

**Scarola Zubatov & Schaffzin PLLC v Rocketfuel
Blockchain, Inc.**

2023 NY Slip Op 30331(U)

January 24, 2023

Supreme Court, New York County

Docket Number: Index No. 652887/2022

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

Justice

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INDEX NO. 652887/2022

SCAROLA ZUBATOV & SCHAFFZIN PLLC,

MOTION DATE 01/19/2023

Plaintiff,

MOTION SEQ. NO. 002

- v -

ROCKETFUEL BLOCKCHAIN, INC.,ROCKETFUEL
BLOCKCHAIN COMPANY

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for DISMISSAL.

Defendants’ motion to dismiss the first, second and fourth causes of action is denied.

Background

Plaintiff, a law firm, contends that it represented defendants starting in February 2021 in connection with a legal malpractice claim; plaintiff commenced a lawsuit related to that claim on defendants’ behalf. Plaintiff admits in the complaint that after working for defendants on an hourly basis for nearly a year, defendants terminated plaintiff in January 2022 and defendants hired a contingent fee attorney to take over the case that plaintiff had commenced. Plaintiff insists that defendant failed to pay the outstanding legal fees and nearly \$120,000 is owed.

Defendants move to dismiss the causes of action for breach of contract, account stated and declaratory judgment that plaintiff has a lien on any recovery defendants may receive in connection with the underlying lawsuit. Defendants claim that plaintiff may only proceed with

their third cause of action for quantum meruit. They insist that where an attorney has been discharged by the client, the attorney cannot seek relief under an account stated or breach of contract theory.

Defendants also claim that they timely objected to the invoices and so plaintiff may not seek relief under an account stated cause of action. Defendants contend they only received one invoice from plaintiff prior to their termination of plaintiff and that they timely objected to that amount (although that invoice is not a part of the instant case). They insist they did not receive any other invoices from plaintiff until after they terminated the firm.

Defendants argue that an attorney cannot bring a breach of contract claim after being discharged by the client and must, instead, only pursue a quasi-contract theory of recovery. They insist that this requires the Court to dismiss the first, second and fourth causes of action. Defendants emphasize that a client has the absolute right to fire his or her attorney and that firing an attorney cannot constitute a breach of a retainer agreement.

In opposition, plaintiff maintains that this is a straightforward case for unpaid legal fees. It observes that it was replaced as defendants' counsel because of financial issues faced by defendants. Plaintiff argues that it can pursue contractual theories of recovery and it is not limited to quasi contract theories. It claims the instant motion is wholly without merit and that the retainer agreement specifically provides that defendants are to compensate plaintiff upon termination by defendants.

Plaintiff further argues that dismissal based on CPLR 3211(a)(1)—documentary evidence—is not applicable where that evidence is merely an affidavit from defendants. Plaintiff insists that its claim for account stated should remain as well as its fourth cause of action for a lien.

In reply, defendants emphasize, again, that an attorney cannot assert a breach of contract after discharge by the client. They also argue that the account stated and the declaratory relief claim should be dismissed.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 NYS2d 972 [1994] [citations omitted]).

Breach of Contract

The Court denies the branch of the motion that seeks to dismiss the breach of contract claim. As an initial matter, the Court sees little difference between the first cause of action (for breach of contract) and defendants' insistence that plaintiff can only pursue its claim in quantum meruit (the third cause of action). Defendants are correct that the Court of Appeals has held in *Martin v Camp* (219 NY 170, 174, 114 NE 45 [1916]) that an attorney who was discharged by his client can only recover the reasonable value of the services provided. And, undoubtedly, a client has the right to fire his or her attorney at any time. But the Court views the parties' arguments about this Court of Appeals case to be wholly inapplicable to the instant matter.

This is not a situation (such as the example referenced in the *Martin* case) where the contract between the attorney and the client was for an agreed sum or specific amount (*see id.* at 174-75). The retainer agreement here did not say for instance, that defendants were to pay a flat

fee for all services. Instead, plaintiff sent invoices for the hours it expended on the subject matter. And to be clear, the breach alleged in the complaint is *not* that defendants discharged plaintiff as defendants seem to suggest in their papers (something that the *Martin* case makes clear is not permitted). It is that defendants allegedly hired plaintiff to perform legal services, plaintiff performed those services and then defendants failed to pay plaintiff for that work. That is a classic breach of contract claim and it has nothing to do with the fact that defendants fired plaintiff. Terminating an attorney does not invalidate a retainer agreement. In other words, the defendants are not being sued for changing attorneys – they had every right to do that. Rather, plaintiff is suing defendant for not paying the (allegedly) agreed upon fees incurred before the termination.

