

Marcum LLP v Bloom

2024 NY Slip Op 30257(U)

January 18, 2024

Supreme Court, New York County

Docket Number: Index No. 651690/2022

Judge: Nancy M. Bannon

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

MARCUM LLP,

Plaintiff,

- v -

ERIKA BLOOM, DANIEL HILBERT,

Defendants.

-----X

INDEX NO. 651690/2022

MOTION DATE 8-18-23

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68 were read on this motion to/for JUDGMENT - SUMMARY.

In this breach of contract action to recover unpaid fees for forensic accounting services rendered in an underlying matrimonial action, *pro se* defendant Daniel Hilpert (“Hilpert”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff, Marcum LLP (“Marcum”) opposes the motion. The motion is denied.

The following undisputed facts are drawn from the parties’ submissions. Hilpert and defendant Erika Bloom (the defendants) were parties to a matrimonial action in the Supreme Court of the State of New York, County of New York, styled, Bloom v Hilpert, Index No. 311623/2016 (the “Matrimonial Action”). On or about July 19, 2018, the court in the Matrimonial Action so-ordered a Consent Stipulation Appointing Financial Forensic Evaluator, appointing Marcum as a neutral accountant to provide business valuations of all businesses in which the defendants had an interest and to provide a determination of the defendants’ income along with other services as required. The order directed that there would be two bills—a “Joint Bill” for the evaluation of all business values and income, for which both of the defendants would be responsible, and the “Defendant’s Bill” for “the *additional* cost of the added valuation dates of

December 31, 2017, and July 2018, and for the income evaluation as of December 31, 2017[,]” for which Hilpert alone would be responsible.

On or about August 15, 2018, Marcum and the defendants entered into a written agreement whereby the defendants formally retained Marcum and agreed to be responsible for all fees and other expenses payable to it for its services. The contract provided that the defendants would be charged hourly for Marcum’s services, plus administrative fees and direct reimbursable expenses such as travel and other out-of-pocket expenses. The contract also provided that Marcum’s findings may or may not be documented in the form of a written report, “and the absence of such written reports shall not diminish [Marcum’s] rights to be compensated” for the work it performed. Marcum thereafter undertook its work, providing the defendants with monthly itemized invoices.

In February 2019, Marcum issued a draft report. Marcum thereafter engaged in continued discussions, email correspondence and meetings with the defendants and their counsel regarding questions raised in relation to the draft report, and provided the defendants and their counsel an opportunity to submit additional documents and information that they believed Marcum did not consider in issuing its draft report. No final report was issued.

On January 13, 2021, Kenneth J. Pia Jr., a partner at Marcum, provided expert testimony in the Matrimonial Action, testifying for over six hours. Asked whether the conclusions in Marcum’s final report, had one been issued, would have differed from the conclusions stated in the draft report, Mr. Pia testified, as relevant here, that Marcum allowed the parties and their counsel an opportunity to submit additional information that they believed Marcum had not considered, or had not considered properly, in reaching its conclusions in the draft report, but that “there was no such information that was provided to us that would have changed our conclusions from the draft analysis” issued in February 2019.

In total, Marcum invoiced \$170,336.26 (including finance charges/late fees in accordance with the terms of its contract with the defendants) in connection with the Matrimonial Action. It has received a total of \$98,282.06 in payments from the defendants, leaving a balance of \$72,054.23 due and owing as of late July 2023. While the court, by order dated November 16, 2022, granted the plaintiff's motion for leave to enter a default judgment against non-answering defendant Ericka Bloom in the sum of \$65,305.23, that judgment remains unsatisfied.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting Nesbitt v Nimmich*, 34 AD2d 958, 959 (2nd Dept. 1970). Defendant Hilpert has failed to meet his burden on the motion in the first instance.

Hilpert principally contends that the invoices furnished to him by Marcum failed to comply with the requirements set by the court's order in the Matrimonial Action, specifically that the invoices be itemized and differentiate between charges for the "Joint Bill" and the "Defendant Bill"; that for several of the invoices received from Marcum, the beginning balance

does not match the previous month's ending balance; and that Marcum, after submitting its draft report in February 2019, double-charged for work it had already completed in connection with the issuance of the draft report. These contentions lack merit, are unsupported by the evidence submitted, and are thus insufficient to establish Hilpert's prima facie entitlement to judgment as a matter of law.

Review of Marcum's invoices reveals that they do, in fact, differentiate between charges for the "Joint Bill" and the "Defendant's Bill." Although they are not labelled as relating to either the "Joint Bill" or the "Defendant's Bill" as such, the invoices related to the "Defendant's Bill" are clearly identifiable. Unlike the majority of the invoices that relate to the "Joint Bill," those that relate to the "Defendant's Bill" expressly itemize "[t]ime devoted, to date, to the valuation analysis as of December 31, 2017, and July 2018 and the income evaluation of Daniel Hilpert as of December 31, 2017."

Hilpert's contention that there are discrepancies between the balances stated on Marcum's invoices is similarly off-base. Hilpert failed to submit a complete set of Marcum's invoices, and thus does not account for invoices totaling approximately \$34,000. Moreover, as is made clear by the Client Statement Summary submitted by Marcum, the reason that the beginning balance does not match the previous month's ending balance on certain of Marcum's invoices is simply due the fact that the invoices themselves do not list payments or credits that serve to reduce the previous month's ending balance.

Likewise, Hilpert submits no evidence in support of his contention that Marcum double billed for work it had already completed after submitting its draft report in February 2019. The invoices themselves do not establish this fact. Nor is this contention supported by Mr. Pia's January 13, 2021, testimony. Hilpert apparently reads Mr. Pia's testimony, that Marcum did not alter its conclusions after submitting its draft report, to mean that Marcum performed no further substantive work after February 2019, and thus that anything billed after that date was improper.


However, as stated, Mr. Pia did not testify that Marcum performed no additional analysis and evaluation after submitting its draft report, but merely that no additional information was submitted to Marcum following the issuance of its draft report that would have caused it to alter its conclusions.

Accordingly, upon the foregoing papers, it is

ORDERED that the motion of defendant Daniel Hilpert for summary judgment pursuant to CPLR 3212 is denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

1/18/2024
DATE

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 checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER