

Hinshaw & Culbertson LLP v Eurotire, Inc.

2016 NY Slip Op 30662(U)

April 14, 2016

Supreme Court, New York County

Docket Number: 154649/2015

Judge: Eileen A. Rakower

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 15

-----X
HINSHAW & CULBERTSON LLP,

Index No: 154649/2015

- against -

Decision/Order

Mot. Seq.: 001

EUROTIRE, INC.,

Defendant.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Hinshaw & Culbertson LLP (“Plaintiff” or “Hinshaw”), brings this action to collect for legal services rendered and expenses incurred in connection with Plaintiff’s representation of defendant Eurotire, Inc. (“Defendant” or “Eurotire”) from November 2013 through April 2014. The Complaint alleges causes of action for account stated, breach of contract, and quantum meruit. Defendant interposed an Answer on July 1, 2015.

Plaintiff now moves for an Order pursuant to CPLR §3212, granting summary judgment to Plaintiff in the amount of \$211,172.99 on its account stated and breach of contract claims. Defendant does not oppose.

In support of its motion for oral argument, Plaintiff submits the affidavit of Gregory Glickman, a partner in Plaintiff’s law firm. Mr. Glickman avers, “I was the lead attorney in defending Eurotire against the breach of contract claims brought by former employees of the company in the United States District Court for the Southern District of New York, Docket No. 13-cv-6921 (the “McKee Matter” or “Underlying Action”). Mr. Glickman states that Plaintiff’s representation of Eurotire commenced in October 2013 and “effectively ended on September 19, 2014, when Eurotire paid the first installment of the settlement in the McKee Matter, though Hinshaw continued occasional discussions with Eurotire through December 2014, when Eurotire paid the second installment of the settlement sum to the plaintiffs in the McKee Matter.” Mr. Glickman states, “Prior to termination of the attorney-client relationship, Hinshaw continued its attempts to obtain additional payments for Eurotire in July and August 2014.” Annexed to Glickman’s affirmation as exhibits are: copies of the pleadings; Plaintiff’s First Request for Admissions which

Defendant failed to respond to; the Engagement Letter between Hinshaw and Eurotire, dated October 15, 2013 and signed by Eurotire on November 7, 2013; monthly invoices sent by Hinshaw to Eurotire from November 2013 through January 2015; records confirming wire transfers from Eurotire and cash receipts records; a copy of an email dated June 6, 2014 from Schuyler Kraus, a partner at Hinshaw, to Eurotire representatives; an email dated June 13, 2014 from Mr. Kraus to Shimon Laber, Eurotire's president; and a Statement of Undisputed Facts.

CPLR § 3123 permits the service of a request for admission “of the genuineness of any papers or documents . . . or the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.” (CPLR § 3123[a]).

CPLR § 3123 further provides:

Each of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof or within such further time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

(CPLR 3123[a]).

The purpose of a notice to admit is “to eliminate from the litigation factual matters which will not be in dispute at trial, not to obtain information in lieu of other disclosure devices.” (*Taylor v. Blair*, 116 A.D.2d 204, 205-06 [1st Dep’t 1986]). This device is used “to eliminate from contention factual matters which are easily provable and about which there can be no controversy” and “to expedite the trial by eliminating as issues that as to which there should be no dispute.” (*Id.* at 206). Therefore, a notice to admit “may *not* be utilized to request admission of material issues or ultimate or conclusory facts, which can only be resolved after a full trial.” (*Id.* [emphasis added] [internal citations omitted]). The notice to admit may not be employed as a “substitute” for other disclosure devices, such as examinations before trial, depositions upon written questions or interrogatories. (*Id.*).

On July 6, 2015, Plaintiff served Eurotire with Requests for Admissions and other discovery requests, which required a response by July 27, 2015. Eurotire failed to respond to the Requests for Admissions, as well as the other discovery requests served on Eurotire. The items, contained in Plaintiff's Notice to Admit, which Plaintiff's instant motion seeks to be deemed as admitted related to the invoices Plaintiff sent to Eurotire to collect legal fees incurred in connection with Plaintiff's representation of Eurotire in the underlying action. The requests seek admissions concerning Eurotire's receipt and retention of the invoices, and Eurotire's failure to object to the same.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]; *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

"An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other... In this regard, receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor." (*Shea & Gould v. Burr*, 194 AD2d 369,370 [1st Dept. 1993]).

Here, Plaintiff has demonstrated a prima facie showing of entitlement to judgment as a matter of law on its account stated claim through Glickman's, the accompanying invoices sent to Eurotire reflecting Plaintiff's services, and proof of partial payment by Eurotire for the services rendered. Plaintiff has demonstrated that it rendered invoices covering services performed and expenses incurred, Eurotire did not dispute any invoice or statement of account, and Eurotire made partial payment for Plaintiff's services. By failing to oppose, Eurotire has failed to raise any issues of fact. Where the movant has established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be

granted. (*See generally Access Capital v. DeCicco*, 302 A.D. 2d 48, 53-54 [1st Dept. 2002]). Additionally, Hinshaw is entitled to rely on the facts as stated in the Requests for Admissions, which Eurotire failed to answer, in Hinshaw's motion for summary judgment. (*New Image Const., Inc. v. TDR Enterprises Inc.*, 74 A.D.3d 680, 681 [1st Dept 2010]).


Wherefore, it is hereby,

ORDERED that Plaintiff's motion for summary judgment on its account stated claim is granted without opposition; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Hinshaw & Culbertson, LLP, and against defendant, Eurotire, Inc., in the sum of \$211,172.99, with interest at the statutory rate from the date of this decision and order, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk.

DATED: APRIL 14, 2016

APR 14 2016



EILEEN A. RAKOWER, J.S.C.