[* 1]

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

WIMPFHEIMER & WIMPFHEIMER, ESQS.,

Plaintiff,

-against-

LUCY LIPINER, Individually and as Voluntary Administrator of the Estate of Edward Lipiner,

Defendant.

----------X

DECISION and ORDER

File No.: 2013-4683/B

M E L L A, S.:

The following papers were considered by the court in resolving plaintiff's motion to dismiss defenses:

Papers	Numbered
Notice of Motion, Affidavit of Michael C. Wimpfheimer, Esq., in Support with Exhibits A through J	1, 2, 3
Affirmation of Gil Santamarina, Esq., in Opposition, with Exhibit A, and Memorandum of Law in Opposition to Motion	4,5
Reply Affidavit of Michael C. Wimpfheimer, Esq., with Exhibits	6

Upon the motion of defendant Lucy Lipiner, the present attorneys fees dispute was transferred to this court from Supreme Court (New York County) as a matter related to the estate of Edward Lipiner (*see* CPLR 325[e]). Plaintiff, the law firm of Wimpfheimer & Wimpfheimer, Esqs., has sued defendant in her individual capacity as decedent's sole distributee and in her fiduciary capacity as the voluntary administrator of decedent's estate. The complaint alleges two causes of action, one for legal fees based upon specified services rendered and the other for account stated.

Plaintiff moved to dismiss the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Defenses raised in defendant's verified Answer. At the October 29, 2019 return date of the motion, this court ruled from the bench, granting the motion as to one defense but denying it as to the rest, for the reasons discussed below.

Defendant's "Second Defense" challenges the court's personal jurisdiction, on the ground that defendant was not duly served. But plaintiff's affidavits of service constitute prima facie proof of proper service upon defendant (*see Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 344 [2d Dept 2003]). Although plaintiff's process server did not purport to have served defendant directly, he averred that he had not been allowed access to defendant beyond the lobby of her apartment building and had therefore been obliged to leave the summons and complaint with the building's concierge for transmittal to defendant. The law is well settled that, "if a process server is not permitted to proceed to the actual apartment by the doorman or some other employee, the outer bounds of the actual dwelling place must be deemed to extend to the location at which the process server's progress is arrested" and where, as the process server's affidavit here attests, a copy of process is also mailed to the defendant, service is properly effected (*F.I. Du Pont, Glore Forgan & Co. v Chen*, 41 NY2d 794, 797 [1977]; Siegel, NY Prac § 72 [6th ed 2018]).

Defendant's opposition papers do not contain the type of specific and detailed averments by an individual with personal knowledge that might have served to rebut the process server's statements (*see U.S. Bank, N.A. v Peralta*, 142 AD3d 988, 989 [2d Dept 2016]; *Simonds v Grobman*, 277 AD2D 369, 370 [2d Dept 2000]). Consequently, plaintiff's motion to dismiss the Answer's Second Defense was granted.

The Answer's "First Defense" and "Eighth Defense" are, respectively, that the complaint fails to state a cause of action and that it in any event lacks particularity. Precedent establishes that "no motion by the plaintiff lies under CPLR 3211(b) to strike [such] defense[s], as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim ..." (*Butler v Catinella*, 58 AD3d 145, 150 [2d Dept 2008]); *see Riland v Frederick S. Todman & Co.*, 56 AD2d 350 [1st Dept 1977]). Accordingly, the motion to dismiss these defenses was denied.

The same analysis applies with respect to the Answer's "Third Defense," which is based on defendant's allegation that plaintiff failed to mail bills or invoices to her in support of the amount sought in the complaint. In order to recover under the theory of account stated, plaintiff must show that he sent detailed bills to defendant and that she retained them without expressing objection to them within a reasonable time (*see Morrison Cohen Singer & Weinstein, LLP v Ackerman,* 280 AD2d 355, 356 [1st Dept 2001]). Here too plaintiff's request for dismissal amounts to an attempt to test the sufficiency of its claim (*Butler v Catinella*, 58 AD3d at 150). Plaintiff's request for dismissal was therefore denied.

Defendant raised various affirmative defenses in her "Sixth Defense" and "Seventh Defense," which impute to plaintiff "laches and unclean hands" and "waiver, estoppel, release and/or excuse." As the basis for dismissal, plaintiff contends that they "have no relevance to this action" (emphasis in original). Defendant denies in her Answer having received timely invoices or demands for payment from plaintiff. In a motion to dismiss a defense, the answer is to be liberally construed and defendant is "entitled to the benefit of every reasonable intendment of its pleading" (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738, 739 [2d Dept 2010] [a defense should not be dismissed if there is any possibility of its availability to

defendant]). In light of defendant's allegations in her pleading, the validity of the defenses included in the "Sixth Defense" and "Seventh Defense" should not be determined at this stage of the litigation and the motion to dismiss them was denied.

Defendant's "Ninth Defense" asserts that she is not a proper party to this lawsuit in her individual capacity, because plaintiff never represented her individually. Plaintiff seeks dismissal of this defense, arguing that defendant, in her individual capacity, "received a distribution of all of [decedent's] assets." If defendant in fact received estate assets while the estate's liability to plaintiff for the services it provided remained outstanding, she may be personally responsible for payment of such amount as is ultimately proved to be due plaintiff from the estate (*see* EPTL 11-1.5; 11-4.7). However, such determination may only be made on a full record. Plaintiff has not demonstrated at this stage of the litigation that the "Ninth Defense" is without merit as a matter of law. Accordingly, the motion to dismiss this defense was denied.

Defendant's "Tenth Defense" challenges the appropriateness of the Supreme Court as a forum for litigating this action. Since the action has already been transferred from that court to this one, the motion to dismiss this defense is moot.

Finally, as a purported "Eleventh Defense," Defendant "reserv[es] the right" to assert new or modify existing defenses. This portion of the Answer does not raise a defense per se. In any event, upon a proper motion to amend her pleading, this court may grant defendant leave to assert new defenses. The motion to "dismiss" such portion of the Answer was therefore denied.

The parties will be contacted for scheduling of a discovery conference.

This decision constitutes the decision and order of the court.

Date: January 2, 2020

SURROGATE