

Wachtel Missry LLP v Dadoun
2019 NY Slip Op 32143(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 656301/2017
Judge: Anthony Cannataro
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANTHONY CANNATARO PART IAS MOTION 41EFM

Justice

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INDEX NO. 656301/2017

WACHTEL MISSRY LLP,

MOTION DATE 05/05/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

DANIEL DADOUN, SELDAT INC.

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

In this action to recover attorneys' fees, plaintiff Wachtel Missry, LLP moves, pursuant to CPLR 3212, for summary judgment on its claims for breach of contract, *quantum meruit*, and account stated and to schedule a hearing to determine the attorneys' fee plaintiff is entitled to recover as the prevailing party herein.

The parties entered into a retainer agreement on January 24, 2017 whereby plaintiff agreed to represent defendants in connection with a lawsuit brought against defendants by Skiddies, Inc. and Joseph Franco. The retainer agreement provides that defendants were to pay for legal services plaintiff rendered on their behalf at plaintiff's standard hourly rates as well as all out-of-pocket expenses. As provided for in the agreement, defendants paid a retainer fee of \$35,000, to be applied toward the last bill. Under the agreement, plaintiff was to send defendants statements for their services on a periodic basis and payment of such bills is due within 30 days of receipt, those not timely paid accrue interest at the rate of 9% per annum.

The retainer agreement specifically provides that if defendants believe plaintiff's bills are "mounting too rapidly," they should contact plaintiff immediately to evaluate "future alternatives." And further, that if no such contact is made, the retainer provides that plaintiff "will assume that [defendant] approve[s] of the overall level of activity on [plaintiff's] part and that the statements are otherwise in order."

The agreement further provides that should defendants fail to comply with its terms, plaintiff may be relieved from performing further work and immediately withdraw as counsel. If litigation is necessary to collect fees, the agreement states that the prevailing party may recover reasonable attorneys' fees and interest.

Throughout the time plaintiff represented defendants, plaintiff sent a total of seven statements—dated March 7, 2017, March 29, 2017, April 27, 2017, May 23, 2017, June 28, 2017, July 25, 2017, and August 22, 2017—totaling \$123,209.60. Defendants made one payment on May 25, 2017 for \$30,000. Beginning on August 21, 2017, the parties began discussions via telephone and email concerning the amount of the bills and whether plaintiff would continue representation of defendants. On August 22, 2017, plaintiff informed defendants that it would give them a 10% discount and waive interest on the remaining total of \$93,209.60 if full payment was made immediately. On August 29, 2017, defendants asked plaintiff to reduce the amount due to \$75,000, to which plaintiff responded that it could not accept such terms if representation were to continue, but a small discount could be applied if plaintiff were to withdraw. Plaintiff moved to withdraw in the underlying action on September 13, 2017. On September 15, 2017, settlement discussions continued with plaintiff maintaining their offer of a 10% discount on payment due within a week and defendants offering a payment of \$60,000. The parties did not reach an agreement and plaintiff commenced the instant action to collect its legal fees.

Plaintiff argues it is entitled to summary judgment on its breach of contract cause of action because it had a valid contract for legal services, it rendered legal services pursuant to the agreement, defendants have not paid for those services, and plaintiff has been damaged as a result. Further, plaintiff asserts that it is entitled to summary judgment on its *quantum meruit* claim arguing that because defendants did not object to the invoices they accepted the charges as the fair and reasonable value of plaintiff's services. On its account stated claim, plaintiff argues that having established the existence of the agreement and defendants' failure to timely object to the invoices it is entitled to summary judgment.

Defendants oppose the motion on the basis that plaintiff has failed to make a *prima facie* showing required for summary judgment and, as such, each of its causes of action should be dismissed. Defendants deny that they are in breach and assert that plaintiff breached its duty of good faith and fair dealing by overbilling and submitting inaccurate invoices. Defendants argue that plaintiff cannot pursue a claim for *quantum meruit* where the existence of a valid contract is undisputed. Further, defendants claim that the motion as it relates to plaintiff's account stated claim should be denied because defendants objected to the amount billed within a reasonable time.

To obtain summary judgment, the movant must tender evidentiary proof in admissible form to establish his cause of action "sufficiently to warrant the court as a matter of law in directing judgment" (*Zuckerman v. New York*, 49 NY2d 557, 562 [1980]). Once the movant meets its initial burden, the burden then shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*id.*)

"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" (*She & Gould v Burr*, 194 AD2d 369, 370 [1st Dept 1993], quoting *Chisholm-Ryder*

Co. v Sommer & Sommer, 70 AD2d 429, 431). “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 Signer & Weinstein, LLP v Ackerman*, 280 AD2d 355, 356 [1st Dept 2001]).

The Court in *Morrison Cohen Singer and Weinstein, LLP v Waters* (13 AD 3d 51, 52 [1st Dept 2004]) held that, “[t]he rule to which we have adhered and which we now reiterate is that either retention of bills without objection or partial payment may give rise to an account stated.” Further, the Court in *Morrison Cohen Singer and Weinstein, LLP v Waters* held that a request for summary judgment cannot be defeated where defendant delays making an objection to the billed amounts and only asserts that the claimed fees were not justly due in a subsequent fee litigation (*id.*).

Here, it is undisputed that the parties entered into a retainer agreement; defendants paid a retainer fee of \$35,000; over the course of their relationship, plaintiff sent and defendants received seven itemized bills dated between March and August; and defendant made an additional payment of \$30,000 on its bill which at that time totaled \$77,351.57. The evidence presented shows that the first time an issue concerning the amount of the bills was raised was in August 2017, and that this was in the context of a settlement negotiation over the outstanding bill and plaintiff’s continued representation. These present claims, raised less than three months after a substantial payment was made and without any noticeable change in billing practices, are insufficient to raise an issue of fact as to whether defendant timely objected to the bills.

Based on the foregoing, that portion of plaintiff’s motion which seeks summary judgment on its claim for account stated is granted, rendering moot its claims for breach of contract and *quantum meruit*.

Finally, pursuant to section 6 of the retainer agreement, the prevailing party in any litigation over fees and expenses may recover reasonable attorney's fees, as well as pre-judgment interest at the rate of 9% annum. Therefore, plaintiff is entitled to recover reasonable attorney's fees and a hearing must be scheduled to determine the amount plaintiff is entitled to recover.

Accordingly, it is

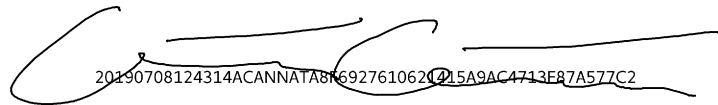
ORDERED that plaintiff's motion is granted to the extent of granting summary judgment in favor of plaintiff on its claim for account stated; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants in the sum of \$58,323.83, together with interest at the statutory rate of 9% per annum from August 22, 2017; and it is further

ORDERED that the portion of the motion seeking summary judgment on plaintiff's breach of contract and quantum meruit claims are denied; and it is further

ORDERED that a Referee shall be designated to hear and determine the issue of attorneys' fees in this action; and it is further

ORDERED that the above issues are hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referee Part, which, in accordance with the Rules of the Part, shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above.



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7/8/2019
DATE

ANTHONY CANNATARO, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE