

**Farley v Gregory**

2022 NY Slip Op 31179(U)

April 8, 2022

Supreme Court, New York County

Docket Number: Index No. 654811/2017

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. SABRINA KRAUS PART 57TR**

*Justice*

-----X

SUSAN FARLEY

Plaintiff,

- v -

TABER GREGORY,

Defendant.

-----X

INDEX NO. 654811/2017

MOTION DATE April 8, 2022

MOTION SEQ. NO. 003 004

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 72, 74, 76, 92, 93, 94, 95, 96, 97, 98, 99, 101, 103, 105, 107, 108, 109, 110, 111, 115

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 64, 65, 66, 67, 68, 69, 70, 71, 73, 75, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 100, 102, 104, 106, 112, 113, 114

were read on this motion to/for SUMMARY JUDGMENT.

**BACKGROUND**

Plaintiff commenced this action seeking damages for alleged breach of oral and written contracts in connection with plaintiff's provision of immigration services to defendant. Plaintiff alleges that defendant failed to pay fees due pursuant to said agreements and breached a clause prohibiting defendant from disparaging plaintiff.

It is undisputed that defendant did pay plaintiff \$40,000.00 for the services that were rendered. Defendant has counterclaimed for damages, seeking to recoup this money. Defendant alleges plaintiff engaged in the improper practice of law, violated the FDCPA, and asserting that this action was frivolously commenced entitling defendant to an award of sanctions and attorneys' fees.

### **PROCEDURAL HISTORY**

Plaintiff filed a summons and complaint in July 2017 asserting causes of action for breach of contract, unjust enrichment, account stated, and breach of implied covenant of good faith.

In early 2019, plaintiff moved for a default judgment and defendant cross-moved for dismissal. Both motions were denied by the court (Borrok, J) pursuant to a decision and order which directed defendant to file an answer within 20 days.

Defendant then moved for an order dismissing the action for lack of personal jurisdiction. This motion was denied by the court (Borrok, J) pursuant to a decision and order dated November 19, 2019 finding that defendant failed to meet his burden of establishing that jurisdiction in New York was improper.

On July 30, 2021, plaintiff filed a Note of Issue declaring also discovery had been completed and seeking a bench trial.

### **PENDING MOTIONS**

On November 1, 2021, defendant moved for summary judgment, dismissal of the action and an award of sanctions (Mo Seq No 3); and plaintiff moved for summary judgment on her causes of action for breach of contract and account stated seeking judgment in the amount of \$81,576.67, and for an order dismissing defendant's counterclaims.

On April 8, 2022, the court heard oral argument on the motions and reserved decision.

The motions are consolidated herein for determination and denied for reasons set forth below.

## DISCUSSION

It is well established that CPLR § 3212 authorizes the grant of summary judgment if it can be shown that no issues of material fact exist which require a trial. *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957). To establish entitlement to judgment as a matter of law, the movant must make a *prima facie* showing by tendering sufficient evidence to eliminate any material issues of fact from the case. *Penthouse Terraces, Inc. v. McGrath*, 163 A.D.2d 144 (1st Dep't 1990). Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues." *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974). Even the color of a triable issue forecloses the remedy. *Rudnitsky v. Robbins*, 191 A.D.2d 488, 489 (1993)

Because neither party has met their burden in establishing judgment as a matter of law, the motion and cross-motion for summary judgment are denied.

There is no actual written contract between the parties as acknowledged by counsel for plaintiff at oral argument. The writings annexed to the moving papers are convoluted, not explicitly addressed by the parties' affidavits and not susceptible to summary determination.

Nor is it possible from the record to determine whether plaintiff engaged in the unlawful practice of law without a license. Plaintiff's counsel stated at oral argument that plaintiff is a "public relations consultant" and that the services she provided to defendant consisted of reaching out to political officials about defendant's immigration status. However, the documents submitted by plaintiff suggest that she engaged in the unlawful practice of law. For example, NYSCEF Doc # 67 which is labeled "agreement" includes invoices from plaintiff where she billed at an hourly rate for the preparation and submission of an N-400 Application. Plaintiff's counsel when questioned on this point at argument stated he was unfamiliar as to what said

application was for. Work billed for included research and drafting pertaining to defendant's immigration status. While these bills suggest that plaintiff engaged in the unlawful practice of law, these documents also raise more questions than they answer, and the relatively brief affidavits submitted by the parties are insufficient to resolve the issues raised.

As to the alleged non-disparagement agreement, the court can not determine from the record if the lone paragraph relied on was part of a larger contract. At oral argument, Plaintiff argued that the paragraph itself is an independent contract, however the court finds that if the paragraph is viewed on its own it would seem insufficient to meet all the elements needed for a contract. For example, no consideration is recited. While the court agrees with defendant that the amount due in the event the paragraph were found to be a contract would be limited to \$5,000, plaintiff appears to be arguing defendant signed the same paragraph repeatedly creating multiple contracts. Moreover, the correspondence from plaintiff regarding the non-disparagement paragraph to be a "clause" included in some overall contract (see eg email from plaintiff to Mr. Hall dated 7/31/14 - NYSCEF Doc 69).

Plaintiff's claim for account stated is not susceptible to summary relief. The documents submitted do not appear to have been generated in the regular course of business and based on plaintiff's own arguments the statements themselves acknowledge that defendant expressed dissatisfaction with the work done and therefore presumably the amounts billed. Additionally, the alleged invoices have all kinds of handwritten notations on them which would require foundation before they could be considered admissible evidence. Moreover, both defendant and Mr. Hall state that they repeatedly objected to said invoices.

While plaintiff asserts the right to seek attorneys' fees in the moving papers, counsel acknowledged at oral argument that he could not point to any language in any of the alleged agreements that provides for fees.

Defendant argues plaintiff will be unable to prove that defendant made disparaging remarks to others because she is precluded from calling third party witnesses at trial. Plaintiff counters defendant admitted making such disparaging statements to her and acknowledged said admissions in the difficult to discern documents attached to the motion papers.

In sum, the lack of a written contract, the condition of the writings submitted most of which contain all kinds of handwritten notations not addressed by the parties, and the contradictory factual allegations made by the parties preclude a summary determination as a matter of law on the parties claims and defenses.

### **CONCLUSION**

WHEREFORE it is hereby:

ORDERED that the motions for summary judgment are denied; and it is further

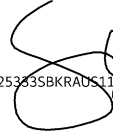
ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh));]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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4/8/2022  
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: