

**Kalow & Springut LLP v Members Only Licensing
Group LLC**

2010 NY Slip Op 31444(U)

June 7, 2010

Supreme Court, New York County

Docket Number: 114390/09

Judge: Eileen A. Rakower

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

PRESENT: Rakower

PART 15

Index Number : 114390/2009
KALOW & SPINGUT LLP
vs.
MEMBERS ONLY LICENSING GROUP
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

1 this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2, 3

4, 5, 6

7, 8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED
JUN 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/7/10



HON. ELBEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
KALOW & SPRINGUT LLP,

Plaintiff,

Index No.114390/09

Decision and Order

- against -

Seq No.: 001 & 002

MEMBERS ONLY LICENSING GROUP LLC,

Defendant.

-----X
HON. EILEEN A. RAKOWER

Plaintiff, Kalow & Springut LLP (K&S) brings this action for breach of contract, account stated and unjust enrichment to recover \$72,246.77, representing legal fees for services rendered, which K&S billed to defendant, Members Only Licensing Group LLC (Members) in 14 separate invoices dated from April 2008 to September 2009, all of which remain unpaid. K&S brings this motion for summary judgment on its claim for an account stated pursuant to CPLR 3212. K&S, by separate motion, seeks to compel discovery, although K&S concedes such motion will be rendered moot by a favorable decision and judgment on its first motion. Members opposes both motions, and cross moves to amend its answer to include an affirmative defense that the dispute is subject to mandatory arbitration under 22NYCRR 137.1.

Plaintiff, in support of its motion, provides the pleadings and 15 invoices for professional services, the first seven of which are dated in the year 2008 and addressed to Mr. Paul Spector of Members, and the next eight of which are dated in the year 2009 and addressed to Mr. Arnold Simon of Members. Plaintiff, by affirmation of counsel Milton Springut, explains the firm's billing and mailing practices, and asserts that the invoices were received and retained without objection, and remain unpaid.

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Defendant, in opposition and in support of its cross motion to amend, provides an attorney affirmation, the affidavit of Arnold Simon along with a schedule he prepared to address the unpaid invoices, and its proposed amended answer. Defendant claims Mr. Spector no longer works for Members, and that he was the person primarily responsible for directing and reviewing K&S's work. Defendant asserts it lacks facts essential to oppose the summary judgment motion without first taking the non party deposition of Mr. Spector. Further, defendant urges that it was not advised by plaintiff of its right to have the dispute resolved by arbitration pursuant to 22 NYCRR 137.1. Finally, Defendant explains, in opposition to the motion to compel, that its failure to timely respond was not willful. Rather, "Defendant's business has suffered in the current economic climate and, as a result, was compelled to reduce its staff. The loss of personnel has delayed Defendant's discovery responses."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557[1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

"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 . . . In this regard, receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor." (*Shea & Gould v. Burr*, 194 AD2d 369,370[1st Dept. 1993]).

Where facts essential to justify opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied. (See CPLR §3212(f)). However, the opposition must

offer more than mere hope that it might be able to uncover some evidence during the discovery process which will impeach the facts asserted by movant. See Pow v. Black, 182 AD2d 484 (1st Dept. 1992). It is incumbent upon the party opposing a motion on CPLR 3212(f) grounds to provide a proper evidentiary basis supporting its request for further discovery. Where facts essential to justify opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied.

Regarding the Fee Dispute Resolution Program, 22 NYCRR 137.1, states, in relevant part:

(a) This Part shall apply where representation has commenced on or after January 1, 2002, to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter.

(b) This Part shall not apply to any of the following:

(2) amounts in dispute involving a sum of less than \$1,000 or more than \$50,000, except that an arbitral body may hear disputes involving other amounts if the parties have consented.

Pursuant to CPLR 3025(b), "A party may amend his pleading... at any time by leave of court... Leave shall be freely given upon such terms as may be just..." "CPLR 3025 allows liberal amendment of pleadings absent demonstrable prejudice" (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). Notwithstanding the absence of prejudice, leave to amend a pleading must be denied where the proposed amendment is plainly lacking in merit (*see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]).

Initially, the motion to amend must be denied. The amount in dispute exceeds \$72,000, and 22 NYCRR 137.1 does not apply to the instant case.

Plaintiff has set forth the elements of an account stated. Defendant urges that an employee, who was the addressee of only the first seven invoices, must be deposed before it will have facts essential to its opposition. Specifically, it claims Mr. Spector is the only individual who may have objected to the invoices. However, Defendant

demonstrates no efforts to obtain such non party deposition. Nor does it state that records maintained within the company cannot supply duplicative facts, if indeed, such facts were to exist. "Inasmuch as plaintiffs' inability to oppose the summary judgment motion resulted from their own voluntary inaction, their reliance on CPLR 3212(f) is misplaced [internal citation omitted]." (*Cooper v. 6 West 20th Street Tenants Corp.*, 258 AD2d 362 [First Dept. 1999])

Wherefore, it is hereby

ORDERED that the cross motion to amend defendant's answer is denied; and it is further

ORDERED that the motion for summary judgment is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Members Only Licensing Group LLC in the amount of \$72,246.77, together with interest as prayed for allowable by law at the rate of 9% from October 14, 2009 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; and it is further

ORDERED that the motion to compel is denied as moot.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: June 7, 2010



Eileen A. Rakower, J.S.C

FILED
JUN 10 2010
NEW YORK
COUNTY CLERK'S OFFICE