

Pryor Cashman LLP v U.S. Coal Corp.

2013 NY Slip Op 30371(U)

February 4, 2013

Supreme Court, New York County

Docket Number: 651908/11

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

PRYOR CASHMAN LLP

INDEX NO. 651908/11

-v-

MOTION DATE

U.S. COAL CORPORATION

MOTION SEQ. NO. 003

The following papers, numbered 1 to , were read on this motion tofor
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 by plaintiff for summary judgment is GRANTED and defendant's cross motion for summary judgment is DENIED, per the attached Decision and Order.

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

Dated: February 4, 2013

Melvin L. Schweitzer, 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: PART 45

-----X	:	
PRYOR CASHMAN LLP,	:	Index No. 651908/11
	:	
Plaintiff,	:	DECISION AND ORDER
	:	
- against -	:	Motion Sequence No. 003
	:	
U.S. COAL CORPORATION,	:	
	:	
Defendant.	:	
-----X	:	

MELVIN L. SCHWEITZER, J.:

Plaintiff Pryor Cashman LLP moves, pursuant to CPLR 3212, for summary judgment against defendant U.S. Coal Corporation in the principal amount of \$2,455,478.86, with interest, dismissing the counterclaims and affirmative defenses, and awarding it costs and expenses incurred in this action.

US Coal cross-moves for summary judgment on its counterclaims for breach of fiduciary duty; ordering Pryor Cashman to forfeit any fees that US Coal would otherwise owe, and for restitution and disgorgement of all amounts paid for any work done during the relevant time period; dismissing Pryor Cashman’s claims in their entirety; and awarding US Coal the expenses incurred in defending this action, and in prosecuting its counterclaims, including pre- and post-judgment interest, costs, and attorneys’ fees.

Background

Complaint

The complaint alleges as follows: In July 2006, US Coal sought to acquire numerous coal companies, and it hired Pryor Cashman to perform all legal work in connection with those acquisitions, including equity and debt financing. Pryor Cashman provided an engagement letter

to Karl Douglas, the then director and secretary of US Coal. The letter contained the terms of their agreement, including (1) the specific scope of the legal services; (2) a list of billing rates for Pryor Cashman's attorneys, law clerks and paralegals; (3) expenses that may be incurred, to be reimbursed by US Coal; (4) an explanation of the firm's billing practices, such as sending a monthly invoice containing the fees and expenses incurred during the previous month, and the firm's right to impose interest on balances outstanding for more than 30 days; (5) an explanation that US Coal is free to terminate the attorney-client relationship at any time, and that Pryor Cashman would withdraw in compliance with applicable law; and (6) an agreement to waive certain conflicts of interest. US Coal acknowledged and agreed to these terms. From July 2006 through June 2011, Pryor Cashman performed legal services in accordance with the terms of the engagement letter. It regularly sent US Coal invoices, and, after receiving each invoice, US Coal never raised an objection, nor requested a reduction of the billed amount. US Coal periodically paid the invoices, though not in full.

From March 2008 through December 31, 2009, US Coal repeatedly assured Pryor Cashman that it would pay the outstanding balance on its invoices. According to its executives, US Coal was in the process of obtaining financing for acquisitions of other coal companies, or refinancing its then-existing debt obligations. Afterwards, it would have enough money to pay the outstanding fees and expenses. Based on those representations, Pryor Cashman continued to perform legal services on US Coal's behalf.

In 2010 and 2011, Pryor Cashman represented US Coal in a proposed public offering, as well as providing other legal services. From January 2010 through June 2011, US Coal was billed \$387,310, and US Coal made 12 payments in the total amount of \$376,084.73. As of

June 24, 2011, Pryor Cashman was owed \$2,455,478.86. US Coal has declined to pay, and this action ensued.

The complaint contains two causes of action. The first is for breach of contract. As of June 2011, US Coal had an outstanding balance in the amount of \$2,455,478.86, representing a large portion of Pryor Cashman's legal fees and expenses that US Coal incurred during the time of its representation.

The second cause of action is for an account stated, based on the invoices that Pryor Cashman sent to US Coal on a monthly basis. Allegedly, US Coal agreed to pay to Pryor Cashman the fees and expenses listed on the invoices, without objection. US Coal failed to do so, and there is an outstanding balance of \$2,455,478.86.

Answer

The answer alleges as follows: US Coal alleges that, during the time of Pryor Cashman's representation (from 2006 through July 2011), Pryor Cashman violated the following New York rules of legal ethics then in effect:

(1) Rule 1.7 (a) of the Rules of Professional Conduct, provides: A lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyers' professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests (22 NYCRR 1200);

(2) Rule 1.7 (b) requires written, confirmed consent to waive a conflict of interest pursuant to Rule 1.7;

(3) Disciplinary Rule 5-101 (A) of the New York Lawyers' Code of Professional Responsibility in effect until April 1, 2009 provided that a lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client reasonably may be affected by the lawyer's own financial, business, property, or personal interests;

(4) Rule 1.8 (a) of the Rules of Professional Conduct provides that a lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless: (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner than can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction; and

(5) Former Disciplinary Rule 5-104 (A) provided that: A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless: (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client; (2) The lawyer advises the client to seek the advice of independent counsel in the transaction; and (3) The client consents in writing, after full disclosure, to the terms of the transaction and to the lawyer's inherent conflict of interest in the transaction.

From 2007 to the time that Pryor Cashman ceased to represent US Coal, Eric Hellige – Pryor Cashman's "head partner" for US Coal, as alleged in paragraph 17 of the complaint – had material responsibility for the representation. In 2007 and 2008, Hellige became the owner of 50,000 and 25,000, respectively, of common stock warrants of US Coal. On June 18, 2009, Hellige became the owner of 57,147 shares of Series B preferred stock of US Coal.

From 2007 to at least July 1, 2011, Hellige received additional US Coal common stock as stock dividends. Until at least July 1, 2011, Hellige continued to own shares of US Coal common stock. During the time that Hellige was an equity investor in US Coal, Pryor Cashman was purporting to represent US Coal regarding transactions or proposed transactions in which the

treatment of existing investors was at issue. Hence, Pryor Cashman had a real or potential conflict of interest.

On January 3, 2007, Hellige entered into a subscription agreement with US Coal, agreeing to purchase a \$100,000 promissory note (with interest on the principal at an annual rate of 8%) payable to him by US Coal, together with an additional 100,000 shares of US Coal common stock, as part of a debt financing transaction. On January 6, 2009, Hellige entered into subscription agreement for the purchase of another \$100,000 promissory note (with interest on the principal at an annual rate of 20%), together with an additional 25,000 shares of US Coal common stock, as part of another debt financing transaction.

On April 27, 2009, US Coal repaid Hellige on the January 6, 2009 promissory note, in preference to all other holders of such notes (all of which notes remain outstanding), and without return of the associated 25,000 shares of common stock acquired as part of that transaction. On November 21, 2007, and March 3, 2008, Hellige received a \$100,000 promissory note and a \$50,000 promissory note, respectively, payable to him by US Coal, pertaining to a 2007 bridge offering transaction. As a noteholder, Hellige became a creditor of US Coal, while Pryor Cashman was purporting to represent US Coal regarding transactions in which the treatment of existing creditors was at issue.

During the time that Pryor Cashman represented US Coal, Pryor Cashman may also have represented TerraNova Capital Partners, Inc. (TerraNova), a banker and investor in US Coal, touted by Pryor Cashman as one of its representative underwriter and placement agent clients pertaining to transactions by US Coal. On September 29, 2006 and January 5, 2007, Pryor

Cashman itself became an equity investor in US Coal when it received 24,000 and 375,000 shares, respectively, of its common stock.

In each instance, Pryor Cashman did not make a full disclosure of the implications of the inherent conflicts of interest, nor advise US Coal about seeking independent legal representation in transactions involving the treatment of existing investors or creditors. Pryor Cashman never obtained written informed consent, waiving the real or potential conflicts of interest.

The answer contains three counterclaims. The first and second counterclaims are based on the allegation that the failure to advise of the real or potential conflicts of interest posed by one of its partners being an equity investor or creditor of US Coal breached the duty of loyalty. The third counterclaim is similar to the first and second, except that it is based on Pryor Cashman's status as equity investor. In all three counterclaims, US Coal contends that, during the time of the breaches of loyalty, Pryor Cashman is not entitled to fees for the work done, and that US Coal is entitled to the return of any fees paid to Pryor Cashman.

Pryor Cashman argues that there are no issues of fact relating to its account stated cause of action in that it has demonstrated that it sent 117 invoices to US Coal using regular mailing procedures, none of which were ever returned. US Coal never objected to any of the invoices, and even made partial payment. As for the breach of contract cause of action, it asserts that US Coal cannot dispute the existence of the contract, and that both parties performed under the terms of the contract. It also contends that the investments obtained were inconsequential in terms of the amount of equity of the company that was outstanding. Moreover, the shares given to the law firm were given in appreciation of its agreement to defer payment of the attorney's fees owed.

US Coal argues that there are substantial issues of fact concerning the reasonableness and accuracy of the invoices, that the claimed bills do not match US Coal's records, that the mere retention of invoices from a lawyer is not sufficient to prevail on a claim of account stated, and that Pryor Cashman's violation of applicable ethical standards provides a complete defense. It disputes that it ever entered into a contract with Pryor Cashman, and argues that New York regulations require a signed contract or a final written retainer letter. Moreover, it contends that, even if there were a contract, there are issues of fact and credibility regarding the law firm's performance of its professional obligations.

Discussion

For the reasons discussed below, the motion is granted as to both causes of action, and the counterclaims and affirmative defenses are dismissed.

Pryor Cashman established a prima facie entitlement to judgment as a matter of law on the cause of action for an account stated, by demonstrating that it sent detailed invoices to US Coal on a regular basis in the course of its business (*Geron v DeSantis*, 89 AD3d 603, 604 [1st Dept 2011]), and documentary evidence shows that US Coal received and retained the invoices without objection (*Miller v Nadler*, 60 AD3d 499 [1 Dept 2009]).

As set forth in his affidavit, Hellige provided an engagement letter, dated July 17, 2006, to Karl Douglas, the then managing director of US Coal. Although US Coal states that it has not found a formal retainer letter executed by Pryor Cashman or by US Coal, it concedes that it has a copy of the engagement letter.

The engagement letter set forth the terms of the legal work that Pryor Cashman was to perform for US Coal, including: (1) the general scope of services (corporate and securities

matters); (2) an explanation of the basis of fees to be charged, and a range of billing rates for the attorneys, law clerks, and paralegals; (3) an explanation of the type of expenses likely to be incurred, and which are to be reimbursed by US Coal; (4) an explanation of billing practices, including its practice of sending a monthly invoice setting forth the fees and expenses incurred during the previous month, and Pryor Cashman's right to impose interest on balances outstanding for more than 30 days; (5) an explanation that US Coal is free to terminate the attorney-client relationship at any time, and that Pryor Cashman will withdraw in a manner that complies with applicable law; and (6) a discussion about arbitration as the means to resolve disputes regarding fees charged and services performed.

Hellige states in his affidavit that, in July 2006, Douglas acknowledged and agreed to the terms of Pryor Cashman's representation. Douglas himself submitted an affidavit stating that, after reviewing the engagement letter, he informed Hellige that US Coal agreed to the terms contained therein. US Coal's new management does not controvert this assertion, stating that it knows only of the July 17, 2006 letter that "purports to describe some relationship between US Coal and Pryor Cashman" (US Coal Response to Pryor Cashman's 19-a statement, ¶ 2¹).

According to Hellige and Salvatore A. Curcurato, Pryor Cashman's director of finance, Pryor Cashman sent US Coal 117 invoices, which assertion is not persuasively controverted by US Coal, in that it admits that its files and accounting records reflect receipt of a lesser number of invoices, but fails to state that number. Hence, its disagreement with the number of invoices received is conclusory, and fails to rebut the presumption of delivery, as discussed below (*Stephanie R. Cooper, P.C. v Robert*, 78 AD3d 572, 573 [1st Dept 2010] ["Defendant's

¹It refers to a July 17, 2005 letter, but it is evident that it meant to refer to the July 17, 2006 letter.

conclusory denial of receipt of some number of those invoices does not suffice to rebut the presumption of delivery established by plaintiff's comprehensive proof'). Moreover, in his affidavit, Michael P. Windisch, US Coal's chief financial officer, states only that the company has 109 invoices in its accounting system (*see* Windisch Affidavit, ¶ 9).

The record establishes that Pryor Cashman sent each of the 117 invoices to US Coal using regular mailing procedures. Hellige states that, over the course of the representation, he regularly sent invoices to US Coal, which is critical to establishing an account stated (*Roth Law Firm, PLLC v Sands*, 82 AD3d 675, 676 [1st Dept 2011]). Hellige states further that he, or his partner Edward Normandin, reviewed each of the draft invoices, made any necessary edits, and reviewed the final invoices. Each invoice identifies the date of service, the attorney who performed each service, the service performed by the attorney, the amount of time spent by the attorney, and the fee assessed for each block of service performed. The motion papers contain copies of the invoices.

Maria Rappa, Hellige's legal secretary, submitted an affidavit stating that, after finalization of each invoice, she prepared an envelope, and, as per Hellige's instructions, mailed the invoice together with Hellige's signed cover letter, by first class mail, to US Coal's then chief executive officer, Robert Gabbard, or to its then chief financial officer, James Wolff, at US Coal's principal executive office, located at "448 Lewis Hargett Circle, Suite 240, Lexington, KY 40503." Rappa states that she has no reason to believe that the addressees did not receive the invoices, and the post office never returned any of the invoices. Considering the foregoing, there is a presumption of delivery (*Stephanie R. Cooper, P.C. v Robert*, 78 AD3d at 573).

The record also establishes that US Coal did not make a timely objection to the invoices, which is critical to the validity of the claim (*see Cook & Assoc. Realty, Inc. v Chestnutt*, 65 AD3d 937 [1st Dept 2009]; *Beekman Bottger & Rodd, LLP v Moriarty*, 58 AD3d 539 [1st Dept 2009]; *LD Exch. v Orion Telecom. Corp.*, 302 AD2d 565 [2d Dept 2003]). In its opposition memorandum of law, US Coal presents four arguments against the account stated cause of action, but, in none of them, does it state that it ever objected to the invoices that it received and retained over the course of the five years of representation. According to US Coal chief executive officer, John Collins, US Coal did not object to any of the invoices prior to the time in 2011 that US Coal became aware of the alleged conflicts of interest (*see Collins Affidavit*, at ¶ 8). But even then, in 2011, it did not object to the reasonableness or accuracy of the invoices.

Furthermore, it is undisputed that, over the years, US Coal made partial payment on the invoices which “established an account stated, as ‘either retention of bills without objection or partial payment may give rise to an account stated’” (*Jaffe v Brown-Jaffe*, 98 AD3d 898, 899 [1st Dept 2012], quoting *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]; *LePatner & Assoc., LLP v Horowitz*, 81 AD3d 472 [1st Dept 2011]).

In challenging the substance of the invoices, US Coal submitted an affidavit of Michael Brychel, a senior legal auditor in the firm of Stuart, Maue, Mitchell & James, Ltd., sworn to July 9, 2012. He states that US Coal retained him to review the unpaid legal bills that are the subject of this action. He concludes that the bills “fall below the prevailing standards of the industry, are consistent with likelihood that Pryor Cashman has overbilled US Coal, and demonstrate that there are substantial issues of fact as to whether those bills are reasonable on their face” (Brychel Affidavit, ¶ 20).

The total dollar value of the bills that Brychel reviewed was \$4,670,345.23, including \$4,551,826.32 attributed to fees, and \$136,547.13, to expenses, with \$18,028.22 as write-offs against fees or expenses. In reviewing Pryor Cashman's bills, he noted that it appeared to charge US Coal in quarter-hour increments, which does not represent the industry standard (tenths of an hour) that existed during the time covered by the bills. He opines that large numbers of instances of 14-hour-plus days represent questionable billing practices, and in the invoices, he noted \$92,970.00 billed in such a manner which constitute "a significant amount."

According to Brychel, another typical hallmark of questionable billing practices is the presence of large numbers of entries that repeat virtually word for word over multiple days. In his review, he identified an attorney who regularly committed such billing entries, and \$64,840.67 of the time billed for this attorney appeared to be only partial entries that were too vague to enable one to accurately discern the task performed. Another \$146,466.21 was attributed to conferences in which no other party is noted, and \$380,190.86 where no subject matter is stated. Brychel noted that \$85,437.83 of expenses were "unusually vague," and \$11,921.96 of those expenses appear to be billing for overhead, not for actual expenses allocable to specific amounts expended for the client.

Regardless of the merits of these objections, US Coal has not met its burden of showing that they objected to the invoices within a reasonable time (*Healthcare Capital Mgt. v Abrahams*, 300 AD2d 108 [1st Dept 2002] [that they objected only in late January 2001, many months after the March 2000 bill for the HCI/Purchase of Assets and the July 2000 bill for the HCI/Corporate Matters is a belated objection that is insufficient to avoid summary judgment]). Because of the failure to object, the challenges to the reasonableness of the charges fail (*Lapidus & Assoc., LLP*

v Elizabeth St., Inc., 92 AD3d 405 [1st Dept 2012]). However, even if the court were to review the quality of the invoices, they appear to be adequate, at least in the context of US Coal's failure to contemporaneously object – they identify the attorneys who performed the services, the date of the service, a description of the work performed, the hours billed, and the fee assessed for each block of time charged.

As for the conflict of interest defense, the valid accounts stated bar US Coal's breach of contract counterclaim (*Matter of Rockefeller Ctr. Props.*, 272 BR 524, 543 [Bankr SD NY 2000]).

Pryor Cashman is also entitled to judgment on its claim of breach of contract. As discussed above, Hellige provided the engagement letter, dated July 17, 2006, to Karl Douglas, the then managing director of US Coal. As previously stated, Douglas submitted an affidavit acknowledging that US Coal had agreed to the terms contained therein.

US Coal argues that Pryor Cashman failed to produce a signed contract, in violation of 22 NYCRR 1215.1. Pryor Cashman complied with this regulation, however, by providing US Coal with a written letter of engagement, even if that document was not signed by US Coal. 22 NYCRR 1215.1 provides:

“(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter:

...

(b) The letter of engagement shall address the following matters:

- (1) explanation of the scope of the legal services to be provided;
- (2) explanation of attorney's fees to be charged, expenses and billing practices; and

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b) of this section.”

Even if Pryor Cashman had not complied with the letter of engagement rule, that, by itself, would not preclude it from seeking recovery of legal fees under such theories as services rendered, quantum meruit, and account stated (*Roth Law Firm, PLLC v Sands*, 82 AD3d at 676; *Kramer Levin Naftalis & Frankel LLP v Canal Jean Co., Inc.*, 73 AD3d 604 [1st Dept 2010]).

As for the counterclaims, US Coal does not allege that it was damaged in any way by the alleged conflicts of interest, which is fatal to the claim (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.* (10 AD3d 267 [1st Dept 2004])). Even US Coal’s expert witness, Bruce A. Green, Esq., does not opine as to any damage (Green Affirmation, ¶ 14). Indeed, he only goes so far as to say that it is “likely” that the representation created a conflict under DR 5-101 (A).

In *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, the court stated:

“We take this occasion to note that the court erred in holding that the ‘but for’ standard of causation, applicable to a legal malpractice claim, does not apply to the claim for breach of fiduciary duty. Instead, it applied the less rigorous ‘substantial factor’ causative standard. We have never differentiated between the standard of causation requested for a claim of legal malpractice and one for breach of fiduciary duty in the context of attorney liability. The claims are coextensive. Under New York law, to establish the elements of proximate cause and actual damages, where the injury is the value of the claim lost, the client must meet the ‘case within a case’ requirement, demonstrating that ‘but for’ the attorney’s conduct the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages”

(10 AD3d at 271-272 [citations omitted]).

In all of the cases that US Coal cites, actual harm was either alleged or demonstrated resulting from egregious conflicts of interest: *see Beltrone v General Schuyler & Co.* (252 AD2d 640, 641 [3d Dept 1998] [plaintiff was required to personally pay a partnership obligation of approximately \$5.5 million]; *Griffin v F.J. Sciame Constr. Co.* (267 AD2d 100 [1st Dept 1999] [the attorneys for the estate took positions adverse to the interests of the estate's sole distributee, seeking to retain control of the estate's wrongful death action and to collect legal fees]; *Matter of Allen* (308 AD2d 143 [4th Dept 2003] [attorney withdrew funds from the firm's trust accounts as legal fees prior to issuing settlement proceeds to all of the firm's clients, and he rectified the shortages in the firm's trust accounts by depositing into those accounts funds earned in unrelated matters and nonclient funds]; *U.S. Ice Cream Corp. v Bizar* (240 AD2d 654 [2d Dept 1997] [plaintiffs alleged that they paid \$900,000 in legal fees to achieve a settlement of \$1,250,000, and defendant law firm improperly attempted to obtain an even greater remuneration by coercing the plaintiffs into settling the underlying action]; *Schlanger v Flaton* (218 AD2d 597 [1st Dept 1995], *lv denied* 87 NY2d 812 [1996] [matter was not one of a lawyer undertaking a business relationship with a client, but of a lawyer, in effect, exploiting his own client through a lack of disclosure and also pursuing affirmative steps to benefit himself at the expense of that client]; *Forest Park Assoc. Ltd. Partnership v Kraus* (175 AD2d 60 [1st Dept 1991] [client charged that the law firm placed its interest in ahead of the client by drafting a series of letter agreements which protected the interests of the firm's partners at the expenses of the clients]).

US Coal also cites *Dagny Mgt. Corp. v Oppenheim & Meltzer* (199 AD2d 711 [3d Dept 1993]) in support of its assertion that "a lawyer's professional misconduct may justify fee

forfeiture even if the client was not harmed by the misconduct” (Green Affirmation, at ¶ 10).

However, there the court found that the firm frustrated and interfered with the client’s attempt to settle the underlying actions and close on the property in question.

US Coal complains that, in January 2007, Pryor Cashman itself became an equity investor in US Coal, when it received 375,000 shares of its common stock. The record contains a resolution of the US Coal board of directors, dated January 12, 2007, in which the board authorized the company to deliver to Pryor Cashman 375,000 shares of its common stock in consideration of its willingness to defer payment of legal fees until completion of a future financing transaction (*see* Affirmation of Eric M. Fishman, Esq. at Exhibit A, USC 0002553). Furthermore, US Coal is not entitled to a forfeiture of the fees paid because it did not discharge Pryor Cashman for cause, and there is no claim of an actual breach of loyalty (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 11 [1st Dept 2008]).

US Coal argues that the motion must be denied, because it depends on inadmissible evidence consisting of self-serving, conclusory affidavits. This assertion is without merit. Affidavits constitute admissible evidence, especially here where they have been submitted by persons with specific first-hand knowledge of the assertions contained therein (*see IRB-Brasil Resseguros S.A. v Eldorado Trading Corp. Ltd.*, 68 AD3d 576, 577 [1st Dept 2009]). The only affidavits submitted on the motion that lack probative value as to the circumstances of the representation between 2006 and 2011 have been submitted on behalf of US Coal (*see e.g.* the affidavit of US Coal’s chief executive officer John Collins [affiant joined US Coal in May 2011]; affidavit of chief financial officer Michael P. Windisch [same]). Moreover, Pryor Cashman submitted copies of the invoices as well as other relevant documentary evidence.

US Coal also argues that the motion should be denied because it requires further discovery, but fails to identify any discovery that it needs that is not in its control, and could have a bearing on the motion (*Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418, 418 [1st Dept 2009]).

As for the request to dismiss the affirmative defenses, there are no affirmative defenses that US Coal asserts on this motion that have not been addressed in this decision. Hence, the request is granted.

Regarding damages, Salvatore A. Curcurato, Pryor Cashman's director of finance, states that Pryor Cashman sent US Coal 117 invoices reflecting fees and expenses in an aggregate amount of \$4,673,084.28. US Coal made 23 payments totaling \$2,217,605.42, leaving an outstanding balance as of June 27, 2011 of \$2,455,478.86. Attached to his affidavit is a payment ledger spreadsheet in support that he states he personally created. Attached to the affirmation of Eric M. Fishman, Esq., a Pryor Cashman attorney, are copies of the 117 invoices.

In his affidavit, Michael P. Windisch, US Coal's chief financial officer, states that he reviewed 109 invoices reflected in the US Coal accounting system, and the company's records show 17 checks and wire transfers to Pryor Cashman's name in a total amount of \$717,021.72 that are traceable to a particular Pryor Cashman invoice or invoices. The files and accounting records of US Coal also show that US Coal paid an additional \$2,009,926.31 to Pryor Cashman that is not traceable to a particular Pryor Cashman invoice or invoices. Together with the \$717,021.72, the total payments by US Coal to Pryor Cashman are \$2,726,948.03, which exceed the 23 payments totaling \$2,217,605.42 that Pryor Cashman claims were made.

In its reply papers, Pryor Cashman explains the discrepancy by stating (with supporting documentation) that there was an additional amount billed of \$509,342.61, attributable to a different client number (but also on behalf of US Coal). Thus, \$4,673,084.28 plus \$509,342.61 totals \$5,182,426.89. Then, subtracting the amount US Coal asserts that it paid (\$2,726,948.03), leaves the same amount as originally claimed by Pryor Cashman to be due, namely \$2,455,478.86 (*see also* Hellige's affidavit in further support, at ¶¶ 13-18). Although Pryor Cashman clarified this in its reply papers, US Coal subsequently submitted papers, and, therefore, was afforded the opportunity to controvert the clarification, but did not do so. Thus, Pryor Cashman has demonstrated entitlement to \$2,455,478.86.

Interest on the amount owed at the statutory rate is to run from the date that the representation ended in July 2011, and not from the date of each invoice. According to Pryor Cashman's own explanation of the circumstances of the representation, the parties had an understanding that, because of liquidity problems, the invoices would not be paid upon receipt. Apparently, Pryor Cashman was satisfied with the arrangement that payment on the invoices would not be immediately satisfied, and it continued performing services for US Coal.

Accordingly, it is

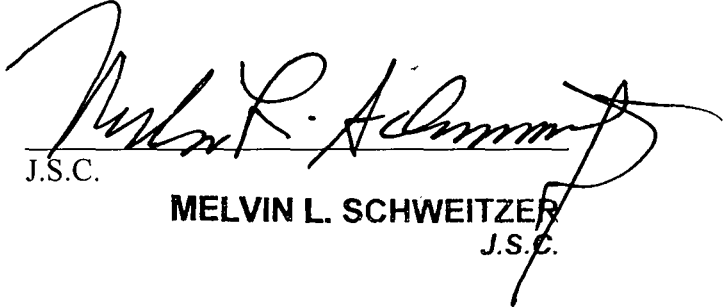
ORDERED that the motion for summary judgment on the complaint is granted and the Clerk is directed to enter judgment in favor of Pryor Cashman LLP and against U.S. Coal Corporation in the amount of \$2,455,478.86, with interest at the statutory rate from August 2011, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the counterclaims and affirmative defenses of U.S. Coal Corporation are dismissed; and it is further

ORDERED that the cross-motion is denied.

Dated: ~~January~~ ^{February} 4, 2013

ENTER:



J.S.C.
MELVIN L. SCHWEITZER
J.S.C.