

Davidoff Hutcher & Citron LLP v Kadosh

2019 NY Slip Op 32149(U)

July 3, 2019

Supreme Court, New York County

Docket Number: 657292/2017

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----X
DAVIDOFF HUTCHER & CITRON LLP,

Plaintiff,

-against-

Index No. 657292/2017

DAVID KADOSH,

Motion Seq. No.: 002

Defendant.

-----X

DORIS LING-COHAN, J.:

Plaintiff law firm Davidoff Hutcher & Citron LLP (DHC) moves, pursuant to CPLR 3212, for an order granting: 1) partial summary judgment against defendant David Kadosh (Kadosh) on DHC's first and second causes of action for breach of contract and account stated in the amount of \$387,815.05, plus statutory interest accrued and accruing; and 2) summary judgment as to liability only on DHC's first and second causes of action for breach of contract and account stated and setting down for a hearing a determination on the balance of \$868,677.91 owed by Kadosh to DHC.

Background

On December 3, 2012, Kadosh signed a retainer agreement, retaining DHC to represent him in connection with litigation brought against him by his brother, Michael Kadosh, entitled *Kadosh v Kadosh*, Sup Ct, NY County, index No. 651834/2010 (*Kadosh v Kadosh*). Pursuant to the retainer agreement, Kadosh agreed to pay DHC \$10,000 upon execution of the agreement, which moneys

would be credited against his initial time charges. Kadosh paid the initial \$10,000, and DHC represented Kadosh in the *Kadosh v Kadosh* litigation, which was consolidated with another case brought by Kadosh dealing with the building which was the subject of the *Kadosh v Kadosh* case. See *Matter of the Application of David Kadosh for the Judicial Dissolution of 213 W. 85th St., LLC*, Sup Ct, NY County, Index No. 650048/2013 (the Dissolution Litigation, together with *Kadosh v Kadosh*, the 85th Street Actions).

DHC contends that in May 2015, it was clear that the 85th Street Actions were going to proceed to trial and that as of May 14, 2015, although Kadosh had paid DHC a total of \$129,000 of the fees and expenses billed with respect to the 85th Street Actions, he still owed DHC \$387,815.05. As a result, DHC considered moving to withdraw as counsel. The complaint alleges that, on May 29, 2015, in order to get DHC to continue working on his behalf and to extend further credit to him, Kadosh signed a letter, in partial consideration, stating that, as of May 14, 2015, he owed DHC \$387,815.05 for legal services rendered on his behalf in *Kadosh v Kadosh*, Sup Ct, NY County, Index No.

651834/2010 and *Matter of the Application of David Kadosh for the Judicial Dissolution of 213 W. 85th St., LLC*, Sup Ct, NY County, index No. 650048/2013, without offset, defense or counterclaim thereto (the May 29 Letter). That letter also acknowledged that

Kadosh consented to have DHC paid the \$387,815.05, as well as any other fees that become due, directly from his share of a \$7,000,000 fund resulting from the sale of the W. 85th Street building. The fund was being held in escrow by a court-appointed receiver, Robert Lewis (the Receiver), pending the determination of how the escrowed funds would be distributed between Kadosh and his brother. The fees were not paid from the escrowed funds, however, because the funds were wrongfully released by the Receiver, whose conduct is the subject of a separate action.

According to the Decision & Order of Justice Shirley Werner Kornreich in the consolidated 85th Street Actions,

"[a]fter years of litigation and numerous attempts to resolve the matters, the actions were settled on July 21, 2016, in the midst of a 23-day bench trial that spanned a year. All of the claims, counterclaims, third-party claims, and all claims 'whether stated or unstated' 'from the beginning of the world to today's date' were released and resolved between the brothers and their entities by agreeing to release a portion of millions of dollars held in escrow (by Robert L. Lewis, the court-appointed Temporary Receiver) to be divided equally between David and Michael Kadosh, and to hold the remainder of the escrow money awaiting a non-appealable, final decision of the Court."

Kadosh v Kadosh, *supra*, Decision & Order, NYSCEF Doc. No. 467.

According to the complaint, during DHC's representation of Kadosh in the 85th Street Actions and other unrelated matters, its bills for fees and expenses totaled over \$1,439,272.99, of which Kadosh paid only \$182,780.03, leaving a balance owed of \$1,256,492.96 (i.e. the \$387,815.05 sought pursuant to the May 29

Letter, plus the claimed balance of \$868,677.91).

The complaint asserts causes of action for 1) breach of contract, 2) account stated, and 3) quantum meruit. Only the first two causes of action are at issue in this motion.

1. Partial summary judgement on DHC's claim for \$387,815.05

a) Breach of Contract

DHC moves for partial summary judgment pursuant to its causes of action for breach of contract on its claim for \$387,815.05, based upon: 1) the retainer agreement signed by Kadosh on December 3, 2012, pursuant to which Kadosh retained DHC to perform legal services with respect to *Kadosh v Kadosh*; 2) the affidavit of Raul Batista (Batista), the accounts receivable manager for DHC, identifying the invoices for legal work performed by DHC on the 85th Street Actions, which were sent to Kadosh that remained unpaid, prior to May 14, 2015 and invoices annexed thereto (see Batista aff, ¶¶ 8-264 and Exhibit J annexed thereto); and 3) the May 29 Letter from Kadosh to Michael Zapson (Zapson), previously the Managing Attorney at DHC, dated May 29, 2015, containing the heading "re Matter 10586.005 - David Kadosh adv. Michael Kadosh and Matter 10586.007 - Dissolution of 213 West 85th Street LLC." The May 29 Letter states, among other things,

"I am writing to confirm our understanding as to how Davidoff Hutcher & Citron LLP ('DHC' or 'the Firm') will be paid for the outstanding fees I now owe and will continue to incur in connection with the Actions.

At the very outset, I acknowledge that there is now due and owing to DHC \$387,815.05 for legal services rendered on the above actions as of May 14, 2015, and that there is no offset, defense or counterclaim thereto."

Krakowsky Aff, Exhibit F (May 29 Letter), at 1.

According to the affidavit of Zapson, in May 2015, he spoke with Kadosh regarding the money the firm was owed and the amount of work that needed to be done if the matter went to trial.

Zapson states that Kadosh asked if DHC would agree to be paid out of the money being held in escrow by the court-appointed

Receiver. According to Zapson, he told Kadosh that, under the retainer agreement, Kadosh had to continue to make payments, but that DHC "would agree for the balance, on all matters we represented him on to be paid from the monies being held."

Zapson Supporting Aff, ¶ 9. Zapson further states that he later met with Kadosh and his wife and that on May 29, 2015, Kadosh signed the letter in front of him.

DHC argues that it is entitled to summary judgment on its breach of contract cause of action based upon Kadosh's May 29 Letter admitting that he owed that amount for legal services rendered as of May 14, 2015. DHC cites *Fred Ehrlich, P.C. v Tullo* (274 AD2d 303, 710 [1st Dept 2000]) in which defendant's attorney sought to recover his attorney's fees based, in part, on a stipulation between the parties concerning a portion of the fees. There, the Appellate Division reversed the trial court's

denial of summary judgment to plaintiff and ruled that the plaintiff was entitled to, among other things, its claim to the portion of its fee, to which defendant had stipulated.

Kadosh opposes the motion for summary judgment contending that DHC has failed to meet its burden of proof both with respect to the May 29 letter and the retainer agreement signed on December 3, 2012. With respect to the May 29 letter, Kadosh submits an affidavit stating:

" 18. First, I never saw this letter. Second, there are patent discrepancies between the two pages. For example, the first page has a handwritten date of May 29, 2015. The second page, which it is alleged contains my signature, has a typewritten date of May 16, 2015.

" 19. I once again repeat that I never saw this letter. I never signed this letter."

Kadosh Aff, ¶¶ 18 & 19.

Kadosh also claims that while he did retain DHC to represent him in the litigation brought against him by his brother (*Kadosh v Kadosh*), he never retained the law firm in the Dissolution Litigation. He, further claims that he paid the law firm approximately \$400,000 for the litigation against his brother, but that the funds were applied to other cases for which the firm had not been retained and that when he stopped paying them the law firm "rushed to wrap up the case without using my witnesses or my accountant, all to my detriment." *Id.*, ¶ 14.

On reply, with respect to its claim for breach of contract regarding the claim for \$387,815.05, DHC submits a reply

affidavit of Zapson, reiterating that he had discussed the issue of lack of payment with Kadosh, and stating that he then met with Kadosh and his wife on May 29, 2015 in Long Beach, New York, at the Long Beach Hotel, which is owned by Kadosh. He states that he reviewed the outstanding legal fees with Kadosh, and that Kadosh signed the May 29 Letter in front of him. With respect to the discrepancy in dates between the first and second pages of the letter, Zapson states that:

"[a]t my direction, my assistant prepared the letter on May 16th which is the date that appears on the second page of the Agreement. Although that date should not be there, the Court will note that the date on the first page of the May 29th Agreement was not typed, rather it was handwritten on the date that Kadosh signed it - May 29th."

Zapson Reply Aff, Exhibit N, ¶ 17.

The standards on a motion for summary judgment are clear. It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (see CPLR 3212). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a

denial of the motion, *regardless of the sufficiency of the opposing papers.*" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted, emphasis in original). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact which require a trial. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). The "facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d at 503 (internal quotation marks and citation omitted)).

Here, DHC has made out a prima facie case for breach of contract on its claim for \$387,815.05 based upon the retainer agreement and the May 29 Letter.

Kadosh's main basis for opposing the breach of contract claim regarding the May 29 letter agreement is his claim that he never saw the letter before and never signed it. Normally such a sworn statement would at least raise a question of fact sufficient to defeat summary judgment. As DHC has pointed out, however, the same letter has previously been submitted to the court in the underlying 85th Street Actions, in support of its efforts to obtain payment of its bills.

Specifically, the May 29 Letter was first offered to the court in connection with the Receiver's motion to have his accounts settled and DHC's cross motion contending that the

Receiver had violated a court order when he released to Kadosh his portion of the settlement money, without DHC's signature.¹ The court referenced the letter which provided for payments to DHC from the funds held in escrow for David Kadosh and indicated that he owed a specific amount of money to DHC. See Krakowsky Aff, Exhibit D (*Kadosh v Kadosh*, *supra*, transcript of proceedings, March 7, 2018, at 5-6). In the court's decision, it again referred to the May 29 Letter stating:

"In fact, in a letter from David to DHC, dated May 29, 2015, David acknowledges owing \$387,814.05 in legal fees. See Dkt. 501 (the May 2015 Letter). In the May 2015 Letter, David 'irrevocably' consented 'to [the Receiver] paying DHC directly from the Escrow any fees due to the Firm for work rendered in connection with the Actions and/or for any other fees I then owe to the Firm....'"

Krakowsky aff, exhibit DD (*Kadosh v Kadosh*, *supra*, Decision & Order, at 2). There is no indication that Kadosh objected to the May 29 Letter being considered in those proceedings, or that he in any way contested its validity.

The significance of the May 29 Letter was again considered by Justice Jennifer G. Schecter in connection with DHC's cross

¹ In August 2016, the court ordered "the release of \$2.7 million to each Kadosh brother was to occur 'upon receipt of a letter from each party (David Kadosh's letter to be signed both **by his counsel, Frank L. Perrone, Jr.**, and David), with instructions as to how and where the money is to be paid.' See Dkt. 460.... The reason for the precondition was David's indebtedness to Davidoff Hutcher & Citron LLP (DHC) for legal fees incurred in this heavily litigated action." Krakowsky Aff, Exhibit DD (*Kadosh v Kadosh*, Decision & Order), at 2 (emphasis in original).

motion to have Kadosh held in contempt for contacting the Receiver to obtain the funds that were subject to a court order. During the hearing on DHC's cross motion, while Kadosh claimed he never saw the first page of the letter, he did not deny signing the second page. In that proceeding, Kadosh submitted an affidavit in which he stated:

"19. I never signed this purported letter to DHC by which I allegedly acknowledge and guaranteed a debt to DHC in the sum of \$387,815.05. The only document I signed, at the bequest [sic] of Mr. Michael Zapson, was the second page of that 'letter', that is the page wherein I agreed to continue to make partial payments to DHC and agreed to a 'standstill', whatever that is.

"20. I never saw the first page of that document and first became aware of its existence many months later when I appeared in DHC's office to discuss the firm's outlandish claim for attorney's fees."

Krakowsky Reply Aff, Exhibit K (Kadosh aff, dated June 23, 2018), ¶¶ 19 & 20.

Justice Schecter responded with skepticism to Kadosh's assertion that he signed the second page without having seen the first page, indicating that she had a lot of questions regarding "[s]igning second pages of agreements without looking at the first page in the context of dealing with his attorneys."

Krakowsky Reply Aff, Exhibit L (*Kadosh v Kadosh, supra*, Transcript of Contempt Hearing, June 29, 2018, at 21).² Justice

² The court notes that in a Decision & Order, dated June 14, 2018, Justice Schecter held Kadosh in civil contempt for knowingly violating the court's order, dated August 5, 2016, by contacting the Receiver to obtain the escrowed funds "because

Schechter's assessment is all the more understandable, since the second page of the letter refers back to the preceding page, stating "*Notwithstanding the foregoing, I will continue to make partial payments and DHC is not obligated to wait to get paid from the Escrow and can terminate the standstill agreement at any time on written notice to me.*" May 29 Letter, at 2 (emphasis supplied).

Only now, when DHC is seeking to collect the \$387,815.05 debt directly from Kadosh does he claim that the signature on the second page of the letter is not his. It has been repeatedly held, however, that contradictory sworn testimony by a party is insufficient to raise a triable issue of fact in opposition to a motion for summary judgment. See *Little Cherry, LLC v Two Bridgeset Hous. Dev. Fund Co.*, 146 AD3d 714 (1st Dept 2017) (affidavit of plaintiff's managing member that contradicted his prior affidavit failed to raise triable issue of fact in opposition to defendant's summary judgment motion); *Lipsker v 650 Crown Equities, LLC*, 81 AD3d 789 (2d Dept 2011) (self-serving affidavit which contradicted affiant's prior sworn testimony insufficient to raise triable issue of fact); *Telfeyan v City of*

David's actions were calculated to and actually did defeat, impair, impede, and prejudice the rights or remedies of DHC to recover its attorneys' fees from the receiver's escrow account prior to any funds being dispursed to David as ordered and agreed upon by the parties in court." *Kadosh v Kadosh, supra*, Decision & Order, NYSCEF Doc., 570 at 7.

New York, 40 AD3d 372, 373 (1st Dept 2007) ("Affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, 'creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment.'" [internal citation omitted]). Furthermore, "[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature. ... Hence, [Kadosh's] affidavit alone [is] inadequate to raise an issue of fact necessitating a trial." *Banco Popular N. Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381, 384 (2004).

With respect to his challenge to the retainer agreement, Kadosh claims that the retainer agreement only references *Kadosh v Kadosh*, and that he did not retain DHC to represent him on the Dissolution Litigation, therefore presumably, any bills for work on that litigation would be invalid. The Dissolution Litigation, however, was consolidated with the original Kadosh litigation, and it is clear from the papers in the consolidated matters that DHC represented Kadosh on both cases. See e.g. *Kadosh v Kadosh*, Sup Ct, NY County, Index No. 651834/2010; *Matter of the Application of David Kadosh for the Judicial Dissolution of 213 W. 85th Street, LLC*, Sup Ct, NY County, index No. 650048/2013; Transcript of Court Proceedings Memorializing Partial Settlement.

