

**Kleinberg, Kaplan, Wolff & Cohen, P.C. v Rubino**

2023 NY Slip Op 31243(U)

April 3, 2023

Supreme Court, New York County

Docket Number: Index No. 654549/2019

Judge: Dakota D. Ramseur

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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. DAKOTA D. RAMSEUR PART 34M

*Justice*

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KLEINBERG, KAPLAN, WOLFF & COHEN, P.C.,	INDEX NO. <u>654549/2019</u>
Plaintiff,	MOTION DATE <u>12/14/2022</u>
- v -	MOTION SEQ. NO. <u>003</u>

RICHARD RUBINO,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for

SUMMARY JUDGMENT

In 2019, plaintiff Kleinberg, Kaplan, Wolff & Cohen, P.C. commenced this action against its former client, defendant Richard Rubino, seeking to recover \$97,520.56<sup>1</sup> for legal services it rendered representing him in an action to obtain sole ownership of his mother's apartment after her death. On these allegations, plaintiff asserts causes of action for breach of contract, in *quantum meruit*, and unjust enrichment. Thereafter, defendant answered and asserted counter claims for breach of contract, excessive attorney's fees, breach of fiduciary duties, and declaratory judgment. (NYSCEF doc. no. 6, Answer with counter claims.) In motion sequence 003, plaintiff moves for summary judgment pursuant to CPLR 3212 only on its breach-of-contract cause of action and for dismissal of defendant's affirmative defenses and counterclaims. For the following reasons, plaintiff's motion is granted.

**BACKGROUND**

In 2015, defendant's mother, Virginia Rubino, died and, in her will, devised her residual estate equally between her six children. (NYSCEF doc. no. 59 at ¶4, aff. in support.) Her estate included cooperative apartment M1806 located at 383 Grand Street, New York, NY, which she had held title to since 1981. (*Id.* at ¶6.) Thereafter, plaintiff opposed the sale of the apartment and the eventual six-way distribution of the proceeds derived therefrom. In February 2017, defendant hired plaintiff law firm to represent him "in connection with the administration of the Estate of Virginia Rubino's estate." The aim of the representation was specifically to "recoup an apartment from the Estate" and make defendant the sole owner. (NYSCEF doc. no. 4 at ¶9, complaint; NYSCEF doc. no. 70, representation agreement.) Defendant paid a \$5,000 retainer,

<sup>1</sup> Plaintiff invoiced for \$112,711.52 in legal fees plus fees and expenses incurred. However, it seeks only the above amount, opting to forgo any claim for fees connected in withdrawing as defendant's counsel.

with the agreement specifying that additional invoices for the firm's services would be sent monthly to defendant. Plaintiff did not send monthly invoices for approximately four months between December 2017 and March 2018, which plaintiff attributed, then and now, to a mix up in its billing practices. (NYSCEF doc. no. 90, email.) The invoice for these months that plaintiff eventually sent defendant was for \$62,589.93<sup>2</sup> (the "April 2018 invoice").

Plaintiff continued performing legal work for defendant after the billing issue and at no point did defendant terminate the representation agreement. (NYSCEF doc. no. 61 at 150-151, Rubino Deposition Transcript.) Plaintiff continued its representation for approximately another ten months before moving to withdraw as counsel for nonpayment. Plaintiff acknowledges that when it withdrew, it had not successfully overseen the litigation in Surrogates Court for sole possession of the co-op. However, plaintiff submitted a detailed affirmation that describes its strategy that led to at least two of defendant's siblings withdrawing their claim to the apartment and settling with the others for \$35,000 each (NYSCEF doc. no. 71, Settlement Agreement), when the approximate value of the apartment was between \$800,000 and \$1,000,000. (NYSCEF doc. no. 59 at ¶40, ¶5.) Though it's not clear who specifically negotiated the settlement agreement, plaintiff alleges, and defendant does not suggest otherwise, the final settlement was based entirely on its strategy and its investigation of the matter. (NYSCEF doc. no. 59 at ¶40; NYSCEF doc. no. 80 at 7, Carvajal affirmation [I never negotiated or drafted anything, and since my experience in Surrogate court was limited, I did not offer anything in terms of strategy for the case".]) Moreover, both defendant and Carvajal admit in their respective affidavits that they had knowledge of and approved plaintiff's strategy. (NYSCEF doc. no. 25, Rubino affidavit ["Mr. Carvajal served as a liaison during this process, I was copied on all correspondence and made aware of all conversation that I did not personally participate in. There is nothing that took place that I was not aware of"]; NYCEF doc. no. 80 ["Rubino was present at the only in-person meeting with plaintiff...I would immediately update him on any call or correspondence he was not available for".])

Plaintiff brought this breach-of-contract action to recover the legal fees defendant accrued. To this point, the only payment defendant has made to plaintiff is for the \$5,000 retainer fee. Defendant asserted various defenses and counter claims, alleging that plaintiff breached the representation agreement by failing to invoice monthly and by charging him unreasonable legal fees for the work it did perform. On this motion, plaintiff has moved for summary judgment pursuant to CPLR 3212 on its breach-of-contract claim and defendant's counter claims. The Court finds summary judgment appropriate.

## DISCUSSION

In a motion for summary judgment under CPLR 3212, the moving party bears the initial burden of establishing that no material issues of triable fact exist and that he is entitled to judgment as a matter of law. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Once the movant has made this prima facie showing of entitlement, it is incumbent on the opposing party

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<sup>2</sup> Defendant alleges that he immediately objected procedurally with being presented the invoice for four months and to the reasonableness of these fees. However, as will be discussed *infra*, defendant cites no evidence, either in his own deposition or in that of his personal attorney, Carlos Carvajal, that he objected to the invoices at the time he received the invoice.

to produce evidence in admissible form sufficient to raise a triable issue of material fact. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Since summary judgment is an extreme remedy, the Court must draw all reasonable inferences in favor of the non-moving party. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012].) A summary judgment motion should be denied where there is doubt as to the existence of material facts or where different conclusions can reasonably be drawn from the evidence. (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002].)

For summary judgment on its breach-of-contract claim, plaintiff must establish prima facie evidence of (1) the existence of a contract; (2) its own performance; (3) defendant's breach; and (4) damages. (*See Alloy Advisory, LLC v 503 W. 33rd St. Assoc.*, 195 AD3d 436, 436 [1st Dept 2021].) Plaintiff has established each element: neither party denies the existence of the contract; plaintiff invoiced for legal work performed (and provided a detailed description of the nature of the legal work, within both the invoice and its supporting papers) (NYSCEF doc. no. 59); defendant has not paid for the legal work; and plaintiff was thereby damaged by plaintiff's failure to pay.

In opposition, defendant posits two main defenses: (1) contrary to its assertion, plaintiff breached the contract by failing to invoice monthly; and (2) plaintiff failed to meet its burden of proving the amount of legal fees charged was reasonable in light of time worked and experience brought to the representation. (NYSCEF doc. no. 88 at 8-11.) Neither has merit. As to (1), defendant appears to argue that, because plaintiff did not bill monthly, and therefore did not strictly comply with the "[a]s is our practice, we shall bill you monthly for work completed"-provision in the representation agreement, plaintiff was in breach. Yet, despite asserting that plaintiff's failure to invoice "took away his ability to terminate" the representation agreement, this is not, as a matter of law, accurate. Unlike with other contracts, clients have an absolute right to terminate the attorney-client relationship, at any time, with or without cause. (*See Shaw v Manufacturers Hanover Trust Co.*, 68 NY2d 172, 177 [1986].)

As such, defendant's failure to terminate the relationship upon receipt of the April invoice is instructive. It indicates that the failure to bill for those four months was not a material breach. It indicates that, to defendant, the billing method was separate and immaterial to the primary purpose of the representation agreement, which was to obtain sole ownership of the apartment. (*See Exportaciones Del Futuro Brands, S.A. de C.V. v Authentic Brands Group, LLC*, 201 AD3d 499, 500 [1st Dept 2022] [Holding that a breach was material because it "substantially defeated the parties' contractual objective"]; *King v Fox*, 2005 US Dist. LEXIS 28638 at \*21 [SDNY 2005] [Holding that the sending of a single bill for legal fees accumulated over several months did not strictly conform to the terms of the engagement agreement, but any deviation did not constitute a material breach]; *Kasowitz, Benson, Torres LLP v Cabrera*, 2019 NY Slip Op 32738 [U] at \*21 [Sup. Ct. NY County 2019] [Holding that the failure to bill monthly was not a material breach because it does not go to the object of the contract and defendant suffered no damages arising therefrom].) Indeed, defendant proceeded with this course of conduct, with plaintiff's representation, for another 10 months. Given the above considerations, that plaintiff continued to inform both Carvajal and defendant of its actions during the four-month period (NYSCEF doc. no. 25; NYCEF doc. no. 80), and that defendant has failed to provide any

evidence of its own that he objected to the billing practice at the time, the Court finds that the failure to bill is an immaterial breach, such that defendant's obligation to pay is not excused.

That defendant continued to accrue legal fees for another ten months is instructive for another reason as well: it is evidence that he ratified the contract for legal fees accruing after plaintiff sent the April 2018 invoice. "Upon learning of a material breach of a contract, [the non-breaching party] must choose between terminating the contract and continuing performance... [If] defendants elected to continue [with the contract], it remained in force and performance by defendants was not excused." (*Parlux Fragrances v S. Carter Enters*, 204 AD3d 72, 90 [1st Dept 2022]; see also *Rebecca Broadway L.P. v Hotton*, 143 AD3d 371, 80-81 [1st Dept 2016] [A party faced with the other party's breach "has no right to represent himself as continuing to perform under the contract—and continuing to receive the other party's performance in exchange—while at the same time surreptitiously breaching his own duty by flouting his own implied duty of good faith and fair dealing"].) Here, even assuming arguendo that plaintiff breached the representation agreement, because defendant chose to affirm the contract, he remains obligated to plaintiff for fees accrued during that four-month period and beyond. Lastly, there are no triable issues of fact exist as to whether defendant affirmed the contract: defendant has offered no evidence of his own as to his words or conduct that suggest anything other than the intention to continue with plaintiff's representation. (See *Parlux Fragrances*, 204 AD3d at 87 [finding triable issues of fact precluded summary judgment where there was a dispute as to whether defendant's words and conduct after plaintiff's breach amounted to an affirmation of the contract].)

The remaining argument in opposition—that plaintiff is obligated, but failed, to demonstrate the reasonableness of the legal fees—is unavailing, as plaintiff, in the Court's view, has indeed demonstrated their reasonableness. Steven Popofsky, the attorney primarily responsible for handling the Surrogate's Court litigation, submitted an affirmation that described in particular detail the legal work performed, its strategy, various complications, and ultimately how their representation led to a favorable settlement. In the affirmation, Popofsky speaks to the difficulty of procuring the favorable outcome: Virginia Rubino's intended her estate be divided evenly between her children, several of whom defendant had a particularly acrimonious relationship (NYSCEF doc. no. 59 at ¶7-9); all of her children, even his brother who was co-executor of the Estate, opposed defendant obtaining sole ownership of the apartment (*id.* at ¶9-10); defendant sought an aggressive strategy of litigation that he believed his siblings could not afford (*id.* at ¶18-19, ¶21-22); and defendant's use of Carvajal as intermediary complicated, at least in part, the fact intensive research needed to develop their legal strategy (*id.* at 24). He further testifies that plaintiff ultimately developed a successful strategy revolving around defendant's extensive financial investment in the apartment's upkeep while Virginia Rubino was alive, a level of financial investment apparently unequalled by the rest of his siblings. (*Id.* at ¶27-30.) Described *infra*, that strategy helped defendant negotiate downward the share of the apartment his sibling would receive: for an apartment that is valued between \$800,000 and

\$1,000,000,<sup>3</sup> two siblings withdrew their claim to the apartment, and two others accepted payments of \$35,000.<sup>4</sup>

Defendant does not raise an issue of fact as to the reasonableness of the attorneys' fees—his opposition neither contradicts any of Popofsky's assertions that the Court has cited above nor brings forth non-speculative reasons to believe that mistakes, errors, or fraud are contained in the invoices.<sup>5</sup> From the Court's perspective, the first problem is that defendant and Carvajal do not submit affirmations denying the material allegations contained in Popofsky's affirmation, such as the value of the apartment, then and now, the extensive communications plaintiff sent informing them of plaintiff's progress in litigating his Surrogate's case, even during those four months, or the effort the firm devoted to reviewing the financial documents related to the apartment and the formulation of its legal strategy. Though his counsel has provided the Court with an affirmation, it is not based on personal knowledge of plaintiff's representation and offers nothing more to dispute the allegations contained in Popofsky's affirmation. (*See Fuller v KFG L & I, LLC*, 189 AD3d 666, 669 [1st Dept 2020] [The submission of a hearsay affirmation by counsel alone does not demonstrate factual issues requiring trial].)

As to non-speculative or conclusory factors weighing against reasonableness, counsel's affirmation challenges the experience of Popofsky working in Surrogate's Court, contending that a "little bit" of experience does not justify a \$700 per hour rate (NYSCEF doc. no 87 at ¶8), but this ignores that the representation agreement provides, "[o]ur current hourly rates are...\$530 to \$990 for partners and counsel." (NYSCEF doc. no. 89.) Similarly, defendant argues that the firm does not have a formal department handling trusts and estate litigation (NYSCEF doc. no. 88 at 11), but defendant made the choice to hire plaintiff in the first place. Defendant's list of allegations against plaintiff for impropriety and the accompanying dearth of evidentiary support goes on: (1) plaintiff allegedly engaged in the possibly frowned-upon practice of "block billing," yet the invoices, in fact, are not block billing—they detail the specific work that is being charged (NYSCEF doc. no. 27, invoices); (2) plaintiff allegedly double and triple billed for conferences, but defendant does not inform the Court as to which invoice he refers nor offer supporting deposition testimony from Carvajal or himself or testimony in which he questioned Popofsky about such practices; and (3) plaintiff allegedly "chose and implemented" the wrong strategy to complete the legal work, yet defendant entirely neglects to explain how this might be true. Lastly, defendant speculates that the invoices contain mistakes and cannot be trusted based solely on the fact that plaintiff billed four months late. This speculation contains no evidentiary support.

The contention that the Court should find summary judgment inappropriate until defendant has had a chance to provide "expert testimony" at trial is unpersuasive given that, after two years of discovery, defendant at no point identified an expert to testify in response to interrogatory requests (NYSCEF doc. no 85, interrogatory), plaintiff filed the Note of Issue on April 18, 2022, without objection from defendant, and plaintiff then moved for summary

<sup>3</sup> When first hiring plaintiff, defendant estimated the apartment to be worth \$850,000; current estimates, based on the selling price of other apartments in the area, are upwards of \$1,000,000. (*Id.* at ¶5.)

<sup>4</sup> Defendant's attempts to cast doubt on the efficacy of plaintiff's representation, noting that the law firm withdrew before a settlement was achieved, would be more persuasive if he cited any evidence of his own as to what transpired after the withdrawal.

<sup>5</sup> After conferencing with the Court, defendant stipulated to withdraw the allegation that the invoices "falsely represented Plaintiff's actual work in the matter."

judgment herein approximately seven months later, to which defendant could have submitted evidence in opposition or employed such an expert yet failed on both accounts. Again, on summary judgment motions, it is the opposing party who must come forward with evidence demonstrating material issues of fact (*Zuckerman*, 49 NY2d at 562)—that defendant has not done so precludes any need for expert testimony. In any event, defendant never specifies the subject matter to which the expert witness would testify to or the facts or opinions that would ground such testimony.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that plaintiff Kaplan, Wolff & Cohen, P.C.’s motion for summary judgment pursuant to CPLR 3212 is granted; and it is further

ORDERED and ADJUED that plaintiff is entitled to a judgment of \$97,520.56 against defendant; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that plaintiff and defendant shall appear at 60 Centre Street, Courtroom 341 at 10 a.m. on April 18, 2023, for a conference with the Court; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order, along with notice of entry on all parties within ten (10) days of entry.

This constitutes the Decision and Order of the Court.

4/3/2023

DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<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