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| <b>Epstein Becker &amp; Green, P.C. v Amersino Mktg.<br/>Group, Inc.</b>                                                                                                                                                         |
| 2012 NY Slip Op 32882(U)                                                                                                                                                                                                         |
| November 30, 2012                                                                                                                                                                                                                |
| Sup Ct, NY County                                                                                                                                                                                                                |
| Docket Number: 102458/2010                                                                                                                                                                                                       |
| Judge: Cynthia S. Kern                                                                                                                                                                                                           |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
EPSTEIN BECKER & GREEN, P.C.,

Plaintiff,

Index No. 102458/2010

-against-

DECISION/ORDER

AMERSINO MARKETING GROUP, INC.  
And YU WANG,

**FILED**

Defendants.

DEC 06 2012

-----X  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered by the court in connection with this motion for : \_\_\_\_\_

NEW YORK  
COUNTY CLERK'S OFFICE

| Papers                                       | Numbered |
|----------------------------------------------|----------|
| Notice of Motion and Affidavits Annexed..... | <u>1</u> |
| Answering Affidavits.....                    | <u>2</u> |
| Cross-Motion and Affidavits Annexed.....     | <u>3</u> |
| Answering Affidavits to Cross-Motion.....    | <u>4</u> |
| Replying Affidavits.....                     | <u>5</u> |
| Exhibits.....                                | <u>6</u> |

Plaintiff commenced the instant action to collect unpaid fees incurred in connection with representing defendants in two separate lawsuits. By order dated August 23, 2011, the action was stayed pending arbitration. Plaintiff now moves to lift the stay on the ground that defendants have failed to proceed in arbitration and for an order pursuant to CPLR § 3212 granting plaintiff summary judgment. In response, defendants have cross-moved for an order pursuant to CPLR § 3212 granting defendants summary judgment and dismissing plaintiff's complaint in its entirety. As an initial matter, the portion of plaintiff's motion requesting to lift the stay in this action, unopposed by defendant, is granted and the court will now decide the case on the merits. For the

reasons set forth below, plaintiff's motion for summary judgment is granted and defendants' cross-motion is denied.

The relevant facts are as follows. On December 7, 2007, defendant Yu Wang ("Wang") executed, individually and on behalf of Amersino Marketing Group, LLC ("Amersino"), a retainer agreement (the "Retainer") with plaintiff law firm Epstein Becker & Green, P.C., ("EBG"). The Retainer states that EBG's "services will include representation and advice with respect to specific matters that [defendants] refer to the Firm." Pursuant to the Retainer, EBG represented defendants in two separate wage claim disputes entitled *Apreza v. Amersino Marketing Group, LLC, et al.* ("Apreza") and *Ortiz v. Amersino Marketing Group, LLC, et al.* ("Ortiz") (collectively refereed to herein as the "Underlying Actions"). In both cases, Wang was named as a defendant in his individual capacity.

Thereafter, EBG sent invoices for services rendered in the Underlying Actions in unpaid amounts of \$61,177.64 for the *Apreza* matter and \$26,817.70 for the *Ortiz* matter. Defendants failed to pay these sums when they became due and owing. Accordingly, plaintiff filed the instant action seeking to recover the total unpaid balance of \$87,995.34. Plaintiff initially moved for summary judgment on January 24, 2011, with defendants cross-moving to, *inter alia*, compel arbitration pursuant to a mandatory arbitration clause in the Retainer. On August 23, 2011, the court issued an order compelling arbitration and staying the matter until said arbitration was complete. Arbitration was scheduled to take place on October 1, 2012, but defendants failed to pay their share of the arbitration fees by the set due date and the matter was dismissed.

The court first turns to EBG's motion for summary judgment. On a motion for summary

judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In the instant action, EBG has established a *prima facie* right to judgment as a matter of law against both defendants for breach of contract entitling it to summary judgment. Pursuant to the Retainer signed by defendants, defendants agreed to pay EBG for its representation of defendants in the Underlying Actions. However, defendants, in violation of the terms of the Retainer, have failed to pay EBG’s invoices in the amount of \$87,995.34. Defendants’ argue that EBG’s motion should be denied because the Retainer only applies to EBG’s representation in the *Apreza* action and not the *Ortiz* action. Moreover, they allege that even if the Retainer does apply to both Underlying Actions, the motion should still be denied as to defendant Wang because the Retainer was with Amersino only. As discussed below, these arguments are without merit.

First, under 22 N.Y.C.R.R. § 1215.1, an attorney who undertakes to represent a client must provide said client with a written letter of engagement, or enter into a signed retainer agreement, that contains an “explanation of the scope of the legal services to be provided.” By its very terms, this provision does not require a separate letter or retainer agreement for each suit the attorney is to represent the client in, but one letter explaining “the scope of the legal services.” *See* 22 N.Y.C.R.R. § 1215.1. Here, the Retainer explicitly states: “Our services will

include legal representation and advice with respect to specific matters that you refer to the Firm.” Thus, while the Retainer’s subject line reads “Re: Apreza, et al. v. Amersino Marketing Group, L.L.C., et al.,” the actual terms of the Retainer do not limit EBG’s representation of defendants to that particular case. There is no dispute that defendants sought representation by EBG for the *Ortiz* matter. Therefore, EBG’s representation of defendants in *Ortiz* falls within the ambit of “specific matters that [defendants] refer to the Firm” and payment for said representation is covered by the Retainer.

Second, as Judge Solomon previously held in the August 23, 2011 order, defendants argument that Wang can not be held personally liable is baseless. Wang executed the retainer in his individual capacity and he was an individually named defendant in the Underlying Actions. Thus, Wang may be held jointly and severally liable.

Based on the forgoing, plaintiff’s motion for summary judgment against defendants for breach of contract is granted and the portion of defendants’ cross-motion seeking summary judgment and dismissing EBG’s complaint in its entirety is denied.

Defendants argue that if Wang is found liable for the unpaid fees, his liability should be limited to the portions of work specifically done for him and that the court should conduct a hearing to decide which portion of work in the Underlying Actions was exclusively done for Wang. The court is not persuaded by this argument. Wang was jointly and severally liable in the Underlying Actions and so any legal work that was performed on Amerisino’s behalf was equally performed for Wang’s benefit and defendants point to no law requiring EBG to divide the fees and expenses incurred in the Underlying Actions between the defendants. Thus, the portion of defendants’ cross-motion seeking a hearing to decide Wang’s portion of the attorney’s fees is

denied.

Defendants also argue that a hearing is required to determine whether the overall amount of fees charged by the plaintiff is reasonable or not. While defendants have a right to challenge the reasonableness of attorney's fees, the court is not required to hold a hearing in this instance as plaintiff has also demonstrated its entitlement to summary judgment on an account stated. Defendants receipt and retention of the invoices annexed to EBG's moving papers, without objection within a reasonable time gives rise to an actionable account stated, thereby entitling EBG to summary judgment in its favor. See *Ruskin, Moscou, Evans & Faltischek v. FGH Realty Credit Corp.*, 228 A.D.2d 294 (1<sup>st</sup> Dept 1996); *Fink, Weinberger, Fredman, Berman & Lowell v. Petrides*, 80 A.D.2d 781 (1<sup>st</sup> Dept 1981). Defendants did not challenge the reasonableness of EBG's fees when they received the invoices, nor did they raise this issue in their opposition papers to EBG's previous motion for summary judgment. Thus, they failed to object to the fees in a reasonable time and plaintiff is now entitled to the amount set forth in the invoices.

Accordingly, plaintiff's motion for summary judgment against defendants is granted and defendants' cross-motion is denied in its entirety. The Clerk is directed to enter judgment in favor of plaintiff Epstein Becker & Green, P.C. and against defendants, jointly and severally, in the amount of \$87,995.34, plus interest thereon at the statutory rate. This constitutes the decision and order of the court.

Dated: 11/30/12

Enter: CK  
J.S.C.

**FILED**

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