Consolidated Cases, dated July 21, 2016, NYSCEF Doc. 522. Kadosh fails to make any showing that he in any way objected to, or rejected, DHC's representation on either of the consolidated matters. Furthermore, the May 29 Letter specifically references both *Kadosh v Kadosh* and the Dissolution Litigation and states that "I am writing to confirm our understanding as to how [DHC] will be paid for the outstanding fees I now owe and will continue to incur in connection with *the Actions*." May 29 Letter, at 1 (emphasis supplied). Finally, Justice Kornreich's decision regarding the disposition of the escrowed funds being held by the court-appointed Receiver, noted that "David, Michel and David's wife, . . . , who was a principal of some of his entities, were fully allocuted" with respect to the disposition of the escrowed funds in the consolidated actions, one of which was the Dissolution Litigation. *Kadosh v Kadosh, supra*, Decision & Order, NYSCEF Doc. No. 467, at 2. Kadosh's claim that he did not retain DHC on the Dissolution Litigation, therefore, fails.

Finally, Kadosh's conclusory claim that he paid DHC approximately \$400,000 for the litigation but that the funds were applied to other cases, is completely unsupported by any documentation.

For these reasons, DHC's motion for partial summary judgment for breach of contract with respect to its claim for \$387,815.05 based upon its retainer agreement and the May 29 Letter is

granted.

b) Account Stated

Because the court has granted DHC's motion for partial summary judgment on its claim for \$387,815.05 based upon breach of contract, it need not reach DHC's arguments based upon its second cause of action for account stated or Kadosh's opposition thereto, and DHC's motion for partial summary judgment based upon an account stated is denied as moot.

2. DHC'S Motion for Partial Summary Judgment on Liability for the Balance of \$868,677.91

DHC also moves for summary judgment on the issue of liability for the balance of its claim for \$868,677.91, on its causes of action for breach of contract and account stated, and asks to have the issue of the amount due be set down for an immediate hearing.

DHC contends that there is no dispute that it represented Kadosh pursuant to a retainer agreement, and that it provided legal services to him pursuant to that retainer agreement. DHC submits invoices that it sent to Kadosh and that, it contends, he retained without objection, that represent the balance due of \$868,677.91. See Exhibit J to the Batista Aff, DH 0000123-DH0000840. Those invoices represent work done on both the 85th Street Actions, as well as legal work on unrelated matters.

The retainer agreement, which is identified as "Re: David Kadosh, et al. ADV. Michel Kadosh Index No. 651834/2010 Our File

No.: 10586/005," states that, "you have retained and employed the above firm to represent you with regard to legal proceedings concerning the above referenced matter." Krakowski Aff, Exhibit E, at 1. The letter also states, "Representation on any other matters will be assumed to be of the same terms as outlined above unless specifically agreed to in writing to the contrary." *Id.* at 2.

Kadosh states in his affidavit that there are no retainer agreements for many of the matters for which he was billed and states that he was billed for at least one matter that he was never a party to and that "I have been invoiced for approximately \$403,648.76 for various cases for which I either never signed a retainer, or for which I never retained plaintiff, verbally or otherwise, to represent me." Kadosh Aff in Opposition, ¶12.

The court has indicated above that it considers the Dissolution Litigation, which was consolidated with *Kadosh v Kadosh*, to be encompassed by the retainer agreement. The court is not prepared, however, to conclude, based solely on the language of the retainer document, that the document constitutes an open-ended retainer for representation with respect to an infinite number of unidentified matters, unrelated to Kadosh's brother Michael and/or the W. 85th Street building. This is particularly the case given Kadosh's sworn statement that he was billed for matters for which he did not retain DHC and that he

had told DHC both verbally and in writing to cease representing him in connection with at least one of such matters. See *Kadosh Aff in Opposition*, ¶¶ 7 & 12, and Exhibits 1 & 2 (directing no further action on the case with Leo Zucker).

It is clear from the documentation submitted by DHC in connection with its motion and additional documentation contained in the record of the case of *Kadosh v Kadosh, supra*, that it represented Kadosh in connection with the 85th Street Actions, through the 23-day bench trial, which occurred over the period of a year and the ultimate settlement of the matter by the parties, on July 21, 2016. That representation ceased when DHC's motion to withdraw as counsel was granted by the court on November 6, 2017. See *Kadosh v Kadosh, supra*, Decision and Order on Motion, dated November 6, 2017, NYSCEF Doc. No. 479. The invoices for the work on the 85th Street Actions are among those contained in Exhibit J to the Batista Affidavit which DHC contends were sent to Kadosh and retained by him without objection. "Defendant's receipt and retention of the plaintiff law firm's invoices seeking payment for professional services rendered, without objection within a reasonable time, [give] rise to an actionable account stated, thereby entitling the plaintiff to summary judgment in its favor." *Ruskin, Moscou, Evans & Faltischek v FGH Realty Credit Corp.*, 228 AD2d 294, 295 (1st Dept 1996). Furthermore, "partial payment may give rise to an account

stated." *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 (1st Dept 2004).

With respect to the 85th Street Actions, Kadosh contends that he has in fact disputed the amounts he was billed in numerous meetings with attorneys, claiming that he was assigned at least five different attorneys at the law firm, each of whom spent time reviewing the file and performing work already done by previous lawyers and that he was therefore billed multiple times for the same work. Kadosh has not submitted any evidence of his disputes to those charges, but contends that DHC has refused to return his files, and, therefore, he is not in a position to establish that he was charged for unnecessary work.

Based upon the within submissions, DHC is entitled to reimbursement for its representation of Kadosh in the consolidated 85th Street Actions (as a result of which Kadosh recovered several million dollars), and, thus, is entitled to partial summary judgment as to liability as to its breach of contract claim with respect to that representation. There are factual issues with respect to the account stated cause of action in that the balance owed is in dispute. At a hearing, on the issue of damages, specifically, as to the balance owed to DHC, Kadosh will be able to contest individual charges, based upon admissible evidence.

With respect to DHC's representation of Kadosh in relation

to matters other than the 85th Street Actions, DHC has not established that Kadosh in fact verbally authorized such representation or that he entered into retainer agreements concerning any or all of those matters. Therefore, DHC's motion for summary judgment with respect to liability for matters other than the 85th Street Actions is denied.

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on its first cause of action for breach of contract in the amount of \$387,815.00 is granted, and the portion of the motion motion as based on plaintiff's claim for account stated is deemed moot; and it is further

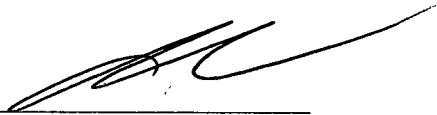
ORDERED that plaintiff's motion for partial summary judgment as to liability on its cause of action for breach of contract with respect to the alleged balance due is granted with respect to liability for its representation of defendant in connection with *Kadosh v Kadosh*, Sup Ct, NY County, Index No. 651834/2010 and *Matter of David Kadosh for the Judicial Dissolution of 213 W. 85th St., LLC*, Sup Ct, NY Count, Index No. 650048/2013, with the amount damages to be established at the hearing, and the motion is otherwise denied; and it is further

ORDERED that issue of damages is respectfully referred to a Special Referee, to hear and determine, in accordance with CPLR §4317 (b); and it is further

ORDERED that *within 60 days of entry of this order*, plaintiff shall serve a copy of this order, with notice of entry, upon all parties and upon the Clerk of the Judicial Support Office (Room 119M), to arrange a calendar date for the reference to a Special Referee.

It is noted that this case is scheduled for a discovery conference on September 5, 2019, which may be canceled if the note of issue is filed, on or before August 30, 2018.³

Dated: July 3, 2019



Doris Ling-Cohan, J.S.C.

³ By "So Ordered" stipulation dated June 27, 2019, the parties' time to complete discovery was extended, and a note of issue is to be filed on or before August 30, 2019.