

**Bragar, Wexler, Eigel & Squire, P.C. v Knack Sys.,  
LLC**

2010 NY Slip Op 30586(U)

March 11, 2010

Supreme Court, New York County

Docket Number: 106916/08

Judge: Emily Jane Goodman

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3-22-10  
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN  
*Justice*

PART 17

Brazer Wexler Eagle

INDEX NO. 106916/08

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

MOTION SEQ. NO. 02

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

Knock Systems

**FILED**

The following papers, numbered 1 to \_\_\_\_\_ were read <sup>at</sup> this motion to hear \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**NEW YORK COUNTY CLERK'S OFFICE**  
MAR 22 2010

| PAPERS NUMBERED |
|-----------------|
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|                 |

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided as attached

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

Dated: 3/17/10

[Signature]  
EMILY JANE GOODMAN <sup>J.S.G.</sup>

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X  
BRAGAR, WEXLER, EAGEL & SQUIRE, PC, f/k/a  
BRAGAR, WEXLER & EAGEL, PC,

Plaintiff,

Index No.: 106916/08

-against-

KNACK SYSTEMS, LLC,

Defendant.

**FILED**  
MAR 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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**HON. EMILY JANE GOODMAN, J.S.C.:**

Bragar, Wexler, Eigel & Squire, PC (BWE&S) commenced the action for legal fees on May 19, 2008 by filing a complaint that sets forth causes of action for: 1) breach of contract and 2) an account stated. Exhibit A. Defendant Knack Systems, LLC (Knack) filed an answer on July 25, 2008 that included counterclaims for: 1) "negligent rendition of professional services"; 2) "wrong and misleading billing practices"; and 3) "unethical conduct." Exhibit B. Plaintiff now moves for partial summary judgment on the second cause of action for account stated. For the following reasons, this motion is granted, in the amount stated.

**BACKGROUND**

BWE&S is a New York State licensed law firm organized as a professional corporation. See Notice of Motion, Exhibit A (complaint), ¶ 2. Defendant Knack is a New Jersey corporation engaged in the business of providing temporary office staffing. *Id.*, ¶ 3.

Knack retained BWE&S on January 23, 2003 pursuant to the terms of a retainer agreement (the retainer agreement) that provides, in pertinent part, as follows:

- 2. Fees. In general, our billings are based on the amount of time expended. Our hourly rates for attorneys and other members of the staff are based on years of

experience, specialization in training and practice, and level of professional attainment. These rates are reconsidered and readjusted from time to time, generally on an annual basis. We know that questions do arise on the subject of fees, and should that occur you should contact us immediately. [The partner's] billing rate presently is \$500.00 per hour and [the associate's] is \$320.00.

3. Disbursements. Often it is necessary for us to incur expenses for items such as expert witnesses, travel, lodging, meals, telephone calls and deposition transcripts. Often matters require costly ancillary services such as photocopying, facsimile, word processing, clerical and computerized legal research. In order to allocate these expenses fairly ... these items are separately classified on our statements as "disbursements." Some such costs represent out of pocket expenses, others represent an allocation of overhead costs associated with the foregoing items and others represent a combination of both factors.

4. Billings. Our statements generally will be prepared and mailed as early as feasible during the month following the month in which services are rendered and costs incurred. Payment is due upon your receipt of the statement.

5. Late Payments. Occasionally, a client has difficulty in making timely payment. To avoid burdening those clients who pay their statements promptly ... a charge equal to the statutory rate of interest of 9% per year is imposed for payments made more than 30 days after the invoice is tendered. In the unlikely event that legal proceedings are required to collect fees and costs, we shall be entitled to ... obtain reasonable attorney's fees and other costs of collection.

*Id.*; Exhibit E.

BWE&S defended Knack in a breach of contract action that had been commenced in the United States District Court for the Southern District of New York under docket number 07-CV-395 (the federal court action). *Id.*; Bragar Affirmation, ¶ 6; Exhibits C, D. BWE&S's representation of Knack continued for the period of January 2007 through February 2008, when the parties to the federal court action executed a "settlement agreement and mutual release," pursuant to which terms the judge in the federal court action (Rakoff, J.) dismissed that action on February 29, 2008. *Id.*, ¶¶ 8-11; Exhibit F.

BWE&S alleges that Knack ceased paying its monthly bills in September 2007, and paid

nothing through February 2008. *Id.*, ¶ 13. BWE&S presents copies of the itemized bills that it states it sent to Knack during this six-month time period. Exhibit G. BWE&S also presents copies of two pieces of e-mail correspondence between BWE&S partner Raymond Bragar, Esq. (Bragar) and Knack's president, Rajiv Sharma (Sharma). *Id.*; Exhibits H, I. In the first, dated February 8, 2008, Sharma states, in response to Bragar's recitation of the amount and breakdown of the legal fees then due, that "I am totally fine with the fees till date. No issues with that." *Id.*; Exhibit H. In the second, dated March 4, 2008, Sharma states, in response to Bragar's query about a proposed fee payment schedule, that "I will be back in NJ tomorrow, will check all the invoices and call you ... DON'T WORRY YOU HAVE DONE A GREAT JOB [emphasis in original]." *Id.*; Exhibit I. BWE&S presents statements that it claims to have mailed Knack. Exhibit G. BWE&S alleges that Knack has still neither paid this balance, nor sent BWE&S any written correspondence to discuss or object to said balance. Bragar Affirmation, ¶ 17. BWE&S also cites Sharma's deposition testimony, wherein Sharma acknowledged that Knack had never submitted any written objections to BWE&S regarding the unpaid attorney's fees balance, and that all of the disputes that he raised concerning BWE&S's billing were oral. *Id.*; Exhibit K, at 15-16, 100-102, 105-106.