That the retainer agreement suggests that defendants will be liable for all amounts billed (NYSCEF Doc. No. 7 at 3) does not change the Court's decision. As with any breach of contract claim, the plaintiff will have to meet its burden to prove the elements of this cause of action, including the amount of damages, and defendants will, of course, have the right to challenge the claimed amount. Because the retainer agreement does not include a specific amount to be paid by defendants, that will require discovery about the charges and the basis for those charges (i.e., the hours actually spent on the case and the necessity of those charges). It is axiomatic that a retainer agreement is not a blank check for an attorney to spend countless hours on a matter. But that does not prevent plaintiff from pointing to the retainer agreement as the basis for the breach of contract claim and defendants did not point to any binding case law that holds to the contrary. And plaintiff has the right to pursue its fees under either theory (the breach of contract or the quasi-contract theory) at this stage of the litigation.

Account Stated

Similarly, the Court finds that plaintiff can pursue an account stated theory of recovery regardless of the fact that defendants discharged plaintiff. That defendants view the invoices as retaliatory because they were sent after the termination is of no moment. An attorney is clearly permitted to send invoices to the client for the time expended for charges that accrued while the attorney was representing the client. Defendants did not cite any binding caselaw for the proposition that terminating an attorney moots an invoice or absolves the client's obligation to timely object.

Moreover, the affidavit of Mr. Yankowitz does not constitute documentary evidence sufficient to dismiss this cause of action. Of course, an affidavit is not "unambiguous, authentic and undeniable" and it cannot form the basis of a CPLR 3211(a)(1) motion (*Attias v Costiera*, 120 AD3d 1281, 1283, 993 NYS2d 59 [2d Dept 2014]). And, even if the Court could simply credit such an affidavit on a motion to dismiss, the affidavit suggests that he made an objection on behalf of defendants to an invoice from July 2021 and does not expressly opine about whether there were any objections lodged with respect to the January 2022 invoices. He suggests instead that plaintiff was on notice about the objections to the legal fees from July 2021. That is clearly a contested issue of fact and renders the documentary evidence basis for the motion as inapplicable.

Fourth Cause of Action

Plaintiff's fourth cause of action seeks a declaratory judgment that it has a lien on any recovery that defendants may receive in the underlying lawsuit (the one plaintiff filed when it represented defendants). The Court denies the branch of the motion that seeks to dismiss this

claim. It is standard practice that an attorney may seek a charging lien in a case where it performed work and has not been paid. Plaintiff is not required to elect its remedies at this stage of the litigation.

Summary

The Court recognizes that defendants rely, nearly exclusively, on a federal court case for the proposition that an attorney discharged without cause can only seek unpaid legal fees in quantum meruit (*Liddle & Robinson, LLP v Garrett*, 720 FSupp2d 419 [SD NY 2010]). But that non-binding case merely offers a prediction (and dicta) about how the Court of Appeals might rule. And it concerns what remedies an attorney can seek where he or she demands unpaid legal fees pursuant to a blended contingency and hourly fee agreement (*id.* at 425). To the extent the decision claims that the Second Department has held that an attorney is limited to a quantum meruit recovery for unpaid legal fees, the Court observes that the Second Department matter referenced by the federal court (*Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 833 NYS2d 566 [2d Dept 2007]) concerned an oral retainer agreement and so it is inapposite to the instant matter.


The Court declines to issue any sanctions.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is denied and they are directed to answer pursuant to the CPLR.

Conference: June 8, 2023 at 11 a.m. By June 1, 2023, the parties are directed to upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement or 3) letters explaining why no discovery agreement could be reached. The Court will then assess whether an

in-person conference is necessary. The failure to upload anything by June 1, 2023 will result in an adjournment of the conference.

<u>1/24/2023</u> DATE					 ARLENE P. BLUTH, 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		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE