

**Wu & Kao v Yu Qing Wang**

2011 NY Slip Op 30279(U)

February 7, 2011

Sup Ct, NY County

Docket Number: 104625/2010

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C.

PART 10

Index Number : 104625/2010  
WU & KAO  
vs.  
WANG, YU QING  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

**FILED**

FEB 09 2011

Upon the foregoing papers, It is ordered that this motion  
NEW YORK COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

PC set for 3/3/11 @ 9:30am

Dated: FEB 07 2011

HON. JUDITH J. GISCHE J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----x  
WU & KAO,

Plaintiff,

Index No. 104625/2010

-against-

Seq. No. 001

YU QING WANG a/k/a HENRY WANG,

Defendant.  
-----x

**FILED**

FEB 09 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Pltf's n/m (3211, 3212) w/AS affirm, exhs . . . . .	1
Def's x/m (3212) w/YQW affid, KKT affirm, exhs . . . . .	2
Pltf's opp/reply w/AS affirm, exhs . . . . .	3
Def's reply w/KKT affirm . . . . .	4

Hon. Judith J. Gische, J.:

Plaintiff law firm, Wu & Kao, moves for an order dismissing defendant Yu Qing Wang's (Wang) affirmative defenses, pursuant to CPLR 3211 (b), and granting it summary judgment on its complaint, which seeks to recoup legal fees, based on causes of action sounding in breach of contract, account stated, quantum meruit, and unjust enrichment, for services rendered, according to the complaint, to Wang. Wang opposes the motion, and cross-moves for an order granting him summary judgment dismissing the complaint.

**Background**

Wang and his wife equally own nonparty Amersino Marketing Group, LLC (Amersino), a farm goods and produce wholesaler. In

addition to controlling Amersino, Wang is the sole shareholder and principal of several similar entities, as well as of a number of holding companies and trucking companies, which were used by his various produce entities. Wu & Kao has for the past seven years provided legal services in connection with Wang's entities. Until the last several years, all bills for services rendered have been paid. However, Amersino became financially unstable, considered filing for bankruptcy, and failed to pay bills issued by Wu & Kao in 2009 and 2010, for some services rendered in those years and in 2008.<sup>1</sup> The bills listed the dates of services, the specific services rendered, and the time spent and the charge for each service. Those bills were, except for the last ones, dated March 10, 2010, which were addressed only to Wang at Amersino's place of business, addressed to "Wang and Amersino." See bills attached to Complaint. Those unpaid bills totaled about \$60,000. The bills related to services rendered largely in connection with several proceedings brought against Wang and Amersino, and to a State Insurance Fund proceeding, also brought against Wang's wife and apparently against another of Wang's entities, Dynasty Trucking, LLC (Dynasty), arising out of Amersino matters. Wu &

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<sup>1</sup>Bills issued by Wu & Kao for work performed for several other entities controlled by Wang, also remained unpaid. See Seelig aff. in opp., ex. R. In this regard, I take judicial notice of the County Clerk's computerized records, which show that Wu & Kao commenced, in July 2010, an action against Wang and his entities, Dongnan, LLC (Dongnan), Southeast Produce, Limited (USA), and Southeast Holdings, LLC, for unpaid legal fees in the amount of about \$143,000 for services allegedly rendered to them.

Kao's services were also rendered, on a more limited basis, to Amersino for general corporate matters (Wu aff., ¶ 2).

At one point, Wang requested "[p]laintiff" to assist Amersino in filing for bankruptcy, and to help it, and allegedly Wang (but see Tung aff. in opp., ex. A, which includes bills for services rendered on 9/15/09 and 12/01/09 for "Corporate Restructure"), restructure their debts, including by possibly closing Amersino. Seelig aff. in opp., ¶ 38. The bankruptcy form prepared by Wu & Kao indicated that Amersino had assets of \$50,000 or less, and that it had liabilities of more than \$1,000,000. By letter dated March 11, 2010, Anne Seelig (Seelig), an associate at Wu & Kao, advised Wang that, since he had not paid legal fees, allegedly owed personally by him and his companies, the law firm would have to withdraw from representing "you," and expressed Seelig's understanding that Wang and Amersino had retained new counsel, Kevin Tung (Tung). Seelig aff. in opp., ex. R. Seelig also wrote to Tung that day, indicating that she had been advised that he would be the new counsel for "Amersino" and another of Wang's entities in various litigated matters. *Id.* A consent to change counsel, dated March 12, 2010, in the State Insurance matter was then executed.

