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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C.
Justice

PART 11

Index Number : 103783/2011
SIMON, EISENBERG & BAUM, LLP
vs.
XIMINES, ENID
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

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 determined in accordance with the annexed decision and order.

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

Dated: January 30, 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 IAS PART 11

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SIMON, EISENBERG & BAUM, LLP,

INDEX NO. 103783/2011

Plaintiff

-against-

ENID XIMINES,

Defendant.

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JOAN A. MADDEN, J.:

In this action to recover legal fees, plaintiff Simon, Eisenberg & Baum, LLP moves, pursuant to CPLR 3212, for an order granting summary judgment in the amount of $77,799.25 on its account stated cause of action, and an order dismissing defendant's counterclaims. Pro se defendant Enid Ximines opposes the motion.

Attorney Sheldon Karasik, represented defendant, a mathematics teacher, in an employment discrimination action in federal court (Enid Ximines v. George Wingate High School and New York City Department of Education, United States District Court, Eastern District of New York, Civ. Action Nos. 05 Civ. 124 and 07 CV 4309).[1] It is undisputed that from about March 2005 through December 2008, defendant paid attorney Karasik approximately $85,000 in legal fees. In or about July 2009, attorney Karasik negotiated a settlement of either

[1]According to attorney Karasik, the law firm of Karasik & Associates, LLC, is the predecessor in interest to plaintiff Simon, Eisenberg & Baum, LLP, which acquired all the assets and liabilities of his former firm, through merger.

$115,000 or $120,000 or $125,000, which defendant declined to accept.[2] In November 2009, attorney Karasik moved to withdraw as counsel, on grounds of nonpayment of legal fees of "roughly $73,500," and defendant's "non-cooperation" and "unwillingness to agree to a substantial monetary settlement." On April 9, 2010, the federal court issued an order granting Karasik's motion to withdraw, finding as follows: "In this case discovery is complete, settlement discussions are at an impasse, and defendants intend to file a motion for summary judgment. As Mr. Karasik has shown, and Ms. Ximines's opposition confirms, the attorney client relationship has irreparably broken down. Because of disputes over tactics and fees, it is clear that the attorney and client no longer have confidence in each other." Ms. Ximines thereafter continued with the action pro se, and it was ultimately dismissed when defendants prevailed on a motion for summary judgment.

On April 28, 2010, plaintiff commenced the first action against Ms. Ximines in this court for legal fees (Simon , Eisenberg & Baum, LLP v. Enid Ximines, Index No. 105599/10, Sup Ct, NY Co, Hon. Louis B. York). In June 2010, plaintiff moved for a default judgment based on Ms. Ximines's failure to appear or answer. Ms. Ximines appeared pro se in opposition to the motion, asserting that she was never served with the summons and complaint, and that she first received the papers upon receipt of plaintiff's motion for a default judgment. On November 10, 2010, Judge York ordered a traverse hearing, and on February 21, 201, he issued an order dismissing the action based on improper service.

On March 29, 2011, plaintiff commenced the instant action. The complaint seeks legal fees in the amount $75,549.25, based on causes of action for breach of contract, account stated

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[2]The motion papers contain references to these three different amounts.

and quantum meruit.[3] In her answer, defendant objects that she was not properly served, and alleges that she paid her former attorney Sheldon Karasik "more than $85,000," and that she does not owe "any more payments." She alleges that she had an "ongoing dispute" about the amount billed, and that she has "always questioned the time, services, inflated fees and exorbitant amount she was informed that she owed." She alleges that after she paid "enormous sums and was sent notice of vast amount remaining," attorney Karasik "refused" to send her copies of the invoices she requested. She asserts a counterclaim for a "refund" of $50,000, "which includes excessive fees and expenses from which defendant did not benefit," and alleges that plaintiff has caused her "severe mental anguish, headaches, loss of sleep, elevated anxiety and a perplexed mind."

Plaintiff is now moving for summary judgment on the account stated cause of action, and to dismiss defendant's counterclaims. Plaintiff submits an affirmation from attorney Karasik, stating that he met personally with defendant and agreed with her on the "hourly billing arrangement reflected in the billing invoices."[4] He asserts that at no time prior to April 24, 2009, did defendant ever question or challenge any billing invoices she received. He asserts that her receipt and retention of invoices without objection within a reasonable time, gives rise to an account stated. Plaintiff submits various documents including six invoices addressed to

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[3]The $75,549.25 amount is probably based on the April 2010 invoice, which is slightly less, $75,459.25. The amount sought in the motion is identical to the amount listed on the June 2010 invoice.

[4]Although the complaint alleges that the parties had a retainer agreement, plaintiff does not include a copy with its motion papers. Defendant acknowledges that she paid a $5,000 retainer, but states that she asked attorney Karasik if he would consider a "contingency agreement." Plaintiff's billing records show that starting in March 2005, the hourly rate charged was $200, and in June 2008, the hourly rate increased to $250.

defendant covering the period from June 2009 through June 2010,[5] plaintiff's time records for the period from March 31, 2005 through April 1, 2009 and the pleadings. Additional documents are annexed to defendant's answer, including papers filed by attorney Karasik's in support of his motion to withdraw in the federal court action, the federal court's decision granting that motion in March 2010, and papers filed in plaintiff's first action against Ms. Ximines for legal fees, which was dismissed by Judge York.

In opposition, defendant submits affidavits stating that she already paid attorney Karasik $85,000 and submits copies of canceled checks made payable to him, from 2005 to 2008. She also submits documents from the federal court action and plaintiff's first action for legal fees. She states that she used funds from a home equity loan and borrowed from her retirement and life insurance to pay attorney Karasik. She asserts that in 2006, she spoke to someone at the bar association who told her she could change her attorney at any time, but Karasik "threatened to put a lien" on her file and told her that no other attorney would want to represent her. She alleges that his fees were "exorbitant" and "suspicious," and that he billed for time he did not work. She

[5]The six invoices are dated June 1, 2009, November 17, 2009, February 22, 2010, March 9, 2010, April 19, 2010 and June 8, 2010. The earliest, dated June 1, 2009, lists a "balance due" of $70,282.45, which consists of a "previous balance" of $66,982.45 and charges of $3,300.00 for services rendered in May 2009. The next invoice dated November 17, 2009, lists a "total amount due" of $73,582.88, which consists of a "previous balance" of $70,332.50 [sic] and new charges of $3,250.38 for service rendered in June, July, August, September and October 2009. The February 13, 2010 invoice lists a "total amount due" of $75,284.25, consisting of a "previous balance of $73,582.88 and "total new charges" of $1,701.37 for services rendered in November and December 2009, and January 2010. The March 9, 2010 invoice lists the total due as the previous balance of $75,284.25, without any new charges. The April 19, 2010 invoice lists a "total amount due" of $75,459.25, consisting of a "previous balance" of $75,284.25 and new charges of $175.00 for services rendered in March 2010. The June 9, 2010 invoice lists a "total amount due" of $77,799.25, consisting of a "previous balance" of $75,459.25 and new charges of $2,340.00 for services rendered in April, May and June 2010.

also alleges that in August 2008, she discovered he increased his hourly rate by $50, from $200 to $250, without informing or consulting her, and without her approval. She explains that she did not accept the $125,000 settlement offer in the federal court action, because by then she had already paid Karasik $85,000, which would have left $35,000, and Karasik was asking for an additional $75,000 in fees.[6] She asserts that she "always questioned" plaintiff's invoices but was "forced to continue with him [Karasik] because his threat was always that he would withdraw if she did not bring the balances that he quoted current." She states that plaintiff sent "unexplained totals and balances brought forward," and "refused to make copies [of invoices] available" to her. Defendant also objects that she was not personally served with process at her residence in Brooklyn on June 4, 2011 at 10:40 a.m. because she was at a medical appointment until 10:30 a.m. at the Brooklyn Center for Families in Crisis, located at 1309-1311 Foster Ave. in Brooklyn.

At the outset, the court finds that defendant's objection that she was not served with the summons and complaint, has been waived pursuant to CPLR 3211(e) Under CPLR 3211(e), a defendant challenging service is required to move for judgment on that ground within 60 days of filing the answer, or otherwise a defense based on improper service is considered waived. See B.N. Realty Assocs v. Lichenstein, 21 AD3d 793 (1st Dept 2005); Wiebusch v. Bethany

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[6]In his Reply Certification in support of his motion to withdraw, dated December 15, 2009, attorney Karasik states that to "facilitate" Ms. Ximines's acceptance of the settlement offer of $120,000, he and his firm "offered to reduce the $70.282 balance owing to our firm as of June 2009 by a factor of 50%, waiving 100% of all charges for work done in July through present." He states that "accepting the offer would permit Ms. Ximines to sufficiently discharge her obligations to my firm and pocket almost exactly $85,000 as well." Notably, attorney Karasik neglects to mention that Ms. Ximines had already paid him about $85,000. So, with the 50% discount, Ms. Ximines would have still owed him an additional $35,000, and adding that to the $85,000 paid, the legal fees would have totaled $120,000. Since that was the same amount offered in settlement, Ms. Ximines would have been left with nothing to "pocket."

Memorial Reform Church, 9 AD3d 315 (1st Dept 2004); Aretakis v. Tarantino, 300 AD2d 160 (1st Dept 2002). While 3211(e) authorizes the court to extend the statutory deadline "upon the ground of undue hardship," defendant provides no grounds for granting such relief. See B.N. Realty Assocs v. Lichenstein, supra; Wiebusch v. Bethany Memorial Reform Church, supra; Aretakis v. Tarantino, supra.

Turning to plaintiff's motion, the proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986); see also JMD Holding Corp v. Congress Financial Corp, 4 NY3d 373, 384 (2005). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. See id. Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. See Alvarez v. Prospect Hospital, supra.

On the record presented, plaintiff fails to make a prima facie showing of an account stated. A motion for summary judgment must be supported by an affidavit from a person "having knowledge of the facts," as well as the pleadings and other available proof. CPLR 3212(b); LaRusso v. Katz, 30 AD3d 240 (1st Dept 2006). While CPLR 2016 authorizes an attorney to submit an affirmation in lieu of an affidavit in most instances, "even though those persons who are statutorily allowed to use such affirmation cannot do so when they are a party to an action." Slavenburg Corp v. Opus Apparel, Inc, 53 NY2d 799 (1981); accord Finger v. Saal,

56 AD3d 606 (2nd Dept 2008); LaRusso v. Katz, supra. In both its motion and reply papers, plaintiff relies on affirmations of attorney Karasik. Since attorney Karasik is a member of plaintiff law firm, his submission of the affirmations instead of affidavits is improper, and the contents of those affirmations are not properly considered in support of plaintiff's summary judgment motion. See Finger v. Saal, supra; LaRusso v. Katz, supra.

Even if plaintiff were to cure the foregoing procedural infirmity, the motion would still be denied, as the invoices submitted with plaintiff's motion papers are insufficient to support a prima facie showing of an account stated. Plaintiff submits a total of six invoices, the earliest of which is dated June 9, 2009 and includes a past due balance of $66,982.45, which is by far the major portion of the amount sought in this action. With respect to this past due balance, plaintiff submits no contemporaneous invoices rendered to defendant, which must detail the underlying charges by setting forth the particular services rendered and the billable hours expended. See Ween v. Dow, 35 AD3d 58 (1st Dept 2006); Kaye, Scholer, Fierman, Hays & Handler, LLP v. L.B. Russell Chemicals, Inc, 246 AD3d 479 (1st Dept 1998). The five subsequent invoices simply incorporate and include the past due balance from the June invoice. Notably, two invoices post-date the federal court's order granting Karasik's motion to be relieved as Ms. Ximines's counsel, and include charges relating to the instant fee dispute and plaintiff's commencement of the first action in this court *against* Ms. Ximenes to recover legal fees. The June 8, 2010 invoice incorrectly states that it is for "professional service rendered by our firm regarding Ximines v. NYC Board of Education," as the charges are for drafting the complaint *against* Ms. Ximines, for serving that complaint, and for preparing the motion for a default judgment against her.

Since plaintiff has failed to meet its prima facie burden, the court need not consider the sufficiency of defendant's opposition papers. Nevertheless, the court will do so, in the event plaintiff is inclined to make a motion to reargue or renew.

The issue of "[w]hether a bill has been held without objection for a period of time sufficient to give rise to an inference of asset, 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." Landau v. Weissman, 78 AD3d 661 (2nd Dept 2010) (quoting Yanelli, Zevin & Civardi v. Sakol, 298 AD2d 579 [2nd Dept 2002]). The court concludes that under the circumstances presented, issues of fact exist as to whether defendant's alleged oral objections are sufficient to defeat plaintiff's claim for an account stated, especially in light of attorney Karasik's certification in support of his motion to withdraw, admitting in November 2009 that $73,643.32 was "presently owing," that Ms. Ximines had not paid a legal bill "for approximately one year," and that when "I raised the subject of our invoices to Ms. Ximines, she flatly refused to pay another cent, telling me 'you have been paid enough already.'"

Based upon the foregoing, plaintiff is not entitled to judgment as a matter of law on its claim for an account stated. The portion of plaintiff's motion to dismiss defendant's counterclaims is denied a premature.

Finally, any issues with respect to this court's May 3, 2012 Interim Order directing the service of supplemental papers, and defendant's subsequent requests for additional time, shall be addressed at the preliminary conference scheduled below.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment and dismissal of defendant's

counterclaims, is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on March 28, 2013 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties, by mailing copies of this decision and order.

DATED: January 30, 2013

ENTER:

J.S.C.