Tokayer v Kosher Sports Inc.
2023 NY Slip Op 31062(U)
April 4, 2023
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
COUNTY OF NEW YORK: PART 8

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Ira Daniel Tokayer,

Plaintiff(s),

-against-

Kosher Sports Inc., et al

Defendant(s).

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DECISION AFTER TRIAL
INDEX NO.: 157471/16

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

This is an action for unpaid legal fees. As a way of background, on December 9, 2020, plaintiff Ira Daniel Tokayer (Tokayer) obtained a money judgment in the sum of $155,541.35 against the corporate defendant Kosher Sports Inc (KSI). The action continued against the remaining individual defendant Jonathan Katz (Katz) and was assigned to this court for a bench trial. In his complaint, plaintiff asserts three causes of action for breach of the contract, account stated and quantum meruit against both defendants.

Prior to the scheduled trial, the parties engaged in pre-trial motion practice in motion sequences 12 and 13. In motion sequence 12, defendant Katz moved for an order to preclude any evidence of the unsigned retainer and any invoices at trial and to dismiss for failure to state a cause of action. In motion sequence 13, plaintiff moved to adjourn the date of the trial and to extend time to file opposition to defendant's motion in sequence 12.

In a decision dated June 14, 2022, the court denied Katz' motion to preclude plaintiff from presenting at trial either the unsigned retainer agreement or testimony to

establish that Katz did in fact sign the agreement. The court found that "...the unsigned retainer agreement satisfies 22 N.Y.R.C.C. Sec. 1215.1 (*see ie Kutner v. Vazquez*, 17 Misc3d 1123(A)[Dist Ct, Nass Co 2007]" and that "[t]here 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". However, the court held that there are triable issues of fact as to whether the retainer agreement is barred by the statute of frauds and also held that Tokayer may testify that the retainer agreement was signed by Katz as well as the work that was performed and the invoices sent to both defendants, KSI and Katz. As to motion sequence 13, the court denied plaintiff's motion to adjourn the trial and allowed and considered plaintiff's opposition to defendant Katz' motion sequence 12.

The bench trial was held via Microsoft Teams on August 10 and September 7, 2022. Daniel Tokayer and Leo Klein testified on behalf of the plaintiff at the hearing. Defendant did not call any witnesses.

At the conclusion of the trial, the court reserved decision and ordered the parties to submit post-hearing memoranda of law. Plaintiff submitted its post-hearing brief contending that Tokayer established that Katz breached the contract with him, that the statute of frauds does not apply under these circumstances, and that plaintiff is entitled to a judgement for account stated and quantum meruit. Defendant Katz contends that the underlying dispute was between the corporate defendant KSI and Queens Ballpark Company LLC (Mets), not Katz as an individual nor as a corporate officer of the company and that plaintiff's attempt to seek collection of his bills against Katz is

governed by the statute of frauds. Defendant also seeks sanctions against plaintiff.

Based upon the testimony and the evidence introduced at trial, the court makes the following findings of fact and conclusions of law.

FACTS

Plaintiff Daniel Tokayer is a practicing attorney in the area of commercial litigation with over 30 years of experience. Tokayer attended the University of Pennsylvania Law School and graduated in 1982. He is licensed in the states of Florida and New York since 1983 and 1985, respectively. He is admitted to practice before the Southern District of New York, the Eastern District of New York and the Second Circuit. Tokayer practiced law at several firms in New York City before starting his own practice over twenty years ago. Tokayer described his law practice as a sole practitioner as follows: "I provided competent legal services at an affordable and reasonable price with a goal of providing cost effective solutions to my clients' business problems. The services that I provide are all aspects of litigation from the drafting of pleadings to the conducting of discovery, both party and non-party, substantial motion practice, expert discovery, I have been engaged in mediations and arbitrations, evidentiary hearings, trials, both at the state and federal level, and appeals; and anything else that comes along with a general commercial litigation practice." and that he "...had many types of clients, but overwhelmingly I represent individuals"."

