

<b>Tokayer v Kosher Sports Inc.</b>
2022 NY Slip Op 31866(U)
June 14, 2022
Supreme Court, New York County
Docket Number: Index No. 157471-2016
Judge: Lynn R. Kotler
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

IRA DANIEL TOKAYER

INDEX NO. 157471-2016

- v -

MOT. DATE

KOSHER SPORTS INC. et al

MOT. SEQ. NO. 12 and 13

The following papers were read on this motion to/for _____	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	ECFS DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	ECFS DOC No(s). _____
Replying Affidavits	ECFS DOC No(s). _____

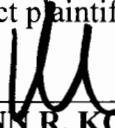
This is an action for unpaid legal fees. Plaintiff has already obtained a judgment against the corporate defendant after said defendant's answer was stricken. After this action was assigned to this court for a bench trial, an issue arose as to whether plaintiff has a signed copy of a retainer agreement with which he seeks to hold the individual defendant Jonathan Katz liable. The court denied plaintiff's motion to obtain post-note of issue discovery (see order dated January 26, 2022). Now, there are two motions before the court.

In motion sequence 12, Katz moves for an order (i) precluding the introduction at trial of this action of any evidence of an unsigned retainer; (ii) precluding the introduction at trial of any invoices; (iii) dismissing this action under CPLR § 3211(a)(7) as Plaintiff has failed to state a cause of action; and (iv) pursuant to 22 NYCRR § 130-1.1(b) for sanctions and/or an award of for costs, expenses and legal fees incurred in making this motion and defending this case. Plaintiff then moved in motion sequence 13 for an order adjourning the date of trial and extending the time for plaintiff to file papers in opposition to Katz's motion to dismiss, filed on February 18, 2022, to a date 21-days from the notice of entry of such Order, setting a return date for the motion and for such other or further relief as the Court deems just and proper. Meanwhile, plaintiff has since filed opposition to motion sequence 12 and defendant has filed a reply.

At the outset, motion sequence 13 is granted to the extent that the court will consider plaintiff's late opposition as well as defendant's reply to motion sequence 12.

As for motion sequence 12, the court's decision follows. Plaintiff has three causes of action: breach of the retainer agreement, account stated and *quantum meruit*. Katz argues that this action seeks to impose personal liability on him for the corporate defendant's debts and the fact plaintiff does not have

Dated: 6.14.22

  
\_\_\_\_\_  
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one:  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. Check if appropriate:  SETTLE ORDER  SUBMIT ORDER  DO NOT POST
- FIDUCIARY APPOINTMENT  REFERENCE

a copy of the signed retainer agreement is fatal to his case against Katz. The court disagrees. Plaintiff raises a number of technical arguments, including that Katz failed to assert a defense founded on the Statute of Frauds, that the motion must nonetheless be denied because plaintiff has stated a *prima facie* cause of action, and that his claims are not otherwise precluded by 22 NYCRR §1215.1.

The unsigned retainer agreement is dated April 28, 2010 and provides in pertinent part as follows:

Re: Legal Representation

Dear Jonathan:

It was a pleasure meeting with you yesterday. This will set forth the terms of my retention by you and your company in connection with a dispute concerning a distributorship agreement with Queens Ballparck Company LLC and a concession license agreement with Aramark Sports and Entertainment Services, Inc.

You agree to pay a fee based on my current hourly rate of \$350. You also agree to pay all out-of-pocket expenses which may be incurred... You will be billed on a periodic basis and bills are payable in full upon receipt. ...

Under the circumstances, as we discussed, a retainer fee of \$3,000 is appropriate. ...

I look forward to assisting you and your company.

Very truly yours

/s/

Ira Daniel Tokayer

Encl.

UNDERSTOOD AND AGREED:

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Jonathan Katz

Although not using the specific words “statute of frauds”, Katz has properly interposed an affirmative defense based on that ground insofar as his affirmative defenses assert that defendant did not assent to the contract, plaintiff has sued the wrong party and lack of privity. Further, the court agrees with Katz that his failure to expressly plead the statute of frauds as a defense does not preclude him from raising the defense at trial (*see generally Rogoff v San Juan Racing Assn.*, 54 NY2d 883 [1981]). However, this is the same argument that Katz raised on his prior cross-motion for summary judgment which was denied along with plaintiff’s motion as untimely. In essence, Katz’ argument is a successive motion for summary judgment in disguise.

While the court did grant Katz leave to file a motion *in limine*, Katz has moved pursuant to CPLR 3211 to dismiss plaintiff’s complaint for failure to state a cause of action. Insofar as plaintiff’s complaint has alleged all the required elements of each cause of action (order dated January 2, 2018), Katz’ motion

is denied. To the extent that Katz seeks to preclude plaintiff from presenting at trial either the unsigned retainer agreement or testimony to establish that Katz did in fact sign the agreement in his personal capacity, the court agrees with plaintiff that the Statute of Frauds does not warrant preclusion.

Contrary to defendant's contention, the unsigned retainer agreement satisfies 22 N.Y.C.R.R. § 1215.1 (*see i.e. Kutner v. Vazquez*, 17 Misc3d 1123(A) [Dist Ct, Nass Co 2007]). There is no dispute that after the retainer was allegedly signed, a check was signed by Katz for \$3,000, plaintiff provided legal services to Katz and/or the corporate defendant and invoices for those legal services were periodically sent to Katz. A contract may be enforceable even if it is not signed by the party to be charged, provided it is not barred by the Statute of Frauds, GOL § 5-701 (*Flores v. Lower East Side Service Center, Inc.*, 4 NY3d 363 [2005]).

GOL § 5-701 provides that “[e]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking ... [b]y its terms is not to be performed within one year from the making thereof ...” As the Court of Appeals stated in *William J. Jenack Estate Appraisers and Auctioneers, Inc. v. Rabizadeh* (22 NY3d 470 [2013]), “[t]he Statute of Frauds was not enacted to afford persons a means of evading just obligations; nor was it intended to supply a cloak of immunity to hedging litigants lacking integrity; nor was it adopted to enable defendants to interpose the Statute as a bar to a contract fairly, and admittedly, made” (internal quotations omitted). Thus, “courts have generally been reluctant to give too broad an interpretation to this provision of the Statute and instead have limited it to those contracts only which by their very terms have absolutely no possibility in fact and law of full performance within one year” (*D&N Boening, Inc. v. Kirsch Beverage*, 63 NY2d 449 [1984]).

The unsigned retainer agreement may not be barred by the Statute of Frauds if performance could be completed within one year (*see i.e. Cohen v. Trump Organization LLC*, 2019 N.Y. Slip Op. 32565(U) [Sup Ct, NY Co 2019]; *see also Dunnington Bartholow & Miller, LLP v. Simon*, 2017 WL 2734067 [NY Sup, NY Co 2017]). Therefore, it remains a triable issue of fact as to whether the retainer agreement is barred by the Statute of Frauds.

Even if the unsigned retainer agreement falls within the scope of the Statute of Frauds, it may still be enforced if “[t]here is sufficient evidence that a contract has been made if ... [t]here is a note, memorandum or other writing sufficient to indicate that a contract has been made, signed by the party against whom enforcement is sought...” (*see i.e. Lewis & Clarkson v. October Mountain Broadcasting Co., Inc.*, 131 AD2d 15 [3d Dept 1987]). Other forms of communication, including emails, can satisfy the “writing” requirements (*Cohen, supra* quoting *Sassoon v. CDx Diagnostics*, 172 AD3d 617 [1st Dept 2019]; *Naldi v. Grunberg*, 80 AD3d 1, 13 [1st Dep't 2010]).

On this record, the court finds that plaintiff may properly testify that the retainer agreement was signed by Katz, as well as the work that was performed and the invoices sent to both defendants (*see also Concordia General Contracting v. Peltz*, 11 AD3d 502 [2d Dept 2004]). Otherwise, there is no basis to preclude plaintiff from submitting evidence of invoices sent to the defendants. Even assuming *arguendo* that Katz was entitled to dismissal of plaintiff's breach of contract and *quantum meruit* claims at this juncture, Katz has failed to show that plaintiff's account stated claim is unavailing as a matter of law.

In light of this result, Katz is certainly not entitled to sanctions. Nor is plaintiff.

This case must proceed to trial. The trial will be held on August 10, 2022 at 10am. No adjournments absent good cause shown in a formal written application.

**CONCLUSION**

In accordance herewith, it is hereby:

**ORDERED** that defendant Katz' motion is denied; and it is further

**ORDERED** that a bench trial in this action will be held on August 10, 2022 at 10am via Microsoft Teams. No in-person appearances. No adjournments absent good cause shown in a formal written application; and it is further

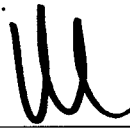
**ORDERED** that on or before August 8, 2022, [1] the parties shall submit a joint letter to the court outlining all witnesses they intend to call during the trial and an estimate of how long each witness' testimony is expected to take; and [2] the parties shall meet and confer and exchange their exhibits which they intend to submit to the court for evidence and submit to the court a list of exhibits that they have agreed shall come into evidence and a separate list of exhibits which requires a ruling, to the extent applicable; copies of all exhibits shall be filed on NYSCEF.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

6.14.22  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.