

Assaf & Siegal, PLLC v Miciotta

2012 NY Slip Op 30926(U)

April 10, 2012

Sup Ct, Albany County

Docket Number: 7510-11

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

ASSAF & SIEGAL, PLLC,

Plaintiff,

-against-

SUSAN MICIOTTA,

Defendant.

DECISION and ORDER
INDEX NO. 7510-11
RJI NO. 01-12-106273

Supreme Court Albany County All Purpose Term, March 30, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Assaf & Siegal, PLLC
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Attorney for the Plaintiff
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Albany, New York 12211

Susan Civic, Esq.
Attorneys for Defendant
376 Broadway
Saratoga Springs, New York 12866

TERESI, J.:

Plaintiff commenced this action claiming that Defendant owes it a balance of \$22,504.14 for legal services provided. Issue was joined by Defendant and discovery is ongoing. Plaintiff now moves for summary judgment. Defendant opposes the motion. Because Plaintiff demonstrated its entitlement to summary judgment on its account stated cause of action, and Defendant raised no material issue of fact, Plaintiff's motion is granted.

It is well established that "[s]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v Finn, 229

AD2d 869, 870 [3d Dept 1996]). “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (Smalls v AJI Industries, Inc., 10 NY3d 733 [2008] quoting Alvarez v Prospect Hospital, 68 NY2d 320 [1986]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v City of New York, 49 NY2d 557 [1980]).

An account stated is “an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due.” (Levine v Harriton & Furrer, LLP, 92 AD3d 1176, 1178 [3d Dept 2012], quoting J.B.H., Inc. v Godinez, 34 AD3d 873, 874 [3d Dept 2006] and Jim-Mar Corp. v Aquatic Constr., 195 AD2d 868 [3d Dept 1993], lv. denied 82 NY2d 660 [2000]). “An attorney can recover fees on an account stated with proof that a bill ... was issued to a client and held by the client without objection for an unreasonable period of time.” (Antokol & Coffin v Myers, 86 AD3d 876, 877 [3d Dept 2011], quoting O’Connell & Aronowitz v Gullo, 229 AD2d 637 [3d Dept 1996], lv. denied 89 NY2d 803 [1996][internal quotation marks omitted]; Darby & Darby, P.C. v VSI Intern., Inc., 95 NY2d 308 [2000]; Miller v Nadler, 60 AD3d 499, 499 [1st Dept 2009]; Geron v DeSantis, 89 AD3d 603 [1st Dept 2011]; Ruskin, Moscou, Evans, & Faltischek, P.C. v FGH Realty Credit Corp., 228 AD2d 294 [1st Dept 1996]).

On this record, Plaintiff demonstrated its entitlement to judgment as a matter of law on its account stated claim. Plaintiff supports its motion with the affirmation of one of its members (hereinafter “Siegal”). He submitted the parties’ retainer agreement, which outlined Defendant’s

obligation to pay an hourly fee for services provided and for interest to accrue on unpaid charges. The agreement also obligated Defendant to “promptly bring to [Plaintiff’s] attention any objections [she] may have to [Plaintiff’s] bill[s].” Additionally, Plaintiff submitted copies of twenty seven invoices, each detailing the services provided to Defendant. The invoices also acknowledged and detailed numerous payments Defendant made to Plaintiff. In conjunction with such documentary proof, Siegal alleged that Plaintiff sent its invoices to Defendant on the dates corresponding to the twenty seven copies submitted. Despite the billing and Defendant’s obligation to promptly object, Siegal specifically asserts that “neither [he], nor [his] staff, ever received any objections or notice of any concerns from the defendant” relative to Plaintiff’s invoices. He further alleged that he mailed arbitration claim forms to Defendant, but that Defendant neither commenced an arbitration proceeding nor remitted any payment on the balance due. On these allegations and the supporting documentation, Plaintiff established its account stated claim as a matter of law.

In opposition, Defendant failed to raise a triable issue of fact. Defendant incorrectly argues that Plaintiff’s motion must be denied because Plaintiff previously obtained a judgment against her ex-husband, for her attorney’s fees in the underlying matrimonial action. (Law Firm of Joel R. Brandes, P.C. v Ferraro, 257 AD2d 610 [2d Dept 1999]; Seth Rubenstein, P.C. v Ganea, 41 AD3d 54 [2d Dept 2007]). Such assertion raises no issue of fact. Similarly, the charging lien Plaintiff previously obtained against Defendant neither precludes a separate judgment nor raises a triable issue of fact. (Ferraioli ex rel. Suslak v Ferraioli, 8 AD3d 163, 164 [1st Dept 2004]). Additionally, Defendant’s “conclusory denial [of receiving Plaintiff’s invoices] failed to rebut the presumption of proper mailing established by the plaintiff’s proof”

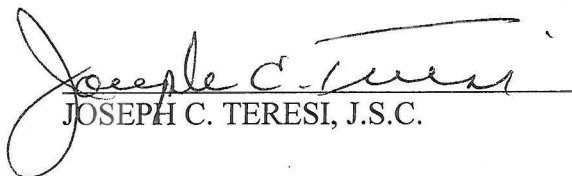
(Am. Exp. Centurion Bank v Williams, 24 AD3d 577, 578 [2d Dept 2005]) and her belatedly raised “belief” that much of the invoiced work was not performed does “not constitute the requisite specific, as opposed to general, allegations of protest.” (Levine v Harriton & Furrer, LLP, supra 1179, quoting 1000 N. of N.Y. Co. v Great Neck Med. Assoc., 7 AD3d 592 [2d Dept 2004]). Moreover, Defendant’s assertion that a prior firm of one of Plaintiff’s attorneys is the creditor on a judgment against her ex-husband, raised no issue of fact because no conflict of interest allegation was specified. Lastly, as explained by Plaintiff’s reply, Defendant’s assertion that Plaintiff previously offered to settle this matter raises no issue of fact.

Accordingly, Plaintiff’s motion for summary judgment is granted.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: April 10, 2012
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated February 24, 2012; Affirmation of David Siegal, dated February 24, 2012, with attached Exhibits "A" - "E."
2. Affidavit of Susan Miciotta, dated March 28, 2012, with attached Exhibits "A" - "D."
3. Affirmation of David Siegal, dated March 30, 2012.