

Boies, Schiller & Flexner LLP v Modell
2013 NY Slip Op 32801(U)
October 29, 2013
Sup Ct, New York County
Docket Number: 651454/2013
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 651454/2013
HON. ANIL C. SINGH
SUPREME COURT JUSTICE
 BOIES, SCHILLER & FLEXNER LLP
 vs
 MODELL, LESLIE
 Sequence Number : 001
 SUMMARY JUDGMENT

PART 61

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 10/29/13

Rec) _____, J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

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 61**

BOIES, SCHILLER & FLEXNER LLP,
Plaintiff,

-against-

LESLIE MODELL,
Defendant.

INDEX NUMBER 651454/2013
Motion Sequence 001 & 002
DECISION & ORDER

HON. ANIL C. SINGH, J.:

Motion sequences bearing the numbers 001 and 002 are hereby consolidated for disposition. In this dispute over legal fees, Boies, Schiller & Flexner LLP (BSF) moves, pursuant to CPLR 3212, for summary judgment in its favor in the principal amount of \$156,748.76 against defendant Leslie Modell (Modell), and for other relief (Mot. Seq. 001). Additionally, BSF moves, pursuant to CPLR 3211 (a) (7), to dismiss Modell's counterclaims, and for other relief (Mot. Seq. 002).

BACKGROUND

Modell retained BSF, a large law firm, on or about March 11, 2011, by a written retainer agreement, to perform legal services concerning her brother Mitchell Modell's conduct of Henry Modell & Company, Inc. (the Company), her family's business, and her father's estate pending before the Surrogate's Court of Nassau County. Dyer affirmation (July 24, 2013), exhibit A. On May 31, 2012, BSF filed an order to show cause with that court, asking to be relieved as Modell's counsel, because of her alleged failure to pay her legal fees. *Id.*, exhibit C. On or about September 11, 2012, Modell and BSF reached an agreement on outstanding fees; she paid all accounts receivable outstanding to BSF, and BSF resumed representing her.

Subsequently, BSF sent Modell monthly invoices for legal services, dated October 18,

2012, November 26, 2012, January 4, 2013, January 23, 2013, February 25, 2013, and March 20, 2013. *Id.*, exhibit D. Little, if any, payment was allegedly made against these invoices, and BSF claims that Modell owes \$156,748.76, as of February 2013.¹ As a result, BSF again moved, by order to show cause, to be relieved as Modell’s counsel before the Surrogate’s Court of Nassau County, on February 4, 2013. *Id.*, exhibit K.

The instant action commenced on April 22, 2013, with the complaint asserting causes of action for breach of contract and account stated in the amount of \$156,748.76. Dyer affirmation (August 7, 2013), exhibit A.

DISCUSSION

Plaintiff’s Summary Judgment Motion

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

BSF maintains that its invoices to Modell “described in detail the work performed,” and included the names, hourly rates and time spent with respect to each attorney. Dyer affirmation

¹ Some of the work was done on behalf of Shelby Modell, Modell’s mother.

(July 24, 2013), ¶ 15. The invoice copies submitted to the court confirm this contention. BSF states that “Ms. Modell never objected to any specific bill BSF sent, never objected to any particular time entry(ies) contained therein, and never objected to BSF’s hourly rates.” *Id.*, ¶ 16. If so, BSF will prevail in this motion. *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 (1st Dept 2004) (“The rule to which we have adhered and which we now reiterate is that either retention of bills without objection or partial payment may give rise to an account stated”); *Rosenberg Selsman Rosenzweig & Co., LLP v Slutsker*, 278 AD2d 145, 145 (1st Dept 2000) (“having received and retained the invoice without objection for a reasonable time, defendant’s silence gave rise to an actionable account stated warranting summary judgment for plaintiff”). Objections to the contrary must be raised in a timely manner, not merely in an answer to a complaint or in opposition to a summary judgment motion. *Morrison Cohen*, 13 AD3d at 51-52 (“It was only in her September 2003 answer to the instant proceeding that she alleged that the claimed fees were not ‘justly due,’ and only months later in opposition to a summary judgment motion when defendant actually specified objections to the billed amounts”).

Modell claims that “my mother and I repeatedly objected both in writing and orally to [BSF’s bills].” Modell aff (August 27, 2013), ¶ 2. She states that BSF withdrew its representation in May 2012 “due to the serious objections we had to their bills and our refusal to pay same.” *Id.*, ¶ 9. She claims that “we reluctantly re-hired” BSF in October 2012, without acknowledging that she paid the outstanding invoices in full at that point. Then, she says that “[w]e regularly and repeatedly objected to these Invoices [that were issued from October 2012 through March 2013].” *Id.*, ¶ 12.

BSF views the record as demonstrating that “Leslie Modell only began to object to BSF’s bills *after* BSF informed her of its intention to withdraw as counsel due to her nonpayment.”

Reply Memorandum (October 2, 2013) at 1. It also characterizes her objections as “untimely, vague, nonspecific, and often contemporaneous with inconsistent communications in which Leslie Modell praised BSF.” *Id.* at 2.

Modell provides as evidence the following excerpts of e-mail messages to BSF:²

DATE	CONTENT
11/10/12	“I don’t want to start another lawsuit without goals that will be remunerated.”
12/12/12	“I can’t afford to do this in two sections. We discussed there’s no benefit to the other action for Shawn [my daughter] and myself and no point in pursuing it when Michael was involved.”
12/12/12	“the time and expense is a tremendous issue and must be addressed.”
12/22/12	“I’m disgusted and have to rethink my options[.] Maybe have the accountants [instead of BSF] negotiate for us[.] I don’t want to waste more money.”
12/31/12	“I want results and all I’m getting is bills, no responses from Mitchell’s attorneys and losing cases. I am going to go over all the bills and their wisdom with them to get this behind us [...] Due to your inability to get their attention, I had to bring in [additional counsel] Gloria and Nathan [...] Mitchell’s lawyers have frozen you out [...] Please do not proceed as I advised Karen [Dyer] last week because I’m going to try and get my new accountant to negotiate the deal with Mitchell’s accountant to end this [...] I’m sick and tired of your Threats, inaction, outlandish bills and losing cases!”
01/25/13	“I am not paying any bill until [] its reviewed. Considering that Mitchell’s lawyers don’t answer your calls. I can’t imagine what I’m being charged for I would like a copy of all moms [Shelby’s] and my bills for my accountant to decide who should pay what from the onset. ... You’re bills will be addressed and my accountant will review everything before its paid”
02/05/13	“Do you feel good about burying us?”
02/05/13	“What results did you get? I had to bring in another firm for your lack of results”

² These excerpts are presented at Modell aff (August 27, 2013), ¶¶ 13-24. They are reproduced here as is, except for some changes in the spacing between words, punctuation marks and/or paragraphs. The complete thread of original messages is found at *id.*, exhibits 2-9.

02/03/13 ³	<p>“Nick, You said we had a good case not a weak case against [Mitchell.] If I had known it Was a weak case I wouldn’t have allowed my mother to sell all her [possessions]! You’re referring to spending another fortune on a complaint which my friend and I had to rewrite because it was so poorly written by [BSF attorney] Rick Batan (indeed every sentence) Not cohesive and an embarrassment! When we wrote the term sheet, and I realized that we couldn’t ask or lawyers fees That means every dollar we spend on legal fees won’t be reimbursed and I have no income and been cut off My health has been greatly affected by your screaming and actions and to add to the pressure You’re. Withdrawing from the estate case tomorrow I don’t know how you sleep at night. Unfortunately, I Trusted you and Karen would do the right thing when we engaged you. The stress that I’m living with is preventing me from recovering from a flu I’m too sick to write anymore, but I’m not throwing good money after pipe dreams. I am not an idiot! If I thought we didn’t have a case I wouldn’t have pursued this. I met [BSF attorney] David [Boies] and know he has integrity @ I went to his firm This is worse than cancer because I buried my mom and daughter believing in you I have to get off because I’m having difficulty Breathing Leslie</p>
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Modell also asserts that, “in response to each of the Invoices I received on my own behalf and on behalf of Shelby, I called Karen Dyer to object to same.” Modell aff (August 27, 2013), ¶ 25. The e-mail messages quoted here are more substantial than Modell merely offering “self-serving, conclusory and unsubstantiated allegations that she orally objected to the bills . . . [and] made no specific objections of any kind about the invoices, but instead proffered a general complaint that the bills were mounting and that she could not afford to pay them,” which was insufficient to deny an account stated in another action. *Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355, 356 (1st Dept 2001). “There can be no account stated where no account was presented or where any dispute about the account is shown to have existed.” *Abbott, Duncan & Wiener v Ragusa*, 214 AD2d 412, 413 (1st Dept 1995). By December 31, 2012, Modell’s objections to BSF’s invoices pose a genuine dispute between the parties.

³ This is the sequence presented by plaintiff. This message responded to a message by Nicholas Gravante (Gravante), one of BSF’s partners working on this matter, dated February 3, 2013, to Modell stating that “if you do have a case, it’s a weak case.” *Id.*, exhibit 9.

Under these circumstances, BSF's motion for summary judgment must be denied, and the material issues of fact in dispute placed before a jury. *Hull v City of N. Tonawanda*, 6 AD3d 1142, 1142-1143 (4th Dept 2004) (summary judgment seeking damages based on an account stated denied, because "plaintiff failed to establish the absence of any dispute about the account and thus did not meet his initial burden . . .").

Plaintiff's Motion to Dismiss

Modell's amended answer to the complaint asserts counterclaims, on behalf of her and Shelby Modell, her mother, for breach of fiduciary duty, unjust enrichment and breach of contract. Dyer affirmation (August 7, 2013), exhibit B (Amended Answer). Modell asks for return of approximately \$2.2 million paid to BSF, over \$1.2 million by Modell, and almost \$1 million by her mother. BSF moves to dismiss the counterclaims for failure to state a cause of action, pursuant to CPLR 3211 (a) (7). On a motion to dismiss for failure to state a cause of action, the pleading is afforded a liberal construction. The court "accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "However, allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 (1st Dept 1994).

Modell claims that BSF "charged [her] exorbitant fees for legal services that were totally unnecessary and not useful. BSF's legal strategy appears to simply have been to assert claims, even though such claims bordered on being frivolous, in order to obtain a perceived advantage in settlement negotiations." Amended Answer, ¶ 3 at 6. Modell's current counsel, Larry Hutcher, bolsters this view by paraphrasing a purported conversation he had with Gravante, in or about

June 2013. “Mr. Gravante told me, in sum and substance, that BSF recognized that the claims it prosecuted on the Modells’ behalf against Mitchell Modell lacked merit, but that BSF’s strategy all along had been to aggressively pursue the claims in an effort to obtain a perceived advantage in settlement negotiations.” Hatcher affirmation (August 27, 2013), ¶ 2. Modell contends that, had BSF explained this litigation strategy, she (and her mother as well) “would never have agreed to such a strategy.” Amended Answer, ¶ 4 at 6. Modell maintains that, rather than being an exercise in hindsight, “this is an instance of attorneys adopting a legal strategy designed to benefit the attorneys’ interests rather than the client’s interests, without informing the client of what that legal strategy was.” *Id.*, ¶ 6 at 7.

Modell argues that BSF breached its fiduciary duty to her “by billing the Modells for legal services that were not useful, unnecessary, duplicative, or wasteful, and for placing its own interests ahead of its clients.” *Id.*, ¶ 36 at 11. Modell’s counterclaim also asserts a cause of action for breach of contract by BSF

“(i) pursuing a legal strategy that failed to represent the Modells competently and diligently; (ii) failing to put the Modells’ interests ahead of of BSF’s interests by charging and receiving exorbitant legal fees for services that were unnecessary, duplicative, or wasteful; (iii) failing to charge a reasonable fee for the services rendered; and (iv) failing to explain how the faulty strategy employed would result in such exorbitant legal fees.”

The counterclaim for breach of contract includes a repetition of the allegations in the counterclaim for breach of fiduciary duty, which warrants dismissal of the counterclaim for breach of fiduciary duty as duplicative. *Nineteen Eighty-Nine, LLC v Icahn*, 96 AD3d 603, 604 (1st Dept 2012) (“Because of the primacy of contract law over fiduciary law, if the duty sought to be enforced arises from the parties’ contractual relationship, a contractual claim will preclude a fiduciary claim” [quotation marks and citation omitted]).

In the retainer agreement executed by the parties, BSF does not “guarantee the success of

any given matter, but we will strive to represent your interests professionally and efficiently.” Modell’s allegations question both the professionalism and efficiency of BSF’s representation, and, as such, exceed the low bar of CPLR 3211 (a) (7). *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977) (“the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail”). The counterclaim for breach of contract shall remain.

Modell withdraws her counterclaim for unjust enrichment, recognizing that “a party generally cannot sue for unjust enrichment when there is a valid contract.” Memorandum of Law in Opposition (August 27, 2013) at 20; see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987) (“The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter”).

BSF also requests an award of costs and expenses in each of the motions herein. Both requests are denied in light of the decisions rendered.

Accordingly, it is

ORDERED that plaintiff Boies, Schiller & Flexner LLP’s motion, pursuant to CPLR 3212, for summary judgment in its favor in the principal amount of \$156,748.76 is denied (Mot. Seq. 001); and it is further

ORDERED that plaintiff Boies, Schiller & Flexner LLP’s motion, pursuant to CPLR 3211 (a) (7), to dismiss defendant Leslie Modell’s counterclaims is granted to the extent of dismissing the counterclaim for breach of fiduciary duty (Mot. Seq. 002); and it is further

ORDERED that defendant’s counterclaim for unjust enrichment is dismissed on

consent; and it is further

ORDERED that plaintiff Boies, Schiller & Flexner LLP's motions for an award of costs and expenses are denied; and it is further

ORDERED that plaintiff shall serve and file a reply to the remaining counterclaim within 20 days of receipt of a copy of this order; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on January 15, 2014, at 9:30 AM.

DATED: October 29, 2013

ENTER:



**HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE**