STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

DENNIS B. SCHLENKER,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 5650-11
RJI NO. 01-11-105019

SALVATORE CASCINO; 13 LACKAWANNA PROPERTIES, LLC; BRONX COUNTY RECYCLING, LLC; TACONIC MEADOWS LLC; TEN MILE RIVER, LLC and COPAKE VALLEY FARM, LLC;

Defendants.

Supreme Court Albany County All Purpose Term, December 12, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Law Office of John Hoggan, PLLC
Attn: John D. Hoggan, Jr., Esq.
Attorneys for Plaintiff
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TERESI, J.:

Plaintiff commenced this breach of contract / account stated / quantum meruit action

claiming that Defendants failed to pay their fee for the legal services he rendered, in the amount of $52,480.94.[1] Issue was joined by Defendants, who set forth a legal malpractice counterclaim. Discovery has been conducted, a note of issue was filed and a trial date certain has been set (April 8, 2013).

Plaintiff now moves for summary judgement granting his account stated and breach of contract causes of action, while also dismissing Defendants' counterclaim. Defendants oppose the motion, and move to strike the note of issue. Plaintiff opposes Defendants' motion. Because Defendants' motion to strike is both procedurally defective and moot it is denied. Plaintiff, however, demonstrated his entitlement to summary judgment on his account stated cause of action, and no material issue of fact was raised. Such holding renders moot Plaintiff's motion for summary judgment on his breach of contract claim.[2] Plaintiff additionally demonstrated his entitlement to summary judgment partially dismissing Defendants' malpractice claim.

Considering first Defendants' motion, it is denied because they failed to comply with paragraph 11 of this Court's Preliminary Conference Stipulation and Order, dated December 6, 2011 (hereinafter "¶11"). The mandatory procedure litigants must employ when engaged in a discovery dispute in an action pending before this Court is clearly set forth at ¶11. After complying with 22 NYCRR 202.07, parties are required to telephone chambers, set up a conference, provide this Court with a statement outlining the dispute and engage in a discovery

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[1] In his breach of contract action, he added $2,041.99 to such amount, as an amount unpaid for copying services rendered by a non-party.

[2] Although the breach of contract claim seeks an additional $2,041.99 for a copying charge incurred, Plaintiff failed to allege that he has actually paid such charge and thereby suffered damages. Thus, he failed to demonstrate his entitlement to judgment as a matter of law on that portion of his claim.

dispute conference. All such steps must be taken "before filing any discovery motion." Here, although Defendants proffer conclusory allegations of 22 NYCRR 202.07 compliance, they wholly failed to comply with the balance of ¶11 prior to making this motion. Their failure "authorizes the court to fashion an appropriate remedy, the nature and degree of which is a matter committed to the court's sound discretion." (Pierson v North Colonie Cent. School Dist., 74 AD3d 1652, 1653 [3d Dept 2010], quoting Pangea Farm, Inc. v Sack, 51 AD3d 1352 [3d Dept 2008]). As such, in an exercise of discretion, Defendants' motion is denied.

Defendants' motion is also denied as moot. After filing this motion, Defendants sought and obtained a discovery related conference on the same issues they raised in this motion. Oral argument was heard and this Court issued a Letter Decision and Order, dated December 5, 2012. Because the issues raised in this motion have already been addressed and resolved by such Letter Decision and Order, the motion is denied as moot.

Turning to Planitiff's summary judgment motion, it is well established that "[s]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v Finn, 229 AD2d 869, 870 [3d Dept 1996]).

"On a motion for summary judgment, the moving party bears the burden of establishing that no material issues of triable fact exist and that it is entitled to judgment as a matter of law." (U.W. Marx, Inc. v Koko Contr., Inc., 97 AD3d 893, 894 [3d Dept 2012]; Alvarez v Prospect Hospital, 68 NY2d 320 [1986]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v City of New York, 49 NY2d 557 [1980]).

In general, an account stated is "an agreement between parties to an account based upon

prior transactions between them with respect to the correctness of the account items and balance due." (Levine v Harriton & Furrer, LLP, 92 AD3d 1176, 1178 [3d Dept 2012], quoting J.B.H., Inc. v Godinez, 34 AD3d 873 [3d Dept 2006] and Jim-Mar Corp. v Aquatic Constr., 195 AD2d 868 [3d Dept 1993], lv. denied 82 NY2d 660 [2000]). "An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account." (Am. Exp. Centurion Bank v Cutler, 81 AD3d 761, 762 [2d Dept 2011]; Morrison Cohen Singer and Weinstein, LLP v Waters, 13 AD3d 51 [1st Dept 2004]; Jaffe v Brown-Jaffe, 98 AD3d 898 [1st Dept 2012]; Shaw v Silver, 95 AD3d 416 [1st Dept 2012]).

As is specifically applicable here, "[a]n attorney can recover fees on an account stated with proof that a bill ... was issued to a client and held by the client without objection for an unreasonable period of time." (Antokol & Coffin v Myers, 86 AD3d 876, 877 [3d Dept 2011], quoting O'Connell & Aronowitz v Gullo, 229 AD2d 637 [3d Dept 1996], lv. denied 89 NY2d 803 [1996][internal quotation marks omitted]; Miller v Nadler, 60 AD3d 499 [1st Dept 2009]; Geron v DeSantis, 89 AD3d 603 [1st Dept 2011]; Ruskin, Moscou, Evans, & Faltischek, P.C. v FGH Realty Credit Corp., 228 AD2d 294 [1st Dept 1996]). On such claim "it is not necessary to establish the reasonableness of the fee since the client's act of holding the statement without objection will be construed as acquiescence as to its correctness." (Cohen Tauber Spievak & Wagner, LLP v Alnwick, 33 AD3d 562, 562-63 [1st Dept 2006], quoting O'Connell & Aronowitz v Gullo, supra [internal quotation marks omitted]). "Nor does [the attorney's] failure to provide a written retainer agreement bar its claim for an account stated." (Thelen LLP v Omni Contr. Co., Inc., 79 AD3d 605, 606 [1st Dept 2010] lv to appeal denied, 17 NY3d 713 [2011];

Roth Law Firm, PLLC v Sands, 82 AD3d 675 [1st Dept 2011]; Kramer Levin Naftalis & Frankel LLP v. Canal Jean Co., Inc., 73 AD3d 604 [2010]; Roth Law Firm, PLLC v Sands, 82 AD3d 675 [1st Dept 2011]; Miller v Nadler, 60 AD3d 499 [1st Dept 2009]). Moreover, "the fact that an invoice is not itemized does not ... prevent an account stated from being created." (ERE LLP v Spanierman Gallery, LLC, 94 AD3d 492, 493 [1st Dept 2012], quoting Zanani v. Schvimmer, 50 AD3d 445 [1st Dept 2008]).

On this record, Plaintiff demonstrated his entitlement to judgment as a matter of law on his account stated claim. Plaintiff alleged that his office billed for his legal services regularly and supported such assertion with copies of the invoices sent to Defendants. He unequivocally states that Defendants made no objection to his legal services or to the reasonableness of his fees. Moreover, Defendants consistently partially paid his invoices. Plaintiff submits an accounting of his billings and Defendants' payments. This accounting is largely reflective of the invoices submitted.[3] Based upon Plaintiff's proof that Defendants both retained his bills "without objecting to them within a reasonable period of time" and made "partial payment[s] on the account," Plaintiff demonstrated his entitlement to judgment as a matter of law on his account stated claim.

With the burden shifted, Defendants raised no triable issue of fact. First, because Defendants' attorney's affirmation is not based upon "personal knowledge of the operative facts [of Plaintiff's account stated claim, it is of no]... probative value." (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009]; Groboski v. Godfroy, 74 AD3d 1524 [3d

[3] The invoices submitted do not acknowledge all of Defendants' payments, specifically when a bill was paid in full prior to the next bill being issued. The accounting, however, acknowledges and reconciles all payments made.

Dept. 2010]). Defendants instead rely solely on the affidavit of Salvatore Cascino (hereinafter "Cascino"),[4] which neither attaches nor references any supporting documentary evidence. Cascino's conclusory, undetailed, "[s]elf-serving, [and] bald allegations of oral protests are insufficient to raise a triable issue of fact as to the existence of an account stated." (1000 Northern of New York Co. v Great Neck Medical Associates, 7 AD3d 592, 593 [2nd Dept 2004]; Darby & Darby, P.C. v VSI Intern., Inc., 95 NY2d 308 [2000]). Moreover, Cascino neither denied receiving Plaintiff's invoices nor to partially paying them. With such submission, Defendants raised no triable issue of fact.

Accordingly, Plaintiff's motion for summary judgment on his account stated claim is granted, rendering moot his motion for summary judgment on his breach of contract claim.

Turning to Plaintiff's motion for summary judgment dismissing Defendants' legal malpractice counterclaim, "[i]n order to recover damages in a legal malpractice action, [Defendants] must establish that [Plaintiff] failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that [Plaintiff's] breach of this duty proximately caused [Defendants] to sustain actual and ascertainable damages." (Dombrowski v Bulson, 19 NY3d 347, 350 [2012], quoting Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438 [2007][internal quotation marks omitted]).

As amplified by Defendants' bill of particulars, their malpractice claim is based, in part, upon three[5] occurrences within Plaintiff's representation of them in criminal prosecutions.

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[4] Cascino is not only individually named in this action, but is also an officer of each of the LLC defendants.

[5] Failed to accept an adjournment, wrongfully sought a global settlement and failed to move for joinder of duplicitous prosecutions.

Applicable to this portion of Defendants' malpractice claims, "[Defendants] must have at least a colorable claim of actual innocence that the conviction would not have resulted absent the attorney's negligent representation." (Id. at 350; Shields v Carbone, 78 AD3d 1440 [3d Dept 2010]). Defendants, however, resolved such criminal matter by a plea of guilty. Such plea conclusively negates any claim of actual innocence. Accordingly, Plaintiff established his entitlement to summary judgment dismissing Defendants' malpractice claim based on his alleged failure to accept an adjournment, his wrongfully seeking of a global settlement and his failure to move for joinder of duplicitous prosecutions. Because Defendants raised no triable issue of fact, this portion of Defendants' malpractice claim is dismissed.

Plaintiff failed to demonstrated, however, his entitlement to summary judgment dismissing the balance of Defendants' malpractice claim.[6] Although Plaintiff relies on the above guilty plea to support his summary judgment motion of Defendants' remaining malpractice claims, such reliance is misplaced because he did not demonstrate that such claims arose within the context of that guilty plea. Nor did he demonstrate, as a matter of law, such guilty plea's effect on Defendants' remaining claims. Moreover, Plaintiff neither defined the "standard [of care] nor explain[ed] that a reasonable attorney would reach the same conclusion that he did on the facts as they were presented to him" for each additional instance of malpractice amplified in Defendants' bill of particulars. (Jack Hall Plumbing & Heating, Inc. v Duffy, 100 AD3d 1082

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[6] As amplified by Defendants' bill of particulars, Defendants malpractice claim is also based upon Plaintiff's handling of the "Town of Copake... matter under Index No. 0864-06;" his failure to perfect an appeal in a matter brought by the Town of Dover; his failing "to address the conflict in orders from the matter pending under Index No. 1995-07...;" and his failure to raise "mandatory joinder... in the Article 78 matter pending in the Third Department (Docket No. 511502)."

[3d Dept 2012]). As such, Plaintiff failed to meet his initial burden on his motion for summary judgment dismissing that portion of Defendants' malpractice claim based on: Plaintiff's handling of the "Town of Copake... matter under Index No. 0864-06;" his failure to perfect an appeal in a matter brought by the Town of Dover; his failing "to address the conflict in orders from the matter pending under Index No. 1995-07...;" and his failure to raise "mandatory joinder... in the Article 78 matter pending in the Third Department (Docket No. 511502)." Accordingly, this portion of his motion is denied.

This Decision and Order is being returned to John Hoggan, attorney for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 31, 2012
Albany, New York

Joseph C. Teresi
JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated November 6, 2012; Affirmation of Brian Gardner, dated November 6, 2012, with attached Exhibits "A" - "J."
2. Affirmation of Shawn Nash, dated December 5, 2012, with attached Exhibits "A" - "C."
3. Affirmation of David Meglino, dated December 10, 2012, with attached Exhibits "A" - "B."
4. Notice of Motion, dated October 19, 2012; Affidavit of Dennis Schlenker, dated October 18, 2012, with attached Exhibits "A" - "K."
5. Affirmation of Brian Gardner, dated November 28, 2012, Affidavit of Salvatore Cascino, dated November 28, 2012.
6. Affirmation of John Hoggan, dated December 7, 2012, with attached Exhibit "A"; Affidavit of Dennis Schlenker, dated December 7, 2012, with attached Exhibits "A" - "X."