

McLaughlin & Stern, LLP v Zaremba
2022 NY Slip Op 33282(U)
September 29, 2022
Supreme Court, New York County
Docket Number: Index No. 155045/2021
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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MCLAUGHLIN & STERN, LLP

Plaintiff,

- v -

PAMELA ZAREMBA as Preliminary Executor
of the Estate of Zenovia Vlahakis,

Defendant.

INDEX NO. 155045/2021

MOTION DATE 08/26/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 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, 40, 41, 42, 43, 45

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, and oral argument which took place on June 21, 2022, where Donald Pearce, Esq. appearing for Plaintiff McLaughlin and Stern, LLP (“Plaintiff”) and Randy M. Kornfeld, Esq. appearing on behalf of Defendant Pamela Zaremba as Preliminary Executor of the Estate of Zenovia Vlahakis (“Defendant”), the motion for summary judgment is denied without prejudice.

I. Factual and Procedural Background

Plaintiff has filed the instant motion summary judgment pursuant to CPLR 3212 and an order dismissing Defendant’s affirmative defenses pursuant to CPLR 3211(b) (NYSCEF Doc. 8). This action arises out of allegedly unpaid legal fees accrued in the course of Plaintiff’s representation of the now deceased Zenovia Vlahakis (“Zenovia”) in ongoing litigation in Kings County (NYSCEF Doc. 2; *see also Zenovia Vlahakis vs Donna Vlahakis, et. al.*; Index No. 523904/2019 (the “Kings County Action”)).

Plaintiff and Zenovia signed an engagement letter on September 1, 2019 wherein Zenovia agreed that the Kings County Action would be handled by James Kosakow, Esq., David Sweet, Esq., David Blasband, Esq., at the hourly rate of \$585, \$650, and \$500, respectively (NYSCEF Doc. 3). Among services provided, Plaintiff allegedly initiated the Kings County action, filed a notice of pendency, opposed multiple motions to dismiss, moved for injunctive relief, and replied to counterclaims (NYSCEF Doc. 2 at ¶ 8). Zenovia received legal fee invoices from Plaintiff from November 25, 2019 through March 10, 2021 seeking a total sum of \$299,663.65 (NYSCEF Docs. 12-22). Allegedly, Zenovia never objected to or protested these invoices (NYSCEF Doc. 2 at ¶ 12). Plaintiff ceased representing Zenovia in the Kings County action on or about March 5, 2021 (*id.* at ¶ 8).

Plaintiff filed their Complaint against Zenovia on May 24, 2021 (*id.*). Plaintiff sought relief under numerous legal theories, including breach of contract, quantum meruit, account stated, and unjust enrichment (*id.*) Zenovia filed an Answer with affirmative defenses on July 23, 2021 (NYSCEF Doc. 5). Zenovia also served discovery demands on July 23, 2021 (NYSCEF Doc. 6-7).

On August 18, 2021, Plaintiff filed this motion for summary judgment. Plaintiff moves for summary judgment on its account stated cause of action, arguing, in essence, that Zenovia's retention of the invoices without objection, and her partial payments of those invoices, allows for enforcement of the entire outstanding balance on Zenovia's account (NYSCEF Doc. 26).

Zenovia opposed the Plaintiff's motion for summary judgment testifying by sworn affidavit that she did complain about the enormity of the bills and so did her daughter in law, Pam Zaremba ("Zaremba") (NYSCEF Doc. 29). Zenovia further testified that at the time she received the invoices, she was 85 and in poor health, and for that reason made Zaremba largely responsible

for objecting to the invoices (*id.*).¹ Zaremba also testified via sworn affidavit that she would often call Mr. Kosakow to express Zenovia's frustration with Plaintiff's lack of progress and the mounting legal fees (NYSCEF Doc. 30 at ¶ 5). Zaremba flatly contradicts Plaintiff's sworn testimony that there were no objections to the invoices (*id.* at ¶ 7).

Defendant also opposes the reasonableness and accuracy of the invoices by pointing out that Mr. Sweet billed 11.5 hours to Zenovia's file on one day, 9.8 hours on another day and 9.5 hours on a third day (NYSCEF Doc. 31 at ¶ 9-10). Defendant also points out that David Blasband, Esq. billed 22 hours on December 6, 2019 and 3.2 hours on December 7, 2019 for "conference and prepare motion papers" (*id.* at ¶ 11). Eleven lawyers billed 230.4 hours for a total of \$110,737.00 from November to December of 2019 (*id.*). Finally, Defendant points out that there has been no discovery in this matter despite there being numerous factual issues which have yet to be resolved regarding the reasonableness of the legal invoices billed to Zenovia (*id.* at ¶¶ 17-19).

