

Levitt v Jackson

2014 NY Slip Op 31161(U)

April 28, 2014

Sup Ct, New York County

Docket Number: 1592423/12

Judge: Joan A. Madden

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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: PART 11

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RICHARD WARE LEVITT, d/b/a LEVITT & KAIZER,
Attorneys at Law, A New York Partnership,

INDEX NO. 1592423/12

Plaintiff,
-against-

STUART JACKSON,

Defendant.

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JOAN A. MADDEN, J.:

In this action for attorney’s fees, plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment in the amount of \$48,882.00. Defendant, pro se, opposes the motion.

On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. See CPLR 3212 [b]; Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980); Meridian Management Corp v. Cristi Cleaning Service Corp, 70 AD3d 508, 510 (1st Dept 2010). Once such showing is made, the opposing party must “show facts sufficient to require a trial of any issue of fact.” CPLR 3212 (b); see Zuckerman v. City of New York, supra at 562.

In support of the motion, plaintiff Levitt submits an affidavit, and he also submits an affidavit from the law firm’s office manager, Susan McMahon, and documents including plaintiff’s August 28, 2008 engagement letter addressed to defendant Jackson, email

correspondence between the parties, reminder statements addressed to defendant Jackson as to the balance due and owing, and invoices addressed to defendant Jackson detailing the legal services provided by plaintiff to defendant Jackson.

In his affidavit, plaintiff Levitt explains that on or about August 28, 2008, defendant Jackson “retained me in a criminal proceeding in Supreme Court, New York County, *People v. Jackson*, Index No. 05343/08.” Levitt states he drafted a “retainer letter,” dated August 28, 2008, “memorializing our agreement, and sent it to Mr. Jackson the same day.” Levitt states that upon receipt of the letter, Jackson called him and requested a “professional discount,” as an attorney; Levitt agreed to a 15% discount, so “each bill sent during the period of representation therefore includes the statement, ‘Less 15% discount.’” Levitt states he thereafter represented Jackson “through pretrial and trial proceedings,” and Jackson was acquitted at trial in November 2010. Levitt asserts Jackson owes a balance of \$48,882, and that he has “demanded payment of this balance from Mr. Jackson on numerous occasions.” Levitt also asserts that on “several occasions, Mr. Jackson acknowledged the unconditional validity of this debt, most recently in an email dated August 17, 2012, in which Mr. Jackson wrote: ‘I have not forgotten and am still working on payment.’” Levitt states that on December 17, 2012, he sent Jackson an email “suggesting that, as an alternative to immediate full payment of the balance due and owing, Mr. Jackson could execute a confession of judgment or agree to payment plan,” but Jackson did not respond to the email. On December 24, 2012, Levitt sent Jackson another email stating, “Are you available to talk about this? My strong preference is to avoid litigation and resolve this quickly in a friendly way,” but Jackson did not respond to that email either.

Susan McMahon, the law firm's office manager, submits an affidavit that Jackson made "payments to his client account at L &K [Levitt & Kaizer] from approximately December 2008 through March 2011," no additional payments have been received since March 15, 2011, and since that time Jackson has had a balance due and owing of \$48,882.54. McMahon states she mailed "Reminder Statement" to Jackson "reflecting this balance amount in March , April, May, June, July, August, September, October and December 2011, and also in January, February, April, June, August, September and October 2012." She states she also e-mailed Reminder Statements to Jackson in November 2011, and May, July, November and December 2012. Copies of the Reminder Statements are annexed to her affidavit. McMahon states that "[n]one of the Reminder Statements was ever returned to me or bounced back as undeliverable mail," and that Jackson "never objected to the \$48,882.54 balance due and owing in response to any of the Reminder Statements."

Based on the foregoing affidavits and documents, plaintiff has established prima facie entitlement to judgment as a matter of law on the unpleaded cause of action for account stated. Although, as a "general rule," a party may not obtain summary judgment on an unpleaded cause of action, the First Department holds that "it is also true that summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice." Weinstock v. Handler, 254 AD2d 165, 166 (1st Dept 1999). Here, while the complaint does not assert a cause of action for account stated, such omission is not a bar to summary judgment, since the evidence necessary to substantiate such claim is in the record, plaintiff's motion is explicitly based in part on an "Unpleaded Fourth Cause of Action for An Account Stated," and defendant Jackson has not been prejudiced. See Kramer Levin Natalia

& Frankel, LLP v. Canal Jean Co, Inc, 73 AD3d 604 (1st Dept 2010). The burden now shifts to defendant Jackson to raise an issue of material fact.

In opposition to the motion, defendant Jackson argues that plaintiff's August 28, 2008 letter does not qualify as an "agreement" since he never signed it. Jackson asserts that "at most, the letter was a representation by Mr. Levitt identifying the personnel from Levitt and Kaizer who would work on defendant's behalf and the maximum hourly rate for each of them." Jackson's argument is without merit. In addition to identifying the hourly rates for four specific attorneys, the letter details the terms of plaintiff's representation. The letter states in pertinent part as follows:

This letter memorializes our conversation regarding the terms of our engagement. As I explained, our firm, Levitt & Kaizer, will represent you in the pending matter we have discussed We will bill you each month and payment is to be made within two weeks of billing. We are always available to answer any questions you might have regarding billings or any other matters.

We have also agreed that the non-refundable retainer is \$10,000, half of which you have already paid to us, and half of which you have agreed to pay within one week. This retainer is non-refundable in consideration, among other things, of the need for us to turn our attention immediately to your case; quickly perform necessary research concerning relevant legal issues; engage in discussions with the New York District Attorney's Office and prepare you for possible grand jury testimony.

Plaintiff characterizes the letter as a "retainer letter," but it is actually an engagement letter, as indicated in the opening sentence quoted above: "This letter memorializes our conversation regarding the terms of our engagement." The letter satisfies 22 NYCRR § 1215.1, which requires an attorney either to provide a client with a written engagement letter, or to enter into a signed written retainer agreement, before or within a reasonable time after the representation commences. Contrary to defendant's assertion, the absence of his signature on

the engagement letter, does not render it ineffective, as Rule 1215.1 does not require the client's signature on the engagement letter. See Pechenik & Curro, P.C. v. Weaver, 24 Misc3d 1246(A) (Sup Ct, Rensselaer Co, 2009). As reasoned in Pechenik, the "plain wording of the regulation supports this conclusion and also the fact that the regulation provides in the alternative that an attorney may enter into a signed written retainer agreement with the client in order to comply with the regulations." Id.

Defendant Jackson also objects that plaintiff's invoices are "unreasonable" and the charges "excessive," as "they reflect time expended that exceeds what would be reasonable and necessary." Jackson asserts that plaintiff's total bill "approximated \$180,000, of which I paid \$130,000," and "even taking account of a successful outcome, the total charges exceeded any boundary of reasonableness." Jackson specifically challenges the fees for an associate, Dean Solomon, on the ground that Solomon is not mentioned in plaintiff's August 2008 engagement letter, and the fact that his time was initially billed at the hourly rate of \$400, and later at the hourly rates of \$200 and \$100. Jackson argues discovery is necessary to determine the reason for the different rates, and whether Solomon's rate should have been \$100 throughout, and if so, whether he is entitled to a credit for the time charged in excess of that amount. Jackson acknowledges that the "Levitt firm promised a 15% courtesy discount from all charges," and argues that the invoices do not show a courtesy discount "when Mr. Solomon is charged at \$100 per hour." Jackson also questions the accuracy of the hourly rates for attorneys Levitt and Kaizer, specifically whether the invoices reflect his 15% courtesy discount. Jackson further states that after receiving plaintiff's April 15, 2013 invoice, "I wrote a note to Levitt & Kaizer, a

copy of which I enclose as Exhibit B, that I unequivocally reject the bill and each and every part thereof.”

In reply, plaintiff Levitt submits affidavit explaining that attorney Solomon is not listed on the 2008 engagement letter, since he did not join the firm until July 2010. Levitt further explains that Solomon was initially billed at the same hourly rate of \$400 as the associates listed on the engagement letter, but “[a]s trial neared I believed that Mr. Jackson’s defense would be enhanced by Mr. Solomon’s continuing participation both during the final pretrial preparation stage as well as trial,” so “I proposed to Mr. Jackson that Mr. Solomon ‘second chair’ me at trial at a sharply discounted rate of \$200 per hour and Mr. Jackson readily agreed.” Levitt states that Solomon’s hours were thereafter billed at the reduced rate, but “amidst trial, in effort to help Mr. Jackson economize even further, I voluntarily . . . discounted Mr. Solomon’s hourly rate once again to \$100.” Levitt states that Jackson was “well aware” that the \$100 and \$200 rates were “final discounted rates,” without any further 15% discount, and that those final rates “are accurately reflected in each of the relevant invoices.” Levitt also states that Jackson “never suggested” the rates or invoices were “unfair or inaccurate in any way,” and that “on numerous occasions both during and after these proceedings, Mr. Jackson acknowledged his debt in full and repeatedly said he would pay the balance; he just never did.”

Based on the foregoing, the court concludes that defendant Jackson has failed to raise an issue of material fact as to any viable defense to the unpleaded cause of action for account stated, so as to defeat plaintiff’s motion. Rather, the undisputed record establishes that defendant Jackson retained plaintiff’s invoices without objection, so as to establish, as a matter of law, defendant Jackson’s liability on an the account stated cause of action. See Morrison Cohen

Singer & Weinstein, LLP v. Waters, 13 AD3d 51 (1st Dept 2004). In the absence of a reasonably timely objection, defendant Jackson has no viable defense to plaintiff's claim to recover on an account stated. See Epstein Becker & Green, PC v. Amersino Marketing Group, LLC, 111 AD3d 428 (1st Dept 2013); Geron v. Amritraj, 82 AD3d 404 (1st Dept 2011). Notably, the only evidence of any objection on defendant Jackson's part, is his April 13, 2013 letter, which was well after the commencement of this action in December 2012. See Lapidus & Associates, LLP v. Elizabeth Street, Inc, 92 AD3d 405 (1st Dept 2012). In addition, defendant Jackson's challenges to the reasonableness of plaintiffs's fees fail, as in the "context of an account stated pertaining to legal fees, a firm does 'not have to establish the reasonableness of its fee.'" Id at 406 (quoting Thelen LLP v. Omni Contr Co, Inc, 79 AD3d 605, 606 [1st Dept 2010], lv app den 17 NY3d 713 [2011]); accord Epstein Becker & Green, PC v. Amersino Marketing Group, LLC, supra. Rather, the "client's act of holding the statement without objection will be construed as acquiescence as to its correctness." Cohen Tauber Spievak & Wagner, LLP v. Alnwick, 33 AD3d 562 (2006), lv app dism 8 NY3d 840 (2007); accord Lapidus & Associates, LLP v. Elizabeth Street, Inc, supra.

Thus, in the absence of a material issue of fact, plaintiff's motion for summary judgment is granted, and plaintiff is entitled to judgment as a matter of law in the amount of \$48,882.00, on the unpleaded cause of action for account stated.

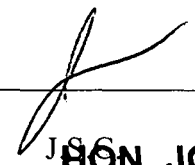
Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff Richard Ware Levitt, d/b/a Levitt & Kaizer, Attorneys at Law, A New York Partnership, and against defendant Stuart Jackson in the amount

of \$48,882.00, together with interest as computed by the Clerk at the statutory rate from December 20, 2012, and costs and disbursement as taxed by the Clerk upon submission of an appropriate bill of costs.

DATED: April 28, 2014

ENTER:



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