On April 27, 2010, Katz met Tokayer at his law office regarding a dispute with the NY Mets. Tokayer and Katz discussed the terms of retention including hourly rate, and Katz sent Tokayer a $3,000.00 retainer check that bounced but ultimately the retainer fee was paid. Tokayer testified that it is his custom and practice to prepare a

retainer agreement and that he did so in this matter memorializing the terms of his retention. The Agreement remained on his computer in an electronic retainers file in WordPerfect file format and as a PDF bearing a metastamp of its date April 28, 2010. The unsigned Retainer Agreement (P. Ex. 1) provides in pertinent part: "the terms of my [plaintiff's] retention by you [Katz] and your company" and concluded: "I look forward to assisting you [Katz] and your company." The Agreement further provided: You [Katz] agree to pay a fee based on my current hourly rate of $350. You [Katz] also agree to pay all out-of-pocket expenses which may be incurred, such as court fees, charges for service of process, deposition costs, and charges for copying, postage, overnight delivery services, messenger services, travel costs and the like. You [Katz] will be billed on a periodic basis and bills are payable in full upon receipt. You [Katz] agree that all outstanding bills will be paid in full before the commencement of trial. During the course of the representation, it may become necessary to increase my hourly rates. However, you [Katz] will be notified in advance of any such increase." There was one signature block at the end of the Agreement. Tokayer testified that he was present when Jonathan Katz signed the retainer agreement, but Tokayer could not locate or produce the original or copy of the electronic version of a signed retainer.

On June 9, 2010, plaintiff Tokayer commenced an action in the United States District Court for the Eastern District of New York entitled *Kosher Sports, Inc. v. Queens Ballpark Company, LLC*, Case No. 10-CV-2618 (JBW) (the "QBC Action"). (Trial Tr., 54, PEX 34.)

Tokayer performed legal services in connection with the QBC Action based on the QBC Action docket sheet and in plaintiff's detailed time records (PEX 3). These

services included drafting pleadings and amended pleadings, propounding and responding to document requests and interrogatories, reviewing documents, conducting non-party discovery, taking party and non-party depositions, engaging in expert discovery including expert depositions, engaging in motion practice, appearing at court proceedings, communicating with opposing counsel and conducting settlement negotiations.

Plaintiff sent bills/legal invoices accompanied by time records reflecting the services rendered to Katz and KSI at 392 Broad Avenue in Englewood, New Jersey, which is Katz' home. KSI's primary place of business and its address for service of process is listed with the New York State Department of State at 392 Broad Avenue, Englewood, New Jersey. Katz made an initial payment of $3,000 on a Kosher Sports Inc. check that bounced, but that check was subsequently replaced.

Tokayer sent periodic legal invoices for services rendered to Katz and KSI on the following dates: June 2010 for $10,425; September 2010 for $17,844.78; February 2011 for $13,640.02; May 2011 for $65,458.38; July 2011 for $90,1890.20; October 2011 $45,668.11; November 2011 for $10,983.46; January 2012 for $22,113.80 and April 2016 for $7,857.50. The April 2016 invoice was the only bill that indicated "Previous Balance $253,645 and "Total Due" $261,502.50. All other legal invoices included "not including amounts outstanding from previous bills". It is worth noting that the July 2011 invoice included over $11,000 in disbursements for messenger, copying, deposition fees and postage which were not itemized.

Tokayer testified that "[t]here are many emails in which I made it. I expressly said that Mr. Katz was responsible for my bills and I was looking to him for payment." He

further testified that there are marked exhibits which Tokayer looked to Katz for payment and that "[he] would rely on my able counsel to provide that information in a post-trial memo. Tokayer testified that an email dated August 31, 2011 reflects that Katz understood that "you", meaning Katz, "will deposit $50,000 into my account" and that "it was Mr. Katz's responsibility and obligation which he freely undertook to deposit monies and pay the bills…". Tokayer further testified that when he asked Katz about paying the court reporter and him for outstanding bills from June 2011, Katz responded in an email dated June 16, 2011 "Hopefully next week I will be able to get you something." In another email exchange in November 2010, Katz indicated when he returned from Florida he will make a deposit into Tokayer's account upon his return. In another email exchange in January 18, 2011, Tokayer requested a deposit on account and Katz responded "I'll try". Additional email exchanges have been provided to the court where Katz indicated that he would reach out to family to pay outstanding bills. Tokayer testified that in a May 8, 2012 email was the first time that he heard any objection in any form to any of the services he provided to Katz. Tokayer testified that it was his intention to remain the attorney for both Katz and KSI even though he was not paid and owed a lot of money.

