

<b>Reisman, Peirez &amp; Reisman, L.L.P. v Glass</b>
2010 NY Slip Op 32651(U)
August 31, 2010
Supreme Court, Nassau County
Docket Number: 12249/09
Judge: F. Dana Winslow
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SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**REISMAN, PEIREZ & REISMAN, L.L.P.,**

**TRIAL/IAS, PART 5  
NASSAU COUNTY**

**Plaintiff,**

**-against-**

**ANNE GLASS,**

**Defendant.**

**MOTION SEQ. NO.: 001, 002  
MOTION DATE: 6/24/10**

**INDEX NO.: 12249/09**

**The following papers read on the motion (numbered 1-3):**

**Notice of Motion.....1**  
**Notice of Cross Motion.....2**  
**Reply Affirmation.....3**

Plaintiff, Reisman, Peirez & Reisman, LLP (“RPR”), moves, pursuant to CPLR §3212, for an Order of this Court, granting summary judgment on its first, second, third and fourth causes of action in the Complaint in the sum of \$11,042.10, together with interest thereon at the rate of nine (9%) percent from June 1, 2008; and upon the granting of summary judgment, severing and discontinuing the fifth cause of action pursuant to CPLR §3217(b). Defendant Anne Glass (“Glass”), cross moves, pursuant to CPLR §3211(a)(7), for an Order of this Court, granting dismissal of plaintiff’s complaint in its entirety. The motions are determined as follows.

This is a fee dispute action. The undisputed facts are as follows:

On or about April 4, 2007, RPR and Glass executed a Retainer Agreement pursuant to which RPR agreed to represent Glass in the negotiation and execution of an agreement for the resolution of her matrimonial dispute. Pursuant to the Retainer Agreement, RPR and Glass also executed a “Statement of Client’s Rights and Responsibilities.” According to the Retainer Agreement, Glass promised and agreed, *inter alia*, to (a) pay RPR time charges, expenses and disbursements for its services

representing her in the marital negotiation; and (b) pay or reimburse RPR for all disbursements advanced on defendant's behalf in the marital negotiation. The Retainer Agreement further advised Glass of her right to discontinue RPR's representation of her, and of RPR's right to discontinue its representation of her where the legal fees or disbursements remained unpaid. In connection with executing the Retainer Agreement, Glass paid RPR a Retainer of \$5,000.00.

Thereafter, until approximately April 25, 2008, RPR rendered legal services and incurred costs and disbursements on behalf of Glass in the marital negotiations. Such legal fees and disbursements totaled \$16,042.10. RPR alleges that other than paying the initial retainer of \$5,000.00, Glass never made another payment to RPR on the account of the services it rendered on Glass's behalf.

Since May 1, 2007, RPR mailed monthly invoices to Glass; yet, she has undisputedly failed to submit payment for her arrears owed to RPR. On or about January 26, 2009, RPR mailed Glass a notice of her right to have this fee dispute arbitrated, pursuant to Part 137 of the Rules of the Chief Administrator. Glass, however, never demanded arbitration or otherwise contacted RPR in a good faith effort to resolve the fee dispute. Accordingly, RPR commenced this action on June 23, 2009. Based upon these facts, RPR maintains that Glass is liable to it for the outstanding sum of \$11,042.10.

Defendant Glass opposes the motion and, in turn, cross moves for an Order, pursuant to **CPLR §3211(a)(7)**, dismissing plaintiff's complaint in its entirety on the grounds that the complaint fails to state a cause of action. In opposition, Glass argues that there has not been any discovery to adduce evidence to support the plaintiff's version of the facts or undermine defendant's denial of those facts. Additionally, relying principally upon her self serving arguments advanced in her affidavit in opposition to plaintiff's motion, Glass submits that she disputed and objected to plaintiff's billing and that she never received the arbitration packet allegedly mailed on January 26, 2009 because it was mailed to her prior residence where she no longer resided.

Furthermore, in support of her own cross motion, Glass maintains that as plaintiff failed to plead a condition precedent to bringing this action - i.e., that defendant received notice from plaintiff of her right to arbitrate the fee dispute as required by 22 NYCRR 136.5 - the action must be dismissed in its entirety. Defendant's arguments are

unavailing.

An action on an account stated is established by proving the defendant received and retained bills for services rendered or goods provided to the defendant without objection (*Nebraskaland, Inc. v. Best Selections, Inc.*, 303 AD2d 662 [2<sup>nd</sup> Dept. 2003]; *Herrick Feinstein LLP v. Stamm*, 297 AD2d 477 [1<sup>st</sup> Dept. 2002]). A cause of action for account stated cannot be maintained when the plaintiff does not establish that an account was presented to the defendant or the defendant establishes that it has contested the charges (*M & A Construction Corp. v. McTague*, 21 AD3d 610 [3<sup>rd</sup> Dept. 2005]; *Abbott, Duncan & Wiener v. Ragusa*, 214 AD2d 412 [1<sup>st</sup> Dept. 1995]).

Based upon the documentary evidence submitted by plaintiff in this action, the Court finds that plaintiff RPR, has sufficiently demonstrated its entitlement to judgment as a matter of law. It is clear, based upon the invoices submitted, that defendant Glass accepted the invoices dated May 1, 2007 through June 1, 2009, without objection, thereby acquiescing to their accuracy and the correctness of the amount (*Speciner v. Parr*, 252 AD2d 554 [2<sup>nd</sup> Dept. 1998]).

In opposition, Glass maintains that \$16,042.10 “is not a reasonable value for the services performed” (*Answer*, ¶10). This argument however is insufficient to defeat RPR’s prima facie showing of entitlement to judgment as a matter of law and does not “establish the existence of material issues of fact which require a trial of the action” (*Alvarez v. Prospect Hosp.* 68 NY2d 320 [1986]). The evidence demonstrates that plaintiff sent out regular invoices to defendant and that it did not receive any objection to the invoices. Consequently, defendant’s assertions in opposition to plaintiff’s motion herein that the bills she received contained overcharges, does not preclude summary judgment in favor of plaintiff. This is particularly the case, because it is plain from a simple reading of the invoices, that RPR contains charges at the hourly rates defendant expressly agreed upon by signing the Retainer Agreement. It is undisputed that defendant signed the Retainer Agreement agreeing to pay such legal fees. Glass’s vague assertion that she did dispute the amount of the attorneys’ fees and did request to arbitrate the fee dispute is equally insufficient to raise an issue of fact herein particularly as she submits no evidence in support of her argument.

Glass’s argument that the case should be dismissed because the arbitration package

was mailed to her parents' home is also meritless. In light of the fact that RPR mailed the package to the sole address that she had provided to the firm during her representation and her acknowledgment in her cross motion that she did reside at that address during all relevant times herein, her argument for dismissal on these grounds is unavailing. Moreover, this Court cannot overlook the fact that the law merely requires that RPR only "substantially comply" with Part 136 (*Edelman v. Poster*, 72 AD3d 182, 184 [1<sup>st</sup> Dept. 2010]). Thus, where as here, the Retainer Agreement and Statement of Client's Rights and Responsibilities, read together, advise defendant of her right to arbitrate fee disputes, RPR has satisfied Part 136 of the Rules of the Chief Administrator. In that regard, defendant's self serving statements in her affidavit that she had multiple conversations with Seymour Reisman, the firm's managing partner and a friend of defendant's family, regarding the amount she was being charged and how she believed it was unfair, is baseless. The fact is that the Retainer Agreement and the Statement of Client's Rights and Responsibilities plainly spelled out the fee rates. Furthermore, not only did she sign both documents but, as stated above, she also never objected to the same in writing or more formally.

Glass's argument that a grant of summary judgment is premature because additional discovery is needed is also baseless. The mere hope that further discovery would yield evidence of a triable issue of fact is not a basis for denying summary judgment (*see Chemical Bank v. PIC Motors Corp.*, 58 NY2d 1023, 1026; *American Home Assur. Co. v. Gemma Constr. Co.*, 275 AD2d 616; *Lambert v. Bracco*, 18 AD3d 619, 620). This is especially so when defendant fails to come close to meeting her burden of showing that discovery would lead to identifiable facts necessary to defeat summary judgment, that such facts are solely in the possession of RPR and that her ignorance of these facts was unavoidable and that she made reasonable attempts to discover these facts (*Lavin & Kleiman v. J.M. Heinike Assocs.*, 221 AD2d 919 [4<sup>th</sup> Dept. 1995]).

Accordingly, it is

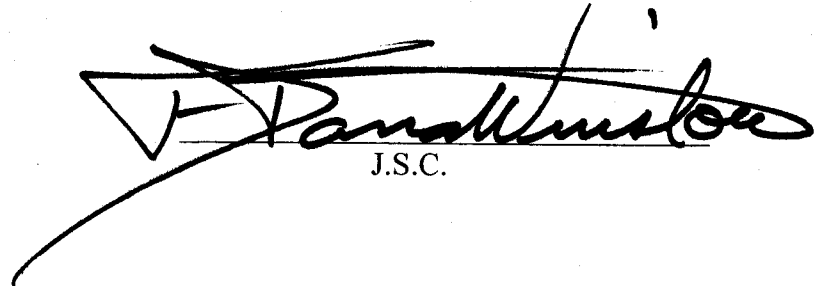
ORDERED, that plaintiff's motion for an Order granting it summary judgment on its first, second, third and fourth causes of action in the sum of \$11,042.10, together with interest thereon at the rate of 2% from June 1, 2008 is **granted**. The Court hereby reduces the interest rate to 2% from the 9% requested. *See Kurre v. Wong* (Winslow, J),

December 18, 2009. Under these circumstances, plaintiff's fifth cause of action for attorneys' fees, is discontinued pursuant to CPLR §3217(b); and it is further

ORDERED, that defendant, Anne Glass's cross motion for an Order dismissing plaintiff's complaint pursuant to CPLR §3211(a)(7) is **denied**.

This constitutes the Order of the Court.

Dated: *Aug 31*, 2010

  
J.S.C.

**ENTERED**  
SEP 22 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE