

Stim & Warmuth, P.C. v East End Cement & Stone, Inc.

2014 NY Slip Op 31826(U)

July 9, 2014

Supreme Court, Suffolk County

Docket Number: 18169/2012

Judge: Jr., Andrew G. Tarantino

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SUPREME COURT - PART 50
COUNTY OF SUFFOLK - STATE OF NEW YORK

PRESENT

HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

Index No. 18169/2012
Orig. Date: 3/25/2014
Adj. Date: 4/15/2014
Motion Dec. 002: MotD
003: XMotD

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STIM & WARMUTH, P.C.,

Plaintiff(s),

**ORDER GRANTING
PARTIAL SUMMARY
JUDGMENT IN FAVOR OF
THE PLAINTIFF,
STRIKING EAST END'S
AFFIRMATIVE DEFENSE,
DENYING DEFAULT
JUDGMENT AND OTHER
RELIEF**

-against-

**EAST END CEMENT AND STONE, INC. and
DAVID SCHIAVONI,**

Defendant(s).

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Upon consideration of the Notice of Motion of the plaintiff Stim & Warmuth PC [“the plaintiff”], for an order 1) granting a default judgment against defendant David Schiavoni [“Schiavoni”], on the third cause of action, 2) dismissing the affirmative defense of the defendant East End Cement and Stone, Inc. [“East End”], and 3) granting summary judgment in favor of the plaintiff against East End on the first and second causes of action of the complaint, dated February 27, 2014, (motion sequence 002), the affirmation and affidavit in support, and exhibits A through M, the affirmation and affidavit in opposition interposed solely on behalf of the defendant East End, and exhibit A, and the plaintiff’s affirmation in reply and in opposition to the cross motion dated April 8, 2014, and exhibits J and K, and further

Upon consideration of the Notice of Cross Motion by Schiavoni for an order 1) granting an extension of time to answer the complaint, 2) compelling the plaintiff to accept service of an undated answer with one affirmative defense originally filed solely on behalf of East End on August 23, 2013, or in the alternative, an Answer filed on behalf of Schiavoni dated March 11, 2014, containing nineteen affirmative defenses, and 3) denying the plaintiff’s motion for a default judgment against Schiavoni dated March 31, 2014, (motion sequence 003), the supporting

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affidavit, the supporting affirmation, and exhibits A and B, the plaintiff's affirmation in reply and in opposition to the cross motion dated April 8, 2014 and exhibits J and K, and Schiavoni's affirmation in reply, it is now

ORDERED that so much of the plaintiff's motion seeking an order granting a default judgment against defendant David Schiavoni ["Schiavoni"], on the third cause of action for unpaid legal fees is denied, and it is further

ORDERED that so much of the plaintiff's motion seeking an order dismissing the affirmative defense of the defendant East End is granted; and it is further

ORDERED that so much of the plaintiff's motion seeking an order granting summary judgment in favor of the plaintiff and against East End on the first cause of action of the complaint for the reasonable value of attorneys' fees is granted as to liability only and referred back to the IAS Judge for an assessment of the reasonableness of the fees sought; and it is further

ORDERED that so much of the plaintiff's motion seeking an order granting summary judgment in favor of the plaintiff against East End on the second cause of action of the complaint for an account stated is denied; and it is further

ORDERED that so much of Schiavoni's cross motion for an order compelling the plaintiff to accept service of the answer originally filed solely on behalf of East End on August 23, 2013, as Schiavoni's answer is granted, the Answer is deemed served, and the cross motion is otherwise denied; and it is further

ORDERED that the attorneys for the parties are directed to appear for a conference on August 19, 2014 at 9:30 AM at the courthouse located at One Court Street Annex, Riverhead.

This action for unpaid legal fees was commenced by the filing of the summons and complaint on June 14, 2012. Defendant Schiavoni is the President of defendant East End. There is no dispute that Schiavoni signed various letters of engagement on East End's behalf as its President to retain the plaintiff law firm on some eight different matters. As to the services to be provided in one of the eight matters entitled, "*J.R.C. Land Company and Josephine Carnevale v East End Cement and Stone Inc. and David Schiavoni*" described in a letter of engagement dated January 14, 2011, Schiavoni personally signed the engagement letter twice, once as East End's President, and again on his own behalf individually.

The same day the complaint for unpaid legal fees was filed, East End filed for bankruptcy and the instant action was stayed. The bankruptcy was dismissed on June 6, 2013 and the automatic stay in bankruptcy was lifted. The instant complaint was served on both defendants on June 19, 2013.

The complaint contains four causes of action. The first cause of action against East End alleges that the plaintiff rendered legal services and advanced disbursements in a variety of matters on East End's behalf in a total amount of \$47,961.64 between May 1, 2011, and April 1, 2012, no

part of which has been paid with the exception of \$483.80, leaving an unpaid balance of \$47,477.84.

The second cause of action is for an account stated in the amount of \$47,477.84 which the plaintiff's moving papers clarify is alleged solely against East End. The third cause of action alleges that between July 1, 2011, and February 1, 2012, the plaintiff rendered legal services and advanced disbursements on behalf of both East End and Schiavoni individually in the total amount of \$4,427.50 which remains unpaid. The third cause of action alleges that Schiavoni is personally liable since, as to those services, Schiavoni personally signed the letter of engagement on behalf of himself individually. The fourth cause of action alleges an account stated against both East End and Schiavoni in the amount of \$4,427.84.

On August 22, 2013, East End served an answer containing one affirmative defense that the complaint failed to state a cause of action. On August 23, 2013, Schiavoni, as distinguished from East End, moved to dismiss the complaint which motion was denied by order dated December 5, 2013. On January 24, 2014, defense counsel was served with the order with notice of entry. On February 17, 2014, plaintiff's counsel wrote to defense counsel and advised that Schiavoni was in default in answering the complaint and offered to accept Schiavoni's answer up until February 25, 2014. On February 19, 2014, an attorney from defense counsel's office wrote back to plaintiff's counsel advising (incorrectly) that Schiavoni had indeed served an Answer back on August 22, 2013, mistakenly referring to the answer filed solely on behalf of East End.

On February 27, 2014, the plaintiff moved, inter alia, for a default against Schiavoni individually. Apparently in response to the default motion Schiavoni then attempted to serve plaintiff's counsel with a new Answer dated March 11, 2014. Unlike the original Answer filed on East End's behalf, the March, 2014 Answer which is verified by defense counsel, contains nineteen affirmative defenses, many of which are clearly inapplicable to the alleged claims against Schiavoni for unpaid legal fees.

It is undisputed that Schiavoni signed eight letters of engagement, that the plaintiff completed all the work it represented that it performed, that the plaintiff sent Schiavoni the bills for the completed work, that the plaintiff sent Schiavoni monthly statements for the work performed, that Schiavoni did not, either on his own behalf or on behalf of East End, dispute the amount of the bills when they were presented for payment. The bills remain unpaid. These undisputed facts established the plaintiff's entitlement to the payment of the reasonable value of its services to East End and/or Schiavoni in accordance with the terms of the letters of engagement (*cf. Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363, 689 N.Y.S.2d 189 [2d Dept. 1999]; *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986, 825 N.Y.S.2d 80 [2d Dept. 2006]).

Nevertheless, it is also undisputed that the bills for legal time spent are not itemized. The plaintiff's motion, insofar as it seeks summary judgment on the first cause of action in a specific amount, is denied. None of the invoices presented for payment in eight different matters gave a description of the particular legal services rendered and the time spent on each task. Rather, the invoices stated the name of the matter, the period of time the professional services were rendered, the amount of hours expended, and a statement that an itemization would be provided upon

request. All of the invoices were for services rendered in 2011 and early 2012. The monthly invoices and all but two of the letters of engagement contain the caveat that an itemized statement would be provided upon request. There is no evidence that East End/Schiavoni made a request for an itemization of services.

On the record here, the Court is unable to determine what would constitute a reasonable fee in the eight matters where the plaintiff represented East End and/or Schiavoni. Thus, so much of the plaintiff's motion that seeks summary judgment on the first cause of action in an amount certain is denied as there must be a hearing for assessment of expenses and reasonable attorneys' fees (see, *Fleet Credit Corp. v. Harvey Hutter & Cox*, 207 A.D.2d 380, 615 N.Y.S.2d 702; *Tuttle v. Juanis*, 54 A.D.2d 589, 387 N.Y.S.2d 167; cf., *Jordan v. Freeman*, 40 A.D.2d 656, 336 N.Y.S.2d 671). The copies of handwritten notes and phone messages, etc. furnished with the plaintiff's moving papers don't establish the reasonableness of the services provided. Thus, as to the first cause of action against East End, partial summary judgment as to the plaintiff's entitlement to its attorneys fees is granted, the amount to be determined after a hearing on the issue (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]; *Livigne v. D'Agostino Supermarkets, Inc.*, 207 A.D.2d 776, 616 N.Y.S.2d 515 [2d Dept. 1994]).

As to the second cause of action, "[a]n account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*Jim-Mar Corp. v. Aquatic Constr.*, 195 A.D.2d 868, 869, 600 N.Y.S.2d 790, lv. denied 82 N.Y.2d 660, 605 N.Y.S.2d 6, 625 N.E.2d 591; see *Sisters of Charity Hosp. of Buffalo v. Riley*, 231 A.D.2d 272, 282, 661 N.Y.S.2d 352; *Chisholm-Ryder Co. v. Sommer & Sommer*, 70 A.D.2d 429, 431, 421 N.Y.S.2d 455). An essential element of an account stated is an agreement with respect to the amount of the balance due (see *Interman Indus. Prods. v. R.S.M. Electron Power*, 37 N.Y.2d 151, 153-154, 371 N.Y.S.2d 675, 332 N.E.2d 859; *Sisters of Charity Hosp. of Buffalo*, 231 A.D.2d at 282, 661 N.Y.S.2d 352). "An account stated assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists" (*Paladino, Inc. v. Lucchese & Son Contr. Corp.*, 247 A.D.2d 515, 516, 669 N.Y.S.2d 318; see *Gurney, Becker & Bourne v. Benderson Dev. Co.*, 47 N.Y.2d 995, 996, 420 N.Y.S.2d 212, 394 N.E.2d 282; *Bauman Assoc. v. H & M Intl. Transp.*, 171 A.D.2d 479, 485, 567 N.Y.S.2d 404).

In a claim for account stated, by retaining the plaintiff's billing statements and failing to object to the account within a reasonable time, the recipient of the bill implies that he or she agrees with the sender regarding the amount owed" (*Stephan B. Gleich & Assoc. v. Gritsipis*, 87 A.D.3d 216, 223, 927 N.Y.S.2d 349 [citations omitted]; see *Rodkinson v. Haecker*, 248 N.Y. 480, 485, 162 N.E. 493; see also *Law Offs. of Clifford G. Kleinbaum v. Shurkin*, 88 A.D.3d 659, 931 N.Y.S.2d 879; *Pryor & Mandelup, LLP v. Sabbeth*, 82 A.D.3d 731, 732, 918 N.Y.S.2d 165; *Thaler & Gertler v. Weitzman*, 282 A.D.2d 522, 722 N.Y.S.2d 891). "Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible" (*Legum v. Ruthen*, 211 A.D.2d 701, 703, 621 N.Y.S.2d 649, citing *Bowne of City of N.Y. v. International 800 Telecom Corp.*, 178 A.D.2d 138, 576 N.Y.S.2d 573; see *Camp, Dresser & McKee v. City of Niagara Falls*, 142 A.D.2d

973, 530 N.Y.S.2d 391).

In opposition to the plaintiff's summary judgment motion, East End submitted a transcript from a status conference in the bankruptcy proceeding entitled *In Re East End Cement & Stone*, Docket #12-73759, that occurred on February 26, 2014. The transcript indicates that in early 2013 East End moved to object/reclassify/reduce/expunge the plaintiff's claim there for unpaid legal fees. Although East End's motion papers are not annexed to the cross moving papers, it appears from the transcript of the conference that the objection to the fees in the bankruptcy was that the plaintiff firm did not adequately identify the services it rendered in 2011 and early 2012 in its un-itemized invoices and that significant portions of the time expended could have been performed by a paralegal or clerical person.

In 2011 and 2012 East End continued to accept the plaintiff's services and retained the plaintiff on a number of matters on essentially the same terms. The monthly invoices and all but two of the letters of engagement state that an itemized statement would be provided upon request. There is no evidence before the Court that East End/Schiavoni ever made a request for an itemization of services notwithstanding that during the year 2011, the plaintiff was invariably submitting monthly invoices to East End without itemization. However, the fact that East End disputed the plaintiff's claim for unpaid legal fees in the 2013 bankruptcy proceeding raises an issue of fact as to whether East End disputed the amount of the invoices or the nature or necessity of the legal services provided within a reasonable time of their being rendered precluding summary judgment based on the theory of account stated (*Legum v. Ruthen*, 211 A.D.2d 701, 621 N.Y.S.2d 649 [2d Dept. 1995] [citations omitted]).

Regarding Schiavoni's cross motion, as Schiavoni maintains that through law office failure the Answer filed in August of 2013 should have been on Schiavoni's behalf as well as on behalf of East End, but wasn't, and that courts favor a disposition on the merits, the plaintiff's motion for a default judgment against Schiavoni is denied, and Schiavoni's cross motion to compel the plaintiff to accept service of the answer originally filed solely on behalf of East End on August 23, 2013, as Schiavoni's answer, is granted, and the cross motion is otherwise denied (*see generally Moore v. Day*, 55 A.D.3d 803, 866 N.Y.S.2d 303 [2d Dept. 2008]). The Court emphasizes that so much of the plaintiff's motion insofar as it seeks to strike the single affirmative defense of failure to state a cause of action in the August 2013 Answer is granted. Thus, as East End may not avail itself of that affirmative defense, neither may Schiavoni.

To summarize, summary judgment in favor of the plaintiff against East End on the first cause of action for the reasonable value of legal services rendered is granted, the amount of which must be determined at a hearing. Summary judgment in favor of the plaintiff against East End on the second cause of action for an account stated in the amount of \$47,477.84 is denied. So much of the plaintiff's motion seeking dismissal of the first and only affirmative defense of failure to state a cause of action in the August 2013 Answer is granted. So much of the plaintiff's motion for a default judgment against Schiavoni in the amount of \$4,427.84 is denied. So much of Schiavoni's cross motion for an order compelling the plaintiff to accept service of the answer that was originally filed solely on behalf of East End on August 23, 2013, as Schiavoni's answer is granted except as to the first affirmative defense which has been struck. The Answer, *sans* the first

affirmative defense, is deemed served, and the cross motion is otherwise denied. The attorneys for the parties are directed to appear for a conference on August 19, 2014 at 9:30 AM at the courthouse located at One Court Street Annex, Riverhead.

Plaintiff shall submit judgment.

Dated: July 9 2014



ANDREW G. TARANTINO, JR., A.J.S.C.

 FINAL DISPOSITION

 XX NON-FINAL DISPOSITION