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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS L. J.S.C. Justice PART 2

Index Number : 102288/2011
JACALYN F. BARNETT, P.C.
vs.
LABATE, ROSALIA
SEQUENCE NUMBER : 003
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the decision in sequence no. 004.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAY 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/16/12

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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THE LAW OFFICE OF JACALYN F.BARNETT, P.C.

Plaintiff,

Index No 102288/11

-against-

ROSALIA LABATE, a/k/a ROSALIA ISENBERG,

Defendant.

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YORK, J.:

Motions Sequence Number Three and Four are consolidated for disposition and resolved as follows.

BACKGROUND

This action for collection of attorney fees arises from the representation by the plaintiff's law firm, the Law Office of Jacalyn F. Barnett ("Barnett"), of defendant Rosalia Labate a/k/a Rosalia Isenberg ("Labate") in divorce proceedings. On May 20, 2010, defendant retained Barnett, replacing a prior counsel in an ongoing matrimonial action. Defendant paid the requested $75,000 retainer and executed a retainer agreement. In addition to Jacalyn F. Barnett, another attorney, Julia Maxfield ("Maxfield"), and a paralegal worked on Labate's the case. Barnett billed her services at the hourly rate of $500, Maxfield's at $400, and the paralegal's at $150.

Labate and her then-husband entered into a settlement agreement, affirmed by the Supreme Court, Nassau County, on October 12, 2010. During the course of the representation Barnett submitted seven invoices to Labate, the first on July 15, 2010 and the last on January 25, 2011, for a total sum of approximately $300,000. After the retainer was exhausted, Barnett was paid $100,000 on August 31, 2010 by Labate's then-husband out of the marital assets. That payment covered the August 12, 2010 invoice and was later applied to partially cover the September 17, 2010 invoice. Labate made one additional payment of $10,000, on November 16, 2010.

On February 7, 2011 defendant signed a stipulation to substitute representation by Barnett for pro se representation. She was urged to do so by Barnett herself. On February 23, 2011 the plaintiff law firm commenced this action for recovery of unpaid legal fees and expenses in the amount of $110,179.40 plus interest and $2,677.66 in unpaid third party invoices. The complaint asserts two causes of action, for an account stated and for breach of the retainer agreement. Defendant answered pro se averring, in essence, that she was overcharged for services, and that certain tasks listed on invoices were billed twice or sometimes three times by the two attorneys and the paralegal. She also counterclaimed, with little explanation, for damages of $150,000. No counterclaim of attorney malpractice was raised in these proceedings, but defendant started a separate action for malpractice against plaintiff in the Supreme Court, Nassau County by a verified complaint dated November 21, 2011.

Plaintiff moved for summary judgment, which was denied by this court on July 7, 2011. By that time Labate had retained a lawyer to represent her. The court observed that there was an outstanding demand by defendant for a breakdown of charges, and the parties were directed to proceed with discovery.

On November 7, 2011 Barnett filed the note of issue and on December 5, 2011 moved for (1) summary judgment, pursuant to CPLR 3212, on her first claim of account stated; (2) pursuant to CPLR 3211(b) and 3212, to dismiss affirmative defenses; and (3) pursuant to CPLR 3211(a) and 3212, to dismiss the counterclaim for failure to state a cause of action. She failed to attach pleadings to her moving papers, as required by CPLR 3212(b). The return date of the motion was January 5, 2012. On December 28, 2011, David Frisa, counsel for defendant, mailed his opposition to the motion and a cross-motion to compel discovery. They were received by plaintiff on the return date. The timing of the responsive papers was not in accordance with CPLR 2214(b) and 2103(2).

The court notes that both parties did not follow the requirements of CPLR. This, in itself, would be sufficient to deny their respective motions. Nevertheless, for the sake of efficiency, and in exercise of discretion in accordance with CPLR 2001, the court allowed plaintiff to correct her omission by including pleadings with her subsequent application, and disregarded defendant's untimely service of a cross-motion by providing plaintiff an opportunity to respond.

DISCUSSION

Plaintiff's Motion for Summary Judgment.

Account stated

Plaintiff initially moved for summary judgment on her claim of account stated in the amount of $110,179.40 plus interest and $2,677.66 in unpaid third party invoices. She subsequently agreed to write off $11,306.05 in attorney fees which defendant characterized as "erroneous and unsubstantiated," thus reducing the sum demanded to $98,873.35.

