Sieratzki v Ying Shih Chow
2014 NY Slip Op 32738(U)
October 20, 2014
Supreme Court, New York County
Docket Number: 653065/12
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

STEVEN S. SIERATZKI, ESQ.,

Plaintiff,

-against-

INDEX NO. 653065/12

MOTION SEQ. NO. 002

JAMES YING SHIH CHOW, M.D., a/k/a JAMES CHOW, M.D. and JAMES HIDEYO CHOW, M.D., CMG MANAGEMENT, INC., INTERNATIONAL HEALTHCARE ALLIANCE, L.L.C., NIPPON CLINIC AND NOGUCHI NINGEN DOCK, L.L.C. a/k/a NIPPON CLINIC, IN NOGUCHI NINGEDOCK, L.L.C., NIM MANAGEMENT CORPORATION, NIHON CLINIC, CORNERSTONE MEDICAL GROUP INC., and MANHATTAN WELLNESS MEDICAL CARE PLLC,

Defendants.

The following papers were read on this motion by plaintiff to dismiss affirmative defenses and counterclaims and for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

Steven S. Sieratzki, Esq., pro se (plaintiff), moves, pursuant to CPLR 3211 and 3212, for an order dismissing the counterclaims and affirmative defenses, and granting summary judgment on plaintiff's account stated, breach of contract, and unjust enrichment claims.

BACKGROUND

This is action by a lawyer to recover legal fees against the individual defendant James Ying Chow, M.D., a/k/a James Chow, M.D. and James Hideyo Chow M.D. (Chow), and various corporate entities owned by Chow, the defendants CMG Management, Inc., International Healthcare Alliance, L.L.C., Nippon Clinic and Noguchi Ningen Dock, L.L.C. a/k/a Nippon Clinic,

In Noguchi Ningedock, L.L.C., Nim Manangement Corporation, Nihon Clinic, Cornerstone Medical Group Inc., and Manhattan Wellness Medical Care PLLC. The complaint also seeks to pierce the corporate veil.

The 35-page complaint sets forth causes of action for: breach of contract (first), account stated (second), quantum meruit (third), breach of the duty of good faith and fair dealing (fourth), unjust enrichment (fifth), piercing claim (sixth) and for the legal fees associated with this action (seventh). The answer sets forth 11 affirmative defenses: failure to state a cause of action (first), unclean hands (second), breach of contract by failing to provide accurate monthly statements (third), statute of frauds (fourth), corporate shield (fifth), failure to comply with 22 NYCRR part 1215.11 (sixth), failure to comply with 22 NYCRR part 137 (seventh), failure to supply satisfactory legal services (eighth), the payments made were accepted as full payment (ninth), accord and satisfaction (tenth), and defendants protested the purported charges (eleventh). The answer pleads the following counterclaims: overbilling (first), breach of fiduciary duty (second), malpractice (third), and negligence (fourth).

Preliminarily, pursuant to this Court's rules, a memoranda of law submitted on a motion, may not exceed 30 pages in length (New York County Supreme Court Civil Branch, Rules of the Justices available at the Court's web site). In violation of this rule, plaintiff submits a memoranda 41 pages long, and a reply memoranda using a smaller font, 29 pages long . Chow submits a 35 page memoranda in opposition. The Court will read, but will not consider, any of either memorandum beyond page 30. Any matters raised for the first time in plaintiff's reply will also be disregarded.

In support of his motion, plaintiff makes the following arguments. Plaintiff is entitled to summary judgment on his account stated claim because defendants retained invoices without objection, made partial payments, and made repeated promises to pay. Plaintiff is entitled to summary judgment on his breach of contract and unjust enrichment claims because he fully performed the work. Defendants have failed to adequately plead the 11 affirmative defenses

and four counterclaims contained in the answer. Finally, plaintiff argues the corporate veil should be pierced because Chow exercised complete domination and control over the corporate defendants.

In opposition to the motion, Chow makes the following allegations. Plaintiff has represented defendants either individually or collectively since 2004. Defendants allegedly entered into at least 19 separate oral and written retainer agreements and yet plaintiff has submitted only one retainer dated December 2009 identifying only defendants Chow, Nihon Medical Group, P.C., and nonparty Kwan Park, P.T., as clients. Prior to February 2012, plaintiff never communicated to defendants that a large balance for unpaid legal fees remained outstanding since 2007. It was only when Chow told plaintiff that the medical clinics were having financial trouble, and plaintiff withdrew as counsel, that plaintiff first sent two invoices for amounts of money that far exceeded the total amount of money that had been billed in the previous five years. On several occasions Chow objected to the bills. On several occasions plaintiff sent invoices containing charges for services rendered for another client. Chow was providing medical services to plaintiff in exchange for the legal services he was receiving from plaintiff.

In opposition to the 3211 motion to dismiss, Chow argues that the affirmative defenses and counterclaims comply with CPLR 3013, 3014, 3016, 3018(a), 3211(a)(1),(5), and (7), and 3211(b).

In opposition to the 3212 motion for summary judgment, Chow argues that there is no evidence that Chow was the alter ego of the corporate defendants. The only retainer agreement submitted relates to legal services rendered in a Supreme Court action under index number 117892/09.

In reply, plaintiff makes no new arguments, but merely asserts that despite the fact that Chow's communications in response to the bills claimed payment and sought an opportunity to review the bills, the communications are not really objections.

STANDARDS

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). The pleading is to be liberally construed, accepting all the facts alleged therein to be true and according the allegations the benefit of every possible favorable inference (*Leon,* 84 NY2d at 87). The credibility of the parties is not under consideration (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank,* 300 AD2d 226 [1st Dept 2002]).

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of

material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]). If there is any doubt as to the existence of a triable fact, the motion for 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]; CPLR 3212[b]).

DISCUSSION

It is well established that "[a]n account stated is an account, balanced and rendered, with an assent to the balance either express or implied" (*Abbott, Duncan & Weiner v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995], citing *Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 153 [1975]). "[T]he very meaning of an account stated is that the parties have come together and agreed upon the balance of the indebtedness. . .so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained" (*Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st Dept 2002]; *see James Talcott, Inc. v United States Tel. Co.*, 52 AD2d 197, 200 [1st Dept 1976]). An account stated may arise when a party retains invoices without rejecting them or objecting to them within a reasonable time, evincing an acquiesce to the amount due (*see Shaw v Silver*, 95 AD3d 416, 416 [1st Dept 2012]; *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51 [1st Dept 2004]). In this case, Chow objected to the invoices when he received them, or within a reasonable time thereafter. Therefore, plaintiff fails to establish an account stated (*Jaffe v Brown-Jaffe*, 98 AD3d 898, 899

[1st Dept 2012]).

The very retainer both relied upon, and drafted by the plaintiff, recites that it is limited to the action "under Index No. 117892/2009 entitled Muneo Hattori, M.D. v James H. Chow, Kwan Park, P.T. and Nihon Medical Group, P.C." Inasmuch as 22 NYCRR 1215.1 mandates that a retainer agreement contain an "explanation of the scope of the legal services to be provided" (22 NYCRR 1215.1 [b] [1]) the retainer, by its terms, may not be relied upon by the plaintiff to recover fees earned in any other matter. Moreover, if plaintiff desired to bind Chow personally for the fees earned by plaintiff in rendering legal services to the Chow's corporations, plaintiff could have, and should have done so in writing.

Furthermore, the very timing of the bills relied upon by the plaintiff raise an issue of fact. The bills, for relatively large amounts of money, only make their first appearance in 2012, after plaintiff was informed that his client was experiencing financial difficulty, and long after the services were allegedly rendered. Plaintiff showed a remarkable concern with billing only upon learning that his client was becoming insolvent.

Additionally, the Court finds that Chow's four counterclaims for overbilling, breach of fiduciary duty, malpractice, and negligence, all assert prime facie claims (*Cherry Hill Mkt. Corp. v Cozen O'Connor P.C.*, 118 AD3d 514 [1st Dept 2014]).

Finally upon a motion to dismiss an affirmative defense, "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]). The movants bear "the burden of demonstrating that those defenses [a]re without merit as a matter of law" (*Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]). An affirmative defense is any matter "which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading" (CPLR 3018[b]). CPLR 3018(b) lists the traditional affirmative defenses, but concludes that "[t]he application of this subdivision shall not

be confined to the instances enumerated." Affirmative defenses, such as those set forth in CPLR 3018(b), may be asserted regardless of consistency and may be pleaded in the alternative or hypothetically (*Sinacore v State of New York*, 176 Misc 2d 1, 4 [Ct of Claims 1998]). Unprejudicial oversights will be simply ignored (CPLR 3026). Therefore, when in doubt as to whether or not a matter is an affirmative defense, it is best to treat it as a defense and plead it (Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3018:16).

In view of the foregoing liberal rules, enough is stated in defendant's affirmative defenses to sustain them. For example, pleading the defense of failure to state a cause of action is unnecessary, constitutes harmless surplusage, and a motion by the plaintiff to strike the same should be denied (*Riland v Todman & Co.*, 56 AD2d 350 [1st Dept 1977]).

CONCLUSION

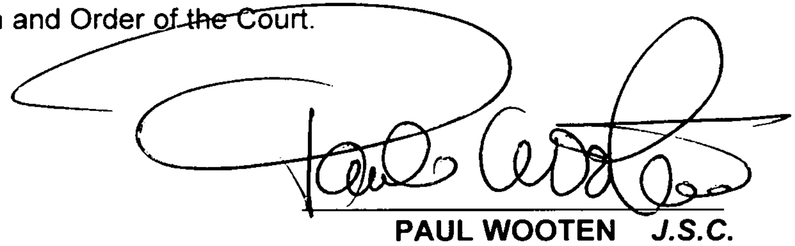
Accordingly, it is

ORDERED that the plaintiff's motion to dismiss the counterclaims and affirmative defenses, and to grant summary judgment on plaintiff's account stated, breach of contract, and unjust enrichment claims is denied; and it is further,

ORDERED that the parties are directed to appear for a status conference in Part 7, 60 Centre Street, Room 341 on November 19, 2014 at 11:00 a.m.; and it is further,

ORDERED that counsel for defendants is directed to serve a copy of this order with notice of entry upon the plaintiff.

This constitutes the Decision and Order of the Court.



Dated: 10/20/14

PAUL WOOTEN ***J.S.C.***

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**