SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 20

X

RUSKIN MOSCOU FALTISCHEK, P.C.,

Plaintiff,

-against-

Index No. 005049/08
Motion Sequence...02, 03
Motion Date... 01/21/10

STADIUM MOTORS, INC. d/b/a POPULAR KIA; EURASIAN MOTORS, INC, d/b/a AUTO CENTRAL; OMNI AUTO GROUP, INC d/b/a BROOKLYN DODGE; VANGUARD AUTO GROUP, INC, d/b/a POPULAR FORD; BARON AUTO MALL, INC., d/b/a DRIVEWORLD f/d/b/a BARON KIA; TRI-COUNTY MOTORS, INC., d/b/a DRIVEWORLD; LESTER WU, VLADIMIR ZANAN and RAYMOND LAHEY,

Defendants.

X

Papers Submitted:
Notice of Motion (Mot. Seq. 02).....x
Memorandum of Law.....x
Affidavits in Opposition.....x
Memorandum of Law.....x
Reply Affirmation.....x
Notice of Motion (Mot. Seq. 03).....x
Affirmation in Opposition.....x
Reply Affidavit.....x

The Defendants[1] move pursuant to CPLR § 3211[a][7] for an order dismissing the within complaint (Mot. Seq. 02).

The Plaintiff, Ruskin, Moscou Faltischek, P.C., moves pursuant to CPLR § 2308 and § 3124 for an order compelling a non-party, Jeffrey Miller, Esq., to comply with a subpoena duces tecum (Sequence #003).[2]

In June 2006, the Plaintiff, Ruskin Moscou Faltischek, P.C., [hereinafter "the Firm"], undertook to represent Airport Auto Group, Inc., d/b/a Five Towns Mitsubishi, a non-party herein (*see* Kremer Affidavit at ¶¶9,12; *see also* Exhibit A). Said representation was in connection with an investigation instituted by the New York State Attorney General's Office as against this corporate entity (*id.* at ¶¶9,10). In connection with its representation, and in accordance with 22 NYCRR 1215.1, on June 29, 2006, the Firm sent to Five Towns Mitsubishi a written Letter of Engagement which was thereafter signed by the Defendant, Lester Wu, in his capacity as President of the corporation (*id.* at ¶16; *see also* Exhibit A).

The Attorney General's investigation, which originally only targeted Five Towns Mitsubishi, subsequently expanded and evolved to include all of the automobile dealerships owned by the Defendants, Lester Wu and Vladimir Zanan and included investigations and administrative proceedings by and before the New York City Department

---

[1] By Short Form Order dated December 7, 2009, the Honorable William LaMarca granted a motion for summary judgment interposed by defendant, Raymond Lahey, and dismissed the within action as asserted against him.

[2] By Stipulation dated January 14, 2010, the first three branches of the plaintiff's application interposed pursuant to CPLR §3124 and §3126 [1], [2] and [3] were resolved.

of Consumer Affairs [hereinafter DCA] (*id.* at 18, 19, 20; *see also* Exhibits D, E). As a result, the Firm thereafter purportedly provided legal representation to the all of the named defendants with respect to matters involving consumer complaints pending before the DCA, as well as in connection to the commencement of an action in federal court "challenging as unconstitutional the administrative process and procedures" utilized by the DCA (*id.* at ¶21; *see also* Napoletano Affirmation in Support at Exhibit A at ¶¶11,15). In May of 2007 and November 2007 respectively, the Defendant, Valdimir Zanan executed an "Affidavit Granting Authority to Act", which authorized the Firm to represent the named defendants with respect to the proceeding before the DCA (*see* Kremer Affidavit in Opposition at Exhibits F, G).

The Plaintiff contends that the named defendants herein were referred to the Firm by Jeffrey Miller, Esq., "a long time attorney of Defendants", who represented them on other matters (*id.* at ¶38). The Plaintiff asserts that Mr. Miller acted as "agent" and "intermediary" between the firm and the defendants "regularly requesting that [the Firm] perform specific legal services on behalf of Defendants" and "played an integral role in determining the nature and extent of the legal services performed [the Firm] on behalf of the defendants (*id.* at ¶¶36,38,39).

The Firm alleges that relative to it's representation of the defendants there remains an unpaid balance for the services rendered in the sum of $216,228.27 and accordingly on March 17, 2008 commenced the underlying action to recover same (*id.*). The

within complaint contains four separate causes of action sounding in breach of contract, account stated, unjust enrichment and quantum meruit (*id.*). The Defendants' within application seeking dismissal thereof thereafter ensued and is determined as set forth hereinafter.

In support of the within application, counsel for the Defendants posits various contentions. Initially, counsel argues that the Plaintiff's cause of action sounding in breach of contract must be dismissed as the Plaintiff has failed to allege if the contract upon which said action is predicated was oral or written and has not provided any of the specifics attendant thereto (*see* Napoletano Affirmation in Support at ¶¶12,14, 15,16, 24). The Defendants' counsel further contends that the Plaintiff has failed to assert an action for which compensation can be granted as it has not demonstrated compliance with 22 NYCRR 1215.1 and 22 NYCRR 1400.2 (*id.* at ¶¶32, 34-36,38, 64; *see also* Reply Affirmation at ¶¶10,11,12). Specifically, the Defendants' counsel asserts that the failure of the Plaintiff to obtain a written Retainer Agreement or Letter of Engagement pursuant to 22 NYCRR 1215.1, as well as in failing to provide the Defendants with periodic billing statements in accordance with 22 NYCRR 1400.2, necessarily precludes the Plaintiff from recovering fees for the legal services purportedly rendered (*id.*).

In addition to the foregoing and with regard to the Plaintiffs cause of action sounding in unjust enrichment and quantum meruit, the Defendants' counsel argues that both must be dismissed. With particular regard to the to the Plaintiff's cause of action sounding

in unjust enrichment, counsel argues that the legal services provided were done so at the behest of Jeffrey Miller, Esq., and not the Defendants and thus the claim must fail (*see* Napoletano Affirmation in Support at ¶44). As to the Plaintiff's cause of action sounding in quantum meruit, the Defendants' counsel argues that the Plaintiff's time accounts are an insufficient basis upon which to predicate the reasonable value of services rendered (*id.* at ¶48; *see also* Defendants' Memorandum of Law at Point I; *see also* Defendants' Reply Affirmation at ¶24). Relying principally upon cases decided in the United States Bankruptcy Court, the Defendants' counsel argues that the billing statements proffered by the Plaintiff do not specifically delineate each task undertaken and the time devoted to each but rather "lump" several services into one billing entry (*see* Defendants' Memorandum of Law at Point I). Counsel for the Defendants' urges that the billing statements provided by the Plaintiff should be subject to the stringent requirements employed by the Bankruptcy Courts which require that such bills contain "separate time entries for each activity" (*id.*).

Finally, and with particular respect to the individual Defendants, Wu and Zanan, the Defendants' counsel contends that the none of the legal services directly benefitted these defendants and as such the within complaint should be dismissed as against them (*see* Napoletano Affirmation in Support at ¶¶ 53,55,56,57).

The Plaintiff opposes the application and argues that the initial Attorney General investigation, and the proceedings which thereafter occurred before the DCA, were interrelated and of the same general kind. Therefore, and by operation of 22 NYCRR 1215.2

their retention was covered by the original Letter of Engagement obviating the need to procure any additional retainer agreement (*see* Plaintiff's Memorandum of Law at pp. 5-8). The Plaintiff argues that as there existed a valid Letter of Engagement for *all* the legal services rendered, the Plaintiff's cause of action for breach of contract can be properly maintained (*id.*). Further, counsel for the Plaintiff posits that the filing of a Letter of Engagement or Retainer Agreement is not a condition precedent to filing an action for counsel fees and thus even in the absence thereof the Firm can still recover legal fees under a theory sounding in quantum meruit or account stated (*id.* at pp. 8,9,14).

