

Rose & Rose v Edelman
2010 NY Slip Op 33807(U)
April 7, 2010
Sup Ct, NY County
Docket Number: 101945/05
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 61

ROSE & ROSE,

Plaintiff,

-against-

JERRY EDELMAN and J & M REALTY SERVICES CORP.,

Defendants.

INDEX NO. 101945/05

MOTION DATE March 2, 2010

MOTION NO. 001

MOTION COURT OFFICE 3

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The following papers, numbered 1 to 6 were read on this motion for summary judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

3-5

6

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

Cross-Motion: Yes No

Upon the foregoing papers, plaintiff's motion to dismiss defendants' affirmative defenses and counterclaim and for summary judgment on the complaint and defendants' cross motion for summary judgment dismissing the complaint are decided in accordance with the accompanying decision and order.

MS

Dated: 4/7/10

O.P. Sherwood
O. PETER SHERWOOD, 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 61**

-----X
ROSE & ROSE,

Plaintiff,

DECISION AND ORDER

Index No.: 101945/05

-against-

**JERRY EDELMAN and J & M REALTY
SERVICES CORP.,**

Defendants.
-----X

HON. O. PETER SHERWOOD, J.S.C.:

In this action to recover fees for legal services, plaintiff moves for an order striking defendants' affirmative defenses and counterclaim and granting summary judgment in its favor on the complaint and defendant cross-moves for summary judgment dismissing the complaint. For the following reasons, the motion and the cross motion are both granted in part and denied in part.

Background

Plaintiff Rose & Rose (Rose & Rose) is a New York State licensed partnership that engages in the practice of law (Dreiblatt Aff., Exhibit "A", Complaint, ¶ 1). Defendant J & M Realty Services Corp. ("J & M") is a New York State licensed corporation that engages in the business of real estate management (*Id.*, ¶ 4). Co-defendant Jerry Edelman ("Edelman") is the president of J&M (*Id.*, ¶ 5; Edelman Aff., ¶ 1) (collectively "defendants").

Rose & Rose alleges that defendants retained them at some point in 2002 to provide legal representation in residential landlord and tenant proceedings before the Civil Court of the City of New York ("Civil Court") (*Id.*, ¶ 4). Rose & Rose alleges that defendants failed to pay for such legal services rendered during the period from between September 2003 and October 2004 (Dreiblatt Aff. ¶ 10). Rose & Rose specifically alleges that defendants owe \$51,707.48 in unpaid fees, and has submitted invoices to substantiate this debt (*Id.*, ¶ 7, Exhibit "C"). Rose & Rose finally alleges that defendants have never disputed the amounts set forth on these invoices, and have never paid them (*Id.*, ¶ 10).

In opposition to the motion and in support of their cross motion, defendants allege that they never retained Rose & Rose, and that Rose & Rose was actually hired by the "owners of various

residential properties” for which J & M merely happened to work as the managing agent (Edelman Aff., ¶¶ 3-4). Defendants note that there is no signed retainer agreement between themselves and Rose & Rose (*Id.*, ¶ 6). Edelman admits that he signed checks to pay Rose & Rose for its services, but states that he did so “only in my capacity as agent for these various owners” (*Id.*, ¶ 8). Defendants further state that in 2005 they ceased to act as managing agent for some of the property owners for whom Rose & Rose performed legal work (*Id.*, ¶ 9). Defendants also now assert that one set of the invoices that Rose & Rose now seeks to enforce is improper because it concerns unnecessary work occasioned by Rose & Rose’s “low quality” representation in the Civil Court in a proceeding entitled *P & J Housing Partners LLC v Richere* (*Id.*, ¶¶ 15-16). Finally, defendants assert that at some point they communicated a payment offer to Rose & Rose from one of the landlords that Rose & Rose represented, but that Rose & Rose refused the offer (*Id.*, ¶ 17).

Rose & Rose replies that it was directly retained by defendants, and presents a copy of an unsigned letter agreement, dated November 14, 2000, that sets forth a proposed schedule of fees for certain types of legal work (Rose Reply Aff. ¶ 10, Exhibit “A”). Rose & Rose further alleges that it commenced all of the landlord/tenant proceedings at issue herein at the sole direction of defendants, and that it reported to and consulted with defendants exclusively, and not with the individual property owners (*Id.*, ¶¶ 10-11, 14). Rose & Rose presents copies of status reports, bills and court settlements that it sent to defendants during the period of 2003-2004 (*Id.*, Exhibits “B”, “C”, “D”). Rose & Rose also presents copies of tenants’ rent information for use in landlord/tenant proceedings that defendants sent to it during that same period (*Id.*, Exhibit “E”). Finally, Rose & Rose presents a copy of a decision by the Appellate Term, First Department, in *P & J Housing Partners LLC v Richere* (8 Misc 3d 17, 18 [App Term, 1st Dept 2005]) that states that the inadvertent dismissal of that proceeding by the Civil Court “did not result from any lack of diligence on the part of landlord’s counsel.”

Rose & Rose commenced this action on December 23, 2004 by filing a complaint that sets forth causes of action for: 1) “the fair and reasonable value of legal services rendered pursuant to a retainer agreement”; 2) breach of contract; and 3) an account stated (Dreiblatt Aff., Exhibit “A”). Defendants filed an answer on June 14, 2005 that sets forth the affirmative defenses of: 1) general denial; 2) failure to state a cause of action; 3) failure to name indispensable parties; 4) payment; 5)

improperly naming J & M as a defendant; and 6) improperly naming Edelman as a defendant, as well as a counterclaim for attorney's fees (*Id.*, Exhibit "B"). Rose & Rose now moves for summary judgment on the complaint and to dismiss defendants' affirmative defenses and counterclaim, while defendants cross-move for summary judgment to dismiss the complaint.

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 "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). Here, the court finds that Rose & Rose is entitled to summary judgment on one of its causes of action, and that defendants have not established the existence of triable issues of fact with respect to either their affirmative defenses or their counterclaim.

As previously mentioned, Rose & Rose's first cause of action seeks "the fair and reasonable value of legal services rendered pursuant to a retainer agreement" (Dreiblatt Aff., Exhibit "A", ¶ 10). This appears to make out a claim of breach of contract. Pursuant to New York State law, the proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages (*see e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 [1st Dept 1988]). Here, however, as previously noted, Rose & Rose has failed to present a copy of a retainer agreement between itself and defendants. The November 14, 2000 letter agreement

annexed to Rose & Rose's reply papers is unsigned, and cannot be construed as a binding contract. (Rose Reply Aff., Exhibit "A"). Therefore, the court finds that Rose & Rose's first cause of action must fail, as a matter of law, because Rose and Rose has failed to present evidence of "the existence and terms of a valid, binding contract." Therefore, Rose & Rose's motion for summary judgment must be denied with respect to that cause of action.

Rose & Rose's second cause of action alleges breach of contract (Dreiblatt Aff., Exhibit "A", ¶ 13). This claim appears to be duplicative of Rose & Rose's first cause of action. Therefore, the court finds that Rose & Rose's second cause of action must also fail, as a matter of law, for the reasons discussed above and the motion is denied as to that cause of action.

Lastly, Rose & Rose's third cause of action alleges \$51,707.48 due pursuant to an account stated (*Id.*; ¶ 17). 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 [1st Dept 2009]; *Manhattan Telecommunications Corp. v Best Payphones, Inc.*, 299 AD2d 178 [1st Dept 2002]). Here, Rose & Rose has presented invoices totaling \$51,707.48 for unpaid legal work for the period of September 2003 through October 2004 (Dreiblatt Aff., Exhibit "C"). Defendants present no evidence that they raised any timely objections to these invoices, and do not deny that they have not paid them. In fact, defendants' only evident objection to these invoices appears to be set forth in Edelman's February 5, 2010 affidavit in support of defendants' cross motion - six years after the last unpaid invoice. This is insufficient, as a matter of law. Therefore, the court finds that Rose & Rose has made out a prima facie case with respect to its claim for an account stated which has not been sufficiently rebutted by defendants' submissions.

Defendants nonetheless object on the ground that they are not the proper parties to receive the invoices because they do not have an attorney/client relationship with Rose & Rose (Edelman Aff., ¶¶ 3-10). As the Appellate Division, First Department, recently noted in *Pellegrino v Oppenheimer & Co., Inc.* (49 AD3d 94, 99 [1st Dept 2008]),

To determine whether an attorney-client relationship exists, a court must consider the parties' actions. "[A]n attorney-client relationship is established where there is an explicit undertaking to perform a specific task." While the existence of the relationship is not dependent upon the payment of a fee or an explicit agreement, a

party cannot create the relationship based on his or her own beliefs or actions [internal citations omitted].

Here, Rose & Rose has presented documentary evidence that it initiated Civil Court proceedings at defendants' direction, consulted with and reported to defendants concerning those proceedings, and submitted invoices and received payment from defendants for its legal work on those proceedings (Dreiblatt Aff., Exhibit "C"; Rose Reply Aff., Exhibits "B", "C", "D", "E"). Such documentary evidence offer all of the necessary indicia of an attorney/client relationship. Defendants have presented no evidence, apart from their own self-serving allegations, to support the claim that Rose & Rose was retained by their client landlords. "[A]verments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment [citation omitted]" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004]). Therefore, the court rejects defendants' argument¹ as baseless.

Turning then to defendants' affirmative defenses and counterclaim, the court concludes that they do not raise a triable issue of fact sufficient to defeat plaintiff's motion for summary judgment.

Defendants' first affirmative defense consists of a general denial (Dreiblatt Aff., Exhibit "B", ¶ 10). This is clearly a conclusory allegation, and is dismissible on that ground (*see e.g. Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317 [1st Dept 2006]).

Defendants' second affirmative defense alleges that the complaint "fails to state a cause of action" (Dreiblatt Aff., Exhibit "B", ¶ 11). The court has already determined that although plaintiff's first and second causes of action must be dismissed, Rose & Rose has made out a prima facie case with respect to its account stated claim, and that its two breach of contract claims fail, as a matter of law. Therefore, the court finds that defendants' second affirmative defense does not raise a triable issue of fact.

Defendants' third affirmative defense alleges "failure to name indispensable parties" (*Id.*, ¶ 12). However, the court has already rejected as baseless defendants' contention that it was their

¹ Defendants raise the additional argument that Rose & Rose should have notified them of their right to arbitrate the instant fee dispute, pursuant to Court Rule 137 (*see Gropper Aff.*, ¶ 4). However, the court rejects this argument too, because, as Rose & Rose correctly points out, the instant fee dispute involves an amount at issue that is greater than the reach of this rule (*see Rules of the Chief Administrative Judge* § 137.1).

client landlords, and not themselves, that stood in an attorney/client relationship with Rose & Rose. Accordingly, all parties who must be before the court in order to resolve the present controversy have been properly named

Defendants' fourth affirmative defense alleges "payment" (*Id.*, ¶ 13). However, defendants do not support this allegation with any documentary evidence. Conclusory assertions which are unsupported by evidence are insufficient to sustain a motion for summary judgment (*see e.g. Mason v Dupont Direct Financial Holdings, Inc.*, 302 AD2d 260 [1st Dept 2003]).

Defendants' fifth and sixth affirmative defenses state that the complaint improperly named J & M and Edelman, respectively, as defendants (Dreiblatt Aff., Exhibit "B", ¶¶ 14-15). However, as discussed above, the court has already rejected these contentions as baseless. Accordingly, the court concludes that Rose & Rose's motion should be granted solely to the extent of awarding it summary judgment on its cause of action for an account stated, and that defendants' cross motion should be granted solely to the extent of dismissing Rose & Rose's first and second causes of action.

As a final matter, defendants raised a counterclaim for attorney's fees (*Id.*, ¶ 16). Rose & Rose asserts that this "counterclaim is baseless as there is no contractual or statutory basis" for it (Dreiblatt Aff., ¶ 19). Defendants do not identify such a basis in their cross motion. As previously noted, "averments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment [citation omitted]" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d at 383). Therefore, the court finds that there are no grounds to support defendants' request for legal fees, and therefore concludes that it should also be dismissed.

Conclusion

Accordingly, for the foregoing reasons, it is hereby

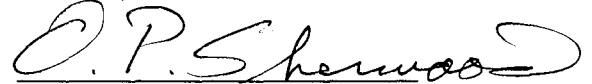
ORDERED that plaintiff's motion for summary judgment pursuant to CPLR § 3212 is granted solely to the extent of awarding plaintiff summary judgment on its third cause of action for an account stated, and the Clerk of the Court is directed to enter judgment in favor of plaintiff ROSE & ROSE and against defendants JERRY EDELMAN and J & M REALTY SERVICES CORP. in the amount of \$51,707.48, together with interest as prayed for allowable by law, 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

awarding plaintiff summary judgment dismissing said defendants' affirmative defenses and counterclaim, but is otherwise denied; and it is further

ORDERED that the defendants' cross motion for an order pursuant to CPLR § 3212 is granted solely to the extent that the first and second causes of action in the complaint are dismissed, but is otherwise denied.

DATED: 4/7/10

ENTER:

A handwritten signature in cursive script, appearing to read "O. P. Sherwood".

O. PETER SHERWOOD

J.S.C.