

Adam Leitman Bailey, P.C. v 436 W. 20th St. LLC
2016 NY Slip Op 30270(U)
February 16, 2016
Supreme Court, New York County
Docket Number: 160621/2014
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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ADAM LEITMAN BAILEY, P.C.,

Plaintiff,

Index No. 160621/2014

-against-

DECISION/ORDER

436 WEST 20TH STREET LLC and MICHAEL BOLLA,

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.....	1
Affirmation in Opposition	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Adam Leitman Bailey, P.C. commenced the instant action against defendants 436 West 20th Street LLC ("436 West 20th Street") and Michael Bolla ("Bolla") seeking to recover fees for certain legal work plaintiff allegedly performed on behalf of 436 West 20th Street and Bolla. Bolla now moves for an Order pursuant to CPLR §§ 3211(a)(1) and (7) dismissing the complaint as against him. For the reasons set forth below, Bolla's motion is denied.

The complaint alleges as follows. In or around February 2009, defendants retained plaintiff to represent and provide legal counsel to defendants in connection with the recovery of rent against a non-paying tenant of either 436 West 20th Street or Bolla or both 436 West 20th Street and Bolla. Plaintiff performed its obligations in rendering legal services to defendants. From approximately March 2009 to October 2009, plaintiff sent defendants monthly invoices for

the legal services rendered. However, defendants have not paid the sum of \$33,198.66 due for the provision of legal services. Plaintiff thereafter commenced the instant action asserting four causes of action for breach of contract, account stated, unjust enrichment and quantum meruit against defendants seeking to recover the outstanding legal fees.

As an initial matter, Bolla's argument that the complaint must be dismissed pursuant to CPLR § 3211(a)(7) for failure to state a claim on its face because it uses equivocal language in alleging that 436 West 20th Street "and/or" Bolla retained plaintiff, accepted plaintiff's legal services and failed to pay is without merit. Although plaintiff's use of the expression "and/or" may make the complaint more difficult to understand, plaintiff's choice of wording is not a ground to dismiss the complaint as it is apparent that plaintiff is stating a claim against Bolla, as shown by plaintiff's submission of the retainer agreement signed by Bolla and the invoices addressed to Bolla.

The court now turns to Bolla's motion to dismiss the complaint pursuant to CPLR § 3211(a)(1). In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

The portion of Bolla's motion for an Order pursuant to CPLR § 3211(a)(1) dismissing the cause of action for breach of contract is denied on the ground that the documentary evidence relied on by Bolla, the retainer agreement, does not definitively dispose of plaintiff's claim. Bolla's argument that the retainer agreement disposes of plaintiff's claim because it shows that Bolla entered into the agreement on behalf of 436 West 20th Street and not in an individual

capacity is without merit. Contrary to Bolla's contention, it is not clear from the face of the retainer agreement that Bolla did not intend to bind himself individually to the agreement for the provision of legal services. The agreement was signed by "Michael Bolla" and there is no indication in the signature block that Bolla signed on behalf of 436 West 20th Street. The lack of any indication in the signature block that Bolla signed on behalf of 436 West 20th Street is particularly evident when compared with the signature of Adam Leitman Bailey, Esq. ("Bailey"), the only other signature on the agreement. Bailey's signature was clearly on behalf of a corporate entity as the name of that entity, "Adam Leitman Bailey, P.C.," is typed directly above the signature.

Bolla's contention that his handwritten insertion that "[w]e must be informed of changes first before new rate becomes effective" proves that the agreement was actually between plaintiff and 436 West 20th Street, not Bolla, because "we" could only refer to 436 West 20th Street is without merit. In this context, "we" could refer to 436 West 20th Street and Bolla together, if plaintiff were retained by both, or even to Bolla only. Thus, the retainer agreement does not definitively dispose of plaintiff's claim for breach of contract.

The portion of Bolla's motion for an Order pursuant to CPLR § 3211(a)(1) dismissing the cause of action for an account stated is denied on the ground that the documentary evidence relied on by Bolla, the invoices, do not definitively dispose of plaintiff's claim. For a plaintiff to recover on a cause of action for an account stated, the invoices that are the foundation of the claim must actually be addressed to the defendant. *See Roth Law Firm, PLLC v. Sands*, 82 A.D.3d 675, 676 (1st Dept 2011).

In the present case, the invoices do not definitively dispose of plaintiff's claim for an account stated as it is not clear from the face of the invoices whether the invoices were addressed

to Bolla. The invoices were addressed to “Michael Bolla, 436 West 20th Street LLC, 355 West Broadway, Suite 2, New York, New York,” creating ambiguity as to whether the invoices were addressed to Michael Bolla in his individual capacity, 436 West 20th Street LLC or both. Plaintiff did not address the invoices to “Michael Bolla c/o 436 West 20th Street LLC,” which would have indicated that 436 West 20th Street LLC was the intended recipient of the invoices. Thus, as it is not apparent from the face of the invoices that they are not addressed to Michael Bolla in his individual capacity, the invoices do not definitively dispose of plaintiff’s claim for an account stated.

The portions of Bolla’s motion for an Order pursuant to CPLR § 3211(a)(1) dismissing the causes of action for unjust enrichment and quantum meruit are denied on the ground that the documentary evidence relied on by Bolla, the retainer agreement, does not definitively dispose of plaintiff’s claims. The retainer agreement does not definitively dispose of plaintiff’s claims as it is not clear from the face of the retainer agreement that Bolla did not receive legal services from plaintiff in his individual capacity. The agreement was signed by “Michael Bolla” and there is no indication in the signature block that Bolla signed on behalf of 436 West 20th Street. Further, the letter serving as the retainer agreement is addressed to “Mr. Bolla,” and plaintiff states in the letter that “[w]e are pleased to confirm the retention of our firm to provide legal advice and representation to you and we are pleased to accept such retention.” Thus, the retainer agreement does not definitively dispose of plaintiff’s claims for unjust enrichment and quantum meruit.

To the extent that Bolla raised new arguments in his reply papers, this court will not consider such arguments as “[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion.” *Dannasch v. Bifulco*, 184 A.D.2d 415

(1st Dept 1992).

Accordingly, Bolla's motion to dismiss the complaint is denied. This constitutes the decision and order of the court.

Dated: 2/16/16

Enter: _____

OK
J.S.C.
CYNTHIA S. KERN
J.S.C.