

Louis F. Burke, P.C. v Kivo

2014 NY Slip Op 30105(U)

January 9, 2014

Sup Ct, New York County

Docket Number: 112859/11

Judge: Doris Ling-Cohan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----- X
LOUIS F. BURKE, P.C.,

Plaintiff,

Index No. 112859/11

- against-

Motion Sequence No.: 003

LEWIS KIVO,

Defendant.
----- X

The following papers, numbered 1 to 3 were considered on this motion to reargue :

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<u>1, 2</u>
Answering Affidavits - Exhibits	<u>3</u>
Replying Affidavits (Reply Memo)	

FILED

JAN 14 2014

Cross-Motion: [] Yes [X] NO

NEW YORK
COUNTY CLERK'S OFFICE

DORIS LING-COHAN, J.:

Upon the above submitted papers, in this breach of contract action for attorneys' fees, plaintiff's motion to reargue the denial of plaintiff's prior motion for summary judgment is granted; however, upon reargument, as detailed below, plaintiff's motion for summary judgment is denied.

Motion to Reargue

To succeed on a motion for leave to reargue pursuant to CPLR § 2221, movant must show "that the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision". *William P. Pahl Equipment Corp. v. Kassis*, 182 AD2d 22, 27 (1st Dept 1992), *leave to appeal dismissed in part, denied in part* 80 NY2d 1005, *reargument denied* 81 NY2d 782 (1993) (citing *Schneider v. Solowey*, 141 AD2d 813 (1988)). Here, by order of this court dated June 11, 2013, plaintiff's motion for summary judgment was denied, for failure to timely move for summary judgment, since plaintiff's prior motion was not filed within 120 days of the filing of the note of issue. Unbeknownst to this court, however, since this case had only recently been assigned to this Part (having previously been assigned to Justice Joan M. Kenney), additional time for plaintiff to serve a motion for summary judgment, had been granted, by oral order of Justice Kenney, on March 13, 2013. See Exhibit 7, to Motion for Summary Judgment,

Transcript, at 23. At such March 13, 2013 court appearance, after permitting plaintiff additional time to move for summary judgment, notwithstanding no offering or showing of good cause reflected in the transcript, Justice Kenney recused herself from this case, which resulted in the re-assignment of the case, to this Part. The court notes that while defendant argues, in opposition to plaintiff's motion to reargue, that Justice Kenney erred in granting plaintiff additional time to move for summary judgment because there was no showing of good cause, this court is without jurisdiction to modify another judge's decision.

It is also noted that, a note of issue was filed in this case, on or about October 25, 2012, and, pursuant to the preliminary conference order dated June 24, 2012, "so ordered" by Justice Kenney, dispositive motions were to be filed within 30 days of the filing of the note of issue. Nevertheless, given Justice Kenney's ruling, which is the law of the case, plaintiff's motion to reargue is thus granted and this court shall consider plaintiff's prior motion for summary judgment below, notwithstanding that it was made while this case was on the trial calendar.

Motion for Summary Judgment

The following principles govern summary judgment motions. To obtain summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. CPLR § 3212 (b); *Guiffrida v Citibank Corp.*, 100 NY2d 72, 81 (2003); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985). The court must deny a summary judgment, if the movant fails to meet its initial burden, despite any insufficiency in the opposition. *Bowie v 2377 Creston Realty, LLC*, 14 AD3d 457, 459 (1st Dept 2005); *Diaz v Nunez*, 5 AD3d 302, 303 (1st Dept 2004). Moreover, on a motion for summary judgment, the court must draw all reasonable inferences in favor of the non-moving party, and should not pass on issues of credibility. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990).

The proof needed on a motion for summary judgment is detailed in CPLR §3212(b) and *specifically requires* that such a motion, be supported by, *inter alia*, an affidavit, "by a person having knowledge of the facts; it shall recite all the material facts and it shall show that there is

no defense to the cause of action...”. See also *Spearmon v. Times Square Stores Corp.*, 96 AD2d 552, 553 (2d Dept 1981). A conclusory affidavit, or an affidavit by a person who has no personal knowledge of the facts, cannot establish a *prima facie* case. *JMD Holding Corp. v. Cong. Fin. Corp.*, 4 NY3d 373, 385 (2005); *Castro v. N.Y. Univ.*, 5 AD3d 135, 136 (1st Dept 2004).

Moreover, an affirmation by an attorney, who is without the requisite knowledge of the facts, has no probative value and is insufficient to support a motion for summary judgment. *DiFalco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560 (1st Dept 1981), *affirmed* 54 NY2d 715 (1981); *GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 (1985); *Wehringer v. Helmsley Spear*, 91 AD2d 585 (1st Dept 1982).

