contract, 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, 2006 NY Slip Op 50497 [Sup Ct, New York County 2006], *citing Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]). In addition, the "essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged" (*Volt*

Delta Resources, *citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; *Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]). Finally, it is well settled that "an enforceable contract requires mutual assent to its essential terms and conditions. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" (*Edelman v Poster*, 2010 WL 376107, 2 [1st Dept 2010]).

Liability of Mr. Baumgart

Generally, a person who signs a contract in his capacity as an officer of the corporation is not held personally liable for the contract unless the evidence is clear that he intended to be personally liable (*Herman v Ness Apparel Co., Inc.*, 305 AD2d 217, 218 [1st Dept 2003] ["A person who signs a writing solely as a corporate officer is not personally obligated on any contract evidenced by the writing *even though the text of the writing states that the officer is to be personally obligated*" (emphasis added)]; *see also Boas & Assoc. v Vernier*, 22 AD2d 561, 563 [1965]; *Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961] ["[A]n agent for a disclosed principal 'will not be personally bound *unless there is clear and explicit evidence* of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal'" (emphasis added]). First Department caselaw "illustrates the principle that the presence or absence of a reference to corporate office above or below a person's signature on an instrument does not necessarily determine the capacity in which the person signed the instrument" *(150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 7 [2004] *citing PNC Capital Recovery v Mechanical Parking Systems, Inc.*, 283 AD2d 268, 270-271 [1st Dept 2001]).

Here, plaintiff fails to provide "clear and explicit evidence" of Mr. Baumgart's intention to "substitute or superadd his personal liability for, or to, that of" MOH. Plaintiff's reliance upon

the Retainer Agreement as proof of that Mr. Baumgart guaranteed the payment is misplaced. The Retainer Agreement contains no language concerning a personal guaranty, and plaintiff's reliance on Mr. Baumgart's signature alone is insufficient to establish, as a matter of law, that Mr. Baumgart personally guaranteed MOH's debts (*Herman* at 218). Further, contrary to plaintiff's contention, defendants *do not* admit in their Answer that Mr. Baumgart "personally guaranteed in writing" to repay MOH's debt. Instead, defendants state: "[Mr. Baumgart] acted as officer of Defendant MOH and *at no time did he give any personal guarantees*" (Answer, ¶ 2) (emphasis added). Mr. Baumgart later attests: "Again, at no time did . . . I personally hold myself out as other than an officer of MOH" (Baumgart Affd., ¶ 13). Therefore, as plaintiff fails to establish that Mr. Baumgart is personally liable for MOH's debts, plaintiff's motion for summary judgment as to all claims against Mr. Baumgart is denied.

Liability of MOH

Here, plaintiff makes out a *prima facie* case entitling it to summary judgment as against MOH. However, defendants raise an issue of material fact regarding plaintiff's duties, pursuant to the Retainer Agreement, and the intention of the parties at the time the agreement was executed. As discussed above, it is clear from the Retainer Agreement, that MOH retained plaintiff to advise and represent MOH in the Libra Matter. The Retainer Agreement states in relevant part:

> Thank you for requesting that we provide you with legal services relating to the attachment of funds belonging to Midway Oil Holdings Ltd. in connection with a legal matter now pending in the [Libra Matter].
>
> * * *
>
> For these services, we will bill according to the amount of the time expended on the file by attorneys and paralegals of the Firm, billed at the standard hourly rates in effect for such personnel from time to time. . . . [Mr. Van Praag] will conduct and supervise all of