As to the Plaintiff's cause of action sounding in account stated, the Plaintiff's counsel contends that the billing invoices were regularly sent to and received by the Defendants without objection, and that partial payments were rendered by the Defendants in accordance therewith (*id.* at p. 15). The Plaintiff's counsel further argues that in email correspondence authored by the Defendant, Vladimir Zanan, the Defendants acknowledge their indebtedness to the Firm and thus, dismissal of the cause of action for an account stated is unwarranted (*id.* at p. 16).

Finally, Plaintiff's counsel argues that since the Firm rendered extensive legal services to the Defendants in accordance with their express written authorization, in exchange for which the Firm had an expectation of payment and for which the Defendants have failed to fully compensate the Firm, the third and fourth causes of action sounding in unjust enrichment and quantum meruit can accordingly be maintained (*id.* at pp. 19,20).

On an application interposed pursuant to CPLR § 3211(a)(7), the complaint is to be liberally construed and the facts as alleged therein are to be accepted as true and the plaintiff afforded every favorable inference which may be drawn therefrom (*Leon v Martinez*, 84 N.Y.2d 893 [1984]). In entertaining such an application, the function of the court is only to determine whether the facts as alleged fall within a cognizable legal theory (*id.*). "In assessing a motion to dismiss under CPLR § 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*id.; Leon v Martinez*, 84 N.Y.2d 893 [1984]). When an affidavit is presented for the court's review "the criterion is whether the proponent of a pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 N.Y.2 268 [1977]).

In order to establish a cause of action sounding in breach of contract, the party so asserting it must demonstrate the following: the existence of a contract between the parties; performance by the party asserting the claim; breach of the agreement by the other party; and damages resulting from said breach (*Clearmont Property, LLC v Eisner*, 58 A.D.3d 1052 [3d Dept 2009]).

In the instant matter, having reviewed the Verified Complaint, as well as the Kremer Affidavit, the Court finds that the Plaintiff has stated a cause of action sounding in breach of contract (*Leon v Martinez*, *supra*). Here, the complaint and the affidavit sufficiently demonstrate the existence of an agreement between the parties herein, which provided that the Firm would render to the Defendants various legal services in connection

with the proceedings held before the DCA (*id.*). Moreover, the complaint and affidavit adequately demonstrate that the Firm indeed provided such services to both the corporate and individual defendants named herein and that there remains an outstanding balance due and owing thereon (*id.*).

Accordingly, the Defendants' motion to dismiss the Plaintiff's first cause of sounding in breach of contract is hereby **DENIED**.

"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 account, and the balance due" (*Chisholm-Ryder Company, Inc. v Sommer & Sommer*, 70 A.D.2d 429 [4th Dept 1979]). Such an account "assumes the existence of some indebtedness between the parties, or an agreement to treat the statement as an account stated". (*Ryan Graphics, Inc. v Bailin*, 39 A.D.3d 249 [1st Dept 2007] quoting *M. Paladino, Inc. v J. Lucchese & Sons Contracting Corp.*, 247 A.D.2d 515 [2d Dept 1998]). Stated differently, a party asserting an account stated "must prove that the account was presented, that by mutual agreement it was accepted as correct, and that the debtor promised to pay the amount stated" (1 NY Jur 2d, Accounts and Accounting §31).

A party can establish the existence of an account stated by submitting invoices for the services rendered, which detail the hourly rate, the hours devoted to the particular task and by establishing that the party to be charged approved of the invoices and made partial payments thereon. (*Landa v Dratch*, 45 A.D.3d 646 [2d Dept 2007]; *Landa v Sullivan*, 255

A.D.2d 295 [2d Dept 1998]). Having reviewed the complaint, while the Plaintiff indeed alleges that the requisite invoices were sent to the Defendants and that same were retained thereby, the complaint fails to allege that such invoices were duly approved, without any objection posed by the Defendants (*id.*;*Chisholm-Ryder Company, Inc. v Sommer & Sommer*, 70 A.D.2d 429 [4th Dept 1979], *supra*).

Accordingly, the Defendants application seeking an order dismissing the Second Cause of Action sounding in Account Stated is hereby **GRANTED**.

