

<b>Davidoff Hutcher &amp; Citron LLP v Smirnov</b>
2014 NY Slip Op 31795(U)
July 7, 2014
Supreme Court, New York County
Docket Number: 156137/12
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

-----X  
DAVIDOFF HUTCHER & CITRON LLP f/k/a  
DAVIDOFF MALITO & HUTCHER LLP,

Index No. 156137/12

Plaintiff,

-against-

IOORI SMIRNOV and  
IRINA STAVROVSKAYA,

Defendants.

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

In this action to recover attorney’s fees, the plaintiff law firm, Davidoff Hutcher & Citron (“DH&C” or “plaintiff”) moves for summary judgment on its claims against defendants and to dismiss defendants’ counterclaims. Defendants oppose the motion.

Background

In this action, DH&C sues defendants, who are its former clients for \$91,847.48 in outstanding attorney’s fees for legal services performed by DH&C between December, 2009, and September, 2011. On December 2, 2009, defendant, Ioori Smirnov (“Smirnov”) entered into a retainer agreement with DH&C for representation of both him and his wife, Irina Stavrovskaya (“Stavrovskaya”), as defendants, in an action entitled Tabakman v. Schley Ave. Dev. LLC, Index No.: 33400/2008 (“the Tabakman action”). The retainer agreement stated that it “shall serve to confirm the retention of this firm,” that defendants would pay plaintiff for its legal services, and set forth the plaintiff attorneys’ hourly rates, as well as the possibility of the use of “an associate and/or paralegal” and their respective rates. Additionally, the retainer agreement stated that

plaintiff would provide the necessary information regarding New York's Fee Dispute Resolution program upon either defendants' request or in the event of a fee dispute. Plaintiff commenced its representation of the defendants in the Tabakman action on December 2, 2009.

Defendants paid DH&C approximately \$25,000 through March, 2010. However, by May, 2010, defendants had fallen behind on payments. On December 22, 2010, defendants owed an approximate outstanding balance of \$54,000. On January 19, 2011, Justice Sylvia Hinds-Radix signed an order to show cause presented by DH&C to withdraw as defendants' counsel in the Tabakman action on the grounds of "significant financial issues" and an "irreparable breakdown in the attorney-client relationship" making it effectively impossible and impracticable to represent defendants. Defendants opposed the motion to withdraw, and after a hearing on June 7, 2011, it was ordered that defendants pay \$15,000 to DH&C on or before June 21, 2011, and that defendants "promptly advise defendants of the balance of fees" and requiring defendants to pay that amount by September 15, 2011, if they wished to retain plaintiff's representation. By letter to Judge Hinds-Radix dated June 21, 2011, Gary Lerner, Esq. of DH&C confirmed that defendants paid his firm \$15,000, and that he and Smirnov had agreed to an unspecified "discounted amount" to be paid by September 1, 2011. By email to Smirnov dated September 8, 2011, Mr. Lerner wrote that he was "memorializing the offer I made to you in court today ... [that] [t]his firm would continue to represent you through trial...if (and only if)...you wire into our firm's account \$88,000... by no later than 5:00 pm on Thursday, September 15, 2011." Defendants paid \$5,000 of the \$88,000 sought by plaintiff.

After defendants failed to pay the \$88,000, plaintiff was permitted to withdraw as counsel for defendants. At that time, the total amount of defendants' bill was \$189,847.48, of which

defendants paid in total \$98,000. This action was commenced on September 6, 2012, and seeks to recover the remaining \$91,847.48 allegedly due and owing.

The complaint asserts causes of action for breach of contract, quantum meruit against both defendants, and account stated against both defendants. Defendants answered the complaint and asserted counterclaims against the plaintiff for breach of fiduciary duty and breach of contract.

At his deposition, while Smirnov testified that he received DH&C's invoices every month, he also stated that he had objected that the billing rates he was receiving were different from what was set forth in the retainer "verbally in 2010 and also it was discussed in front of judge in the courtroom." (Smirnov Dep. at 71, 74). The record shows that defendants' objection raised at the court hearing for DH&C's motion to withdraw, resulted in defendants' bills being amended on June 8, 2011, to represent the correct amount. At the same time, Smirnov testified that he never sat down with anyone in the firm to object to any specific invoice or charge (Id. at 79-80).

Smirnov further testified, when asked if DH&C owes Smirnov any money for causing him monetary loss, that "[n]o, you not owe me monetary loss." (Smirnov's Dep. at 147). Smirnov defines his relationship with DH&C into two parts: "I remember only it was very intensive, aggressive in the beginning of 2010, January, February, March . . . I was kind of impressed. Everything changed after[.]" (Id. at 53). During the first part of the representation, Smirnov was "happy with [DH&C]" (Id. at 67), however in the later period Smirnov was unsatisfied with the quality of his representation and felt like "we've been abandoned." (Id.).

At his deposition, Gary I. Lerner, of DH&C admitted that defendants were originally

incorrectly billed using the firms customary rates instead of the discussed rate provided in the retainer agreement. (Lerner Dep. at 32). He testified that when the error was discovered, defendants were emailed revised invoices. (Id. at 33).

Discovery is now complete and DH&C moves for summary judgment on its claims for an account stated and for quantum meruit<sup>1</sup> and to dismiss defendants' counterclaims. Plaintiff argues that it should be granted summary judgment on its account stated claim since defendants made partial payments on the account and points to Smirnov's testimony that he never specifically objected to any invoice or charge. Moreover, plaintiff argues that it should be granted summary judgment on its quantum meruit claim as it performed legal services for defendants in good faith. Plaintiff also seeks dismissal of defendants' counterclaims, asserting that it did not breach any fiduciary duty owed to defendants and that defendants suffered no monetary damages as a result of any alleged breach of fiduciary duty or breach of contract.

Defendants oppose the motion, arguing that as DH&C withdrew as counsel prior to completion of services, it cannot recover its fee and that, in any event, a hearing is needed to determine the reasonable value of plaintiff's services. Defendants also argue that issues of fact exist as to whether plaintiff had good cause to withdraw, and with respect to plaintiff's allegations that defendants failed to timely object to plaintiff's invoices so as to give rise to account stated. Defendants further argue that the record raises factual questions as to whether plaintiff breached their fiduciary duty and the retainer agreement by failing to provide defendants with necessary information regarding the New York Fee Dispute Resolution Program.

---

<sup>1</sup>DH&C originally moved for summary judgment on its breach of contract claim but conceded in reply it was not entitled to this relief.

In support of their opposition, defendants rely on Smirnov's deposition testimony and his affidavit in which he maintains, *inter alia*, that plaintiff's fees were excessive, and calls into question the quality of DH&C's work on their behalf. Specifically, Smirnov states that upon recognition of defendants' financial situation, that the quality of plaintiff's representation started to "drop significantly." (Smirnov Affidavit, ¶ 10). The record contains writings dated March 3, 2011 and September 6, 2011, setting forth complaints by defendants about plaintiff's representation including the firm's failure to serve certain subpoenas, and its putting its own financial interests over the quality of defendants' representation. In addition, Smirnov states that throughout DH&C's representation, he complained to members of the firm regarding "the way the case was being handled and the bills charged for services that I thought fell far below the expectations and goals we initially set up." (*Id.*, ¶ 20). Smirnov also states that, in or about August 2011, during the final stages of the case, DH&C had him work on his own case to lessen the charges and that he worked on the case at plaintiff's offices for 2-3 weeks. (*Id.*, ¶ 20). In addition, Smirnov questions the quality of DH&C's representation at a settlement conference held in August 2011. Specifically, according to Smirnov, on August 8, 2011, after being authorized to discuss settlements in the Tabakman action, plaintiff attended a settlement conference on behalf of defendants. In his affidavit Smirnov states that prior to the conference, he and his wife had agreed with DH&C to settle the case for approximately \$200,000. (Smirnov Affidavit, ¶ 31). However, Smirnov states that at the conference DH&C did not adhere to the previously discussed plan, resulting in defendants feeling "the entire process was a complete waste of time and an utter humiliation for us before the opposition." (Smirnov Affidavit, ¶ 16). Smirnov also avers that DH&C "put pressure on us to settle for a higher amount for what I

suspect was to attempt to avoid trying the case and end our relationship as soon as possible.” (Smirnov Affidavit ¶ 17). Smirnov further states that after plaintiff withdrew as his attorney, defendants’ new counsel was able to secure a favorable settlement amount of \$200,000. (Smirnov Affidavit ¶ 31).

Defendants maintain that plaintiff breached its fiduciary duty owed to them as it lacked good faith as they were motivated “by their own monetary interests” as opposed to zealously representing defendants. (Id. ¶’s 36, 37). Additionally, Smirnov states that plaintiff “cheated us out of money” for work that they did not put their best effort into. (Id. ¶ 34). Thus, defendants claim as damages the \$98,000 already paid, as well as \$12,000 it expended to acquire his new counsel.

Defendants also argue that they have a viable counterclaim for breach of contract based on plaintiff’s failure to inform defendants of the New York Fee Dispute Program, which provides a mechanism for resolving fee disputes over legal fees of \$50,000 or less via arbitration and that this failure “robbed [them] of a potentially quick and inexpensive way to resolve the underlying fee dispute[.]” (Id. ¶ 39).

In reply, plaintiff argues that defendants suffered no damages as a result of plaintiff’s alleged breach of fiduciary duty or breach of contract, noting that Smirnov testified at his deposition that he suffered no monetary loss as a result of DH&C’s allegedly wrongful conduct. (See Smirnov’s Dep., at 147). Plaintiff also argues that since it was judicially determined that plaintiff had the right to withdraw as counsel, DH&C cannot be found liable for the costs of acquiring new representation. As it pertains to the breach of contract counterclaim, plaintiff argues that it had no duty to inform defendants of the Fee Dispute program because as a result of

the agreement between the parties made at the motion to withdraw hearing, there was “no dispute.” (Plaintiff’s Reply Memorandum of Law at 7).

#### Discussion

On a motion for summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case . . .” Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

“An account stated has long been defined as an ‘account balanced and rendered with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note has been given for the balance.’” Morrison Cohen Singer & Weinstein, LLP v Ackerman, 280 A.D.2d 355, 355-356 (1st Dept. 2001) (quoting Interman Industrial Products, Inc. v. R.S.M. Electron Power, 37 N.Y.2d 151 (1975)). The receipt and retention of an account, without objection for a reasonable period of time, gives rise to an account stated. Shea & Gould v. Burr, 194 A.D.2d 369, 370 (1st Dept. 1993); Rosenman Coliin Freund Lewis & Cohen v. Edelman, 160 A.D.2d 626 (1st Dept. 1990), appeal denied 77 NY2d 802 (1991).

At the same time, however, an account stated does not exist where there is any dispute about the account within a reasonable time. Abbott, Duncan & Wiener v. Ragusa, 214 A.D.2d 412, 413 (1st Dept. 1995) (finding triable issues of fact as to claim for an account stated where defendants’ affidavits submitted in opposition to plaintiff’s motion for summary judgment indicated there

were disputes as to the amount due and the quality of work); M & A Constr. Corp. v. McTague, 21 AD3d 610, 611-612 (3d Dept. 2005).

Here, DH&C has made a prima facie showing entitling it to summary judgment on its account stated claim based on evidence that defendants received and retained plaintiff's monthly invoices, without objection, and made partial payments.

However, the defendants have controverted this showing by submitting evidence that they objected not only to the bills throughout the representation but also to the quality of the legal services provided. See Abbott, Duncan & Wiener v. Ragusa, 214 A.D.2d at 413 (denying summary judgment on account stated claim where defendant submitted evidence disputing, inter alia, the quality of work performed on their behalf); Charles J Hect, P.C. v. Kravetz, 160 A.D.2d 308, 309 (1st Dept. 1990) (holding summary judgment was precluded when dispute over the quality of attorney's representation existed). Furthermore, when as, here, an attorney withdraws as counsel over the objection of its client prior to the completion of its representation, the reasonableness of the fee must be shown. Collier, Cohen, Crystal & Bock v. MacNamara, 237 A.D.2d 152 (1st Dept. 1997)(holding that summary judgment on account stated claim was improper where plaintiff sought to withdraw as counsel based on client's refusal to pay invoice and the record raised factual questions as to reasonableness of plaintiff's fee); compare Tunick v. Shaw, 45 A.D.3d 145, 149 (1st Dept. 2007), lv dismissed, 10 N.Y3d 930 (2008).

Next, while DH&C's admitted over billing error was corrected after the initial hearing on its motion to withdraw as counsel, and therefore cannot be a basis for rebutting evidence of an account stated (See Shaw v. Silver, 95 A.D.3d 416, 416 [1<sup>st</sup> Dept. 2012]), defendants' objections were not limited to this billing error. Next, although evidence of partial payment may give rise to

an account stated, such payments are not dispositive “since the precise amount due is not therefore established.” Reid & Priest LLP v. Realty Asset Group, Ltd., 250 A.D.2d 380, 380 (1st Dept 1998). Accordingly, plaintiff is not entitled to summary judgment on its claim for an account stated.

As for the claim for quantum meruit when, as here, there is a retainer agreement for an attorney’s services, but the attorney withdraws as counsel prior to the completion of services, an attorney may recover in quantum meruit. In re Dunn, 205 N.Y. 398, 403 (1912); Ventola v. Ventola, 112 A.D.2d 291, 292 (2d Dept 1985). However, a hearing is required to determine the reasonable value of such legal services. DeGregorio v. Bender, 52 A.D.3d 645 (2d Dept 2008). Accordingly, DH& C’s motion for summary judgment on its claims is denied except insofar as granting summary judgment as to liability on its claim for quantum meruit.

On the other hand, plaintiff has established entitlement to judgment as a matter of law dismissing the defendants’ counterclaims for breach of fiduciary duty and for breach of contract. Defendants’ breach of fiduciary duty claim is predicated upon allegations that 1) defendants expended \$98,000 to DH&C in attorney’s fees without any concrete result or benefit, (2) defendants expended an additional \$12,000 in order to retain new counsel in the Tabakman action, and (3) the legal fees sought in the present action.

To recover on a breach of fiduciary duty claim, a plaintiff is required to “prove both the breach of a duty owed to it and damages sustained as a result.” Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 A.D.3d 1, 10 (1st Dept 2008 ). In other words, a client must establish “actual and ascertainable damages” Boone v. Bender, 74 A.D.3d 1111, 1112 (2d Dept 2010)(internal quotation marks and citations omitted), that would not have occurred “but for” the

attorney's conduct. Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 272 (1st Dept 2004)

Here, DH&C owed defendants, as its clients, “fiduciary duties of both confidentiality and loyalty.” However, DH&C has come forth with evidence that shows that plaintiff were not damaged as a result of any alleged breach of fiduciary duty and defendants have not controverted this showing. In fact, at his deposition, Smirnov admitted that defendants had not been damaged by any alleged misconduct by DH&C. As for the \$98,000 paid to DH&C for legal services which were rendered, it cannot be said that “but for” a breach of fiduciary duty this amount would not have been paid. With respect to the \$12,000 paid to defendants’ new attorney, as DH&C was given permission to withdraw as counsel, it cannot be said that withdrawing as counsel was a breach of plaintiff’s fiduciary duty or that the payment to the new attorney constituted damages arising from such breach. Furthermore, although there are issues of fact as to the reasonableness of the fee sought by plaintiff, it cannot be said that plaintiff’s attempt to collect the fee in this action constitutes a breach of plaintiff’s fiduciary duty.

The counterclaim for breach of contract is also without merit. “The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant’s failure to perform, and resulting damage.” Flomenbaum v. New York Univ., 71 A.D.3d 80, 91 (1st Dept. 2009). Here, it cannot be said that plaintiff breached the retainer agreement by failing to inform defendants of the New York Fee Dispute Program.

While, any dispute that falls below \$50,000 would require plaintiff to inform defendants’ of the New York Fee Dispute Program, the record indicates that any dispute over fees did not arise until the amounts were above that threshold. Accordingly, the counterclaim for breach of contract

must be dismissed.

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion for summary is granted to the extent of granting summary judgment as to liability on its quantum meruit claim and dismissing defendants' counterclaims for breach of fiduciary duty and breach of contract; and it is further

ORDERED that the parties shall proceed to mediation.

DATED: ~~July 7, 2014~~

*July 7, 2014*

  
\_\_\_\_\_  
**HON. JOAN A. MADDEN**  
**J.S.C.**