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M E M O R A N D U M

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - IAS PART 16

IDEAL STEEL SUPPLY CORP.,

Plaintiff,

- against -

MARSHALL H. BEIL, MCGUIRE WOODS, LLP, ROSS & HARDIES, LLP.,

Defendants.

BY: KELLY, J

DATED: NOVEMBER 18, 2010

INDEX NUMBER: 20519/06

MOTION DATE: SEPTEMBER 7, 2010

MOT. SEQ. NUMBER 7

The defendants have moved for, inter alia, summary judgment and dismissal of plaintiff's cause of action for legal malpractice. Plaintiff has cross moved for summary judgment dismissing the counterclaim.

On or about December 11, 2001, plaintiff Ideal Steel Supply Corp. retained defendant Ross & Hardies LLP (R&H), a law firm, in contemplation of legal action against National Steel Supply, Inc., a competitor. Both Ideal and National operate stores in Queens and the Bronx, and Ideal asserts that wrongful action by its competitor cost it approximately $10,000,000.

It is undisputed that Paul Brancato, one of the principals of Ideal, acting on behalf of his company, signed a retainer agreement with defendant R&H, the predecessor of defendant McGuire Woods, LLP (MW), providing, inter alia, that defendant Marshal H. Beil, Esq. would provide representation at the rate of $400.00 per

hour and that Joshua Rubin, Esq., an associate, would provide representation at the rate of $265 per hour. The retainer agreement further provided in relevant part: "These rates may be adjusted periodically, and the applicable rates will be those in effect at the time the services are rendered. Disbursements, such as telephone, mailing, photocopying, etc. will be billed to you at our cost."

The plaintiff alleges that Beil orally promised Brancato at various later times during the Anza litigation that (1) he would not raise any rates without the client's written consent, (2) that he would rebate at lease half of the total billing at the end of representation, (3) that he would charge Ideal at rates no higher than any other client, (4) that he would charge actual cost rather than premium rates for the services of a paralegal, and that he would discount $27,500 to compensate for excessive copying charges. Ideal apparently paid the defendants approximately $1,000,000 in legal fees and have alleged defendants breached their oral promises.

The underlying litigation commenced in or about June 2002, when defendant R&H instituted an action on behalf of the plaintiff in the United States District Court for the Southern District of New York against National and its owners, Joseph Anza and Vincent Anza, which asserted claims for breach of a previous settlement agreement and violations of the Racketeer Influenced and Corrupt

Organizations Act (hereinafter RICO) 18 USC §§ 1961 et seq (See, Ideal Steel Supply Corp. v Anza, 254 F Supp 2d 464). Specifically Ideal alleged that National did not charge the combined 8.25% New York State and New York City sales taxes to customers who paid cash, thereby gaining an unfair competitive advantage and, through mail and wire fraud, engaging in racketeering activity. The case eventually reached the United States Supreme Court which, inter alia, remanded the case to the Court of Appeals for further proceedings consistent with its opinion (See, Anza v Ideal Steel Supply Corp., 547 US 451). While the Anza matter was pending before the Supreme Court, the relationship between Ideal and the defendants herein soured mainly due, according to defendants, legal bills which Ideal wanted reduced.

Eventually, the plaintiff began this action for legal malpractice and breach of contract on September 19, 2006. On March 20, 2007, the defendants moved for an order dismissing the complaint against them pursuant to CPLR §3211(a)(1) and (7), and this court granted the motion in part and denied it in part pursuant to a decision and order dated July 3, 2007. The Appellate Division, Second Department affirmed this court's order insofar as appealed and cross-appealed (See, Ideal Steel Supply Corp. v Beil, 55 AD3d 544).

Turning to the defendant's motion, the plaintiff's first cause of action is for breach of contract, and it rests on, inter alia,

(1) the terms of the retainer agreement, (2) Beil's alleged promise not to raise billing rates without Ideal's written consent, and (3) Beil's alleged promise to rebate half of the total billing at the end of MW's representation. The first branch of defendants motion is for summary judgment based upon their ninth affirmative defense which invokes the doctrine of an account stated. Essentially, from on or about May 22, 2002 to April 20, 2006, the defendant law firms sent to the plaintiff thirty three invoices, usually on a monthly basis, which listed the services rendered by particular individuals, the time expended, and the hourly rates. The plaintiff paid $800,431 of the total billed. Defendants argue that, with respect to the amounts paid, plaintiff can not recover.

The court notes initially that the doctrine of an account stated may be used as the basis of a cause of action or as the basis of an affirmative defense (See, Gross v Empire Healthchoice Assur., Inc., 16 Misc.3d 1112[A] [Table], 2007 WL 2066390 [Text]; In re Rockefeller Center Properties, 272 BR 524 [applying New York law]). "The doctrine of account stated may be raised by a plaintiff seeking to recover from an account obligor or by a defendant seeking to prevent the reopening of a paid account . . ." (In re Rockefeller Center Properties, supra, 542). "An account stated is an agreement, independent of the underlying agreement, regarding the amount due on past

transactions . . .” (G.W. White & Son, Inc. v Gosier, 219 AD2d 866).

The basic elements of the doctrine of an account stated include (1) the plaintiff’s sending of invoices to the defendant and (2) the defendant’s retention of the invoices without objecting to them within a reasonable time (See, Star Video Entertainment, LP v J & I Video Distrib., 268 AD2d 423; Rona-Tech Corp. v LeaRonal, Inc., 254 AD2d 473; Werner v Nelkin, 206 AD2d 422). There can be no account stated where any dispute about the account is shown to have existed (See, PPG Industries Inc. v A.G.P. Systems Inc., 235 AD2d 979).

In the case at bar, the plaintiff came forward with sufficiently specific allegations that it made objections to certain billed items such as fee rates and copying costs. Since there are issues of fact pertaining to whether plaintiff Ideal retained or paid the bills without objection (See, Elmo Mfg. Corp. v American Innovations, Inc., 44 AD3d 703) this branch of the motion must be denied as summary judgment is not warranted where there is an issue of fact which must be tried (See, Alvarez v Prospect Hospital, 68 NY2d 320).

Turning to that branch of the motion which is for summary judgment dismissing that part of the first cause of action which alleges a breach of contract for failure to make a 50% reduction in fees, the plaintiff alleges that defendant Beil breached an

oral promise made in 2004 to reduce MW's invoices by 50%. The defendants assert that the plaintiff's allegation of such an oral modification lacks evidentiary support and lacks credibility (See, *e.g.*, Citidress II v 207 Second Ave. Realty Corp., 59 AD3d 209; Oakes v Oakes, 38 AD3d 865).

Contrary to the defendants' assertion, there is sufficient evidence in the record to create a genuine issue of fact concerning whether Beil made the promise. For example, there is evidence in the record that in September, 2004 Paul Brancato spoke on his cell phone to defendant Beil while on 30th Avenue, near his apartment, and that during the conversation Beil promised to make the adjustment at the end of the Anza case. Brancato testified at his deposition: "He [Beil] agreed to reduce his hourly rate . . ." (Tr., p. 59). "[W]hen it came to billing matters, it was, you know, he was rather clear that he was going to make these things happen, but that the paperwork or the billing might not reflect that because he had to, you know, keep his partners happy . . . but he assured me at the end of the day, that we would be properly credited." (Tr., p. 61). Jack Brancato testified similarly at his deposition: "He agreed that since he was billing so much and like anything else, you get a volume discount, I would get that at the end." (Tr., p. 114). While the plaintiff did not produce documentation supporting the alleged oral promise (which would have resulted in a downward adjustment of over $400,000) and while

the plaintiff may not have made specific reference to the alleged oral promise at the earliest stages of this litigation, such matters merely raise issues of credibility which may not be resolved on a motion for summary judgment (See, Dayan v Yurkowski, 238 AD2d 541; T&L Redemption Center Corp. v Phoenix Beverages, Inc., 238 AD2d 504; First New York Realty Co., Inc. v DeSetto, 237 AD2d 219). Accordingly, this branch of the motion is denied.

That branch of the motion which is for summary judgment dismissing that part of the first cause of action which alleges a breach of contract because of an increase in the hourly rates without the plaintiff's consent is granted. Plaintiff has alleged that defendant Biel made the hourly rate promise contemporaneously with the signing of the written retainer averring that: "In or about December 2001, Paul Brancato by telephone asked Marshall Biel to agree that he would not increase the rates without a further signed agreement by Giacomo Brancato consenting to rate increases. Beil agreed."

However, the retainer agreement, signed in December 2001, said nothing about further consent by Giacomo Brancato and allowed Biel to adjust the rates unilaterally from time to time, specifically stating "these rates may be adjusted periodically, and the applicable rates will be those in effect at the time the services are rendered." In opposition, defendant argues the parol evidence rule prohibits proof in this regard.

"[A]bsent fraud or mutual mistake, where the parties have reduced their agreement to an integrated writing, the parol evidence rule operates to exclude evidence of all prior or contemporaneous negotiations between the parties offered to contradict or modify the terms of their writing" (Marine Midland Bank-Southern v Thurlow, 53 NY2d 381, 387). In the case at bar, the retainer agreement is an apparently complete written contract, and the plaintiff may not offer evidence of a contemporaneous agreement which modifies or adds to its terms (See, Salzstein v Salzstein, 70 AD3d 806; Bowery Boy Realty, Inc. v H.S.N. Realty Corp., 55 AD3d 766).

Contrary to the argument made by the plaintiff, the incomplete writing exception to the parol evidence rule (See, City of Buffalo v Buffalo Police Benevolent Ass'n, Inc., 4 AD3d 815; Smith v Slocum, 71 AD2d 1058; Richardson on Evidence [11th Ed.] § 11-301) has no application to the case at bar. "Whenever . . . a written instrument appears, upon its face, to embrace all of the terms of a valid contract, the courts of New York are disposed to exclude all extrinsic evidence tending to show an additional term of the contract which might have been, but was not, included in the writing" (Richardson on Evidence [11th Ed.] § 11-301).

The court notes that the parol evidence rule does not apply to alleged promises made by Biel after the signing of the retainer agreement such as (1) to charge Ideal at rates that did not exceed

any other clients (2003), (2) to reduce the invoices by 50% (2004), (3) to charge less than premium rates for the paralegal (2004), and (4) to reduce copying charges (2005). "[T]he parol evidence rule has no application to a subsequent agreement, and the rule does not exclude parol evidence of a subsequent modification or discharge of a written agreement" (Local 50, Bakery Confectionery and Tobacco Workers Union, AFL-CIO v American Bakeries Co., 73 AD2d 862; *Scott v KeyCorp*, 247 AD2d 722; Getty Refining and Marketing v Linden Maintenance Corp., 168 AD2d 480).

That branch of the motion which is for summary judgment dismissing those parts of the first cause of action which make "any claim for any adjustments at the end of the [Anza] litigation" is denied. Contrary to the defendants' allegation, Paul Brancato did not waive the alleged agreement to make billing adjustments at the end of the Anza case. His e-mail dated September 27, 2005 reads in relevant part: "I want to be flexible and provided that we all get a reasonable payday, we *might* well ignore these [billing] issues in the end. . . . We will *probably* forego the adjustments in the end." (Italics added). Brancato did not make a definite promise to waive adjustments if the Anza litigation ended favorably. In any event the Anza litigation ended badly for Ideal when, on June 30, 2009, a federal court district court, after the appeals and remand, granted Anza's

motion for judgment on the pleadings and, alternatively, for summary judgment dismissing Ideal's last cause of action (Ideal Steel Supply Corp. v Anza, 2009 WL 1883272).

Although Ideal did not prevail, the defendants herein argue frustration of performance (See, Stardial Communications Corp. v Turner Const. Co., 305 AD2d 126), because Ideal's discharge of MW allegedly prevented the law firm from obtaining a favorable outcome. However, since there was no definite promise or agreement to waive adjustments if the Anza litigation ended in Ideal's favor, the defendants cannot successfully invoke the doctrine of frustration of performance.

That branch of the motion which is for summary judgment dismissing the third cause of action insofar as it alleges legal malpractice arising from a protective order entered in the Anza litigation is granted.

The plaintiff alleges that the defendants committed legal malpractice by advising it to consent to an overly broad protective order entered into during the discovery phase of the Anza litigation which, inter alia, impaired the plaintiff's ability to inform governmental authorities about the illegal conduct of the Anza company. According to defendant Beil, the Anza litigants, who were direct competitors, had concerns about the disclosure of their financial records, customer lists, supplier invoices, pricing information, and tax returns. In

Beil's professional judgment, the federal district court would impose a protective order if Ideal did not agree to a negotiated one, the preferable course of conduct. The plaintiff alleges that Beil gave incorrect legal advice by advising that (1) "virtually every case in federal court has one of these," and that such an order "is in every litigation," (2) the protective order could be "easily modified," and (3) the protective order "would not affect our stated goals of going to the government and going to the press."

The claim of legal malpractice in regard to the protective order lacks merit. First, protective orders such as that agreed to by Ideal are, under the facts presented here are, indeed, common. "Protective orders have often been sought by agreement, particularly regarding confidential information and in litigation likely to involve a large volume of documents. . . . Protective orders have been used so frequently that a degree of standardization is appearing" (8 Wright & Miller: Federal Practice and Procedure. § 2035). Second, a district court has the discretion to modify, alter, amend, or lift an existing protective order (10A Fed. Proc., L. Ed. § 26:389; See, American Telephone and Telegraph Co. v Grady, 594 F.2d 594; H.L. Hayden Co. of New York, Inc. v Siemens, 106 FRD 551). Third, Ideal cannot base a claim of legal malpractice upon allegations that Beil's error

thwarted its attempt to use discovery for an improper purpose. The purpose of discovery is to gather materials for use in the pending litigation, not for use in other litigation, or for the harassment or embarrassment of the other party (See, Oppenheimer Fund, Inc. v Sanders, 437 US 340). Fourth, and perhaps most salient, Ideal did, in fact, notify the New York State Attorney General and other authorities about its competitor's alleged no-tax violations, and Ideal provided them with documents excluded from the protective order. In fact, Joseph Anza, Sr. eventually pled guilty to the crime of failing to collect and remit sales tax to the State of New York, in state Supreme Court, Queens County, on or about February 2, 2010, and he received a sentence of conditional discharge if he made restitution in the amount of $3,816,328.75.

"In order to prevail on a motion for summary judgment seeking dismissal of a complaint for legal malpractice, a defendant must establish that the plaintiff is unable to prove at least one necessary element of the legal malpractice action, i.e., that the plaintiff is unable to prove that he or she 'would have been successful on the underlying claim but for [the defendant's] negligence' . . .." (Giardina v Lippes, ___ AD3d ___, ___ NYS2d ___, 2010 WL 3817091, quoting Potter v Polozie, 303 AD2d 943, 944). In view of the criminal conviction of Joseph Anza, Sr., Ideal did successfully reach its goal of having the

governmental authorities end the no-tax scheme, and Ideal cannot establish the "but for" element of a legal malpractice cause of action.

The plaintiff's cross motion for summary judgment dismissing the defendants' counterclaim is denied. The defendants allege that the retainer agreement obligated the plaintiff to pay for disbursements such as photocopying, that MW incurred approximately $70,000 in photocopying costs, that the plaintiff paid only approximately $35,000 in photocopying costs, and that the plaintiff breached the retainer agreement by refusing to pay the balance. The plaintiff alleges that it reached an agreement with defendant Biel that if it paid $57,500 to the photocopying service Xact, the reduced sum which Xact agreed to accept, Biel would give Ideal a $27,500 credit toward MW's bills. Having paid $57,500 toward Xact's invoices, Ideal therefore asserts that it owes nothing further for photocopying charges.

The defendants, seeking to recover the $27,500 credit, reply that the plaintiff repudiated the above agreement by including in the first cause of action a claim for damages for the same photocopying dispute that had been settled. The papers reveal that plaintiff's response to the defendants' interrogatories sworn to September 22, 2007 states in relevant part: "The elements of damages include . . . (13) Mismanagement of documents and photocopying costs resulting in excessive fees for those service, $75,000."

A repudiation of a contract by one party allows the other party to claim damages for total breach (See, Norcon Power Partners, L.P. v Niagara Mohawk Power Corp., 92 NY2d 458). During the course of the instant action, the plaintiff has taken inconsistent positions in regard to the photocopying charges, admitting "Plaintiff did initially pursue a claim for such damages . . ." and then alleging "No; plaintiffs [sic] simply are not seeking 'damages for [those] very copy charges." The proponent of a motion for summary judgment has the burden of establishing its entitlement to judgment as a matter of law (See, Alvarez v Prospect Hospital, supra), and the plaintiff failed to carry this burden because the record is not clear concerning whether it has repudiated the photocopying agreement.

Short form order signed herewith.

Peter J. Kelly, J.S.C.