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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 103294/2011

SATTERLEE STEPHENS BURKE

VS

CONEY ON THE PARK LLC, ET AL.

Sequence Number : 001

DISM ACTION/ INCONVENIENT FORUM

PART 11

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 annexed Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

FOR THE FOLLOWING REASON(S): _____

FILED

JUL 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 17, 2012

_____, 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: PART 11

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SATTERLEE STEPHENS BURKE & BURKE LLP,

Plaintiff,

-against-

Index No. 103294/11

CONEY ON THE PARK, LLC, BRIDGEFRONT, LLC, CITY VIEW GARDENS, LLC, AFRICA ISRAEL INVESTMENTS LTD. D/B/A A.I. USA, D/B/A AFRICA-ISRAEL USA, d/b/a AFI USA, A.I. & Boymelgreen Developers LLC, a/k/a A.I. Boymelgreen Developers LLC, Boymelgreen Developers LLC, Boymelgreen Developers Inc., Leviev Boymelgreen Developers LLC, a/k/a Leviev Boymelgreen, a/k/a Leviev & Boymelgreen Developers, LLC, d/b/a Leviev Boymelgreen, Atlantic Court, LLC, City View Towers LLC, Park Slope Gardens, LLC, Park Slope Terrace, LLC, Shaya B. Pacific, LLC, 15 Broad Street LLC, 23 Wall Commercial Owners LLC, Wall Street Commercial Owners LLC, 20 Pine Street LLC, 85 Adams Street LLC, 60 Spring Street LLC, W Squared, LLC, XYZ Corp., 1-10.

Defendants.

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JOAN MADDEN, J.:

In this action for unpaid legal fees and expenses, plaintiff *pro se* Satterlee Stephens Burke & Burke LLP (Satterlee Stephens) moves for an order, pursuant to CPLR 3211 (a) (7), dismissing the counterclaim for legal malpractice of defendants Africa Israel Investments LTD d/b/a A.I. USA, d/b/a Africa-Israel USA, d/b/a AFI USA, Boymelgreen Developers, LLC, 15 Broad Street LLC, 23 Wall Commercial Owners LLC, Wall Street Commercial Owners LLC, 20 Pine Street LLC, 85 Adams Street LLC, 60 Spring Street LLC, and W Squared, LLC for failure to state a cause of action upon which relief may be granted. Defendants cross-move: for an order, pursuant to CPLR 3211 (a) (8), dismissing all claims as against Africa Israel Investments LTD d/b/a A.I. USA, d/b/a Africa-Israel USA, d/b/a AFI USA based upon a lack of jurisdiction; for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint against all

defendants based upon documentary evidence and upon plaintiff's failure to state a cause of action; and for an order dismissing the entire complaint based upon plaintiff's failure to properly plead pursuant to 22 NYCRR Part 137.6 (b).

Satterlee Stephens, a law firm located at 230 Park Avenue, New York, New York, charges the defendants with collectively owing $740,000 in unpaid fees and expenses for legal services rendered between October 2004 and January 2009. The firm contends that the various defendants have, at all relevant times, been involved in real estate ventures in both New York and Kings counties, and that between October 28, 2004 and January 31, 2009, it represented them in numerous litigations, either as defendants or as interested parties in both employment and real estate matters. The firm further contends that, while it received payments during these years from defendants, a substantial balance remains due and owing, and despite due demand, payment has not been forthcoming.

Satterlee Stephens commenced this action to recover the unpaid legal fees and expenses by filing a summons and complaint on or about March 17, 2011. The complaint contains causes of action for breach of contract, account stated and unjust enrichment. Issue was joined by service of a joint answer by defendants City View Gardens LLC, City View Gardens Phase II, LLC, Park Slope Gardens LLC and Park Slope Terrace, LLC on or about May 2, 2011, and by service of a joint answer by defendants Africa Israel Investments LTD (AFI Investments), d/b/a A.I. USA, d/b/a Africa-Israel USA, d/b/a AFI USA, Boymelgreen Developers, LLC, 15 Broad Street LLC, 23 Wall Commercial Owners LLC, Wall Street Commercial Owners LLC, 20 Pine Street LLC, 85 Adams Street LLC, 60 Spring Street LLC, and W Squared, LLC on or about June 10, 2011, together with a counterclaim for negligence/professional malpractice against Satterlee Stephens.

The background facts, as relevant to the motion and cross motion, are alleged as follows.

In or about 2002, real estate developers Lev Leviev (Leviev) and Jeshuya[1] Boymelgreen (Boymelgreen) entered into an arrangement to develop real estate in parts of the United States, including New York and Kings counties. At all relevant times Leviev has held a majority ownership interest in AFI Investments, an Israeli investment and holding company, and Boymelgreen, the founder of Boymelgreen Developers, at all relevant times, has held a majority ownership interest in multiple real estate holding companies. According to Satterlee Stephens, the arrangement was a joint venture and was memorialized in a 2002 written Memorandum of Understanding, which was executed by AFI Investments, through an XYZ Corp. in which it holds a 100% interest, and by Boymelgreen and his company, the defendant Boymelgreen Developers LLC, f/k/a Boymelgreen Developers, Inc. (hereinafter, Boymelgreen Developers). Pursuant to the Memorandum of Understanding, the parties purportedly agreed that each property they developed as part of their joint venture would be owned by a separate holding company, and that each holding company, with certain exceptions, would be owned jointly by AFI Investments and Boymelgreen Developers, with AFI Investments owning 65%, Boymelgreen Developers owning 35%, and with AFI Investments paying Boymelgreen Developers a 5% management fee (Complaint ¶ 34).[2] Defendants 15 Broad Street LLC, 23 Wall Commercial Owners LLC, Wall Street Commercial Owners LLC, 20 Pine Street LLC, 85 Adams Street, 60 Spring Street LLC and W Squared, LLC are alleged to be the holding companies for Leviev and Boymelgreen's

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[1] Some of the documents annexed to the motion papers alternately refer to Jeshuya Boymelgreen as "Yeshayahu" Boymelgreen.

[2]Although not relevant to the resolution of the motion and cross motion, the selected portions of the Periodic Report annexed at Exhibit A, reveal that the interests are reversed: at a rate of 65% by Boymelgreen Developers and 35% by AFI Investments.

joint venture.

Satterlee Stephens contends that its involvement with defendants originated in 2004, when nonparty Eugene Zlatopolsky (Zlatopolsky), in his role as Manager of the Legal Department of Boymelgreen Developers, engaged the services of the firm in connection with a Kings County action. Pursuant to the letter of engagement (Retainer Agreement), dated October 28, 2004, and executed by Zlatopolsky on October 29, 2004, Satterlee Stephens was retained to represent Boymelgreen Developers, Inc., Park Slope Gardens, Inc., and (nonparty herein) Alisa Construction LLC in an action commenced against them by (nonparty herein) 345 3rd Street Housing Development Fund Corp., under Kings County index No. 13382/04 (Kings Action). The Retainer Agreement, which collectively refers to Boymelgreen Developers, Inc., Alisa Construction LLC and Park Slope Gardens, Inc. as the "Company," provides, in relevant part:

> You have asked us to represent you in connection with [the Kings Action] . . . You acknowledge that we have not acted as Company's general counsel and that our acceptance of this engagement does not involve an undertaking to represent the Company's interest in any matter, except to the limited extent described herein. Furthermore, the Company acknowledges that our representation does not entail a continuing obligation to advise the Company concerning legal developments unrelated to the [Kings Action] that might have a bearing on its affairs generally.
>
> While this letter is intended to deal with the specific legal services described above, these terms and conditions will also apply to any additional legal services that we may agree to provide that are outside the initial scope of our representation.
>
> * * *
>
> [Boymelgreen Developers, Inc., Alisa Construction LLC and Park Slope Gardens, Inc.] shall have the right at any time to terminate our services . . . termination shall not, however, relieve [Boymelgreen Developers, Inc., Alisa Construction LLC and Park Slope Gardens, Inc.] of the obligation to pay for all services rendered and disbursements and other charges made or incurred on its behalf prior to the date of termination.
>
> * * *
>
> Any claim, dispute or other controversy arising out of our engagement or the performance of our services hereunder shall only be resolved in a proceeding commenced in the State Supreme Court for New York county and in connection

> therewith and by execution hereof, you hereby agree to the exclusive in personam jurisdiction of such Court (and relevant Appellate Courts thereof) and agree to waive any claim of improper venue or forum non conveniens or of any right to trial by jury. In appropriate circumstances, you have the right to arbitrate any controversy, dispute, or claim arising out of or relating to our fee and charges through binding arbitration in New York City in accordance with Part 137 of the Rules of the Chief Administrator of the Courts of the State of New York then in effect. Any service of process . . . in connection with any such proceeding may be served by first class mail, postage prepaid, addressed to the parties at their respective addresses . . .

According to Satterlee Stephens, after the Kings Action was concluded, it continued to represent Boymelgreen Developers, as well as various defendant entities named in this action, in numerous transactions/litigations involving employment and real estate matters. It provided these legal services in accordance with the terms of the Retainer Agreement, and did so at the behest of Boymelgreen Developers on behalf of its various principals. Satterlee Stephens asserts that, between, approximately, 2004 and 2009, Zlatopolsky and his assistants supervised the firm's work, requested and received status updates, and provided the firm with needed documents, witnesses and affidavits for use in the legal work it performed for defendants. The firm also asserts that: (1) the invoices it generated for these legal services were sent to Boymelgreen Developers from November 30, 2004 through 2010; (2) payment for these services was made by the various defendants, with AFI Investments paying a portion of the invoices, consistent with its allocation of ownership interest set forth in the Memorandum of Understanding; (3) during that same time period, AFI Investments requested audit letters from Satterlee Stephens containing information as to the progress and status of different litigations involving Leviev and Boymelgreen's holding companies, and Satterlee Stephens complied, providing AFI Investments with detailed responses until in or about 2009; (4) defendants paid

over $1.5 million in legal fees and expenses over a five-year period without complaining about the scope, the quality of the services, the expenses incurred, or the amounts billed; (5) Boymelgreen Developers acknowledged receipt of the invoices and represented, both orally and in writing, that the defendants would pay the outstanding balance; and (6) despite repeated attempts to collect, at this juncture, the entire $740,000 remains outstanding.

Defendants answered the complaint and asserted a counterclaim for legal malpractice. The allegations supporting the counterclaim provide, in relevant part:

> 114. Plaintiff owed a duty to Defendants to perform its professional services in a manner consistent with the level of learning, skill and experience ordinarily exercised by legal professionals, and that reasonable and ordinary care and diligence were used to perform the work.
> 115. Plaintiff breached its duty to Defendants by, among other things, performing its services contrary to sound legal practices, failing to advised Defendants in a reasonable manner, and performing its professional services in a negligent, improper and careless manner.
> 116. By reason of the foregoing, plaintiff is liable to Defendants in a sum to be proven at trial, together with interest, costs and disbursements.

Satterlee Stephens now moves to dismiss the counterclaim for legal malpractice, asserting that the allegations are insufficient to state a claim, as defendants fail to identify any specific transaction or transactions which was affected by plaintiff's purported negligence/malpractice, what action or inaction constituted negligence/malpractice, and the nature of the loss or the negative outcome suffered as a result of Satterlee Stephens's alleged negligence/malpractice.

> [I]t is settled that an action for legal malpractice requires proof of three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages. In order to demonstrate proximate cause, [defendants/counterclaim plaintiffs] must establish that "but for" the attorney's negligence, [defendants/counterclaim plaintiffs] would have prevailed in the matter at issue or would not have sustained any damages

(*Between The Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Viener*, 290 AD2d

380, 380 [1st Dept] [internal citations omitted], *lv denied* 98 NY2d 603 [2002]).

Even viewing the counterclaim in the light most favorable to defendants, as this court must (*see Leon v Martinez*, 84 NY2d 83, 87 - 88 [1994]), it is evident that defendants do not meaningfully allege any of these elements, relying instead, on general, broad-based accusations of poor quality work over a nonspecific period of time. In addition, defendants' failure to plead specific factual allegations demonstrating that, but for the alleged negligence, there would have been a more favorable outcome in a particular, underlying transaction, mandates a dismissal of the counterclaim (*see Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082, 1083 [2nd Dept], *lv denied* 6 NY3d 701 [2005]; CPLR 3211 [a] [7]).

Turning to the cross motion, defendants seek a dismissal of the complaint based upon the failure of Satterlee Stephens to comply with Part 137 of the Rules of the Chief Administrator (22 NYCRR Part 137.6 [b]). This regulation provides, in relevant part, that:

> [a]n attorney who institutes an action to recover a fee must allege in the complaint: (1) that the client received notice under this Part of the client's right to pursue arbitration and did not file a timely request for arbitration; or (2) that the dispute is not otherwise covered by this Part.

