Kasowitz, Benson, Torres & Friedman LLP v Amira Nature Foods, Ltd.
2017 NY Slip Op 30488(U)
March 13, 2017
Supreme Court, New York County
Docket Number: 158126/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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KASOWITZ, BENSON, TORRES & FRIEDMAN LLP,

Index No. 158126/2016

Plaintiff,

-against-

DECISION/ORDER
Motion Seq. 001

AMIRA NATURE FOODS, LTD.,

Defendant.

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HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for breach of contract, *quantum meruit*, and account stated based on unpaid legal fees.

Plaintiff, Kasowitz, Benson, Torres & Friedman LLP ("Plaintiff"), now moves for summary judgment of its breach of contract (First Cause of Action) and account stated (Third Cause of Action) pursuant to CPLR § 3212, and to dismiss the amended counterclaims of Defendant, Amira Nature Foods, LTD. ("Defendant"), pursuant to CPLR § 3016[b] and § 3211[a][1], [6][1], and [7].

Factual Background

On August 6, 2015, Bruce Wacha ("Wacha"), Defendant's Chief Financial Officer, engaged Plaintiff to represent Defendant in connection with a short selling attack against it.[2] On August 7, 2015, the parties signed the written retention agreement ("Retention Agreement"), wherein Defendant agreed to "investigate, advise, advocate, and potentially litigate concerning, among other things, the dissemination of misinformation related to [Defendant], the

[1] Plaintiff fails to argue CPLR § 3211(a)(6) in its Memorandum of Law.

[2] A "short selling attack" is a conspiracy to drive down the price of a company's stock, including by publicly disseminating misinformation about a company, so that buyers can purchase the stock at a lower price (Bowie Aff. at ¶11).

manipulation of its securities, and harm caused to its business, reputation, and interests" (Retention Agreement, at p.1). The Retention Agreement further states that, "[i]n addition to legal fees, you will be charged for other expenses incurred in connection with our representation of you. . . . This retention may also include investigative work by our affiliate Intelligence Options LLC" ("IO") (*id.* at p.2). Further, the Retention Agreement identified the primary attorneys handling Defendant's matter and their fees, and required Defendant to pay a retainer in the amount of $100,000 (*Id.* at pp.1, 2). As to Plaintiff's right to withdraw as counsel, the Retention Agreement states, in relevant portion, that:

> [Plaintiff] may elect to terminate our services and decline to represent you further with your consent or for good cause. . . . If we elect to terminate this agreement, you agree to cooperate and facilitate such termination by retaining substitute counsel or otherwise. Such resignation shall not affect our right to be paid for all of our previously incurred but unpaid fees, and all of our previously incurred but unpaid charges and disbursements.
> (*Id.* at pp.2-3).

On August 19, 2015, Plaintiff withdrew as counsel with Defendant's consent.

On November 3, 2015, Defendant e-mailed plaintiff for the return of the remainder of the retainer fee. On November 5, 2015, Plaintiff sent Defendant its invoice-for the first time-for services provided from August 6, 2015 until August 21, 2015 (the "Invoice").[3] The aggregate amount of Plaintiff's representation of Defendant totaled $237,603.98: fees of $143,236 for legal work, and costs of $94,367.98, of which $91,843.36 was attributable to investigative services by IO (*Id.*)

On November 16, 2015, Wacha sent an e-mail to Plaintiff stating:

[3] The Invoice includes two post-representation charges on August 21, 2015, for transition related communications with Defendant's subsequent counsel.

> [I] also meant to respond to your email from the other day [November 5]. I would like to discuss the invoices live when you have a moment as they were substantially higher than we anticipated due to the duration of the engagement.

Next, on December 9, 2015, Plaintiff sent the following e-mail to Wacha:

> As you requested, I re-reviewed the bills. The charges were all in line with the extraordinary task, responsibilities, and risks you were asking us to undertake in an extremely short time frame. Frankly, they were a little light under the circumstances. (Siegel Aff. Ex. P, Dec. 9, 2015 e-mail from Plaintiff to Wacha)

Finally, on December 31, 2015, less than two months after Defendant received the Invoice, Wacha sent the following e-mail to Plaintiff:

> [w]e are not disputing that you and your firm did work for Amira and should be compensated, or that you very well could have added tremendous value to the Company had we continued to work together. However, as discussed, we think the bill is excessive given the time period that you acted as our counsel and the scope of work that was completed.
>
> . . . .
>
> . . . despite having similar stature and billing rates, our new counsel completed the entire formal complaint for a fraction of the cost the Kasowitz has billed us for filing the notice of summons ["Summons with Notice"].
>
> . . . .
>
> Furthermore, there is absolutely no backup for disbursements which total nearly $100,000 and there is significant billing after the notice of summons was filed when we were on pause before embarking on the complaint stage, and even after you resigned as counsel.

When Defendant did not pay the Invoice, Plaintiff filed the instant Complaint alleging, first, that Defendant breached the Retention Agreement "by failing and refusing to pay the fees and disbursements incurred thereunder. . ."(Compl. ¶¶17, 18). Next, Plaintiff seeks relief under the theory of *quantum meruit* (*Id.* at 25). Finally, Plaintiff asserts an account stated claim, alleging that it "[r]endered to Defendant an invoice for services rendered and expenses

generated, and such invoice was received by Defendant without objection, protest or rejection" (*Id.* 27).

Plaintiff's Motion

Plaintiff argues that it is entitled to summary judgment for breach of contract. The Retention Agreement is an enforceable contract that Defendant breached by failing to pay the Invoice. Plaintiff, on the other hand, fulfilled its obligations by providing legal services to Defendant. Moreover, Defendant's Answer only submits general denials, which are insufficient to raise any issue of fact as to the reasonable value of Plaintiff's services.

Further, Plaintiff seeks summary judgment based on an account stated between the parties, arguing that Defendant's objections to the Invoice were nonspecific and "untimely" (Pla. MOL at p.9). The Invoice was issued to Defendant on November 5, 2015, and Plaintiff made numerous attempts to discuss the Invoice with Wacha thereafter. Further, Wacha's statements that the charges on the Invoice "were substantially higher than we had anticipated due to the duration of the engagement" and that he found the Invoice to be "excessive," failed to assert a specific objection (*Id.*). Moreover, Defendant's attempt to assert, objections to the Invoice in the Counterclaims are untimely and insufficient (*Id.* at p.10).

Plaintiff argues next that Defendant's counterclaims should be dismissed. First, Defendant fails to state a claim for legal malpractice, since the allegations that Plaintiff: i) engaged the services of an unnecessary expert without authorization from Defendant; ii) over billed; and iii) over charged Defendant, are not cognizable claims for legal malpractice. Second, Defendant fails to establish that Plaintiff's actions affected the outcome of the underlying litigation. Third, Defendant fails to allege it incurred damages resulting from Plaintiff's alleged malpractice.

Finally, Defendant failed to state a claim for breach of fiduciary duty, since it fails to allege that Plaintiff was the proximate a cause of Defendant's damages, and fails to allege cognizable damages. Moreover, Defendant's claim is duplicative of its claim for legal malpractice.

Defendant likewise fails to state its claim for negligent misrepresentation with the requisite particularity or allegations of damages caused by any alleged misrepresentation.

Defendant's Opposition[4]

Defendant argues that plaintiff is not entitled to summary judgment on it breach of contract claim since Plaintiff withdrew as Defendant's counsel prior to the completion of services. Under such circumstance, the amount of attorney's fees must be determined on a *quantum meruit* basis and a hearing is necessary to determine the actual value of Plaintiff's alleged services, especially in light of Defendant's overbilling and breach of fiduciary duty claims.

Also, Plaintiff's claim for account stated should be denied because genuine issues of material fact exist as to whether Defendant retained the Invoice for a period of time to infer assent. Defendant received the Invoice on November 5, 2015, and its first and second objections were November 16, 2015 and December 31, 2015, respectively. Further, there is no inference of acceptance of the Invoice, as Defendant did not make partial payments attributable to the Invoice.

Finally, Plaintiff's motion to dismiss is abated, given that the Amended Answer filed thereafter contains affirmative defenses and counterclaims that supersede the Answer.[5]

[4] Defendant filed his Amended Answer simultaneously with his Opposition.
[5] The Court notes that Defendant's Amended Answer retained the legal malpractice and breach of contract claims, but added counterclaims for, breach of fiduciary duty, unjust enrichment and fraud, and removed its claim for negligent misrepresentation.

Plaintiff's Reply

Plaintiff reiterates that Defendant's amended counterclaims must be dismissed as a matter of law and that the filing of the amended counterclaims does not automatically abate Plaintiff's motion, despite the fact that the amended pleading imposes additional causes of action.

First, as to legal malpractice, Defendant's does not claim that Plaintiff's actions affected the underlying litigation. Further, Defendant fails to allege facts supporting its claim that Plaintiff engaged in "massive overbilling and billing for "duplicative and unnecessary investigative services" (Reply at p.6). Defendant commenced suit in New York State Court with the filing of the Summons with Notice, a procedure unavailable in Federal Court, because Wacha expressed a desire to commence litigation immediately. Further, Defendant failed to allege specific factual allegations that the New York State Court filing prejudiced the underlying litigation.

Second, as to breach of fiduciary duty, Defendant fails to allege an actionable breach by Plaintiff, since Defendant's conclusory allegation that Plaintiff was "billing Defendant for legal and expert services that were unnecessary, duplicative, or wasteful" are insufficient to support a cause of action for breach of fiduciary, as they are speculative and conclusory. Further,

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As to the legal malpractice counterclaim, Defendant alleges that Plaintiff breached its duty to exercise care, as it: i) engaged the services of an unnecessary expert without authorization from Defendant; ii) over billed; and iii) over charged Defendant. But for Plaintiff's aforementioned actions, the aggregate legal fees would not be so high. Second, as to breach of contract, Defendant alleges that Plaintiff breached the Retention Agreement by failing to provide invoices on a timely basis, and overcharging Defendant for wasteful or duplicative work. Third, as to breach of fiduciary duty, Defendant alleges the same facts as in its legal malpractice claim. Fourth, as to unjust enrichment, it is alleged that Plaintiff was enriched at Defendant's expense, and equity and good conscience require Plaintiff to reimburse Defendant. Finally, as to fraud, Plaintiff misrepresented the language in Retention Agreement with regard to the language authorizing Plaintiff to hire IO's services; Plaintiff made it seem that it was required to seek approval from Defendant prior to hiring IO.

Defendant's counterclaim is duplicative of its legal malpractice counterclaim, as both claims rely on the same allegations and identical damages.

Third, as to breach of contract, Defendant fails to identify a provision of the Retention Agreement that Plaintiff violated. Moreover, Defendant fails to allege that it incurred damages as a result of Plaintiff's alleged breach. Further, Defendant's counterclaim is duplicative of its legal malpractice claim.

Fourth, Defendant may not recover for unjust enrichment since the Retention Agreement governs the payment of legal fees.

Finally, as to fraud, Defendant fails to allege any misrepresentation by Plaintiff. Specifically, IO's investigative work was done with Defendant's consent, since the Retention Agreement states that Plaintiff's representation of Defendant "may include investigative work by our affiliate IO." Moreover, e-mail correspondence from Defendant to Plaintiff contradicts Wacha's claim that he never authorized IO's services. Further, Defendant's fraud counterclaim is duplicative of his legal malpractice and breach of fiduciary counterclaims, as it arises from the same underlying facts and does not allege distinct damages.

Plaintiff further argues that it is entitled to summary judgment for its breach of contract and account stated claims. As to breach of contract, the Retention Agreement expressly states that Plaintiff maintained its right to be paid for previously incurred but unpaid fees, charges, and disbursements. And, as to the account stated claim, Defendant only stated a "general complaint as to the overall amount of the bill" (Reply at p.15), never stated its refusal to pay the Invoice, and failed to raise a timely objection thereto.

Defendant's Sur-Reply[6]

Defendant argues that Plaintiff's summary judgment motion fails because Plaintiff's Responses and Objections to Defendant's First Requests for Admissions ("Plaintiff's R & O") raise issues of fact as to Plaintiff's account stated claim and Defendant's breach of contract counterclaim.

Plaintiff's Sur-Reply

Plaintiff disputes that its R&O raises issues of fact.

Discussion

Plaintiff's Motion for Summary Judgment

As the proponent of the motion for summary judgment, Plaintiff must establish its cause of action or defense sufficiently to warrant the court directing judgment in its favor as a matter of law in (CPLR § 3212[b]; *VisionChina Media Inc. v. Shareholder Representative Services*, LLC, 109 A.D.3d 49, 967 N.Y.S.2d 338 [1st Dept 2013]; *Ryan v. Trustees of Columbia University in City of New York, Inc.*, 96 A.D.3d 551, 947 N.Y.S.2d 85 [1st Dept 2012]). This standard requires that Plaintiff make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*People ex rel. Cuomo v. Greenberg*, 95 A.D.3d 474, 946 N.Y.S.2d 1 [1st Dept 2012]; *Madeline D'Anthony Enterprises, Inc. v. Sokolowsky*, 101 A.D.3d 606, 957 N.Y.S.2d 88 [1st Dept 2012], citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

[6] The Court advised the parties by telephonic conference, that it will consider Defendant's and Plaintiff's respective sur-replies.

Alternatively, to defeat a motion for summary judgment, Defendant must show facts sufficient to require a trial of any material issue of fact (CPLR § 3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Wing Wong Realty Corp. v. Flintlock Const. Services, LLC*, 95 A.D.3d 709, 945 N.Y.S.2d 62 [1st Dept 2012], citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]; *Ostrov v. Rozbruch*, 91 A.D.3d 147, 936 N.Y.S.2d 31[1st Dept 2012]). Like the proponent of the motion, Defendant must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562; *IDX Capital, LLC v. Phoenix Partners Group*, 83 AD3d 569, 922 NYS2d 304 [1st Dept 2011]). Defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" *(Kornfeld v. NRX Technologies, Inc.*, 93 A.D.2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]; *see Machado v. Henry*, 96 A.D.3d 437, 945 N.Y.S.2d 552 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Siegel v. City of New York*, 86 A.D.3d 452, 928 N.Y.S.2d 1 [1st Dept 2011], citing *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]).

Account Stated

To state a cause of action for account stated, plaintiff must allege defendant's receipt and retention of the subject statement of account without proper objection within a reasonable time (*Goldmuntz v. Schneider*, 99 A.D.3d 544, 952 N.Y.S.2d 172 [1st Dept 2012]). Where an account is rendered showing a balance, if the party receiving the account fails to dispute its correctness or

completeness, that party will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown (*Shaw v. Silver,* 95 A.D.3d 416, 943 N.Y.S.2d 89 [1st Dept 2012], *citing Peterson v. IBJ Schroder Bank & Trust Co*, 172 A.D.2d 165 [1st Dept 1991]). General objections to an invoice are insufficient to defeat a motion for summary judgment (*Morrison Cohen Singer & Weinstein, LLP v. Ackerman*, 280 A.D.2d 355, 356, 720 N.Y.S.2d 486 [1st Dept 2001]).

Plaintiff fails to demonstrate a *prima facie* showing that it is entitled to summary judgment for its account stated claim. Plaintiff's submissions indicate that Wacha issued sufficiently specific written objections to Plaintiff's Invoice. First, Wacha's November 16, 2015 e-mail identifies a specific objection: the excessiveness of the Invoice compared with the time devoted and scope of work Plaintiff completed. Further, Plaintiff's subsequent email response to Wacha on December 9, 2015 acknowledges Wacha's objection to the Invoice by attempting to justify the amount billed *vis-a-vis* work performed, considering the circumstances in which it was accomplished. Second, Wacha's December 31, 2015 e-mail specifically objects to the disbursements and billing for legal services after the Notice and Summons were filed, as addressed within the Invoice ((*see Herrick, Feinstein LLP v. Stamm*, 297 A.D.2d 477, 746 N.Y.S.2d 712 [1st Dept 2002] (holding that "a trier of fact could reasonably conclude that defendant's alleged statement . . . with plaintiff that he was "very troubled by the size of the bills then in hand" was sufficiently specific and timely to negate any inference of assent to the invoices."); *see also Collier, Cohen, Crystal & Bock v. MacNamara*, 237 A.D.2d 152, 655 N.Y.S.2d 10 [1st Dept 1997] (sufficient proof of a timely objection found where "plaintiff's [law] firm itself wrote to defendant acknowledging his complaints and, in its October 1993 motion to withdraw as counsel, the firm gave defendant's refusal to pay as its reason for seeking

withdrawal, stating "upon receipt of the invoice, Mr. MacNamara expressed his intention not to pay the outstanding balance.)).

Further, Defendant's objections were timely. A lapse of two months between the receipt and the objection has been held not so long as to constitute "an unequivocal assent to the balance(s) stated" (*Herrick, Feinstein LLP v. Stamm,* 297 A.D.2d 477, 478, 478 [1st Dept 2002], *quoting Epstein Reiss & Goodman v Greenfield,* 102 A.D.2d 749, 750 [1st Dept 1984]). Plaintiff sent the Invoice to Wacha on November 5, 2015. Thereafter, Defendant initially objected on November 16, 2015, eleven days after it received the Invoice, and again on December 31, 2015, just under two months after Plaintiff sent the Invoice.

Therefore, the branch of Plaintiff's motion for summary judgment of its account stated claim (Third Cause of Action), is denied.

Breach of Contract

To state a cause of action for breach of contract, the proponent of the pleading must specify the (1) making of an agreement, (2) the performance by that party, (3) breach by the other party, and (4) resulting damages (*Volt Delta Resources LLC v. Soleo Communications Inc.,* 11 Misc.3d 1071 [A], 2006 NY Slip Op 50497[U] [Sup. Ct., New York County 2006], citing *Furia v. Furia,* 116 A.D.2d 694, 695, 498 N.Y.S.2d 12 [2d Dept 1986]). "The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged" (*Volt Delta Resources LLC v. Soleo Communications Inc.,* citing *Sud v. Sud,* 211 A.D.2d 423, 424, 621 N.Y.S.2d 37 [1st Dept 1995]; *Caniglia v. Chicago Tribune-New York News Syndicate Inc.,* 204 A.D.2d 233, 234, 612 N.Y.S.2d 146 [1st Dept 1994]). Further, a complaint alleging breach of contract must set forth the terms of the agreement upon which liability is predicated by making specific reference to the

relevant portions of the contract or by attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v. Silliker, Inc.*, 11 Misc. 3d 1072, 816 N.Y.S.2d 693 [Sup. Ct., New York County 2006], citing *Chrysler Capital Corporation. v. Hilltop Egg Farms, Inc.*, 129 A.D.2d 927, 928, 514 N.Y.S.2d 1002 [3d Dept 1987], *accord Valley Cadillac Corporation. v. Dick*, 238 A.D.2d 894, 894 [4d Dept 1987]). It is well settled that where a party employs an attorney under an express valid contract stipulating the compensation the attorney is to receive for his services, the stipulated method of compensation must generally control both the attorney and the client (7 NY Jur. 2d Attorneys at Law § 194; *Ransom v. Ransom*, 147 A.D. 835 [1st Dept 1911] [holding that absent any proof of fraud, misrepresentation, undue influence or other contractual infirmities, a written employment contract between a plaintiff attorney and his client would govern the attorney's compensation for his services]).

Plaintiff demonstrates a *prima facie* showing its entitlement to judgment as a matter of law against Defendant on its breach of contract claim. Specifically, Plaintiff submitted the Retention Agreement, which states that Plaintiff shall provide Defendant legal services in exchange for payment, and further, explicitly states that in the event Plaintiff terminates the Retention Agreement, such "resignation shall not affect [Plaintiff's] right to be paid for all of our previously incurred but unpaid fees, and all of our previously incurred but unpaid charges and disbursements" (Retention Agreement at p.2-3). As the Invoice, Affidavit of Michael Bowe who was "primarily responsible" for Defendant's legal representation, Plaintiff provided legal services to Defendant. According to Bowe, once retained, he and his "team immediately began reviewing the[] materials [Defendant provided] to determine the most appropriate course of action, including what additional investigative work [Plaintiff] would need to perform in addition to that which had already been completed." (Affidavit, ¶19). Bowe continues:

> "Wacha began pressing me to file a lawsuit immediately and issue a press release announcing that action." (Id.¶20). . . . I reiterated our reluctance to file a lawsuit before our investigation was complete . . . Under pressure from Wacha to file a lawsuit immediately, I proposed that, while we continued our investigation, KBTF would be willing to prepare an initial Summons with Notice on Amira's behalf against the individuals who we were able to identify with some certainty . . . . I sought and received unequivocal assurances from Wacha that Amira was committed to pursuing this strategy beyond the initial filing and would not use a filing merely as a prop for other purposes, including to instigate a regulatory investigation. Wacha agreed with this strategy, gave me those assurances" (Id.¶21) . . . . it soon became apparent that, contrary to the assurances I had been given, Hamilton and Amira's CEO, Karan Chanana ("Chanana"), and not Wacha, would be directing the short-selling efforts and were not committed to the terms upon which I had conditioned our representation. Indeed, Wacha suddenly disappeared as my point of contact . . . .I believe I was misled and quickly became uncomfortable with Hamilton's role and Amira's intentions, and determined that KBTF could not continue to effectively represent Amira . . .. Id.¶29) . . . this conflict over strategy, and my discomfort with having been misled, were the sole reasons for KBTF's decision to withdraw from representing Amira (Id.¶33).

Plaintiff establishes, and Defendant fails to contradict, that Plaintiff investigated the short sale attack, and filed the Summons and Notice on August 11, 2015, naming five defendants that Plaintiff was "[a]ble to identify with some certainty were responsible for statements [that] were likely false" (Bowie Aff. at ¶21). Further, Plaintiff prepared a press release issued concurrently with the filing (*Id.* at ¶22). Further, Defendant failed to perform, as Wacha's affidavit concedes that Defendant has not compensated Plaintiff the amount requested in the Invoice (Wacha Aff. at ¶26). As a result of Defendant's failure to pay Plaintiff for the performed services, Plaintiff established its damages in the amount of $137,603.98, the amount of the unpaid Invoice, in addition to interest from November 5, 2015, the date of the Invoice.

Defendant fails to raise an issue of fact in opposition.

Defendant's contention that Plaintiff cannot obtain judgment based on a breach of contract theory, and is limited to recovery under a theory of *quantum meruit*, because Plaintiff withdrew from representation before the completion of services lacks merit. In support,

Defendant cites to *Spano v. Scott* (166 A.D.2d 917, 561 N.Y.S.2d 678 [4d Dept 1990]), and *Mars Prods., Inc. v. U.S. Media Corp.*, (198 A.D.2d 175, 176, 603 N.Y.S.2d 487 [1st Dept1993] (affirming award based on quantum meruit where counsel was granted leave to withdraw as counsel)). However, both cases are distinguishable. In *Spano*, the Court held that where "an attorney retained for a specific purpose based on a contract for a noncontingent fee is *discharged or withdraws for cause* before the completion of services, the amount of the attorney's fee must be determined on the basis of quantum meruit" (*Spano*, 166 A.D.2d at 917) (emphasis added) (*citing* Matter of Montgomery, 272 N.Y. 3236 N.E.2d 40 [1936] ("We are committed to the quantum meruit rule without limitation to the contract price in cases where the client voluntarily *discharges* the attorney") and *Ventola v Ventola*, 112 A.D.2d 291, 491 N.Y.S.2d 736 [2d Dept 1985] ("an attorney employed under contract for a fixed fee, who is *discharged* without fault, has an immediate right to recover upon quantum meruit for the services rendered prior to the discharge....") (emphasis added)). And in *Mars Prods.*, the law firm's withdrawal was premised on a court's order granting it leave to withdraw as counsel (*Mars Prods*, at 176). Here, Plaintiff withdraw its representation, and such withdrawal was premised on *mutual consent*, factors not addressed in either case. And, the record demonstrates, and Defendant does not dispute, that Plaintiff did in fact complete legal services pursuant to the Retention Agreement.

Further, Wacha's statements regarding the engagement of IO's services is refuted by documentary evidence. While Wacha claims that the Retention Agreement stated that "it 'may also include investigative work' instead of 'shall also include investigative work,'" and thus he did not believe that he gave Plaintiff the authority to utilize the investigative services of IO (Id. at ¶13), Wacha in fact affirmed Plaintiff's use of IO to identify prospective defendants in the short sale attack; Wacha stated that Defendant "already engaged the firm of BDO, LLC to

perform much of the investigative work desired by [Plaintiff]. [Plaintiff] then recommended that we leave the possible use of IO open-ended in the written agreement, to which I agreed" (Wacha Aff. at 10). Further, the Retention Agreement explicitly states that Defendant will be charged for investigative work expenses incurred with Plaintiff's representation of Defendant (Retention Agreement at p.2; *see* Factual Background, *supra* at 2). Furthermore, Wacha authorized IO's services for a "period of 6 week[sic], wherein they helped coordinate filing a complaint with the Englewood Police Department and provided a one-person detail at my residence for approximately 6 days. . . ." (Wacha Aff. at 17).

Accordingly, the branch of Plaintiff's motion for summary judgment of its breach of contract claim (First Cause of Action), is granted.

Plaintiff's Motion to Dismiss Defendant's Counterclaims

Failure to State a Claim

The sole criterion for deciding a motion to dismiss pursuant to CPLR § 3211[a][7] is whether a pleading states a cause of action (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 N.Y.S.2d 459 [1st Dept 2013]). A pleading states a cause of action if factual allegations are discerned from its four corners which, taken together, manifest any cause of action cognizable at law (*id.*). If a cognizable cause of action is found, a motion to dismiss pursuant to CPLR § 3211[a][7] will fail (*id.*). In performing this analysis, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401 [1st Dept 2013]; *Nonnon v. City of N.Y.*, 9 N.Y.3d 825 [2007]; *Leon v Martinez,* 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 [1994]). However, "allegations consisting of bare legal conclusions as

well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack*, 97 A.D.3d 437, 948 N.Y.S.2d 583 [1st Dept 2012]).

Breach of Contract

Defendant fails to plead facts to establish a claim for breach of contract. Specifically, as to Defendant's claim that Plaintiff breached the Retention Agreement by failing to furnish Defendant with invoices in a timely fashion,[7] Defendant fails to plead facts establishing the resulting damages of receiving the Invoice in November. Next, Defendant's claim of breach of contract for Plaintiff's "systematic and sustained practice of overbilling by charging [Defendant] for services that were unnecessary, duplicative or wasteful" (Compl. ¶79), is wholly conclusory and flatly contradicted by documentary evidence, and contrary to the terms of the Retention Agreement which set forth the hourly billing rates for certain attorneys. Accordingly, Defendant's counterclaim for breach of contract (Second Cause of Action), is dismissed.

Legal Malpractice

In order to state a claim for legal malpractice, Defendant must allege that (1) Plaintiff owed it a duty to exercise the degree of care, skill and diligence commonly possessed by a member of the legal profession, (2) Plaintiff breached that duty, and (3) that actual damages were proximately caused by the breach (*see Gonzalez v. Ellenberg*, 5 Misc.3d 1023 [Sup. Ct., New York. County 2004], citing *Hatfield v. Herz*, 109 F. Supp. 2d 174, 179 [S.D.N.Y. 2000]). To establish the third element of proximate cause and actual damages, Plaintiff "must meet the 'case within a case' requirement, demonstrating that 'but for' the attorney's conduct the client

[7] The Retention Agreement states: "[b]ills for our services and expenses are rendered on a monthly basis and are payable on receipt" (Retention Agreement at 2).

would have prevailed in the underlying matter or would not have sustained any ascertainable damages" had Defendants exercised due care (*Levine v. Lacher & Lovell-Taylor*, 256 A.D.2d 147 [1st Dept 1998]; *Rubinberg v. Walker*, 252 A.D.2d 466 [1st Dept 1998]).

Defendant fails to plead facts to establish a claim for legal malpractice. First, Defendant's general claim that Plaintiff breached its duty by way of "massive overbilling" and billing for "work that was unnecessary or wasteful" is, without more, conclusory and insufficient (*see Chowaiki & Co. Fine Art Ltd. v. Lacher*, 115 A.D.3d 600, 982 N.Y.S.2d 474 [1st Dept 2014] ("Plaintiffs' claims of excessive billing and related conduct, which actions are not alleged to have adversely affected their claims or defenses in the underlying action, do not state a claim for legal malpractice")). Second, Defendant's allegation that Plaintiff engaged IO in "unauthorized" and "unnecessary investigative services," is belied by the Retention Agreement, wherein Defendant agrees that, "retention may also include investigative work by our affiliate Intelligence Options LLC" (*see* Breach of Contract, *supra* at 11-12). Further, Defendant fails to plead facts that Plaintiff breached their duty to Defendant by engaging IO in the underlying litigation, since the Retention Agreement explicitly authorizes Plaintiff to do so. Finally, Defendant fails to plead sufficient facts to establish that filing the Notice and Summons in the State Court prejudiced Defendant, or that "but for" such filing, Defendant would not have suffered the damages it alleges. Defendant alleges that Plaintiff's "incompetence" by commencing the underlying action in the "wrong venue" caused Defendant "time and money to duplicate efforts to re-commence the action in federal court." However, as demonstrated by Plaintiff's submissions, the substance of which are uncontested in this regard, Defendant's immediate filing of the action at the insistence of Defendant by Summons with Notice was a strategy unavailable in Federal Court. Nor is Defendant's allegation that Plaintiff's "hasty

withdrawal as counsel" upon discovery of "a conflict of interest after it was retained by Amira" an act of malpractice. Accordingly, Defendant's counterclaim for legal malpractice (First Cause of Action), is dismissed.

Breach of Fiduciary Duty

When a breach of fiduciary duty arises from the same facts as the legal malpractice claim and alleges similar damages, the claims are duplicative and the breach of fiduciary duty claim should be dismissed for failure to state a cause of action (*Gursky & Ederer, LLP v. GMT Corp.*, 5 Misc. 3d 1022(A), 799 N.Y.S.2d 160 [Sup. Ct., New York County 2004], *citing Sonnenschine v. Giacomo,* 295 A.D.2d 287 [1st Dept 2003]; *Turk v. Angel,* 293 A.D.2d 284 [1st Dept 2002]).

Here, the first and third counterclaims for breach of fiduciary duty and legal malpractice are premised upon the same facts: that Plaintiff billed Defendant for legal and investigative services that were "unnecessary, duplicative, or wasteful" (Compl. ¶¶82, 68-69). Further, both counterclaims seek identical damages: the fee paid as the retainer (*id.* 73, 84). Thus, Defendant's counterclaim for breach of fiduciary duty (Third Cause of Action), is dismissed.

Unjust Enrichment

It is well settled that a claim for unjust enrichment does not lie where it duplicates or replaces a conventional contract claim (*see Corsello v. Verizon N.Y., Inc.,* 18 N.Y.3d 777, 790, 944 N.Y.S.2d 732, 967 N.E.2d 1177 [2012]). Thus, damages for unjust enrichment may not be sought "where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties" (*Clark–Fitzpatrick, Inc. v. Long Is. R.R. Co.,* 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 516 N.E.2d 190 [1987]). On the other hand, "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a

theory of quasi contract as well as breach of contract" (*Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc.*, 95 A.D.3d 434, 438, 944 N.Y.S.2d 36 [1st Dept 2012] [internal quotation marks omitted]).

Here, the unjust enrichment counterclaim is precluded by the Retention Agreement, as the parties do not dispute its validity, and the subject matter of the unjust enrichment claim—the legal fees Plaintiff is entitled to for their representation of Defendant-is addressed in the Retention Agreement (Retention Agreement at pp.1-2); (*Scarola Ellis LLP v. Padeh*, 116 A.D.3d 609, 984 N.Y.S.2d 56 [1st Dept 2014]).

Therefore, Defendant's counterclaim for unjust enrichment (Fourth Cause of Action), is dismissed.

Fraud

To state a cause of action for fraud, Defendant must allege a misrepresentation or omission of a material fact, falsity, knowledge by Plaintiff, justifiable reliance on the deception, and the resulting injury (*Rather v. CBS Corporation*, 886 N.Y.S.2d 121 [1st Dept 2009]; *Waggoner v. Caruso*, 886 N.Y.S.2d 368 [1st Dept 2009]). CPLR § 3016[b]'s requires that fraud be pleaded with particularity, and conclusory statements will not suffice (*see Dragon Inv. Co. II LLC v. Shanahan*, 49 A.D.3d 403, 403, 854 N.Y.S.2d 115, 116 [1st Dept 2008]; *see e.g. Longo v. Butler Equities II, L.P.*, 278 A.D.2d 97, 97, 718 N.Y.S.2d 30, 32 [1st Dept 2000]).

Defendant's allegations fails to state a claim for fraud as to the alleged unauthorized engagement of IO. The Retention Agreement explicitly contemplates investigative work by IO, and Defendant agreed to be charged for IO's services in the event utilized (Retention Agreement at 2). Moreover, apart from the claim regarding investigative work by IO, Defendant failed to "state the circumstances of the alleged fraud in detail," as required by CPLR § 3016[b] (*Linden*

v. Moskowitz, 294 A.D.2d 114, 115, 743 N.Y.S.2d 65, 67 [1st Dept 2002]). Further, the fraud counterclaim is duplicative of Defendant's legal malpractice counterclaim, which was based on the same alleged acts of authorizing investigative work by IO without Defendant's prior approval (¶¶69, 96), and alleged identical damages (¶¶73,97) (*see Voutsas v. Hochberg*, 103 A.D.3d 445, 958 N.Y.S.2d 903 [1st Dept 2013]; *Spinosa v. Weinstein,* 168 A.D.2d 32, 571 N.Y.S.2d 747 [2d Dept 2001]). Accordingly, Defendant's counterclaim for fraud (Fifth Cause of Action), is dismissed.

CONCLUSION

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment of its account stated claim (Third Cause of Action), is denied; and it is further

ORDERED that the branch of Plaintiff's motion for summary judgment of its breach of contract claim (First Cause of Action), for the amount of $137,603.98, together with interest and costs is granted; and it is further

ORDERED that the branch of Plaintiff's motion seeking dismissal of Defendant's First, Second, Third, Fourth and Fifth counterclaims pursuant to CPLR § 3016[b] and § 3211[a][1], [6] and [7], is granted pursuant to 3211[a][1] and [7]; and it is further

ORDERED that Plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment in favor of plaintiff and against defendant in the amount of $137,603.98, together with statutory interest from November

5, 2015 and costs to be calculated by the Clerk upon a submission of an appropriate bill of costs, and that plaintiff have execution therefor.

This constitutes the decision and order of the Court.

Dated: March 13, 2017

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.