

<b>Law Firm of Alexander D. Tripp, P.C. v Fiorilla</b>
2020 NY Slip Op 32696(U)
August 17, 2020
Supreme Court, New York County
Docket Number: 654991/2019
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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LAW FIRM OF ALEXANDER D. TRIPP, P.C.,

Index No. 654991/2019

Plaintiff

- against -

DECISION AND ORDER

JOHN LEOPOLDO FIORILLA,

Defendant

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LUCY BILLINGS, J.S.C.:

Plaintiff sues to recover damages for an account stated and breach of contract based on two engagement agreements, the first dated June 26, 2016, and the second dated September 18, 2016, which the parties entered for plaintiff to provide legal representation to defendant. Plaintiff moves for summary judgment on all claims, C.P.L.R. § 3212(b), and for summary judgment dismissing defendant's affirmative defenses. C.P.L.R. §§ 3211(b), 3212(b). For the reasons explained below, the court grants plaintiff's motion.

Plaintiff meets its initial burden to demonstrate entitlement to judgment on its account stated claim by presenting its authenticated invoices and admissible evidence that they were emailed to defendant, who did not object to them and made partial

payment. Unisol, Inc. v. Kidron, 180 A.D.3d 570, 571 (1st Dep't 2020); Cushman & Wakefield, Inc. v. Kadmon Corp., LLC, 175 A.D.3d 1141, 1141-42 (1st Dep't 2019); EPF Intl. Ltd. v. Lacey Fashions Inc., 170 A.D.3d 575, 575 (1st Dep't 2019); A&W Egg Co., Inc. v Tufo's Wholesale Dairy, Inc., 169 A.D.3d 616, 617 (1st Dep't 2019). Specifically, Alexander Tripp, of plaintiff firm, attests that he prepared the invoices and emailed them to defendant at an email address the parties had used to communicate. The invoices reflect defendant's partial payments. Plaintiff's final invoices for \$55,000.00 under the first engagement agreement and for \$73,707.00 under the second engagement agreement were dated June 3, 2019.

Unless defendant objected to an invoice within a reasonable time, he is considered to have acquiesced to the invoice.

Cushman & Wakefield, Inc. v. Kadmon Corp., LLC, 175 A.D.3d at 1142; Glassman v. Weinberg, 154 A.D.3d 407, 408 (1st Dep't 2017); Epstein Becker & Green, P.C. v. Amersino Mktg. Grp., 111 A.D.3d 428, 429 (1st Dep't 2013). Defendant never complained about plaintiff's legal representation until plaintiff commenced this action, long after his time to object to the invoices expired. Unisol, Inc. v. Kidron, 180 A.D.3d 570 at 571; Glassman v. Weinberg, 154 A.D.3d at 408.

While defendant claims further disclosure, including a deposition of Tripp, is necessary, he does not identify the relevant evidence to be uncovered by further disclosure. C.P.L.R. § 3212(f); Unisol, Inc. v. Kidron, 180 A.D.3d at 571; Duane Morris LLP v. Astor Holdings Inc., 61 A.D.3d 418, 418 (1st Dep't 2009). Nor does defendant even claim that evidence necessary to oppose summary judgment is exclusively under plaintiff's control. C.P.L.R. § 3212(f); Unisol, Inc. v. Kidron, 180 A.D.3d at 571; A & W Egg Co. v. Tufo's Wholesale Dairy, Inc., 169 A.D.3d at 617; Duane Morris LLP v. Astor Holdings Inc., 61 A.D.3d 418. While defendant seeks disclosure of how plaintiff calculated its fees, which may be exclusively in plaintiff's control, and the reasonableness of the charges, evidence on those questions is irrelevant to the account stated claim.

Defendant raises no factual issues regarding plaintiff's account stated claim. A & W Egg Co. v. Tufo's Wholesale Dairy, Inc., 169 A.D.3d at 617. See Cohen Bros. Realty Corp. v. Mapes, 181 A.D.3d 401, 405 (1st Dep't 2020); Glassman v. Weinberg, 154 A.D.3d at 408-409. Defendant's alleged understanding that the proceeds of the litigation in which plaintiff represented defendant would be the primary source of plaintiff's fee contradicts the first engagement agreement, which requires that

defendant make monthly payments and that only any unpaid balance would be paid by the proceeds of a settlement or final award.

See Mintz & Gold LLP v. Daibes, 125 A.D.3d 488, 489 (1st Dep't 2015).

Since plaintiff seeks the same damages for the account stated claim as the breach of contract claims, the court need not address the breach of contract claims. Healthcare Capital Mgt. v. Abrahams, 300 A.D.2d 100, 109 (1st Dep't 2002). Nor will the court address the affirmative defenses that defendant has withdrawn: failure to state a claim, expiration of the statute of limitations, lack of personal jurisdiction, failure to mitigate damages, unjust enrichment, unclean hands, laches, a superseding cause, and failure to join necessary parties.

Defendant's remaining five affirmative defenses of waiver and estoppel, failure to exhaust remedies, the statute of frauds, potential reliance on additional evidence, and the absence of any duty of care owed by defendant to plaintiff, all of which merely state legal conclusions without supporting facts, are insufficiently pleaded. C.P.L.R. § 3013; Bd. of Managers of Ruppert Yorkville Towers Condo. v. Hayden, 169 A.D.3d 569, 569 (1st Dep't 2019); Commissioners of State Ins. Fund v. Ramos, 63 A.D.3d 453, 453 (1st Dep't 2009); 170 W. Vill. Assocs. v. G & E

Realty, Inc., 56 A.D.3d 372, 372-73 (1st Dep't 2008). The statute of frauds defense is particularly meritless in the face of the invoices that are confirmatory writings to which defendant failed to object within a reasonable time. Mulitex USA, Inc. v. Marvin Knitting Mills, Inc., 12 A.D.3d 169, 169 (1st Dep't 2004). In opposition to plaintiff's motion, defendant further fails to support his affirmative defenses to raise factual issues that might sustain them. Bd. of Managers of Ruppert Yorkville Towers Condo. v. Hayden, 169 A.D.3d at 570.

For all these reasons, the court grants plaintiff's motion for summary judgment on plaintiff's account stated claim against defendant and summary judgment dismissing defendant's third, fourth, ninth, eleventh, and thirteenth affirmative defenses, the remaining affirmative defenses that defendant has not withdrawn. C.P.L.R. §§ 3211(b), 3212(b). This decision constitutes the court's order and judgment. The Clerk shall enter a judgment in favor of plaintiff and against defendant for \$128,707.00 with interest at 9% per year from June 3, 2019, as calculated by the Clerk.

DATED: August 17, 2020



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LUCY BILLINGS, J.S.C.