

<b>Rose &amp; Rose v Croman</b>
2015 NY Slip Op 32209(U)
November 17, 2015
Supreme Court, New York County
Docket Number: 159165/2014
Judge: Cynthia S. Kern
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: Part 55

-----x  
ROSE AND ROSE,

Plaintiff,

Index No. 159165/2014

-against-

**DECISION/ORDER**

STEVEN CROMAN, et al.,

Defendants.

-----x  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

This is an action to recover for allegedly unpaid legal fees. Plaintiff has brought the present motion for summary judgment on its claim for an account stated.

The relevant facts are as follows. Plaintiff Rose and Rose alleges that it was retained by defendants Steven Croman and Croman Real Estate, Inc. ("Croman") approximately 17 years ago to perform legal services for these defendants and for other entities allegedly controlled by these defendants pursuant to an agreed upon fee schedule. The remaining defendants named herein are business entities that plaintiff alleges were owned by Steven Croman and Croman at one point or another. Plaintiff alleges that each and every month for approximately 17 years, plaintiff rendered invoices to the defendants. All of the invoices were addressed to defendants

Steven Croman and Croman at the business address which these defendants used as a place of business and principal office.

For the first 15 years of the relationship, the defendants paid the invoices within a reasonable time thereafter. Plaintiff alleges that approximately 2 ½ years prior to the end of the relationship between the parties, defendants stopped making regular payments on plaintiff's invoices. According to plaintiff, for the past 2 ½ years prior to February 2014, defendants started to pay for certain invoices but not others on a random basis. However, plaintiff alleges that defendants during this period did not articulate any objection to any of these invoices until an email from defendants newly hired in-house counsel was sent on December 20, 2013. Plaintiff alleges that until the December 20, 2013 email, defendant Steven Croman and his chief operating officer made repeated promises to pay the invoices and never objected to a single invoice issued during the entire 17 year relationship. To the extent that there are any writings from defendants during this period prior to December 20, 2013, none of these writings articulate any objection by defendants to the invoices. To the contrary, all of the written communications from defendants during this period indicate that defendants were intending to pay the invoices. For example, there is an email from the chief operating officer on July 23, 2013 wherein he states "you should have been paid all current bills, the only outstanding should be the things from 2012 and earlier. I'm terribly sorry." Despite the foregoing, defendants allege that they made repeated oral objections to plaintiff's invoices before December 2013. They allege that Steven Croman and the chief operating officer for Croman told plaintiff that the invoices were inaccurate and excessive and that defendants would not pay them unless the amounts charged were reduced.

In the December 20 email from defendants' general counsel, defendants challenge certain fees and charges billed by plaintiffs for invoices which were rendered five months earlier. Many

of the objections by defendants' counsel center on procedures and billing practices that had been in place for 17 years, including that plaintiff was billing for court appearances by the hour rather than a flat fee and that plaintiff billed in increments of quarter hours rather than tenth hours.

In January 2014, plaintiff advised Steven Croman that it could no longer work on defendants' pending cases due to the amount of unpaid bills and that it would be making motions to withdraw as counsel. After further discussion and negotiation between the parties and threats by plaintiff to stop performing work on defendants' matters, defendants' counsel sent plaintiff a notice of discharge on February 5, 2014 discharging plaintiff as attorneys effective immediately. Defendants allege that this discharge by defendants was for cause based on overbilling and that plaintiff admitted that it padded its bills, which plaintiff denies ever stating. Plaintiff alleges that by the time the parties ended their relationship in February 2014, there were unpaid invoices in the amount of \$724,197.38.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

"The receipt and retention of an account, without objection, within a reasonable period of time, coupled with an agreement to make partial payment, gives rise to an account stated entitling the moving party to summary judgment in its favor." *Morrison Cohen Singer &*

*Weinstein v. Ackerman*, 280 A.D.2d 355 (1<sup>st</sup> Dept 2001). A plaintiff will establish “a prima facie entitlement to summary judgment on its claim of account stated by showing that it generated detailed monthly invoices and mailed them to defendant on a regular basis in the course of its business.” *Stephanie R. Cooper, P.C. v. Robert*, 78 A.D.3d 572, 573 (1<sup>st</sup> Dept 2010).

In the present case, the court finds that plaintiff has established its prima facie entitlement to summary judgment on its account stated claim as against Croman and Steven Croman for the invoices rendered through December 20, 2013 by establishing that it generated detailed monthly invoices and mailed them to these specific defendants on a regular basis and that these defendants received and retained these invoices without a reasonably timely objection and in fact made partial payments on these invoices. However, plaintiff has failed to establish that the invoices were retained by defendants without objection after December 20, 2013 as that is the date that defendants’ general counsel sent plaintiff a detailed letter explaining his objections to plaintiff’s invoices. Although this letter was not a timely objection as to previous invoices rendered by plaintiff five months earlier, plaintiff was on notice as of the date of this letter that defendants were objecting to any of plaintiff’s bills rendered as of the date of the letter. The court also finds that plaintiff is not entitled to summary judgment as to any defendants other than Steven Croman and Croman as the invoices were specifically addressed to Steven Croman and Croman and not to any of the other parties and plaintiff has failed to make a prima facie showing that it sent invoices to these other defendants and that the other defendants retained the invoices without objection.

In response to plaintiff’s prima facie showing that it is entitled to summary judgment on its account stated claim against Croman and Steven Croman for the invoices rendered through

December 20, 2013, defendants have failed to raise an issue of fact sufficient to defeat plaintiff's summary judgment motion. Defendants' argument that plaintiff's motion for summary judgment on its account stated cause of action should be denied because it allegedly discharged plaintiff for cause is without basis. It is well established that notwithstanding the terms of the agreement between them, a client has an absolute right, at any time, with or without cause, to terminate the attorney-client relationship by discharging the attorney. *Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38, 44(1990). If the discharge is without cause, the attorney is then limited to recovering in quantum meruit the reasonable value of the services rendered. *Id.* However, the First Department has specifically held that an attorney can recover on an account stated cause of action for services that were rendered before the termination even where the attorney has allegedly been discharged for cause. *Salans Hertzfeld Heilbronn Christy & Viener v. Between the Bread, Inc.*, 290 A.D. 2d 381 (1<sup>st</sup> Dept 2002). The court there stated:

The motion court, in denying defendants' motion to dismiss, properly rejected their contention that the termination of plaintiff law firm's services relegated plaintiff to recovering in quantum meruit for services rendered to defendants! Termination does not necessarily result in such remedial limitation and, indeed, we have specifically approved recovery by attorneys on an account stated theory for pretermination services billed on an hourly basis at a contractually agreed rate... We do so again here, in affirming the motion court's grant of partial summary judgment to plaintiff upon its account stated claim, in view of the uncontradicted showing that plaintiff issued invoices for pretermination legal services billed to defendant at the agreed upon hourly rate, which defendant retained without objection.

In the present case, as in *Salans*, the court finds that plaintiff is entitled to summary judgment on its account stated claim for pretermination legal services billed to defendant despite that defendants attempted to discharge plaintiff for cause after plaintiff threatened to move to withdraw from defendants' cases.

Defendants' argument that plaintiff's motion for summary judgment should be denied on the ground that plaintiff has failed to sufficiently establish a written retainer between plaintiff

and defendants is without basis. The law is well established that a law firm's failure to provide a written retainer agreement does not bar its claim for an account stated. *Thelen LLP v. Omni Contracting Co, Inc.* 79 A.D. 3d 605, 606 (1<sup>st</sup> Dept 2010). See also *Kramer Levin Naftalis & Frankel LLP v. Canal Jean Co, Inc.*, 73 A.D.3d 604, 604-605 (1<sup>st</sup> Dept 2010).

The argument by defendants that they made oral objections to the invoices rendered by plaintiff prior to December 2013 is rejected by this court. Statements made by defendants that "they made oral protests about the invoices in question ... are facially insufficient to establish that they protested the invoices" particularly where the statements are contradicted by the fact that defendants made partial payments on the invoices. *Kramer Levin Naftalis & Frankel LLP v. Canal Jean Co, Inc.*, 73 A.D.3d 604, 604-605 (1<sup>st</sup> Dept 2010). See also *Thelen LLP*, 79 A.D.3d at 606 ("even if defendant's president orally complained that plaintiff's bills were excessive, that is insufficient to avoid summary judgment") (*Stephanie R. Cooper*, 78 A.D.3d at 573 (defendant's "allegations of oral objections, with no specificity as to the time of those objections or the content of the conversations in which they were made, [are not sufficient] to raise issues of fact as to an account stated.") The Court of Appeals, in affirming the lower court's granting of summary judgment to a law firm for account stated, specifically held that defendant's "self-serving, bald allegations of oral protests were insufficient to raise a triable issue of fact as to the existence of an account stated." *Darby & Darby v. VSI Intl.*, 95 N.Y.2d 308, 315 (2000).

In the present case, any alleged oral objections by defendants that the bills were excessive and that they would not pay them until they were reduced is insufficient to create a factual dispute sufficient to defeat plaintiff's motion for summary judgment on its account stated claim. It is undisputed that defendants made partial payments on these invoices and all of the extensive writings by defendants prior to December 20, 2013 fail to reflect that defendants were making

any objections to these invoices and in fact indicate that defendants did intend to eventually make payments on these invoices. Under the circumstances, the conclusory self-serving statements by Steven Croman and his chief operating officer that they made oral objections to the bills as being excessive is insufficient to defeat plaintiff's motion.

To the extent that defendants argue that summary judgment should be denied on the ground that plaintiff has failed to produce any evidence that the claimed amounts are reasonable, such argument is without basis. A law firm seeking to recover on an account stated cause of action is not required to establish the reasonableness of its fee. *Thelen LLP v. Omni Contracting Co, Inc.* 79 A.D. 3d 605, 606 (1<sup>st</sup> Dept 2010).

To the extent defendants contend that summary judgment should be denied pursuant to CPLR 3212(f) because discovery remains outstanding, such argument is unavailing. It is well settled that "a claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment." *Hariri v. Amper*, 51 A.D.3d 146, 152 (1<sup>st</sup> Dept 2008). Moreover, the First Department has specifically held that although no discovery had been conducted on an account stated cause of action, this did not require the denial of the motion as premature. *See Thelen, LLP*, 79 A.D. 3d at 606; *Duane Morris LLP v. Astor Holdings, Inc.*, 61 A.D.3d 418 (1<sup>st</sup> Dept 2009) (lack of discovery does not require denying plaintiff's motion as premature where defendants have failed to establish "that facts essential to justify opposition to the motion were within plaintiff's exclusive knowledge or that discovery might lead to facts relevant to the issues.")

In the instant case, defendants have failed to establish either that facts essential to justify defendants' opposition are in plaintiff's exclusive knowledge or that discovery might lead to

facts relevant to the issues. Whether or not defendants objected to plaintiff's invoices within a reasonable time after they were sent is not a fact within the exclusive knowledge of plaintiff. Nor have defendants sufficiently established that any of the requested discovery is relevant to this motion for summary judgment based on account stated or would establish anything further with respect to defendants' claim that they objected to the invoices within a reasonable time.

Finally, defendants' request that the entry of summary judgment in favor of plaintiff be held in abeyance pursuant to CPLR 3212 [e] [2] pending the determination of defendants' counterclaims is denied. That section provides that the court may direct that the entry of summary judgment shall be held in abeyance pending the determination of any remaining cause of action. The Court of Appeals has held that the court's discretion to hold the judgment in abeyance is not unlimited and "is to be exercised only if there exists some articulable reason for concluding that the failure to impose conditions might result in some prejudice, financial or otherwise, to the party against whom the partial summary judgment is granted should that party subsequently prevail on the unsettled claims." *Robert Stigwood Org., Inc. v. Devon Co.*, 44 N.Y.2d 922 (1978). Thus, where the party who has obtained summary judgment is financially stable and able to satisfy any judgment that might be subsequently obtained against it, it is appropriate for the court to exercise its discretion not to hold the judgment in abeyance. *See Omega Equities Corporation v. Morris Levy*, 34 A.D.2d 938 (1<sup>st</sup> Dept 1970), *affd.*, 27 N.Y.2d 820 (1970).

In the present case, the court denies the request by defendants to hold the entry of summary judgment in favor of plaintiff in abeyance pending the determination of defendants' counterclaims. Defendant has failed to establish that it would suffer any prejudice by allowing judgment to be entered in favor of plaintiff at the present time as they have failed to present any

evidence that plaintiff is financially unstable or unable to satisfy any judgment that may subsequently be obtained against it. The court therefore exercises its discretion to deny defendants' request.

Based on the foregoing, plaintiff's motion for summary judgment on its account stated claim is granted to the extent stated herein. Settle order.

Dated: 11/17/15

Enter: CAK

J.S.C.  
**CYNTHIA S. KERN**  
J.S.C.