Plaintiff in reply admits that there is a billing error and that David Blasband, Esq.'s bill for 22 hours on December 6, 2019, should actually read 2.2 hours (NYSCEF Doc. 41 at ¶ 2). Plaintiff also argues that establishing the reasonableness of attorneys' fees is not required when an account has been stated, and that the Defendant's claims of complaints which are not substantiated by any documentation are insufficient to defeat Plaintiff's summary judgment motion (NYSCEF Doc. 42).

II. Discussion

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and

¹ Worth noting, Ms. Zenovia passed away during the pendency of this motion (NYSCEF Doc. 48).
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on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

To establish a prima facie entitlement to summary judgment on an account state claim, a movant must provide evidence of invoices, receipt by defendant, and a lack of objection by a defendant for a substantial period of time (*L.E.K. Consulting LLC v Menlo Capital Group, LLC*, 148 AD3d 527, 528 [1st Dept 2017]). As stated by Justice Cardozo, “the very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness” (*Newburger-Morris Co. v Talcott*, 219 NY 505 [1916]). The Court of Appeals has held that while mere silence and failure to object to an account stated cannot be construed as an agreement to the correctness of the account, the factual situation attending the particular transactions may be such that, in the absence of an objection made within a reasonable time, an implied account stated may be found (*Interman Indus. Products, Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 153 [1975]).

Here, Zenovia, who is now deceased, and despite being 85 at the time of receiving the invoices and in poor health, testified via sworn affidavit that she had called Mr. Kosakow, objected to the charges as excessive and unreasonable and that she would not be able to pay them (NYSCEF Doc. 29 at ¶¶ 11-12). Similarly, Zaremba, who was designated Zenovia’s agent due to Zenovia’s old

age and poor health, testified via sworn affidavit that she “would often call Mr. Kosakow to express Zenovia’s frustration with his firm’s lack of progress and the mounting legal fees. Zenovia was always very clear that she could not afford to pay these enormous fees.” (NYSCEF Doc. 30 at ¶ 5). Indeed, the dispute over the fees led to Zenovia terminating Plaintiff as counsel and retaining new counsel (NYSCEF Doc. 29 at ¶ 11).

These issues alone are material issues of fact which warrant denying summary judgment (*Boies, Schiller & Flexner LLP v Modell*, 129 AD3d 533, 534 [1st Dept 2015] [triable issue of fact as to client’s consent to amounts due under invoices preclude summary judgment where client had called firm and objected that she did not understand the charges, that they appeared unwarranted, and that she could not pay]; *Erdman Anthony & Associates, Inc. v Barkstrom*, 298 AD2d 981 [4th Dept 2002] [architects’ oral objections to purported account stated were sufficient to rebut any inference of implied agreement to pay stated amount to consulting engineering firm]; *see also Collier, Cohen, Crystal & Bock v MacNamara*, 237 AD2d 152 [1st Dept 1997] [on motion for summary judgment, evidence of oral objection, with some specificity, to account rendered is sufficient to rebut any inference of implied agreement to pay stated amount]).

Further at issue is that on this motion for summary judgment, Plaintiff has admitted that the account stated is not accurate where Davis Blasband, Esq., one of the partners who billed Zenovia, states “[Defendant’s counsel] rightfully points out in his September 30, 2021, affirmation in opposition to [Plaintiff’s] motion that [Plaintiff’s] January 23, 2020 invoice shows a time entry of 22 hours...on December 6, 2019. That plainly is wrong and is nothing more or less than an innocent transcription error” [NYSCEF Doc. 41 at ¶ 2]. As there has been no discovery since this motion for summary judgment was filed less than a month after Defendant filed its Answer, and there are admitted errors in the invoices as well as numerous issues of material fact which have

not yet been flushed out, the motion for summary judgment is premature. Therefore, Plaintiff's motion is denied without prejudice.

Accordingly, it is hereby,

ORDERED that Plaintiff's motion for summary judgment is denied without prejudice.

This constitutes the decision and order of the Court.

<u>9/29/2022</u> DATE					<u>Mary V Rosado</u> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<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