

Hoffinger Stern & Ross, LLP v Neuman
2010 NY Slip Op 31092(U)
May 5, 2010
Supreme Court, New York County
Docket Number: 113111/09
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LOUIS B. YORK

PRESENT: _____ **J.S.C.**
Justice

PART 2

Hoffinger Stein & Ross

INDEX NO. 113111/09

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -
Neuman

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

MAY 06 2010

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED BY THE COURT
WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 5/5/10

Luy

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

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 2

-----X
HOFFINGER STERN & ROSS, LLP,

Plaintiff,

-against-

Index No.

PHILIP NEUMAN, NEUMAN ASSOCIATES, LLC,
UNITED NATIONAL FUNDING, LLC, MAPLEWOOD
GARDENS, LLC, SAGE TERRACE, LLC, 5TH AVENUE
AT BLOOMFIELD ASSOCIATES, LLC, SAGE
TERRACE DEVELOPERS, LLC, CLASSIC
DEVELOPMENT ASSOCIATES OF CLOVE ROAD,
LLC, PAPER CLIP REALTY, LLC, HOWSTER
PARTNERSHIP, INTERVAL MANAGEMENT CORP.,
NEUMAN ENTERPRISES, LLC, PREMIER
BEVERAGES, LLC, and JOHN DOES 1-20,

113111/09

Defendants.

FILED
MAY 06 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Plaintiff moves for partial summary judgment on its second cause of action and for dismissal of defendants' affirmative defenses.

This is an action for breach of contract, account stated, unjust enrichment and quantum meruit. According to the complaint, plaintiff served as the legal counsel for defendant Philip Neuman (Neuman) and the other defendants, which are entities owned and/or controlled by Neuman, or associates of Neuman. Neuman retained plaintiff beginning on July 12, 2006. For almost two years, plaintiff was the legal representative of defendants in over a dozen actions in New York and New Jersey. Plaintiff is seeking the recovery of fees for legal services performed in these actions, as well as other work done on behalf of defendants.

Plaintiff brought a similar action against defendants the previous year, entitled *Hoffinger*

Stern & Ross, LLP v Neuman, et al., Index No. 105427/08. Plaintiff sought summary judgment against Neuman on its account stated cause of action. The court in that action held that, pursuant to Part 137 of the Rules of the Chief Administrator (Rules), defendant had the right to arbitrate a fee dispute. The court therefore dismissed the action.

Plaintiff claims that it gave Neuman thirty days written notice of his right to seek arbitration. To date, plaintiff asserts that Neuman has not filed a request for arbitration. Plaintiff brings a new action, this one, and seeks summary judgment on the account stated cause of action against defendants, jointly and severally.

According to plaintiff, invoices to Neuman were transmitted on a monthly basis. An affidavit from plaintiff's office manager, Lyn LiCalsi, states that none of plaintiff's statements to Neuman was returned as undelivered, misaddressed or undeliverable. Plaintiff avers that Neuman provided no written or oral proof that he disputed the invoices he received. Moreover, as alternative proof, plaintiff states that Neuman made partial payments against the invoices. In the answer, Neuman admitted that he caused various payments to be made to plaintiff. Plaintiff states that Neuman made up to \$980,000 in payments for fees and disbursements incurred.

Plaintiff claims that during the course of the ongoing representation, plaintiff agreed to provide Neuman a reduction of \$110,000 against prior fees invoiced, on the condition that he remit a certain amount over the course of a six month period (e.g. \$ 45,000 for each of six months). Plaintiff states that Neuman failed to keep his promise and, consequently, an invoice dated April 16, 2008 was sent, reinstating the \$110,000 reduction.

In seeking partial judgment, plaintiff wants the amount of (a) \$785,924.60 with interest (said figure reinstating the \$110,000 conditional reduction), or, at a minimum, (b) \$675,924.60

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with interest (crediting for the \$110,000 reduction, without prejudice to seeking the same in connection with other causes of action in the complaint).

Plaintiff also moves to dismiss the affirmative defenses in the answer. Each defense is alleged upon information and belief. The twelve defenses are lack of personal jurisdiction, failure to state a cause of action, unclean hands, excuse from performing obligations, full performance of obligations, failure to mitigate damages, plaintiff's failure to perform, statute of limitations, contributory negligence, estoppel, waiver and conflict of interest. Plaintiff asserts that no factual basis is pled to support the defenses and defenses should be dismissed as conclusory. Plaintiff claims that defendants were put on notice and afforded the opportunity to amend the pleading to substantiate their defenses. Failing to amend, defendants allegedly should have their defenses dismissed.

Opposing the motion, defendants raise several arguments. First, they argue that plaintiff has not adequately pled or proven its compliance with the pre-litigation notice of right to arbitrate requirements. Second, they argue that plaintiff failed to provide defendants with required written letters of engagement. Third, they argue that triable issues remain as to the account stated cause of action, including whether defendants objected to the invoices. Fourth, they argue that plaintiff represented defendants under an undisclosed conflict of interest in violation of the Code of Professional Responsibility (Code). Fifth, they argue that the motion should be denied due to the need for discovery.

Defendants assert that the complaint names thirteen separate defendants. Defendants state that plaintiff has not alleged in its complaint that all the defendants from whom it seeks judgment received notice of a right to arbitrate prior to the commencement of this action. Even if

plaintiff adequately pled compliance with Part 137 of the Rules, defendants claim that plaintiff did not provide evidence that defendants had received notice by certified mail. Pursuant to Part 137, the 30 day period to seek arbitration does not start to run until notice was received. Since plaintiff allegedly failed to provide compliance with Part 137, defendants state that the motion must be denied.

Further, defendants note that plaintiff alleges that several of the defendants are residents of New Jersey, and that services were rendered in New Jersey courts. Similar to Part 137, Section 1:20 A-6 of New Jersey Rule of Court requires an attorney, prior to the institution of an action to recover a fee, to advise his or her client of the availability of an arbitration remedy for fee-dispute resolution, and to certify that such notice was given in the complaint. Moreover, if an attorney fails to notify his client of the arbitration option pursuant to the rule, a dismissal is warranted, as in New York.

The second argument is that plaintiff allegedly failed to demonstrate the existence of fee contracts for all the services rendered to all the defendants. According to 22 NYCRR 1215, sometimes called the Letter of Engagement Rule, which applies to all civil actions where the amount in controversy is \$3,000 or more, attorneys are required to provide all clients with a written letter of engagement explaining the scope of legal services, the fees to be charged, billing practices to be followed and the right to arbitrate a fee dispute under Part 137 of the Rules. In its motion papers, plaintiff provides two retainer agreements dated July 2006 and a third one dated April 2008. Defendants aver that these agreements only cover three of the numerous matters for which plaintiff claims to have been retained. Moreover, the aforesaid agreements were executed only by Neuman.

Defendants contend that plaintiff may have intentionally represented defendants in violation of the aforesaid rule and dispensed with the execution of written fee agreements. Such an intention would allegedly preclude a recovery of fees. Nevertheless, defendants assert that the motion must be denied.

Defendants assert that the motion should be denied on the ground of triable issues of fact. First, defendants assert that Neuman, in his affidavit filed in opposition to the prior motion in the earlier action, stated that he had objected to invoices he received from plaintiff as inconsistent with agreed-upon arrangements. Also, defendants state that, while plaintiff avers that detailed invoices were sent to Neuman, only a small percentage of them were actually exhibited. Defendants claim that the offered invoices are vague and cursory, and that there is a dispute as to the nature, terms and conditions of the arrangement for payments of fees.

Defendants contend that plaintiff concurrently represented adverse parties in a legal proceeding. Specifically, they claim that Steven Stern, an attorney who works for plaintiff, represented Neuman and his opponent, Mark Stern, in an action in Rockland County, and that Neuman never signed a waiver after full disclosure. Defendants maintain that this alleged conflict of interest is a gross violation of the Code.

Finally, defendants argue that they served a request for production of documents in this action, seeking fee and/or retainer agreements, documents evidencing fee and/or retainer agreements, invoices for services rendered and costs incurred, all conflict waivers and all documents evidencing time spent and money incurred by plaintiff's performance of legal services. Before responding to these requests, plaintiff brought this motion. Defendants contend that the motion is premature and that discovery is essential at this time.

With respect to the affirmative defenses, defendants consider them sufficient to give notice to plaintiff. They aver that plaintiff could seek further elucidation of the defenses through a demand for a bill of particulars. However, if the court finds that the defenses should be set forth in greater detail, defendants request leave to replead them.

In reply, plaintiff argue that defendants rely on the affidavit of defendants' counsel who lacks personal knowledge of the facts, and upon an old affidavit from Neuman that was used in the earlier action. Plaintiff wants the references to Neuman's affidavit stricken. This affidavit is said to be contradicted by evidence, specifically where Neuman claimed not to have recalled executing any retainer agreements and denied being provided with backup details for billing statements.

Plaintiff states that defendants were afforded the opportunity to arbitrate the fee dispute and decided not to do so. According to plaintiff, defendants' present counsel confirmed via phone that defendants would not pursue arbitration. Plaintiff provides a copy of a return postcard received by it, evidencing Neuman's receipt of the offer of arbitration on April 20, 2009. Plaintiff asserts that since Neuman had control over the defendant-entities, it would not be necessary to mail offers to all of them individually. Plaintiff contends that by raising the arbitration argument, defendants are indulging in frivolous conduct.

Plaintiff claims that after executing the first two retainer agreements and making subsequent payments, Neuman requested that plaintiff represent him and his entities on all future matters without the necessity of future separate retainer agreements. Plaintiff argues that this is a perfectly permissible procedure. Citing 22 NYCRR 1215.2, plaintiff states that the Letter of Engagement Rule does not apply to representation where the attorney's services are of the

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general kind as previously rendered to and paid for by the client. Plaintiff avers that, even if there was some technical violation of the Rule, it would not warrant denial of summary judgment on the account stated cause of action.

Plaintiff states that there are no triable facts precluding summary judgment, and alleges that Neuman's oral protests are conclusory and self-serving. Plaintiff also states that its submission of bills with its motion papers are sufficient to create an account stated.

Plaintiff refers to the alleged conflict of interest as a non-issue, due to the assertion that Neuman knew of and approved plaintiff's representation of Mark Stern in a unrelated federal action. Plaintiff asserts that there was no simultaneous representation of Neuman and an adverse party in the same litigation.

Plaintiff also asserts that the need for discovery is a non-issue and that all of the documents sought by defendants are already in the custody and possession of defendants by virtue of the monthly invoicing.

Plaintiff again appeals to this court to dismiss the affirmative defenses, stating that defendants already had an opportunity to amend the answer and refused to do so.

The court will first decide whether plaintiff abided by Part 137 prior to commencing this suit. Pursuant to Part 137, plaintiff may not sue defendants in court over a fee dispute unless it provides defendants with notice of their right to utilize arbitration. Once defendants have received this notice they have 30 days to decide whether to utilize arbitration. If they refuse arbitration after 30 days, plaintiff is free to resort to litigation. Plaintiff has provided proof that Neuman received notice of his right to arbitrate. It is apparent that the 30 day period is over, and that Neuman has shown no interest in arbitration.

The previous motion was addressed to Neuman personally. The other entities are being sued independently of Neuman and the present motion is brought against them and Neuman jointly and severally. Pursuant to Part 137, these entities must also be given notice of their right to arbitrate before this action can continue. This court shall sever the motion, and while plaintiff provides notice to the other entities as to their right to arbitrate, the court shall determine whether Neuman can be personally be liable for the claim of account stated.

With respect to the letters of engagement, plaintiff has provided proof that the relationship between plaintiff and Neuman would come under the conditions provided by 22 NYCRR 1215.2. Plaintiff had provided previous services to Neuman and Neuman made prior payments. This would permit an exception to the aforesaid Rule.

“An account stated is an agreement between parties to an account based upon a prior transaction between them with respect to the correctness of the account items and the balance due.” *Ryan Graphics, Inc. v Ballin*, 39 AD2d 249, 250 (1st Dept 2007). A recovery premised upon an account stated will fail where a dispute about the account can be shown to have existed. *Farley v Promovision Video Display Corp.*, 198 AD2d 122, 123 (1st Dept 1993). Generally, receipt and retention of a law firm’s account without objection within a reasonable time, and an agreement to pay a portion of the indebtedness, gives rise to an account stated. *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51 (1st Dept 2004); *Scheichet & Davis, P.C. v Steinger*, 183 AD2d 479 (1st Dept 1992).

An affidavit of Neuman that was used in the prior action is being used here to oppose the motion. In this affidavit, Neuman denied making payments against the various invoices. He asserted that, based upon conversations with plaintiff, plaintiff would accept lump sum payments

against fees and costs incurred and that any further payments would be based upon a further agreement assessing the scope and nature of the work performed. He also asserted that he objected to some invoices as inconsistent with the parties' accepted course of conduct concerning the payment of fees, and as excessive and unclear. Neuman does not state specifically when he objected to the invoices and the specific substance of the conversations in which the objections were made. Plaintiff has submitted copies of correspondence to defendants' counsel in which plaintiff asserted that Neuman never previously objected or questioned invoices sent to him.

The court finds that Neuman has not provided sufficient evidence that he objected to the invoices sent by plaintiff. Thus, he has not raised triable facts which would preclude summary judgment. Plaintiff is entitled to summary judgment on its account stated cause of action.

The court will disregard the issue of whether plaintiff's counsel has possibly committed a conflict of interest as defendants have shown insufficient evidence of such a violation.

The affirmative defenses are dismissed on the ground that defendants failed to properly respond to plaintiff's request to elucidate upon them.

Accordingly, it is

ORDERED that the motion for partial summary judgment is severed and granted against defendant Philip Neuman in his personal capacity and that he is liable on the second cause of action for an account stated; and it is further

ORDERED that the motion for partial judgment is denied to the other defendants; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Philip Neuman in the amount of \$ 785,924.60, together with interest as

prayed for allowable by law at a rate of 9% per annum from the date of the commencement of this action until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs motion; and it is further

ORDERED that the motion to dismiss the affirmative defenses is granted and the Clerk of the Court is directed to include this dismissal in the aforesaid judgment; and it is further

ORDERED that this action continues against the remaining defendants.

DATED: 3/5/10

ENTER:

_____ *Tracy*

J.S.C.

LOUIS B. YORK
J.S.C.

FILED

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