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| <b>Schwartz &amp; Thomashower, LLP v NY Medscan, LLC</b>                                                                                                                                                                                                         |
| 2013 NY Slip Op 32463(U)                                                                                                                                                                                                                                         |
| October 8, 2013                                                                                                                                                                                                                                                  |
| Sup Ct, New York County                                                                                                                                                                                                                                          |
| Docket Number: 652178/2011                                                                                                                                                                                                                                       |
| Judge: Barbara Jaffe                                                                                                                                                                                                                                             |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                                                           |

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: BARBARA JAFFE  
J.S.C.  
*Justice*

PART 12

Index Number : 652178/2011  
SCHWARTZ & THOMASHOWER LLP  
vs.  
NY MEDSCAN, LLC  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. 652178/11  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for S/J  
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  
ACCOMPANYING DECISION / ORDER**

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

Dated: OCT 08 2013

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

BARBARA JAFFE  
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
SCHWARTZ & THOMASHOWER, LLP,

Plaintiff,

- against -

Index No. 652178/2011

Mot. seq. no. 002

**DECISION AND ORDER**

NY MEDSCAN, LLC, THE PROTON INSTITUTE  
OF NEW YORK and TPTCC NY, INC.,

Defendants.  
-----X

BARBARA JAFFE, J.:

**For plaintiff, self-represented:**

Rachel Schwartz, Esq.  
Carla Sereny, Esq.  
15 Maiden La., Ste. 705  
New York, NY 10038  
212-227-4300

**For defendants:**

Allen M. Eisenberg, Esq.  
Heller, Horowitz & Feit, PC  
292 Madison Ave.  
New York, NY 10017  
212-685-7600

By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order granting it partial summary judgment. Defendants oppose.

**I. UNDISPUTED FACTS**

At an emergency meeting held on September 12, 2010 and at defendants' instance, plaintiff agreed to represent them in a federal action which was subsequently commenced in the Southern District of New York. (*TPTCC NY, Inc. et al. v Radiation Therapy Services, Inc. et al.*, 10 Civ. 7097). The action, seeking \$350 million, set forth federal claims for antitrust violations and related state claims. Jack Lefkowitz, principal of the three defendants, gave plaintiff \$20,000 as a initial advance retainer. (NYSCEF 23). Plaintiff immediately began work and by September 16, 2010, commenced the federal action with the filing of a 31-page complaint, although the retainer agreement was not signed by Lefkowitz until October 28, 2010. (NYSCEF 26).

In the retainer agreement, Lefkowitz agrees that plaintiff would commence litigation against certain entities “to recover for anticompetitive acts, unfair competition, theft of trade secrets and other claims in connection with [defendants’] development of a proton beam therapy facility in New York.” (NYSCEF 1-1). In the retainer, defendants acknowledge that plaintiff does not represent or guarantee the nature, extent, and cost of the services required or that any result will be obtained. The retainer also contains the pertinent billing rates for the two partners and associates. (*Id.*).

By emails between Thomashower, Schwartz, and Lefkowitz, all dated October 14, 2010, Lefkowitz makes it clear that in addition to retaining plaintiff, he wanted to hire other law firms as a litigation tactic (NYSCEF 28), and the following month, defendants entered into retainer agreements with Crowell & Moring LLP and Morrison & Foerster LLP (NYSCEF 29).

By invoice dated October 20, 2010, plaintiff billed defendants \$45,241 in attorney fees and disbursements, against which it credited them with the \$20,000 retainer, leaving a balance of \$25,241. By invoice dated November 17, 2010, plaintiff billed an additional \$25,323.32 in attorney fees and disbursements, and credited defendants with a payment of \$25,000, leaving a balance of \$25,564.32. (NYSCEF 2).

By invoice dated December 10, 2010, plaintiff billed defendants an additional \$85,070.93 in attorney fees and disbursements, and credited defendants with a payment of \$20,000, leaving a balance of \$90,635.25. In an entry dated November 4, 2010, plaintiff recorded a telephone call between Thomashower and Lefkowitz, “re billing options.” (*Id.*).

On December 6, 2010, plaintiff filed a 66-page amended complaint. (NYSCEF 68).

By invoice dated January 7, 2011, plaintiff billed defendants \$80,353.09, and credited

them with a payment of \$30,000, leaving a balance of \$135,988.34. By invoice dated February 14, 2011, plaintiff billed defendants \$122,521.20, crediting defendants with a payment of \$92,500, leaving a balance of \$166,009.54. In an entry for January 17, 2011, plaintiff recorded "billing options" as having been discussed. (NYSCEF 2).

In an email dated February 23, 2011 and in response to Thomashower's email of the same day regarding the January invoice and plaintiff's need to have it paid, Lefkowitz declined to scrutinize the bills on every line item or "get into % factors." Rather, he expressed his opinion that the January bill is "excessive pure simple," and asked that it be discounted. (NYSCEF 87). On February 24, 2011, the amended complaint was dismissed with prejudice. (NYSCEF 37).

By invoice dated April 11, 2011, plaintiff billed defendants \$53,998.67 and credited them with \$42,924.02, leaving a balance of \$177,084.19. An entry dated March 16, 2011, reflects a discussion of "fees due." And, by invoice dated May 12, 2011, plaintiff billed defendants \$4,775.71, leaving a balance of \$181,859.90. (NYSCEF 2). In an email dated April 12, 2011, Schwartz noted that Lefkowitz had "expressed concern with certain of the daily detailed services." (NYSCEF 88).

By order dated May 13, 2011, plaintiff was granted leave to withdraw from representing defendants, based on defendants' failure to pay the open invoices. Thereafter, one of the other law firms on the case appealed the dismissal and obtained a reversal to the sole extent that the dismissal of the state claims was remanded for entry of an order dismissing them without prejudice. (NYSCEF 36).

On or about August 10, 2011, plaintiff commenced the instant action against defendants, asserting causes of action for breach of contract, services rendered, and an account stated.

(NYSCEF 1). On or about September 7, 2011, defendants answered. (NYSCEF 5).

On June 12, 2012, Lefkowitz was deposed by plaintiff. He answered none of the questions posed except for acknowledging his position as managing member of defendants. He was evasive, uncooperative, and obstreperous. (NYSCEF 73).

## II. CONTENTIONS

Plaintiff asserts that it has established, *prima facie*, its entitlement to summary judgment on its causes of action for breach of contract and an account stated. It offers the retainer agreement, the pleadings filed in the underlying case, detailed invoices, and the pertinent correspondence. It also observes that having fully paid the first three invoices, and partially paid the fourth, defendants have no defense to the account stated as to which they lodged no specific objections beyond complaining that the bills were excessive. (NYSCEF 23-33).

Defendants argue that plaintiff has failed to set forth a *prima facie* case given its patently unreasonable invoices, such as invoice entries reflecting as many as 18 hours worked in a single day by Schwartz, and object to paying for more than 24 hours of work in a given day by more than one lawyer. They maintain that Lefkowitz's complaints about plaintiff's excessive billing constitute objections sufficient to raise a triable issue as to plaintiff's account stated, and that their partial payments, none of which relate to any specific invoice, do not evidence acquiescence. (NYSCEF 36).

In reply, plaintiff relies on email correspondence reflecting Lefkowitz's active participation in the litigation and an absence of any objections. It argues that Lefkowitz's affidavit should be disregarded given his refusal to answer any questions at his deposition. (NYSCEF 75-90).

### III. ANALYSIS

An account stated constitutes an agreement between parties based upon prior transactions as to the correctness of separate items composing the account and the balance due. Such an agreement is implied if the party receiving the statement keeps it without objecting to it within a reasonable period of time. (*Rodkinson v Haecker*, 248 NY 480, 485 [1928]). The rationale for implying such an agreement is that one who receives a statement from another with whom it has conducted prior transactions is expected to examine the statement and object to it, if an objection lies. (*Id.*).

An account stated is conclusive upon the parties, absent fraud, mistake, or other equitable considerations. (*Rodkinson*, 248 NY 480, 485). “Either retention of bills without objection or partial payment may give rise to an account stated.” (*Jaffe v Brown-Jaffe*, 98 AD3d 898, 899 [1<sup>st</sup> Dept 2012]; *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1<sup>st</sup> Dept 2004]; *Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431 [1<sup>st</sup> Dept 1979]). “The partial payment is considered acknowledgment of the correctness of the account.” (*Chisholm-Ryder*, 70 AD2d 429, 431).

As the evidence offered by plaintiff demonstrates that defendants partially paid a significant portion of the total amount billed, plaintiff has set forth, *prima facie*, its entitlement to summary judgment on its cause of action for an account stated. That defendants’ partial payments do not relate to a particular invoice does not defeat the account stated, nor do defendants’ complaints of excessive billing or Schwartz’s email acknowledgment that Lefkowitz had expressed concern about certain services, absent specification by defendants. Rather, Lefkowitz expressly declined to specify his objections. Moreover, Lefkowitz’s affidavit is

\* 7]  
without probative value given his conduct at the deposition, and the decisions relied on by defendants are significantly distinguishable.

Given this result, I need not address plaintiff's cause of action for breach of contract. In any event, in view of the complexity of the issues addressed, the retainer agreement, and plaintiff's appropriately detailed monthly invoices, there is no basis for finding that the fees are unreasonable. Multiple lawyers working on a single day will bill more than 24 hours, and, per the retainer agreement, defendants acknowledge that no result is guaranteed.

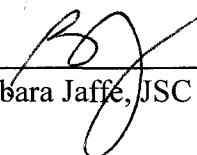
#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment on its claim for an account stated against defendants is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of \$\_\_\_\_\_, together with interest at the rate of \_\_\_% per annum from the date of May 12, 2011, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, 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 plaintiff's motion for summary judgment on its breach of contract claim is denied as moot.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

DATED:      October 8, 2013  
                 New York, New York