

<b>Sunblock Sys., Inc. v Marcum, LLP</b>
2020 NY Slip Op 31412(U)
April 1, 2020
Supreme Court, New York County
Docket Number: 653172/2017
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

*Justice*

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INDEX NO. 653172/2017

SUNBLOCK SYSTEMS, INCORPORATED,

MOTION DATE 03/31/2020

Plaintiff,

MOTION SEQ. NO. 004

- v -

MARCUM, LLP, and SAMUEL A. FEINBERG,

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, and 66

were read on this motion to/for SUMMARY JUDGMENT.

**I. INTRODUCTION**

In this action to recover, inter alia, for breach of contract and on an account stated, the defendant Marcum, LLP (Marcum), moves for summary judgment dismissing the complaint against it and on its cross claims against the defendant Samuel A. Feinberg for common-law indemnification, contractual indemnification, and breach of contract. No party submits any opposition. The motion is granted to the extent that the second cause of action, which seeks to recover against Marcum on an account stated, is dismissed, the motion is otherwise denied, and, upon searching the record, the court awards summary judgment to Feinberg dismissing the first cross claim asserted against him by Marcum, which sought common-law indemnification.

In its complaint, the plaintiff alleges that, between July 30, 2013, and September 19, 2013, it provided \$35,254.22 worth of digital forensic services to Marcum, an accounting firm, in connection with accounting services that Marcum performed for Feinberg with respect to an underlying 2013 commercial action to which Feinberg was a party, but that Marcum has not paid for those services. In its first cause of action, asserted only against Marcum, the plaintiff asserts

that Marcum breached an oral agreement to pay for those services. In the second cause of action, also asserted only against Marcum, the plaintiff alleges that it invoiced Marcum for that amount, and that Marcum received and retained the statements of account without objection or refusal to pay. In the third cause of action, asserted only against Feinberg, the plaintiff asserted that Feinberg was unjustly enriched by Marcum's failure to pay for the forensic services. Marcum cross-claims against Feinberg for common-law indemnification (first cross claim), contractual indemnification (second cross claim), and to recover for breach of contract (third cross claim). By order dated March 20, 2018, this court denied Feinberg's pre-answer motion pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against him (SEQ 001). By order dated April 4, 2018, this court denied the plaintiff's motion for summary judgment on the complaint against both defendants (SEQ 002). In a companion order dated April 1, 2020, this court granted Feinberg's motion for summary judgment dismissing the complaint against him (SEQ 003).

## II. DISCUSSION

The proponent of a summary judgment motion must make a prima facie showing, by sufficient proof in admissible form, that there are no triable, material issues of fact. In other words, the movant must make a prima facie showing of entitlement to judgment as a matter of law. Once the movant meets this burden, the opponent must adduce proof in admissible form to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Where the movant fails to establish its prima facie entitlement to judgment as a matter of law, summary judgment must be denied, regardless of the existence or sufficiency of any opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *Beach v Touradji Capital Mgt., L.P.*, 144 AD3d 557, 561 [1st Dept 2016]).

A. First Cause of Action—Breach of Contract

To recover for breach of contract, a plaintiff must show the “formation of a contract between the parties, performance by the plaintiff, the defendant’s failure to perform, and resulting damage” (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009]). Marcum contends that it never entered into a contract with the plaintiff for the subject forensic services. Rather, it asserts that Feinberg’s attorneys retained the plaintiff to perform those services in connection with representing Feinberg in an underlying 2013 action involving a corporation in which Feinberg owned 50% of the stock. Nonetheless, Marcum submits, with its papers, the deposition transcript of the plaintiff’s principal, David Sun, in which he unequivocally asserted that the plaintiff entered into an oral argument with Marcum, and not with Feinberg’s attorneys, for the provision of the subject forensic services. Moreover, Sun testified at his deposition that the plaintiff fully performed its obligations under the oral argument, but has yet to be paid. Marcum does not adduce any proof that the plaintiff did not provide those services or was paid. Marcum thus failed to establish its prima facie entitlement to judgment as a matter of law dismissing the first cause of action, as its submissions reveal the existence of triable issues of fact as to whether it entered into a contract with the plaintiff, whether the plaintiff performed under the contract, and whether the plaintiff was damaged by the breach. Accordingly, Marcum is not entitled to summary judgment dismissing the first cause of action.

B. Second Cause of Action—Account Stated

To recover on an account stated, a plaintiff must establish the existence of an agreement between the parties to an account, based upon prior transactions between them with respect to the correctness of both the separate items composing the account and the balance due, along with the defendant’s receipt and retention of those accounts, without objection within a reasonable time, and an agreement to pay a portion of the indebtedness (*see Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51 [1st Dept 2004]; *Shea & Gould v Burr*, 194

AD2d 369 [1st Dept 1993]). Proof supporting the existence of such an account may include the “[p]laintiff’s business records . . . and resulting invoices and statement of accounts for a balance due” (*Commissioners of State Ins. Fund v Allou Distributions*, 220 AD2d 217, 217 [1st Dept 1995]; see *Commissioners of State Ins. Fund v DiPietro*, 289 AD2d 46 [1st Dept 2001]; *Commissioners of State Ins. Fund v Country Carting Corp.*, 265 AD2d 158 [1st Dept 1999]).

Marcum demonstrated, though the affidavit of its principal, that the plaintiff never invoiced it for the amounts claimed to be due; rather, as is clear from the papers submitted in connection with Motion Sequence 003, although the plaintiff never expressly entered into an agreement with Feinberg, it directly invoiced only him, and not Marcum, for the subject forensic services. Marcum thus established its prima facie entitlement to judgment as a matter of law dismissing the second cause of action, which sought to recover on an account stated. Inasmuch as the plaintiff did not oppose this motion, summary judgment dismissing that cause of action must be awarded to Marcum.

### C. First Cross Claim—Common-Law Indemnification

Marcum also is not entitled to summary judgment on its first cross claim against Feinberg, which seeks common-law indemnification. Here, Marcum’s liability to the plaintiff in the main action, if any, is not vicarious or secondary. In other words, Marcum’s potential liability to the plaintiff is not based solely on Feinberg’s breach of any obligation that he purportedly owed directly to the plaintiff, but is based on Marcum’s alleged failure to perform its own contractual obligations pursuant to the alleged oral agreement (see *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 146 AD2d 190, 199 [3d Dept 1989]). Thus, even viewing the allegations of first cross claim asserted by Marcum against Feinberg as true, Marcum failed to state a cause of action for common-law indemnification against Feinberg (see *Genesee/ Wyoming YMCA v Bovis Lend Lease LMB, Inc.*, 98 AD3d 1242, 1245 [4th Dept 2012]; *Westbank Contr., Inc. v Rondout Val. Cent. School Dist.*, 46 AD3d 1187, 1189-1190 [3d

Dept 2007]; *Carter v Farmington Sportservice*, 233 AD2d 840, 840 [4th Dept 1996]; see also *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 146 AD2d at 199-200). Consequently, Marcum cannot establish its prima facie entitlement to judgment as a matter of law on its first counterclaim, and summary judgment thereon must be denied. In light of the foregoing, the court exercises its authority to search the record and award summary judgment to a nonmoving party (see *Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc.*, 61 NY2d 106 [1984]), and thereupon awards summary judgment to Feinberg dismissing the cross claim for common-law indemnification asserted against him by Marcum.

D. Second Cross Claim—Contractual Indemnification

“A party is entitled to full contractual indemnification provided that the ‘intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances’” (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; see also *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). Generally, a hold harmless clause in an agreement for the provision of professional services is prima facie proof of a claim for contractual indemnification (see *Sokolovic v Throgs Neck Operating Co., Inc.*, 147 AD3d 646 [1st Dept 2017]). Here, Marcum established its prima facie entitlement to judgment as a matter of law on its second cross claim against Feinberg by submitting the Marcum-Feinberg retainer agreement, pursuant to which Feinberg agreed to hold Marcum harmless from any claims against it that arose from its provision of accounting services to him.

Nonetheless, “courts may take judicial notice of a record in the same court of either the pending matter or of some other action” (*Caffrey v North Arrow Abstract & Settlement Servs., Inc.*, 160 AD3d 121, 126 [2d Dept 2018]; see *Casson v Casson*, 107 AD2d 342, 344 [1st Dept 1985]). Under Motion Sequence 003 in this action, Feinberg filed a stipulation of settlement dated April 30, 2015, and entered in an action entitled *Marcum, LLP v Feinberg*, Supreme

Court, Suffolk County, Index No. 601820/15, pursuant to which Marcum released Feinberg from liability for

“all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law, admiralty or equity.”

Under Motion Sequence 003, Feinberg further stated, in an affidavit, that this stipulation and release was intended to cover all disputes arising from Marcum’s provision of accounting services in connection with the underlying 2013 litigation, including its retention of outside consultants. Thus, there are triable issues of fact as to whether the release bars Marcum’s second cross claim, and summary judgment on that cross claim must thus be denied.

E. Third Cross Claim---Breach of Contract

As with the cross claim for contractual indemnification, there are triable issues of fact as to whether the release bars Marcum from recovering against Feinberg under its third cross claim, which alleges that Feinberg breached their retainer agreement by failing to pay the plaintiff’s invoice. Hence, summary judgment dismissing the third cross claim must be denied.

III. CONCLUSION

Accordingly, it is

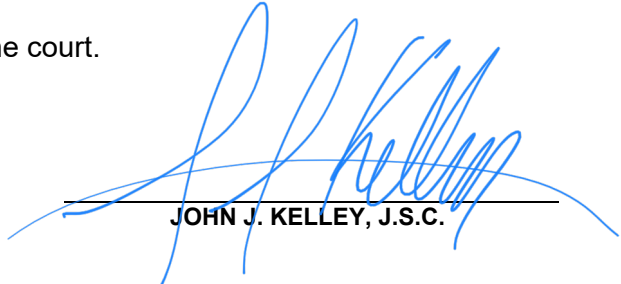
ORDERED that the motion of the defendant Marcum, LLP, for summary judgment is granted to the extent that it is awarded summary judgment dismissing the plaintiff’s second cause of action, which seeks to recover on an account stated, that cause of action is dismissed, and the motion is otherwise denied; and it is further,

ORDERED that, upon searching the record, summary judgment is awarded to the defendant Samuel A. Feinberg dismissing the first cross claim asserted against him by the

defendant Marcum, LLP, which seeks common-law indemnification, and that cross claim is dismissed.

This constitutes the Decision and Order of the court.

04/01/2020  
DATE

  
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JOHN J. KELLEY, J.S.C.

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