

**Mintz & Gold, LLP v Daibes**

2013 NY Slip Op 33225(U)

December 16, 2013

Supreme Court, New York County

Docket Number: 104699/11

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: Paul Wooten  
Justice

PART 7

Index Number : 104699/2011  
MINTZ & GOLD, LLP.  
vs.  
DAIBES, FRED A.  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

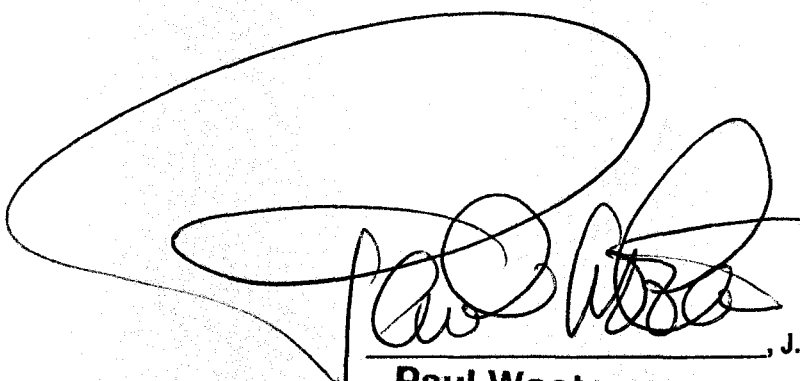
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is decided in accordance  
with the decision in Motion Sequence 002.

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

**FILED**  
DEC 19 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12/16/13

  
\_\_\_\_\_, J.S.C.  
**Paul Wooten**

- 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 — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

MINTZ & GOLD LLP,

**FILED**

INDEX NO. 104699/11

- against-

Plaintiff,

DEC 19 2013

MOTION SEQ. NO. 002

FRED A. DAIBES,

**NEW YORK  
COUNTY CLERKS OFFICE**

Defendant.

The following papers, numbered 1 to 3, were read on this motion by plaintiff for summary judgment pursuant to CPLR 3212.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits (Memo) _____	<u>2</u>
Replying Affidavits (Reply Memo) _____	<u>3</u>

Cross-Motion:  Yes  No

Motion sequences 002 and 003 are hereby consolidated for purposes of disposition.

Plaintiff Mintz & Gold LLP (plaintiff), a law firm, brings this action to recover unpaid attorney's fees allegedly owed by its former client, defendant Fred A. Daibes (defendant), pursuant to four outstanding invoices. Plaintiff seeks judgment against defendant under the theories of, inter alia, breach of contract, account stated, unjust enrichment and quantum meruit. Now before the court is a motion by the plaintiff for summary judgment in its favor, pursuant to CPLR 3212 (Motion Sequence 002). Also before the Court is a motion by the defendant for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint in its entirety (Motion Sequence 003). Defendant moves on the basis that the defendant was not a party to the contract for the legal services which plaintiff seeks to collect on, the defendant did not pay the retainer monies and was not billed for the legal services, the defendant is a principal and member of the clients under the retainer agreement and on the basis that plaintiff fails to

name necessary parties which is fatal to its claim as plaintiff alleges no facts to hold a member liable for bills of the companies. Plaintiff cross-moves for an order imposing sanctions against the defendant and defendant's counsel for engaging in frivolous conduct, pursuant to 22 NYCRR §130-1.1. Discovery in this matter is not complete and the Note of Issue has not been filed.

#### STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary

judgment should be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

#### DISCUSSION

The Court finds that the retainer letter creates triable issues of fact as to whether plaintiff can collect monies from defendant personally. Specifically, the retainer letter is written to Mr. Daibes, accepting his request to represent River Lookout Associates, LLC and 1275 River Road Associates, LLC in litigation (Plaintiff Notice of Motion, exhibit 1). Additionally, the retainer letter is signed by defendant in his individual capacity, as under his signature it does not state that he is signing in his capacity as a member of the above mentioned LLCs.

Regarding plaintiff's cross-motion for sanctions pursuant 22 NYCRR §130-1.1, Part 130 of the Rules of the Chief Administrator permits courts to sanction attorneys for engaging in frivolous conduct, which includes conduct: (1) "completely without merit in law"; (2) "undertaken primarily to... harass or maliciously injure another"; or (3) "assert[ing] material factual statements that are false" (see 22 NYCRR § 130-1.1; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]). Here, plaintiff moves pursuant to 22 NYCRR §130-1.1 for sanctions against defendant and his counsel for engaging in frivolous conduct. The Court finds that the defendant's conduct in bringing the herein motion for summary judgment was not frivolous within the meaning of 22 NYCRR § 130-1.1, and therefore plaintiff's cross-motion seeking the imposition of sanctions against the defendant and his counsel is denied.

#### CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff's motion for summary judgment in its favor, pursuant to CPLR 3212 (Motion Sequence 002) is denied; and it is further,

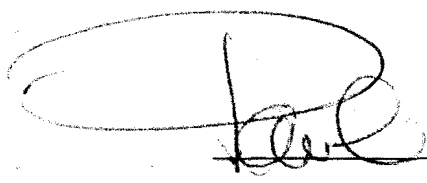
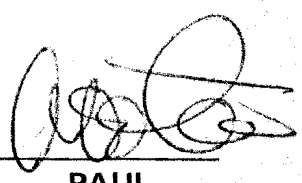
ORDERED that the defendant's motion for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint in its entirety (Motion Sequence 003) is denied; and it is further,

ORDERED that plaintiff's cross-motion for an order imposing sanctions against the

defendant and defendant's counsel for engaging in frivolous conduct, pursuant to 22 NYCRR §130-1.1 is denied; and it is further,

ORDERED the parties are directed to appear for a Compliance Conference on January 22, 2014 at 2:30 pm at 60 Centre Street, Room 341, Part 7.

This constitutes the Decision and Order of the Court.

Dated: 12/16/13    
\_\_\_\_\_  
WOOTEN, J.S.C. PAUL

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate: :  DO NOT POST  REFERENCE

**FILED**  
DEC 19 2013  
NEW YORK  
COUNTY CLERK'S OFFICE