At some point, Katz retained the firm Boies Shiller Flexner LLP to represent him in the QBC litigation. However, Tokayer continued to provide legal services consisting of 22.45 hours for an additional $7,857.50 over and above the outstanding legal bills even though new counsel appeared in the federal action.

Plaintiff called Leo Klein as his next witness. Klein is an attorney and referred defendant Katz to plaintiff Tokayer. Klein has known Ira Tokayer for approximately 30

years while Katz is a newer acquaintance and he has known him for approximately 10 years. He did not know if Katz received a retainer letter or if it came in letter form or, email form, but he did know "that he did receive some sort of communication from Ira Tokayer regarding his fee, his fee structure with him". Klein further testified that to the best of his recollection he was not present when Katz signed the retainer and that he spoke with Tokayer once to see if he could do better on his fee. On cross-examination, Klein testified that he didn't believe he ever saw a copy of the retainer agreement and doesn't remember Katz signing one. Klein testified that at the beginning of the representation he had a phone call with Katz to discuss the fee arrangement he had with Tokayer, but could not recall anything else discussed in that conversation because it was over 10-11 years ago. Klein testified that he was aware of the dispute between KSI and the Mets, that he did have conversations about the case with Tokayer and that he also appeared in court when Tokayer represented KSI in the federal court action. Klein further testified that the litigation was related to KSI v. Queens Ballpark, the action that Tokayer commenced on behalf of KSI which was not related to Katz personally. On occasion, Klein discussed the outstanding bills of Kosher Sports and Tokayer did mention a written retainer agreement.

The court reviewed invoices prepared by plaintiff and the professional services rendered and notes that the initials "LK" appears throughout the invoices for either phone calls, meetings/conferences and or court appearances between the years 2010 and 2011. Moreover, there are several emails from Leo Klein from an email address lklein@koshersportsinc.com to Ira Tokayer about the federal court litigation in or about 2010 and then at some point, Klein forgoes the KSI email and uses an aol email

address, leothelawyer27@aol.com.

The court finds Klein's testimony lacks credibility. He has known both plaintiff and defendant for over 40 years combined and to selectively recall certain facts to the omission of others, one is left to surmise that Klein does not want to take "sides". Moreover, Klein's testimony doesn't help or hurt either Tokayer or Katz, which the court believes was Klein's intention, to remain neutral to both, in an effort to preserve his relationship with both Tokayer and Katz.

LAW

In his Post-Hearing Memo, plaintiff's counsel argues that the court should apply the missing witness rule because Katz did not testify. The missing witness rule is related to the broader principle that "[a] trier of fact may draw the strongest inference that the opposing evidence permits against a witness who fails to testify in a civil proceeding" (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]; *see Matter of Commissioner of Social Servs. v Philip De G.*, 59 NY2d 137 [1983]; *Noce v Kaufman*, 2 NY2d 347 [1957]; *Dowling v Hastings*, 211 NY 199 [1914]; *Crowder v Wells & Wells Equip., Inc.*, 11 AD3d 360 [2004]). This formulation of the broader principle is generally applied in cases where the missing witness is a party (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d at 79-80; *Matter of Commissioner of Social Servs. v Philip De G.*, 59 NY2d at 141; *Matter of Renee R. [Tonya D.]*, 98 AD3d 1048 [2012]; *Matter of Clarissa S.P. [Jaris S.]*, 91 AD3d 785 [2012]; *Katz v Gangemi*, 60 AD3d 819 [2009]; *Brown v City of New York, 50 AD3d 937* [2008]; *Matter of Cantina B.*, 26 AD3d 327 [2006]; *Crowder v Wells & Wells Equip., Inc.*, 11 AD3d at 361-362). In these cases, which include jury trials, nonjury trials, and

hearings, the negative inference is generally applied without reference to the prerequisites for the missing witness rule, since those factors would be either irrelevant (the party's control over himself or herself) or deemed satisfied (the party's availability and personal knowledge of noncumulative, material facts) (*but see Crowder v Wells & Wells Equip., Inc., 11 AD3d at 361-362* [analyzing, in a multiple defendant case, the availability and noncumulative, personal knowledge of the missing defendant]). The rule permits the strongest possible adverse inference as to any evidence which the missing party or witness "would be in a position to controvert," but the rule "may not be used to draw any inferences beyond that" (*Matter of Jane PP. v Paul QQ.*, 65 NY2d 994, 996 [1985])

While the court is permitted to draw a negative inference against defendant Jonathan Katz for his failure to testify and controvert the testimony of plaintiff, that would not warrant a different result on this record. At the trial, plaintiff rested after calling its witnesses Tokayer and Klein. Defendant proceeded to call his only witness Jonathan Katz when plaintiff's counsel objected on the ground that "witnesses are not supposed to be in the same room as the attorneys" and that "I think the UCS published a protocol for virtual trials". Defense counsel then opted to rely on Katz affidavits that were previously filed on NYSCEF and not call Katz. Defendant then rested over plaintiff's objection that he could not cross-examine Katz.

First, the court did not rely on Katz's affidavits to arrive at this decision after hearing. Regardless of whether or not Katz testified, Tokayer failed to meet his burden of establishing that he represented Katz personally for the reasons stated below and therefore the court finds that the missing witness rule would not warrant a different

result on this record. Moreover, it is unlikely that plaintiff believed Katz would testify that he signed the retainer in his personal capacity and that he agreed to be personally liable for any and all of Tokayer's legal bills.

For the reasons that follow, plaintiff failed to demonstrate a prima facie case on any of its claims. The four elements required of a cause of action for breach of contract are: [1] formation of a contract between the parties; [2] performance by plaintiff; [3] defendant's failure to perform; and [4] resulting damage (*Furia v. Furia*, 116 AD2d 694 [2d Dept 1986]).

Plaintiff has failed to establish through credible evidence at a two-day trial that Katz, entered into the retainer agreement in his individual capacity. While plaintiff argues that courts routinely grant judgement for breach of contract in favor of attorneys, the attorneys must show that they were retained by the parties they seek to enforce the retainer agreement against. Plaintiff testified that he represented both Katz and Kosher Sports Inc and that he represented Katz in his personal capacity and KSI in a federal court action involving the NY Mets. It is undisputed that Tokayer does not have the original or copy of the executed retainer agreement. He produced an unsigned retainer agreement from his computer that does not even contain his signature. Moreover, the evidence in this matter overwhelmingly focuses on plaintiff's representation of Kosher Sports Inc. The retainer check was paid via a KSI check, plaintiff announced that he was the attorney for KSI, and at one point plaintiff wrote that if his bill was not paid "I will have choice but to move to withdraw as the company's counsel".

On this record, Tokayer's testimony alone absent any other credible evidence establishing that Katz signed the retainer agreement is insufficient to establish that Katz

agreed to be held personally liable for breach of the retainer agreement. Moreover, Tokayer focuses on emails over the course of the federal court litigation between KSI and the NY Mets which he asserts is evidence that Katz had agreed to be personally liable. This is simply inaccurate. Katz' email comments, such as "Excellent" or "Even Stronger" back to Tokayer and typing his name "Jon" does not create personal liability. Furthermore, the state court complaint alleges that plaintiff was to "perform legal services in connection with a dispute concerning a distributorship agreement with Queens Ballpark Company LLC and a concession license agreement with Aramark Sports and Entertainment Services, Inc." and in the federal action that plaintiff was the attorney for Kosher Sports, Inc.

Assuming arguendo that the court credited Tokayer's testimony that Katz signed the version of the retainer agreement he has presented to the court, the use of the word "you" in the retainer agreement absent any other credible evidence does not create individual liability for Katz. The court reviewed the invoices that were sent to Katz at 362 Broad Avenue, Englewood, NJ, which is both his home address and principal place of business for KSI, and notes that the work performed by plaintiff was related to the federal court action. The fact that Tokayer believed that it would cause Jonathan Katz personal ruin does not warrant a different result on the record before the court. Tokayer is an Ivy League-educated attorney with over thirty (30) years of experience as a commercial litigator in state and federal courts. Plaintiff testified that as a sole practitioner for the last over twenty (20) years he has had "many types of clients, but overwhelmingly [he] represent[s] individuals like Mr. Katz who sometimes conduct business through an entity." and that he has clients sign retainers.

In light of this result, the court does not reach the issue of whether or not the statute of frauds applies here based on the foregoing reasoning and evidence.

In Plaintiff's post hearing brief, plaintiff argues that Katz concedes that there is an agreement between him and Tokayer and refers the court to NYSCEF 6 and 7 paragraph 22. There is no credible evidence in the record to conclude that Katz concedes this very point. In fact, plaintiff fails to include and conveniently omits the first sentence in paragraph 1 that provides: "Plaintiff was retained by Defendant Kosher Sports Inc. ("KSI") to pursue a breach of contract claim against the Mets."

Even plaintiff's own witness, Leo Klein, a practicing attorney, who referred Jonathan Katz to Tokayer, and has a relationship in some capacity with both individuals did not corroborate Tokayer's position that Katz not only signed a retainer agreement but that he also signed in his individual capacity. Klein testified that he had no recollection if he was present when an agreement was signed but that he knows there was some agreement.

Plaintiff's remaining causes of action, account stated and quantum meruit, also fail. An account stated exists when bills, invoices or statements evidence a party's indebtedness and that party does not object within a reasonable time (*Russo v. Heller*, 80 AD3d 531 [1st Dept 2011]; see also *Ryan Graphics, Inc. v. Bailin*, 39 AD3d 249 [1st Dept 2007]). Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails (*Abbott, Duncan & Wiener v. Ragusa*, 214 AD2d 412 [1st Dept 1995]).

Meanwhile, a cause of action for quantum meruit has four elements: "[1] the performance of services in good faith, [2] the acceptance of the services by the person

to whom they are rendered, [3] an expectation of compensation therefor, and [4] the reasonable value of the services" (*Fulbright & Jaworski, LLP v. Carucci,* 63 AD3d 487 [1st Dept 2009]).

Plaintiff commenced this action against defendants KSI and Jonathan Katz to recover legal fees. Plaintiff obtained a judgement in the amount of $155,541.35 against KSI in or about January 28, 2020. However, on this record, plaintiff did not establish that plaintiff represented Jonathan Katz in his individual capacity or that Katz, individually agreed to be personally liable for the legal fees incurred based on the invoices addressed to and sent to the 362 Broad Avenue address on a cause of action for account stated. As an Ivy-educated attorney with over 30 years of experience, the court is hard pressed to conclude that Tokayer represented Jonathan Katz in his personal capacity and that he performed legal services for Katz. While Katz communicated with Tokayer throughout the federal court litigation, that in and of itself does not establish that Katz agreed to be personally liable for the invoices. For example, Tokayer's reference to various emails that "I will get you something next week", meaning payment of a bill, does not create personal liability for Katz. There is no independent credible evidence to establish that Katz is personally responsible for KSI debt. Tokayer cannot create liability where none existed. Plaintiff's reliance on Katz objection to an invoice in 2012 does not warrant a different result.

Based on the foregoing, plaintiff has failed to establish a prima facie cause of action for either account stated or quantum meruit. Accordingly, the causes of action for account stated and quantum meruit are dismissed.

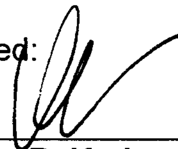
Defendant's request for sanctions is denied. While plaintiff did not prevail, the

court cannot say that this action was frivolous within the meaning of the court rules.

Based on the foregoing, it is hereby **ORDERED** that plaintiff's complaint is dismissed after trial and the clerk is directed to enter judgement accordingly.

Dated: New York, New York
April 4, 2023

So Ordered:



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