

**Mintz & Fraade, P.C. v Docuport, Inc.**

2012 NY Slip Op 30974(U)

April 11, 2012

Supreme Court, New York County

Docket Number: 603125/07

Judge: Doris Ling-Cohan

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summary judgment on the complaint and to dismiss defendant's counterclaim.

**Plaintiff's Motion to Dismiss Defendant's Counterclaim**

In support of its motion to dismiss defendant's counterclaim of breach of fiduciary duty, plaintiff maintains that such counterclaim is barred by the three (3) year statute of limitation which applies to such a claim. In opposition, defendant argues that its counterclaim is not barred the statute of limitations, since such counterclaim and plaintiff's claims arise from the same transactions, occurrences or series of occurrences, namely plaintiff's provision of legal services, and thus, pursuant to CPLR §203(d), defendant may pursue its counterclaim, in the nature of recoupment or set-off against any amount plaintiff seeks to recover on its claims. This court agrees.

CPLR §203(d) provides, in pertinent part, as follows:

"A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint, notwithstanding that it was barred at the time of the claims asserted in the complaint were interposed".

Thus, while defendant's breach of fiduciary duty counterclaim may have been time-barred when plaintiff filed its complaint, in accordance with CPLR §203(d), defendant is permitted to pursue its counterclaim, to the extent of the demand in the complaint, since the counterclaim for breach of a fiduciary duty, "arose from the transactions, occurrences, or series of transactions or occurrences, upon which [plaintiff's] claim[s are] asserted" (CPLR §203[d]); specifically, the alleged legal services rendered, in connection with plaintiff's claim for legal fees. *See Darby & Darby, P.C. v. VSI Intl.*, 178 Misc 2d 113, *affirmed as modified* 268 AD2d 270 (1<sup>st</sup> Dept 2000), *leave to appeal granted* 270 AD2d 975, *affirmed*

95 NY2d 308 (2000)(in accordance with CPLR §203[d], defendants' counterclaim for legal malpractice was determined not to be barred by the three (3) year statute of limitation to the extent of the demand asserted in the complaint, since it arises from plaintiff's claim for fees, resulting from the legal services rendered to the defendant). Thus, plaintiff's motion to dismiss defendant's counterclaim on the basis that it is time-barred is denied.

#### **Defendant's Cross-Motion to Dismiss**

Defendant's cross-motion to dismiss is procedurally defective in that a statutory basis for dismissal is not supplied. *See Rubin v. Rubin*, 72 AD2d 536 (1<sup>st</sup> Dept 1979); *Tortorice v. Tortorice*, 55 Misc 2d 649 (Sup Court, Kings County 1968); CPLR §2214(a); CPLR §3211(e). CPLR §2214(a) specifically provides that the grounds for the relief demanded must be specified in the notice of motion, which defendant failed to do herein. Moreover, the affidavit supplied by defendant in support of its cross-motion to dismiss, asserts numerous times, that, "there exists material issues of fact..." regarding plaintiff's claims, *conceding that* dismissal is not warranted at this juncture. [¶¶ 17, 19, 21, Tuli Affidavit, in Support of Cross-Motion]. Thus, defendant's cross-motion is denied.

#### **Plaintiff's Motion for Summary Judgment**

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "succinctly to warrant the court as a matter of law in directing judgment." CPLR § 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v NYU Medical Ctr.*, 64 NY2d 851, 853 (1985). To grant summary judgment it must be clear that no material and triable issue of fact is presented. *See Sillman v Twentieth*

*Century-Fox Film Corp.*, 3 NY2d 395 (1957). The court should draw all reasonable inferences in favor of the non-moving party, and should not pass on issues of credibility. *Dauman Displays, Inc. v. Masturzo*, 168 AD2d 204 (1<sup>st</sup> Dept 1990). Applying such principles herein, as detailed below, plaintiff's motion for summary judgment is denied.

At the outset the court notes that, while plaintiff's notice of motion indicates that it is seeking summary judgment with respect to (1) the complaint, and (2) defendant's counterclaim, plaintiff only argues in support of summary judgment based upon its account stated cause of action and dismissal of defendant's counterclaim, in the moving papers. Thus, as no legal or factual basis has been supplied with respect to granting summary judgment on plaintiff's causes of action for breach of contract, unjust enrichment and quantum meruit, summary judgment is denied as to such causes of action.

As to plaintiff's cause of action for an account stated, plaintiff failed to make a prima facie showing of entitlement to judgment as a matter of law, since the invoices supplied in support of its claim do "not set forth [its] hourly rate, the billable hours expended, or the particular services rendered", as required, and, thus, summary judgment is denied. *Ween v. Dow*, 35 AD3d 58 (1<sup>st</sup> Dept 2006). In *Ween*, the First Department, searched the record, *to specifically find* that plaintiff was not entitled to summary judgment for failing to make a prima facie showing, because the invoices submitted in support did not include counsel's "hourly rate, the billable hours expended, or the particular services rendered". *Id.* at 62; *see also Kaye, Scholer, Fierman, Hays & Handler, LLP v. L.B. Russell Chemicals, Inc.*, 246 AD2d 479 (1<sup>st</sup> Dept 1998); *Herbert Paul, P.C. v. Coleman*, 236 AD2d 268 (1<sup>st</sup> Dept 1997); *Diamond & Golomb, P.C.*, 140 AD2d 183 (1<sup>st</sup> Dept 1988). Similarly, here, the proof relied upon by plaintiff in seeking summary judgment on its account stated cause of action, is lacking in *any detail* with respect to the alleged legal

services rendered to defendant.

Specifically, plaintiff's submissions consist of a mere two (2) bills, one dated June 25, 2001 and one dated July 27, 2001; each of which contain, in essence, lump sum numbers, with no breakdowns or details as to the services allegedly rendered. The June 25, 2001 bill merely indicates: "FOR PROFESSIONAL AND PARAPROFESSIONAL SERVICES RENDERED AND MISCELLANEOUS EXPENSES POSTED THROUGH DECEMBER 31, 2000...\$385,715.20", and indicates a deduction for a payment of \$5,577.70, leaving a balance of \$380,137.50. [Exh. E, Notice of Motion for Summary Judgment]. The July 27, 2001 bill, issued approximately one month after the June 25, 2001 bill, lists a balance of \$608,971.94, and includes the sum of \$169,748.75, "FOR PROFESSIONAL AND PARAPROFESSIONAL SERVICES RENDERED FROM APRIL 1, 2001 THROUGH JUNE 30, 2001" and "MISCELLANEOUS EXPENSES" of \$4,433.19 (totaling \$174,181.95). [Exh. F, Notice of Motion for Summary Judgment]. Interestingly, the affidavit supplied in support of its motion for summary judgment, indicates numbers which are inconsistent with the July 27, 2001 bill, in that in the affidavit it is asserted that a total due of \$171,181.94 is due for professional and paraprofessional services rendered and miscellaneous expenses, yet, the July 27, 2001 bill lists \$174,181.95, as being owed. [¶15, Fraade Affidavit in Support of Motion for Summary Judgment]. Moreover, the July 27, 2001 bill, includes a references to a June 26, 2001 bill (which has not been supplied), and indicates as the balance for such bill, \$484,750.00. It is noted that the alleged balance of the June 26, 2001 bill (which has not been supplied), does not coincide with the balance of the June 25, 2001 bill which was supplied in the moving papers and indicates a balance of \$380,137.50.<sup>1</sup> No explanation for these discrepancies is supplied by

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<sup>1</sup> The July 27, 2001 bill also includes handwritten notes on the bottom of the bill, which appear to deduct from the \$608,971.94 balance, two payments made on November 23, 2001 and March 5, 2002, adjusting the balance to \$594,001.94.

plaintiff.

The court notes that plaintiff also claims to have performed “substantial additional legal services for [d]efendant after the time period covered by [the July 27, 2001] bill[,] [t]he balance which [d]efendant actually owes [p]laintiff is closer to \$750,000” [¶20, Affidavit in Support of Motion for Summary Judgment], however, plaintiff has failed to provide any details as to the additional services and admits that it “did not send [defendant] a bill reflecting this extra amount”. *Id.* Thus, as plaintiff failed to establish a prima facie case on its account stated cause of action, its motion for summary judgment on such claim is denied.

Moreover, in opposition, defendant has raised factual issues with respect to the account stated cause of action, to warrant a denial of plaintiff’s motion for summary judgment. Significantly, defendant has supplied a letter dated March 14, 2001, from plaintiff’s partner, Frederick M. Mintz to Docuport, in which it is indicated that Mintz & Fraade, P.C. was resigning as corporate counsel for “Docuport Inc., The Widecom Group, Inc., Metaclic.com, Inc....effective immediately”, yet the above referenced bills dated June 25, 2001 and July 27, 2001, *inexplicably* indicate charges for alleged services rendered, after the alleged resignation date of March 14, 2001. [Exh. 6, Defendant’s Notice of Cross-Motion].

Additionally, according to Raja Tuli (“Tuli”) defendant’s Chief Executor Officer (“CEO”), the subject two (2) invoices were not received until on or about October of 2002, that he objected to them and contacted plaintiff “to discuss the basis for the invoices so that [he] could understand what [d]efendant was being billed for and how [p]laintiff justified its inordinately high fees”. [¶8, Affidavit in Support of Cross-Motion & in Opposition to Motion for Summary Judgment]. According to Tuli, he was questioning plaintiff’s legal fees because he believed that defendant was “being billed for services that

were actually provided to other entities, namely The Widecom Group, Inc., and Metaclie.com Inc.”.

[¶10, *Id.*]. Thus, the portion of plaintiff’s motion seeking summary judgment on its cause of action for an account stated is denied.

As to defendant’s counterclaim for breach of fiduciary duty, plaintiff’s motion for summary judgment is also denied. In its answer, defendant asserts that, plaintiff, as defendant’s attorney, breached its fiduciary duty by performing services at the request of Norman Docteroff (“Docteroff”), defendant’s former President and CEO, which plaintiff knew or had reason to know that Docteroff was not expressly authorized to perform. According to defendant, since plaintiff negotiated, reviewed and drafted portions of Docteroff’s employment contract between Docteroff and defendant, plaintiff knew or should have known that Docteroff did not have the power and authority to write checks in excess of \$20,000, without a second signatory by a member of the board of directors, or bind defendant or enter into agreements or commitments on behalf of defendant, without prior approval of defendant’s board of directors.

In seeking summary judgment of dismissal of such counterclaim, plaintiff asserts in a conclusory manner that, “[a]ll of the professional services provided by [p]laintiff on behalf of [d]efendant were requested and approved by...Docteroff, and were for the benefit of [d]efendant...and that Docteroff, as president and CEO of [d]efendant, had authority to enter into agreements, such as the agreements with [p]laintiff to perform legal services on behalf of [d]efendant”. [¶24, Affidavit in Support of Motion for Summary Judgment]. In support, plaintiff merely refers to the deposition testimony of Tuli, defendant’s current CEO, in which Tuli allegedly testified that Docteroff had the authority to enter into contracts and sign checks on behalf of defendant. *Significantly, however*, plaintiff has failed to supply this court with the transcript of Tuli’s alleged testimony, and merely cites to select excerpts of what was allegedly testified

to; this is insufficient on a motion for summary judgment, where movant clearly has the burden of proof. Moreover, this Part's rules specifically require the submission of full deposition transcripts; here, not even a portion of the subject transcript is supplied. Further, while plaintiff maintains that "Tuli's deposition testimony completely contradicts [d]efendant's Answer and Counterclaim", since Tuli's deposition transcript has not been supplied, the court is unable to review such alleged contradictions. Moreover, in opposition, Tuli, defendant's current CEO, disputes plaintiff's conclusory assertions. Thus, as plaintiff has failed to establish that it did not breach its fiduciary duty to defendant as a matter of law, plaintiff's motion for summary judgment is denied.

Accordingly, it is

ORDERED that plaintiff's motion to dismiss defendant's counterclaim is denied; it is further

ORDERED that defendant's cross-motion to dismiss is denied; and it is further

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy of this order upon plaintiff, with notice of entry.

**FILED**

Dated: April 11, 2012

  
 APR 12 2012  
 DORIS LING-COHAN, J.S.C. NEW YORK  
 COUNTY CLERK'S OFFICE

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