

The Wallack Firm, P.C. v Nacos
2013 NY Slip Op 30161(U)
January 14, 2013
Supreme Court, New York County
Docket Number: 101536/2012
Judge: Joan A. Madden
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: MADDEN
Justice

PART 11

Index Number : 101536/2012
WALLACK FIRM, P.C.
vs.
NACOS, JULIE KAREN
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
 Answering Affidavits — Exhibits _____ | No(s). _____
 Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the approved memorandum Decision + Order*

FILED
JAN 30 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: January 14, 2013

J.S.C.

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

-----X
THE WALLACK FIRM, P.C.,

Index No. 101536/12

Plaintiff

- against -

JULIE KAREN NACOS,

Defendant.

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

FILED
JAN 30 2013
NEW YORK
COUNTY CLERK'S OFFICE

In this action for attorneys' fees, defendant Julie Karen Nacos ("Nacos") moves to dismiss the complaint of the plaintiff, The Wallack Firm, P.C. ("Firm") on the grounds that (a) the Firm's causes of action are barred by documentary evidence; (b) the complaint fails to state a cause of action upon which relief can be granted; and (c) the Firm's alleged violation of the rules governing the conduct of attorneys in the domestic relations matters bars its collection of fees and disbursements set forth in its September 21, 2011 invoice. Nacos also seeks an order directing the Firm to turn over the files relating to her underlying divorce proceeding to her current counsel. The Firm, which is appearing *pro se*, opposes the motion.

Background

This action seeks to recover unpaid legal fees for legal services allegedly provided by the Firm to Nacos. The Firm represented Nacos in a divorce action (the "Matrimonial Action") in the Supreme Court of the State of New York, County of New York, from the period of June 19, 2009 to September 2, 2011 (Julie Karen Nacos v. John Christopher Nacos, Index No. 306730/2010). Robert Wallack is the partner and founder of the Wallack Firm, P.C.

On June 12, 2009, Nacos entered into and executed a retainer agreement with the Firm, whereby Nacos retained the Firm to provide legal counsel and representation for her in the Matrimonial Action. The retainer agreement set forth both parties' rights and obligations, including Nacos' obligation to pay for services rendered by the Firm on her behalf. The terms and conditions of the retainer agreement stated that Nacos would be obligated to pay interest at the rate of nine percent per month on any balance billed to her, which remained unpaid for more than thirty days.

Between September 2009 and October 2010, the Firm provided Nacos with four invoices for services rendered and disbursements, dated September 18, 2009, January 19, 2010, April 5, 2010, and October 23, 2010. On September 2, 2011, Nacos executed a consent to change attorney substituting the firm of Bender, Rosenthal, Issacs, and Richter, LLP ("the Bender firm") for the Firm. On or about September 21, 2011, Wallack sent Nacos an invoice in the amount of \$409,356.91. Nacos objected to the Firm's invoice through an email sent to Wallack on November 16, 2011.

On February 10, 2012, the Firm commenced this action by filing a summons and complaint seeking the amounts due and owing it for unpaid legal services allegedly rendered in her Matrimonial Action. The complaint asserts causes of action for breach of contract and for an account stated.

Nacos now moves to dismiss the complaint arguing that the Firm violated the rules for attorneys in domestic relations matters by waiting eleven months to send an invoice for a fifty-four week period, since the rules require that attorneys provide clients with invoices for services rendered at least every sixty days (See 22 NYCRR. §§ 1400.2, 1400.3(9)(2012)), and that the Firm therefore forfeited its right to recover the fees sought in this action. In her affidavit, Nacos states that she, her brother, Noah Leichtling, and

her father, Michael Leichtling, through email, in person, and during telephone conferences repeatedly requested Mr. Wallack send an invoice for his legal services. Nacos states that after she received a forty-two page invoice, dated September 21, 2011, seeking \$409,356.91 for alleged fees and disbursements accrued between September 2, 2010 and September 14, 2011, she objected to the invoice through an email dated November 16, 2011, on the basis that the fees were excessive and the services rendered inappropriate, incompetent and unnecessary. Nacos also asserts that the Firm's failure to comply with the domestic relations laws requires it to surrender and turn over the files from the Matrimonial Action to her and the Bender firm.

Nacos further argues that the court should dismiss the Firm's claim for account stated, since she disputed the September 21, 2011 invoice and her objection was timely, and that the breach of contract cause of action must also be dismissed as the documentary evidence establishes that the Firm did not perform its obligations under the Agreement.

In support of her motion, Nacos submits, *inter alia*, the Firm's retainer letter dated June 12, 2009 (Exhibit A), the court's letter dated February 8, 2011, admonishing Robert Wallack, Esq. for his ex parte communications and improper behavior (Exhibit B), the Firm's invoices to Nacos from the period of June 11, 2009 to July 1, 2010 (Exhibit C), emails from Nacos and her brother, Noah Leichtling to Robert Wallack, requesting monthly invoices (Exhibit D), the Firm's invoice dated September 21, 2011 for the period from September 1, 2010 to July 21, 2011 (Exhibit E), and Nacos' email to Robert Wallack, dated November 16, 2011, objecting to the September 21, 2011 invoice (Exhibit F).

In opposition, the Firm's founder and partner, Robert Wallack submits his affirmation in which he states that Nacos' allegations concerning their relationship are

false. According to Wallack, Nacos discharged the Firm not due to dissatisfaction with his work but, rather, because Judge Deborah Kaplan was, “so angry at [him],” for his aggressive advocacy on behalf of Nacos which he pursued in consultation with Nacos and her brother and father, who are both lawyers (Wallack Aff. ¶’s 3, 4). Wallack next contends that the Firm’s complaint states a cause of action, and that the documentary evidence provided by Nacos does not resolve all factual issues or definitely dispose of the Firm’s claim. Wallack asserts that Nacos has not provided any documentary evidence to support her allegations that she discharged the Firm due to ineffective and incompetent legal services, a breakdown in attorney-client relations, or any counterproductive actions by the firm.

As for Nacos’ statement that he did not provide invoices for nearly a year, Wallack responds that “even if accurate (it is not), it is not dispositive and does not relieve her of her obligation to pay me for the services rendered.” (Wallack Aff. ¶ 13). Wallack points out that Nacos’ retainer agreement with the Firm stated, “[a]ll bills will be presumed to be correct if the Firm does not receive any written objection to the same within thirty days of your receipt,” and that Nacos did not object to the invoice provided on September 21, 2011 until November 16, 2011. (*Id.*). Wallack also contends that the Firm is entitled to retain Nacos’ case file as a lien until she pays for the services that were allegedly rendered to her.¹

¹Wallack also argues that Nacos’ motion to dismiss should be denied as untimely, since it was brought seven days after she was required to serve an answer or otherwise respond to the Firm’s complaint and Nacos did not seek an extension. This argument is without merit. The complaint was served by substituted service in accordance with CPLR 308(2), on April 10, 2012, with follow-up mailing sent on April 12, 2012. Assuming that the affidavit of service was filed on April 12, 2012, service would be complete ten days after that date, and Nacos would have 30 days from the date of completion of service to answer, move or otherwise respond to the complaint. See Siegel’s New York Practice, § 72 at 116 (4th ed. 2005). Here, the motion to dismiss was timely as it was served on May

Discussion

On a motion to dismiss a pleading for legal insufficiency pursuant to CPLR 3211(a)(7), the court “accept[s] the facts alleged as true and determine[s] simply whether the facts alleged fit within any cognizable legal theory.” Morone v. Morone, 50 N.Y.2d 481, 484 (1980) (citation omitted). The pleading is to be liberally construed, accepting all the facts alleged therein to be true, and according the allegations the benefit of every possible favorable inference. See Goshen v. Mutual Life Ins. Co. of NY, 98 N.Y.2d 314 (2002). Where the allegations are ambiguous, the court resolves the ambiguities in plaintiff's favor. Snyder v. Bronfman, 13 N.Y.3d 504 (2009).

On a motion to dismiss pursuant to CPLR 3211(a)(1), “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” Leon v. Martinez, 84 N.Y.2d 83, 87–88 (1994). “To be considered ‘documentary,’ evidence must be unambiguous and of undisputed authenticity.” Fontanetta v. Doe, 73 A.D.3d 78, 86 (2nd Dept 2010), *citing*, Siegel’s Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, at 21-22, CPLR 3211(a)(1), C3211:10; see also Tsimerman v. Janoff, 40 A.D.3d 242 (1st Dep’t 2007). Thus, affidavits, emails and letters are not considered documentary evidence. Fontanetta v. Doe, 73 A.D.3d at 86; see also Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267, 271 (2004)(finding that emails were insufficient to conclusively establish a defense as a matter of law for the purposes of CPLR 3211(a)(1)).

The Rules of Procedure in Domestic Relations matters require attorneys to provide their clients with “a written, itemized bill on a regular basis, at least every sixty

8, 2012, and filed on May 10, 2012.

days.” (22 NYCRR 1400.2). In the mandatory written retainer agreement, clients must be informed of the “frequency of itemized billing, which shall be at least every sixty days.” (22 NYCRR 1400.3). “[F]ailure to abide by these rules, promulgated to address abuses in the practice of matrimonial law and to protect the public, will result in preclusion from recovering such legal fees.” (Julien v. Machson, 245 A.D.2d 122 (1st Dep’t 1997)(citation omitted).

However, where the courts have found “substantial compliance” with the rules, recovery of reasonable fees has been allowed. Flanagan v. Flanagan, 267 A.D.2d 80 (1st Dep’t 1999). In Flanagan, the court held that an attorney in a matrimonial fee dispute, who did not fully comply with 22 NYCRR 1400.2 and 1400.3, was entitled to reasonable fees since there was “substantial compliance” and the attorney “rendered substantial services, and achieved reasonably favorable results.” Id., at 81; see also, Edelstein v. Greisman, 67 A.D.3d 796 (2d Dep’t 2009)(holding that the trial court providently exercised its discretion in upholding an Arbitration Panel’s award of fees to an attorney who failed to transmit an invoice for services rendered to a client for seventeen months where the arbitration panel properly reviewed the petitioner’s work performance, fee schedule, billing history and services rendered and determine whether there was “substantial compliance” with the rules); Riley v. Coughtry, 13 A.D.3d 703 (3d Dep’t 2004)(affirming trial court decision upholding arbitrator’s award of reduced attorneys’ fee to matrimonial attorney who failed to render a bill every 60 days).

In this case, there is no dispute that the Firm and Nacos executed a retainer agreement, as required by 22 NYCRR 1400.3. Furthermore, while Nacos’ affidavit and the attached emails support a defense to this action based on the Firm’s purported failure to comply with the rule requiring it to provide Nacos with an itemized bill at least every

60 days, such evidence does not constitute documentary evidence providing a basis for dismissal under CPLR 3211(a)(1). see also Tsimerman v. Janoff, 40 A.D.3d 242. In any event, even assuming *arguendo* that the Firm failed to timely provide invoices in accordance with the rule, it cannot be said at this juncture that this violation provides a basis for the Firm forfeiting its fee, as there may be circumstances warranting a finding of substantial compliance by the Firm. See Flanagan v. Flanagan, 267 A.D.2d 80; Edelstein v. Greisman, 67 A.D.3d 796. Finally, it cannot be said that the complaint does not state a cause of action.

Accordingly, the motion to dismiss is denied, and the request for an order requiring the Firm to turn over its files is also denied as it cannot be said at this juncture that the Firm is not entitled to an additional fee.

Conclusion

In view of the above, it is

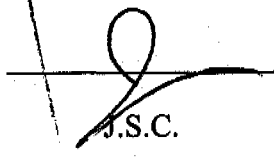
ORDERED that defendant's motion to dismiss is denied; and it is further

ORDERED that defendant's request for an order directing the Firm to turn over the files relating to her underlying divorce proceeding to her current counsel is also denied; and it is further

ORDERED that the parties shall appear for a settlement conference in Part 11, room 351, on January ^{31,} ³ 201~~0~~ at 2:30 pm.

DATED: ~~December 7, 2012~~ ^{January 4, 2013}

FILED
 JAN 30 2013
 NEW YORK
 COUNTY CLERK'S OFFICE


 J.S.C.