> the work under this engagement. My current rate is $500 per hour and the partners and associates who will work with me on this matter have rates ranging from $200 to $420 per hour. . . . The elements of a reasonable fee are set forth in DR 2-106 of the Code of Professional Responsibility, a copy of which provision will be furnished to you upon request.
>
> ***
>
> . . . We have determined to require an initial minimum advance retainer payment in the amount of $5000.00. This will be applied to the first invoiced fees and disbursements.
>
> If, when your matter is concluded or our relationship is terminated, you have a positive account balance after applying your retainer to all unpaid time expended and unpaid expenses incurred, then we will refund the unused balance to you. . . .
>
> We will render our statements monthly. We will send you an itemized invoice containing a description of our services and costs advanced. Again, some expenses are not available to be posted in the month in which they are incurred. Our payment policy requires payment within thirty (30) days of billing. . . .
> (Retainer Agreement, pp. 1-2)

The Invoices demonstrate that plaintiff rendered legal services to MOH from June 2007 through July 2008, and that MOH owes plaintiff $16,114, representing unpaid fees and disbursements (see the *Invoices*). As MOH's failure to pay those fees constitutes a breach of the Retainer Agreement, plaintiff has made out a *prima facie* case entitling it to summary judgment on its breach of contract claim.

However, as discussed (see section under fraudulent inducement, *supra* at 18-22), defendants raise an issue of material fact regarding plaintiff's duties, pursuant to the Retainer Agreement. Central to the dispute over legal fees herein are the issues of exactly what kinds of services the parties contemplated at the time they executed the Retainer Agreement, and whether such services were adequately performed. Contrary to plaintiff's argument, it is not clear from the Retainer Agreement whether plaintiff's representation of MOH included only "*advisory work* for defendants and the London firm," as plaintiff argues, or actual representation in the London

Arbitration, as defendants argue. Further, defendants maintain that Mr. Baumgart understood that "a London firm would be necessary for appropriate representation in the United Kingdom. What was not anticipated was ongoing billing that continued once the London firm was retained," *i.e.* that plaintiff would generate fees for "reading and reviewing" the London firm's work product (defendants MOL, p. 7). Therefore, it cannot be said at this juncture, whether plaintiff adequately performed its services, and, thus, whether defendants' refusal to pay plaintiff the full amount demanded constituted a breach of the Retainer Agreement.

The parties also dispute exactly when plaintiff's representation of MOH ended, and therefore, when defendants' obligation to pay for plaintiff's services ended. While the Retainer Agreement is silent as to the manner of termination of the agreement, the evidence in the record demonstrates that the attorney-client relationship between plaintiff and defendants continued during the London Arbitration. It is undisputed that after the execution of the Retainer Agreement, plaintiff referred defendants to the London firm to handle the London Arbitration (Friend Affm., ¶ 8). However, the record fails to establish, as a matter of law, that from there on, MOH was "fully represented by that firm in London" (*id.* at 8). An e-mail exchange between Mr. Van Praag and Mr. Baumgart indicates that the parties were aware that plaintiff was still representing MOH in the New York Action while the London Arbitration was proceeding. In an e-mail dated August 9, 2007 (the "August 9, 2007 e-mail"), Mr. Van Praag writes Mr. Baumgart as follows:

> I apologize if I have caused any confusion with my last substantive email [*sic*]. The New York proceeding was commenced in order to initiate Rule B(1) attachment proceedings. We do not have litigation in two different forums. *The arbitration in London is the controlling proceeding. What normally happens with regard to the New York proceeding is that it will be stayed pending the conclusion of the arbitration and the funds will be available to satisfy any arbitration award found to be in favor of the Owners*. If the

> Owners are not successful in the arbitration, the funds will be released back to Midway. Thus, and I hope I am very clear, Midway is not litigating any proceeding whatsoever in New York unless and until it files a counterclaim and seeks counter-security in New York. The only proceeding which will have a binding effect upon both parties will be the London arbitration. *The New York proceeding is only for security purpose.* I hope I have clarified any confusion I may have caused.
> (August 9, 2007 e-mail) (emphasis added)

Mr. Baumgart acknowledges Mr. Van Praag's e-mail by responding: "Thanks" (*id.*).

Thus, contrary to defendants' argument, the August 9, 2007 e-mail clearly demonstrates that the attorney-client relationship between plaintiff and defendants *did not end* when defendants retained the London firm; instead, it appears that concurrent legal actions were proceeding in both New York and London, with plaintiff representing MOH in New York and the London firm representing MOH in London. The fact that the London firm continued to send plaintiff courtesy e-mails about the progress of the London Arbitration is further evidence of this concurrent representation. Finally, according to the Libra Docket, the Libra Matter was not closed until February 5, 2008, *after* the London Arbitration was completed (Libra Docket, Item nos. 12-13). Defendants' counsel attests that the London firm settled the arbitration in the United Kingdom on or about October 9, 2008, and MOH reimbursed the London firm in full for said services in December 2008 (Friend Affd., ¶ 10; *see also* the December 2, 2008 e-mail from the London firm to Mr. Baumgart acknowledging that "the funds have been safely received" and including an attached Statement of Account from the London firm). This evidence supports plaintiff's argument that, pursuant to the Court's Order of Maritime Attachment in the New York Action, plaintiff was required to report to the Court with details on the progress of the London Arbitration. Therefore, it cannot be said that the attorney-client relationship between plaintiff and defendants ended when defendants retained the London firm.

However, as an issue of material fact exist as to plaintiff's duties, as understood by the parties, pursuant to the Retainer Agreement, the Court cannot determine at this juncture whether MOH actually breached the Retainer Agreement by not paying plaintiff for the services rendered after defendants retained the London firm. Accordingly, summary judgment for breach of contract is denied as to MOH.

Quantum Meruit

"The elements of a claim in quantum meruit are: the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of compensation therefor, and the reasonable value of the services" (*Freedman v Pearlman*, 271 AD2d 301, 304, [1st Dept 2000]). In addition, "a claim in equity to recover the reasonable value of services rendered under a theory of unjust enrichment may be pleaded in the alternative to a contract claim" (*Mirchel v RMJ Securities Corp.*, 205 AD2d 388, 390 [1st Dept 1994]). However, where an enforceable contract for legal services exists, "recovery for those services in *quantum meruit* is precluded" (*Zito v Fischbein, Badillo, Wagner & Harding*, 35 AD3d 306, 307 [1st Dept 2006] ["It is plain that the services rendered by plaintiff to defendant law firm fell squarely within the contractually contemplated duties of plaintiff's employment, and given that an enforceable oral contract exists, covering the matter of plaintiff's compensation, recovery for those services in *quantum meruit* is precluded"]; *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 NY2d 382, 388 [1987] ["A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment"]).

Here, plaintiff fails to demonstrate that the services rendered by plaintiff to defendants

"fell squarely within the contractually contemplated duties of plaintiff's employment" (*Zito* at 307). As discussed above, the Retainer Agreement is ambiguous as to plaintiff's "contemplated duties." Therefore, it is unclear, at this juncture, whether all of the services plaintiff performed fall under the Retainer Agreement. Therefore, summary judgment on *quantum meruit* is denied as premature at this juncture.

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, 746 [1st Dept 1983]; *see also Ruskin, Moscou, Evans, & Faltischek, P.C. v FGH Realty Credit Corp.*, 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"]). 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, 166 [1st Dept 1991]; *Lapidus & Associates, LLP v Elizabeth Street, Inc.*, 2009 WL 3823246, 3 [Sup Ct, New York

County 2009] [stating that "bald conclusory allegations of fraud, mistake and other equitable considerations are insufficient to defeat a motion for summary judgment on an account stated"].

An agreement also may be implied if the debtor makes a partial payment (*Levisohn, Lerner, Berger & Langsam v Gottlieb*, 309 AD2d 668, 668 [1st Dept 2003], *lv denied* 1 NY3d 509 [2004]; *Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355, 356 [1st Dept 2001]). The partial payment is considered acknowledgment of the correctness of the account (*Parker Chapin Flattau & Klimpl v Daelen Corporation.*, 59 AD2d 375 [1st Dept 1997] [where defendant made partial payment of an account, such payment constituted an acknowledgment of the validity of the bill, thereby establishing it as an account stated]; *Rik Shaw Assoc. v Bronzini Shops*, 22 AD2d 769 [1st Dept 1964]).

Here, plaintiff makes out a *prima facie* case entitling it to summary judgment as against MOH. However, defendant's affirmative defense of fraudulent inducement raises an issue of material fact defeating summary judgment.

Mr. Van Praag states in his sworn affirmation that he "personally mailed each of the invoices sent to the Defendants as set forth in the Complaint on or about: July 10, 2007, August 6, 2007, September 7, 2007, November 5, 2007, December 6, 2007, January 3, 2008, February 5, 2008, March 5, 2008, April 3, 2008, May 6, 2008, June 5, 2008, July 8, 2008, August 4, 2008, [and] December 4, 2008." Mr. Van Praag further attests that regular office practice and procedure was followed, thus raising "a presumption of receipt that cannot be rebutted by a bare denial of receipt" (*Jonathan Woodner, Co. v Higgins*, 179 AD2d 444, 445 [1st Dept 1992], *citing Nassau Ins. Co. v Murray*, 46 NY2d 828 [1978]). Mr. Van Praag goes on to state: "Defendants spoke with me on numerous occasions and made repeated promises to pay all of their invoices.

They also promised in writing, promising payment in full and made a partial payment by check in December 2008 (*id.* at 4).[13] Further, the "Statement of Account" as of December 1, 2008 from the London firm states: *"As per Mr. Baumgart's e-mail of 28 November 2008*, US $25,000 to be paid to Mr. Van Praag from escrow account funds with the balance to be settled directly by Midway Oil Holdings Limited" (emphasis added), and the December 4, 2008 Invoice from plaintiff indicates a balance owing of $16,114. The December 2008 payment of $25,000 came more than a year after the first Invoice of July 10, 2007, and four months after the Invoice of August 4, 2008. Therefore, as plaintiff demonstrates that defendants retained the Invoices without objecting within a reasonable time of receipt, and made a partial payment on the Invoices, plaintiff establishes a *prima facie* case that defendants owe plaintiff $16,114 in unpaid fees and disbursements.

While Mr. Baumgart attests that he orally objected to plaintiff's billing after defendants retained the London firm, he fails to provide sufficient detail regarding when he objected or the specific substance of the conversations in which the objections were made (*see Levisohn, Lerner, Berger & Langsam v Gottlieb*, 309 AD2d 668, 668-669 [1st Dept 2003] ["Defendant's allegations of oral protests fail to identify the persons with whom he spoke 'or to specify the substance of the alleged conversations' and are therefore merely conclusory (internal citations omitted)]). 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

[13]The Court notes that plaintiff does not provide a copy of this alleged "writing" or the check by defendants. However, the August 4, 2008 Invoice shows an outstanding balance of $37,548.35, and the December 4, 2008 Invoice shows an outstanding balance of $16,114. The Court assumes that defendants made a partial payment for approximately $25,000. This assumption is supported by defendants' reference to a payment of $25,000 *via* wire transfer in their opposition (*see* defendants' MOL, p.6).

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. 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 Schvimmer*, 50 AD3d 445, 446 [1st Dept 2008] (internal citations omitted).

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*)." Therefore, Mr. Baumgart's conclusory assertion that he orally objected to the plaintiff's bills is insufficient to defeat summary judgment on plaintiff's account stated claim.

Further, Mr. Baumgart claim that he objected "when it came to his attention that the London firm was forwarding 'courtesy copies' of e-mails to plaintiff and that plaintiff was billing MOH for reading and reviewing said e-mail, is likewise insufficient. New York Courts have offered the following guidance on whether an objection is reasonably timely:

> A lapse of two months between the receipt and the objection is not so long as to constitute such an assent, nor a lapse of three months. However, a lapse of five months has been deemed sufficient to give rise to an account stated, as a matter of law, as has a lapse of more than four and a half months.
> *Sid Paterson Advertising, Inc. v Giuffre Auto Group, LLC,* 17 Misc 3d 1127, 851 NYS2d 74 [Sup Ct, New York County 2007] (internal citations omitted).

Further, the Second Department has held that a lapse of four months is untimely (*R.A. Associates v Lerner*, 245 AD2d 437, 438 [2d Dept 1997]). Here, Mr. Baumgart does not indicate when he objected to plaintiff's billing or instructed "the London firm" to stop forwarding e-mails. Mr.

Baumgart's additional claim that he "further complained of this turn of events to Mr. Van Praag following a meeting in Hong Kong" fails to indicate when this complaint was lodged. And, while Mr. Baumgart also claims that he objected when he first learned of the forwarding of the e-mails to plaintiff, it is noted that the references to plaintiff's review of e-mail first occurred in the Invoice of July 10, 2007 until the last Invoice of August 4, 2008, Mr. Baumgart provides no details as to when he made the alleged objections or exactly what was communicated to Mr. Van Praag during those alleged objections.

Further, the Invoices demonstrate that plaintiff began charging MOH for reading and reviewing e-mails from the London firm as early as June 13, 2007, a week after MOH retained plaintiff. Each of the subsequent Invoices through August 4, 2008 indicate continued charges for reading and reviewing e-mail. Defendants fail to rebut the presumption that they received the Invoices each month, thus, supporting the inference that defendants retained the Invoices without objecting to them (*Levisohn* at 668 ["The record contains some 24 separate account statements sent by plaintiff law firm to defendant over a one-year period, with no indication of objection."]).

However, it is well settled that a showing of *fraud*, mistake or other equitable considerations may defeat a cause of action sounding in an account stated *(Lapidus & Associates, LLP v Elizabeth Street, Inc.*, 2009 WL 3823246, 2 [Sup Ct New York County 2009] ["Thus, a party who receives an account for services rendered and thereafter either fails to timely object to the account, or makes partial payments on it, will be bound on the account, *unless fraud, mistake or other equitable considerations are shown to impeach what is otherwise presumed a conclusive settlement*" (emphasis added)]; *Sid Paterson Advertising, Inc.*; *Marchi Jaffe Cohen Crystal Rosner & Katz v All-Star Video Corp.*, 107 AD2d 597, 599 [1st Dept 1985]).

Here, defendants' remaining affirmative defense of fraudulent inducement, which this Court declines to dismiss, raises an issue of material fact as to whether there was ever an agreement between the parties with respect to the correctness of the Invoices and the balance due. Mr. Baumgart attests that "[a]t no time did MOH authorize fees for oversight of work done by the London firm" (Baumgart Affd., ¶ 10). Finally, defendants insist that its $25,000 payment was for plaintiff's work on the Libra Matter, excluding plaintiff's review of the London e-mails. Therefore, as defendants raise an material issue of fraudulent inducement, summary judgment as to MOH's liability on plaintiff's account stated claim is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion of plaintiff Eaton & Van Winkle LLP for an order, pursuant to CPLR §3211(b), dismissing the jurisdictional defense of defendants is granted, and the jurisdictional defense alleged by said defendants is hereby severed and dismissed; and it is further

ORDERED that the branch of plaintiff's motion for an order, pursuant to CPLR §3211(b), dismissing defendants' defense of fraudulent inducement is denied; and it is further

ORDERED that the branch of plaintiff's motion for an order, pursuant to CPLR §3212, for summary judgment on all of its claims against defendants is denied; and it is further

ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, April

13, 2010 at 2:15 p.m.; 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.

This constitutes the decision and order of the Court.

Dated: March 15, 2010

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

HON. CAROL EDMEAD

FILED
MAR 16 2010
NEW YORK
COUNTY CLERK'S OFFICE