The Plaintiff's Third Cause of Action sounds in unjust enrichment and demands damages thereon in the amount of $216,228. 27. "To prevail on a claim of unjust enrichment, a plaintiff must establish that the defendant benefitted at the plaintiff's expense and that equity and good conscience require restitution". (*Whitman Realty Group, Inc. v Galano*, 41 A.D.3d 590 [2d Dept 2007]; *Spector v Wendy*, 61 A.D.3d [2d Dept 2009]). However, as the Plaintiff's cause of action for unjust enrichment is duplicative of that sounding in breach of contract and seeks identical damages for events which arise from the same subject matter, same is hereby **DISMISSED.** (*Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski,* 14 A.D.3d 644 [2d Dept 2005]; *Bettan v Geico General Insurance Co.*, 296 A.D.2d 469 [2d Dept 2002])

The failure on behalf of a law firm to procure from a client either a written retainer agreement or a letter of engagement does not preclude a law firm from recovering fees under a theory in quantum meruit (*Rubenstein, P.C. v Ganea*, 41 A.D.3d 54 [2d Dept

2007]). In order to state a cause of action sounding in quantum meruit, "the plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of services allegedly rendered". (*Tesser v. Allboro Equipment Company*, 302 A.D.2d 589 [2d Dept 2003]; *AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 A.D.3d 6 [2d Dept 2008])

In the instant matter, the Plaintiff's Fourth Cause of Action sufficiently sets forth all of these requisite elements (*id.*). Additionally, the Court notes that where, as is the case herein, there is a genuine dispute between the parties as to the existence of a valid contract, the plaintiff is permitted to proceed under theories sounding in both breach of contract and quasi-contract (*Curtis Properties Corp. v. The Greif Companies*, 236 A.D.2d 237 [1st Dept 1997]; *Breslin Realty Development Corp. v. 112 Leaseholds, LLC*, 270 A.D.2d 299 [2d Dept 2000]).

Accordingly, based upon the foregoing, the branch of the Defendants' motion which seeks an order dismissing the Plaintiff's cause of action sounding in quantum meruit is hereby **DENIED**.

At this juncture, the Court is compelled to note that in the Defendants' Reply Affirmation, counsel argues that *Rubenstein v Ganea,* as cited hereinabove, is inapplicable to the matters herein raised and that any reliance thereon by the Plaintiff is misplaced (*see* Defendants' Reply Affirmation at ¶20). In so arguing, counsel urges that the *Rubenstein*

Court excused noncompliance with 22 NYCRR 1215.1[3], given that at the time of the noncompliance, said regulation was recently enacted (*id.*). While indeed the *Rubenstein* Court was presented with a newly enacted section 1215.1, the emergent status thereof was not the dispositive factor in that Court's decision. Rather, in holding that a law firm's failure to obtain either a written retainer agreement or letter of engagement did not serve as a barrier to recovery under quantum meruit, the Court in *Rubenstein* expressly noted the spirit underlying the promulgation of the regulation and stated that "the intent of Rule 1215.1 was not to address abuses in the practice of law, but rather, to prevent misunderstandings about fees that were a frequent source of contention between attorneys and clients" (*Rubenstein, P.C. v Ganea*, 41 A.D.3d 54 [2d Dept 2007], *supra* at 60). The Court further stated "We find that a strict rule prohibiting the recovery of counsel fees for an attorney's noncompliance with 22 NYCRR 1215.1 is not appropriate and could create unfair windfalls for clients who know that the legal services they receive are not pro bono and where the failure to comply with the rule is not willful" (*id.* at 63).

Thus, to suggest that *Rubenstein* is not controlling in the matter *sub judice* because 22 NYCRR 1215.1 is no longer a new or recently enacted regulation, is to patently misconstrue the Court's holding and the legal analysis which informed same.

As noted above, the Firm asserts that attorney and non-party, Jeffrey Miller,

---

[3] 22 NYCRR 1215.1 provides the following, in relevant part: "Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter."