Defendants contend that since the pleadings do not adequately state that they failed to timely file a request for arbitration, the complaint must be dismissed in its entirety.

Satterlee Stephens opposes the cross motion, asserting that under section 22 NYCRR 137.1 of New York's regulatory scheme arbitration cannot be compelled in this action as the amount in dispute is more than $50,000, and as, with the possible exception of 15 Broad Street LLC, it rendered its final services on March 16, 2009, two years prior to the commencement of this action.

Section 137.1 provides, in relevant part:

> (b) [t]his Part shall not apply to any of the following:
>
> (2) amounts in dispute involving a sum of less than $1,000 or more than $50,000, except that an arbitral body may hear disputes involving other amounts if the parties have consented;
>
> * * *
>
> (6) disputes where no attorney's services have been rendered for more than two years[.]

Given that the claimed legal fees and expenses total $740,000, and that the action was not commenced until on or about March 17, 2011, plaintiff meets the provisions set forth in 22 NYCRR 137.1 (b) (2) and (6).

With respect to that aspect of the cross motion which demands a dismissal of the complaint as against AFI Investments based on issues pertaining to personal jurisdiction, the motion is denied without prejudice to renewal.

The complaint alleges, at paragraph 12, that "Africa Israel Investments LTD, d/b/a A.I. USA, d/b/a Africa-Israel USA, d/b/a AFI USA . . . is, on information and belief, a publically traded foreign corporation doing business in the State of New York." Based upon its purported relationship with New York-based AFI USA, Satterlee Stephens sought to serve AFI Investments by sending a process server to AFI USA's office in Manhattan.

On April 1, 2011, the process server delivered a copy of the summons and complaint to AFI USA's director of legal services, Ilya Braz (Braz). Defendants assert that service on Braz did not constitute good service on AFI Investments, and in support of this assertion, submit Braz's affidavit. According to Braz, AFI USA is a separate and distinct entity from AFI Investments. He neither works for, nor gets paid by, AFI Investments. Braz denies that AFI

USA is authorized to accept service of process on behalf of AFI Investments and states that he explained this to the process server.

Braz also expresses doubts about the validity of the affidavit of service attested to by the process server. Although he acknowledges that "[o]n April 1, 2011 [he] was served with the complaint, which is the subject of this action, allegedly on behalf of AFI Investments" (Braz Aff., ¶ 3), he questions the accuracy of the description of him attested to by the process server,[3] suggesting that process server who executed the affidavit of service was not the same person he dealt with on April 1, 2011 (Braz Aff., ¶ 5).

With respect to service of process, Satterlee Stephens offers the affidavit of the process server, Frederick Pringle (Pringle), to establish that proper service was effected on April 1, 2011. In it, Pringle attests that he served a true copy of the summons and verified complaint:

> upon AFRICA ISRAEL INVESTMENTS LTD, d/b/a A.I. USA, d/b/a AFRICA-ISRAEL USA, d/b/a AFI USA, A.I. & BOYMELGREEN DEVELOPERS LLC, a/k/a A.I. BOYMELGREEN DEVELOPERS LLC at AFRICA-ISRAEL, U.S.A., The Times Square Building, 229 West 43rd Street, 10th Floor for AFI, USA by personally delivering and leaving the same with ILYA BRAZ, who informed deponent that she (*sic*) is a Director of Legal Services for AFIUSA authorized by appointment or by law to receive service at that address.
>
> Ilya Braz is a white male, approximately 40 years of age, stands approximately 5 feet 6 inches tall, weighs approximately 160 pounds with black hair and brown eyes.

New York recognizes that the proper affidavit of a process server attesting to personal service constitutes prima facie evidence of proper service (*Matter of de Sanchez*, 57 AD3d 452,

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[3]In the affidavit of service, the process server described Braz as a white male, approximately 40 years old, approximately 5'6" in height, 160 pounds, and has black hair and brown eyes (*see* Notice of Cross Motion, Exhibit D). Braz states that he is 33 years old, 5'9" in height and 180 pounds.

454 [1st Dept 2008]). However, here, there is a sharp disagreement as to whether Braz refused to accept service on behalf of AFI Investments, a traverse hearing should be conducted to resolve this issue (*Omansky v Gurland*, 4 AD3d 104, 108 [1st Dept 2004]).

In addition to their dispute over service of process, the parties dispute the larger issues pertaining to whether AFI Investments is subject to jurisdiction in New York. Nadav Grinshpon, a director of AFI Investments, submits an affidavit to establish that the Israeli-based company does not have a presence in New York, whether through AFI USA, or any other named or unnamed entity, and therefore, cannot be subjected to this court's jurisdiction. Grinshpon's affidavit states, in relevant part:

> 2. . . . AFI Investments does not conduct any operations or business in the United States or the State of New York. Other than being an indirect owner of interest in certain limited liability companies or corporations which may have operations or spaces of business in New York, AFI Investments has no contacts to the State of New York whatsoever.
>
> * * *
>
> 4. AFI Investments has no offices, warehouses, employees or telephone listing or any other such contacts/presence in the State of New York.
>
> * * *
>
> 6. . . . AFI Investments never entered into an agreement, deal or joint venture in its own capacity. Nor did AFI Investments ever operate or control the various properties identified in the Complaint. As such, AFI Investments was not involved in the transactions complained of by Plaintiff, and jurisdiction may not lie against it

(Notice of Cross Motion, Grinshpon Aff.).

Defendants contend that Grinshpon's affidavit establishes that AFI Investments neither conducts or transacts business in New York, nor does not maintain sufficient contacts to the state to justify personal jurisdiction under CPLR 301 or 302 (a) (1). They explain that AFI

Investments' only connection to New York is through its indirect ownership of interests in, possibly, two New York-based limited liability holding companies and/or corporations, and that its limited interest in these holding companies is too tenuous a connection to confer jurisdiction over this non-domiciliary. They argue that, because Satterlee Stephens's attempted service on this non-domiciliary, through Braz/AFI USA, could not confer jurisdiction over AFI Investments, the complaint should be dismissed as against it based upon lack of personal jurisdiction (CPLR 3211 [8]).

Satterlee Stephens disputes these assertions, contending that it has sufficiently alleged a basis for personal jurisdiction under CPLR 301, and/or a basis for long-arm jurisdiction under CPLR 302 (a) (1), as it has sufficiently established, for the purpose of CPLR 3211, that AFI Investments transacts and/or conducts business in New York either directly or through its "mere department(s)," agents, and/or holding companies.

As evidence of the relationship between AFI Investments and AFI USA, and certain of the other named defendants, Satterlee Stephens submits portions of The Africa Israel Investments Ltd.'s Periodic Report for 2006 (Periodic Report), which contains, among other things, a diagram/flow chart illustrating the connection between AFI Investments (also referred to in the report as the "Company") and various entities involved in real estate development in the United States. The Periodic Report contains a detailed description of AFI Investments' businesses, and the businesses of "The Group," a term which is not defined in the submitted portion of the report, but which, based on the report, appears to refer to an AFI Investments corporate conglomerate.

Plaintiff specifically refers the court to Periodic Report § 1.21, which contains information about "The Group's" involvement with real estate development. The report notes

that, as of 1997, it has "expanded its operation in this area outside Israel, through foreign investee companies that invest in various real estate ventures, including construction, acquisition or investment in projects in the US." The projects in the United States include "The Group's" real estate development projects in New York which are handled through (mostly) incorporated companies "that are under its ownership, in partnership with the developing entrepreneurs" (*see* Periodic Report § 1.8.3 et seq.).

Tables, under section 1.8.3, provide more specific information pertaining to "The Group's" real estate development projects. Among those listed as New York projects, are: "20 Pine," "15 Broad," "60 Spring," and "Atlantic Court," each of which lists Boymelgreen and/or Boymelgreen Developers as AFI Investments' partner. The Periodic Report also offers basic background information, explaining at Section 1.27:

> Mr. Yeshayahu Boymelgreen has been the Company's business partner in real estate development operations in the United States since 2002. These operations are carried out through a number of jointly owned corporations for each project. The said operations of the parties are based on a Memorandum of Understanding that was entered into on April 4, 2002 . . . between the Company or any subsidiary of the Company that shall be appointed by the same . . . and Mr. Boymelgreen and Boymelgreen Developers LLC ("Mr. Boymelgreen" and "the Boymelgreen Company" respectively, and jointly "the BD Group"), according to which the Company and the BD Group established a joint venture for the purpose of investing in real estate in the United States and Canada ["the Memorandum of Understanding"] (1.27.1.1).
>
> * * *
>
> Any property that is jointly owned by the parties is owned by a separate holding company (LLC), and the holders of each holding company are the Company and the Boymelgreen Company. As provided for in the Memorandum of Understanding, the Company and the BD Group will provide all capital that is required for the purchase of properties by each holding company, and that has not been otherwise obtained from one or more lenders ("the Contribution of the Partners"). . . . the Contribution of the Partners is divided between the parties as follows: the Company - 35% and the Boymelgreen Company - 65%, other then in certain cases in which the parties have reached specific agreements in respect to

> the Contribution of the Partners.
> Each such holding company is managed in accordance with a specific operating agreement . . . As provided for in the operating agreements, the BD Group manages the everyday business of each holding company, with [certain] exception[s] . . . as provided for in the operating agreements . . . " (1.27.1.3).
>
> * * *
>
> The Memorandum of Understanding . . . expires on April 4, 2007 . . . (1.27.1.6).[4]

According to Satterlee Stephens, these sections of the Periodic Report evidence AFI Investment's clear nexus to New York.

The firm further asserts that Levliev and/or AFI Investments' requests for audit letters regarding the New York transactions and litigations constitute additional evidence that AFI Investments operates and controls (in conjunction with Boymelgreen and Boymelgreen Developers) the real estate development projects in New York through the various defendants, including AFI USA. That despite defendants' repeated denials of affiliation between the two entities, there is substantial evidence establishing a parent - subsidiary relationship between AFI Investments and AFI USA, such that the latter is a "mere department" of the former. Therefore, proper service of process on AFI USA would confer jurisdiction by the New York courts over AFI Investments, pursuant to CPLR 301.

Alternately, plaintiff contends that, in the event that AFI Investments is not found to be doing business in New York "with a fair measure of permanence and continuity" (*Tauza v Susquehanna Coal Co.*, 220 NY 259, 267 [1917]), it is, nevertheless, subject to New York's

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[4]According to Satterlee Stephens, although the Memorandum of Understanding and joint venture agreement ended, pursuant to their respective terms in April 2007, Leviev and Boymelgreen made adjustments to the ownership structure of several of the defendant holding companies and Boymelgreen Developers continued to act as a disclosed agent, providing managerial services to defendants, and seeking, accepting and supervising the legal services of Satterlee Stephens.

jurisdiction, pursuant to CPLR 302 (a) (1), based upon retention and continued use of its legal services which are the basis of this action.

It is well settled that a state may exercise personal jurisdiction over a non-domiciliary defendant provided that it "have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" (*International Shoe Co. v State of Washington*, 326 US 310, 316 [1945] [internal quotation marks and citations omitted]). While a foreign corporation is present within New York, for the purpose of jurisdiction pursuant to CPLR 301, if it is "engaged in such a continuous and systematic course of 'doing business' in New York as to warrant a finding of its 'presence' in this jurisdiction" (*Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d 426, 430 - 431 [1972], citing *Frummer v Hilton Hotels Intl.*, 19 NY2d 533 [1967]; *see also Tauza v Susquehanna Coal Co.*, 220 NY at 267), it is also subject to jurisdiction under New York's long arm statute (CPLR 302(a)(1) when it "transacts business" here and there is a substantial relationship between the transaction and the claim.

CPLR 302 (a) (1) "is a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). Under this standard, in an action from attorneys fees by a New York attorney against an out-of-state client, long arm jurisdiction has been found even though the client never entered New York, where the record showed that client sought out a New York attorney and established an ongoing relationship with the attorney and communicated regularly with the attorney in the state

(*Fischbarg v. Doucet*, 9 NY3d 375, 380-381 [2007]).

Satterlee Stephens asserts that it has sufficiently pled jurisdiction under CPLR 302 (a) (1) based upon its claims for reimbursement for legal services. Specifically, it alleges that there is a sufficient nexus between its claims and the actions taken on behalf of AFI Investments, which caused the Retainer Agreement to be executed and the services to be provided over an extended period of time for the various defendants with respect to New York-based employment and real estate matters. Satterlee Stephens also contends that AFI Investments' payment of a proportionate share of the legal fees, and the (above referenced) requests it received (in New York) from Leviev/AFI Investments for audit letters updating the key players as to the legal work it was providing with respect to these New York-based employment and real estate matters constitute additional evidence of contact between AFI Investments and the firm sufficient to confer long-arm jurisdiction over AFI Investments under CPLR 302 (a) (2).

Although the existence of a parent - subsidiary relationship does not necessarily confer either agency or mere department status on the subsidiary for jurisdictional purposes (*see Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d at 432; *Arbenny v Kennedy Exec. Search, Inc.*, 31 Misc 3d 494, 499 [Sup Ct, NY County 2011]), the issue presented on a motion to dismiss, pursuant to CPLR 3211, is whether the allegations are sufficient to avoid a pre-answer dismissal.

> [A] party seeking additional discovery for resolution of what is, in effect, a complex in personam jurisdictional issue need not meet the standard of establishing a prima facie case; rather, the party need only convince the court that facts 'may exist' to defeat the dismissal motion, in order to warrant discovery on the issue, especially where [as here] the corporate relationships are complex

(*Banham v Morgan Stanley & Co.*, 178 AD2d 236, 237 - 238 [1st Dept 1991] [internal citations

omitted]; *Amsellem v. Host Marriot Corp.*, 280 AD2d 357 [1st Dept 2001]).

Upon a review of the parties' submissions, the court finds that Satterlee Stephens has shown the facts may exist to establish jurisdiction in this court over AFI Investments under CPLR 301 or CPLR 302 (a) (1) (*Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]). It is therefore appropriate for the parties to pursue jurisdictional discovery to resolve whether, as defendants contend, there is substantial independence between these entities, or as plaintiff contends, "[t]he control over the subsidiary's activities . . . [is] so complete that the subsidiary is, in fact, merely a department of the parent" (*Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d at 432), and whether service of process on AFI USA constitutes good service on AFI Investments.

Next, with respect to that aspect of the cross motion which seeks a dismissal of the causes of action sounding in breach of contract, account stated and unjust enrichment, as against the balance of the defendants, the cross motion is denied.

Defendants argue that the Retainer Agreement, which was executed by Zlatopolsky on behalf of Boymelgreen Developers, Inc., does not bind any of the other named defendants, and a dismissal of the breach of contract cause of action is required due to a lack of privity of contract. They also demand a dismissal of the unjust enrichment cause of action on the ground that plaintiff cannot establish that any of them, with the possible exception of Boymelgreen Developers, benefitted at the firm's expense, or knew and/or consented to the firm's services on their behalf. Lastly, their demand for a dismissal of the account stated cause of action is based on two theories: (1) an account stated assumes the existence of some indebtedness between the parties, which plaintiff cannot demonstrate; and (2) plaintiff cannot maintain an account stated

claim against defendants, other then possibly Boymelgreen Developers, because the firm never issued invoices to any of the other entities, and none of the other entities agreed to pay any invoices issued by plaintiff.

In opposition, plaintiff points out that Boymelgreen Developers (a/k/a or d/b/a Boymelgreen Developers, Inc.), as a disclosed agent for AFI Investments, was authorized to engage its firm's legal services, not only for the Kings Action, but also for matters involving each holding company and other entities owned and/or controlled by Boymelgreen, Boymelgreen Developers, Leviev, AFI Investments, or any combination thereof. It references specific language in the Retainer Agreement which confirms that Zlatopolsky contemplated the possibility that the firm would provide legal service after the completion of the initial Kings Action, and that it would do so pursuant to the terms of the Retainer Agreement ("[w]hile this letter is intended to deal with the specific legal services described above, these terms and conditions will also apply to any additional legal services that we may agree to provide that are outside the initial scope of our representation" (Notice of Cross Motion, Exhibit E, page 2). That, according to plaintiff, is what occurred.

It is well settled that "[t]he receipt and retention of an account, without objection, within a reasonable period of time, coupled with an agreement to make a partial payment gives rise to an account stated" (*Morrison Cohen Singer & Weinstein LLP v Ackerman,* 280 AD2d 355, 356 [1st Dept 2001]). To this end, it is alleged that, after the conclusion of the Kings Action, legal work was performed by Satterlee Stephens for the various defendants, expenses were incurred, and invoices were generated, and payments on multiple invoices were made without complaint or objection, by various defendant entities other than Boymelgreen Developers. As evidence of

their acknowledged obligation to pay for the legal services rendered, Satterlee Stephens has annexed, at Plaintiff's Exhibit D, copies of 11 checks it received which purportedly correspond to the firm's invoices. Each of the 11 checks was drawn on accounts held at the "Doral Bank" in New York City, under specific account names of: Boymelgreen Developers, LLC; 85 Adams, LLC; W. Squared, LLC; and 15 Broad Street, LLC. Having received substantial payments over the term of their professional relationship, it is Satterlee Stephens's contention that, in an unscrupulous attempt to avoid payment, defendants are suddenly denying the very relationships between the various entities which plaintiff, as counsel intimately involved in numerous transactions involving these entities, knows to exist.

Based upon an examination of the parties' submissions, questions exist as to whether any of the named defendants are contractually obligated under the Retainer Agreement to pay for legal services rendered and received[5], and as to whether and/or to what extent each named defendant is indebted to Satterlee Stephens under theories of unjust enrichment and account stated, which cannot be resolved at this juncture. As with the issues surrounding personal jurisdiction and service of process, discovery must be pursued in order to determine whether a nexus exists between the various defendants which might obligate some or all of them to pay some or all of the legal expenses at issue in this action, under breach of contract, account stated or unjust enrichment.

In connection with the account stated claim, the court recognizes that defendants'

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[5] Additionally, where, as here, the firm asserts claims sounding in account stated and unjust enrichment, any failure on its part "to comply with the rules on retainer agreements (22 NYCRR 1215.1) does not preclude [the firm] from suing to recover legal fees for services it provided" under these alternate theories (*Miller v Nadler*, 60 AD3d 499, 500 [1st Dept 2009]).

arguments, including that the invoices were addressed only to Boymelgreen Developers, raises issues concerning whether the Satterlee Stephens can recover against certain defendants based on an account stated. However, as the nature of the relationship between the parties has not been established, and as Satterlee Stephens submits evidence that the payments on the invoices were made by various defendants, the viability of the account stated claim cannot be determined at this time (*see Butowsky v. RWG Support Services, Inc.*, 1997 WL 72149 [SD NY 1997][denying summary judgment on account stated claim as against individual defendant when documentary and other evidence was insufficient to establish whether the legal fees sought were owed by the individual or corporate defendant]; *compare*, *Marchi Jaffe Cohen Crystal Rosner & Katz v. All-Star Video Corp.*, 107 AD2d 597 (1st Dept 1985][granting summary judgment on account stated claim where documentary evidence showed that one of the individual defendants expressly acknowledged receipt of legal bills on behalf of the company, and behalf of herself, and the other individual defendant and acknowledged the individual defendants' liability); *Brown Rudnick Berlack Israels LLP v Zelmanovitch*, 11 Misc 3d 1090[A], *5 [Sup Ct Kings Co. 2006][granting summary judgment dismissing account stated claim where there was no evidence that individual defendant, who was chairman of a company, agreed to be held liable for legal bills and had not made any personal payment of the bills]).

Accordingly, it is

ORDERED that the motion by plaintiff for an order, pursuant to CLR 3211 (a) (7), dismissing the counterclaim for legal malpractice is granted and the counterclaim is dismissed; and it is further

ORDERED that that aspect of the cross motion which seeks a dismissal of the entire

complaint based upon plaintiff's failure to plead pursuant to 22 NYCRR Part 137.6 (b), is denied; and it is further

ORDERED that that aspect of the cross motion which seeks a dismissal of the complaint as against defendants for failure to state a cause of action is denied; and it is further

ORDERED that that aspect of the cross motion which seeks a dismissal of the complaint as against Africa Israel Investments LTD d/b/a A.I. USA, d/b/a Africa-Israel USA, d/b/a AFI USA based upon a lack of jurisdiction is denied without prejudice following jurisdictional discovery; and it is further

ORDERED that upon completion of jurisdictional discovery, and if the issue has not been rendered moot, defendants may request a traverse hearing to resolve questions pertaining to service of process; and it is further

ORDERED that the preliminary conference scheduled for June 21, 2012, is hereby adjourned to October 4, 2012, at 9:30 am, as there are subsequently made motions to dismiss that must be resolved prior to such conference.

DATED: ~~June~~ July 17, 2012

J.S.C.

FILED

JUL 20 2012

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COUNTY CLERK'S OFFICE