Applying such principles herein, plaintiff has failed to meet its burden of proof, since an affidavit by someone with personal knowledge of the facts, as *specifically required* by CPLR 3212(b), has not been supplied. Plaintiff only submits an affirmation by its counsel, which is insufficient, as an affirmation by an attorney, who is without the requisite knowledge of the facts, has no probative value. *DiFalco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560 (1 Dept 1981), *affirmed* 54 NY2d 715 (1981). Moreover, the attorney’s affirmation submitted by plaintiff in support of its motion for summary judgment, merely lists the documents which have been attached to the motion as exhibits. No evidentiary foundation is laid, by any individual with personal knowledge, for any of the documents relied upon in seeking that this court award judgment, as a matter of law. Additionally, while plaintiff’s notice of motion indicates that a memorandum of law was submitted in support of plaintiff’s prior motion for summary judgment, a memorandum of law is not included in the within submitted papers.

While no affidavit has been supplied herein, it is noted that, when an affiant relies on documents, the affiant must establish an adequate evidentiary basis for such documents, based upon personal knowledge. See *Kennedy v. Town of Thompson*, 99 AD2d 606 (3d Dept 1984); *Grouper Fin. Corp. v. Giromas Trading Corp.*, 22 Misc 3d 1124(A), Sup Court, Kings County 2009)(“[w]hen an affiant relies on attached documents, he or she must establish an adequate evidentiary basis for them. Simply annexing numerous documents, without any identification, explanation or proper evidentiary foundation, is inadequate...”); The mere submission of documents, without any identification or authentication is inadequate. See *Higen Assocs. v. Serge Elevator Co.*, 190

AD2d 712, 713 (2nd Dept 1993). Additionally, when a movant seeks to have the court consider a business record, the proponent must establish that it meets the evidentiary requirements for a business record, by, for example, having a corporate officer swear to the authenticity and genuineness of the document. See CPLR §4518[a]; *First Interstate Credit Alliance, Inc. v. Sokol*, 179 AD2d 583, 584 (1st Dept 1992); *Bowers v. Merchants Mut. Ins. Co.*, 248 AD2d 1005, 1006 (4th Dept 1998); *A.B. Med. Servs., PLLC v. Travelers Prop. Cas. Corp.*, 5 Misc.3d 214 (Civ Ct, Kings County 2004). Here, plaintiff has not supplied the necessary foundation for any of the documents, including the retainer agreement.

Thus, as plaintiff has failed to establish its burden of proving entitlement to judgment as a matter of law, plaintiff's motion is denied, regardless of the sufficiency of the opposing papers. See *Winegrad v. New York Univ Med. Ctr.*, 64 NY2d at 853; *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Vitiello v. Mayrich Constr. Corp.*, 255 AD2d 182, 184 (1st Dept 1998).

Nevertheless, it is noted that in defendant's affidavit submitted in opposition to plaintiff's motion for summary judgment, defendant has raised factual issues, as he specifically disputes the amount of attorneys' fees sought and the billing practices of plaintiff, including that, *inter alia*, defendant was billed for time prior to signing the retainer agreement and after the subject arbitration was concluded. ¶20, Defendant's Affidavit in Opposition, Exhibit C, Notice of Motion. Moreover defendant disputes being charged at an attorney hourly rate of \$650, when the retainer agreement indicates an hourly rate of \$500. *Id.* at ¶25. Defendant further disputes a lump sum charge for "legal research", in the amount of \$4,483, since there is no indication as to the amount of time spent on such research and the hourly billing rate charged. *Id.* at 14. Defendant further objects to plaintiff's charge of a 40% "performance fee", when the retainer agreement provides for a 35% "performance fee". *Id.* at 32. Defendant also disputes an expert fee of \$3,000 for Bruce Larrimer, who, according to defendant, did not testify at the subject arbitration hearing and no proof of payment to such expert, has been supplied. *Id.* at 33.

The court notes that, according to the court's computer records, this case was first deemed "trial ready" by the Part 40 judge on or about March 5, 2013, however, the scheduled trial date has been adjourned several times, and is currently scheduled for February 5, 2014.

Based upon the above, it is

ORDERED that plaintiff's motion to reargue is granted, and upon reargument, plaintiff's motion for summary judgment is denied; and it is further

ORDERED that, within 30 days of entry of this decision/order, defendant shall serve a copy upon plaintiff, with notice of entry.

Dated: New York, New York
January 14, 2014


Doris Ling-Cohan, JSC

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Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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