In response, Knack alleges that it had renegotiated BWE&S's compensation to reduce the hourly billing rate that Bragar could charge as a partner from \$500.00 to \$350.00. *See* Sharma Affidavit in Opposition, ¶ 7. Knack presents a copy of an e-mail between Sharma and Bragar, dated February 11, 2008, in which Sharma calculates proposed costs apparently related to the forthcoming trial in the federal court action. *Id.*; Exhibit C. Knack also submits a copy of an email from Bragar to Sharma dated February 6, 2008, two days before Sharma's email cited

\* 5]

above indicating that Sharma was “totally fine with the fees.” Exhibit D. That email states, in relevant part:

Rajiv:

I just wanted to note our agreement as to my fees. We have billed you \$116,392 though January, 2008, which reflects a reduced hourly rate and write offs. We agreed that our firm would reduce those billings further by one-third (\$38,409) so that Knack would owe \$77,983. Knack has paid \$43,244 to date, leaving a balance of \$34,739.

Knack also asserts that the answer that Bragar prepared for Knack in the federal court action contained “significant flaws and mistakes,” and had to be re-drafted by outside counsel. *Id.*; Sharma Affidavit, ¶ 4. Finally, Knack alleges that BWE&S “forced” it to settle the federal court action “against [its] wishes.” *Id.*, ¶ 8.

In its reply papers, BWE&S notes that the February 11, 2008 e-mail merely concerns the proposed costs of the trial in the federal court action, which never actually took place, and argues that it has no bearing on the amounts due through that month because the firm did not reduce its hourly rates. *See* Bragar Reply Affirmation, ¶ 4. BWE&S also denies that any outside counsel ever made any material changes to the answer that Bragar prepared for Knack in the federal court action, and presents copies of the original answer (dated February 7, 2007) and the amended answer (dated March 6, 2007) to show that only one change was made to the wording of a counterclaim set forth therein. *Id.*; Exhibits A, B. Finally, BWE&S presents copies of e-mail correspondence that dates from February 19 through 29, 2008 that shows that Knack was actively engaged in BWE&S’s efforts to negotiate a settlement of the federal court action. *Id.*; Exhibit D.

## DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment is considered a drastic remedy which should only be employed when there is no doubt as to the absence of such triable issues. *See e.g. Andre v Pomeroy*, 35 NY2d 361 (1974); *Pirrelli v Long Island R.R.*, 226 AD2d 166 (1st Dept 1996). However, the court's reluctance to employ summary judgment when merited "only serve[s] to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated'." *Blechman v I.J. Peiser's and Sons, Inc.*, 186 AD2d 50, 51 (1st Dept 1992), quoting *Andre v Pomeroy*, 35 NY2d at 364.

Under New York State law, a defendant's receipt and retention of a plaintiff's invoices seeking payment for services rendered, without objection, within a reasonable time, gives rise to an actionable account stated. *See e.g. Cook & Associates Realty, Inc. v Chestnutt*, 65 AD3d 937 (1<sup>st</sup> Dept 2009); *Manhattan Telecommunications Corp. v Best Payphones, Inc.*, 299 AD2d 178 (1<sup>st</sup> Dept 2002). Here, BWE&S states that it "rendered invoices for September 2007, October 2007, November 2007, December 2007, January 2008, and February 2008." Notice of Motion,

Exhibit G. BWE&S has also presented Sharma's February 8, 2008 e-mail that states that "I am totally fine with the fees till date. No issues in that." *Id.*; Exhibit H. Finally, BWE&S has presented Bragar's September 3, 2009 affirmation in support that states that BWE&S had not received any written objections from Knack prior to filing the complaint dated May 19, 2008, seeking legal fees for the period September 2007 through February 2008, totaling \$65,547.80 ¶ 17.

In its opposition papers, Knack argues that it "has provided substantial and credible evidence [of billing disputes] by email communications between the plaintiff and defendant which are admitted by plaintiff in his deposition." *See* Defendant's Memorandum of Law in Opposition, at 4. Sharma concedes in this deposition testimony that Knack had never submitted any written objections to BWE&S regarding the unpaid attorney's fees balance, and all of the disputes that he raised concerning BWE&S's billing were oral. *Id.*; Exhibit K, at 15-16, 100-102, 105-106. It is true that "bald allegations of oral protests [are] insufficient to raise a triable issue of fact as to the existence of an account stated" *Darby & Darby, P.C. v VSI Intl., Inc.*, 95 NY2d 308, 315 (2000); *see also Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418 (1<sup>st</sup> Dept 2009); *Miller v Nadler*, 60 AD3d 499 (1<sup>st</sup> Dept 2009). However, here, Bragar's email dated February 6, 2008 appears to indicate that only \$34,739 is owed as of that time, due to write offs, and nothing in the email indicates that the write offs are conditional. Thus, although Sharma indicated he was "totally fine" with the fees to date, that comment was in response to Bragar's email indicating a balance due of \$34,739.<sup>1</sup> Accordingly, an account stated has only been

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<sup>1</sup>The firm's bill for February 2008 totals \$17,320. Therefore, assuming the amount of \$34,739 was due through January 2008, the amount owed would only appear to total \$52,059.

[\* 8]  
demonstrated in the amount of \$34,739.

It is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Bragar, Wexler, Egel & Squire, PC is granted based on account stated in the amount of \$34,739; and it is further

ORDERED that the parties appear for trial on May 3, 2010

**This Constitutes the Decision and Order of the Court.**

Dated: New York, New York  
March 11, 2010

ENTER:



\_\_\_\_\_  
Hon. Emily Jane Goodman, J.S.C.

**FILED**  
MAR 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE