

**Carter Ledyard & Millburn LLP v Pearl Seas Cruises,  
LLC**

2013 NY Slip Op 33081(U)

December 5, 2013

Sup Ct, New York County

Docket Number: 155872/2013

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER  
*Justice*

PART 15

Index Number : 155872/2013  
CARTER LEDYARD & MILBURN LLP  
vs  
PEARL SEAS CRUISES, LLC  
Sequence Number : 001  
SUMMARY JUDGEMENT

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) 1, 2, 3, 4, 5, 6  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) 7, 8, 9  
Replying Affidavits \_\_\_\_\_ | No(s) 10

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 12/15/13

  
\_\_\_\_\_  
HON. EILEEN A. RAKOWER 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 15

-----X  
CARTER LEDYARD & MILLBURN LLP,

Plaintiff,

- against -

PEARL SEAS CRUISES, LLC,

Defendant.

-----X

PEARL SEAS CRUISES, LLC,

Counterclaim Plaintiff,

-against-

CARTER LEDYARD & MILLBURN LLP,

Counterclaim Defendant.

-----X

HON. EILEEN A. RAKOWER

This is an action to recover legal fees commenced by plaintiff Carter Ledyard & Millburn LLP (“Plaintiff”) with the filing of a Summons and Verified Complaint on June 27, 2013. The Complaint alleges claims for account stated and breach of contract against defendant Pearl Seas Cruises, LLC (“Defendant” or “Pearl Seas”). Defendant interposed an answer with counterclaims for legal malpractice and breach of contract on August 16, 2013.

Plaintiff now moves for an Order pursuant to CPLR §§3212 and 3211(a) and (b) granting Plaintiff summary judgment against Defendant in the principal

Index No.  
155872/2013

**DECISION  
and ORDER**

Mot. Seq. 01

amount of \$669,575.64 with interest on its account stated and breach of contract claims, dismissing Defendant's counterclaims and affirmative defenses, and awarding Plaintiff its costs and expenses incurred in this action. Defendant opposes.

In support of its motion for summary judgment, Plaintiff submits the affidavit of Donald J. Kennedy ("Kennedy"), a member of Plaintiff law firm, the affidavit of Gwen Hulet, a legal secretary at Plaintiff, the affidavit of Plaintiff's Comptroller Richard Brescia, and the affirmation of Aaron Cahn. Annexed to Cahn's affirmation is a copy of the August 22, 2008 engagement agreement provided by Plaintiff to Mr. Charles A. Robertson of Pearl Seas, Pearl Seas Confidential memo dated March 30, 2011, and email string from Plaintiff to Pearl Seas dated October 11-14, 2011, a correspondence exchanged between Plaintiff and Pearl Seas between November 4, 2011 and December 5, 2011, a letter from Plaintiff to Pearl Seas dated June 6, 2013, the Complaint, and Answer and Counterclaims.

Kennedy avers that in August 2008, pursuant to a written letter of engagement, Pearl Seas retained Plaintiff as legal counsel in connection with a pending arbitration arising out of a contract for the construction of a passenger vessel, Plaintiff continued to represent Pearl Seas through October 7, 2011, Plaintiff continued to send invoices to Pearl Seas for its services, Pearl Seas admitted receiving and retaining invoices from Plaintiff and made partial payments.

In opposition, Defendant submits the affidavit of Charles A. Robertson, which avers that Pearl Seas repeatedly complained about Kennedy's performance, objected to the firm's invoices, and terminated the firm due to Kennedy's performance. Furthermore, Defendant contends that discovery is needed from Plaintiff, including documents and testimony from Kennedy and his associate, Christopher Rizzo, regarding Defendant's complaints about Kennedy's performance and objection to Plaintiff's invoices.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce

sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 559 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 259 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-52 [1st Dept. 1989]).

“The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage.” (*Flomenbaum v New York Univ.*, 71 A.D.3d 80, 91 [1st Dept. 2009]).

“An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other . . . In this regard, receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor.” (*Shea & Gould v. Burr*, 194 AD2d 369,370[1st Dept. 1993]). “Oral objections to an account stated are sufficient to defeat a motion for summary judgment.” *Prudential Building Maintenance Corp. v. Burton Siedman Associates, et. al.*, 445 N.Y.S. 2d 758, 759 [1<sup>st</sup> Dept. 1982].

CPLR §3212(f) provides that, “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”

In light of issues of fact concerning whether Defendant objected to the invoices and Plaintiff's performance and Defendant's outstanding First Notice for Discovery and Inspection and Notice to Take Deposition, Plaintiff's motion for summary judgment is denied.

Plaintiff also moves to dismiss Defendant's seven affirmative defenses, which are as follows: failure to state a claim, breach of contract, failure to perform substantially, malpractice, set-off, laches, and objections to Plaintiff's invoices. Plaintiff also moves to dismiss Defendant's counterclaims for malpractice and breach of contract for failure to state a claim and on the basis of documentary evidence.

Pursuant to CPLR §3211(b), "a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." Here, Plaintiff has failed to demonstrate that Defendant's affirmative defenses are not stated or have no merit to warrant dismissal.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
  - (1) a defense is founded upon documentary evidence;
  - (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal

conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Pearl Seas sets forth the following “facts common to all counterclaims:”

13. Mr. Kennedy advised Pearl Seas that the company would prevail in its dispute with Irving Shipbuilding. He repeatedly gave assurances of success to Pearl Seas, all of which failed, as described below, because of his poor performance and legal malpractice.

