Emery Celli Brinckerhoff & Abady LLP v Demetriades
2020 NY Slip Op 34221(U)
December 9, 2020
Supreme Court, New York County
Docket Number: 657486/2019
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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EMERY CELLI BRINCKERHOFF & ABADY LLP

Plaintiff,

- v -

TARA A. DEMETRIADES, ESQ.

Defendant.

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INDEX NO. 657486/2019

MOTION DATE 12/07/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 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

were read on this motion to/for SUMMARY JUDGMENT.

The motion by plaintiff for summary judgment is granted and the cross-motion by defendant for *inter alia* summary judgment dismissing this case and for sanctions is denied.

Background

Plaintiff seeks to recover legal fees in connection with its representation of defendant relating to an investigation by the Attorney Disciplinary Committee for the Eastern District of New York and a subsequent disciplinary proceeding. Plaintiff claims that it sent monthly invoices to defendant and that defendant did not object. It points out that it continued to represent defendant despite the fact that she stopped paying the bills.

Plaintiff contends that defendant made numerous partial payments on account of the various invoices and acknowledged plaintiff's entitlement to further payment. It claims that $122,019.60 is due.

In opposition and in support of her cross-motion (which violate this part's rules on page limits), defendant claims that there are many factual and evidentiary gaps in plaintiff's motion. She insists that plaintiff has made numerous false allegations that defendant never objected to the invoices. Defendant argues that her cancelled checks show that she made payments to plaintiff totaling about $124,750, which is greater than the sum plaintiff is seeking. She asserts that plaintiff is trying to seek fees based on an unproven initial agreement and a purported extension.

Defendant points out that she objected to mistakes in plaintiff's bills with respect to the rate charged for the services for an attorney. She insists that a more senior attorney at plaintiff had to do more menial tasks after the junior attorney had to go on leave and plaintiff did not charge the junior associate billing rate as agreed.

Defendant argues that public policy demands that plaintiff's breach of contract be dismissed because plaintiff failed to provide a written letter of engagement and any alleged oral agreement cannot be decided on a motion for summary judgment.

In reply and in opposition to the cross-motion, plaintiff explains that there were two revised invoices that corrected billing errors related to the rates charged for certain attorneys and that defendant sent numerous emails over the course of the representation apologizing for not paying her bills. Plaintiff speculates that defendant is simply unhappy that the result of the disciplinary hearing was not what she desired—she apparently received a six-month suspension.

Plaintiff points out that the checks defendant relies upon were either from before the unpaid invoices at issue in this case or were already accounted for in plaintiff's motion. Six of the checks predate the first unpaid invoice in this action and the remaining cancelled checks were included in the plaintiff's prior payment chart in its moving papers.

In reply to her cross-motion, defendant emphasizes that plaintiff makes no effort to address whether there was a written retainer agreement and notes that plaintiff now admits that defendant raised objections. She complains that her attorney at plaintiff, Mr. Lieberman, provided an estimate for legal services that turned out to be incredibly lower than the total charged by plaintiff.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*,

Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"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. In this regard, receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor" (*Shea & Gould v Burr*, 194 AD2d 369, 370-71, 598 NYS2d 261 [1st Dept 1993] [internal quotations and citations omitted]).

This case can be readily decided based on defendant's emails to plaintiff. On August 17, 2018, Mr. Lieberman sent defendant an email containing a proposal for dealing with the outstanding fees defendant owed to plaintiff (NYSCEF Doc. No. 21). He suggested that she pay plaintiff $100,000 and they would write off the remainder (*id*.). He also proposed another solution that included giving defendant a ten percent discount (*id*.).

Defendant responded that "I think that all of your options suck. Regardless, you are most certainly entitled to the money I fully intend on paying it to you. Unfortunately for me, I have not nor will I ever win the Powerball. Therefore, I'm stuck with payments plus interest. I suppose it could be worse; at least you're not Capital One or Target charging 29.99%. However, try to delay charging me interest for as long as possible. . . I really had no idea that you would cost as much as you have . . . and I'm doing my best, for what it's worth" (*id*.).

This email compels the Court to grant plaintiff's motion and deny defendant's cross-motion. Defendant admitted she owed the money and simply was having trouble paying it. And plaintiff provided options where she would pay less than what she owed. Nothing defendant

presented defeats an email where she admits she owed plaintiff money. Her references to a Phase I and a phantom Phase II agreement are simply distractions. This case is about plaintiff's representation of defendant and her failure to pay the money she admitted she owed.

After this email, plaintiff continued to represent defendant and she periodically sent partial payments (NYSCEF Doc. No. 22 [email from defendant to Lieberman dated February 19, 2019 claiming a $5,000 check was on the way]). In fact, in another email from defendant in February 2019, in which she states she is sending another partial payment of $4,800, she claims that she had some immigration work "to generate additional income, which I hope continues onward so I can keep making the necessary payments" (*id*.).

As plaintiff explained, it properly accounted for defendant's cancelled checks (some of which were before the first unpaid invoice and others which were factored into the amount it seeks). With respect to the lack of an engagement letter, that is of no moment because it does not preclude plaintiff from recovering on its causes of action, including its claims for account stated and unjust enrichment (*Roth Law Firm, PLLC v Sands*, 82 AD3d 675, 676, 920 NYS2d 72 [1st Dept 2011]). And here, the Court declines to depart from binding caselaw where the client was a practicing attorney.

The Court also observes that the affidavit of Mr. Lieberman in reply is instructive (NYSCEF Doc. No. 51).[1] He explains that defendant raised objections in February 2018 and May 2018 concerning a reduced billing rate (*id*. at 3). These errors were corrected and new bills were sent to defendant who did not raise any further objections (*id*. at 3-4). Of course, the email from Mr. Lieberman referencing the outstanding invoices and defendant's response that admitted she owed the money was from just a few months later in August 2018. Simply put, raising an

[1] Although defendant claims that the notary did not sign the affidavit, it does appear to be signed albeit with a messy signature. In any event, the Court will consider this document.

objection that is promptly corrected does not prevent plaintiff from prevailing on an account stated cause of action where she subsequently acquiesced to plaintiff's invoices.

Summary

The Court recognizes that defendant is clearly unhappy with how much plaintiff charged her. Her dissatisfaction may arise, in part, from the negative outcome of her disciplinary hearing but that is beside the point. Defendant does not dispute that she hired plaintiff to be her attorney and she was clearly capable of reviewing the bills as they came in. If she could not afford plaintiff's rates, then she should have picked a different firm or switched to more affordable representation once she realized the amount of work the representation was going to require. Instead, she allowed plaintiff to continue representing her even after she realized she would not be able to afford the invoices. In other words, she received the benefit of plaintiff's representation while only making occasional partial payments and now she claims she does not have to pay the rest. That is not a sufficient defense to plaintiff's causes of action or a basis to grant her cross-motion.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted, defendant's answer and affirmative defenses are severed and dismissed, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $122,019.60 plus interest from June 1, 2020 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the cross-motion by defendant is denied in its entirety.

12/9/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE