

**Foley Hoag LLP v M Inv. Capital, LLC**

2025 NY Slip Op 33371(U)

September 8, 2025

Supreme Court, New York County

Docket Number: Index No. 659264/2024

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M**

*Justice*

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Foley Hoag LLP

Plaintiff,

- v -

M Investment Capital, LLC et al

Defendant.

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INDEX NO. 659264/2024

MOTION DATE 06/24/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

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

Upon the foregoing documents, the motion is granted.

**Background**

In May of 2021, defendants M Investment Capital, LLC and Mark Shvartsburd engaged the plaintiff, Foley Hoag LLP, to represent them in two lawsuits in New York County. Plaintiff sent Defendants regular invoices related to the representation pursuant to the engagement letter, but in the fall of 2021, Defendants ceased to pay the invoices. Plaintiff continued to represent Defendants in the two proceedings, and on September 30, 2022, the parties entered into an Acknowledgment of Satisfaction and Account Receivable (the "Acknowledgement") that detailed an outstanding balance of \$1,366,028.93. Both the Acknowledgement and the initial engagement letter contained a provision stating that invoices would be considered proper and payable unless any concerns were communicated to Plaintiff within 30 days. After this agreement, Defendants made payments totaling \$300,000 towards the balance. Invoices then continued to be sent to Defendants through December for continuing legal services in the new amount of \$755,651.28.

Plaintiff filed the present proceeding in November of 2024, with claims for breach of contract and account stated. They allege that the outstanding amount owed is \$1,821,680.21. Defendants have answered, and the present motion for summary judgment is brought by Plaintiff.

### **Standard of Review**

Under CPLR § 3212, a party may move for summary judgment and the motion “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” CPLR § 3212(b). Once the movant makes a showing of a prima facie entitlement to judgment as a matter of law, the burden then shifts to the opponent to “produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 [2016]. The facts must be viewed in the light most favorable to the non-moving party, but conclusory statements are insufficient to defeat summary judgment. *Id.*

### **Discussion**

Plaintiff is moving for summary judgment in their favor on both causes of action. Defendants oppose on the grounds that the fees are excessive, that Mr. Shvartsburd had expressed concerns about the extent of the amounts charged, and that Plaintiff had not taken reasonable steps to mitigate the damage incurred. For the reasons that follow, the motion is granted.

#### **Plaintiff Has Established Prima Facie Entitlement to Amounts Due Under the Acknowledgment**

The Acknowledgment signed by all parties stated clearly that Defendants were satisfied with the work done by Plaintiff, that they received the invoices issued up to that point totaling

\$1,366,028.93, that Defendants confirmed that the listed fees and expenses were accurate and payable, and that they had consulted with outside counsel before signing. Conclusory arguments by Defendants that they were unhappy with Plaintiff's services and that they considered the fees excessive is not sufficient to rebut the prima facie entitlement to the amount owed under the Acknowledgment. *See, e.g., Geron v. DeSantis*, 89 A.D.3d 603, 604 [1st Dept. 2011]. Furthermore, it is undisputed that Defendants made payments totaling \$300,000 towards the unpaid balance after the Acknowledgment. Partial payment towards invoices received makes an unreasonableness objection unavailing. *See, e.g., Shaw v. Silver*, 95 A.D.3d 416, 416 – 17 [1st Dept. 2012]; *see also Tunick v. Shaw*, 45 A.D.3d 145, 149 [1st Dept. 2007]. Crediting the \$300,000 payments, Plaintiff has established entitlement to the remaining \$1,066,028.93 under the Acknowledgment and Defendants have failed to establish a material issue of fact regarding these invoices.

*Plaintiff Has Established Prima Facie Entitlement to Amounts Due Under the Post-Acknowledgment Invoices*

A secondary issue is whether Plaintiff has established a prima facie case for the invoices sent to the Defendants post-Acknowledgement. Defendants have argued that Plaintiff has failed to establish that the invoices were received because they were mailed to Mr. Shvartsburd's personal attorney in New Jersey. They also argue that Mr. Shvartsburd orally expressed concerns over Plaintiff's billing rates and fees, and that discovery is needed to establish the "exact nature and frequency" of Mr. Shvartsburd's objections. These arguments, however, fail to rebut the prima facie entitlement to a claim of account stated. To begin with, Defendants seem to be arguing both that they didn't receive the invoices sent post-Acknowledgement and that they

objected to them. Clearly, if they objected to invoices, they must have received them. The record contains adequate evidence that the invoices Plaintiff sent were received by the Defendants.

Secondly, discovery would not be necessary for this issue because the nature and extent of Defendants' objections to the invoices are facts that would be under their control, not Plaintiff. *See, e.g., Geron* at 604 (holding that discovery is unnecessary about whether a defendant objected to a firm's invoices, as that was a matter within his control). Vague and non-time specific complaints that an invoice bill was too high is not sufficient to defeat summary judgment on an account stated claim. *Berkman Bottger & Rodd, LLP v. Moriarty*, 58 A.D.3d 539, 539 – 40 [1st Dept. 2009]; *see also Zanani v. Schwimmer*, 50 A.D.3d 445, 446 [1st Dept. 2008]; *Geron* at 604. Between the invoices sent leading up to the Acknowledgment, the invoices sent post-Acknowledgement, and the \$300,000 credit for payments made by Defendants, Plaintiff has established prima facie entitlement to summary judgment in the amount of \$1,821,680.21.

*There Is No Disputed Issue of Material Fact Relating to Duty to Mitigate*

As a final note, Defendants argue that it had become clear that they were unable to pay the legal fees incurred well before Plaintiff ceased representing them and therefore, Plaintiff was obliged to mitigate their damages by ceasing to perform legal work for Defendants. As a matter of public policy, this Court has no wish to encourage attorneys to cease representation mid-matter when there are issues with prompt payment of legal fees or run the risk of forfeiting a potential later account stated claim. Furthermore, the nonpayment of legal fees alone is generally insufficient to justify withdrawal from legal representation. *See, e.g., Cashdan v. Cashdan*, 243 A.D.2d 598, 598 [2nd Dept. 1997]. Defendants' mitigation argument has not rebutted Plaintiff's prima facie entitlement to summary judgment to a sum certain. Accordingly, it is hereby

ADJUDGED that the motion is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Foley Hoag LLP and against defendants M Investment Capital, LLC and Mark Shvartsburd in the amount of \$1,821,680.21, plus interest in the statutory amount from the date of November 30, 2023.

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9/8/2025  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE