

**Emery Celli Brinckerhoff & Abady, LLP v Rose**

2012 NY Slip Op 31198(U)

April 27, 2012

Supreme Court, New York County

Docket Number: 103871/10

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN  
*Justice*

PART 11

*Emery Celli, Brinckerhoff &  
Abady LLP*  
**Plaintiff,**

INDEX NO.: *103871110*

- v -

MOTION DATE:

*Michael Rose,*

MOTION SEQ. NO.: *005*

**Defendant.**

MOTION CAL. NO.:

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

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

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

PAPERS NUMBERED	

Cross-Motion: [ ] Yes  No

Upon the foregoing papers, it is ordered that *this motion is decided in accordance with the annexed Memorandum Decision and order.*

Dated: *April 30, 2012*

*J.S.C.*  
J.S.C.

**FILED**

MAY 07 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Check one:  FINAL DISPOSITION

[ ] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 11

-----X  
EMERY CELLI BRINCKERHOFF & ABADY, LLP,

Plaintiffs,

-against-

Index No. 103871/10

MICHAEL ROSE,

Defendant and Third-  
Party Plaintiff,

-against-

BROADSIDE REALITY CORPORATION, ARNOLD  
KAPILOFF , HERRICK FEINSTEIN LLP,  
MICHAEL KESSEL, and GEORGIA STAMOULIS,

Third-Party Defendants.

-----X  
JOAN A. MADDEN, J.:

This is an action by a law firm, plaintiff Emery Celli Brinckerhoff & Abady LLP (ECBA), to recover unpaid legal fees from its former client, defendant Michael Rose (Rose). ECBA asserts causes of action for account stated, quantum meruit and breach of contract.

The following motion sequence numbers are consolidated for disposition:

motion sequence number 002: ECBA moves to compel nonparty Stuart Goldstein (Goldstein) to comply with a subpoena and subpoena duces tecum served upon him by ECBA;

motion sequence number 003: ECBA moves to compel nonparty Nicholas G. Petras, Sr. (Petras) to comply with a subpoena and subpoena duces tecum served upon him by ECBA;

**FILED**

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NEW YORK  
COUNTY CLERK'S OFFICE

motion sequence number 004: Rose moves to quash plaintiff's nonparty subpoenas and subpoenas duces tecum to Goldstein and Petras, or alternatively, for a protective order barring ECBA from serving similar nonparty subpoenas and a motion in limine to prohibit ECBA from using any information obtained by any disclosure process, other than notices to admit, without prior order of the court;

motion sequence number 005: ECBA moves for summary judgment based on an account stated;

motion sequence number 007: ECBA moves to sever or dismiss the third-party action;<sup>1</sup>

motion sequence number 008: Rose moves to stay all process in this action, or alternatively, to stay ECBA's motion for summary judgment pending discovery in connection with certain e-mails, or alternatively, for permission to allow Rose's counsel to correct the form of an affidavit of Rose and an affirmation of his counsel previously submitted in opposition to ECBA's motion for summary judgment.

Because ECBA'S motion for summary judgment and Rose's motion for a stay could potentially resolve the other outstanding motions, the court will consider those motions first.

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<sup>1</sup> On or about November 15, 2011 Rose filed a third-party complaint against Broadside Realty Corporation, Arnold Kapiloff, Kostelanetz & Fink LLP, John Does 1-100, Herrick Feinstein LLP, Michael Kessel, and Georgia Stamoulis.

## BACKGROUND

ECBA alleges that in February 2005, Rose retained the law firm to represent him and Broadside Realty Corporation (Broadside), a real estate company, of which he was a shareholder, in connection with disputes Rose was having with his step-sisters, Georgia Stamoulis (Georgia) and Rose Helen (Helen), and Helen's son, Aris Taflambas (Aris), who were also Broadside shareholders.<sup>2</sup>

On or about February 8, 2005, Rose signed a retainer agreement with ECBA which provided that he would be billed on an hourly basis for the firm's service. The hourly rates of the individual attorneys were specified in the agreement with the caveat that they were subject to change without notice. The agreement further provided that Rose would provide a refundable initial retainer of \$50,000 against legal fees and expenses, and that ECBA would

bill against the first \$35,000.00 (the "initial retainer"), with the remaining \$15,000.00 (the "back-end amount") to be applied to the bill for the last month in which the firm represents you. ... In the event that the initial retainer is expended, you will be billed monthly or, at our election, a further retainer amount may be required. ... Generally, the firm will send you a bill each month reflecting the legal fees and disbursements incurred during the previous month, though we may defer billing of relatively small amounts. Any balance due shown on a bill should be paid within 30 days of the date of the

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<sup>2</sup> Broadside was allegedly founded in 1944, by Rose's father, Stanley Rose, who originally owned 100% of its stock.

bill. If any unpaid balance is not paid in full within 60 days, interest will be charged on the unpaid balance at the annual rate of 12% from 10 days after the date of the bill.

Letter to Michael Rose from Richard D. Emery, dated February 8, 2005, Affidavit of Richard E. Emery, Exh. A.

The complaint alleges that ECBA represented Rose in the following actions: *Rose v Stamoulis*, Sup Ct, Queens County, index No. 5686/02 (a shareholder derivative action by Rose against his step-sister, Georgia); *Rose v Stamoulis et al*, Sup Ct, Queens County, index No. 6885/03 (a shareholder derivative suit by Rose's other step-sister, Helen and her son, Aris, against Rose and Georgia);<sup>3</sup> *Rose v Broadside Realty Corp.*, Sup Ct, NY County, index No. 602887/07 (an action to determine the number of shares of Broadside stock owned by Rose's father, Stanley Rose, at his death). The complaint further alleges that ECBA successfully represented Rose in a fee dispute with his previous attorneys.

Ultimately, in April 2008, ECBA negotiated a settlement on Rose's behalf, as a result of which, among other things, Georgia, Helen and Aris returned their shares of Broadside to the company in exchange for a payment of a total of \$12,000,000 for their shares, and Rose gained complete control of the company.

It appears that ECBA continued to represent Rose through the

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<sup>3</sup> The court notes that ECBA's representation of Rose in the two actions in Queens County Supreme Court took place prior to the retainer agreement that is at issue in this action.

fall of 2009.

ECBA alleges that during the first year of its representation, Rose paid his monthly bills regularly, however, in January 2006, Rose stopped his regular payments of the firm's invoices. According to ECBA, Rose made sporadic partial payments between January 2006 and August 2009, but has made no payments since August 2009.<sup>4</sup> According to ECBA, as of December 9, 2009, Rose's outstanding balance was \$439,439.03. ECBA further alleges that Rose did not contest any portion of any outstanding bill until late in November 2009, when he objected to billing entries for five days of work in late October, totaling less than \$3,000. ECBA is not now seeking to recover for those challenged billing entries.

ECBA initially attempted to commence an arbitration proceeding against Rose, pursuant to the terms of the retainer agreement, but Rose refused to participate. ECBA filed a petition to compel arbitration which was denied and the

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<sup>4</sup> According to ECBA, Rose made the following partial payments: January 4, 2007, a payment of \$80,000 against a balance of \$124,318.92; June 4, 2007, a payment of \$15,000 against a balance of \$84,734.38; June 15, 2007, a payment of \$15,000 against a balance of 76,623.63; June 11, 2009, a payment of \$150,000 against a balance of \$421,907.39; and on August 13, 2009, a payment of \$20,000 against a balance of \$392,896.58. In addition, in January 2007, ECBA gave Rose what it described as "a \$20,000 courtesy discount relating to costs associated with the addition of a new associate to the litigation team" and on April 6, 2009, ECBA applied Rose's \$15,000 "back end retainer" against his balance. See Affidavit of Richard D. Emery, ¶ 4.

proceeding was dismissed, because an action had been filed by Rose against ECBA one day earlier, in which the issue could be litigated. See *Emery Celli Brinkerhoff and Abady LLP v Rose*, Sup Ct, NY County, March 29, 2010, Stallman, J., index No. 117550/09.

In 2010, ECBA filed a motion for summary judgment in lieu of complaint on its claim for account stated, which was denied on November 23, 2010. On December 2, 2010, ECBA filed the summons and complaint in this action, asserting causes of action for account stated, quantum meruit and breach of contract. In his answer, Rose asserted the following affirmative defenses: 1) that ECBA's contract and quasi-contract causes of action are mutually exclusive; 2) that the retainer he signed is "avoidable" as to fees, because of allegedly unethical provisions governing arbitration, attorney's fees, interest, and hourly rates; 3) that because the retainer agreement is void, ECBA is relegated to quantum meruit; and alternatively 4) that if the retainer is not void, the allowable interest should be reduced and allowable increases in fees be limited to a reasonable amount. Rose did not assert allegations of malpractice or misconduct by ECBA in his answer and affirmative defenses.

In May 2010, ECBA filed a proceeding seeking to assert a charging lien against the proceeds of the settlement previously negotiated by ECBA on behalf of Rose. *Emery Celli Brinckerhoff and Abady LLP v Rose*, Sup Ct, NY County, index No. 106391/10. In

opposition to ECBA's order to show cause seeking the charging lien for unpaid legal fees, Rose argued, among other things, that ECBA committed malpractice in connection with tax matters bearing on the transfer of Broadside shares by Rose's step-sisters, pursuant to the 2008 settlement, and, therefore, ECBA should be barred from collecting any outstanding legal fees. The issue of whether Rose's claims of malpractice barred ECBA's claim for a charging lien was referred to a special referee to hear and report with recommendations. Arguing to the referee that he was entitled to try the malpractice claim before a jury, Rose contended that he was only required to demonstrate that he had raised a "viable" claim of malpractice and was not required to actually prove that malpractice had occurred. ECBA contended that Rose had waived his right to a jury trial on the issue of legal malpractice, and that the order of reference required that Rose try that issue before the special referee. In a decision dated April 11, 2011, the special referee marked the matter off his calendar to enable Rose to return to this court to seek clarification of whether he had waived his right to a jury trial on the malpractice issue. Rose's motion for clarification in the charging lien proceeding is now pending before this court. *Emery Celli Brinckerhoof and Abady LLP v Rose*, Sup Ct, NY County, index No. 106391/10, motion sequence no. 003.

On or about March 31, 2011, in motion sequence numbers 002

and 003, ECBA filed motions to compel nonparty witnesses Stuart Goldstein and Nicholas G. Petras, Sr., Rose's account and attorney, respectively, to comply with subpoenas and subpoenas duces tecum. ECBA argued that it needed to examine the two nonparties and certain documents in their possession as a result of the claims of legal malpractice raised by Rose in opposition to ECBA's proceeding seeking a charging lien. Rose argued in opposition that he had not asserted the defense of legal malpractice in this action, and that, therefore, the discovery sought by ECBA was improper.

In an oral argument on April 14, 2011, Rose indicated that he planned to amend his answer in this action to assert the defense of malpractice, and he was given a deadline of April 25, 2011 to do so. Rose neither amended his answer by April 25, nor sought an extension of time in which to do so.

On or about July 8, 2011, ECBA filed a motion for summary judgment based upon its theory of account stated. In Rose's papers in opposition to the motion for summary judgment, he asserted that ECBA had committed malpractice and misconduct in conjunction with its representation of him, but did not submit a proposed answer including those allegations. During the October 27, 2011 oral argument on the motion for summary judgment, Rose's counsel again raised the possibility that he would seek to amend Rose's answer to include a affirmative defense and/or

counterclaim for legal malpractice and wrongdoing in connection with the calculation of transfer taxes owed by Rose's step-sisters as a result of the settlement negotiated by ECBA. In an order dated November 22, 2011, however, this court denied Rose's request that the summary judgment motion be adjourned pending a motion by Rose to amend his answer. In so ruling, this court noted that, despite having indicated, in April 2011, that he would amend his answer, and having been given a deadline of April 25, 2011 to do so, Rose neither amended his answer, nor filed a motion for an extension of time in which to do so.

The November 22, 2011 decision also noted that in opposition to ECBA's motion for summary judgment Rose submitted a "combined memorandum, affidavit and affirmation in opposition" in which the client merely adopted the majority of the statements made by his counsel in his affirmation. The decision noted that the form was improper and lacked probative value.

#### **ROSE'S MOTION FOR A STAY**

Rose took no action in response to this court's November 22, 2011 order until January 17, 2012, when he filed an order to show cause to stay all process in this action, or alternatively, to stay ECBA's motion for summary judgment pending discovery, based upon an e-mail from Richard Emery (Emery), of ECBA, to Garrett

Gray, dated October 8, 2009.<sup>5</sup> Rose contends that the e-mail raises questions regarding possible misconduct by Emery regarding the computation of the transfer tax by attorneys for Rose's step-sisters. In the motion for a stay, Rose's counsel contends that he has belatedly concluded that Rose does not likely have standing to raise the issue of legal malpractice, which, he asserts, resides with Broadside, and that, therefore, "by not amending I did everyone a favor." Memorandum of Law and Affirmation in Support of Order to Show Cause, at 10. He then appears to contradict himself by asserting that, nonetheless, Rose can raise the defense of legal malpractice, because he was represented by ECBA and was injured to the extent that the allegedly improper valuation of his step-sisters' shares in Broadside ultimately resulted in him having to sue them to pay the transfer taxes with respect to their shares of Broadside. In short, even as of January 17, 2012, when he filed his order to show cause seeking a stay of the proceedings in this action, Rose has not definitively asserted a defense of malpractice or misconduct, or even decided whether Rose is the appropriate party to do so.

The focus of Rose's motion would appear to be an alleged e-

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<sup>5</sup> Although Rose's counsel contends that he never saw the court's order until December 30, 2011, the court notes that, on November 29, 2011, the order was scanned onto the Supreme Court Records On-Line Library (SCROLL) Website.

mail dated October 8, 2009, which he indicates he only "found" among other e-mails in his possession in the two weeks before he filed his motion, and which he had previously overlooked. Rose seeks to justify his delay in bringing the e-mail to the court's attention based on the fact that it was among 1200 other e-mails in his possession. In the face of much current litigation involving e-discovery, 1200 e-mails do not, however, strike the court as a sufficiently overwhelming number to justify Rose's delay.

Furthermore, Rose does not actually submit a copy of the alleged document in a proper fashion. Rather, he re-types into his own affirmation what he states is the text of the e-mail. On that basis alone this court could properly refuse to consider the purported e-mail. See *Wider v Heritage Maintenance, Inc.*, 14 Misc 3d 963 (Sup Ct, NY County 2007) (e-mails failing to comply with requirements of the CPLR for authentication of reproduced documents not considered by the court); *Ourusoff v Hopkins*, 13 Misc 3d 1235(A), 2006 NY Slip Op 52126(U) (Sup Ct, Suffolk County 2006) (e-mail submitted in inadmissible form not a predicate for personal liability).<sup>6</sup> The e-mail is purportedly from Richard D.

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<sup>6</sup> The court notes that this is not the first time Rose utilized this improper method of presenting the content of documents to the court. He similarly copied the text of a purported e-mails and photocopies of tax forms into Defendant's Combined Memorandum, Affidavit, and Affirmation in Opposition to ECBA's motion for summary judgment.

Emery to Garrett Gray, with copies to Yariv Ben-Ari, Michael Kessel and Michael Zargari with the subject of Broadside Transfer Taxes. It states:

We'll just go to court and pay the higher numbers we believe you owe. The side agreement was for your sake to justify the lower numbers based on valuations that you wanted to pay. We cannot consent without that back up for your position, that we will only assent to if you back it up with that agreement. Please have her sign the Agreement if you want this to move forward based on your numbers. Otherwise we will use our higher number, go to court for permission to pay and proceed on our own. Once again, you are insisting on something that can only hurt you. In any event, any balance cannot be returned until we know the taxing authorities accept the return as filed.

See Memorandum of Law and Affirmation in Support, at 6.

Although Rose does not indicate who Garrett Gray and the various recipients of the mail are, he contends that the e-mail indicates that "all the lawyers" knew that the transfer taxes to be paid by Rose's step-sisters were being improperly computed in a manner that would save them money. Although Rose appears to be contending that this 2009 e-mail presents some crucial new evidence for his claim of malpractice/misconduct, the court concludes that it does not substantially add to Roes's previous assertions, which are discussed in greater detail below, in the court's consideration of ECBA's motion for summary judgment. And even in this motion, Rose does not appear to have definitively decided whether he can or will assert those claims. The court does, however, note one change in this motion. Rose appears to

have escalated his rhetoric, now alleging not merely malpractice and "misconduct," but also suggesting a RICO violation by ECBA. Because of what could at best be described as his rambling style, however, it is not clear whether the purported RICO violation is ECBA's alleged involvement with the payment of transfer taxes by Rose's step-sisters, ECBA's assertion that Rose did not produce the e-mail in response to its earlier request for document production,<sup>7</sup> or some other alleged action taken or statement made by ECBA in the course of litigation.

The summons and complaint in this action were filed on December 2, 2010. It would appear that this motion is Rose's first effort to take discovery in this action. Rose has been hinting for what now is nearly a year, that he would raise the defense of malpractice/misconduct, creating what appears to be a game of "will he, won't he raise that defense."<sup>8</sup> It is now too

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<sup>7</sup> Here again, Rose fails to submit actual evidence that he timely produced the e-mail in response to ECBA's discovery request. Rather, he states in his Memorandum of Law and Affirmation in Reply, "As I said in my opening papers, I 'found' [the e-mail] in the batch of emails I assembled precisely for production to ECBA. By agreement, that batch, including that email, 4A1676B9-01EC2243 file, **was given to ECBA ON June 2, 2011** as a ZIP email attachment, in standard searchable Microsoft Outlook\*.eml form, not a stack of papers. A copy of the email was automatically created by AOL and remains stored with attachment on AOL's servers, whence it may be subpoenaed as proof." Memorandum of Law and Affirmation in Reply, at 2, ¶ 2 (emphasis in original).

<sup>8</sup> In addition to Rose's many other statements that he would amend his answer and raise the defense of malpractice discussed above, none of which were carried out, the following statement by

late in that "game" to seek a stay in proceedings to conduct discovery, or even a stay of the motion for summary judgment, which was fully submitted when this court denied Rose's request for an adjournment in its November 22, 2011 decision. See *Ward v New York City Hous. Auth.*, 18 AD3d 391, 392 (1<sup>st</sup> Dept 2005) (lack of discovery is here due to defendant's own failure to take timely steps to obtain the evidence he now claims is necessary to oppose summary judgment).

Rose also seeks permission to resubmit the papers he submitted in July 2011 in opposition to ECBA's motion for summary judgment in a different form. Rose notes that ECBA initially submitted an affirmation by Richard D. Emery with annexed exhibits in support of its motion for summary judgment. After Rose objected to the form of the submission as improper under CPLR 2106, ECBA resubmitted Emery's statement in the form of an affidavit. Rose argues that, since ECBA was permitted to resubmit Emery's affirmation as an affidavit, he, too, should be

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his counsel in an e-mail exchange with ECBA attorney Elizabeth Saylor suggests that he was treating the matter of asserting an affirmative defense as a game. In that e-mail Rose's counsel stated: "The same as to arguing that I 'might' amend pleadings to assert counterclaims and so in anticipation of that you get to poke around based on what you think I may plead later. *Your rights are limited to sitting there and waiting to see if I amend*, making predictably meritless objections if I do that it will be prejudicial, and then getting to take new depositions after that." E-mail from [Fred55@aol.com](mailto:Fred55@aol.com) (Frederick M. Oberlander) to Elizabeth Saylor, dated March 11, 2011, Re: Discovery Disputes. Affirmation of Adam R. Pulver, dated February 1, 2012, Ex. 8 (emphasis supplied).

permitted to correct the form his papers. The problem presented by Emery's original affirmation, however, was merely a simple technical defect. The papers submitted on behalf of Rose in opposition to the motion for summary judgment present far more complicated problems. Defendant's Combined Memorandum, Affidavit, and Affirmation in Opposition consists of a 29-page mostly single-spaced document titled "Attestations" which combines purported facts, law and formulas and contain photocopies of portions of tax documents. In addition there is a one-page affirmation by counsel in which he states

every fact stated hereinabove and described as a fact within my personal knowledge is in fact true and correct to the best of my knowledge and belief, and that I have personal knowledge thereof.

Such facts within my knowledge are:

- (1) That Herrick admitted in 2009 it computes the transfer tax as stated, and has done so 300 times. I was in attendance at that meeting and heard it.
- (2) To the extent that the above allegations as to the malpractice and misconduct state the law "as fact," that is, state what formulas are used, or should be used.

Affirmation of Frederick M. Oberlander, dated July 22, 2011.

The affidavit of Michael Rose is also attached as part of the opposition papers. That affidavit states that

having read the Opposition and Affirmation, Cross-Motions, and all material incorporated therein or attached thereto, [he] hereby swears under penalty of perjury that to the best of my knowledge (except where certain facts, *if there be any*, are specifically and expressly alleged to be within the knowledge of my counsel, in which case my counsel's affirmation shall apply.),

Affirmation of Michael Rose, dated July 22, 2011 (emphasis in original).

Even in this motion, Rose's counsel continues his earlier practice of mixing assertions of fact and law in an, at best, confusing manner, and fails to submit documents in conformity with the CPLR. Again, he improperly, as he would say, "embeds" portions of documents he wishes to rely on within his mixed submissions of fact and law. Correcting the defects in the papers submitted on behalf of Rose in opposition to ECBA's motion for summary judgment would not involve the simple one line technical fix, of converting an affirmation to an affidavit. Rather, Rose's counsel would have to unravel many pages of convoluted mixed statements of purported fact and law, indicating what statements are fact and what are law, properly attributing the facts to the appropriate person, where possible, and properly submitting documents on which he seeks to rely.

The court concludes that Rose's request to resubmit his papers in opposition to ECBA's motion for summary judgment and his motion for a stay are part of his long-established pattern of obfuscation and delay. For these, and the other reasons set forth above, Rose's motion for a stay or for permission to resubmit his papers is denied.

#### **ECBA'S MOTION FOR SUMMARY JUDGMENT**

Turning to ECBA's motion summary judgment based on an

account stated, according to the affidavit of Richard Emery, in January 2006, in the midst of litigation, Rose stopped regular payment of the ECBA's invoices. He made his next payment on January 4, 2007, when he paid \$80,000 against a balance of \$124,318.82 and was given a courtesy discount of \$20,000. Rose allegedly made two more payments in June 2007, and three in 2009, including applying his \$15,000 back-end retainer against his balance. See copies of checks annexed to Emery Affidavit, Exh. C.

On October 9, 2009, ECBA sent Rose an invoice for \$425,928.41 to which he did not object and made no payment. On November 12, 2009, ECBA sent an invoice to Rose for \$438,796.41. On November 23, 2009, Rose sent an e-mail to ECBA objecting to nine entries, totaling \$2,962.50, on November 12 invoice. According to ECBA, this was the first time Rose had objected in writing to an ECBA invoice. ECBA also states that in examining the outstanding bills, it discovered a billing error by another law firm retained to assist ECBA in representing Rose. ECBA has, therefore, reduced the amount sought by that billing error. In moving for summary judgment on its account stated claim, ECBA is seeking \$414,176.21. Emery Affidavit, ¶¶ 4 - 12. ECBA submits copies of its invoices from March 3, 2005 through December 9, 2009. See Emery Affidavit, Exh. B.

Sandra Contreras, the officer manager for ECBA from

September 25, 2006 to April 16, 2010 states that she was responsible for sending bills to clients and for receiving and processing client payments. She further states that she sent monthly bills to Rose reflecting ECBA's charges, that the invoices annexed to Emery's affirmation are consistent with the bills she recalled sending to Rose, and that at no time did Rose inform her that he had not received any of the bills she sent, nor were any ever returned to the office for failure to be delivered by the postal service. Finally she states that Rose did submit payments in response to some of the bills she sent, and that copies of his checks are annexed to Emery's affirmation. Affidavit of Sandra Contreras, ¶¶ 1-5.

In opposition to ECBA's motion for summary judgment, citing *Morrison Cohen LLP v Fink* (81 AD3d 467 [1<sup>st</sup> Dept 2011]), Rose first argues that ECBA improperly submitted an affirmation rather than an affidavit by Emery. Therefore, according to Rose, ECBA offered no admissible evidence in support of its motion for summary judgment. Rose further argues that the defect could not be cured on reply, citing, inter alia, *Abramson v Hertz* 19 AD3d 305 [1<sup>st</sup> Dept 2005]). The Appellate Division, First Department, has, however, explicitly held that the procedural error of submitting an attorney's affirmation rather than an affidavit in support of a claim of account stated may be corrected by the timely submission of an affidavit on reply. *Berkman Bottger &*

*Rodd, LLP v Moriarty*, 58 AD3d 539, 539 (1<sup>st</sup> Dept 2009). ECBA has done so here by submitting the Emery affidavit, dated July 29, 2011.

Rose also objects to the affidavit of Sandra Contreras, asserting that it was notarized by Leda DeRosa, who Rose asserts, is a member of ECBA and, therefore, is a party to the litigation. See *Morrison Cohen LLP v Fink*, *supra*. In reply, however, ECBA submits the affidavit of DeRosa, who states that she is a paralegal for ECBA and is not, and never has been, a partner or member of the firm.

Although Rose has not included an affirmative defense of legal malpractice in his answer, he next argues that an account stated is subject to the defense of legal malpractice. Rose alleges two areas that he contends constitute malpractice and two that he contends constitute misconduct, identified as "Malpractice 1 & 2" and "Misconduct 1 & 2." Although his allegations are less than clear, to the extent that it can be gleaned from his papers, it appears that he contends that failing to properly account for federal, state, and local income tax and state and city transfer tax consequences of the negotiated settlement constitute "Malpractice 1."<sup>9</sup> His allegation of

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<sup>9</sup> The court notes that in his motion for a stay, under the heading of "Various Other Inanities and Frauds," Rose states that "it is impossible to ignore how many times I stood before this court, let alone writing in papers, that I made no malpractice defense in *income* tax, but did in *transfer* tax." Memorandum of

"Misconduct 1" appears to be that negotiating the settlement agreement despite purported "incompetence" in the tax area and failure to acquire necessary competence by associating with an attorney with requisite experience constitutes misconduct. Rose's claim of "Malpractice 2" is, again, less than clear, but it appears to relate to an unspecified "course of conduct" undertaken by ECBA with respect to the transfer tax issue. According to Rose, "Misconduct 2" relates to alleged evidence that ECBA deliberately computed the transfer tax incorrectly "as part of a scheme to defraud New York City as well as its own clients." Defendant's Combined Memorandum, at 10.

Although, in his opposition papers dated July 22, 2011, Rose claims that he "is making final an amended answer with counterclaims pursuant to the above, and estimates filing motion for leave to amend within 10 days" (Defendant's Combined Memorandum, at 10), he failed to make such a motion.

Rose also argues that although he has such defenses, he need not assert them in opposition to ECBA's motion, because the firm has not made a prima facie case because of the procedural defect of Emery's affirmation. Even after ECBA served Emery's July 27, 2011 affidavit, however, Rose made no timely attempt to properly

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Law and Affirmation in Reply in support of Order to Show Cause, dated February 3, 2012, at 3. Rose's Defendant's Combined Memorandum, Affidavit and Affirmation in Opposition, at page 9, however, specifically asserts allegations of malpractice based upon ECBA's alleged failure to properly account for federal, state and local income tax implications of the settlement.

assert affirmative defenses or counterclaims of malpractice or misconduct.

It would appear that the essence of Rose's rather convoluted presentation of his allegations against ECBA that he characterizes as "Malpractice 1" and "Misconduct 1" are that the firm had no expertise in tax law and negotiated a settlement for Rose that did not adequately account for the tax consequences of that settlement relating to transfer taxes to be paid. The court notes that, pursuant to the settlement, the transfer taxes at issue were not paid by Rose, but by Rose's step-sisters in connection with the transfer of their shares to Broadside. The court further notes that on March 31, 2008 ECBA attorney, Elizabeth Saylor, sent an e-mail to Rose regarding the tax consequences of the agreement which states:

As I mentioned in our call, it is very important that you obtain independent tax advice regarding this potential settlement agreement. Find out from a tax attorney what needs to be written into the agreement to minimize your and Broadside's taxes. We are not tax attorneys, so I do not want to give you tax advice.

E-mail from Elizabeth Saylor, Reply Affidavit of Adam R. Pulver in Support of Motion for Summary Judgment, Ex. S. Apparently as a result that e-mail to Rose, Arnold Kapiloff of Kostelanetz & Fink was retained to advise Rose with respect to tax matters.

Although equally convoluted, the essence of Rose's allegations regarding what he characterizes as "Malpractice 2" and "Misconduct 2" appears to be that the transfer taxes to be

paid by Rose's step-sisters in connection with the transfer of their shares back to Broadside were calculated in a manner that would result in their underpaying the City of New York, and that ECBA was aware of the proposed calculations by the step-sisters' attorneys. Although Rose details the formulas that he believes should have been used to calculate the transfer taxes owed by Rose's step-sisters, he does not allege that the calculations were made by ECBA. At best, he alleges that ECBA was aware, or should have been aware that the calculations were improperly made.

This court makes no determination of whether the calculations made by the attorneys for Rose's step-sisters on behalf of their clients was proper. With respect to purported actions by ECBA, however, Rose fails to submit any affidavit of an expert who could attest to the fact that ECBA's handling the tax aspects of Rose's legal problems, or ECBA's alleged knowledge of the way the transfer tax liability of Rose's step-sisters was calculated by their attorneys constituted malpractice, much less "misconduct." In the Memorandum of Law and Affirmation in Support of his order to show cause for a stay, Rose's attorney asserts that such an affidavit is unnecessary where the trier of fact could resolve the question of a deviation at trial without an expert. Notwithstanding Rose's assertion that even "[a] highly trained circus bear could get this right" (See Memorandum

of Law and Affirmation in Support of Rose's Order to Show Cause for a stay, at 5), this court concludes that the questions of the proper method of determining the transfer tax with respect to transfer of corporate shares, whether the attorneys for Rose's step-sisters properly calculated those taxes, and whether ECBA had any obligations with respect to the activities of those attorneys are far too complex to be decided by a jury without the aid of expert testimony. See *Tran Han Ho v Brackley*, 69 AD3d 533 (1<sup>st</sup> Dept 2010) (expert affidavit needed where claims raise issues of professional standards beyond the ordinary experience of non-lawyers); *Natale v Samel & Assoc.*, 308 AD2d 568, 569 (2d Dept 2003) (summary judgment granted to defendants where plaintiffs failed to submit expert affidavit delineating appropriate standard of professional care and skill although "their claims involved allegations that ordinary jurors could not evaluate based on their own knowledge and experience.")

Rose's counsel also contends that it was not necessary for him to submit the affidavit of an expert regarding malpractice, because he is an expert on tax matters, and can properly submit an expert affirmation of his own on behalf of his client. In support of his position he cites *Bloom v Kernan* (146 AD2d 916 [3d Dept 1989]). There, however, plaintiff's attorney was merely setting forth the local practice of real estate attorneys regarding reverter clauses and title insurance, a far less

complicated matter than that raised by defendant. It is not necessary to reach the question of whether Rose's counsel has sufficient expertise in the area of tax law to be considered an expert in this area, because this court concludes that his counsel could not properly function both as an expert and an advocate for Rose in this case. Such an action here would raise serious questions under Rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.0 [previously Rule 1200.21 (DR 5-102) of the Code of Professional Responsibility]), which prohibits a lawyer from acting as an advocate on behalf of his client and before a tribunal where he could also be called as a witness. See *Ellis v Broome County*, 103 AD2d 861, 861 (3<sup>rd</sup> Dept 1984) ("An obvious justification for the advocate-witness rule is avoidance of the unseemly circumstance of placing an attorney in a position in which he must argue the credibility of his own testimony"); *Matter Jung-Chao Liu*, 20 Misc 3d 938 (Sur Ct, Broome County 2008) (former attorney could be an expert witness because he was neither an advocate nor trial counsel in the case in which he would be an expert witness). Furthermore, playing the dual role of an advocate for his client and a purported expert would raise obvious questions about his objectivity as an expert. See *id.* at 940 (where expert witness previously represented the party in the matter in which he is acting as a witness, the party would be subject to cross examination as to bias).

The court concludes that the defects in Rose's malpractice allegations apply to his allegations of "misconduct" as well.

In opposition to ECBA's motion for summary judgment, Rose also argues that he is not liable for any of the legal fees or anything else due to Kapiloff or Kostelanetz. He contends that he refused to hire Kapiloff and he thought they would be representing Broadside, not himself. Rose contends that billing relating to Kapiloff and Kostelanetz constitute approximately 20% of the amount allegedly due. Rose, however, submits no evidence that he made any objection to the invoices that related to the involvement of Kapiloff/Kostelanetz until his e-mail objections to items in the November 12, 2009 invoice relating to charges relating to work performed on October 22, 23, 26, 27 and 30, 2009, which are not the subject of ECBA's motion. Furthermore, as ECBA argues, in his deposition, Rose conceded that he agreed to have Kapiloff represent him with respect to tax matters, because he wanted to continue being represented by Emery, and feared that Emery would refuse to continue his representation if Rose rejected Kapiloff. Deposition of Michael Rose, dated March 18, 2011, at 258.

To establish entitlement to summary judgment, the movant must make a prima facie showing entitling it to judgment as a matter of law, eliminating all triable issues of material fact. CPLR 3212 (b); *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735

(2008). Once the movant satisfies this standard, the burden shifts to the opponent to rebut the prima facie showing, by submitting evidence in admissible form sufficient to require a trial of material issues of fact. *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 (1986). Mere conclusions or unsubstantiated allegations or assertions are insufficient. See *Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 281-282 (1978).

Here, ECBA has established a prima facie claim under the account stated theory. "An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other." *Shea & Gould v Burr*, 194 AD2d 369, 370 [1<sup>st</sup> Dept 1993], quoting *Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431 (4<sup>th</sup> Dept 1979).

There must be a debtor-creditor relationship between the parties regarding the items forming the account, and an account may be so stated between an attorney and client. See *Shea & Gould v Burr*, 194 AD2d at 371; *Paul, Weiss, Rifkind, Wharton & Garrison v Koons*, 4 Misc 3d 447, 450 (Sup Ct, NY County 2004). The account stated may be by an explicit promise to pay the outstanding bills, or an implicit agreement to pay. See *Morrison Cohen Singer & Weinstein v Ackerman*, 280 AD2d 355, 355-356 (1<sup>st</sup> Dept 2001). "An implicit agreement to pay, warranting summary

judgment, will arise from either the absence of any objection to a bill within a reasonable time or a partial payment of the outstanding bills." *Paul, Weiss, Rifkind, Wharton & Garrison v Koons*, 4 Misc 3d at 450, citing *Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d at 433; see *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 (1<sup>st</sup> Dept 2004) (either retention of the bills without objection within a reasonable period of time or partial payment may give rise to an account stated); see also *Biegen v Paul K. Rooney, P.C.*, 269 AD2d 264, 265 (1<sup>st</sup> Dept 2000).

Citing *Santora & McKay v Mazzella* (182 AD2d 572 [1<sup>st</sup> Dept 1992]) and *Diamond & Golomb v D'Arc* (140 AD2d 183 [1<sup>st</sup> Dept 1988]), Rose argues that retention of bills without objection does not always mean that there is implied assent to the amount stated in those bills. In *Santora*, the court concluded there were questions of fact whether the defendant had objected to the bills and the invoices "did not specify the billable hours spent on the services rendered." *Santora & McKay v Mazzella*, 182 AD2d at 572. In *Diamond*, however, the defendant claimed, not merely that the law firm no longer represented him during some of the period for which they were seeking to recover fees, but that he had spoken with the partner in the law firm by telephone objecting to the "'suspiciously large bills'" and requested itemization. In concluding that appellant had raised sufficient questions of fact to reverse a grant of summary judgment on a

claim of account stated, the Court noted that services rendered for which respondent sought payment were only cursorily listed in the bills, without any indication of billable hours spent and counsel also sought payment in connection with items for which there was no evidence indicating it was actively involved.

Rose claims that he "did in fact object, in writing and orally, on many occasions calling the bills wildly excessive. He made these objections orally in October 2009, shortly after his first receipt of some bills." Defendant's Combined Memorandum, Affidavit, and Affirmation in Opposition, at 7. The written objections to which Rose refers, however, are two e-mails which he sent to ECBA on November 23 and December 5, 2009. In the November e-mail he objects to a a series of charges from October 22 - October 30, 2009, none of which are the subject of this motion. In the December 5, 2009 e-mail to Richard D. Emery, Rose states, "I will not be sending you any partial payments unless there can be a universal settlement of your (and Arnold Kapiloff's) outrageously padded bills. A quarter of a million dollars to prepare a transfer tax return while I was in Europe us (sic) ludicrous." *Id.* The December 2009 e-mail does not, however, indicate which invoices or which particular charges Rose is complaining about, nor do Rose's opposition papers pinpoint the particular charges to which he objects. Particularly given the level of detail provided by ECBA in its invoices over the

nearly three years for which it seeks payment, many of which charges appear to be unrelated to "prepar[ing] a transfer tax return," this general objection made in December 2009 is insufficient to raise a question of fact as to the reasonableness of ECBA's charges for January 2006 through July 2009, for which Rose made partial payment, or the bills for September or October 2009, for which Rose made no payment.

While evidence of an oral objection to an account may be sufficient on a summary judgment motion to rebut the inference of an implicit agreement to pay, the oral objections must specify when and to whom oral objections were made, and specify the substance of the conversation. *Fink, Weinberger, Fredman, Berman & Lowell v Petrides*, 80 AD2d 781, 781-782 (1<sup>st</sup> Dept 1981); *Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 (2000). Here, beyond the general statement in his papers that he made many oral objections, no specifics are provided by Rose.

ECBA has submitted copies of all the relevant outstanding invoices, and has submitted an affidavit by a person with personal knowledge, indicating that these invoices were sent on a regular monthly basis to Rose, and the invoices detailed the legal services rendered, the hours billed by the attorney or assistant, and the hourly rates, costs and expenses. To the extent that Rose takes issue with ECBA's failure in submitting attorneys' affirmations on behalf of ECBA, as opposed to an

affidavit (see CPLR 2106), this failure was timely remedied when this same affirmation was submitted thereafter in affidavit form. See *Berkman Bottger & Rodd, LLP v Moriarty*, 58 AD3d 539, *supra*. As in *Berkman Bottger & Rodd*, there is no indication that Rose was prejudiced by the technical defect in opposing this motion.

Partial payment is an acknowledgment of the validity of the bill, implying an agreement to pay. See *Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d at 355-356; *Parker, Chapin, Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 378 (1<sup>st</sup> Dept 1977). Rose argues that partial payments made in 2007, cannot be held to be evidence of assent to invoices sent in 2009; however, ECBA has demonstrated that even after Rose stopped his regular payments of the bills sent to him in January 2006, he made five partial payments against the outstanding balance due, with the last payment of \$20,000 being made on or about August 11, 2009. At that point, according to the next invoice sent to Rose, his outstanding balance was \$406,890.72.

ECBA has made a *prima facie* showing that Rose failed to object within a reasonable time, and Rose fails to raise a triable issue. "Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible."

*Yannelli, Zevin & Civardi v Sakol*, 298 AD2d 579, 580 (2d Dept 2002), quoting *Legum v Ruthen*, 211 AD2d 701, 703 (2d Dept 1995).

Here, the only inference rationally supported by the record is that until he objected in writing to several items in the November 12, 2009 invoice, Rose assented to the correctness of the invoices for the matters included in the Account Stated. Rose fails to present legally sufficient evidence that he objected to any of the invoices before November 23, 2009. An undocumented assertion of an oral objection is insufficient to defeat an account stated. Rose's claim that he orally objected is insufficient, because he fails to state when he objected, the particular invoices or specific amounts, and the specific substance of the conversations in which the objections were made. See *Zanani v Schwimmer*, 50 AD3d 445, 446 (1<sup>st</sup> Dept 2008) (client's oral objections insufficient where she failed to state when she objected or specific substance of conversations, just stating that she told attorney that she would "address the issue with him" after matter was over); *Levisohn, Lerner, Berger & Langsam v Gottlieb*, 309 AD2d 668 (1<sup>st</sup> Dept 2003); *Shea & Gould v Burr*, 194 AD2d at 371; *Fink, Weinberger, Fredman, Berman & Lowell v Petrides*, 80 AD2d 781, *supra*.

Rose has, therefore, not raised a triable issue of fact. See *Schulte Roth & Zabel, LLP v Kassover*, 80 AD3d 500, 501 (1<sup>st</sup> Dept 2011) (summary judgment granted to plaintiff where defendant made

occasional oral objections which did not relate objection to specific amount or invoice, and had extensive history of partial payments and writings acknowledging debt); see also *Darby & Darby v VSI Intl.*, 95 NY3d at 315 (self-serving bald allegations of oral protests insufficient to raise triable issue).

Moreover, it is well-settled that where, as here, a defendant makes a partial payment against a bill, it acknowledges the validity of that bill, establishing it as an account stated. See *Schulte Roth & Zabel, LLP v Kassoover*, 80 AD3d at 501 (summary judgment to plaintiff on account stated where the defendant was unable to relate any objection to specific amount or invoice, and had history of partial payment and writings acknowledging debt); *Zanani v Schwimmer*, 50 AD3d at 446 (clients' claim that they disputed bills all along contradicted by fact of partial payment on substantial number of bills); *Biegen v Paul K. Rooney, P.C.*, 269 AD2d 264, *supra*; *Coudert Bros. v Finalco Group*, 176 AD2d 622, 623 (1<sup>st</sup> Dept 1991). ECBA has, therefore, demonstrated that it is entitled to summary judgment on its claim for account stated in light of Rose's failure to object to ECBA's invoices for the Account Stated Matters, and the partial payments and acknowledgment of the debt.

Because Rose's motion for a stay is denied and ECBA's motion for summary judgment is granted, motion sequence numbers 002, 003, 004, and 007 are denied as moot.

Accordingly, it is hereby

ORDERED in motion sequence number 002, Emery Celli Brinckerhoff & Abady, LLP's motion to compel nonparty Stuart Goldstein (Goldstein) to comply with a subpoena and subpoena duces tecum served upon him by ECBA, is denied as moot; and it is further

ORDERED in motion sequence number 003, that ECBA's motion to compel nonparty Nicholas G. Petras, Sr. (Petras) to comply with a subpoena and subpoena duces tecum served upon him by ECBA is denied as moot; and it is further

ORDERED in motion sequence number 004, that Rose's motion to quash plaintiff's nonparty subpoenas and subpoena's duces tecum to Goldstein and Petras, or alternatively, for a protective order barring ECBA from serving similar nonparty subpoenas and a motion in limine to prohibit ECBA from using any information obtained by any disclosure process, other than notices to admit, without prior order of the court is denied as moot; and it is further

ORDERED in motion sequence number 005, that ECBA's motion for summary judgment on the account stated claim is granted and the Clerk is directed to enter judgment in favor of plaintiff Emery Celli Brinckerhoff & Abady, LLP and against defendant Michael Rose in the amount of \$414,176.21, together with interest as calculated by the Clerk; and it is further

ORDERED in motion sequence number 007, that ECBA's motion to

sever or dismiss the third-party action is denied as moot; and it is further

ORDERED in motion sequence number 008, that Rose's motion to stay all process in this action, or alternatively, to stay ECBA's motion for summary judgment pending discovery in connection with certain e-mails, or alternatively, for permission to allow Rose's counsel to correct the form of an affidavit of Rose and an affirmation of his counsel previously submitted in opposition to ECBA's motion for summary judgment is denied.

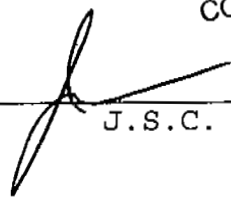
Dated: *April 27, 2012*

**FILED**

**MAY 07 2012**

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COUNTY CLERK'S OFFICE

  
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J.S.C.