Esq., was the intermediary between the Firm and the Defendants and "acted as an agent of Defendants and regularly requested that [the Firm] perform specific legal services on behalf of Defendants" in connection to the DCA proceeding as well as the commencement of the Federal action (*see* Kremer Affidavit in Opposition to Motion to Dismiss at ¶¶5,14,15; *see also* Regan Affidavit in Support at ¶¶32,33,53).

As a result of his role in referring the Defendants to the Firm, on October 27, 2008, the Plaintiff served a subpoena duces tecum upon Mr. Miller, which requested the production of written communications, documents, notes or memoranda between himself and the Defendants concerning the legal services rendered by the Plaintiff on behalf of the Defendants (*see* Regan Affidavit in Support at ¶¶36; *see also* Exhibit I). Said subpoena was returnable on November 19, 2008 (*id.* at ¶¶37,38). While appearing to concede that Mr. Miller is a non-party, the Plaintiff contends that "Miller's communications with the both [the Firm] and Defendants, as well as any other documents in Miller's possession concerning the legal services requested by Defendants and performed by [the Firm], are directly relevant as well as material and necessary to the prosecution of [the Firm's] claims and the defense of the Defendants' purported counterclaim"[4] (*id.* at ¶¶51,53).

The Plaintiff contends that prior to the return date of the subpoena neither Mr. Miller nor the Defendants raised any objections thereto but nonetheless failed to produce the requested documents prompting the Plaintiff to issue two follow up letters on November 20,

[4] As recited in the "Notice of Appearance, Verified Answer & Counterclaim", the defendants have interposed a counterclaim sounding in breach of contract and claim damages in the amount of $400,000.

2008 and February 19, 2009 (*id.* ¶¶38,39,40,41,42; *see also* Exhibit J). Plaintiff's counsel argues that to date, Mr. Miller has failed to comply with the subpoena and that said refusal, coupled with his failing to raise timely objections thereto, constitutes a waiver of any right to object to the documents requested in the subpoena and as such the within application should be granted (*id.* at ¶52).

In the Second Department, a party which is seeking discovery from a non-party is required to demonstrate the existence of special circumstances (*Attinello v DeFilippis*, 22 A.D.3d 514 [2d Dept 2005]; *Lanzello v Lakritz*, 287 A.D.2d 601 [2d Dept 2001]). "The existence of special circumstances is not established merely upon a showing that the information sought is relevant. Rather, special circumstances are shown by establishing that the information sought cannot be obtained from other sources" (*Lanzello v Lakritz*, 287 A.D.2d 601 [2d Dept 2001], *supra*).

In the instant matter, the Court finds that the Plaintiff has failed to demonstrate that the necessary information it requires cannot be procured from alternative sources (*id.*). Here, the Plaintiff's claims are for recovery of legal fees and the counter-claim interposed by the Defendants is for breach of contract. Having carefully reviewed the record, the Court finds that the Letter of Engagement, the two Affidavits Granting Authority to Act, as well as the detailed billing invoices annexed herein, provide a sufficient basis upon which the Plaintiff can both prosecute their claims and defend against the Defendants' counterclaim (*id.*).

Moreover, even assuming that the Plaintiff had argued that Miller was an "agent" within the purview of CPLR § 3101(a)(1), which, if proven would have done away with the need for a showing of special circumstances, the application would still have been denied. In the discovery context, whether an individual is an agent for purposes thereof is determined by whether the proposed witness is under or "within the control" of the defendants (*see Ludden v. Erie Lackawanna Railway Company*, 38 A.D.2d 783 [4th Dept 1972]). In the case at bar, there has been no such showing (*id.*).

Based upon the foregoing, the Plaintiff's motion (Mot. Seq. 03), brought pursuant to CPLR § 2308 and § 3124, seeking an order compelling non-party, Jeffrey Miller, Esq., to comply with a subpoena duces tecum is hereby **DENIED**.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed herein are **DENIED**.

DATED: Mineola, New York
March 11, 2010

Hon. Randy Sue Marber, J.S.C.