14. However, Mr. Kennedy's performance was in sharp contrast to his assurances. In fact, Mr. Kennedy's and Counterclaim Defendants' performance as counsel for Pearl Seas fell far below the standard of care required of attorneys.

15. Specifically, and among other failings, Mr. Kennedy was routinely unprepared for appearances before the arbitration panel and in federal court.

16. Mr. Kennedy also failed to adequately understand critical legal issues, including the law relating to the issuance and timing of classification certificates.

17. Mr. Kennedy's cross-examinations of key witnesses at the arbitration hearing were poor. They were unfocused, poorly conceived, and poorly executed. Indeed, Mr. Kennedy's cross-examinations were so poor that Pearl Seas forced him to allow his junior associate to examine a key witness.

18. Mr. Kennedy's arguments to the arbitration panel were equally poor. He failed to make obvious arguments, and was extremely combative with the panel.

19. Mr. Kennedy also botched a key witness interview with a potentially critical witness, James Shephard, which further compromised Pearl Seas' case.

20. From Pearl Seas' perspective, Mr. Kennedy's poor performance in the

arbitration had caused the arbitration panel to turn against it, notwithstanding his repeated assurances of success. Indeed, Pearl Seas expected to do far better than they ultimately did in the arbitration, which was a direct result of Counterclaim Defendants' malpractice.

21. Mr. Kennedy also exhibited strange and unprofessional behavior outside of the arbitration. He was unwilling to take advice from anyone else, and did not work well with the term that Pearl Seas had put in place. He was unfocused and scatterbrained. He would frequently cut critical meetings short in order to get home to watch a television program that he said he was "addicted to."

22. Fearful that it was going to lose what was a winnable case, on or about October 7, 2011, Pearl Seas terminated Mr. Kennedy and his firm's representation of the company. Pearl Seas was forced to retain another law firm, which only added to the expenses related to the arbitration, but which did turn the case around immediately and produced an acceptable result.

23. In total, Pearl Seas paid Counterclaim Defendant more than \$2.2 million for its services, which had no value. That does not include the amounts that Counterclaim Defendant claim are due in this lawsuit.

24. Pearl Seas repeatedly made clear that it was unhappy with Mr. Kennedy's performance, and that it disputed the amounts billed to it.

Pearl Seas' first counterclaim is for breach of contract. "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, \*9 [1st Dept. 2009]). Accepting all allegations as true, Pearl Seas has stated a counterclaim for breach of the parties' engagement letter. Pearl Seas alleges that the parties entered into a contract which set forth certain terms and conditions, including that Defendant agreed to provide "quality legal services in an efficient, economical manner," that Kennedy failed to provide "quality" services as detailed above, and as a result, Pearl Seas has been damaged. Furthermore, Plaintiff's proffered evidentiary submissions do not flatly contradict the legal conclusions and factual allegations of the counterclaim.



Pearl Seas' second counterclaim is for legal malpractice. "To sustain a cause of action for legal malpractice, moreover, a party must show that an attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession." (*Darby & Darby v. VIS Int'l*, 95 N.Y. 3d 308, 313 [2000]). In order to prevail against an attorney on a legal malpractice claim, a plaintiff must first prove that the attorney was negligent, that such negligence was the proximate cause of the loss sustained, and that actual damages resulted therefrom (*see Tydings v. Greenfield, Stein & Senior*, 2007 NY Slip Op 6734, \*2 [1st Dept. 2007]). In order to establish proximate cause, the plaintiff must demonstrate that he or she would have prevailed in the underlying matter "but for" the attorney's negligence (*id.*). If the plaintiff cannot demonstrate proximate cause, the malpractice action must be dismissed (*id.*).

"Damages in a legal malpractice case are designed 'to make the injured client whole.'" *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, et al.*, 8 N.Y. 3d 438, 443 (NY 2007)(citations omitted). "A plaintiff's damages may include 'litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct.'" (*Id.*).

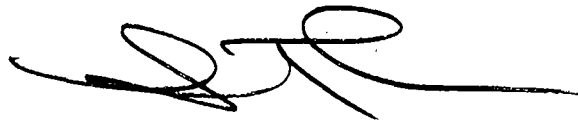
Plaintiff alleges that Kennedy "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" by "being routinely unprepared for appearances before the arbitration panel and in federal court," failing "to adequately understand critical legal issues," and conducting poor cross examinations and arguments. Plaintiff further alleges that "[b]ut for Counterclaim Defendant's legal malpractice, Pearl Seas would not have incurred as significant fees as it has already paid both to Counterclaim Defendant and the replacement law firm," and "[a]s a direct and proximate result of Counterclaim Defendant's legal malpractice, Pearl Seas has been damaged in an amount to be determined at trial but believed to be in excess of \$3 million." Accepting all allegations as true, Defendant has stated a counterclaim for legal malpractice and Plaintiff's proffered evidentiary submissions do not flatly contradict the legal conclusions and factual allegations of this counterclaim.

Wherefore it is hereby

ORDERED that plaintiff's motion is denied in its entirety.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: DECEMBER 5, 2013



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EILEEN A. RAKOWER, J.S.C.