SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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DAVIDOFF HUTCHER & CITRON LLP

Plaintiff,

- v -

STEPHEN K. BANNON,

Defendant.

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INDEX NO. 650913/2023

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 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

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Plaintiff's motion for summary judgment is granted.

Background

In this action to recover allegedly unpaid legal fees, plaintiff maintains that defendant owes $480,487.87 pursuant to a retainer agreement. It insists that it provided legal representation to defendant over the course of two years related to several matters. Plaintiff observes that its representation of defendant ended because defendant stopped paying his bills in late 2022. Plaintiff argues that it regularly provided defendant with invoices detailing the work performed and that defendant never objected to any specific bill or invoice. Plaintiff brings causes of action for breach of contract, account stated and quantum meruit. It points out that defendant made payments totaling $375,000 out of the more than $850,000 billed.

Defendant contends that he told plaintiff to stop working on his behalf in January 2022 and that plaintiff performed work on matters unrelated to the subject matter of the retainer agreement. He also argues that plaintiff failed to include the itemized invoices in its moving

papers and so plaintiff is not entitled to summary judgment on the account stated cause of action. Defendant also argues that there was always the possibility that an attorney for plaintiff would be a witness on behalf of defendant in one of the matters and so plaintiff cannot recover all that it seeks in the instant motion. Defendant maintains that it is too early, before there has been any discovery, to grant plaintiff summary judgment.

In reply, plaintiff argues that defendant is attempting to manufacture an issue of fact where none exists and that documentary evidence shows that defendant was actively accepting plaintiff's legal representation well after January 2022. Plaintiff asserts it attached each invoice to its moving papers and that each bill was mailed to defendant's personal address.

Account Stated

A plaintiff makes "a prima facie showing of his entitlement to summary judgment on his account stated claim by providing documentary evidence of the invoices, and an affidavit stating that he sent the invoices on a [regular] basis to defendant, and that defendant received the invoices and failed to object to the invoices until this litigation" (*Glassman v Weinberg*, 154 AD3d 407, 408, 62 NYS3d 54 [1st Dept 2017]).

"In the context of an account stated pertaining to legal fees, a firm does not have to establish the reasonableness of its fee because the client's act of holding the statement without objection will be construed as acquiescence as to its correctness" (*Lapidus & Assoc., LLP v Elizabeth St., Inc.*, 92 AD3d 405, 405-06, 937 NYS2d 227 [1st Dept 2012]).

Here, there is no dispute that plaintiff and defendant entered into a retainer agreement which provided that plaintiff would represent defendant "in connection with U.S.A. v. Stephen Bannon, et. Al, 20 Cr. 4 l 2(A T) in the Southern District of New York, and such various and other matters and issues as may arise from time to time" (NYSCEF Doc. No. 15 at 1). The

agreement also provided that "We will bill you on a monthly basis, which bill or statement is due and payable on presentation" (*id*. ¶ 6).

And plaintiff met its prima facie burden on its account stated cause of action through the affidavit of its account receivables manager, Mr. Batista, who included the relevant invoices and asserted that the invoices were mailed by plaintiff's accounting department to defendant on a regular basis (NYSCEF Doc. No. 10, ¶¶ 4, 5). Mr. Costello, an attorney for plaintiff, asserts that defendant never objected to these bills and that he had many conversations throughout plaintiff's representation of defendant about the invoices (NYSCEF Doc. No. 14, ¶¶ 20, 21). He also insists that defendant never told him to stop working on defendant's behalf (*id*. ¶ 21).

Defendant failed to raise a material issue of fact in opposition and so the Court grants the motion. Defendant's affidavit in opposition details how plaintiff is seeking fees in connection with four separate matters (a federal criminal case in the Southern District of New York, a subpoena from a committee of the U.S. House of Representatives, a federal criminal case in the District of Columbia and an investigation by the New York County District Attorney's Office). But defendant did not adequately assert that he timely objected to these invoices.

Instead, he claims that "My retainer agreement with DHC [plaintiff] lists my business address in Los Angeles, CA. However, DHC's invoices list my personal address in Washington, DC. I never personally received or reviewed DHC's invoices so I do not know the address to which DHC sent them. Likewise, I did not personally pay DHC's invoices. Rather, as in all my business affairs, I instructed my business team in Los Angeles, CA to pay DHC's invoices" (NYSCEF Doc. No. 22, ¶ 10). This does not state an issue of fact because defendant does not assert that the address listed on the invoices was incorrect or that he never received the invoices.

Instead, he claims that he never "personally received" them while also admitting that he would not have paid them anyway (his team would handle the payment).

These assertions, combined with the fact that defendant (apparently via his business team) paid plaintiff $375,000 in connection with these invoices compels the Court to grant the motion. Clearly, someone affiliated with defendant was getting these invoices and defendant admits *he* instructed his team to pay plaintiff. "An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account" (*Am. Exp. Centurion Bank v Cutler*, 81 AD3d 761, 762, 916 NYS2d 622 [2d Dept 2011] [discussing an account stated claim]). That defendant's business associates paid certain of these invoices at defendant's direction does not constitute a defense to the account stated claim.

Moreover, plaintiff also showed in reply that defendant was actively seeking plaintiff's legal representation well after the time (January 2022) that defendant allegedly told plaintiff to stop providing legal services (*see e.g.*, NYSCEF Doc. No. 32 [discussions about the New York County District Attorney's investigation in August 2022]).

Other Issues

The Court recognizes that defendant insists that plaintiff was not entitled to represent him on all four matters. But the retainer agreement does not strictly confine plaintiff's representation to just the SDNY investigation. The retainer agreement permitted plaintiff to represent defendant in "such various and other matters and issues as may arise from time to time" (NYSCEF Doc. No. 15 at 1). This provision does not constitute a basis by which defendant can avoid paying his legal fees as defendant did not include any evidence that he ever told plaintiff to not represent him in these matters. Put another way, defendant cannot receive the benefit of

plaintiff's legal representation and then insist he need not pay for it. And defendant did not claim, for instance, that the partial payments he made were limited solely to the SDNY case.

Defendant's assertion that he need not pay legal fees because an attorney for plaintiff might be a witness in the case in the District of Columbia is also without merit. As plaintiff pointed out, Mr. Costello filed a notice of withdrawal in that case in July 2022, well after the time defendant allegedly told plaintiff to stop representing him. Nor did defendant adequately explain how the fact that an attorney *might* be called as a witness is a valid defense to not paying legal bills.

The Court also severs and dismisses defendant's affirmative defenses as he did not sufficiently address them in opposition. He merely claimed that his answer asserted many affirmative defenses and listed them (NYSCEF Doc. No. 21 at 15) without offering arguments for why they compel the Court to deny the instant motion.

Finally, the Court finds that the instant motion is not premature. Plaintiff attached the invoices on which it seeks recovery and defendant did not raise an issue of fact in opposition about what material discovery he needs that could compel the Court to deny the instant motion. Because the Court finds that plaintiff is entitled to summary judgment on the account stated cause of action, it can award plaintiff a judgment as the remaining causes of action seek recovery on alternative theories of recovery (i.e., breach of contract and quantum meruit).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted on its account stated cause of action and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $480,487.87 plus interest at the rate of one percent (1%) as set forth

in paragraph 9 of the retainer agreement from December 20, 2022[1] along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that plaintiff is entitled to reasonable legal fees in connection with bringing this action pursuant to paragraph 10 of the retainer and plaintiff shall make a separate application for such fees on or before July 31, 2023.

7/7/2023
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[1] Plaintiff did not suggest a date for when interest should run and so the Court selected the date of the final invoice.