

Mintz & Gold LLP v Daibes

2011 NY Slip Op 30985(U)

March 30, 2011

Supreme Court, New York County

Docket Number: 111513/2010

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

MINTZ & GOLD LLP,

Plaintiff,

- against-

FRED A. DAIBES,

Defendant.

INDEX NO. 111513/2010

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 7, were read on this motion by plaintiff for summary judgment.

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED	
FILED	<u>1</u>
	<u>2,3,4,5</u>
APR 15 2011	<u>6,7</u>

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Mintz & Gold LLP ("plaintiff"), a law firm, brings this action to recover unpaid attorney's fees allegedly owed by its former client, defendant Fred A. Daibes ("defendant"), pursuant to four outstanding invoices. Plaintiff seeks judgment against defendant under the theories of breach of contract, account stated, unjust enrichment and/or quantum meruit. Discovery has not commenced and the Note of Issue has not been filed. Plaintiff now moves for summary judgment, pursuant to CPLR 3212, awarding judgment against defendant in the sum of \$81,049.65 plus interest. Defendant has responded in opposition to the motion, and plaintiff has filed a reply.

BACKGROUND

On December 8, 2009, plaintiff and defendant executed a written retainer agreement for legal services, pursuant to which plaintiff agreed to represent defendant and an entity he owned in a legal action against the New Jersey Department of Environmental Protection. The retainer

agreement contained the following provision regarding attorney's fees:

"2. Fees. The fee for this matter shall require an initial retainer of \$20,000, which will be placed in a trust account. You will be billed hourly and invoiced monthly in accordance with Paragraph 4, below. The fees will be deducted from the trust account upon the earlier of you signing off on an invoice or your failure to object to the bill in accordance with Paragraph 4, below. When and if the billing exceeds the funds available in the trust account, you agree to replenish the account with another \$20,000 and follow this procedure as necessary during the course of the representation. Monies not used will be returned to you. My hourly rate is \$595. The current hourly rates for the other attorneys that may provide services in this matter are as follows: Hourly rates for Partners range from \$395 to \$495. Hourly rates for Associates range from \$225 to \$395. Hourly rates for paralegals range from \$50 to \$100 per hour. Rates are subject to annual changes. If you call upon us to perform services on other matters, our fees will be the same as those set forth herein unless an alternate arrangement is made" (Not. of Mot., Ex. 1).

Defendant provided plaintiff with \$20,000 as the initial retainer fee on December 11, 2009, and also paid an additional \$20,000 as partial payment for attorney's fees incurred. Plaintiff thereafter performed legal services for defendant and issued invoices setting forth plaintiff's hourly rate, the billable hours expended, and the particular services rendered. The invoices at issue in the instant litigation are dated March 15, 2010, April 12, 2010, April 29, 2010, and June 10, 2010.

In support of its summary judgment motion, plaintiff submits an affidavit of Steven W. Gold, Esq., a member of its law firm; the retainer agreement; copies of the invoices sent to defendant; and the pleadings. Gold asserts that defendant has failed to pay the balances due under the outstanding invoices, and consequently, that plaintiff is owed a total of \$81,049.65 plus interest. Plaintiff commenced the present action to recover this sum, and alleges that at no time prior to initiating the present action did defendant ever protest or otherwise object to the invoices sent to him. Defendant, appearing *pro se*, served an initial answer on October 4, 2010, conceding that plaintiff provided the agreed-upon legal services with the expectation that

it would be paid; that plaintiff accepted such services; that plaintiff timely rendered invoices reflecting the legal services and amounts due for those services; and that the invoices showed an outstanding balance totaling \$81,049.65.

In opposition to summary judgment, defendant submits a *pro se* brief; certifications from defendant and his employee Berek Don; and copies of various emails and correspondence.¹ Defendant subsequently retained counsel, and submits a proposed amended answer and an affirmation in opposition from his new counsel, Nicholas G. Sekas, Esq.

Defendant concedes that he had an attorney-client relationship with plaintiff since December 2009 and that he did not pay the balances owed under the outstanding invoices. However, defendant disputes the amount that is owed to plaintiff, and claims that he consistently advised plaintiff that the invoices were incorrect and not in accordance with the retainer agreement, emails and letters between the parties. He claims that it was his understanding that there would be a cap of \$25,000 for the filing of the complaint, and that in the event of litigation additional fees would be incurred pursuant to the retainer agreement. He also claims that he has not been given credit for his payment of \$40,000.