**The Instant Action and Applications**

Wu & Kao then, on April 9, 2010, commenced the instant action solely against Wang. The complaint alleges that Wu & Kao

was a professional limited liability company; that it had entered into contracts with Wang to provide legal services, for which Wang agreed to pay; that Wang was a principal of Amersino, which he dominated and controlled; that Wu & Kao performed legal services, and incurred expenses, "for [d]efendant" (complaint ¶¶ 6-12); that Wu & Kao issued invoices to Wang for the work performed; and that Wang never objected to these invoices. Wang eventually served an amended answer, which asserted eight "affirmative defenses" ... the failure to state a cause of action; the failure to mitigate damages; laches/unclean hands; that Wang disputed the bills; that he never acted in his personal capacity in dealing with Wu & Kao; that, as Amersino's officer, Wang should not be personally liable for Amersino's acts or debts; that he never guaranteed payment of any contract; and that this court lacks jurisdiction over this action, since Wu & Kao failed to comply with the requirements for a letter of engagement or retainer agreement, as per the Rules of the Chief Administrator of the Courts.

Wu & Kao now seeks summary judgment. Its motion is supported by, among things, Seelig's unsigned affirmation and the affirmation of Allen Wu, a law firm member. Wu largely describes the firm's billing of services "for [d]efendant," which are in issue in this action, but Wu does not address any of his firms' alleged contracts with Wang, or any conversations he had with Wang, relative to Wang engaging the law firm, or promising to pay

[\*6]

the invoices in issue. Seelig, in her affirmations, the earlier of which is unsigned, claims that Wu & Kao represented Wang personally, as well as his entities; that Wang personally engaged plaintiff's services; that Wu & Kao was retained as Wang's personal attorney in connection with the litigated matters; that Wang requested Wu & Kao to perform work for him in his personal capacity; that Wu & Kao represented both Wang and Amersino in several actions; and that Wang promised on various unspecified occasions to personally pay the legal fees owed "for the referenced matters" (Seelig aff., ¶ 32), and/or to work out a payment plan (Seelig aff. in opp., ¶¶ 11, 32, 38). Seelig does not indicate that she was present during any conversation in which Wang engaged Wu & Kao or made promises to be personally responsible for paying for services rendered. Seelig further asserts that, since Wang never disputed the firm's reasonable and detailed bills, summary judgment must be granted to Wu & Kao. Plaintiff also maintains that Wang's affirmative defenses must be dismissed.

Wang opposes the motion, and cross-moves for summary judgment, asserting that Wu & Kao has no standing to bring this action, since a search of the Corporation and Business Database of the New York State Department of State, failed to reveal the existence of any entity in the name of Wu & Kao. Wang also claims that Amersino is a necessary party to this action, and that, as an Amersino officer, he is not liable for any of its

debts. Wang further claims, in his supporting affidavit, that it was Amersino which retained Wu & Kao's legal services at issue, that he never personally entered into any agreement with Wu & Kao, either in writing, orally or by his acts, nor did he ever enter into any negotiations to bind himself personally with regard to the legal services, which are the subject of this action. Additionally, he claims that, as Amersino's officer, he expressed to plaintiff, and plaintiff agreed, that it was hired by Amersino. He further claims that all legal fees at issue in this action are for services provided by Wu & Kao in relation to Amersino's business, although, in some instances, he as Amersino's officer was named as a codefendant. Wang points to the facts, that all legal bills which were paid, were paid by Amersino, rather than by him; all bills were sent to Amersino's place of business, rather than to his home; there were notations "AMG," on bills next to each charge; and footnotes on bills recited "Billing & Collection ... Amersino" (Tung aff. in opp., ex. A), as evidence that Wu & Kao's client was Amersino. Additionally, Wang states that, because Wu & Kao could not explain to Amersino the exact services provided, Amersino refused to pay plaintiff's fees. Wang also urges that Wu & Kao's application to dismiss his affirmative defenses is without merit, and, in particular, that, while the defense of failure to state a cause of action is mere surplusage, an application to dismiss such a defense must be denied. Wang aff., ¶ 63.

In reply, Seelig advises that Wu & Kao was the registered assumed name of Allen Wu, P.C., so that plaintiff has standing to sue. Seelig also asserts new grounds in support of Wu & Kao's motion, and in opposition to Wang's motion, namely, that Wang is the alter-ego of his companies, including Amersino. In this regard, Seelig maintains, "[u]pon information," that Wang co-mingled his assets with Amersino's; that he used his companies' funds interchangeably; that he closed, but did not dissolve, Amersino; that he may have transferred his interest in his entity, Dongnan, in name only, to his nephew, while in actuality maintaining his ownership and interest therein; and that Dongnan is Amersino's successor-in-interest. Thus, Seelig asserts that Wang should be liable for Amersino's debts. Seelig also reiterates her claims about alleged oral agreements with Wang, but again does not indicate that she was privy to any such agreements. Finally, she claims that Wu & Kao is entitled to sanctions against Wang and his attorney, pursuant to 22 NYCRR 130-1.1 (c), because they allegedly cross-moved mainly to delay this action.

In response, Wang maintains that Wu & Kao commenced this frivolous action against him only because it knew that Amersino did not have the funds to pay plaintiff's fees; that the corporate veil cannot be pierced just because Wang dominated Amersino; and that, in any event, Wu & Kao failed to plead any

such theory.

#### Discussion

The law is well settled that the movant on a summary judgment application bears the initial burden of prima facie establishing that party's entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Kuri v Bhattacharya*, 44 AD3d 718 (2d Dept 2007). The failure to do so mandates the denial of the application, "regardless of the sufficiency of the opposing papers." *Winegrad*, 64 NY2d at 853. Also, "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court [internal citations omitted]." *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 (1<sup>st</sup> Dept 1987).

Before reaching the substance of the applications, several preliminary issues must be addressed. Since Wang did not, in his reply papers, dispute that Wu & Kao was a registered assumed name for a valid professional corporation, his claim, that plaintiff lacks standing, is unavailing. His further claim that Amersino is a necessary party to this action is without merit, since, although it might have been optimal, were Amersino to have been

named as defendant, complete relief can be accorded between the parties to this action, and Amersino's rights will not be "inequitably affected by a judgment." CPLR 1001. Either Wang is or is not liable for any of the claimed legal fees.

Wu & Kao's summary judgment motion is denied, since it has failed to make a prima facie showing of its entitlement to the requested relief. While it claims that Wang personally contracted and retained its services, no affidavit has been provided by any Wu & Kao attorney, purporting to have first-hand knowledge, detailing any alleged oral agreement, or, for that matter, any promise between the law firm and Wang. Putting aside the fact that Seeling's moving affirmation was unsigned, her bald and conclusory claims of Wang having personally retained the firm, and agreeing on "several occasions" (Seelig moving aff., ¶ 41) to be responsible for all of the legal fees in issue in this case are unavailing. Furthermore, as previously mentioned, Wu's affirmation is wholly silent on these issues, a notable circumstance, considering that it is claimed that the work provided, relating to Wang's entities, was a major source of the law firm's business. I also note, that the submission of affirmations, rather than affidavits, of plaintiff's associate attorney and principal was improper. *Samuel & Weininger v Belovin & Franzblau*, 5 AD3d 466 (2d Dept 2004) (CPLR 2106, which permits an attorney to submit an affirmation, in lieu of an

affidavit, except where that attorney is a party to the action, does not permit a plaintiff law firm to submit its associate attorney's affirmation on the law firm's behalf).

Moreover, the complaint is premised solely on Wang having personally contracted for Wu & Kao's services on behalf of "[d]efendant." See Complaint, ¶¶ 6-12. The complaint is devoid of any claim that Wang made any promises to answer secondarily for Amersino's debts, a claim which would be subject to a Statute of Frauds defense (see General Obligations Law § 5-701 [a] [2]), or that he made any promise to answer for Amersino's debts, received new consideration beneficial to him in connection therewith, and became "in the intention of the parties a principal debtor primarily liable." *Martin Roofing, Inc. v Goldstein*, 60 NY2d 262, 265 (1983), cert den 466 US 905 (1984). While Seelig's affirmations now allude to guarantees and promises, no application is presently before me to amend the complaint to add any such claims.

Wu & Kao's attempt to support its summary judgment motion and resist Wang's summary judgment cross motion by asserting, for the first time in its reply/opposition papers, that Amersino's corporate veil should be pierced, is unavailing since no such claim was alleged in the complaint. *Abalola v Flower Hosp.*, 44 AD3d 522 (1<sup>st</sup> Dept 2007) (summary judgment cannot be opposed on unpleaded theories). Moreover, such a theory must be pleaded.

*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 127 (2d Dept 2009); *Love v Rebecca Dev. Inc.*, 56 AD3d 733, 733-734 (2d Dept 2008). The mere allegation that Wang dominated and controlled Amersino is insufficient to state such a claim, because if it were, all closely held entities would be subject to such a claim. *East Hampton*, 66 AD3d at 126-127. Again, there is no request to amend the complaint to add that claim. Also, a member of a limited liability company, cannot be liable on a contract where that member did not "purport to bind himself individually under the contract." *Panasuk v Viola Park Realty, LLC*, 41 AD3d 804, 805 (2d Dept 2007). Further, "[t]he corporate form may not be disregarded merely because the assets of the corporation ... are insufficient to assure the recovery sought by the person seeking to pierce the corporate veil (internal citation and quotation marks omitted)." *Casa de Meadows Inc. (Cayman Is.) v Zaman*, 76 AD3d 917, 923 (1<sup>st</sup> Dept 2010). Accordingly, Wu & Kao's motion for summary judgment is denied.

Wu & Kao's claim that I should reject Wang's cross motion as untimely, is, in the exercise of my discretion, denied, since it was given more than an adequate amount of time to respond, and does not claim that it was in any way prejudiced. Wang's cross motion for an order granting him summary judgment dismissing the complaint is denied. His affidavit is inadequate to prima facie

meet his burden of establishing his entitlement to summary judgment. Although he claims that he never personally bound himself with respect to any of the legal fees, his affidavit is largely conclusory. In particular, he does not indicate specifically what was said, or to whom it was said, when Wu & Kao was engaged for services concededly provided personally to him and his wife. Additionally, while not necessarily determinative, invoices were addressed, not only to Amersino Marketing Group, LLC, but also to Wang. Thus, Wang has not eliminated the possibility that he may be responsible for at least some of plaintiff's legal fees. Since issues remain as to whether Wang would be liable for any of plaintiff's legal fees, Wu & Kao's request for sanctions is denied.

The branch of Wu & Kao's motion which seeks dismissal of Wang's first affirmative defense (failure to state a cause of action) is denied. See *Butler v Catinella*, 58 AD3d 145 (2d Dept 2008); *Riland v Frederick S. Todman & Co.*, 56 AD2d 350, 352-353 (1<sup>st</sup> Dept 1977) (failure to state a cause of action may be pled as an affirmative defense and is not subject to a motion to strike). The branches of plaintiff's motion which seek dismissal of the second (failure to mitigate damages) and third (unclean hands/laches) affirmative defenses are granted, and those defenses are dismissed. Aside from being inapplicable under the facts alleged here, they are conclusorily pled. See *Fireman's*

*Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 (2d Dept 2008) (court properly granted CPLR 3211 [b] motion to dismiss affirmative defenses which were conclusorily pled and devoid of facts).

The branch of the motion, which seeks to dismiss Wang's fourth affirmative defense (that he disputes the amounts billed), on the ground that it is not a valid defense to the breach of contract and account stated causes of action, since Wang received the bills without protesting (see *Stephanie R. Cooper, P.C. v Robert*, 78 AD3d 572 [1<sup>st</sup> Dept 2010]), is denied, since there are issues as to whether Wang personally retained plaintiff to provide services for himself, and is thus liable for any of plaintiff's bills. For the same reason, the request to dismiss the fifth affirmative defense, that he never acted in his personal capacity, is denied.

The sixth affirmative defense, that Wang, as Amersino's officer, should not be liable for its debts and acts, is dismissed, since it is redundant of the fifth affirmative defense, and the complaint does not state a claim for piercing Amersino's veil. The seventh affirmative defense, that Wang never entered into a guaranty, is dismissed as inapposite, since, as previously indicated, the complaint, does not seek to impose liability on Wang as a guarantor. Finally, the branch of Wu & Kao's motion, which seeks an order dismissing Wang's eighth affirmative defense, that this court lacks jurisdiction over this

action for attorney's fee, based on plaintiff's failure to comply with the retainer agreement rules, is granted, since this court does have jurisdiction. See *Nabi v Sells*, 70 AD3d 252 (1<sup>st</sup> Dept 2009); *Seth Rubinstein, P.C. v Ganea*, 41 AD3d 54 (2d Dept 2007) (plaintiff who fails to comply with retainer agreement/letter of engagement provisions of 22 NYCRR 1215.1 can seek to recover its fees under a quantum meruit theory); see generally *Nicoll & Davis LLP v Ainetchi*, 52 AD3d 412 (1<sup>st</sup> Dept 2008); see also *Kramer, Levin, Naftalis & Frankel, LLP v Canal Jean Co., Inc.*, 73 AD3d 604, 605 (1<sup>st</sup> Dept 2010) (cause of action for account stated is not barred by the failure to comply with retainer agreement/letter of engagement rules). In conclusion, it is

ORDERED that Wu & Kao's motion for an order granting it summary judgment against Wang is denied; and it is further

ORDERED that Yu Qing Wang's cross motion for an order granting him summary judgment dismissing the complaint is denied; and it is further

ORDERED that Wu & Kao's request for sanctions is denied; and it is further

ORDERED that the portion of Wu & Kao's motion, which seeks an order dismissing Yu Qing Wang's affirmative defenses, is granted solely to the extent that the second (failure to mitigate damages), third (unclean hands/laches), sixth (lack of Wang's liability, as Amersino's officer, for its debts or acts), seventh

(guaranty), and eighth (lack of jurisdiction) affirmative defenses are dismissed.

Dated: FEB 07 2011

ENTER:

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J.S.C.

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