SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 59

INOVALIS, S.A.,

Plaintiff,

-against-

CMZ VENTURES, LLC a/k/a THE DYNAMIC GROUP, ALATAU VENTURES LIMITED, and GOLDBERG WEPRIN FINKEL GOLDSTEIN LLP (f/k/a GOLDBERG WEPRIN & USTIN LLP),

Defendants.

INDEX NUMBER 600284/2009
Motion Sequence 001

DECISION

DEBRA JAMES, J.:

Defendant Goldberg Weprin Finkel Goldstein LLP (f/k/a Goldberg Weprin & Ustin LLP) (the Law Firm) moves for summary judgment in its favor on its first, second and third counterclaims in the amount of $237,241.21 plus interest, for legal fees incurred in this action, and to dismiss the third and sixth causes of action as against it of the complaint.

Plaintiff Inovalis, S.A. (Inovalis) is a financial enterprise located in Paris, France. On July 3, 2008, Inovalis, defendant CMZ Ventures, LLC (CMZ) and defendant Alatau Hospitality Limited[1] (Alatau) (together as "the Partners" or "the Venture") executed a "Restated Term Sheet" concerning their intent to acquire and redevelop the Drake Hotel located at 440 Park Avenue, New York County ("the Property"). Under the Term Sheet, the preferred equity was to be divided among the Partners

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[1]The summons names "Alatau Ventures Limited" as a defendant, but the verified complaint and most of the subsequent documents name Alatau Hospitality Limited.

as follows: Inovalis 50%, CMZ 25%, and Alatau 25%. The purchase price for the property was anticipated was $850 million requiring a deposit of $50 million.

Before formation of the Venture, "Inovalis understood that both CMZ and Alatau had already entered into discussions with . . . the owners of the Hotel Drake site, concerning the Project."

On July 16, 2008, the Partners executed a "Letter of Intent" with the owners of the Property. The Letter of Intent provided that the Partners would (1) have 40 days to perform due diligence on the proposed project, (2) make an earnest money payment of $10 million within 10 days, and (3) make an additional payment of $40 million at the end of the due diligence period. On or by July 28, 2008, certain changes were made to the Letter of Intent, including a reduction in the amount of earnest money $5 million, with CMZ and Alatau each paying half. Inovalis agreed to advance $500,000 for the due diligence expenses ("the Due Diligence Deposit or the Deposit"), including $70,000 for work already performed by the Law Firm; and CMZ was appointed as the primary due diligence agent. These changes were memorialized by the "Addendum of Restated Term Sheet" (the Addendum). According to the Addendum, actual due diligence expenses were to be apportioned among the Partners per their equity position; Inovalis's participation in the project would end and its $500,000 advance payment returned (less $35,000 as 50% of the legal fees already incurred) if the due diligence period could not be extended by 30 days. Inovalis's qualified right to

withdraw had to be exercised within 10 days of notice by CMZ that the due diligence period had not been extended. No time limit was set for determining whether the due diligence period was to remain 40 days or to be extended to 70 days, but the Addendum allowed any of the Partners to withdraw from the project and receive an appropriate refund of its deposit up until three days of the end of the due diligence period.

CMZ alone first consulted the Law Firm in April 2008 about possible acquisition of the Property. Though the Law Firm's retainer letter is dated July 29, 2008, at that time the Law Firm had actively participated in negotiations with the Property's owners, met and communicated with the Partners, drafted the Letter of Intent, the Restated Term Sheet, the Addendum and other writings, and reviewed documents and materials needed for these tasks. It was also appointed escrow agent for all contemporaneously with that work under an undated escrow agreement.

On August 22, 2008, three days before the original 40-day due diligence period expired, Inovalis wrote to the other parties that it was withdrawing from the project unless an extension was granted by August 25, 2008. It requested an extension of the due diligence period of 60 days, but insisted that it needed at least 30 days because of the complexity of the project plans. On or by August 25, 2008, the Partners received an extension of the due diligence period until September 24, 2008. Inovalis wrote to CMZ and Alatau, on August 25, 2008, that it still had the right to withdraw from the project on or by September 24, 2008 under any

circumstances, and expressed the need to acquire two additional parcels of land, located at 38 East 57th Street and 46 East 57th Street, that abutted the rear of the Property at a right angle, for the benefit of the project.[2]

On September 12, 2008, Inovalis notified the other parties that it elected to terminate its role in the project, and requested return of its deposit. The Law Firm, "as counsel to the Venture," responded, on September 17, 2008, asking if Inovalis would reconsider in light of some new assurances from the prospective sellers. Inovalis repeated its position, in a letter to the Law Firm, on September 24, 2008.

Inovalis seeking the return of the $465,000 balance of its deposit, filed this action asserting causes of action for (1) breach of contract, (2) unjust enrichment, (3) an accounting, and (4) a declaratory judgment that Inovalis is entitled to the return of $465,000, (5) an injunction against use of the Partners's due diligence materials by CMZ and Alatau, and (6) a declaratory judgment that the amount requested by the Law Firm for incremental legal fees in respect to the due diligence, or approximately $237,000, is unreasonable. The allegations of the third and sixth causes of action, are asserted against the Law Firm.

The Law Firm interposed counterclaims and cross claims against the Partners jointly and severally for the payment of

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[2]In the complaint, at ¶¶ 32-35, Inovalis claims that CMZ and Alatau wrote an "Acknowledgment Letter," dated August 25, 2008, echoing and acknowledging the concerns expressed in its letter of the same day. However, by citing both as Exhibit F, it seems that there is no discrete Acknowledgment Letter, but only a counter-signed copy of Inovalis's letter of August 25, 2008.

$237,241.21 plus interest, for legal fees for services rendered to the Partners over and above the $70,000 billed and paid for, based upon alternate theories of liability of breach of the retainer agreement, quantum meruit and account stated. It also seeks legal fees for defending itself in this action pursuant to the escrow agreement.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People ex rel. Spitzer v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

Inovalis opposes the Law Firm's motion on the grounds that discovery has just begun and this dispositive motion stays the exchange of necessary information and ongoing settlement discussions; Inovalis properly withdrew from the Venture and is not liable for its debts; the relief should be sought against

the Venture and not Inovalis solely and the accounting submitted by the Law Firm raises issues of material fact; and the Law Firm has no contractual basis for its claimed fees.

Discovery began in August 2009 when Inovalis served its "First Notice of Discovery and Production of Documents." The motion at bar was filed in October 2009, which stayed discovery pursuant to CPLR 3214(b). Some unproduced material that Inovalis seeks predates Inovalis' involvement in the project. Inovalis submits evidence that CMZ and Alatau had a relationship with the Law Firm prior to the establishment of the Venture. Inovalis argues that CMZ and/or Alatau and/or the Law Firm may assert that its demand for all documents concerning communications between CMZ and/or Alatau and the Law Firm relating to the prospective project from January 1, 2008 are subject to the attorney-client privilege or attorney's work product protection. In any event, the agreements, letters, e-mail messages and other material produced by the parties (almost entirely duplicating each other) are sufficient for the purpose of determining the Law Firm's motion.

Inovalis's arguments about settlement negotiations are not pertinent to such determination.

Inovalis's $500,000 contribution to the Partners, made when CMZ and Alatau were each putting in $2.5 million as earnest money, was labeled as the "Due Diligence Deposit" in the Addendum. Its deputy CEO in his affidavit and counsel in his affirmation so characterize the fund. The Addendum states:

"The Partners each and collectively acknowledge that

> Project expenses to date are in the approximate sum of Seventy Thousand ($70,000.00) and xx/100 Dollars representing the legal fees and disbursements of the law firm of Goldberg Weprin & Ustin LLP as counsel of the Developer. The Partners each, and collectively, acknowledge responsibility for the payment of such fees in proportion to their respective interests in the Developer (i.e. twenty-five (25%) percent as to CMZ; twenty-five (25%) percent as to Alatau and fifty (50%) percent as to Inovalis).
> As to the additional and ongoing expenses of due diligence for the Project, and in lieu of the current and immediate funding by Inovalis of its commitment as to the Initial Deposit under the Letter of Intent with Seller, Inovalis shall advance on behalf of the Developer the sum of Five Hundred Thousand ($500,000) and xx/100 Dollars on account of due diligence expenses for the Project (the 'Due Diligence Deposit')."

The language "additional and ongoing expenses of due diligence" agreed to by the parties immediately after acknowledging responsibility for the Law Firm's fees is some evidence that the parties intended that the Due Diligence Deposit would be used to pay the Law Firm's additional fees. Inovalis counters that the Due Diligence Deposit was not intended to pay for services performed by the Law Firm.

However, the record before the court establishes that from July 3, 2008, the date the Restated Terms Sheet was executed until, at least, September 12, 2008, the date Inovalis notified the other parties of its withdrawal, Inovalis did not stand apart from CMZ and Alatau individually or the Partners collectively in pursuing the possible purchase and development of the Property. It never challenged the $70,000 billed (or its 50% share) by the Law Firm for work performed prior to the Addendum, the appointment of the Law Firm as escrow agent, the appointment of CMZ as the primary due diligence agent, or the participation of

the Law Firm in due diligence activities after the Addendum. Inovalis' understanding that if it decided to withdraw from the Joint Venture prior to the completion of due diligence, it would be entitled to the return of the entire Due Diligence Deposit, minus the approved $35,000 disbursement to the Law Firm] is unreasonable. It strains credulity that the funds put aside on or about July 28, 2008 for the conduct of due diligence were unavailable to pay for professional services in the performance of due diligence between July 28, 2008 and September 12, 2008 on a project that the Restated Term Sheet estimates will cost approximately $1.5 billion.

While the Addendum promises that the Deposit "shall be fully refundable until the end of the Due Diligence Period," the motion at bar does not concern how much money should be returned to Inovalis or by whom, which is the issue joined before the court in this action.

Inovalis contends that the Law Firm should not be singled out from the Partners with respect to its entitlement to the fund. However, the escrow agreement, at para. 3, provides that it shall disburse funds by "the written instructions of Mr. Brad Jackson[3] on behalf of CMZ and Mr. Gregg Hayden of Hoche Partners acting on behalf of INOVALIS," or others as designated in writing."

The Law Firm submits an affidavit from Zackson of CMZ, who approved its invoices, which states that "Gregg Hayden was well

[3]Brad Zackson is correctly named at all other places.

aware of all of the efforts of the Goldberg Weprin firm." Zackson claims that Inovalis instructed Hayden not to approve the Law Firm's final invoice "because Inovalis sought to withdraw from the Venture and obtain contributions from the other Venture partners as part of a settlement of all accounts."; vouches for the quality and quantity and importance of the work performed by the Law Firm, and asserts that there are no objections to full payment. He asserts that the "internal dispute among the Venture partners should have no effect on the obligation of the Venture to pay its legal expenses as set forth in the retainer letter.

According to the Addendum, the Venture was expected to

> "engage counsel, architects, engineers and other professionals to assist all Partners in their determinations on the Project. All third party expenses incurred by CMZ as so directed by Inovalis shall be prorated, and paid by each of the Partners in proportion to their ownership interest in the Developer. These expenses shall include, but not be limited to: counsel fees (transactional, land use and tax)."

Andrew W. Albstein, partner in the Law Firm, argues that the Law Firm properly and professionally performed the legal services requested by the Partners. He states that the Law Firm "submitted invoices for all legal services," but only attaches a final invoice, dated November 6, 2008, for $307,241.21 ($304,122.00 fees and $3,119.21 expenses) less $70,000.00 paid. This invoice provides over eight pages of tightly-stated detail, such as:

> "drafted letter to Harry Silvera, Esq. regarding open diligence items; participation in discussion of title issues with Bob Callahan and Frank Fasulo; participation in discussions with Patrice Peton at First American; draft, review and forward letter to

> Michael Parley; participation in discussion regarding MTA easement with architect; attendance at meeting with Gregg Hayden, Brad Zackson and Garth Symonds; creation of due diligence book, including diagram of properties, property descriptions, due diligence list and tenancy list; updated title abstract and MTA memorandum; updated checklist; discussed tax structure."

By a rough estimation, there are over 340 entries on the invoice. This invoice, as these entries demonstrate, omit all information, of date, duration, rates and names, and provides only the grand total dollar amounts.

The Law Firm produces for the first time on its motion, seven-and-a-half pages of supporting detail sorted by attorney and date, including eleven attorney posts of time entries. This computer listing includes the billing rate, the duration, the description of the activity and the extended amount for each entry. The descriptions are the same as found on the November 6, 2008 invoice. Expenses are listed in chronological order, showing the person responsible, amount and description.

Albstein states, at para. 26, that "all of the subject services were performed on behalf of the Venture to facilitate the structuring and funding of Venture obligations." He claims that the November 6, 2008 invoice was not challenged or questioned, nor clarification sought until the commencement of this action, about twelve weeks later.

Ordinarily, the receipt and retention of an invoice for legal services, without objection within a reasonable time, gives rise to an actionable account stated (*see Fink, Weinberger, Fredman, Berman & Lowell, P. C. v Petrides*, 80 AD2d 781 [1st Dept 1981]) entitling the Law Firm to summary judgment (*see Rosenman*

Colin Freund Lewis & Cohen v Edelman, 160 AD2d 626 [1st Dept 1990]). Here, it was not necessary for any of the Partners to challenge the November 6, 2008 invoice, because it was inadequate to represent an account stated. *Breed, Abbott & Morgan v Aberdeen Petroleum Corp.*, 46 AD2d 618 (1st Dept 1974) ("Plaintiff, however, did not establish an account stated. The bills sent by plaintiff were not itemized and their mere retention does not show an accord on the reasonableness of the charges"). While the November 6, 2008 invoice contains a wealth of detail, it omits vital data that would allow Inovalis to review the invoice for accuracy and reasonableness, that is, dates, attorney identification, hourly time charges, duration and dollar amounts. Submitting the appropriate data now, in motion practice, does not create an account stated. However, searching the record, it satisfies Inovalis's third cause of action for an accounting.

Inovalis reproduces 36 time entries from the Law Firm's submission, dated September 15, 2008 through October 1, 2008, dealing with various aspects of the project, totaling $35,450.00. It argues that, at a minimum, its involvement with the Partners was terminated by then, and, accordingly, it has no responsibility for these fees. Its notice to the other parties of withdrawal was dated September 12, 2008, which the court judicially notices was a Friday. On Monday, September 15, 2008, the Law Firm met with CMZ and the Property owners and drafted the letter to Inovalis, dated September 17, 2008, asking it to reconsider in light of some purported concessions by the owners.

While $3,025.00 in fees incurred in the follow-up and meeting, were arguably still on behalf of all three Partners, most of the other time entries from September 15, 2008 onward report "business-as-usual" activities as if Inovalis's termination notice of September 12, 2008 had never been received.

As a minimum, therefore, the Law Firm's claim for $237,241.21 shall be reduced to $204,816.21, eliminating "due diligence" activities after September 15, 2008 except for the meeting with the Property owners and the letter to Inovalis reporting on the meeting.

The Law Firm's seeks to enforce the escrow agreement and obtain the disbursement of funds from the Deposit to pay its legal fees and disbursements. The retainer agreement, a letter dated July 29, 2008, addressed to CMZ, Alatau and Inovalis, is counter-signed by CMZ only. The Addendum, dated July 28, 2008, one day earlier, and signed by all

> "designate[s] CMZ as the primary due diligence Partner. . . . At the direction of Inovalis acting directly, or through its advisor, Hoche Partners, CMZ shall also engage counsel, architects, engineers and other professionals to assist all Partners in their determinations on the Project. All third party expenses incurred by CMZ as so directed by Inovalis shall be prorated, and paid by each of the Partners in proportion to their ownership interest in the Developer. These expenses shall include, but not be limited to: counsel fees (transactional, land use and tax)."

Retaining the Law Firm by CMZ was, therefore, under the authority of the Addendum and binding upon Inovalis, at least as long as it remained in the Venture.

The retainer agreement also mentions that "significant time"

has already been expended by the Law Firm, and that the professional services to be rendered include:

> "representation on the purchaser entity structure and organizational documents, purchase of the Drake Hotel site, representation on the financing regarding the acquisition and development, and representation on development related services, including possible conversion of all or a portion of the property to a condominium regime of ownership, and sale of units."

The term due diligence never appears in the agreement, although purchase of the Drake Hotel site would necessarily entail due diligence to be carried out by attorneys.

The Letter of Intent, signed individually by CMZ, Alatau, Inovalis (identified together as "CAI"), and the Property owners, provides that "CAI shall have forty (40) days after the execution and delivery of this letter of intent to perform due diligence." CAI will be able "to inspect the Properties and conduct such investigations as CAI deems appropriate including, without limitation, engineering studies, Phase I and Phase II environmental studies, lease reviews, tenant file reviews, architectural material review and such other matters requested by CAI to confirm its interest in the project."

The escrow agreement, signed by Inovalis on or about the same date as the Addendum and the retainer agreement, does not invoke the qualifications on payment found in the Addendum, but, rather, requires that the "Due Diligence Deposit shall be deposited with Escrow Agent, to be held pursuant to the terms of this Agreement." The only restriction on disbursements from the Deposit is the need for the written instructions of the agents of CMZ and Inovalis. Zackson, on behalf of CMZ, has given his

approval to pay the Law Firm's bill.

Inovalis did not ask for a halt or suspension of the due diligence efforts carried out for the benefit of the Partners. The additional time requested and granted is proof that Inovalis anticipated that additional professional efforts to satisfy the concerns of the Partners would ensue. It is a breach of the retainer for Inovalis now to withhold its approval of the Law Firm's bill in the amount of $204,816.21 plus interest at the statutory rate from the date of May 3, 2010. The Law Firm shall be paid to the extent of 50% of those fees, $102,408.11, i.e. Inovalis' share, from the funds it holds in escrow; the balance of the funds shall remain in escrow pending resolution of this action. With respect to other relief that this court deems appropriate, each defendant CMZ Venture, LLC and Alatau Ventures Limited is liable to the Law Firm to the extent of $68,929.06 apiece (fifty percent of [the sum of $102,408.11 plus $35,450.00]), the balance of the fees for legal services performed for due diligence incurred by the Venture.

The Law Firm's application for legal fees shall be denied. While the retainer agreement provides that the client has a right to arbitrate a fee dispute, it does not set forth any provision for the reimbursement of its legal expenses. The Law Firm's counterclaim is based on a breach of its retainer agreement, and is not based on any violation of its rights as escrow agent.

The Law Firm's application to dismiss the third (accounting) and sixth (declaratory judgment) as against it is denied as moot.

The caption shall be amended to state the name of Alatau

Hospitality Limited as defendant.

Settle Order on Notice.

DATED: March 3, 2011

ENTER,

J.S.C.

HON. DEBRA A. JAMES