An account stated exists when a party to a contract receives bills or invoices and does not protest within a reasonable time. (Bartning v Bartning, 16 AD3d 249, 250; 791 N.Y.S.2d 541 [1st Dept 2005]). Plaintiff alleges that defendant never disputed any particular charge or the amount due (Complaint, ¶41). In her brief, she somewhat modified her position, saying that defendant raised her objection "for the first time, only *after* she executed the Stipulation of Settlement in her matrimonial action" (Pl. Brief, at 16, emphasis in the original). This is an admission on Barnett's part that plaintiff did raise objections. On Barnett's account, she unsuccessfully tried to reach Labate in the fall of 2010 to discuss the outstanding bills, but Labate refused to talk to her. Labate, however, contends that she tried to arrange a meeting with Barnett to get more details about charges on her bill, but was only offered a meeting with Julia Maxfield and the paralegal. Labate's unsubstantiated reports about these efforts are not sufficient to raise an issue of fact about a timely objection to charges. Zanani v Schvimmer, 50 AD3d 445, 445-46, 856 N.Y.S.2d 65 [1st Dept 2008] (defendant 's assertion that she orally objected to the bills is insufficient because she fails to state when she objected or the specific substance of the conversations in which the objections were made). *See*, also, Schulte Roth & Zabel, LLP v. Kassover, 80 A.D.3d 500, 916 N.Y.S.2d 41 [1st Dep't 2011]. E-mails sent by Labate on the eve of the settlement, October 10 (Labate Aff. Exh. 11), complaining about high legal costs and questioning the need for Barnett to appear in court are not relevant to payment for legal services previously provided.

However, Labate presented two written documents that support her position. One, a letter from her to Barnett, dated January 20, 2011, specifically asks for the breakdown of attorney fees and copies of bills from others included in the statements (Labate Aff. Exh. 8). Another, a letter from Barnett to Labate, dated December 22, 2010, is ambiguous (*id.* Exh. 13). Its final paragraph

states: "After the New Year let's sit down and figure out a way to resolve your outstanding obligation to this office in a way that works for you and the office. As you know, we all became very, very fond of you during our representation and were thrilled to meet your sister and to celebrate your new life. I would hate for us to end on a bad note." These words can be interpreted both as a reminder to pay the fees due, and as an acknowledgment that there is a dispute about them. It is unconverted that as of January 2011 Labate contested the bills. The issue is whether she waited unreasonably long to do so.

Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent is ordinarily a question of fact. It becomes a question of law only in those cases where only one inference is rationally possible. Legum v. Ruthen, 211 A.D.2d 701, 621 N.Y.S.2d 649 [2d Dept 1995]. Courts do not draw a bright line between a reasonable and unreasonable wait before contesting the charges, though the case law provides some guidance. Retention of invoices, without objection, for well over a year (I.S. Design, Inc. v Planned Mgt. Const. Corp., 243 AD2d 425, 425-26; 663 N.Y.S.2d 213 [1st Dept 1997)), or for six and ten months (Healthcare Capital Mgt., LLC v Abrahams, 300 AD2d 108, 108; 751 N.Y.S.2d 460 [1st Dept 2002]) was found unreasonable. In contrast, in Herrick, Feinstein LLP v. Stamm, 297 A.D.2d 477, 746 N.Y.S.2d 712 [1st Dep't 2002] the court held that a client's objection approximately two months after receipt of the first of four invoices did not constitute unequivocal assent to the balances stated. A delay of five months is a borderline case. *Compare* Shea & Gould v. Burr, 194 A.D.2d 369, 370-371, 598 N.Y.S.2d 261 [1st Dept.1993] (client's failure to object to attorney's unitemized bill for a period of five months "suffices to give rise to an account stated, especially in view of the partial payment made") with Reisman, Peirez & Reisman, L.L.P. v Gazzara, 15 Misc 3d 1113(A); 839 N.Y.S.2d 436 (Table) [Sup Ct Nassau Cty

2007] (whether, under the circumstances of this case, a delay of five months before challenging the statement of account was reasonable, is a question of fact).

Barnett's argument that plaintiff has affirmed the bills in sworn statements to the matrimonial court on July 26 and August 23, 2010 does not address the fees in dispute. Invoices outstanding at those dates were paid in full on August 31, 2010. The dispute concerns legal fees incurred subsequently, the earliest in September 2010. The balance due on the invoice of September 17, 2010, was $37,000, after a payment from Labate's then-husband had been credited towards her obligations. Absent evidence to the contrary, the payment of $10,000 in November 2010 was on this balance. This partial payment converts the invoice into an account stated. "Either retention of bills without objection or partial payment may give rise to an account stated" Morrison Cohen Singer and Weinstein, LLP v Waters, 13 AD3d 51, 51-52; 786 N.Y.S.2d 155 [1st Dept 2004]. There were no partial payments on further statements, beginning with the statement of October 6 which was due on October 16. About three months passed between the due date and a written objection and request for more itemized charges on January 20, 2011. The retention of invoices during this time is not in itself unreasonable. It cannot be found to be evidence of acquiescence to the invoice as a matter of law. Defendant thus raised a material issue of fact to be determined at trial that prevents the grant of summary for plaintiff on account stated.

Affirmative Defenses.

Plaintiff moves to dismiss affirmative defenses pursuant to CPLR 3211(b) and/or 3212 on the ground that none of them state a valid or meritorious defense and that there is no triable issue of fact concerning them. These defenses were advanced in the answer to the complaint which

Labate submitted pro se. What Labate called "the first affirmative defense" is an assertion that some of the services provided by plaintiff were duplicated by both attorneys and the paralegal, and were also unnecessary. This, in essence, is the defense that the attorney fees were unreasonable. The courts recognize such a defense in attorney fee disputes. The criterion for a motion to dismiss is whether a party has any cause of action, not whether it has technically stated such a cause of action. Guggenheimer v Ginzburg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182 [1977]. Reasonableness of fees is not a defense for the account stated. Lapidus & Assoc., LLP v Elizabeth St., Inc., 92 AD3d 405, 405-06; 937 N.Y.S.2d 227 [1st Dept 2012] (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 in its correctness). However, for invoices which are not an account stated, plaintiff is not entitled to the presumption that the charge is reasonable. The courts possess the traditional authority "to supervise the charging of fees for legal services under the courts' inherent and statutory power to regulate the practice of law," which they exercise in attorney fee disputes. Collier, Cohen, Crystal & Bock v. Francis W. MacNamara 237 A.D.2d 152; 655 N.Y.S.2d 10 [1st Dept 1997]. In Morgan & Finnegan v. Howe Chem. Co. 210 A.D.2d 62; 619 N.Y.S.2d 719 [1st Dept 1994] plaintiff's showing that it was retained in an urgent matter of great financial importance, and that five attorneys worked long hours under considerable time pressure to prepare successful opposition papers, did not obviate the need for a hearing. The court elaborated on the notion of reasonableness: the reasonableness of plaintiff's fees can be determined only after consideration of the difficulty of the issues and of the skill required to resolve them; the lawyers' experience, ability and reputation; the time and labor required; the amount involved and benefit resulting to the client from the services; the customary fee charged for similar services; the contingency or certainty of compensation; and the results obtained and the responsibility involved.

In the present case the defense that attorney fees are unreasonable is sufficiently stated, and does not warrant dismissal. Defendant also presented evidence to show that this defense has merit, preventing the grant of summary judgment on the matter. Labate's Affidavit refers to multiple occasions when e-mails which she was directed to forward to everyone in the law firm were reviewed and accordingly billed by all three persons. Defendant's attorney conducted a detailed analysis of invoices and pointed to instances that seem to be double or triple billing. Defense counsel's affirmation on matters within his expertise is admissible evidence in opposition to the motion for summary judgment in attorney fees litigation. Morgan & Finnegan, at 64.

The second affirmative defense states that plaintiff breached the terms of the retainer by not providing defendant with an itemized bill despite defendant's repeated requests. Paragraph 14 of the retainer agreement reads: "Included in the billing will be a detailed explanation of the services rendered" (Barnett Aff. Exh. A). Barnett objects to this defense by referring to her invoices, which she finds "highly detailed." The invoices list tasks performed by each attorney and the paralegal, the billing rate and the overall amount of time spent by them on the case each day. They do not break down the time expended on particular tasks. Defendant has sufficiently alleged the facts making out this defense to preserve it.

The third and fourth affirmative defenses that plaintiff overcharged defendant for services and performed unnecessary services repeat the first defense and go to the reasonableness of attorney fees. They are dismissed as duplicative of the first defense.

Counterclaim

The defendant's counterclaim restates that plaintiff billed defendant for unnecessary and duplicate services, and concludes that as the result defendant was damaged in the sum of

$150,000.00. This counterclaim fails to present a ground on which relief can be granted. Defendant's counsel did not oppose the part of plaintiff's motion to dismiss the counterclaim, and the counterclaim is thus dismissed.

Defendant's Cross-Motion to Compel Discovery.

Defendant Labate requests an order (1) compelling plaintiff to produce Julia Maxfield, Esq., an attorney in plaintiff's firm, for deposition; (2) to answer defendant's post-deposition discovery demands, dated December 28, 2011; and (3) precluding plaintiff from establishing any of her alleged damages for failure to provide a breakdown of her services.

The note of issue in this action was filed by plaintiff on November 7, 2011, prior to the deadline for discovery, which was November 30, 2011. According to the Uniform Rules for Trial Courts (22 NYCRR §202.21(e)) any party has 20 days after service of a note of issue to make a motion to vacate it. Defendant failed to do so within the prescribed time or even later, for good cause shown. Instead, she submitted additional discovery demands almost two months after the note of issue had been filed. This demand is untimely, and the court denies defendant's cross-motion.

CONCLUSION

Based on the above, it is

ORDERED that plaintiff's motion for partial summary judgment on her claim of account stated is denied, and it is further

ORDERED that part of plaintiff's motion to dismiss affirmative defenses is granted, and the third and fourth affirmative defenses are dismissed; and it is further

ORDERED that defendant's counter-claim is dismissed; and it is further

ORDERED that defendant's cross-motion to compel further discovery is denied.

Dated: 3/16/12

J.S.C.

LOUIS B. YORK
J.S.C.