

**Litman, Asche & Gioiella, LLP v Hasting**

2012 NY Slip Op 32677(U)

October 15, 2012

Sup Ct, NY County

Docket Number: 111535/2010

Judge: Lucy Billings

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

Index Number : 111535/2010  
**LITMAN, ASCHE & GIOIELLA, LLP**  
 vs.  
**HASTING, CARL**  
 SEQUENCE NUMBER : 002  
 SUMMARY JUDGMENT

PART 46

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

1 \$6/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s) 1-2  
 Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) 3  
 Replying Affidavits \_\_\_\_\_ | No(s) 4

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

*The court denies plaintiff's motion for summary judgment on its account stated claim, pursuant to the accompanying decision. C.P.L.R. § 3212(b).*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
**OCT 24 2012**  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 10/15/12

Lucy Williams, J.S.C.  
 COUNTY CLERK  
 NEW YORK

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

LITMAN, ASCHE & GIOIELLA, LLP,

Index No. 111535/2010

Plaintiff

- against -

DECISION AND ORDER

CARL HASTING,

Defendant

-----x

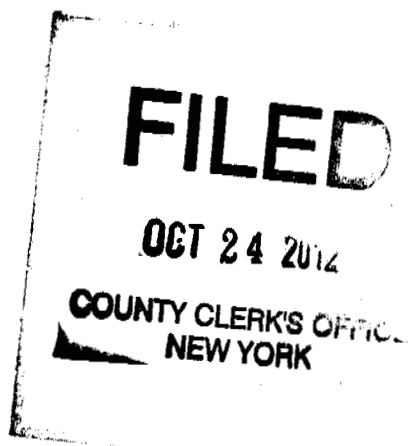
APPEARANCES:

For Plaintiff

Richard M. Asche Esq.  
Litman, Asche & Gioiella, LLP  
140 Broadway, New York, NY 10005

For Defendant

Allison M. Furman Esq.  
260 Madison Avenue, New York, NY 10016



LUCY BILLINGS, J.S.C.:

Plaintiff law firm moves for summary judgment on plaintiff's second claim, for an amount stated of \$235,866.01. C.P.L.R. § 3212(b) and (e). For the reasons explained below, the court denies plaintiff's motion.

I. PLAINTIFF'S PRIMA FACIE CLAIM

Plaintiff's partner Russell Gioiella does not attest in an affidavit, but only affirms under penalty for perjury, see C.P.L.R. § 2106; Morrison Cohen LLP v. Fink, 81 A.D.3d 467, 468 (1st Dep't 2011); LaRusso v. Katz, 30 A.D.3d 240, 243 (1st Dep't 2006); Nazario v. Ciafone, 65 A.D.3d 1240, 1241 (2d Dep't 2009); Lessoff v. 26 Ct. St. Assoc., LLC, 58 A.D.3d 610, 611 (2d Dep't 2009), that his law firm "sent periodic invoices" to defendant

for its services in defending him in a criminal action, where he was charged with participating in a tax shelter scheme while an employee and partner at the global accounting firm KPMG. Aff. of Russell M. Gioiella at 2. See Berkman Bottger & Rodd, LLP v. Moriarty, 58 A.D.3d 539 (1st Dep't 2009). Gioiella does not attest to any regular business mailing procedures that plaintiff followed: the dates or intervals when the invoices were transmitted, who transmitted them for the firm, by what means, or to what address. Nor do the invoices themselves indicate they were mailed or otherwise transmitted to defendant. E.g., People v. Torres, \_\_\_ A.D.3d \_\_\_, 2012 WL 4669673, at \*1 (1st Dep't Oct. 4, 2012); Morrison Cohen Singer & Weinstein, LLP v. Brophy, 19 A.D.3d 161, 162 (1st Dep't 2005). See California Suites, Inc. v. Russo Demolition Inc., 98 A.D.3d 144, 152 (1st Dep't 2012); Goldberg, Wepron & Ustin, LLP, 83 A.D.3d 554, 555 (1st Dep't 2011); Roth Law Firm, PLLC v. Sands, 82 A.D.3d 675, 676 (1st Dep't 2011).

The key element of a prima facie account stated claim is transmission of an invoice to defendant, forming the predicate for his failure to object to the invoice within a reasonable time. Risk Mgm't Planning Group, Inc. v. Cabrini Medical Ctr., 63 A.D.3d 421 (1st Dep't 2009); RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d 618, 619 (1st Dep't 2009); Graubard Miller v. Nadler, 60 A.D.3d 499 (1st Dep't 2009); Rothstein & Hoffman Elec. Serv., Inc. v. Gong Park Realty Corp., 37 A.D.3d 206, 207 (1st Dep't 2007). See Morrison Cohen

Singer & Weinstein, LLP v. Brophy, 19 A.D.3d at 162. Failure to object constitutes an assent to pay the invoice. Risk Mgm't Planning Group, Inc. v. Cabrini Medical Ctr., 63 A.D.3d 421; Graubard Miller v. Nadler, 60 A.D.3d 499; Rothstein & Hoffman Elec. Serv., Inc. v. Gong Park Realty Corp., 37 A.D.3d at 207. See A.O Textile Inc. v. SEP Plus Inc., 57 A.D.3d 397 (1st Dep't 2008). Defendant's nonreceipt of invoices or his reasonably timely objections, on the other hand, will rebut an account stated. RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d at 619; Henry Loheac, P.C. v. Children's Corner Learning Ctr., 51 A.D.3d 476 (1st Dep't 2008); Ween v. Dow, 35 A.D.3d 58, 61 (1st Dep't 2006); Herrick, Feinstein LLP v. Stamm, 297 A.D.2d 477, 478-79 (1st Dep't 2002).

Even if Gioiella's bare allegation that "plaintiff sent periodic invoices" to defendant indicates Gioiella's personal knowledge and thus admissible evidence that the invoices were mailed or otherwise transmitted to defendant, Gioiella Aff. at 2, plaintiff acknowledges that defendant complained to plaintiff about the invoices. RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d at 619; Ween v. Dow, 35 A.D.3d at 61. According to Gioiella, defendant insisted that KPMG was obligated to pay for his defense in the criminal action charging him with participating in a tax shelter scheme as a KPMG employee and partner. See Brauner Baron Rosenzweig & Klein v. Roth, 25 A.D.3d 333, 334 (1st Dep't 2006); Cadwalader, Wickersham & Taft v. Klear, 303 A.D.2d 204 (1st Dep't 2003).

Gioiella maintains that he responded to defendant's complaint, by forwarding plaintiff's invoices to KPMG's attorney, only after defendant confirmed that all the invoices were "correct." Id. at 5 & Ex. F, at 1. The email correspondence Gioiella presents to support this admission, however, nowhere shows that defendant in fact confirmed that the invoices, for either the fees he paid or the fees he still owed, were correct. A.O Textile Inc. v. SEP Plus Inc., 57 A.D.3d 397; Cadwalader, Wickersham & Taft v. Klear, 303 A.D.2d 204. The correspondence indicates only that Gioiella requested that confirmation from defendant.

Even if defendant had confirmed the correctness of all the invoices, such confirmation would acknowledge only that they were the invoices he received, not necessarily that he voiced no objection to them. In seeking KPMG's payment for his benefit, he surely had every incentive to maximize KPMG's payment, rather than to minimize his obligation to plaintiff, because the more KPMG reimbursed plaintiff for its disputed bills, the more the reimbursement would resolve plaintiff's dispute with defendant.

Nor did defendant ever admit, even in his action against KPMG for payment of his attorneys' fees and expenses, that plaintiff's invoices, even just for 2005, were for amounts "necessarily incurred." Reply Aff. of Russell M. Gioiella Ex. A, at 208. When asked that question, defendant responded: "I don't know." Id. Those amounts, moreover, were less than the \$200,000.00 retainer fee defendant already had paid plaintiff and

not the disputed amount plaintiff claims here. Edelman v. Poster, 72 A.D.3d 182, 189 (1st Dep't 2010); RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d at 619; A.O Textile Inc. v. SEP Plus Inc., 57 A.D.3d 397; Cadwalader, Wickersham & Taft v. Klear, 303 A.D.2d 204.

Partial payment of the invoices may establish their receipt, but not necessarily an assent to pay the unpaid remainder. RPI Professional Alternatives, Inc. v. Citigroup Global Markets Inc., 61 A.D.3d at 619. See A.O Textile Inc. v. SEP Plus Inc., 57 A.D.3d 397; Henry Loheac, P.C. v. Children's Corner Learning Ctr., 51 A.D.3d 476. Here, moreover, plaintiff relies on defendant's partial payments against its invoices that defendant made as a retainer fee or deposit, before he received the disputed invoices. See LePatner & Assoc., LLP v. Horowitz, 81 A.D.3d 472 (1st Dep't 2011); Kramer Levin Naftalis & Frankel LLP v. Canal Jean Co., Inc., 73 A.D.3d 604, 605 (1st Dep't 2010).

## II. DEFENDANT'S REBUTTAL

Most significantly, even if plaintiff establishes a prima facie account stated claim, defendant attests that he repeatedly voiced objections to plaintiff's invoices. While he does not specify all the dates when he objected, he does detail the content of his objections. First, plaintiff failed to follow defendant's instructions to curtail the scope of services in his defense, as defendant could ride on the coattails of the vigorous defenses mounted by more prominent KPMG partners and co-defendants, and he could locate and retrieve the pertinent

evidence himself. A.O Textile Inc. v. SEP Plus Inc., 57 A.D.3d 397; Cadwalader, Wickersham & Taft v. Klear, 303 A.D.2d 204; Herrick, Feinstein LLP v. Stamm, 297 A.D.2d at 479. Second, plaintiff's invoices provide no detail regarding the services performed, as established by the scant content of the invoices themselves. Ween v. Dow, 35 A.D.3d at 62. See Berkman Bottger & Rodd, LLP v. Moriarty, 58 A.D.3d 539.

In fact, due to the complete absence of any description of the services plaintiff performed, it is impossible to ascertain whether any of the services were even for defendant's defense, let alone whether they fell within the services defendant authorized. Goldberg, Wepron & Ustin, LLP, 83 A.D.3d at 555; Brauner Baron Rosenzweig & Klein v. Roth, 25 A.D.3d at 334; Cadwalader, Wickersham & Taft v. Klear, 303 A.D.2d 204. This gross imprecision in the invoices themselves is ground alone to deny plaintiff's motion. Goldberg, Wepron & Ustin, LLP, 83 A.D.3d at 555; Ween v. Dow, 35 A.D.3d at 62.

Defendant points out that only on January 23, 2007, after 18 months of plaintiff's services, did he receive any invoices from plaintiff. Before then, defendant had paid plaintiff \$450,000.00 and, after June 2006, never made another payment. Upon receiving the six invoices for services from August 2005 through January 2007 en masse, he responded in writing, but his objection to the invoices was only that plaintiff had not honored his "countless" requests for regular invoices, and consequently he was completely unaware of how much fees and expenses had been incurred. Aff. in

Opp'n of Carl Hasting ¶ 9 & Ex. D. Defendant further attests, however, that shortly afterward he telephoned Gioiella to air defendant's complaints: Gioiella had completely disregarded defendant's request that plaintiff perform minimal work, and defendant would not pay the invoices received because they contained no description of the services rendered. RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d at 619; Ween v. Dow, 35 A.D.3d at 61-62; Herrick, Feinstein LLP v. Stamm, 297 A.D.2d at 479. This time frame is more specific, while defendant's alleged reiteration of his objections whenever Gioiella responded to defendant's telephone messages simply spans the entire period of plaintiff's continued representation.

Nevertheless, defendant does specify that each time he received an invoice, he complained orally to Gioiella. The next invoice defendant received was dated December 12, 2008, almost two years later. Again he complained about the absence of any description of the services performed or delineation of time spent on particular tasks and his inability to discern any basis for the bills. The next and final invoice defendant received was dated June 11, 2009. Once again defendant complained to Gioiella that defendant would not pay the invoice because it did not show what services plaintiff actually had performed. Again, the scant content of the invoices themselves establishes this fact.

Finally, and simply corroborating what Gioiella's own account and email correspondence reveal, defendant emphasizes

that:

At no time did I represent to KPMG that I believed the fees charged by Plaintiff were reasonable or that I had accepted Plaintiff's invoices without prior objection.

Hasting Aff. ¶ 19. Insofar as he may have admitted in his action against KPMG for his attorneys' fees and expenses that he "owes these lawyers over \$1 million," he was referring to three other lawyers before and after plaintiff, as well as plaintiff.

Gioiella Aff. Ex. H ¶ 50.

### III. CONCLUSION


Defendant adequately rebuts plaintiff's allegations that he did not object to its invoices. Edelman v. Poster, 72 A.D.3d at 189; RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d at 619; Ween v. Dow, 35 A.D.3d at 61; Herrick, Feinstein LLP v. Stamm, 297 A.D.2d at 478-79. Plaintiff repeatedly asks the court to reject defendant's sworn statements as incredible, a determination that would be impermissible in the context of plaintiff's motion for summary judgment. E.g., Ferrante v. American Lung Assn., 90 N.Y.2d 623, 631 (1997); Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc., 95 A.D.3d 434, 436 (1st Dep't 2012); Gasperi v. Sadeh, 61 A.D.3d 405, 406 (1st Dep't 2009); McFadden v. Bruno, 37 A.D.3d 177 (1st Dep't 2007). Nor does anything in his recitation of his oral objections contradict his written protest of January 23, 2007, or his deposition testimony. Plaintiff asks defendant to explain why plaintiff would not have sent him its invoices before January 23, 2007, but, other than Gioiella's blanket allegation that his law firm

"sent periodic invoices" to defendant, Gioiella Aff. at 2, which defendant admits it did three times, plaintiff nowhere specifies any other times it sent its invoices, nor explains why it did not. E.g., People v. Torres, \_\_ A.D.3d \_\_, 2012 WL 4669673, at \*1; Morrison Cohen Singer & Weinstein, LLP v. Brophy, 19 A.D.3d at 161-62. See California Suites, Inc. v. Russo Demolition Inc., 98 A.D.3d at 152; Goldberg, Wepron & Ustin, LLP, 83 A.D.3d at 555; Roth Law Firm, PLLC v. Sands, 82 A.D.3d at 676.

Defendant's oral protests, moreover, are more than "bald allegations." Darby & Darby v. VSI Intl., 95 N.Y.2d 308, 315 (2000). See RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d at 619; Ween v. Dow, 35 A.D.3d at 61; Herrick, Feinstein LLP v. Stamm, 297 A.D.2d at 478-79. They are specific in context, following the specific dates of invoices defendant received, as well as "repeatedly" before and between those three occasions. Hasting Aff. in Opp'n ¶ 2. See id. ¶ 4; LePatner & Assoc., LLP v. Horowitz, 81 A.D.3d 472; Kramer Levin Naftalis & Frankel LLP v. Canal Jean Co., Inc., 73 A.D.3d at 604-605; Berkman Bottger & Rodd, LLP v. Moriarty, 58 A.D.3d 539.

The weaknesses in plaintiff's prima facie evidence, combined with defendant's rebuttal, as delineated above, require denial of plaintiff's motion for summary judgment on its account stated claim. C.P.L.R. § 3212(b). This decision constitutes the court's order.

**FILED**

DATED: October 15, 2012 OCT 24 2012   
LUCY BILLINGS, J.S.C.

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NEW YORK**

**LUCY BILLINGS  
J.S.C.**