

**Law Off. of David J. Sutton, P.C. v NYC Hallways & Lobbies, Inc.**

2011 NY Slip Op 32797(U)

September 30, 2011

Supreme Court, Nassau County

Docket Number: 4727/11

Judge: F. Dana Winslow

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

*SUTTON*

**SHORT FORM ORDER**  
**SUPREME COURT - STATE OF NEW YORK**

**Present:**  
**HON. F. DANA WINSLOW,**

**Justice**  
**TRIAL/JAS, PART 4**  
**NASSAU COUNTY**

**THE LAW OFFICES OF DAVID J. SUTTON, P.C.,**

**Plaintiff,**

**MOTION DATE: 7/15/11**

**-against-**

**MOTION SEQ. NO.: 001**  
**INDEX NO.: 4727/11**

**NYC HALLWAYS AND LOBBIES, INC. and**  
**NAMI SHIN,**

**Defendants.**

**The following papers read on this motion (numbered 1-3):**

- Notice of Motion.....1**
- Affirmation in Opposition.....2**
- Reply Affirmation.....3**

In this action to recover unpaid attorneys fees, plaintiff moves for summary judgment pursuant to **CPLR §3212.**

The undisputed facts are as follows. On or about January 31, 2011, defendants NAMI SHIN ("SHIN") and NYC HALLWAYS AND LOBBIES, INC. ("NYC HALLWAYS") retained plaintiff THE LAW OFFICES OF DAVID J. SUTTON, P.C. ("SUTTON") to represent them in a matter entitled *Jaroslav Alexander, et al. v. NYC Hallways and Lobbies, Inc., et al.*, filed in the Supreme Court, New York County under Index No. 11-650227 (the "Underlying Action"). The Retainer Agreement, dated January 31, 2011 (the "Retainer Agreement"), was signed by SHIN both individually and in her capacity as President of NYC HALLWAYS [Mot. Exh. D]. SUTTON performed legal services in connection with the Underlying Action from January 2011 until some time in March 2011. Itemized invoices were sent to SHIN in the following amounts (representing the cumulative balance due, including costs and interest):

February 15, 2011	\$ 8,037.50
February 18, 2011	\$ 8,037.50
February 28, 2011	\$ 36,372.50
March 11, 2011	\$ 47,535.00
March 22, 2011	\$ 48,206.73
March 28, 2011	\$ 55,187.73

[Motion Exh. E.] No amount was paid beyond the retainer of \$7,500.00, which was applied toward the fee for services rendered, as reflected in the February 15, 2011 invoice.

Plaintiff commenced this action on or about March 29, 2011. The Complaint states three causes of action seeking recovery of the invoiced amount (\$55,187.73), predicated on theories of: (1) breach of contract; (2) quantum meruit/fair and reasonable value; and (3) account stated. A fourth cause of action seeks attorneys fees incurred in connection with collecting the outstanding balance due, as provided in the Retainer Agreement.

Plaintiff seeks summary judgment on all four causes of action. In support of its motion, plaintiff submits, among other things: (i) the Affidavit of David J. Sutton, sworn to on May 19, 2011, attesting to the facts as set forth above; (ii) a copy of the Retainer Agreement; and (iii) copies of the itemized bills sent to defendants, including e-mail cover letters. The Court finds this sufficient to demonstrate *prima facie* entitlement to the relief sought. See **Alvarez v. Prospect Hosp.**, 68 NY2d 320, 324. The invoices are not patently unreasonable, particularly in view of Mr. Sutton's explanation regarding the complexity of the underlying action.

The burden thus shifts to defendants to submit evidence in admissible form sufficient to raise an issue of fact. See **Alvarez**, 68 NY2d at 324. Defendants offer the Affidavit of defendant SHIN, sworn to on July 7, 2011 (the "SHIN Affidavit"). SHIN contends that plaintiff breached its contract with her by failing to zealously represent her interests. SHIN claims that plaintiff attempted to pressure her into accepting an unfavorable settlement, which required her to "pay my opposition \$27,000.00 and included none of the provisions that I have requested." SHIN Affidavit, ¶¶ 4-6.

SHIN also states that she disputes the total amount of legal fees claimed by plaintiff. She calls the fee for two months' service "preposterous," and claims that "I was always conscientious of Sutton's time as well as the time of his team. Our phone conversations were always brief and to the point, never running more than 10 minutes for most conversations." In any event, SHIN claims that the representation terminated on March 13, 2011 and that she should not be required to pay for work performed after that date. SHIN Affidavit, ¶¶ 10-13.

In addition to the SHIN Affidavit, defendants submit their attorney's Affirmation in Opposition, which essentially argues that the motion for summary judgment is premature insofar as there has been no discovery in this action to date.

The Court finds that defendants have failed to meet their evidentiary burden. On the issue of breach of contract, defendants' claims are vague and conclusory. Defendants cite no authority for the proposition that the presentation of an "extremely unfavorable" settlement offer constitutes a breach of the attorney/client contract or of the inherent obligation to zealously represent the clients' interests. Even if such proposition were generally true, SHIN fails to specify, in this case, which provisions of the proposed settlement were unfavorable to her. Although she mentions that the proposed settlement would require her to pay a sum of money, she does not explain why this was inappropriate under the circumstances. Nor does she specify which of the provisions she requested were not included. Hyperbole is no substitute for detail.

On the issue of account stated, defendants' silence is informative. SHIN never states that she did not receive the invoices. SHIN never states that she objected to the invoices within 15 days, as required in the Retainer Agreement, or at any time prior to the filing of her opposition. Accordingly, she has not raised an issue of fact with regard to this cause of action. *See Jovee Contracting Corp. v. AIA Environmental Corp.*, 283 AD2d 398.

With respect to the amount of the billings, the balance claimed by plaintiff has been established, at least in part, under the doctrine of account stated. In any event, defendants have failed to come forward with evidentiary facts sufficient to raise a triable issue. SHIN complains generally that the bills are inflated, but points to no particular items that are untrue or exaggerated. SHIN never states, or offers a reasonable basis to infer, that any of the itemized services was not performed, or was excessive or unnecessary. Conclusory allegations, unsupported by competent evidence, are insufficient to defeat summary judgment. *Alvarez*, 68 NY2d at 325. SHIN's claim that their phone conversations were always brief, if true, is not inconsistent with the itemized billings.

Counsel's assertion that summary judgment is premature because there has been no discovery is unavailing. First, counsel does not provide even a general description of the information he hopes to uncover through the discovery process. Plaintiff notes that counsel has not served a demand for discovery, either with the Answer or at any time prior to this motion. Summary judgment is not defeated by the "mere hope" that evidence sufficient to create an issue of fact may be uncovered in the discovery process. *Drepaul v. Allstate Ins. Co.*, 299 A.D.2d 391, 393. Second, the facts necessary to defeat summary judgment, to the extent they exist, are not unavailable to defendants. *Compare Desena v. City of New York*, 65 A.D.3d 562, 563. SHIN had sufficient firsthand knowledge to articulate the terms of the proposed settlement that were unfavorable to her, the provisions she requested but did not receive, or any other perceived shortcoming in plaintiff's legal representation. Any inaccuracies in the billing could have been

contradicted by a detailed narration of events, or defendants' own records. SHIN's failure to provide such evidentiary facts is not excused or negated by the lack of discovery.

The Court finds an issue of fact only with respect to the billing for services rendered after March 13, 2011. Defendants claim that the representation ended on that date. On March 11, 2011, plaintiff sent an e-mail to the defendants stating, among other things, that "I have instructed my staff not to perform any further work on this matter until your financial obligations to this firm have been paid in full." [Motion Exh. F] At some point thereafter, defendants retained their current attorneys, the law firm of Kevin Kerveng Tung, P.C., who claim to have negotiated the final settlement of the Underlying Action. The Court has insufficient information to determine whether and when the plaintiff's representation of defendants effectively terminated, the extent to which plaintiff's continued participation in the Underlying Action after March 13, 2011 was authorized or otherwise justified, and if so, whether the services performed in that period should be compensated on a contractual or quasi-contractual basis. The Court questions whether the doctrine of account stated applies with respect to these services because the time to object to the March 21, 2011 and March 28, 2011 bills had not expired prior to the commencement of this action (on or about March 29, 2011). These issues must be addressed in any subsequent proceedings.

Based upon the foregoing, it is

ORDERED, that plaintiff's motion for summary judgment pursuant to CPLR §3212 is **granted in part** as follows:

- 1. The issue of liability is determined in plaintiff's favor;
- 2. It is determined that plaintiff is entitled to compensation for services rendered and other charges authorized in the Retainer Agreement, in an amount not less than \$47,535.00, the balance due as set forth on the invoice of March 11, 2011; and it is further

ORDERED, that the parties shall appear for a conference on *October 24* to discuss the course of further proceedings in this matter. Counsel are directed to contact the Court after 3:00 p.m. on the business day immediately preceding the date of the scheduled conference, or any duly authorized adjournment thereof, to confirm their attendance and the absence of any scheduling conflict on the part of the Court. *EPW*

This constitutes the Order of the Court. Plaintiff shall serve a copy of this Order upon defendants forthwith upon receipt from any source.

Dated: *September 30, 2011* *F. Dana Winslow*  
J.S.C.

**ENTERED**  
OCT 24 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE