

Berkman Bottger Newman & Rodd LLP v Donner

2016 NY Slip Op 30805(U)

April 27, 2016

Supreme Court, New York County

Docket Number: 159467/2014

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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BERKMAN BOTTGER NEWMAN & RODD, LLP,

Plaintiff,

Index No. 159467/2014

-against-

DECISION/ORDER

SHERYL DONNER,

Defendant.

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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>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Berkman Bottger Newman & Rodd, LLP commenced the instant action to recover outstanding attorney's fees allegedly owed to it by defendant. Plaintiff now moves for an order pursuant to CPLR § 3212 granting it summary judgment against the defendant on its cause of action for an account stated. For the reasons set forth below, plaintiff's motion is granted.

The relevant facts are as follows. On or about February 7, 2007, defendant Sheryl Donner entered into a retainer agreement with plaintiff law firm to have plaintiff represent her in her divorce and paid an initial retainer fee. From February 2007 and April 2011, plaintiff represented defendant and regularly sent defendant invoices for the services rendered. Between January 2010 and April 2011, after the retainer fee had been exhausted, plaintiff sent defendant

fifteen invoices for its services. Defendant made partial payments of \$26,531.66 in April 2010, \$10,000.00 in January 2011 and \$15,000.00, in two payments, in March 2011. However, defendant has not fully paid the invoices and there is an outstanding balance of \$37,724.28.

Defendant sent a number of emails to plaintiff complaining about the quality of its representation and its fees, particularly the fact that two partners were working on and billing for her case, asking plaintiff to discuss the fees and requesting plaintiff to proceed in a more cost-efficient manner. On February 9, 2011, defendant sent an email to Jacqueline Newman, a partner at plaintiff law firm, explaining her complicated financial situation and stating that she had "questions about some of the billing" but that she would make another payment after "recent trades [of investments] clear." She further stated that "I don't repeat all of this as a way to excuse slow payments but as trading is my only source of income right now, timing of such is critical." On March 18, 2011, defendant sent an email to Walter Bottger, another partner at the plaintiff law firm, stating that she was willing to " earmark" her share of her tax refund "to cover payment of my account if not previously resolved, excepting fees which I had indicated to Jacqueline I disputed and expect to further discuss with you." Defendant did not elaborate on these disputed fees in this email, nor does she state which particular fees she disputed in her affidavit.

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.*

It is well established that a law firm may recover its outstanding legal fees on an account stated claim. *See, e.g., Ruskin, Moscou, Evans & Faltischek v. FGH Realty Credit Corp.*, 228 A.D.2d 294 (1st Dept 1996); *Fink, Weinberger, Fredman, Berman & Lowell v. Petrides*, 80 A.D.2d 781 (1st Dept 1981). A plaintiff establishes its *prima facie* right to summary judgement on an account stated claim by establishing “[e]ither retention of bills without objection or partial payment.” *Morrison Cohen Singer and Weinstein, LLP v. Waters*, 13 A.D.3d 51, 52 (1st Dept 2004). *See also Mintz & Gold, LLP v. Hart*, 48 A.D.3d 526, 527-28 (2nd Dept 2008) (holding that the plaintiff established its *prima facie* entitlement to summary judgment on an account stated where the defendant retained invoices without objection, made partial payments on the invoices and sent correspondence to the plaintiff “acknowledging her obligation to pay the balance”).

In the present case, plaintiff has established its *prima facie* right to summary judgment on its claim for an account stated against defendant by presenting copies of the invoices sent to defendant between January 2010 and May 2011, which show that defendant made numerous partial payments on the account. In addition, plaintiff has submitted the affidavit of Walter F. Bottger, a partner at the plaintiff law firm, stating that defendant did not object to the invoices until October 28, 2011, approximately sixth months after plaintiff’s representation ended and plaintiff sent defendant the final invoice.

In opposition, defendant has failed to raise an issue of fact. Defendant’s argument that

she objected to the invoices is without merit as the correspondence she has submitted does not show that she made specific objections to the invoices. To raise an issue of fact on a cause of action for an account stated, an objection must be related to a "specific amount or invoice." See *Schulte Roth & Zabel, LLP v. Kassover*, 80 A.D.3d 500, 501 (1st Dept 2011). See also *Bartning v. Bartning*, 16 A.D.3d 249, 250 (1st Dept 2005) (holding that the plaintiff did not raise an issue of fact based on his assertion in open court "that when he got the bills he raised to appellant his belief that the bills contained overcharges").

In the present case, the emails submitted by defendant show that defendant was concerned with the cost of plaintiff's representation and her ability to pay the invoices but do not show that defendant raised objections to specific amounts or invoices. Rather, in the February 9, 2011 email, defendant actually acknowledged her responsibility to pay by stating that, although she had questions about the billing, she was not trying to excuse "slow payments." In a March 19, 2011 email, defendant indicated that she disputed certain fees. However, she did not specify which fees she disputed, and therefore did not relate her objection to a specific amount or invoice. Moreover, even if defendant had objected to one or more invoices in the March 19, 2011 email, plaintiff is entitled to judgment as a matter of law on the ground that defendant made a partial payment on March 30, 2011, slightly over a week after indicating that she disputed certain fees.

Defendant's argument that plaintiff's motion for summary judgment should be denied on the ground that plaintiff's fees were unreasonable is without merit. To prevail on a cause of action for an account stated, "[i]t is not necessary to establish the reasonableness of the fee since the client's act of holding the statement without objection will be construed as acquiescence as to