DISCUSSION

Plaintiff contends that it is entitled to judgment in its favor in the amount of \$81,049.65 plus interest because there are no disputed issues of material fact regarding its entitlement to payment. Plaintiff argues that defendant has conceded the facts necessary to establish its entitlement to judgment as a matter of law under the theories of breach of contract, account stated, unjust enrichment and/or quantum meruit.

Defendant, through counsel, argues that summary judgment should be denied because:

¹Defendant does not submit affidavits in support of his *pro se* opposition. Rather, he submits "certifications" wherein he and Don state: "I hereby certify that the statements made by me are true. I am aware that if any of the statements are willfully false, I am subject to punishment" (Brief in Opposition to Plaintiff's Motion for Summary Judgment).

(1) the motion is premature since discovery is not complete; (2) there are material issues of fact in dispute regarding the retainer agreement and reasonableness of the fee; (3) a person with knowledge has not submitted an affidavit in support of plaintiff's motion as Gold was not personally involved in the representation of defendant; and (4) plaintiff has not complied with the notice and pleading requirements of Part 137 of the Rules of the Chief Administrator of the Courts and therefore may not maintain this action. Defendant requests that the parties be allowed to proceed to discovery, and he further seeks leave to file an amended answer.

At the threshold, the Court notes that the complaint contains no allegations with respect to plaintiff's compliance with the requirements of Part 137 of the Rules of the Chief Administrator of the Courts (22 NYCRR 137.0 *et seq.*), which require, *inter alia*, that an attorney, under certain circumstances, notify the client of the client's right to arbitrate a fee dispute between the parties (*see* 22 NYCRR 137.6 [a] [1]; *see also Herrick v Lyon*, 7 AD3d 571, 571 [2d Dept 2004]). Part 137 also requires an attorney who brings an action to recover a fee to allege in the complaint that the client received notice of its right to pursue arbitration and mediation and did not file a timely request for either, or that the dispute is not otherwise covered by the Part (*see* 22 NYCRR 137.6 [b]; *see also Bainton McCarthy, LLC v CBC Capital Ventures, Inc.*, 2008 WL 183722 [Sup Ct Nassau County 2008]; *Borah, Goldstein, Altschuler, Schwartz, & Nahins, PC v Lubnitzki*, 13 Misc 3d 823, 824 [Civ Ct, City of NY, NY County 2006]).

"Generally, where a plaintiff-attorney fails to satisfy the pleading requirements of 22 NYCRR 137.6(b), the appropriate remedy is dismissal of the action with leave to replead or without prejudice to a new action" (*Abramson Law Group, PLLC v Bell*, 2010 WL 3155904, at *1 [Sup Ct App Term 1st Dept 2010]; *see also Kerner & Kerner v Dunham*, 46 AD3d 372, 372 [1st Dept 2007]); *Paikin v Tsirelman*, 266 AD2d 136, 136-37 [1st Dept 1999]; *Borah*, 13 Misc 3d at 824 ["The attorney's failure to notify the client requires dismissal of the action, even a cause of action for an account stated"]).

Here, plaintiff does not dispute, nor even address, defendant's contention that plaintiff may not maintain this action because it failed to give plaintiff notice of his right to pursue arbitration and failed to comply with the pleading requirements of Part 137. Therefore, as plaintiff has failed to demonstrate compliance with Part 137, the Court *sua sponte* dismisses the complaint with leave to replead upon compliance with these requirements (*see Kerner*, 46 AD3d at 372; *Peter Axelrod & Assoc., P.C. v Berk*, 2008 WL 2097569, at *2 [Civ Ct, City of NY, NY County 2008] ["Failure to notify in accordance with the statute divests this court of subject matter jurisdiction and leaves it with no other recourse but to dismiss this case"]; *Hobson-Williams v Jackson*, 10 Misc 3d 58, 59 [App Term 2d & 11th Dist 2005]). Accordingly, plaintiff's motion for summary judgment is denied as academic.

For these reasons and upon the foregoing papers, it is,

ORDERED that the complaint is dismissed, *sua sponte*, with leave to replead upon compliance with 22 NYCRR 137; and it is further,

ORDERED that plaintiff's motion for summary judgment is denied as academic; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the complaint, with leave to replead upon compliance with 22 NYCRR 137, with costs and disbursements to defendant as taxed by the Clerk; and it is further,

ORDERED that defendant shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: March 30, 2011

Paul Wooten
 APR 15 2011
 NEW YORK COUNTY CLERK'S OFFICE

Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST