

DLA Piper LLP v Koepfel

2013 NY Slip Op 31565(U)

July 9, 2013

Supreme Court, New York County

Docket Number: 153734/2012

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JOAN A. MADDEN
J.S.C.

PRESENT: _____
Justice

PART 11

Index Number : 153734/2012
DLA PIPER LLP (US)
vs.
KOEPEL, WILLIAM
SEQUENCE NUMBER : 002
PARTIAL 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: July 9, 2013


_____, J.S.C.
HON. JOAN A. MADDEN

- 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 11

----- X
DLA PIPER LLP (US),

INDEX NO. 153734/12

Plaintiff,

-against-

WILLIAM KOEPEL and WHITEHOUSE
ESTATES, INC.,

Defendants.

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

In this action to recover attorneys fees, plaintiff DLA Piper LLP (“DLA Piper”) moves for an order pursuant to CPLR 3212 granting partial summary judgment on its first cause of action for an account stated. Defendants William Koepfel (“Koepfel”) and Whitehouse Estates, Inc. (“Whitehouse”) oppose the motion.¹

The following facts are not disputed unless otherwise noted. On or about December 1, 2009, a partner with plaintiff law firm, Kip Hall, sent defendants an Engagement and Conflict Waiver Letter for Legal Services. The letter “confirm[ed] that Whitehouse Estates and you [Koepfel] have retained our firm to assist Walter Jennings, Esq. with his representation of you in litigation with Craig Avedisian.” As this court determined in its prior order dated December 14, 2012, the parties’ Engagement Letter “conclusively establishes that plaintiff was retained by both Koepfel and Whitehouse. Koepfel does not deny signing the engagement letter in his individual capacity and on behalf of Whitehouse. He also admits paying plaintiff from a Whitehouse checking account. Thus, to the extent the first counterclaim asserts that defendant Whitehouse did not engage plaintiff law firm it must be dismissed.”

¹The cross-motion by defendant Whitehouse for partial summary judgment on its first counterclaim is moot in view of this court’s decision and order dated December 14, 2012, which granted plaintiff’s motion to dismiss Whitehouse’s two counterclaims.

With respect to “Fees and Costs,” the Engagement Letter “confirm[ed] that we have been provided with estimates from Mr. Jennings and you of the time expected from our associate and me, which are roughly 95 hours from the associate and 55 hours from me. The associate will be charged at \$375/hour. My rate will be reduced from \$795 to \$740/hour. The total estimate for this work approximates \$85,000. If this estimate proves to be inaccurate, we will discuss it with you and the conditions under which we may continue.” As noted above, it is undisputed that defendants paid plaintiff from a Whitehouse checking account. Defendants submit copies of 14 checks drawn on Whitehouse’s checking account and payable to plaintiff, totaling \$73,500 and ranging in dates from December 2009 to May 2012.

On June 15, 2012, plaintiff commenced this action against Koepfel and Whitehouse, seeking outstanding legal fees in the amount of \$88,817.69. The complaint asserts causes of action for account stated, breach of contract, breach of implied covenant of good faith and unjust enrichment. Defendants answered asserting four affirmative defenses on behalf of Koepfel, lack of personal jurisdiction, breach of the agreement, payment and over billing; and one defense on behalf of Whitehouse alleging that plaintiff billed Whitehouse “for work performed for another.” The answer also asserts two counterclaims on behalf of Whitehouse, both of which were dismissed by order of this court dated December 14, 2012. Defendants subsequently filed an answer with amended counterclaims. Plaintiff responded by again moving to dismiss (motion seq. no. 003) and that motion is not scheduled for oral argument until July 18, 2013. In the meanwhile, plaintiff is now moving for partial summary judgment on its first cause of action for an account stated.

As the proponent of a motion for summary judgment, plaintiff bears the initial burden to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidentiary proof to eliminate any material issues of fact from the case. See Winegrad v. New

York University Medical Center, 64 NY2d 851, 853 (1985). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. See JMD Holding Corp. v. Congress Financial Corp, 4 NY3d 373, 384 (2005); Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). As CPLR 3212(b) provides that a summary judgment motion “shall be supported by affidavit” of a person “having knowledge of the facts,” as well as other admissible evidence, a conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent’s prima facie burden. See Coleman v. Maclas, 61 AD3d 569 (1st Dept 2009); JMD Holding Corp. v. Congress Financial Corp., *supra* at 384-385; 127 Restaurant Corp. v. Rose Realty Group, LLC, 19 AD3d 172 (1st Dept 2005).

Plaintiff’s motion is denied. Plaintiff has not submitted sufficient evidence in admissible form to support its claim for an account stated. In support of the motion, plaintiff submits affirmation from attorney Stephen P. Davidson and several exhibits consisting of the pleadings, the parties’ Engagement Letter, copies of the parties’ email correspondence, defendant Koeppel’s affidavit in opposition to plaintiff’s prior motion to dismiss Whitehouse’s counterclaim, and a letter dated November 18, 2010 from plaintiff to defendant Koeppel advising that “you currently owe” plaintiff \$109,317.68 for legal services performed. Plaintiff also submits a memorandum of law.

Defendants are correct that plaintiff’s motion is “defective” for not including an affidavit as required by CPLR 3212. Although CPLR 2016 authorizes an attorney to submit an affirmation in lieu of an affidavit in most situations, “even those persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action.” Slalvenburg Corp v. Opus Apparel, Inc, 53 NY2d 799, 801 (1981); see Law Offices of Neal D. Frishberg v. Toman, 105 AD3d 712 (2nd Dept 2013); Berkman Bottger & Rodd, LLP v. Moriarty, 58 AD3d

539 (1st Dept 2009); Finger v. Saal 56 AD3d 606 (2nd Dept 2008); LaRusso v. Katz, 30 AD3d 240 (1st Dept 2006). Since the law firm is the named plaintiff in this action, its submission of an affirmation instead of an affidavit is “improper” and its contents must be disregarded, thereby rendering plaintiff’s motion papers insufficient to support summary judgment. Id at 243 (quoting Pisacreta v. Joseph A. Minniti, PC, 265 AD2d 540 [2nd Dept 1999]); see Finger v. Saal, supra.

An attorney’s affirmation may be used as a vehicle for submitting “acceptable attachments” that provide evidentiary proof in admissible form, such as documents and transcripts. Zuckerman v. City of New York, 49 NY2d 557, 563 (1980). Here, however, the documents attached to plaintiff’s affirmation, standing alone, are not adequate to establish the elements of plaintiff’s claim for an account stated. Significantly, plaintiff fails to submit any invoices allegedly sent to defendants,² and the documents that are submitted do not establish that defendants retained the invoices without objection within a reasonable time, which are necessary elements of an account stated claim. See Russo v. Heller, 80 AD3d 531 (1st Dept 2011); RPI Professional Alternatives, Inc. v. Citigroup Global Markets Inc, 61 AD3d 618 (1st Dept 2009); Rockefeller Group, Inc v. Edwards & Hjorth, 164 AD2d 830 (1st Dept 1990).

Plaintiff’s reliance on the partial payment doctrine is not persuasive. Partial payment or the failure of a party receiving an account to examine the statement and make all necessary objections may be deemed acquiescence to the correctness of the balance owed. Morrison Cohen Singer & Weinstein, LLP v Waters, 13 AD3d 51, 52 (1st Dept 2004); Rosenberg Selsman Rosenzweig & Co, LLP v Slutsker, 278 AD2d 145 (1st Dept 2000). It is undisputed that defendants paid plaintiff \$73,500. Even assuming without deciding that such payment

²Defendants opposition papers include five invoices, dated December 31, 2012, February 12, 2010, March 30, 2010, April 26, 2010 and May 10, 2010.

establishes acquiescence on defendants' part, plaintiff is still required to establish by competent proof the other elements of an account stated, i.e. that it sent defendants detailed invoices as to the services performed and the rates charged for such services.

The court, therefore, concludes that plaintiff has failed to make a prima facie showing of entitlement to judgment as a matter of law on its account stated claim. Under these circumstances, the court need not consider the sufficiency of defendants' opposition. See JMD Holding Corp. v. Congress Financial Corp., *supra*; Alvarez v. Prospect Hospital, *supra*.

Nevertheless, the court notes that the affidavit in opposition submitted by defendant Koepfel raises issues of fact as to whether defendants received plaintiff's invoices and had an opportunity to object. Specifically, Koepfel states that he recalls plaintiff "sending one set of invoices" that were "sent to a "business address I do not use," and for that reason he "did not have an opportunity to properly review the invoices." Koepfel questions why plaintiff used that address, "when two addresses I'm easily reached at are listed on the top of Plaintiff's Engagement Letter." While Koepfel acknowledges payment, he states that he "just blindly sent in checks . . . based on my faith in Mr. Hall and the firm's reputation." He states that "not until recently . . . was I able to sit down with my attorneys and review the invoices," since plaintiff "refused all requests" for copies of the invoices.

Defendants also raise issues of fact as to whether they were overcharged. Koepfel asserts that plaintiff billed at higher rates and for many more hours than agreed to in the Engagement Letter, which resulted in approximately \$23,000 in overcharges. Defendants submit copies of invoices from December 2009, and February, March, April and May 2010, which show that plaintiff billed defendants at rates than those provided for in the Engagement Letter. Specifically, the Engagement Letter states that partner Hall would charge \$740 per hour and the associate \$375 per hour. The invoices, however, show that in December 2009 Hall charged

\$795 per hour, and in December 2009 and February, March and April 2010, associates charged various hourly rates including \$610, \$475, \$460 and \$410.

Based on the foregoing, plaintiff's motion for partial summary judgment is denied. In view of this conclusion, the court makes no determination as to the additional issues raised by defendants.

Accordingly, it is

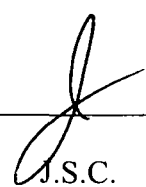
ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that defendants' cross-motion for partial summary judgment is denied as moot; and it is

ORDERED that the parties are directed to appear for a status conference on July 18, 2013 at 9:30 am, Part 11, Room 351, 60 Centre Street.

DATED ~~June~~ *July 9*, 2013

ENTER:



J.S.C.